

PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 1 of 2007

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## TABLE OF CONTENTS

Membership & Staff.....	iii
Functions of the Legislation Review Committee.....	iv
Guide to the <i>Legislation Review Digest</i> .....	v
Summary of Conclusions .....	vii
 Part One – Bills.....	 1
SECTION A: Comment on Bills.....	1
1. Anti-Discrimination Amendment (Offender Compensation) Bill 2007 .....	1
2. APEC Meeting (Police Powers) Bill 2007 .....	5
3. Appropriation Bill 2007; Appropriation (Parliament) Bill 2007; Appropriation (Special Offices) Bill 2007; Payroll Tax Bill 2007; State Revenue and Other Legislation Amendment (Budget) Bill 2007 .....	12
4. Births, Deaths and Marriages Registration Amendment Bill 2007 .....	15
5. Child Protection (Offenders Registration) Amendment (Suspended Sentences) Bill 2007 .....	17
6. Commission For Children and Young People Amendment (Parliamentary Joint Committee) Bill 2007 .....	20
7. Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007 .....	22
8. Criminal Procedure Amendment (Vulnerable Persons) Bill 2007.....	25
9. Drug and Alcohol Treatment Bill 2007 .....	31
10. Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2007 .....	36
11. Fair Trading Amendment (Funeral Goods and Services) Bill 2007 .....	38
12. Guardianship Amendment Bill 2007 .....	40
13. Human Cloning and Other Prohibited Practices Amendment Bill 2007.....	46
14. Industrial and Other Legislation Amendment (APEC Public Holiday) Bill 2007.....	52
15. Judicial Officers Amendment Bill 2007.....	55
16. Mental Health Bill 2007 .....	57
17. Police Superannuation Legislation Amendment Bill 2007 .....	69
18. Private Health Facilities Bill 2007 .....	71
19. Professional Standards Amendment (Mutual Recognition) Bill 2007 .....	74
20. Rural Communities Impacts Bill 2007* .....	76
21. Senator’s Elections Amendment Bill 2007 .....	79
22. Statute Law (Miscellaneous Provisions) Bill 2007 .....	81
23. Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007 .....	83
24. Transport Administration Amendment (Portfolio Minister) Bill 2007.....	88
25. War Memorial Legislation Amendment (Increased Penalties) Bill 2007 ....	90

Part Two – Regulations .....	<b>95</b>
Environmental Planning and Assessment Amendment (Designated Development) Regulation 2007	
Appendix 1: Index of Bills Reported on in 2007 .....	<b>101</b>
Appendix 2: Bills that received comments under s 8A of the Legislation Review Act in 2007 .....	<b>102</b>

\* Denotes Private Member's Bill

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

### 8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
  - (a) to consider any Bill introduced into Parliament, and
  - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
    - (i) trespasses unduly on personal rights and liberties, or
    - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - (iv) inappropriately delegates legislative powers, or
    - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

### 9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
  - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - (i) that the regulation trespasses unduly on personal rights and liberties,
    - (ii) that the regulation may have an adverse impact on the business community,
    - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    - (vii) that the form or intention of the regulation calls for elucidation, or
    - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
  - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

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## GUIDE TO THE *LEGISLATION REVIEW DIGEST*

### Part One – Bills

#### Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page iv).

#### Section B: Ministerial correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

### Part Two – Regulations

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the *Digest*. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the *Digest* drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations is set out in s 9 of the *Legislation Review Act 1987* (see page iv).

#### Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

#### Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

#### Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

## Appendix 1: Index of Bills Reported on in 2007

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

## Appendix 2: Index of Ministerial Correspondence on Bills for 2007

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Bill and correspondence appear.

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2007

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

## Appendix 4: Index of correspondence on Regulations reported on in 2007

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Regulation and correspondence appear.



## SUMMARY OF CONCLUSIONS

### SECTION A: Comment on Bills

#### 1. **Anti-Discrimination Amendment (Offender Compensation) Bill 2007**

##### **Retrospectivity: Schedule 1 [Clause 3] Proposed Section 17 (1) and (3) Operation of amendment**

**Issue: Schedule 1 [Clause 3] Proposed Section 17 (1) and (3) Operation of amendment** (an order for the payment of damages made on or after 29 May 2007 to be made to Victims Compensation Fund. 29 May 2007 is the date on which notice of motion was given in Parliament for the introduction of the Bill; a regulation made pursuant to Section 111A (6) can be expressed to extend to an order for the payment of damages made before the commencement of the regulation).

**11. The Committee is of the view that the Bill's retrospectivity trespasses unduly on personal rights and liberties, and refers to Parliament the question of whether Parliament will find this as trespassing unduly on personal rights and liberties.**

##### **Denial of compensation: Schedule 1 [1] Proposed Section 111A (2) and (2) Compensation to offenders in custody – payment to Victims Compensation Fund**

**Issue: Schedule 1 [1] Proposed Section 111A (2) and (2) Compensation to offenders in custody – payment to Victims Compensation Fund** (A protected defendant who is liable to pay offender damages to a person must not pay the damages to the person and instead must pay the amount into the Victims Compensation Fund; payment of damages into the Victims Compensation Fund by a protected defendant discharges the protected defendant's liability to the damages to the person to whom the damages were ordered to be paid).

**14. The Committee is of the view that a removal of the right to receive damages by a person in custody from unlawful discrimination inflicted by or on behalf of a protected defendant, is an undue trespass on personal rights, and the Committee refers to Parliament the question as to whether Parliament will consider this removal of the right to receive damages by a person in custody is an undue trespass on personal rights.**

**16. The Committee refers to Parliament the question of whether the effect of the Bill's exclusion of people aged over 18 years of age but inclusion of people aged under 18 who are on remand and who have not been convicted of any offence, deriving from the same definition in Part 2A of the *Civil Liability Act 2002*, and the redirection of damages into Victims Compensation Fund, is an undue trespass on personal rights.**

#### 2. **APEC Meeting (Police Powers) Bill 2007**

##### **Search or entry without warrant**

**Issue: Clause 11 (1) and (2) Power to stop and search vehicles or vessels** (A police officer may, without a warrant, stop a vehicle or vessel entering an APEC security area or

Summary of Conclusions

that is in an APEC security area, and require the person in charge of the vehicle or vessel, to submit the vehicle or vessel (and anything in or on the vehicle or vessel) to a search; a police officer may detain a vehicle or vessel for so long as is reasonably necessary to conduct a search).

**Issue: Clause 12 (1), (2) and (3) Power to search persons** (A police officer may, without a warrant, stop a person seeking entry to an APEC security area or who is in an APEC security area, and require the person submit to a search (including any thing in the possession of or under the control of the person); except to the extent of strip searches; and a police officer may detain a person for so long as is reasonably necessary to conduct a search).

**Issue: Clause 21 (1), (2) and (3) Power to enter and search premises in a restricted area** (A police officer may, without a warrant, enter and search any premises in a restricted area; must do as little damage as possible; but does not authorise a police officer to enter any part of premises used for residential purposes except with the occupier's consent or with a search warrant or under another law that authorises entry).

**Strict liability: Clause 19 (1) and (2) Offence: entering restricted area without special justification; Clause 37 Special justification**

**Onus of proof: Clause 38 Onus of proof of lawful excuse or special justification**

**Privacy: Clause 26 (1), (2) and (3) Excluded persons list**

**Excessive punishment: Clause 31 (1) and (2) Presumption against bail for certain offences committed during the APEC period**

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| <p><b>10. The Committee has resolved to write to the Minister to express its concern that the above provisions could have the effect of unduly trespassing on individual rights and liberties, including rights to privacy and property and seeks advice on whether such police powers to search without a warrant, could be amended by adding a need for reasonable suspicion or with reasonable cause as a ground to exercise such powers of search, in recognition of the importance of providing security for the APEC event.</b></p> <p><b>14. The Committee has resolved to write to the Minister to express its concern that the 'special justification' appears to be at a higher threshold or more restrictive than the defence that the accused person was under a mistaken but honest belief about facts which, had they existed, would have meant the conduct alleged would not have constituted the offence.</b></p> <p><b>16. The Committee has resolved to write to the Minister to express its view that the principle that the prosecutor should bear the onus of proving all elements of an offence against an accused person, which is also consistent with the presumption of innocence, is fundamental to personal rights. This right should not be eroded unless there are clear and compelling public interest justifications for doing so.</b></p> |
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19. The Committee refers to Parliament the question of whether the publication of names of excluded persons who have not yet committed an offence, unduly trespasses on personal rights and privacy, and has decided to write to the Minister to seek an amendment on the requirement for a connection between the specific offence committed by such excluded persons in the past and the assessment of potential or future serious threats to the safety of persons or property in an APEC security area.
22. The Committee refers to Parliament the question as to whether, having regard to the aims of the Bill, including the protection of the community, the presumption against bail for offences primarily related to the assault of a police officer, damage to property or throwing a missile at a police officer, trespasses unduly on personal rights and liberties, including the right to peaceful assembly and freedom of opinion and expression.
24. The Committee considers the discrepancy and difference between the two periods of commencement and ending may cause unnecessary confusion and excessive punishment for any person alleged to have committed an offence to fall within the longer extended version of the APEC period (20 August 2007 to 28 September 2007), given that the APEC Act will be repealed on 13 September 2007; and has resolved to write to the Minister to consider amending the different periods wherever mentioned in the Bill to be consistent with the actual APEC period as defined in the Bill, commencing at the beginning of 30 August 2007 and ending at the end of 12 September 2007.

**Non-reviewable decisions: Issue: Schedule 3 Amendment of Acts – Part on Provisions consequent on enactment and repeal of APEC Meeting (Police Powers) Act 2007 – Report on APEC Act by Commissioner of Police – Clause (2) (d)**

28. The Committee refers to Parliament the question as to whether the failure to provide provisions for informing a person on how to make a complaint, and the handling of complaints against the conduct of police officers under the Bill, and the absence of external judicial or merits review, may make a person's rights and liberties unduly dependent on non-reviewable decisions.

3. **Appropriation Bill 2007; Appropriation (Parliament) Bill 2007; Appropriation (Special Offices) Bill 2007; Payroll Tax Bill 2007; State Revenue and Other Legislation Amendment (Budget) Bill 2007**

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

4. **Births, Deaths and Marriages Registration Amendment Bill 2007**

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

## **5. Child Protection (Offenders Registration) Amendment (Suspended Sentences) Bill 2007**

**Retrospectivity:** Schedule 1 [7] inserts proposed Part 4 into Schedule 2 to the principal Act

16. The Committee considers that having regard to the serious aims of the principal Act, and the limited period of the Bill's retrospectivity along with the circumstance that the particular individuals have already been on the registration system before the Supreme Court's decision, the retrospective operation does not unduly trespass on personal rights and liberties.
17. The Committee also notes that the Bill's objective is consistent with the purpose of the principal Act, which is to protect children from people who have been convicted of child sex offences and other offences committed against children and that individual rights of people convicted with such offences may give way to promote other interests such as the public safety of children.

## **6. Commission For Children and Young People Amendment (Parliamentary Joint Committee) Bill 2007**

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

## **7. Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007**

**Issue:** Schedule 1.3 Onus of proof

10. The Committee notes that the offence to be inserted into the Regulation regarding use of a mobile phone is one of strict liability. However, as the offence regards the internal regulation of a correctional centre and the maximum penalty that may be imposed is to deprive the inmate of withdrawable privileges for up to six months, the Committee does not consider that personal rights and liabilities are unduly trespassed.
11. The Committee notes that a reversal of the onus of proof trespasses on the right of an inmate to be presumed innocent. However, there are circumstances in which a reversal of the onus of proof is generally considered acceptable. The Committee refers to Parliament the question of whether rights and liberties are unduly trespassed.

## **8. Criminal Procedure Amendment (Vulnerable Persons) Bill 2007**

**Issue: Schedule 1**

**Right to a fair trial**

- 27. The Committee acknowledges that the Bill does trespass on the ability of the accused to examine witnesses.**
- 28. However, the Committee considers that, given the various safeguards included in the Bill, the retention of the court's discretion, that Part 6 is only to apply to persons with an intellectual impairment if the court is satisfied that it would allow for the facts to be better ascertained, and that the Bill is designed to enable vulnerable persons to more effectively give evidence, some protection is given to right of the accused to a fair trial.**
- 29. Accordingly, the Committee considers that any trespass on personal rights and liberties is not undue.**

**Issue: Commencement by proclamation**

- 31. The Committee has written to the Minister to seek advice as to why the Bill is to commence on proclamation rather than on assent and to indicate a likely timeframe for commencement.**

## **9. Drug and Alcohol Treatment Bill 2007**

**Excessive Punishment: Clause 14 Length of initial detention and review of dependency certificate**

**Clause 38 Adjournments**

**Clause 48 (1) Act does not limit or affect other powers**

- 6. The Committee has resolved to write to the Minister for advice as to the reasons for not following the Standing Committee on Social Issues' recommendation for 14 days of treatment detention, which could then be reviewed and if necessary, be followed by a maximum period of 28 days, and expresses the Committee's concerns that a maximum of 28 days at the outset, which could be extended up to a total of 3 months, may unduly trespass on personal rights and liberties since it is a trial with no evidence at this stage of the effectiveness of involuntary treatment detention.**
- 7. The Committee has also resolved to write to the Minister to seek clarification on addressing the potential issue that the same person may be subjected to repeated assessment and dependency certificate over several times in a year, which could unduly trespass individual rights and liberties.**

8. **The Committee has resolved to write to the Minister for clarification on the circumstances for adjournments of proceedings by Magistrates, since the proposed legislation is only on a trial basis within a prescribed area and the maximum period of treatment detention if extended, could already be lengthy and may unduly trespass on personal rights and liberties.**
9. **The Committee refers to Parliament the question as to whether the person or dependent person who has a severe substance dependence on an illicit drug could be arrested for possession of an illicit drug if the person was searched and found with an illicit drug, and whether this would defeat the objectives of the proposed Bill, and trespass individual rights and liberties.**

**Issue: Clause 10 (5) Order for assessment** (The accredited medical practitioner and any other person authorised under this section may enter premises, if need be, by force, to carry out the assessment).

#### **Clause 23 (3) Police assistance**

12. **The Committee has resolved to write to the Minister for the Minister to consider amending Clause 10 (5) to include the use by reasonable force, rather than by force; and asks for advice as to whether the power of entry without warrant unduly trespasses the right to privacy and personal rights and liberty.**
14. **The Committee has resolved to write to the Minister to ask for advice as to whether the police officer's power of entry without warrant unduly trespasses the right to privacy and personal rights and liberty.**

**Insufficiently defined administrative powers - Insufficient criteria regarding the scope of persons to whom a power would be delegated: Clause 20 (5) (c) Transporting dependent persons to treatment centre – transport officer means: (c) a person of a class prescribed by the regulations.**

**Issue: Clause 20 (5) (c) Transporting dependent persons to treatment centre – transport officer means: (c) a person of a class prescribed by the regulations.**

16. **The Committee refers to Parliament the question of whether allowing the scope of persons to be prescribed by regulation is an appropriate delegation of legislative power.**

#### **10. Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2007**

##### **Schedule 1[4]**

11. **The Committee notes the importance of judicial review for protecting individuals' rights against oppressive administrative action and upholding the rule of law. It further notes that the Bill continues a limitation of judicial review.**

12. Whilst the Committee acknowledges that the Bill does impact on rights and liberties, it is of the opinion that, in these circumstances and given the above findings of the Court, the limitation of judicial review does not unduly trespass on personal rights.

## 11. Fair Trading Amendment (Funeral Goods and Services) Bill 2007

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

## 12. Guardianship Amendment Bill 2007

Issue: Retrospectivity: Schedule 1[27]

12. The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person.

13. The Committee notes that exempting the Tribunal from providing formal written decisions in respect of certain decisions already made by the Court and applying the extension of the powers of the Registrar to pending proceedings trespasses upon a person's right to order his or her affairs in accordance with the current law.

14. The Committee considers that personal rights and liberties are in this respect unduly trespassed.

15. The Committee has resolved to write to the Minister to seek advice as to why these sections are to have retrospective application.

Issue: Right to self-determination

27. The Committee notes that the right to self-determination is a fundamental human right.

28. The Committee considers that the expansion of the areas which may be dealt with by less than three Tribunal members and the allocation of functions to a Registrar may weaken, as opposed to remove, the safeguards currently found in the *Guardianship Act 1987*.

29. However, the Committee notes that the position of persons who are the subject of orders generally made by the Tribunal is particularly vulnerable.

30. The Committee has resolved to write to the Minister seeking further advice as to the reasons for the extent of functions delegated to the Registrar.

31. The Committee accordingly refers to Parliament the question of whether the Bill unduly trespasses on personal rights and liberties.

