

# **SUMMARY OF CONCLUSIONS**

## **SECTION A: Comment on Bills**

### **1. Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010\***

**Issues: Proposed Section 34 – lack of procedural fairness – uncertainty of penalties for non-compliance – undermining of the rights of the family.**

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| <p><b>15. The Committee has identified key issues with this Bill. Firstly, it compels parents and care-givers to attend meetings and possibly enter into arrangements where there is a power imbalance, both by affording the power of one party to compel the other to appear and also an inherent power imbalance by the parent or care-giver's potential vulnerability in such circumstances.</b></p> <p><b>16. Secondly, despite requiring parents or care-givers to appear at a meeting with the Department of Community Services, there does not appear to be any accompanying penalty for a failure to do so, leaving uncertain what measures can be taken against parents or care-givers for non-compliance. The Committee finds it difficult to comment on the bill's infringement on personal rights and liberties where non-compliance penalties are not attached.</b></p> |
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### **2. Coal Mine Health and Safety Amendment Bill 2010**

**Issue: Retrospective Operation of Schedule 1 [25]**

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| <p><b>19. The Committee recognises the intention of this Bill is to clarify potential jurisdictional uncertainties by ensuring that a defendant in an occupational health and safety matter does not escape liability on the basis of a technicality. However, the Committee is always concerned about the retrospective application of legislation, especially when criminal matters are concerned and where legislative authority is backdated. The Committee refers this matter to Parliament for its consideration.</b></p> |
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**Issue: Commencement by Proclamation at Cl. 2**

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| <p><b>21. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.</b></p> |
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3. Companion Animals Amendment (Dogs in Outside Eating Areas) Bill 2010\*

16. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

4. Court Information Bill 2010

Issue: Privacy

20. The Committee notes the intent of the Bill to strike an appropriate balance between two important interests, facilitating open access to court information and maximising privacy protections. The Committee recognises the value these interests have on the rights and liberties of individuals, but at times appreciates that these interests may compete. In light of comments received by Privacy NSW that it does not take significant issue with this Bill, and given the safeguards implemented to protect personal identification information, the Committee appreciates the extent to which the balance has been achieved.

21. The Committee also notes the differentiated standards that will apply between court records created before the enactment of the Bill and those created afterward. The Committee is concerned that the lesser standard of protection afforded to court records created before this Bill is proclaimed risks compromising an individual's security and raising the threat of identity theft. Although the Committee recognises the onerous task of subjecting all pre - *Court Information Act 2010* court records to the privacy standards provided for under the Bill, the Committee is still concerned about the differentiated standard of privacy protection and refers this matter to Parliament for its consideration.

Issue: Commencement by proclamation at clause 2.

23. The Committee accepts that there may be good reasons for commencing an Act on proclamation, such as additional provisions to be included in the Act or the Act's contingency on the making of certain regulations, and has not identified any issues under s8A(1)(b)(iv) of the *Legislation Review Act 1987*.

5. Crimes Amendment (Grievous Bodily Harm) Bill 2010\*

Issue: Personal Physical Integrity – Clause 3 (1) and (2) – Amendment of *Crimes Act 1900*:

12. As the Bill proposes to redefine human life and the foetus, it may also revolve around concerns for personal physical integrity. The Committee notes that a range of interests and rights may potentially be impacted upon, including references made in the Second Reading speech as suggesting a conscience vote.

13. Therefore, the Committee refers clauses 3 (1) and (2) of this Bill to Parliament for consideration as to whether the Bill may trespass unduly on personal rights and liberties including matters of personal physical integrity and wider criminal liabilities potentially arising from the contrasting definition of 'grievous bodily harm' as extended to any embryonic stage.