**Schedule 1[4] Makes rights, liberties or obligations dependent on non-reviewable decisions.**

35. The Committee will always be concerned if a Bill purports to make rights, liberties or obligations unduly dependent on non-reviewable decisions.
36. However, given that non-reviewable guardianship orders are concerned with review at the expiration of an order and that the option of review is not completely excluded, the Committee does not consider that a person's rights, liberties or obligations are unduly dependent on non-reviewable decisions.

**Issue: Commencement by proclamation**

38. The Committee has resolved to write to the Minister to seek advice as to why the Bill is to commence on proclamation rather than on assent and to indicate a likely timeframe for commencement.

**13. Human Cloning and Other Prohibited Practices Amendment Bill 2007**

**Retrospectivity: Clause 2**

21. The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person. However, the retrospective application of the Bill should it pass does not appear to unduly trespass on any personal rights or liberties.

**Right to life**

31. The Committee notes the wide range of opinions expressed by members of the community regarding the status of an embryo. A number of attempted safeguards have been placed into the Bill: the cloning of a human embryo is to only be for the purposes of research and not reproduction; the embryo may not develop beyond 14 days or be implanted in a woman; such research is only to be conducted if authorised by a licence issued by the Embryo Research Licensing Committee; and parliamentary review is to occur within three years from the date of assent to the Bill. The Committee refers to Parliament the decision of whether the Bill unduly trespasses on the right to life.

**14. Industrial and Other Legislation Amendment (APEC Public Holiday) Bill 2007**

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

**15. Judicial Officers Amendment Bill 2007**

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



## **16. Mental Health Bill 2007**

**Rule of law: Clause 20 Detention on information of ambulance officer; Clause 21 Police assistance; Clause 22 Detention after apprehension by police; Clause 81 Transport of persons to and from mental health facilities and other health facilities**

**Entry without warrant and Search and seizure without warrant: Clause 21(2) Police assistance**

**Clause 21 (2) Police assistance and Clause 22 (2) Detention after apprehension by police to be read in conjunction with Clause 81 Transport of persons to and from mental health facilities and other health facilities**

**Clause 49 (3) Police Assistance to be read in conjunction with Clause 81 Transport of persons to and from mental health facilities and other health facilities**

**Excessive Punishment: Clauses 50, 51, 53, 54, 55, 56, 57, 58 and 59 on community treatment order**

**Schedule 7, Clause 76 Person who ceases to be a forensic patient may be detained as an involuntary patient**

**Fair trial: Clause 55 Community treatment order may be made in absence of affected person**

**Vulnerable Groups:**

**Clauses 82 to 86 on mental health treatment, psychosurgery; and Clauses 87 to 97 on Electro convulsive therapy**

**Self incrimination and the right to silence: Clause 139 (1), (3) and (4) Protection from incrimination**

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|-----------------------------------|--|
| <p><b>5.</b></p> <p><b>7.</b></p> | <p>The Committee refers to Parliament the question whether the exercise of detention powers under Clauses 20, 21 and 22, and whether the frisk and ordinary search powers conferred to a member of staff of NSW Health Service, an ambulance officer, a police officer and a person prescribed by regulations under Clause 81, unduly trespass on individual rights and whether amendments could be sought to restrict the powers with a time limit from the time of detention by an ambulance officer (with or without police assistance) or after apprehension by police until an order for medical examination or observation is authorised.</p> <p>The Committee has resolved to write to the Minister or Assisting Minister to seek clarification on the meaning or wording of 'any such person' in the clause; and refers to Parliament the question whether, having regard to the aims of the section, this power to enter without warrant unduly trespasses on personal rights including the liberty and privacy of other owners or occupiers in the absence of offending on the part of the person.</p> |
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- 9. The Committee refers to Parliament the question whether, having regard to the aims of Part 2, that the powers conferred to a police officer by Clause 81, unduly trespass on individual rights and liberties in the absence of offending on the part of the person.**
- 12. The Committee refers to Parliament the question whether, having regard to the aims of Division 4 leave of absence from mental health facilities, that the powers conferred to a police officer by Clause 81, unduly trespass on individual rights and liberties.**
- 14. The Committee has resolved to write to the Minister or Minister Assisting to seek clarification on the scope of these provisions with regard to the same test or criteria, requirements, form, duration and operation of community treatment orders (including medication) can be made about a person who is not detained in a mental health facility as a person who is detained; and expresses concerns that these could have the effect of unduly trespassing on individual liberties.**
- 16. The Committee refers to Parliament the question of whether a breach of a community treatment order is an offence, otherwise, effect of a breach unduly trespasses on individual rights and liberties in the absence of offending on their part.**
- 18. The Committee has resolved to write to the Minister or Minister Assisting to express concerns that if a person ceases to be a forensic patient, any detention of that person as an involuntary patient should not extend unnecessarily beyond the term of a sentence; and any sanction for failing to comply with detention or compulsory community treatment orders should be no more severe than the imposition of the original sentence.**
- 20. The Committee has resolved to write to the Minister or Minister Assisting, to seek clarification on the importance of the person's right to be heard in any application for compulsory community treatment order (including medication) affecting the person, and expresses the need to protect the interests and needs of the affected person (including children, young people and the elderly) by way of the need for appearance or to legislate for representation such as an advocate, legal representative, nominated friend or guardian.**
- 21. The Committee has resolved to write to the Minister or Minister Assisting, to seek clarification on the need for safeguards to protect the interests and needs of children, young people and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends.**
- 23. The Committee has resolved to write to the Minister or Minister Assisting, to seek clarification on the need for safeguards to protect the interests and needs of children, young people (including those aged 14 years or over), and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends with regard to provisions on mental health treatment, psychosurgery and electro convulsive therapy.**
- 26. The Committee refers to Parliament, the question of whether the removal of the privilege against self-incrimination in Clause 139 (1), (3) and (4) unduly trespasses on personal rights.**

**Insufficiently defined administrative powers- Ill-defined and wide powers: Clause 150 (2) and (5) Composition of the Tribunal**

28. The Committee has resolved to write to the Minister or Minister Assisting, seeking clarification on the question of whether the intention is sufficiently clearly expressed to ensure that a full three-person panel sits where substantial or contested matters are heard and that one-person panels are limited to only minor, procedural matters; and that whether these discretions make rights, liberties or obligations unduly dependent on insufficiently defined or wide administrative powers.

**Insufficient criteria regarding the scope of persons to whom a power would be delegated:**

**Issue: Clause 81 Transport of persons to and from mental health facilities and other health facilities** (A person authorised by this Act includes: a member of staff of NSW Health, an ambulance officer, a police officer and a person prescribed by the regulations, and to take a person to or from a mental health facility or other health facility may: use reasonable force, and restrain the person in any way that is reasonably necessary in the circumstances; A person may be sedated; may carry out a frisk search or an ordinary search of the person if the person reasonably suspects that the other person is carrying anything that would present a danger, or could assist the other person to escape).

**Clause 51 (2) Community treatment orders**

30. The Committee refers to Parliament the question of whether allowing the scope of persons to be prescribed by regulation is an appropriate delegation of legislative power.

32. The Committee refers to Parliament the question of whether allowing the scope of persons to be prescribed by regulation is an appropriate delegation of legislative power.

**Non-reviewable decisions [s 8A(1)(b)(iii) LRA] - Exclude judicial review: Schedule 7, Clause 72 (5) Appeals against decisions of Director-General**

34. The Committee has resolved to write to the Minister or Minister Assisting, with concerns that Schedule 7, Clause 72 (5) operates to make personal rights unduly dependent on non-reviewable decisions by excluding judicial review, instead of proposing a reasonable limit to the judicial review period as an appropriate balance between a person's right to challenge the legality or merits by way of a new hearing of such determinations.

**17. Police Superannuation Legislation Amendment Bill 2007**

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

## **18. Private Health Facilities Bill 2007**

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

## **19. Professional Standards Amendment (Mutual Recognition) Bill 2007**

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

## **20. Rural Communities Impacts Bill 2007\***

**12. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.**

## **21. Senator's Elections Amendment Bill 2007**

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

## **22. Statute Law (Miscellaneous Provisions) Bill 2007**

**Commencement:** Schedule 1.12 [4]-[8], 1.13, 1.17 [1], 1.23, 1.26, 1.27 [1], 1.29, 1.30 [1], 1.31, 1.32, 1.38, 1.39, 1.40, 1.41, and 1.55 [4], [5], [7]-[9].

**Retrospectivity:** Schedule 1.1 [2]

**8. The Committee considers that, as no person is detrimentally affected by the retrospective operation of this amendment, this provision does not trespass on personal rights or liberties.**

**Commencement by proclamation:** Schedule 1.5, 1.11, 1.48, and 1.49

**10. The Committee has resolved to write to the Minister to seek advice as to why the Bill is to commence on proclamation rather than on assent and to indicate a likely timetable for commencement.**

## **23. Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007**

**Oppressive official powers:**

**Issue:** Clause 26X (2A) Arrangement for detainee to be held in prison

**Right and access to legal representation:**

**Issue:** Clause 26X (2A) Arrangement for detainee to be held in prison

**Excessive Punishment:**

11. The Committee refers to Parliament the question of whether this Bill unduly trespasses on personal rights and liberties including the right to be heard by Official Visitors and the Chief Executive Officer of Justice Health, with the right to health services.
12. The Committee has resolved to write to the Minister to seek clarification on whether the clause contravenes or is in conflict with Section 26ZC with regard to the humane treatment of persons detained if the bill could exclude the right to be visited by Official Visitors and by the Chief Executive Officer of Justice Health, who have a legislated responsibility to ensure the health, safety and welfare of detainees.
15. The Committee notes that the right to have legal counsel of one's own choosing and the right to access a lawyer are important attributes of the right to a fair trial and form a fundamental human right recognised under international law and the common law.
16. The Committee refers to Parliament the question as to whether this proposed clause could unduly trespass on the fundamental right of a detained person to have legal counsel of his or her own choosing and to have access to legal counsel.
18. The Committee refers to Parliament the question as to whether this bill unduly trespasses on personal rights and liberties by excessively punishing the person detained who have not been charged and have not been proven guilty beyond reasonable doubt, by excluding the rights to communicate with or visits by officials with regard to the health, safety and well-being of detainees.
19. The Committee refers to Parliament the question as to how the object of preventative detention to prevent terrorist acts or to preserve evidence relating to terrorist acts could be achieved by the exclusion of such rights to communicate with or to be visited by such officials.
20. The Committee also refers to Parliament the question of whether the existing prohibited contact orders provided under the present Act are sufficient for the purposes of the Act without requiring this bill to exclude rights afforded to all inmates and detainees.

**Clauses which allow amendment of Acts by a regulation:**

**Issue: Clause 26X (2A)(c) Arrangement for detainee to be held in prison**

23. The Committee has resolved to write to the Minister to seek clarification as to the circumstances in which such regulations may make for exclusions or exceptions from the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987*.
24. The Committee refers to Parliament the question of whether the proposed clause is an inappropriate delegation of legislative power.

## **24. Transport Administration Amendment (Portfolio Minister) Bill 2007**

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| <p><b>6. The Committee has not identified any issues under s 8A (1)(b) of the <i>Legislation Review Act 1987</i>.</b></p> |
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## **25. War Memorial Legislation Amendment (Increased Penalties) Bill 2007**

**Issue: Excessive punishment**

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| <p><b>17. The Committee notes the potential incapacity of certain people such as young people to pay the proposed increased maximum amounts or penalty of \$2,200 or \$4,400, the low deterrence and the likely impact of imprisonment arising from their inability to pay, which also potentially conflicts with the <i>Young Offenders Act 1997</i> with regard to cautions, warnings, and conferencing. The Committee also notes and that the increased penalty units are disproportionate to the penalty units for damaging non-protected places and as such, may constitute an undue trespass on personal rights and liberties.</b></p> |
| <p><b>18. The Committee refers to Parliament the question of whether the doubling of penalty units is an undue trespass on personal rights and liberties in light of the above research and findings from the NSW Bureau of Crime Statistics and Research, and suggests that Parliament might consider whether the more effective option is to make amendments to enable offenders to participate in the restoration or repair of the damage inflicted rather than doubling the penalty units and maximum amounts.</b></p>   |

## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. ANTI-DISCRIMINATION AMENDMENT (OFFENDER COMPENSATION) BILL 2007

Date Introduced:	30 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Police

**The Bill received assent on 6 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill amends the *Anti-Discrimination Act 1977* with respect to damages for conduct involving offenders in custody.

### Background

2. The Bill is consistent with provisions in the *Civil Liability Act 2002* which restricts prisoners' rights to access compensation for injury caused by the negligence of the State. This Bill defines 'offenders in custody' and 'protected defendants' in similar terms as the definitions used in the *Civil Liability Act 2002*.
3. Under the Civil Liability Act, protected defendants are defined to include the Crown, a government department, members of staff of a government department, a public health organisation within the meaning of the Health Services Act 1997 and members of a staff of a public health organisation, any person having public official functions or acting in a public official capacity and a management company or a sub-management company within the meaning of the *Crimes (Administration of Sentences) Act 1999* and members of staff or such a company.
4. The redirection of compensation will include any interest that accrues. Remedies other than monetary compensation will still be available to prisoners who can prove unlawful discrimination by a public sector agency.
5. The rationale for redirecting compensation into the Victims Compensation Fund is that prisoners should not profit from their crimes so that those who commit crimes should contribute to the rehabilitation and compensation of victims of crime.

### The Bill

6. The object of this Bill provides that damages awarded to a person under the *Anti-Discrimination Act 1977* as compensation for loss or damage suffered by conduct of

certain public sector agencies while the person was an offender in custody (or for failure to comply with orders made in connection with such conduct) are not to be paid to the person, instead, are to be paid into the Victims Compensation Fund. Payment into the Victims Compensation Fund discharges the public sector agency's liability to pay damages. This Bill also extends to awards of compensation made on or after 29 May 2007, the date on which notice of motion for the introduction of this Bill was given in Parliament.

7. Proposed Section 111A (6) allows for the making of regulations to exempt certain classes of prisoners from the operation of the amendments in certain circumstances.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Retrospectivity:

**Issue: Schedule 1 [Clause 3] Proposed Section 17 (1) and (3) Operation of amendment** (an order for the payment of damages made on or after 29 May 2007 to be made to Victims Compensation Fund. 29 May 2007 is the date on which notice of motion was given in Parliament for the introduction of the Bill; a regulation made pursuant to Section 111A (6) can be expressed to extend to an order for the payment of damages made before the commencement of the regulation).

8. The Committee will always be concerned where legislation is taken to have commenced on the date when it was introduced into Parliament, rather than on or after the date of assent. The amendment will take effect for all orders for damages made on or after 29 May 2007.
9. The Committee notes that the Bill will remove the right to compensation of damages to the person who has been in custody if it has been found that there has been unlawful discrimination against that person, and that this restriction or removal of right will commence on 29 May 2007 prior to the Bill receiving the Royal Assent. The effect is retrospectivity because it captures cases that were brought before the Anti-Discrimination Commission prior to 29 May 2007, with the effect that this bill will potentially change the outcome of those cases where orders have not yet been made.
10. With regard to the proposed Section 17 (3), the Committee is of the view that, in this case, the retrospective commencement of the regulation is advantageous to those affected and does not unduly trespass on their personal rights or liberties, as it refers to the proposed Section 111A (6) that allows for the making of regulations to exempt certain classes of prisoners from the operation of the amendments in certain circumstances.

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| <ol style="list-style-type: none"><li>11. <b>The Committee is of the view that the Bill's retrospectivity trespasses unduly on personal rights and liberties, and refers to Parliament the question of whether Parliament will find this as trespassing unduly on personal rights and liberties.</b></li></ol> |
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**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]****Denial of compensation:**

**Issue: Schedule 1 [1] Proposed Section 111A (2) and (2) Compensation to offenders in custody – payment to Victims Compensation Fund** (A protected defendant who is liable to pay offender damages to a person must not pay the damages to the person and instead must pay the amount into the Victims Compensation Fund; payment of damages into the Victims Compensation Fund by a protected defendant discharges the protected defendant's liability to the damages to the person to whom the damages were ordered to be paid).

12. The Committee notes that the removal of damages to be paid to the person who was in custody, for an unlawful act of discrimination, trespasses on the right to compensation. The Committee is of the view that prisoners serve time in custody for their crimes but their punishment must reflect the crime and not be disproportionate to the offences they have been found to be guilty of. The prisoner may have been convicted of a victimless crime or a minor offence and the discrimination found to be committed by the protected defendant may be of a serious nature or extent than the offence to which the person in custody was convicted of. If compensation was held to be paid to a prisoner or person in custody and has been legally determined by a tribunal as a result of an unlawful discriminatory conduct on behalf of the State or government body, the Committee considers that this compensation is not a profit of crime, therefore, there is no rationale for the compensation to be redirected to the Victims Compensation Fund, and the person in custody should be entitled to receive the damages.