6. Parliamentary Electorates and Elections Amendment Bill 2010

9. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

7. Registrar-General Legislation (Amendment And Repeal) Bill 2010

10. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

8. Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010

**Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.**

12. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

9. Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)

**Issue: Commencement by Proclamation at Cl. 2**

11. Although some provisions of the Bill commence on proclamation, the Committee recognises the difficulty in commencing all provisions on assent or a fixed date and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

10. Weapons And Firearms Legislation Amendment Bill 2010

**Issue: Not required to provide reasons – closed justice – denial of natural justice and procedural fairness – amendment of *Weapons Prohibition Act 1998* - Schedule 1 [5] - proposed insertion of section 10 (3A) and (3B); Schedule 1 [13] – proposed insertion of section 16 (1A); Schedule 1 [14] – proposed insertion of section 18 (2A); and Schedule 1 [26] – proposed insertion of section 35 (2) and (3); amendment of *Firearms Act 1996* – Schedule 2 [4] – proposed insertion of section 22 (1A); Schedule 2 [5] – proposed insertion of**

section 24 (2A) and Schedule 2 [8] – proposed insertion of section 30 (8) and (9):

22. The Committee is concerned that the Commissioner of Police will not be required to provide any reasons for the decision that a particular applicant will be refused a permit or that the permit holder will have their permit suspended or revoked respectively under the proposed section 10 (3B) of Schedule 1 [5]; proposed section 16 (1A) of Schedule 1 [13]; and proposed section 18 (2A) of Schedule 1 [14], based on the public safety and public interest grounds arising from the proposed section 10 (3A) with the reliance of criminal intelligence report or other criminal information held in relation to the person.
23. Such affected permit applicants or permit holders who will have their permits refused, suspended or revoked under the above proposed provisions may then be denied a right of reply or an opportunity to test the veracity of the criminal intelligence reports submitted against them.
24. By way of comparison, the Committee notes that when the then Security Industry Amendment Bill 2005 was first introduced and which had been passed both Houses and received the Royal Assent on 1 July 2005, a similar concern with regard to procedural fairness was reported in *Digest 9 of 2005*. The Security Industry Amendment legislation in 2005 also contained a new provision that when determining whether an applicant is a fit and proper person, the Commissioner of Police may have regard to certain criminal intelligence reports and other criminal information and may revoke the security licence if of the opinion that the licensee is no longer a fit and proper person to hold a licence. In the public interest, the security legislation, similarly, ensures that any such information will remain confidential in a review by the Administrative Decisions Tribunal of a decision to refuse to grant a licence or to revoke a licence.
25. In *Digest 9 of 2005*, with respect to procedural fairness on the comparative provision proposed by that Security Industry Amendment legislation, the Committee commented at paragraph 11 on page 14, that: “While the Committee appreciates the aim of maintaining the confidentiality of such information, it is concerned that decisions may be made with potentially deleterious effects on a person’s livelihood, without that person being aware of the material on which those decisions are based”. “Procedural fairness, or natural justice, means that decision-makers must comply with certain obligations where any decision made may directly and adversely affect a person’s rights, interests, status or legitimate expectations”. At paragraphs 16 to 19, on page 15 of the *Digest 9 of 2005*, the Committee noted that it is a fundamental common law rule that a person must be given an opportunity to participate in the decisions that affect him or her. The Committee then referred the matter to Parliament to consider whether that new provision unreasonably trespasses on an applicant’s right to a fair hearing.

26. The Committee notes the above comments and conclusions reached in *Digest 9 of 2005* on a similar amendment in the context of the security industry where the Commissioner and the Tribunal could rely on confidential criminal intelligence reports and other criminal information held against the applicant.
27. The reliance of criminal intelligence reports has become increasingly important and useful, particularly in the context of protecting public safety. The Committee also has the obligation of considering what may constitute an undue trespass on personal rights and liberties. In determining whether a trespass on a right is undue, this may require the identification of the degree of trespass to the right; evaluation of the right that is trespassed upon; the importance of the purpose of the trespass such as public interests and public safety concerns; and assessment of the necessity of trespassing on the right to achieve the intended legislative objective including the least restrictive means available to achieve that purpose.
28. The Committee notes that traditionally, the common law rule of procedural fairness is treated as a core right and fundamental principle. Some of the key sources such as the recent South Australian Supreme Court decision and previous High Court judgment may also assist the Committee in assessing whether the extent or degree of a trespass were undue in the context of public interest concerns.
29. By taking consideration of the above issues, the provisions proposed by this Bill could appear to be contrary to the fundamental principles of natural justice and procedural fairness by relying on secret or confidential evidence which would not be disclosed to the affected individual and may lead to an undue trespass on individual rights and liberties. Accordingly, the Committee refers the Bill's amendments to the *Weapons Prohibition Act 1998*, concerning proposed section 10 (3B) of Schedule 1 [5]; proposed section 16 (1A) of Schedule 1 [13]; and proposed section 18 (2A) of Schedule 1 [14] to Parliament for consideration.
36. It could appear that the proposed section 35 (3)(b) affecting the right to natural justice and an opportunity to test the veracity of the criminal intelligence reports or other criminal information may be further undermined by the reliance by the Administrative Decisions Tribunal to base its review on material received in closed hearing, in the absence of the affected applicant and the applicant's representative.