13. The Committee is of the view that freedom from discrimination is a right to which every person is entitled, and any person should also be entitled to access compensation for unlawful discrimination determined in a legal proceeding.

**14. The Committee is of the view that a removal of the right to receive damages by a person in custody from unlawful discrimination inflicted by or on behalf of a protected defendant, is an undue trespass on personal rights, and the Committee refers to Parliament the question as to whether Parliament will consider this removal of the right to receive damages by a person in custody is an undue trespass on personal rights.**

15. The Committee notes that according to the definitions, an 'offender in custody' and 'protected defendant' share the same meaning as in Part 2A of the *Civil Liability Act 2002*. The definition includes detainees as defined by the Children (Detention Centres) Act, which includes children on remand. The effect of this Bill then would include the redirection of damages found liable to be paid to people aged under 18 years of age and who have not been convicted of any offence, into the Victims Compensation Fund. However, people aged over 18 who are on remand would be excluded from the operation of this Bill, as they are excluded from the definition of detainees.

- 16. The Committee refers to Parliament the question of whether the effect of the Bill's exclusion of people aged over 18 years of age but inclusion of people aged under 18 who are on remand and who have not been convicted of any offence, deriving from the same definition in Part 2A of the *Civil Liability Act 2002*, and the redirection of damages into Victims Compensation Fund, is an undue trespass on personal rights.**

***The Committee makes no further comment on this Bill.***

## 2. APEC MEETING (POLICE POWERS) BILL 2007

Date Introduced:	7 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Police

### Purpose and Description

1. This Bill gives police officers special powers with respect to the provision of security for meetings of the members of the Asia-Pacific Economic Cooperation (APEC) group in Sydney as well as for other purposes.

### Background

2. The *Industrial and Other Legislation Amendment (APEC Public Holiday) Bill 2007* is cognate with this Bill. This Bill aims to ensure that the NSW Police have the powers to keep the APEC event safe and provide these police powers around the duration of the APEC period, 30 August to 12 September 2007. The APEC group is made up of a series of meetings culminating in the APEC Leaders Week to be held in Sydney between 2 and 9 September 2007. Events will comprise of the heads of government of 21 member economies and estimated to be attended by up to 5,000 officials and 1,500 international media. APEC venues include Darling Harbour, Cockle Bay, Farm Cove, the Sydney Opera House and Government House.
3. On the basis of security threat assessment, about 3,500 security personnel will be posted in Sydney including members of the NSW Police Force, the Australian Federal Police, the Australian Defence Force, interstate police and New Zealand police. Based on the experience of other APEC meetings overseas, the NSW Police Force has identified the threat of large organised violent protests during the Leaders Week.
4. The Government believes that this Bill strikes the right balance between police powers, the lawful right to protest and the needs of residents and workers in the central business district (CBD). If the Bill is passed, the Government will roll out a communications plan to inform affected people of the impact, and will liaise with residents and businesses.
5. It will be administered by the Attorney General with some safeguards to ensure that police use the powers in a responsible way. The safeguards include, that the bill will apply only to this APEC meeting and then terminates. The powers will apply only within designated areas. Police will receive training on the use of the powers. A review of the powers will be done by the Attorney General and the Minister for Police.

## The Bill

6. The Bill's objectives are to:

- (a) confer special powers on police officer with respect to the provision of security for any meeting (APEC meeting) that forms part of the meetings of the members of the Asia-Pacific Economic Cooperation (APEC) group of economies in Sydney, and
- (b) amend the *Evidence (Audio and Audio Visual Links) Act 1998* to allow first bail appearances to be made by the audio visual link if the bail proceedings relate to an offence alleged to have been committed in metropolitan Sydney during the period at the beginning of 20 August 2007 and ending at the end of 28 September 2007, and
- (c) amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to:
  - (i) make provision for matters of a savings or transitional nature consequent on the enactment and repeal of the proposed Act, and
  - (ii) require the Commissioner of Police to report to the Attorney General and the Minister for Police on the operation of the proposed Act, and
  - (iii) require the Attorney General and the Minister for Police to report to Parliament on the operation of the proposed Act, and
- (d) amend the *Subordinate Legislation Act 1989* to provide for regulations made under the proposed Act to be excluded instruments for the purposes of that Act, and
- (e) amend the *Terrorism Legislation Amendment (Warrants) Act 2005* to postpone the repeal of Part 6B (Terrorism) of the *Crimes Act 1900* to 13 September 2008 (the third anniversary of its commencement) and to make a consequential amendment to the *Crimes Act 1900*, and
- (f) amend the *Weapons Prohibition Act 1998* to include in the list of prohibited weapons for the purposes of that Act certain articles or devices (such as caltrops) that are capable of puncturing the feet, paws or hooves of animals as they pass over them.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Search or entry without warrant:

**Issue: Clause 11 (1) and (2) Power to stop and search vehicles or vessels** (A police officer may, without a warrant, stop a vehicle or vessel entering an APEC security area or that is in an APEC security area, and require the person in charge of the vehicle or vessel, to submit the vehicle or vessel (and anything in or on the vehicle or vessel) to a search; a police officer may detain a vehicle or vessel for so long as is reasonably necessary to conduct a search).

**Issue: Clause 12 (1), (2) and (3) Power to search persons** (A police officer may, without a warrant, stop a person seeking entry to an APEC security area or who is in an APEC security area, and require the person submit to a search (including any thing in the possession of or under the control of the person); except to the extent of strip searches; and a police officer may detain a person for so long as is reasonably necessary to conduct a search).

**Issue: Clause 21 (1), (2) and (3) Power to enter and search premises in a restricted area** (A police officer may, without a warrant, enter and search any premises in a restricted area; must do as little damage as possible; but does not authorise a police officer to enter any part of premises used for residential purposes except with the occupier's consent or with a search warrant or under another law that authorises entry).

7. The Committee notes the power to search vehicles, vessels and to search a person, including anything in the possession of or under the control of the person or in or on the vehicle or vessel, without a warrant, is a significant trespass on rights to privacy and property and unduly trespasses on individual rights.
8. The Committee also notes that the power to enter and search premises without a warrant is a significant trespass on rights to privacy and property, and unduly trespasses on individual rights.
9. The Committee considers that such a power should only be given when it is overwhelmingly in the public interest to do so such as during the APEC event, but is of the view that such a power also needs to be balanced with the need for reasonable suspicion or with reasonable cause as grounds for police officers to exercise the proposed stop and search without warrant, and proposed power of entry to search premises without a warrant.

**10. The Committee has resolved to write to the Minister to express its concern that the above provisions could have the effect of unduly trespassing on individual rights and liberties, including rights to privacy and property and seeks advice on whether such police powers to search without a warrant, could be amended by adding a need for reasonable suspicion or with reasonable cause as a ground to exercise such powers of search, in recognition of the importance of providing security for the APEC event.**

## **Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]**

### **Strict liability:**

**Issue: Clause 19 (1) and (2) Offence: entering restricted area without special justification** (A person must not, without special justification, enter a restricted area. Maximum penalty: 6 months imprisonment or if circumstances of aggravation exist, 2 years imprisonment. Circumstances of aggravation exist in relation to an offence under this section if but only if: the person was in possession or had control of a prohibited item, and the person had no special justification to be in possession or have control of the item).

**Issue: Clause 37 Special justification** (if a person is a police officer on duty in the area; or the person is required or authorised to be in the area or to be in possession or have control of the thing, by a police officer or the Commissioner; or the person is required to be in or pass through the area, or in possession or have control of the thing, for the purposes of the person's employment, profession, trade or business or for any other work-related purpose; or the person resides in premises located in the area or has possession or control of the thing in residential premises of the person located in the area; or the person is in the area or is in possession or has control of the thing, in such other circumstances as may be prescribed by the regulations).

11. The Committee notes that the above provisions impose strict liability offences, where a person can be held liable for conduct irrespective of moral responsibility for an offence where mens rea (guilty mind or knowledge of the wrongfulness of the act) is not necessary. This is particularly so, given that an area could be designated a restricted area without complying with notification requirements, or that a person may not have read the publication of the order or a description of the restricted area in the newspaper or Gazette, or the person may not be aware that erection of barriers alone may form the restricted area.
12. The Committee considers that, except in extraordinary circumstances, it is inappropriate for an offence to be an offence of strict liability if it incurs heavy penalties (such as a maximum penalty of 6 months imprisonment or 2 years imprisonment if circumstances of aggravation exist).
13. The Committee also notes that it was a lawful excuse defence for the person to show that the person has a special justification, to enter a restricted area or be in possession or have control of the thing in the area. However, the Committee is concerned that this 'special justification' is a higher threshold or more restrictive than the defence that he or she was under a mistaken but honest belief about facts which, had they existed, would have meant the conduct alleged would not have constituted the offence.

**14. The Committee has resolved to write to the Minister to express its concern that the 'special justification' appears to be at a higher threshold or more restrictive than the defence that the accused person was under a mistaken but honest belief about facts which, had they existed, would have meant the conduct alleged would not have constituted the offence.**

**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]****Onus of proof:****Issue: Clause 38 Onus of proof of lawful excuse or special justification**

15. The Committee notes the proposed provision reverses the onus of proof regarding responsibility for a proven offence.

**16. The Committee has resolved to write to the Minister to express its view that the principle that the prosecutor should bear the onus of proving all elements of an offence against an accused person, which is also consistent with the presumption of innocence, is fundamental to personal rights. This right should not be eroded unless there are clear and compelling public interest justifications for doing so.**

**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]****Privacy:**

**Issue: Clause 26 (1), (2) and (3) Excluded persons list** (The Commissioner may compile excluded persons list that the Commissioner is satisfied are persons who would pose serious threats to the safety of persons or property in an APEC security area. The Commissioner may but need not, cause an excluded persons list to be published. An excluded persons list may be published: in the Gazette, or in any newspaper; or on an Internet website).

17. The Committee notes that the right of individuals not to be deprived of their liberty and rights in the absence of offending on their part is a fundamental element of the rule of law, and is consistent with the presumption of innocence.

18. The Committee also notes that it is necessary to balance a person's right to privacy with the community's reasonable expectations as to safety and security. The Committee is concerned that the proposed provision does not require that there be any connection between the specific offence already committed by such excluded persons in the past and the assessment of potential serious threats to the safety of persons or property in an APEC security area in the future.

**19. The Committee refers to Parliament the question of whether the publication of names of excluded persons who have not yet committed an offence, unduly trespasses on personal rights and privacy, and has decided to write to the Minister to seek an amendment on the requirement for a connection between the specific offence committed by such excluded persons in the past and the assessment of potential or future serious threats to the safety of persons or property in an APEC security area.**

**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]****Excessive punishment:**

**Issue: Clause 31 (1) and (2) Presumption against bail for certain offences committed during the APEC period** (This section applies to any offence alleged to have been

committed in an APEC security area that involves: the assault of a police officer, or malicious damage to property, or throwing a missile at a police officer; for which a person is not to be granted bail unless the person satisfies the authorised officer or court that bail should not be refused).

20. The Committee notes that all persons have the right to the presumption of innocence, including the right to be treated as though innocent and notes that the right to liberty is one of the most fundamental rights. The proposed presumption against bail for the above offences appear to be targeted at protestors and demonstrators and the protection of police officers.
21. The Committee also considers the importance of freedom of opinion and expression<sup>1</sup> and the right to peaceful assembly<sup>2</sup>, and at the same time, the need for police officers to provide the safety and security for the meetings of the members of APEC.

**22. The Committee refers to Parliament the question as to whether, having regard to the aims of the Bill, including the protection of the community, the presumption against bail for offences primarily related to the assault of a police officer, damage to property or throwing a missile at a police officer, trespasses unduly on personal rights and liberties, including the right to peaceful assembly and freedom of opinion and expression.**

**Issue: Clause 3.2 of Schedule 3 Amendment of Acts – Evidence (Audio and Audio Visual Links) Act 1998 No 105** (To insert proposed Section 22B in Evidence (Audio and Audio Visual Links) Act – on Bail appearances – special provision relating to APEC meeting: to allow first bail appearances to be made by audio visual link during the period at the beginning of 20 August 2007 and ending at the end of 28 September 2007).

23. The Committee notes that the period proposed for the above amendment and elsewhere in the Bill refers to the commencement at the beginning of 20 August 2007 and to the end of 28 September 2007. However, under Part 1 of definitions, the APEC period means the period from commencing at the beginning of 30 August 2007 and ending at the end of 12 September 2007, and the repeal of the APEC Act (if passed), to be on 13 September 2007.

**24. The Committee considers the discrepancy and difference between the two periods of commencement and ending may cause unnecessary confusion and excessive punishment for any person alleged to have committed an offence to fall within the longer extended version of the APEC period (20 August 2007 to 28 September 2007), given that the APEC Act will be repealed on 13 September 2007; and has resolved to write to the Minister to consider amending the different periods wherever mentioned in the Bill to be consistent with the actual APEC period as defined in the Bill, commencing at the beginning of 30 August 2007 and ending at the end of 12 September 2007.**

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<sup>1</sup> Articles 19 and 20 of the *International Covenant on Civil and Political Rights* and Articles 12 and 13 of the *Convention on the Rights of the Child*.

<sup>2</sup> Articles 21 and 22 of the *International Covenant on Civil and Political Rights* and Article 15 of the *Convention on the Rights of the Child*.



**Non-reviewable decisions [s 8A(1)(b)(iii) LRA]**

**Issue: Schedule 3 Amendment of Acts – Part on Provisions consequent on enactment and repeal of APEC Meeting (Police Powers) Act 2007 – Report on APEC Act by Commissioner of Police – Clause (2) (d)** (the number of complaints about conduct relating to the exercise of any power conferred on police officers by the APEC Act and the number of those complaints that are or have been the subject of an investigation).

25. The Committee notes that there are no specific provisions on procedures for laying complaints and the handling of complaints against the conduct of police officers under the Bill, and no provisions for informing a person on how to make a complaint, including for external merits and judicial review. The Committee also notes that there are no appeal or review provisions with regard to the decisions and actions of police officers under this Bill.
26. The Committee is of the view that the above proposed amendment with regard to reporting on APEC Act (including any complaints) by the Commissioner of Police to the Attorney General and Police Minister on the exercise of powers by police officers under the APEC Act is important and could be further assisted with provisions in the Bill to deal with appeals or complaints procedures, handling and information.
27. The Committee also considers that in light of the objective of this Bill to provide for the security of the APEC meetings, the effect of the Bill may restrict the right to liberty and security of the person<sup>3</sup>, the right to freedom of movement and the right of access to any public place<sup>4</sup>, right to privacy<sup>5</sup>, freedom of opinion and expression<sup>6</sup>, the right to peaceful assembly and association<sup>7</sup>. Therefore, the Committee is of the view that there must be a delicate balance, with the need for provisions on appeals and complaints procedures, and on informing the affected persons of these procedures.

**28. The Committee refers to Parliament the question as to whether the failure to provide provisions for informing a person on how to make a complaint, and the handling of complaints against the conduct of police officers under the Bill, and the absence of external judicial or merits review, may make a person's rights and liberties unduly dependent on non-reviewable decisions.**

***The Committee makes no further comment on this Bill.***

<sup>3</sup> Articles 9, 10 and 11 of the *International Covenant on Civil and Political Rights* (ICCPR); Article 37 of the *Convention on the Rights of the Child* (CROC).

<sup>4</sup> Articles 12, 13 of the ICCPR; Article 15 (4) of the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW); Article 10 of CROC.

<sup>5</sup> Article 17 of the ICCPR; Article 14 of the CROC.

<sup>6</sup> Articles 19, 20 of the ICCPR; Articles 12 and 13 of the CROC.

<sup>7</sup> Articles 21 and 22 of the ICCPR; Article 15 of the CROC.

### **3. APPROPRIATION BILL 2007; APPROPRIATION (PARLIAMENT) BILL 2007; APPROPRIATION (SPECIAL OFFICES) BILL 2007; PAYROLL TAX BILL 2007; STATE REVENUE AND OTHER LEGISLATION AMENDMENT (BUDGET) BILL 2007**

Date Introduced: 19 June 2007  
House Introduced: Legislative Assembly  
Minister Responsible: Hon Morris Iemma MP  
Portfolio: Premier

#### **Purpose and Description**

##### *Appropriation Bill 2007*

1. The Bill appropriates various sums of money required for recurrent services and capital works and services of the government during the 2007-2008 financial year.
2. The Bill relates to appropriations from the Consolidated Fund. It contains an additional appropriation, which allocates the additional revenue raised in connection with changes to gaming machine taxes to the Minister for Health for spending on health related services. The Bill also makes additional appropriations from the Consolidated Fund for recurrent services and capital works and services for the years 2006-2007 and 2005-2006 for the purpose of giving effect to certain Budget variations required by the exigencies of government.