37. The Committee notes the recent decision of the South Australian Supreme Court in *Totani & Anor v The State of South Australia* [2009] SASC 301. The South Australian Supreme Court discussed a legislation which involved secret intelligence and administrative decision making on questions which should be judicially decided and on appeal by a superior court; and how the person should have a right to know that he or she has been accused as well as what he or she has been accused of; and that courts should have a right to question and test the accuracy of 'criminal intelligence'.
38. Based on the South Australian Supreme Court decision, the proposed amendments may appear to cause the Tribunal to act in a manner contrary to natural justice and due process by denying people the right to know the allegations made against them including a right of access by a party to all adverse materials taken into account by the Tribunal.
39. While the Committee appreciates the aim of maintaining the confidentiality of such information, however, in light of the above principles decided from the recent South Australian Supreme Court decision, the Committee is concerned that the Administrative Decisions Tribunal is not required to provide any reasons arising from the review of a decision by the Commissioner of Police to refuse to issue a permit, or the revocation or suspension of a permit that was made on the grounds in the proposed section 10 (3A), by the insertion of section 35 (2) and (3) of Schedule 1 [26].
40. The Committee, therefore, refers this to Parliament to consider whether it may be contrary to principles of natural justice and due process and could unduly trespass on individual rights and liberties.
44. The Committee expresses similar concerns with the Bill's amendment to the *Firearms Act 1996* with regard to the proposed section 22 (1A) of Schedule 2 [4], proposed section 24 (2A) of Schedule 2 [5], proposed section 30 (8) and (9) of Schedule 2 [8], where they respectively ensure that the Commissioner of Police will not need to provide any reasons for suspending the licence under the new section 11 (5A); for revoking the licence arising from the new section 11 (5A); or for suspending or revoking a permit because of the grounds for revoking the permit under the new section 11 (5A).
45. Such affected licence or permit holders under the above proposed provisions may then be denied a right of reply or an opportunity to test the veracity of the materials submitted against them. The Committee is aware of the public interest concerns and also weighs up the implications for fundamental principles of natural justice and procedural rights as discussed earlier in relation to the equivalent amendments to the *Weapons Prohibition Act 1998* and also identified in the context of the previously reported *Digest 9 of 2005* with respect to the security industry amendments.

46. Therefore, the proposed amendments to the *Firearms Act 1996* may appear to be contrary to the fundamental principles of natural justice and procedural fairness, and may trespass unduly on personal rights and liberties. Accordingly, the Committee refers this to Parliament for consideration.

Issue: Retrospectivity – amendment of *Weapons Prohibition Act 1998* - Schedule 1 [42] - proposed insertion of Part 4 - section 11 – existing permits may be revoked on grounds of risk to public safety etc:

48. The Committee will always be concerned to identify the retrospective effects of legislation that may have an adverse impact on a person. The Committee also observes the right established by Article 15 of the *International Covenant on Civil and Political Rights* that a person not be subject to a heavier penalty than what was applicable at the time of the commission of the offence.
49. Therefore, the Committee refers to Parliament to consider whether providing for the revocation of permits which had been duly made under the law and in force immediately before the commencement of the new section 10 (3A) as proposed in Schedule 1 [42] by the insertion of section 11 in the new Part 4, may unduly trespass on personal rights and liberties.

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

51. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.