##### *Appropriation (Parliament) Bill 2007*

3. The Bill appropriates funds out of the Consolidated Fund for the recurrent services and capital works for the Legislature for 2007-2008.

##### *Appropriation (Special Offices) Bill 2007*

4. The Bill appropriates funds out of the Consolidated Fund for the recurrent services of the Independent Commission Against Corruption, the Ombudsman's Office, the New South Wales Electoral Commission, and the Office of the Director of Public Prosecutions for the year 2007-2008.

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Appropriation Bill 2007; Appropriation (Parliament) Bill 2007; Appropriation (Special Offices) Bill 2007; Payroll Tax Bill 2007; State Revenue and Other Legislation Amendment (Budget) Bill 2007

### *Payroll Tax Bill 2007*

5. The Bill repeals and re-enacts the *Pay-roll Tax Act 1971* with various changes to harmonise the Act with the equivalent payroll tax legislation of Victoria.
6. Significant changes made to the 1971 Act include the following:
  - a) A payroll tax exemption is introduced for wages paid for adoption or maternity leave paid in addition to an employee's normal leave;
  - b) The method used to calculate the taxable value of fringe benefits is changed to restore payroll tax neutrality as between cash wages and fringe benefits;
  - c) Payroll tax exemptions for motor vehicle and accommodation allowances will be determined on the basis of rates applicable for income tax purposes rather than rates at which the allowances are payable under industrial awards;
  - d) The payroll tax exemption for newly created non-profit organisations will only apply if the organisation has wholly charitable, benevolent, philanthropic or patriotic purposes and the person to whom the wages are payable is engaged exclusively in that type of work
  - e) Provisions for the treatment of contractor payments as wages are modified by: removing the general exemption for contracts at a rate of \$800,000 or more per annum; removing the exemption for amounts paid to financial planners by financial services licensees; and limiting the exemption to services supplied in that financial year.

### *State Revenue and Other Legislation (Budget) Bill 2007*

7. This Bill amends the *Duties Act 1997* to: bring forward the date for the abolition of mortgage duty from 1 January 2011 to 1 July 2009; and to provide for an exemption from mortgage duty for mortgages that secure loans made for the purpose of owner occupied housing, effective 1 September 2007; and to provide an exemption from mortgage duty for mortgages that secure loans made for the purpose of investment housing, effective 1 July 2008.
8. The Bill also amends the *Gaming Machines Act 2001* to: extend the deadline on which large-scale clubs will automatically forfeit any poker machine entitlements that they were required to transfer in order to reach the reduced number of entitlements for the club as required under section 15A of the Act, and to provide that large scale clubs that have not, by 31 July 2007, reduced their allocated number of poker machine entitlements will be able to retain, on payment of a levy and for a limited period only, those entitlements that the club would otherwise be required to forfeit.
9. The Bill also amends the *Land Tax Act 1956* to reduce the land tax rate from 1.7% to 1.6%.
10. The Bill also amends the *Transport Administration Act 1988* to change the name of the State Rail Authority to the State Rail Authority Residual Holding Corporation.

Appropriation Bill 2007; Appropriation (Parliament) Bill 2007; Appropriation (Special Offices) Bill 2007; Payroll Tax Bill 2007; State Revenue and Other Legislation Amendment (Budget) Bill 2007

## Issues Considered by the Committee

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

*The Committee makes no further comment on these Bills.*

## 4. BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2007

Date Introduced:	30 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell, MP
Portfolio:	Police

**The Bill received assent on 15 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill amends the *Births, Deaths and Marriages Registration Act 1995* to make provision with respect to the time within which births are required to be notified and to the functions of the Registrar; and for other purposes.

### Background

2. This Bill provides for amendments to the *Births, Deaths and Marriages Registration Act 1995*, which established a civil system for the registration of births, deaths, marriages, changes of name and changes of sex in New South Wales. The Act regulates the keeping of registers for the recording of such information, access to the information in the registers and the issue of certified information from the registers. State and territory registrars of births, deaths and marriages coordinate their policies and procedures through the Council of Australasian Registrars to ensure a consistent approach to registration. The Bill aims to address several developments that have taken place over the years since the Act was introduced. Firstly, to maintain the integrity of the register with a new function of the registrar to maintain the integrity of the register to prevent identity fraud associated with the register and documents issued from the registrar. This recognises the registrar's role in identity security and management. The development of a national identity security strategy is an initiative of the Council of Australian Governments and is being led by the Commonwealth Government in consultation with the states and territories. Secondly, the bill amends the period within which responsible persons, hospitals, midwives and doctors notify the Registry of a live birth from 21 days to 7 days, in order to improve the reporting of births in NSW by placing greater responsibility on hospitals and midwives. This also implements the Coroner's recommendation following the inquest into the disappearance of baby Tegan Lane. In order to allow for adequate time for implementation, the Government proposes to commence this part of the Bill by proclamation but the remainder of the bill will commence on assent. This will allow time for operational changes necessary to comply with the reduced reporting timeframe such as electronic notification systems and information technology systems at private hospitals.

## The Bill

3. The object of this Bill amends the *Births, Deaths and Marriages Registration Act 1995* (the *Principal Act*) to:
- (a) provide the functions of the Registrar of Births, Deaths and Marriages specifically include maintaining the integrity of the Register and to prevent identity fraud,
  - (b) reduce the period within which the Registrar must be notified of the birth of a child from 21 days to 7 days,
  - (c) enable the Registrar to collect and maintain additional information relating to registrable events and to provide additional information services in relation to that information and the information in the Register,
  - (d) make other amendments of a minor or consequential nature.

The Bill also amends Section 28 of the Act to provide that a child's primary care giver instead of the child's guardian, may apply for registration of a change of the child's name. The meaning of the 'primary care giver' is based on the definition in Section 1 of the *Children and Young Persons (Care and Protection) Act 1988*, which means the person who is primarily responsible for the care and control, including the day-to-day care and control of the child or young person, whether or not that person is the person with parental responsibility or care responsibility. This is because the term 'guardian' is not defined in the Act.

The Bill inserts a new Section 55A to clarify the registrar's ability to collect and maintain separate records of information relating to registrable information and to allow the provision of additional services such as historical and genealogical information or the recording of the location of wills.

## Issues Considered by the Committee

4. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

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| <p>5. <b>The Committee has not identified any issues under s 8A (1)(b) of the <i>Legislation Review Act 1987</i>.</b></p> |
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***The Committee makes no further comment on this Bill.***

## 5. CHILD PROTECTION (OFFENDERS REGISTRATION) AMENDMENT (SUSPENDED SENTENCES) BILL 2007

Date Introduced:	19 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Police

### Purpose and Description

1. This Bill amends the *Child Protection (Offenders Registration) Act 2000* with respect to persons who are subject to suspended sentences of imprisonment.

### Background

2. Since October 2001, NSW has a system which requires people who have been convicted of sex offences and other serious offences against children to report their personal details to the NSW Police Force for a fixed number of years when they are living in the community. Registrable offences are listed in 2 categories. Class 1 includes the most serious offences such as child murder and sexual intercourse with a child. Class 2 includes other offences such as acts of indecency against a child and possession of child pornography.
3. Persons who are convicted of a registrable offence and meet a minimum sentencing threshold are required to report to the police and are defined as registrable persons. The information the registrable persons provide enables that police are told where these persons live, work and what they drive. Registrable persons are required to let police know about any children they reside with or have unsupervised contact with and affiliation with any clubs or organisations that have child membership. They are required to inform police of their intended interstate or international travel.
4. The NSW Government led the development of a national approach to child protection and offender registration through the Australasian Police Ministers Council which resulted in a 2003 agreement to establish a register in each State.
5. In *Khanna v Commissioner of Police NSW* [2007] NSWSC 17 (30 January 2007), Justice Brereton in the Supreme Court of NSW held that while the applicant had been convicted of a single class 2 offence, but he was found not to be a registrable person as he had been subject to a suspended sentence without any supervision. *Khanna v Commissioner of Police NSW* found that the sentence imposed on Khanna did not include a term of imprisonment and did not require that he be under supervision. It followed that "he is a person on whom a sentence has been imposed only in respect of a single class 2 offence, and neither of the two matters that might deprive him of that exemption from registrability applies. He is therefore not a registrable person. The circumstance that as a result of a recent retroactive legislative amendment in Victoria Mr Khanna might become a corresponding registrable person in New South

Wales if he ever goes to Victoria is no reason to decline to recognise and give effect to his current status under New South Wales.” (at 49). His honour held that the suspended sentence that had been imposed was not a ‘term of imprisonment’ for the purposes of the Act.

6. As a result of the Supreme Court decision, 26 people had been identified as capable of being removed from the child protection register in NSW. NSW Police Force had written to each of these people in May 2007 to advise them that they could be removed from the register. These people have been convicted of offences including possession of child pornography, acts of indecency and indecent assault on children.
7. Currently, Section 3A (2)(b) provides that persons who have been convicted of a single class 2 offence are only registrable persons if the sentence included a term of imprisonment, a term of imprisonment the subject of a periodic detention order, or an equivalent order under the laws of a foreign jurisdiction, or a requirement that the person be under the supervision of a supervising body.

## The Bill

8. The object of this Bill is to amend the *Child Protection (Offenders Registration) Act 2000* (the principal Act) to ensure that a person who is subject to a sentence of imprisonment for a single Class 2 offence (less serious offences) is not excluded from the reporting requirements of that Act because the person’s sentence has been suspended under Section 12 of the *Crimes (Sentencing Procedure) Act 1999*.
9. Schedule 1 [1] amends the definition of an existing controlled person to include a person who immediately before October 2001 was serving a term of imprisonment the subject of a sentence supervision order. This will capture any persons who were subject to a sentence supervision order immediately prior to the commencement of the *Child Protection (Offenders Registration) Act 2000* in October 2001.
10. Schedule 1 [2] defines a sentence supervision order as an order under Section 12 of the *Crimes (Sentencing Procedure) Act 1999*.
11. Schedule 1 [3] amends the definition of a registrable person to include a person whose sentence is the subject of a sentence supervision order. This means a person is a registrable person even if the sentence imposed on the person was only a term of imprisonment the subject of a sentence suspension order.
12. Schedule 1 [6] clarifies that this Bill extends to any person who has been sentenced in respect of a registrable offence at any time before the commencement of this Bill. This means the Commissioner of Police will give relevant persons written notice of their reporting obligations.



## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### **Retrospectivity:**

**Issue: Schedule 1 [7]** inserts proposed Part 4 into Schedule 2 to the principal Act. This includes the proposed clause 10 to ensure that the amendments extend, and are taken always to have extended, to persons sentenced before the commencement of the amendments. Any such person who was not subject to the reporting requirements immediately before the commencement, will become subject to the reporting requirements on commencement of the amendments. The Commissioner of Police will be required to notify all relevant persons of their reporting requirements, and the consequence of not meeting those obligations.

13. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. The Committee also weighs up the consideration of individual liberty and rehabilitation of offenders along with the serious nature and impact of sexual and indecency offences against children and the important need to protect children.
14. The Committee notes that the particular people with suspended sentences have already been on the registration system prior to the Supreme Court decision and they have been convicted of offences including possession of child pornography, acts of indecency and indecent assault on children.
15. The Committee also notes that a person who has received a suspended sentence is not necessarily an indicator of the person's actions were at the lowest level of seriousness since other factors such as the offender's personal circumstances may have been taken into consideration during sentencing.
16. **The Committee considers that having regard to the serious aims of the principal Act, and the limited period of the Bill's retrospectivity along with the circumstance that the particular individuals have already been on the registration system before the Supreme Court's decision, the retrospective operation does not unduly trespass on personal rights and liberties.**
17. **The Committee also notes that the Bill's objective is consistent with the purpose of the principal Act, which is to protect children from people who have been convicted of child sex offences and other offences committed against children and that individual rights of people convicted with such offences may give way to promote other interests such as the public safety of children.**

***The Committee makes no further comment on this Bill.***

## 6. COMMISSION FOR CHILDREN AND YOUNG PEOPLE AMENDMENT (PARLIAMENTARY JOINT COMMITTEE) BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. Linda Burney
Portfolio:	Fair Trading, Youth, Volunteering

**The Bill received assent on 12 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill is to reduce the membership of the Parliamentary Joint Committee called the Committee on Children and Young People, established for the purpose of the Parliamentary oversight of the Commission for Children and Young People and the Child Death Review Team.

### Background

2. The Committee on Children and Young People monitors and reviews the exercise of the functions of the Commission for Children and Young People and the Child Death Review Team. It also examines trends and changes in services and issues affecting children and reports to both Houses of Parliament. It currently has 11 members. The former Speaker of the Legislative Assembly wrote to the Premier to suggest the size of the committee be reduced to 7 members prior to re-appointing it after Parliament commences. Reducing the size of the committee would help to improve the functioning of Parliament and reduce the demands on members' time and make some members be available to serve on other committees. The Government considers that changing the number of members will not adversely affect the committee's ability to carry out its review functions. It also makes the committee's size consistent with two other joint parliamentary committees (Committee on the Office of the Ombudsman and the Police Integrity Commission, and the Committee on the Health Care Complaints Commission).

### The Bill

3. The Bill is to amend the *Commission for Children and Young People Act 1998* to reduce the membership of the Parliamentary Joint Committee established under that Act. The membership is reduced from 11 members (comprising 5 members of the Legislative Council and 6 members of the Legislative Assembly) to 7 members (comprising 3 members of the Legislative Council and 4 members of the Legislative Assembly). The Bill also reduces the quorum for a meeting from 6 members to 4 members.

## Issues Considered by the Committee

4. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

***The Committee makes no further comment on this Bill.***

## 7. CRIMES LEGISLATION AMENDMENT (MOBILE PHONES IN PLACES OF DETENTION) BILL 2007

Date Introduced:	7 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	David Campbell
Portfolio:	Police

### Purpose and Description

1. The purpose of the Bill is to prohibit inmates using mobile phones in places of detention.

### Background

2. Possession of a mobile phone by an inmate in a place of detention is currently an offence. According to the Agreement in Principle speech, difficulties of proof have arisen when mobile phones are discovered in a common area of the correctional centre and may have been deliberately placed there to make it difficult to determine ownership of the phone.<sup>8</sup> The Bill is also concerned to overcome difficulties of proof should an inmate use an unauthorised mobile phone whilst locked in his or her cell. Consequently, the Bill seeks to extend the current prohibition of possession of a mobile phone or its parts to include their use.

### The Bill

3. Schedule 1.1 proposes to amend s 56A of the *Crimes (Administration of Sentences) Act 1999* to extend the penalty for possession of a mobile phone to also apply to the use of a mobile phone in a correctional centre.
4. Schedule 1.2 proposes to amend the *Crimes (Administration of Sentences) Regulation 2001* so that an inmate is not to use a mobile phone, mobile phone SIM card, mobile phone charger, or any part of these. Use of any of these is to be deemed a correctional centre offence.
5. Schedule 1.3 proposes to amend the *Summary Offences Act 1988* so it is an offence for an inmate to use a mobile phone, SIM card, charger or any part of these in addition to the current prohibition on their possession in a place of detention.

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<sup>8</sup> B J Collier MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 7 June 2007.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Issue: Schedule 1.3 Onus of proof

6. The Bill proposes to amend the Crimes (Administration of Sentences) Regulation 2001 so that it is an offence for an inmate to use a mobile phone, mobile phone SIM card, a mobile phone charger, or any part of these. The offence is one of strict liability. Strict liability offences do not require proof of intent.
7. The Bill makes it an offence against the *Summary Offences Act 1988* to use, without reasonable excuse, a mobile phone, a mobile phone SIM card, or a mobile phone charger or any of their parts in a place of detention. The proof of reasonable excuse rests on the inmate which effectively reverses the traditional onus of proof.
8. A general principle of criminal law is that the onus of proof falls on the prosecution. Viscount Sankey LC stated in *Woolmington v DPP* [1935] AC 462 at 481:

Throughout the web of the English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

The traditional onus of proof is consistent with a presumption of innocence. Article 14(2) of the *International Covenant on Civil and Political Rights* states 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. Accordingly, any reversal raises concerns. An inmate, by reason of his or her detention, retains his or her rights other than those consequent on the loss of liberty and is thus still entitled to a presumption of innocence. Principle 3 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* states, 'There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent'.

9. However, a reversal of the onus of proof may be justified if an element of the offence is particularly within the knowledge of the accused or if, given the nature of the element, and the relevant lack of gravity of the offence, proof beyond reasonable doubt is considered too onerous.<sup>9</sup> The Senate Standing Committee for the Scrutiny of Bills has noted:

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<sup>9</sup> Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings*, Canberra, 1982, p 14; Queensland Scrutiny of Legislation Committee, *Alert Digest*, No 2 of 1997, pp 12-13.

Where legislation provides that a particular state of belief is to constitute an excuse for carrying out an action which would otherwise be a crime, and in that way allows a defence to a person who is accused of committing one, the Committee will more readily accept the onus of proof being placed on him or her to prove that excuse.<sup>10</sup>

- 10. The Committee notes that the offence to be inserted into the Regulation regarding use of a mobile phone is one of strict liability. However, as the offence regards the internal regulation of a correctional centre and the maximum penalty that may be imposed is to deprive the inmate of withdrawable privileges for up to six months, the Committee does not consider that personal rights and liabilities are unduly trespassed.**
- 11. The Committee notes that a reversal of the onus of proof trespasses on the right of an inmate to be presumed innocent. However, there are circumstances in which a reversal of the onus of proof is generally considered acceptable. The Committee refers to Parliament the question of whether rights and liberties are unduly trespassed.**

***The Committee makes no further comment on this Bill.***

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<sup>10</sup> Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39<sup>th</sup> Parliament (November 1998 – October 2001)*, para 2.96.

## 8. CRIMINAL PROCEDURE AMENDMENT (VULNERABLE PERSONS) BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Police

**The Bill passed all stages of Parliament on 5 June 2007 and received assent on 15 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. The purpose of the Bill is to amend the *Criminal Procedure Act 1986* to further provide for the giving of evidence in criminal proceedings by children and persons with an intellectual impairment. It is designed to make it easier for children and persons with an intellectual impairment to give evidence and to provide greater protection to them throughout the process.

### Background

2. Then NSW Attorney General, the Hon Bob Debus, announced the establishment of the Criminal Justice Sexual Offences Taskforce in December 2004 to examine issues surrounding sexual assault and its prosecution in the criminal justice system. The Taskforce published its report *Responding to sexual assault: the way forward* in December 2005. The Attorney General's Department conducted a statutory review of the *Evidence (Children) Act 1997* in June 2006. According to the Agreement in Principle speech, the Bill forms part of the ongoing legal reform of sexual assault prosecution arising from both of the above.<sup>11</sup>

### The Bill

3. The Bill amends the *Criminal Procedure Act 1986* to provide for the giving of evidence in criminal proceedings by vulnerable persons. A 'vulnerable person' is defined in proposed s 306M as 'a child or an intellectually impaired person'. A person is considered to be intellectually impaired if he or she has:
  - (a) an appreciably below average general intellectual function, or
  - (b) a cognitive impairment (including dementia or autism) arising from, or as a result of, an acquired brain injury, neurological disorder or a developmental disorder, or
  - (c) any other intellectual disability.

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<sup>11</sup> Mr B J Collier MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 9 May 2007.

Criminal Procedure Amendment (Vulnerable Persons) Bill 2007

4. The Bill proposes to insert Part 6 into Chapter 6 (Evidentiary matters) of the *Criminal Procedure Act 1986*. Part 6 is concerned with the giving of evidence by vulnerable persons. It is generally to apply in relation to evidence given by a child who is under the age of 16 at the time of giving evidence. It also applies to evidence given by an intellectually impaired person but only if the court is satisfied that this would be better for ascertaining the facts. It essentially transfers much of the *Evidence (Children) Act 1997* to the *Criminal Procedure Act 1986* but extends application of the provisions to persons with an intellectual impairment. Provisions relate to the: recording of out of court statements; giving evidence of out of court representations; and the giving of evidence by closed-circuit television.
5. The Bill proposes to amend s 91 of the *Criminal Procedure Act* so that a Magistrate cannot direct the complainant who made a written statement that the prosecution intends to tender as evidence in committal proceedings to attend the committal proceedings if the complainant is an intellectually impaired person.
6. A number of other amendments are proposed to be made to the *Criminal Procedure Act* as a consequence of the insertion of Part 6 and the repeal of the *Evidence (Children) Act 1997*. These include:
  - the insertion of a new s 76 into the *Criminal Procedure Act 1986* to allow a written statement to be in the form of a transcript of a recording of interview in relation to vulnerable persons.
  - the extension of s 185 to allow, in circumstances where the prosecutor intends to call a vulnerable person to give evidence in proceedings, the transcript of an interview with the vulnerable person to be included in the brief of evidence. The transcript is to be taken as a written statement from the vulnerable person.
  - the insertion of a note in s 274 that certain provisions concerning evidentiary matters are to extend to evidence given in proceedings of a civil nature arising from certain offences.
7. The Bill repeals the *Evidence (Children) Act 1997* and Evidence (Children) Regulation 2004.
8. The Bill makes consequential amendments to the *Children (Criminal Proceedings) Act 1987*, the *Crimes Act 1900* and *Evidence (Audio and Visual Links) Act 1998*.



## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Issue: Schedule 1

#### Right to a fair trial

9. The right to a fair trial is a fundamental part of the criminal justice system in Australia.<sup>12</sup> It was recognised by Deane J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56 that: 'The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law'.
10. However, whilst the needs of the accused are important, the requirements of others party to the proceedings may also be considered. It was noted in *R v Wilson* (2005) 62 NSWLR 346 at 353 per Hunt A-JA that 'The right to a fair trial operates not only in favour of the accused; the Crown, which prosecutes on behalf of the whole community, also has a right to a fair trial'.
11. One of the primary issues presented by this Bill is the need to balance the right to a fair trial with ensuring adequate protection to witnesses who are considered vulnerable by reason of youth or intellectual impairment. As noted by the NSW Law Reform Commission:

A person with an intellectual disability who has been a victim of crime should have the same opportunity to make a complaint to police and to give evidence in a court against the perpetrator of the crime as anyone else. A person with an intellectual disability who has been charged with a criminal offence should have the same opportunity to answer the case against him or her as a person without such a disability.<sup>13</sup>
12. The introduction of Part 6 provides for the recording of out of court statements, the giving of evidence of out of court representations, and the giving of evidence by closed circuit television in relation to vulnerable persons. These provisions currently apply to children under the *Evidence (Children) Act 1997* but the Bill proposes to extend these to persons with an intellectual impairment.
13. Proposed s 306U enables a vulnerable person to give evidence in chief of a previous representation in the form of a recording made by an investigating official of the interview in the course of which the previous representation was made. Article 14 of the *International Covenant on Civil and Political Rights* states that everyone is entitled to a fair and public hearing in the determination of any criminal charge against him or her. Article 14(3)(e) also provides for the right of a person charged with a criminal offence 'To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. The NSW Law Reform Commission has rejected the use of videorecorded police interviews as a substitute for a witness's testimony as 'using the material would be more prejudicial than probative and... it is

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<sup>12</sup> *Dietrich v R* (1992) 177 CLR 292 at 299.

<sup>13</sup> NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80, 1996, para 7.1.

inconsistent with the general principle that all material facts are inferred from witnesses' oral testimony, tested in cross examination'.<sup>14</sup>

14. However, a number of safeguards are built into the Bill. Proposed s 306U(3) requires a vulnerable person who gives evidence in this way, and who is not the accused, to be subsequently available for cross-examination and re-examination. Before such evidence can be admitted, the accused person and his or her lawyer must have been given reasonable opportunity to listen to and view the recording: proposed s 306V(2). The Court also retains its discretion to rule as inadmissible the whole or any part of the contents of a recording: proposed s 306V(4). Further protection is provided to the accused in the form of a warning to the jury that an adverse inference cannot be drawn or greater or lesser weight given to the evidence because it was given in that way. In addition, the court may order that evidence is not to be given in the form of a recording if it is satisfied that it is not in the interests of justice for the evidence of the vulnerable person to be given in this way: proposed s 306Y.
15. Proposed s 306ZB provides vulnerable persons with the right to give evidence by closed-circuit television (CCTV) or by means of other similar technology in the following types of proceedings (proposed s 306ZA):
  - (a) a proceeding in which it is alleged that a person has committed a personal assault offence,
  - (b) a proceeding in relation to an application for an apprehended violence order, or a variation or revocation of such an order,
  - (c) a civil proceeding arising from the commission of a personal assault offence,
  - (d) a proceeding before the Victims Compensation Tribunal in respect of the hearing of a matter arising from the commission of a personal assault offence that is the subject of an appeal or a reference to it,
  - (e) a proceeding in relation to an application for a child protection prohibition order or to vary or to revoke any such order or a proceeding in relation to a contravention of any such order.

These entitlements extend to a child who is between the ages of 16 and 18 at the time evidence is given but who was under the age of 16 when the charge for a personal assault offence was laid.

16. Proposed s 306ZC enables a court to permit an accused vulnerable person in proceedings of the type listed in proposed s 306ZA to give evidence by CCTV. Such an order may only be made in relation to a child if the court is satisfied that either the child may suffer mental or emotional harm if required to give evidence in the ordinary way, or that it would allow for the better ascertainment of the facts.
17. The NSW Law Reform Commission in its report on people with an intellectual disability and the criminal justice system recommended that:

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<sup>14</sup> NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80, 1996, para 7.18.

If the court is satisfied that a witness with an intellectual disability may be unable to give his or her evidence without the use of special arrangements because he or she is unduly inhibited in giving evidence in the normal way, the court may order that special arrangements (for example, the assistance of a support person, the use of screens or changed seating arrangements and closed circuit television ("CCTV")) be made for taking that witness's evidence.<sup>15</sup>

18. A safeguard is built into the Act in that the court retains its discretion to order that evidence not be given by means of CCTV or other prescribed technology if satisfied that there are special reasons in the interests of justice to make such an order.
19. An additional safeguard is the inclusion of a requirement that the jury be informed that it is standard procedure for the evidence of vulnerable persons in such cases to be given by those means and warned not to draw any adverse inference or give the evidence greater or lesser weight: proposed s 306ZL.
20. Proposed s 306ZL provides that a vulnerable person who is a witness in a criminal proceeding, or a civil proceeding arising from the commission of a personal assault offence, in which the accused or defendant is unrepresented, is to be questioned by a person appointed by the court rather than the accused or defendant.
21. Cross-examination is a basic right of an accused person and is linked to the presumption of innocence.<sup>16</sup> However, proposed s 306ZL does not prohibit the examination or cross-examination of witnesses, rather it regulates way in which this is to occur.
22. The Bill is concerned to protect vulnerable witnesses. A safeguard has been built into proposed section 306P(2) which ensures that Part 6 is to only apply to evidence given by an intellectually impaired person 'if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in such a manner'. Part 6 is thus designed to facilitate a fair trial. In any event, the court retains its discretion in relation to the conduct of a proceeding: proposed s 306ZN.
23. Proposed s 91(7A) provides that a Magistrate cannot direct a complainant in proceedings for a prescribed sexual offence who made a written statement that the prosecution intends to tender as evidence in committal proceedings to attend the committal proceedings if the complainant is an intellectually impaired person.
24. Not requiring a sexual offence complainant with an intellectual impairment to attend committal proceedings protects him or her from the potential stress associated with such attendance. However, it does affect the right of the accused to examine witnesses at the committal stage.
25. The purpose of a committal proceeding is to ensure that a person only stands trial if evidence establishes that there is a prima facie case against him or her. The accused will have the opportunity to examine a sexual offence complainant with an intellectual impairment if the matter proceeds to trial. The Bill does not prevent an accused from examining a witness, but does restrict the timing of such examination.

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<sup>15</sup> NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80, 1996, Recommendation 29.

<sup>16</sup> Article 14(3)(e) *International Covenant on Civil and Political Rights*.

26. Enabling a witness to overcome some of the barriers to give evidence and improving the quality of that evidence ensures that parties have the opportunity to present and challenge evidence and enables persons with an intellectual impairment to have the same access to justice as the rest of the community.<sup>17</sup> The use of special arrangements are designed to put a vulnerable person in the same position as witnesses in general and accordingly do not detract from the right to a fair trial. The NSW Law Reform Commission has concluded that 'A fair trial does not... demand that the witness must be in the witness box and the defendant in the dock or even that they must both be in the same room'.<sup>18</sup>

**27. The Committee acknowledges that the Bill does trespass on the ability of the accused to examine witnesses.**

**28. However, the Committee considers that, given the various safeguards included in the Bill, the retention of the court's discretion, that Part 6 is only to apply to persons with an intellectual impairment if the court is satisfied that it would allow for the facts to be better ascertained, and that the Bill is designed to enable vulnerable persons to more effectively give evidence, some protection is given to right of the accused to a fair trial.**

**29. Accordingly, the Committee considers that any trespass on personal rights and liberties is not undue.**

#### **Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**

##### **Issue: Commencement by proclamation**

30. The Committee notes that providing for part of an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence that Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

**31. The Committee has written to the Minister to seek advice as to why the Bill is to commence on proclamation rather than on assent and to indicate a likely timeframe for commencement.**

***The Committee makes no further comment on this Bill.***

<sup>17</sup> NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80, 1996, chapter 7.

<sup>18</sup> NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80, 1996, para 7.15.

## 9. DRUG AND ALCOHOL TREATMENT BILL 2007

Date Introduced:	30 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Health

**The Bill received assent on 15 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill provides for a trial in a prescribed area, of the involuntary treatment for persons aged over 18, with severe substance dependence through involuntary detention, care, treatment and stabilisation, and other purposes, with the aim of protecting their health and safety.

### Background

2. The Bill arises from a Government commitment in response to the 2003 Summit on Alcohol Abuse that recommended an inquiry into the *Inebriates Act 1912* in order to better reflect modern medical practice treatment options and legal safeguards. The Legislative Council's Standing Committee on Social Issues undertook an inquiry and reported on the *Inebriates Act 1912* in August 2004. The Standing Committee on Social Issues consulted with many specialists. It recommended that the Government repeal the *Inebriates Act* which goes back to the 1900's. The Government has agreed to trial this first for two years, in an area or areas to be prescribed by regulation. The Sydney West Area Health Service or the Nepean Hospital has been suggested as a potential trial area with the possibility of extending to other areas. Detention is for up to 28 days under Clause 14, but this may be extended to 3 months by court order under Part 4 in cases of alcohol-related brain injury. The Standing Committee on Social Issues recommended detention for 14 days, which was then to be reviewed, and a maximum period of 28 days. The Government has proposed 28 days at the outset. The Minister is required to review the legislation and report to Parliament within 2 years.

### The Bill

3. The object of this Bill is to provide for a two-year trial in a prescribed area, of the involuntary treatment of persons with severe substance dependence and to facilitate their stabilisation through medical treatment and giving them the opportunity to engage in voluntary treatment. It replaces the *Inebriates Act 1912* in the area to be prescribed by regulation so that the *Inebriates Act* will not apply in that area. However, the Bill does not apply to minors, whereas, the *Inebriates Act* will continue

to apply to minors. An accredited medical practitioner must issue a dependency certificate before participants can be involuntarily referred for treatment.

The objects of this Bill are to:

- (a) provide for the involuntary treatment of persons with a severe substance dependence with the aim of protecting their health and safety, and
- (b) facilitate a comprehensive assessment of those persons in relation to their dependency, and
- (c) facilitate the stabilisation of those persons through medical treatment, including medically assisted withdrawal, and
- (d) give those persons the opportunity to engage in voluntary treatment and restore their capacity to make decisions about their substance use and personal welfare.

Every function conferred or imposed by this Bill must be interpreted, performed or exercised, so that as far as practicable:

- (a) involuntary detention and treatment of those persons is a consideration of last resort, and
- (b) the interests of those persons is paramount in decisions made under the Act, and
- (c) those persons will receive the best possible treatment in the least restrictive environment that will enable treatment to be effectively given, and
- (d) any interference with the rights, dignity and self respect of those persons will be kept to the minimum necessary.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Excessive Punishment:

**Issue: Clause 14 Length of initial detention and review of dependency certificate** (If a dependency certificate is issued, the person must not be detained for treatment for more than 28 days. Note: Under Part 4, the period of detention may be reduced or it may be extended for up to a total period of not more than 3 months from the day the certificate is issued).

4. The Committee notes that the Legislative Council's Standing Committee on Social Issues inquiry report on the *Inebriates Act 1912* recommended that the initial referral for treatment be of 14 days, which was then to be reviewed, followed by a maximum period of 28 days. It was the view of the majority of people who gave evidence to the

inquiry and the view of the Standing Committee on Social Issues that 14 days would have been appropriate.

5. The Committee notes that the Bill does not address the issue of the maximum number of times a person could be repeatedly subjected to an assessment and dependency certificate. Potentially, within the 2 year trial period, the same person could be subjected to repeated assessment and dependency certificate on an on-going basis or over several times. This could significantly trespass a person's liberties and rights.

**6. The Committee has resolved to write to the Minister for advice as to the reasons for not following the Standing Committee on Social Issues' recommendation for 14 days of treatment detention, which could then be reviewed and if necessary, be followed by a maximum period of 28 days, and expresses the Committee's concerns that a maximum of 28 days at the outset, which could be extended up to a total of 3 months, may unduly trespass on personal rights and liberties since it is a trial with no evidence at this stage of the effectiveness of involuntary treatment detention.**

**7. The Committee has also resolved to write to the Minister to seek clarification on addressing the potential issue that the same person may be subjected to repeated assessment and dependency certificate over several times in a year, which could unduly trespass individual rights and liberties.**

**Issue: Clause 38 Adjournments** (The Magistrate may from time to time and if it is in the best interests of the dependent person, adjourn the proceedings for up to 7 days. If the proceedings are adjourned, the dependency certificate continues to have effect unless another provision states otherwise).

**8. The Committee has resolved to write to the Minister for clarification on the circumstances for adjournments of proceedings by Magistrates, since the proposed legislation is only on a trial basis within a prescribed area and the maximum period of treatment detention if extended, could already be lengthy and may unduly trespass on personal rights and liberties.**

**Issue: Clause 48 (1) Act does not limit or affect other powers** (Nothing in this Act limits or affects any power conferred on a police officer or any other person by or under any other law with respect to stopping, searching or detaining a person or taking any such person to any place).

**9. The Committee refers to Parliament the question as to whether the person or dependent person who has a severe substance dependence on an illicit drug could be arrested for possession of an illicit drug if the person was searched and found with an illicit drug, and whether this would defeat the objectives of the proposed Bill, and trespass individual rights and liberties.**

**Issue: Clause 10 (5) Order for assessment** (The accredited medical practitioner and any other person authorised under this section may enter premises, if need be, by force, to carry out the assessment).

10. The Committee notes that compelling a person to undergo medical assessment for drug or alcohol dependency treatment is a significant trespass to the person's rights and liberties, especially since alcohol is not an illicit substance, and entering premises including entering private residential premises, with force, to carry out the assessment, may unduly trespass the person's rights and liberties.

**Privacy and power of entry without warrant:**

11. The Committee also notes that the above clause significantly trespasses the right to privacy and individual rights by allowing any other authorised person and the accredited medical practitioner to enter private premises without warrant, particularly where there are no requirements regarding the qualifications or attributes of persons who may be authorised to have powers of entry, including the use of force, for the purposes of the proposed Bill.

**12. The Committee has resolved to write to the Minister for the Minister to consider amending Clause 10 (5) to include the use by reasonable force, rather than by force; and asks for advice as to whether the power of entry without warrant unduly trespasses the right to privacy and personal rights and liberty.**

**Issue: Clause 23 (3) Police assistance** (The police officer may enter premises to apprehend the dependent person who was not permitted to be absent from treatment centre, and may apprehend the person without a warrant).

13. The Committee notes that compelling a person to undergo medical assessment for drug or alcohol dependency treatment is a significant trespass to the person's rights and liberties, especially since alcohol is not an illicit substance, and entering premises including entering private residential premises, without a warrant, may unduly trespass the person's rights and liberties and right to privacy.

**14. The Committee has resolved to write to the Minister to ask for advice as to whether the police officer's power of entry without warrant unduly trespasses the right to privacy and personal rights and liberty.**

**Insufficiently defined administrative powers [s 8A(1)(b)(ii) LRA]**

**Insufficient criteria regarding the scope of persons to whom a power would be delegated:**

**Issue: Clause 20 (5) (c) Transporting dependent persons to treatment centre – transport officer means: (c) a person of a class prescribed by the regulations.**

15. The Committee notes that the scope of 'a person of a class prescribed by the regulations' is wide and there are no requirements regarding the qualifications or attributes of such persons who may be authorised for the purposes of the proposed



section to transport dependent persons, including the use of reasonable force, and to conduct a frisk search and an ordinary search.

**16. The Committee refers to Parliament the question of whether allowing the scope of persons to be prescribed by regulation is an appropriate delegation of legislative power.**

*The Committee makes no further comment on this Bill.*

## 10. DRUG SUMMIT LEGISLATIVE RESPONSE AMENDMENT (TRIAL PERIOD EXTENSION) BILL 2007

Date Introduced: 7 June 2007  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Reba Meagher MP  
Portfolio: Health

**The Bill passed the Legislative Assembly on 20 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of Parliament or become an Act.**

### Purpose and Description

1. The purpose of the Bill is to extend the trial period for the operation and use of the medically supervised injecting centre at Kings Cross to 31 October 2011. It also proposes to require a review of the economic viability of the medically supervised injecting centre should its service level activity fall below 75% of that prescribed in the regulations.

### Background

2. Part 2A of the *Drug Misuse and Trafficking Act* permits the operation and use of a single licensed medically supervised injecting centre. The trial of the medically supervised injecting centre at Kings Cross commenced in May 2001 as a result of the 1999 Drug Summit and NSW Parliament has extended the initial trial on two occasions. The period in which the current licence is effective finishes on 31 October 2007.

### The Bill

3. Proposed section 36A would extend the trial period of a medically supervised injecting centre to 31 October 2011. A review is to be completed by 1 May 2011.
4. Proposed section 36K requires the economic viability of an injecting centre to be reviewed should the service activity level drop below 75% of the level prescribed in the regulations. The licence may subsequently be revoked if the injecting centre is found to no longer be economically viable.
5. The Bill proposes to amend section 36T so that the licence may not be challenged or called into question in a court or tribunal as a result of the trial period having been extended.
6. The Bill proposes to amend the Drug Misuse and Trafficking Regulation 2006 to prescribe the level of service activity as an average of at least 208 client visits per day in each month.

## Issues Considered by the Committee

### Non-reviewable decisions [s 8A(1)(b)(iii) LRA]

#### Schedule 1[4]

7. Schedule 1[4] of the Bill amends section 36T(1) of the Drug Misuse and Trafficking Act 1985 so that the licence is extended for the whole of the trial period and may not be challenged or called into question in proceedings before any court or tribunal as a consequence of its having been so extended.
8. The effect of this amendment would be to continue an 'ouster clause' that excludes the extension of the licence of the medically supervised injecting centre trial from judicial review. The ouster clause was originally inserted following enactment of the *Drug Summit Legislative Response Amendment (Trial Period Extension) Act 2002*.
9. Judicial review of administrative decisions is an important means of balancing the various arms of government. It has previously been noted that the purpose of the ouster clause in section 36T of the *Drug Misuse and Trafficking Act 1985* is to minimise disruption to the operations of the injecting centre by vexatious litigants.<sup>19</sup> The validity of the original grant of the licence was considered by Justice Sully in *Kings Cross Chamber of Commerce and Tourism Inc v The Uniting Church of Australia Property Trust (NSW) and Ors* (2001) 160 FLR 300.
10. The High Court has held that it will not recognise ouster clauses where they 'protect manifest jurisdictional errors or ultra vires acts'.<sup>20</sup> However, it will usually respect a legislative intention that it should not review a particular class of decisions where that intention is expressed with sufficient clarity.<sup>21</sup> Section 36T(1) clearly expresses the intention of the legislature.

**11. The Committee notes the importance of judicial review for protecting individuals' rights against oppressive administrative action and upholding the rule of law. It further notes that the Bill continues a limitation of judicial review.**

**12. Whilst the Committee acknowledges that the Bill does impact on rights and liberties, it is of the opinion that, in these circumstances and given the above findings of the Court, the limitation of judicial review does not unduly trespass on personal rights.**

***The Committee makes no further comment on this Bill.***

<sup>19</sup> Mr N J Newell MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 5 September 2003.

<sup>20</sup> *The Church of Scientology v Woodward* (1980) 154 CLR 25 at 55-56, per Mason J.

<sup>21</sup> *Darling Casino Ltd v NSW Casino Control Authority* (1997) 143 ALR 55.

## 11. FAIR TRADING AMENDMENT (FUNERAL GOODS AND SERVICES) BILL 2007

Date Introduced:	7 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Linda Burney MP
Portfolio:	Fair Trading

**The Bill passed all stages of Parliament on 20 June 2007. Under s8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of Parliament or become an Act.**

### Purpose and Description

1. The purpose of the Bill is to amend the *Fair Trading Act 1987* to enable the regulations to prescribe an information standard to require the provision of information to consumers about funeral goods and services by providers of those goods and services.

### Background

2. The Legislative Council Standing Committee on Social Issues conducted an inquiry into the funeral industry in 2005. One of the recommendations of the Standing Committee was that an information standard for funerals be introduced.
3. A concern was expressed in the Agreement in Principle speech that people organising funerals could be in a vulnerable position due to time pressures and the experience of grief.<sup>22</sup> The Bill was introduced so that funeral directors may be required to provide pricing information that is easily understood by customers and that allows for comparison of the products and services provided by different funeral directors.

### The Bill

4. The Bill proposes to insert Part 5F into the *Fair Trading Act 1987* so that regulations may prescribe an information standard for funeral goods and services. The *Fair Trading Act 1987* currently allows for the prescription of information standards about goods only, not services. The information standard may relate to the provision of information to a consumer by a supplier of funeral goods and services as well as the form and manner in which the information is to be provided.
5. Schedule [2]-[10] makes a number of amendments to Part 6 (Enforcement and remedies) of the *Fair Trading Act 1987*. Amongst other things, this enables the Supreme Court, in the event of a contravention, to grant an injunction or make certain

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<sup>22</sup> The Hon L J Burney MP, Legislative Assembly *Hansard*, 7 June 2007.

orders. A person who has suffered loss or damage may also commence an action for damages.

6. The Bill commences on assent.

## **Issues Considered by the Committee**

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| <p>7. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p> |
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***The Committee makes no further comment on this Bill.***

## 12. GUARDIANSHIP AMENDMENT BILL 2007

Date Introduced:	30 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Kristina Keneally MP
Portfolio:	Ageing and Disability Services

**The Bill passed all stages of Parliament on 19 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. The Bill proposes to amend the *Guardianship Act 1987* with respect to the review of guardianship orders, the constitution of the Guardianship Tribunal, the exercise of certain functions of that Tribunal by its Registrar and the review of the exercise of those functions, and the term of office of members of that Tribunal.

### Background

2. According to the Agreement in Principle speech, there has been a significant increase in the jurisdiction and workload of the Tribunal, with the majority of people now accessing guardianship laws suffering from age-related disabilities, especially dementia. There is accordingly a desire to improve the efficiency of the Tribunal.<sup>23</sup>
3. In November 2006, a discussion paper detailing the proposed amendments to the *Guardianship Act 1987* was released to which a number of stakeholders made submissions.

### The Bill

4. The Bill proposes to insert a new section 16(2A) into the *Guardianship Act 1987* to enable a guardianship order to state that it will not be reviewed at the expiration of the period for which it has effect if the Tribunal believes it is in the best interests of the person who is the subject of the order that it not be so reviewed.
5. The Bill proposes to insert a new section 51A to provide that less than three Tribunal members may, at the discretion of the President of the Tribunal, deal with the following matters:
  - (a) assessment and review of guardianship orders
  - (b) the review and revocation of financial management orders
  - (c) the review of appointment of manager

<sup>23</sup> The Hon K K Keneally MP, Legislative Assembly *Hansard*, 30 May 2007.

- (d) the provision of consent for minor or major medical or dental treatment (with the exception of special treatment or treatment in a clinical trial)
- (e) reciprocal arrangements – the recognition of guardians and managers appointed under the law of another State, Territory or country.
- (f) functions under Division 2 of Part 6 – such as the publication of names, joining of parties, right of appearance, the presentation of cases, compulsion of witnesses, adjournments etc. However, fewer than three Tribunal members are not to deal with the dismissal of frivolous or vexatious proceedings.
- (g) review of decisions of the Registrar – in this case the Tribunal must be constituted by or include the President, Deputy President or a legal member.

The members of the Tribunal must not be from the same category (ie legal, professional or community).

6. The Bill makes a number of amendments in terms of who is to be considered the presiding member at any sitting of the Tribunal (proposed s 51B). It allows the President to nominate as the presiding member someone other than the President, Deputy President, or a legal member where the Tribunal is constituted to include no one from these categories.
7. The Bill proposes insert a new s 54(3) so that questions of law are to be determined by the Presiding member if he or she is the President, Deputy President or a legal member. If the presiding member is not such a person, the question of law is to be referred to the President, Deputy President or a legal member nominated by the President.
8. The Bill proposes to insert Division 3A into Part 6 of the *Guardianship Act 1987* to set out various provisions regarding the Registrar and other staff of the Tribunal. Proposed s 67C enables a Registrar, at the discretion of the President, to exercise the following functions:
  - (a) dismiss an application if it falls outside the jurisdiction of the Tribunal
  - (b) dismiss an application for want of prosecution
  - (c) refuse a request to review a guardianship order where the request does not disclose grounds that warrant a review or if the Tribunal has previously reviewed the order. The Tribunal must review the decision of the Registrar if requested by a person party to the proceedings (proposed s 67E(2)).
  - (d) refuse a request to review a financial management order where the request does not disclose grounds that warrant a review or if the Tribunal has previously reviewed the order. The Tribunal must review the decision of the Registrar if requested by a person party to the proceedings (proposed s 67E(2)).
  - (e) refuse a request to review the appointment of the manager of a protected person's estate where the request does not disclose grounds that warrant a review or if the Tribunal has previously reviewed the appointment. The Tribunal

must review the decision of the Registrar if requested by a person party to the proceedings (proposed s 67E(2)).

- (f) recognise a person's status under the law of another State, Territory or country as the guardian of another person or as the manager of the estate of another person
  - (g) join a person as a party to any proceedings before the Tribunal
  - (h) grant leave for a person to be represented by an Australian legal practitioner or an agent
  - (i) make orders requiring and securing separate representation for a person where it appears that the person ought to have separate representation
  - (j) give directions regarding the conduct of any proceedings before the Tribunal
  - (k) adjourn proceedings
  - (l) consent to the withdrawal of an application to the Tribunal
9. The Bill enables the President to direct the Registrar to refer the exercise of one of these functions to the Tribunal. The Registrar may also refer a particular matter to the Tribunal if he or she considers it to be more appropriate that the Tribunal deals with the matter.
10. Schedule 1[23] of the Bill proposes to extend the period for which a member of the Tribunal may hold office from three to five years.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Issue: Retrospectivity: Schedule 1[27]

11. Schedule 1[27] of the Bill proposes to insert into Schedule 3 of the *Guardianship Act 1987* proposed clause 14 which would apply s 68(1C) to decisions made before the commencement of the Bill. Proposed clause 15 is also designed to extend the power of the Registrar to exercise functions in relation to applications made and proceedings pending upon commencement of section 67C.

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| <p>12. <b>The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person.</b></p> <p>13. <b>The Committee notes that exempting the Tribunal from providing formal written decisions in respect of certain decisions already made by the Court and applying the extension of the powers of the Registrar to pending proceedings trespasses upon a person's right to order his or her affairs in accordance with the current law.</b></p> <p>14. <b>The Committee considers that personal rights and liberties are in this respect unduly trespassed.</b></p> |
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**15. The Committee has resolved to write to the Minister to seek advice as to why these sections are to have retrospective application.****Issue: Right to self-determination**

16. Article 1(1) of the *International Covenant on Civil and Political Rights* states that 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.
17. The *Guardianship Act 1987* enables guardians to be appointed and relevant orders to be made when a person lacks decision-making capacity in particular areas. A substitute decision-maker may thus be appointed.
18. Schedule 1[10] of the Bill proposes to expand the functions that may be exercised by a Tribunal of less than three members. This includes the review of guardianship and financial management orders and the appointment of a manager.
19. A particular issue with expanding the areas in which decisions can be made by less than three Tribunal members is that proposed s 51A(1)(d) would enable a Tribunal constituted by less than three members to give consent to the carrying out of major medical or dental treatment as well as minor treatment.
20. Unwanted medical treatment may interfere with bodily integrity, and medical treatment without informed consent may constitute assault in particular circumstances. Ensuring that consent to major medical or dental treatment is only given in appropriate cases is crucial to the protection of the rights and liberties of a patient who lacks the requisite decision-making capacity.
21. The Tribunal (regardless of the number of members constituting it) may only consent to medical or dental treatment if satisfied that it is the most appropriate form of treatment for promoting and maintaining the patient's health and well-being: s 45 *Guardianship Act 1987*.
22. Expansion of the functions that may be exercised by a Tribunal of less than three persons alters one of the safeguards currently in the *Guardianship Act 1987* that ensures that most of the decisions made by the Tribunal are made by at least one legal member, one professional member, and one community member.
23. However, the Committee notes that a Tribunal of less than three members is only constituted at the discretion of the President of the Tribunal.
24. Schedule 1[19] sets out a number of functions that may be exercised by a Registrar. According to the Agreement in Principle speech, one of the purposes of the Bill is to clarify the role of the Registrar. Whilst a number of these functions appear to be procedural, they extend to the ability to refuse to review certain orders and permit a Registrar to consent to the withdrawal of an application to the Tribunal.
25. There is the potential that the personal rights and liberties of a person subject to an order may be adversely affected should the review of an order be inappropriately refused. Many persons who come before the Guardianship Tribunal are in a particularly vulnerable position.

26. The Committee acknowledges that the Bill proposes a number of safeguards namely that: the Registrar exercises these functions at the discretion of the President; the President may direct the Registrar to refer the exercise of a function in a particular matter to the Tribunal; the Registrar may refer a matter to the Tribunal should he or she consider it to be more appropriate that the Tribunal deal with it; and the Tribunal may review any decision of the Registrar concerning the refusal of a request to review a guardianship order, financial management order or the appointment of the manager of a protected person's estate. A number of the types of decisions that may be made by the Registrar are not reviewable. However, nothing prevents a person making a further application to the Tribunal regarding a matter that was the subject of a Registrar's decision.

**27. The Committee notes that the right to self-determination is a fundamental human right.**

**28. The Committee considers that the expansion of the areas which may be dealt with by less than three Tribunal members and the allocation of functions to a Registrar may weaken, as opposed to remove, the safeguards currently found in the *Guardianship Act 1987*.**

**29. However, the Committee notes that the position of persons who are the subject of orders generally made by the Tribunal is particularly vulnerable.**

**30. The Committee has resolved to write to the Minister seeking further advice as to the reasons for the extent of functions delegated to the Registrar.**

**31. The Committee accordingly refers to Parliament the question of whether the Bill unduly trespasses on personal rights and liberties.**

#### **Non-reviewable decisions [s 8A(1)(b)(iii) LRA]**

#### **Schedule 1[4] Makes rights, liberties or obligations dependent on non-reviewable decisions.**

32. The Bill proposes to insert a new section 16(2A) into the *Guardianship Act 1987* which would change the circumstances in which a non-reviewable guardianship order can be made. The new section would enable a guardianship order to state that it is not to be reviewed at its expiration if the Tribunal is satisfied that it is in the best interests of the subject of the order that it not be reviewed. Currently, a non-reviewable guardianship order can only be made if the order solely relates to the taking of specific decisions or actions on behalf of the subject and the Tribunal is satisfied that there is no need for the order to continue after those decisions or actions have been taken. The proposed change is designed to avoid the unnecessary distress and anxiety experienced by many people when attending a legal hearing.

33. The Act currently contains safeguards protecting a person who is the subject of a non-reviewable guardianship order. Section 25 of the Act provides that the Tribunal can review a guardianship order on its own motion or at the request of a person entitled to request a review. A review may be requested by the guardian, the person

under guardianship, the Public Guardian, or any person the Tribunal believes has a genuine concern for the welfare of the person under guardianship.

34. These safeguards may not always adequately protect the vulnerable position of a person who is the subject of a guardianship order. The importance of periodic review is stressed in clause 7 of the *Declaration on the Rights of Mentally Retarded Persons* (attached as Schedule 4 to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)). However, the Committee notes that non-reviewable guardianship orders are concerned with review at the expiration of an order rather than while it is in force.

**35. The Committee will always be concerned if a Bill purports to make rights, liberties or obligations unduly dependent on non-reviewable decisions.**

**36. However, given that non-reviewable guardianship orders are concerned with review at the expiration of an order and that the option of review is not completely excluded, the Committee does not consider that a person's rights, liberties or obligations are unduly dependent on non-reviewable decisions.**

#### **Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**

##### **Issue: Commencement by proclamation**

37. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence that Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

**38. The Committee has resolved to write to the Minister to seek advice as to why the Bill is to commence on proclamation rather than on assent and to indicate a likely timeframe for commencement.**

***The Committee makes no further comment on this Bill.***

## 13. HUMAN CLONING AND OTHER PROHIBITED PRACTICES AMENDMENT BILL 2007

Date Introduced:	29 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Verity Firth MP
Portfolio:	Science and Medical Research

### Purpose and Description

1. The purpose of the Bill is to amend the *Human Cloning and Other Prohibited Practices Act 2003* to mirror amendments made to corresponding Commonwealth legislation by the *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006* (Cth) and thus ensure nationally consistent legislation.

### Background

2. On 5 April 2002, the Council of Australian Governments (COAG) agreed to a national scheme to prohibit human cloning and regulate research that involves human embryos.
3. The *Prohibition of Human Cloning Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth) passed the Commonwealth Parliament in December 2002. These Acts provide the framework for the nationally consistent scheme.
4. The NSW Parliament passed complementary legislation in 2003 – the *Human Cloning and Other Prohibited Practices Act 2003* and the *Research Involving Human Embryos (New South Wales) Act 2003*.
5. On 31 March 2004, COAG signed an intergovernmental agreement committing all States and Territories to the introduction and maintenance of nationally consistent legislation banning human cloning and establishing a national regulatory regime for the use of excess assisted reproductive technology embryos in research.
6. The Legislation Review Committee (Chair: Justice Lockhart) was appointed to conduct an independent review of the *Prohibition of Cloning Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth). The report of the Lockhart Review was completed in December 2005. It reaffirmed the effectiveness of the national scheme and supported the continued prohibition of human reproductive cloning. It recommended that Somatic Cell Nuclear Transfer (therapeutic cloning) be permitted subject to strict regulation.
7. The Senate Standing Committee on Community Affairs published its report *Legislative responses to recommendations of the Lockhart Review* in October 2006. The majority of the Committee agreed to support the Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill

2006 (Cth) which gave effect to some of the recommendations of the Lockhart Review. The Bill received assent on 12 December 2006.

8. On 13 April 2007, a notice of variation to the original intergovernmental agreement was signed at COAG as a nationally consistent legislative framework would no longer exist once the Commonwealth legislation came into effect on 12 June 2007. The variation renewed the commitment of the States and ACT to nationally consistent arrangements, with each jurisdiction to use its best endeavours to introduce corresponding legislation by 12 June 2008.
9. On 3 May 2007 the Victorian Parliament passed the *Infertility Treatment Amendment Act 2007* to correspond with the Commonwealth Act. Legislation was introduced into the Western Australian Parliament on 28 March 2007.
10. A review of the *NSW Human Cloning and Other Prohibited Practices Act 2003* and the *Research Involving Human Embryos (New South Wales) Act 2003* was completed by the NSW Office for Science and Medical Research in May 2007. It recommended that corresponding legislation be introduced to the NSW Parliament.
11. The Human Cloning and Other Prohibited Practices Amendment Bill 2007 was introduced into NSW Parliament on 29 May 2007. The Bill mirrors the Commonwealth legislation. According to the Agreement in Principle speech:<sup>24</sup>

the research that will be allowed is being undertaken to improve fertility treatment and practice and to provide insights, therapies and cures for a variety of diseases, including diabetes, cardiovascular conditions, cancer, Parkinson's disease, spinal cord injury and motor neurone disease.

All of these diseases carry a huge emotional burden and significant socioeconomic impacts for individuals, their families and the broader community.

It was further noted that:

The New South Wales bill re-establishes national consistency and enables research to be undertaken under licence and in an ethically appropriate way that includes appropriate safeguards, provides public good and has benefit or potential for which there is support from the broad scientific and general community, notwithstanding variations in community opinion on some issues.

## The Bill

12. The Bill proposes to amend the *Human Cloning and Other Prohibited Practices Act 2003* to mirror amendments made to corresponding Commonwealth legislation and is in line with recommendations made by the Lockhart Committee.
13. Schedule 1[5] proposes to insert a new definition of 'human embryo'. A 'human embryo' is defined to mean:

a discrete entity that has arisen from either:

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<sup>24</sup> The Hon V H Firth MP, Legislative Assembly *Hansard*, 30 May 2007.

Human Cloning and Other Prohibited Practices Amendment Bill 2007

- (a) the first mitotic division when fertilisation of a human oocyte by a human sperm is complete, or
- (b) any other process that initiates organised development of a biological entity with a human nuclear genome or altered human nuclear genome that has the potential to develop up to, or beyond, the stage at which the primitive streak appears,

and has not yet reached 8 weeks of development since the first mitotic division.

A hybrid embryo and a human embryonic cell line are not considered to be human embryos.

14. The Bill proposes to insert a new Part 2 into the Act. Proposed sections 5 to 16 completely prohibit the following practices:

- Placing a human embryo clone in the human body or the body of an animal
- Creating a human embryo for a purpose other than achieving pregnancy in a woman
- Creating or developing a human embryo by fertilisation that contains genetic material provided by more than two persons
- Developing a human embryo outside the body of a woman for more than 14 days
- Altering the genome of a human cell in such a way that the alteration is heritable
- Collecting a viable human embryo from the body of a woman
- Creating a chimeric embryo
- Developing a hybrid embryo for a period of more than 14 days
- Placing a human embryo in an animal or in the body of a woman other than in the reproductive tract
- Placing an animal embryo in the body of a human for any period of gestation
- Placing a prohibited embryo in the body of woman
- Commercial trading in human eggs, human sperm or human embryos

A maximum penalty of imprisonment for 15 years applies to these offences.

15. The following practices are deemed to be prohibited, unless authorised by a licence issued by the Embryo Research Licensing Committee, according to Division 2 of proposed Part 2 (proposed ss 17-18B):

- Creating a human embryo other than by fertilisation or developing such an embryo
- Creating or developing a human embryo containing genetic material provided by more than 2 persons

- Using precursor cells from a human embryo or a human foetus to create a human embryo or developing such an embryo
- Creating or developing a hybrid embryo – amendments made to the *Research Involving Human Embryos Act 2002* (Cth) specify that a licence may authorise the use of a hybrid embryo up to, but not including, the first cell division which occurs less than 48 hours after fertilisation. The creation or development of a hybrid embryo may only be for the purposes of testing sperm quality.

A maximum penalty of imprisonment for 10 years applies to each offence.

16. The Bill thus enables somatic cell nuclear transfer and other practices involving the creation of human embryos other than by the fertilisation of human eggs by human sperm, but only under licence for research purposes, and not for reproductive purposes.
17. Proposed s 19A requires the Minister to further review the *Human Cloning and Other Prohibited Practices Amendment Act 2003* within three years of the date of assent to the Bill. The review is to determine whether the policy objectives remain valid and whether the Act remains appropriate for securing those objectives.
18. Schedule 2 of the Bill proposes to make a number of minor amendments to the *Research Involving Human Embryos (New South Wales) Act 2003* so that the amendments made to the *Research Involving Human Embryos Act 2002* (Cth) also apply as a law of NSW. This would enable the *Research Involving Human Embryos (New South Wales) Act 2003* to extend to the regulation of activities involving the use of embryos created by means additional to assisted reproductive technology, including therapeutic cloning. Section 24(1) of the *Research Involving Human Embryos Act 2002* (Cth) provides that a licence is subject to the condition that before an excess ART embryo or human egg is used or any other embryo created or used, each responsible person is to have given proper consent to that creation or use. The licence holder is required to make a written report to the National Health and Medical Research Council Licensing Committee that such consent has been obtained.
19. Schedule 2[4] proposes to insert into the *Research Involving Human Embryos (New South Wales) Act 2003* a requirement that the Act be reviewed within three years from the date of assent to the Bill. The review is to determine whether the policy objectives remain valid and whether the terms remain appropriate for securing the objectives.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Retrospectivity: Clause 2

20. The Bill is taken to have commenced on 12 June 2007. This is to coincide with the commencement of the Commonwealth amending Act. However, the Committee notes that NSW is not required to introduce corresponding legislation until 12 June 2008 in accordance with the notice of variation to the Inter-Governmental Agreement signed

at the COAG meeting on 13 April 2007. However, commencement on 12 June 2007 allows for legislation consistent with the Commonwealth.

**21. The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person. However, the retrospective application of the Bill should it pass does not appear to unduly trespass on any personal rights or liberties.**

### Right to life

22. The Bill raises a number of issues regarding the status to be afforded to an embryo. The Bill proposes to allow, subject to authorisation by licence, the creation of a human embryo for research purposes provided that it is not created by the fertilisation of a human egg by human sperm (proposed s 17).
23. Somatic Cell Nuclear Transfer involves transferring the nucleus of a body cell into an egg that has had its nucleus removed. This is also known as therapeutic cloning. A human embryo clone is prohibited from being placed in the body of a woman or an animal. It is also prohibited to develop a human embryo outside the body of a woman for more than 14 days.
24. The Bill also proposes to allow, subject to authorisation by a licence, the creation of human embryo, using the genetic material of more than two people, for research purposes provided the embryo is not created using a human egg and sperm (proposed s 18).
25. The Bill proposes to allow, subject to authorisation by licence, the development of a hybrid embryo (proposed s 18A). However, a hybrid embryo must not develop for a period of more than 14 days (proposed s 13).
26. Article 6(1) of the *International Covenant on Civil and Political Rights* states that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The UK House of Commons Science and Technology Committee has highlighted three fundamental principles thought to underpin discussions regarding the status of an embryo.<sup>25</sup>
  - (i) An embryo is a human life and is thus entitled to the conferral of full human rights.
  - (ii) The development of a person is a gradual process. An embryo is thus entitled to some protection.
  - (iii) An embryo is a collection of cells and has the potential to develop into a human being.

The Science and Technology Committee believed that it was best to adopt the gradualist approach.

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<sup>25</sup> UK House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law: Fifth Report of Session 2004-2005*, p 15.



27. An embryo does not appear to be legally recognised as a person in Australia until after birth.<sup>26</sup> This is the approach adopted in the ACT where section 9 of the *Human Rights Act 2004* (ACT) specifies that everyone has the right to life but that this right only applies to a person from the time of birth.
28. A number of international agreements have considered the position of cloning and the use of embryos for research purposes.
29. Article 18(2) of the *European Convention on Human Rights and Biomedicine* prohibits the creation of human embryos for research purposes. It should be noted that the Bill permits the creation of a human embryo clone for research purposes by means of Somatic Cell Nuclear Transfer and does not permit the fertilisation of an egg by a sperm for a purpose other than achieving pregnancy in a woman.
30. This appears to be consistent with the approach adopted in article 11 of the *Universal Declaration on the Human Genome and Human Rights* which prohibits the cloning of human beings for reproductive purposes rather than cloning per se.
- 31. The Committee notes the wide range of opinions expressed by members of the community regarding the status of an embryo. A number of attempted safeguards have been placed into the Bill: the cloning of a human embryo is to only be for the purposes of research and not reproduction; the embryo may not develop beyond 14 days or be implanted in a woman; such research is only to be conducted if authorised by a licence issued by the Embryo Research Licensing Committee; and parliamentary review is to occur within three years from the date of assent to the Bill. The Committee refers to Parliament the decision of whether the Bill unduly trespasses on the right to life.**

***The Committee makes no further comment on this Bill.***

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<sup>26</sup> NSW Law Reform Commission, *Artificial Conception: In Vitro Fertilization*, Report 58, 1988, para 3.12.

# 14. INDUSTRIAL AND OTHER LEGISLATION AMENDMENT (APEC PUBLIC HOLIDAY) BILL 2007

Date Introduced:	7 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Police

## Purpose and Description

1. This Bill amends certain Acts to clarify the way in which the various references to public holidays are to be interpreted in respect of the public holiday to be appointed on 7 September 2007 in metropolitan Sydney to facilitate the holding of an APEC meeting on that day; and for other purposes.

## Background

2. This Bill is cognate with the *APEC Meeting (Police Powers) Bill 2007*. This Bill supports the public holiday which has been declared for the first metropolitan region on 7 September 2007. Asia-Pacific Economic Cooperation Group (APEC) will be the largest and most significant international meeting in Australia. The APEC group comprises of a series of meetings culminating in the APEC Leaders Week to be held in Sydney between 2 and 9 September. The events will include the heads of government of 21 member economies and are likely to be attended by up to 5,000 officials and 1,500 international media. APEC venues include Darling Harbour, Cockle Bay, Farm Cove, the Sydney Opera House and Government House.
3. Based on advice from security officials, the NSW Government recognises that the keeping of the Sydney metropolitan area open for workers will be burdensome. The public holiday on 7 September 2007 aims to allow for the smoother operation of the event. Public holidays had been declared in Santiago, Chile in 2004 and in Shanghai, China in 2001 when they hosted the APEC summits.
4. The Minister for Industrial Relations announced on 28 February that a one-off public holiday would be declared for Friday 7 September 2007 for the Sydney metropolitan area and local government areas, referred to as the designated holiday areas of: Ashfield, Auburn, Bankstown, Baulkham Hills, Blacktown, Botany Bay, Burwood, Camden, Campbelltown, Canada Bay, Canterbury, City of Sydney, Fairfield, Holroyd, Hornsby, Hunters Hill, Hurstville, Kogarah, Ku-ring-gai, Lane Cove, Leichhardt, Liverpool, Manly, Marrickville, Mosman, North Sydney, Parramatta, Penrith, Pittwater, Randwick, Rockdale, Ryde, Strathfield, Sutherland, Warringah, Waverley, Willoughby and Woollahra.
5. The principal rationale for this Bill is that the Government is concerned that confining the declared APEC holiday to the designated holiday areas may not attract the usual

public holiday entitlements, which would require action by the Government such as in the form of this Bill.

6. This Bill deems 7 September as a paid public holiday under State industrial instruments for those who work in the designated holiday areas. This ensures that the public holiday entitlements under the State awards and enterprise agreements will be available to workers.
7. The public holiday takes effect in relation to businesses, schools, workplaces and other services within the designated holiday areas, but does not operate on the basis of a person's place of residence. If the person's workplace is outside the designated holiday area, that workplace will not be subject to the public holiday even if the person lives inside the designated holiday area.
8. For the workers who are engaged under Federal instruments, the entitlement to the APEC holiday will be under the Commonwealth Workplace Relations Act but there may be some uncertainty as to whether workers under these instruments will get public holiday entitlements. For those who were previously on State awards but the awards were converted on 27 March to National Agreements Preserving State Awards, their entitlement will be subject to the same as for workers still on State awards.
9. The Premier will write to the Prime Minister to invite him to consider similar legislative action at the Federal level if required to ensure that workers in NSW who work under the WorkChoices legislation are not disadvantaged.

## The Bill

10. The objects of this Bill are to:
  - (a) provide that 7 September 2007 is to be a public holiday for the purposes of State industrial instruments and laws, but only in respect of employment in the local government areas in which the holiday is to be observed, and
  - (b) permit the clarification of the way in which various other references to 'public holidays' are to be interpreted in respect of that holiday, and
  - (c) provide that the State is not liable to pay compensation for economic loss in respect of anything done or omitted to be done in good faith in connection with an APEC-related matter.

Schedule 1 inserts proposed Part 10 (Clauses 49 and 50) in the Schedule of savings, transitional and other provisions to the *Industrial Relations Act 1996*. It clarifies that a reference in any industrial instrument to a public holiday is taken to include a reference to the APEC public holiday but only in respect of the local government areas in which that holiday is to be observed.

Schedule 2 inserts proposed Part 4 (Clauses 8-10) in the Schedule of savings, transitional and other provisions to the *Shops and Industries Act 1962*. This requires certain shops to be kept closed on public holidays. The Minister is permitted, by order published in the Gazette, to suspend the above operation in certain circumstances. Other provisions also provide for various exemptions from the operation of the Act. Any

such exemption is of no effect on the APEC public holiday in respect of shops in the local government areas in which the holiday is to be observed. However, the proposed clause makes it clear that the clause does not nullify any suspension in relation to the APEC public holiday.

The declaration of a public holiday does not mean that businesses or other services actually close on 7 September. However, this Bill also contains provisions that will enable the Minister for Industrial Relations to declare the closure of general shops in the central business district if this should be required to achieve security. The Shops and Industries Act deals with 'general shops' but does not regulate small shops or 'scheduled' shops such as the local corner shop, newsagents, chemists, video shops. The proposed amendments will have the effect of deeming the APEC holiday to be a closed holiday for all general shops in the designated holiday areas under the Shops and Industries Act. However, orders will be published to ensure that general shops can trade on that day. If security developments demand it, the Government will be able to vary or revoke those orders.

Schedule 3 inserts proposed Clause 3 in the Schedule of savings and transitional provisions to the *Long Service Leave Act 1955*. The effect is that any person who is on long service leave on the APEC public holiday is entitled to have their period of long service leave extended by one day.

Schedule 4 inserts proposed Part 3 (Clauses 4-6) in the Schedule of savings, transitional and other provisions to the *Banks and Bank Holidays Act 1912*. This clarifies the operation of various references in relation to the APEC public holiday and enables regulations to provide that the APEC public holiday is, or is not, to be taken to be or to have been a business day, a public holiday or a working day. It also clarifies that no compensation in respect of things done or omitted to be done, in good faith, in connection with an APEC-related matter is payable by the State, an authority of the State or a local council or an officer, employee or agent.

## Issues Considered by the Committee

11. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

***The Committee makes no further comment on this Bill.***

# 15. JUDICIAL OFFICERS AMENDMENT BILL 2007

Date Introduced:	20 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Police

## Purpose and Description

1. This Bill amends the *Judicial Officers Act 1986* with respect to the appointment of non-legally qualified persons in addition to judicial officers to the Conduct Division of the Judicial Commission of NSW, and for other purposes.

## Background

2. The Conduct Division of the Judicial Commission of NSW deals with complaints about the ability or behaviour of judicial officers and with formal requests regarding the suspected impairment of judicial officers. Under Part 6 of the *Judicial Officers Act*, any person may complain to the Judicial Commission about matters that may concern the ability or behaviour of a judicial officer. If the Commission does not dismiss a complaint or refer it to the head of jurisdiction after its preliminary examination, the complaint must then be referred to a Conduct Division for further investigation. A Conduct Division is currently constituted by a panel of 3 serving judicial officers or 2 serving judicial officers and a retired judicial officer. A separate Conduct Division is established for each complaint referred by the Judicial Commission.
3. The appointment of a community representative is to ensure that a different perspective is included on judicial misconduct matters as a community representative must not be legally qualified or be members of the Judicial Commission.

## The Bill

4. The object of this Bill is to amend the *Judicial Officers Act 1986* to provide for the appointment of non-legally qualified community representatives nominated by Parliament to the Conduct Division of the Judicial Commission.
5. Schedule 1 [1] and [3] provide for the appointment of a community representative on a panel of the Conduct Division, nominated by Parliament to replace one of the 3 judicial officers currently required to constitute a panel. A community representative must not be legally qualified, must not be a member of the Commission and is to be a person of high standing in the community. Parliament may nominate 2 community representatives who are to be appointed to a panel in rotation. Nominations must be made jointly by the Legislative Assembly and the Legislative Council, with provision for dealing with a disagreement about a nomination. Provision is made for expiry of a

nomination such as if the nominee becomes legally qualified, resigns or is replaced by Parliament).

6. Schedule 1 [2] provides for the remuneration payable to a community representative.
7. Schedule 1 [4] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed legislation.
8. Schedule 1 [5] inserts provisions to ensure that any existing panel is not affected and the requirement for a community representative will not take effect until Parliament has made the nomination.

## **Issues Considered by the Committee**

9. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

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| <ol style="list-style-type: none"><li>10. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></li></ol> |
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***The Committee makes no further comment on this Bill.***

## 16. MENTAL HEALTH BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. Paul Lynch, MP
Portfolio:	Local Government, Aboriginal Affairs, and Mental Health

**The Bill received assent on 15 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. The objects of this Bill are to make provision with respect to the care, treatment and control of mentally ill persons and mentally disordered persons and other matters relating to mental health.

### Background

2. The current *Mental Health Act* 1990 has been in operation for 15 years. Over the years, there have been changes in the New South Wales health system and in the way mental health services are provided. There has been the Parliamentary Select Committee on Mental Health that reported to Parliament in December 2002. This bill has been a result of an extensive consultation and review process started by the Government in 2003. In February 2004, the Government delivered the first discussion paper called 'Carers and Information Sharing and the Operation of the Mental Health Act' with a call for submissions. The review's second discussion paper was delivered in July 2004 which focused on the provisions of the Mental Health Act and called for submissions. This was followed by a final discussion paper in 2005. In August 2006, the draft exposure on the Mental Health Bill 2006 report on the Mental Health Act was released. In November 2006, the Mental Health Bill 2006 was introduced. The forensic review is currently looking at a range of matters such as the appropriate authority or person to make decisions about the care, treatment and control of forensic patients, the ways to ensure public safety and the role of victims of crime.

### The Bill

3. The key changes include new provisions on 'principles of care and treatment'; recognition of the role of carers and patients; and recognition of their involvement in care and treatment decisions; and their right to information. The bill contains transportation provisions and the role of police. The revision of 'prohibited treatment' provisions includes psychosurgery. It lists the prohibited treatments that will not be permitted in NSW such as deep sleep therapy, insulin coma therapy and psychosurgery, along with a revised definition of psychosurgery. The definition of psychosurgery allows the listing in the regulations of the medical conditions or illnesses for which treatment may be provided so as to ensure that the ban will not prevent treatment and research into other debilitating medical conditions. The current

two orders (community counselling orders and community treatment orders) will be consolidated into a single community treatment order that can be issued while the person is in a mental health facility or living in the community. The proposed community treatment order can run for 12 months under this bill. The bill provides for people in the community to be given 14 days notice of an application for such an order but a failure to attend on the date will allow an order to be issued in the person's absence. The bill will allow simple, procedural or administrative matters to be dealt with by a legal member of the Mental Health Review Tribunal, sitting alone instead of the tribunal constituted by three members. Additional public facilities listed in the Health Services Act will be eligible to be declared psychiatric facilities. The period of time in which a forensic patient must be reviewed is still back to six months as it is in the current Act.



## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### **Rule of law:**

**Issue: Clause 20 Detention on information of ambulance officer** (An ambulance officer who provides ambulance services in relation to a person may take the person to a declared mental health facility if the officer believes on reasonable grounds that the person appears to be mentally ill or mentally disturbed and an ambulance officer may request police assistance if of the opinion that there are serious concerns relating to the safety of the person or other persons);

**Clause 21 Police assistance** (A police officer to whose notice a police assistance endorsement on a mental health certificate or a request for assistance by an ambulance officer, must if practicable, apprehend or assist in taking the person to a declared mental health facility, or a police officer may enter premises to apprehend a person without a warrant and may exercise any powers conferred by Section 81 on a person to take the person to a mental health facility or another health facility);

**Clause 22 Detention after apprehension by police** (A police officer who finds a person who appears to be mentally ill or mentally disturbed may apprehend the person and take the person to a declared mental health facility if the officer believes on reasonable grounds that, the person is committing or has committed an offence or the person has recently attempted to kill himself or herself or it is probable that the person will attempt to kill himself or herself or any other person or attempt to cause serious physical harm; a police officer may apprehend a person without a warrant and may exercise any powers conferred by Section 81 on a person and take the person to a mental health facility or another health facility).

**Clause 81 Transport of persons to and from mental health facilities and other health facilities** (A person authorised by this Act includes: a member of staff of NSW Health, an ambulance officer, a police officer and a person prescribed by the regulations, and to take a person to or from a mental health facility or other health facility may: use reasonable force, and restrain the person in any way that is reasonably necessary in the circumstances; A person may be sedated; may carry out a frisk search or an ordinary search of the person if the person reasonably suspects that the other person is carrying anything that would present a danger, or could assist the other person to escape).

4. The Committee notes that the right of individuals not to be deprived of their liberty in the absence of offending on their part is a fundamental element of the rule of law.

5. **The Committee refers to Parliament the question whether the exercise of detention powers under Clauses 20, 21 and 22, and whether the frisk and ordinary search powers conferred to a member of staff of NSW Health Service, an ambulance officer, a police officer and a person prescribed by regulations under Clause 81, unduly trespass on individual rights and whether amendments could be sought to restrict the powers with a time limit from the time of detention by an ambulance officer (with or without police assistance) or after apprehension by police until an order for medical examination or observation is authorised.**

**Entry without warrant and Search and seizure without warrant:**

**Issue: Clause 21(2) Police assistance**

6. The Committee notes the wide scope of powers of entry to apprehend the person but also 'may apprehend any such person, without a warrant'. This power to enter without a warrant trespasses on personal rights to liberty and privacy and the privacy of other owners or occupiers in the absence of offending on the part of the person.

**7. The Committee has resolved to write to the Minister or Assisting Minister to seek clarification on the meaning or wording of 'any such person' in the clause; and refers to Parliament the question whether, having regard to the aims of the section, this power to enter without warrant unduly trespasses on personal rights including the liberty and privacy of other owners or occupiers in the absence of offending on the part of the person.**

**Issue: Clause 21 (2) Police assistance**

**and Clause 22 (2) Detention after apprehension by police**

**to be read in conjunction with Clause 81 Transport of persons to and from mental health facilities and other health facilities** (A person authorised by this Act to take a person to or from a mental health facility or other health facility may: use reasonable force, and restrain the person in any way that is reasonably necessary in the circumstances; A person may be sedated; may carry out a frisk search or an ordinary search of the person if the person reasonably suspects that the other person is carrying anything that would present a danger, or could assist the other person to escape).

8. The Committee notes that a police officer may exercise any powers conferred by Clause 81 including using reasonable force and restraining the person in any way that is reasonably necessary; as well as that a person may be sedated; and a frisk or an ordinary search of the person may be carried out; when entering premises to apprehend a person under Clause 22 (2) or detention after apprehension under Clause 22 (2). These powers may trespass on personal rights to liberty especially with regard to sedation (Clause 81(3)) and when exercised under Cl 21 (2) by police entering premises to apprehend a person without a warrant.

**9. The Committee refers to Parliament the question whether, having regard to the aims of Part 2, that the powers conferred to a police officer by Clause 81, unduly trespass on individual rights and liberties in the absence of offending on the part of the person.**

**Issue: Clause 49 (3) Police Assistance** (A police officer may enter premises to apprehend a person under this section or Section 48 to apprehend a person not permitted to be absent from mental health facility, without a warrant and may exercise any powers conferred under Section 81).

**to be read in conjunction with Clause 81 Transport of persons to and from mental health facilities and other health facilities** (A person authorised by this Act to take a person to or from a mental health facility or other health facility may: use reasonable force, and restrain the person in any way that is reasonably necessary in the circumstances; A person may be sedated; may carry out a frisk search or an ordinary search of the person if the person reasonably suspects that the other person is carrying anything that would present a danger, or could assist the other person to escape).

10. The Committee notes that a police officer may exercise any powers conferred by Clause 81 including using reasonable force and restraining the person in any way that is reasonably necessary; as well as that a person may be sedated; and a frisk or an ordinary search of the person may be carried out; when entering premises to apprehend a person under Clause 49 (3)). These powers may trespass on personal rights to liberty especially with regard to sedation (Clause 81(3)) and when exercised under Cl 49 (3) by police entering premises to apprehend a person without a warrant.
11. The Committee also notes the aim of this section deals with the apprehension of persons not permitted to be absent from mental health facility and the need to balance the right of individuals not to be deprived of their liberty in the absence of offending on their part as a fundamental element of the rule of law.

**12. The Committee refers to Parliament the question whether, having regard to the aims of Division 4 leave of absence from mental health facilities, that the powers conferred to a police officer by Clause 81, unduly trespass on individual rights and liberties.**

### Excessive Punishment:

**Issue: Clauses 50, 51, 53, 54, 55, 56, 57, 58 and 59 on community treatment order**

**Clause 50** definitions

**Clause 51** (A community treatment order authorising the compulsory treatment in the community of a person may be made by the Tribunal or a Magistrate. The authorised medical officer of a mental health facility in which the affected person is detained or is a patient, a medical practitioner who is familiar with the clinical history of the affected person, any other person prescribed by the regulations may apply for the order).

**Clause 51 (3):** 'An application may be made about a person who is detained in or a patient in a mental health facility or a person who is not in a mental health facility'.

**Clause 53** (Determination of applications for community treatment orders – A Magistrate or the Tribunal determines whether the affected person is a person who should be subject to the order. The Magistrate or Tribunal is to consider: a treatment plan, if the affected person is subject to an existing order, a report by the psychiatric case manager, a report as to the efficacy of any previous community treatment order, any other information. The Magistrate or Tribunal may make the order for the affected person if: no other care of a less restrictive

kind is appropriate and reasonably available, and a declared mental health facility has an appropriate treatment plan and if the affected person has been previously diagnosed as suffering from a mental illness, the affected person has a previous history of refusing to accept appropriate treatment. The Magistrate or Tribunal must not specify a period longer than 12 months as the period for the order).

**Clause 54** Requirements for treatment plans under community treatment orders (an outline of the proposed treatment, counselling, management, rehabilitation or other services; the method, the frequency and the place).

**Clause 55** Community treatment order may be made in absence of affected person (if the person has been given notice).

**Clause 56** Form and duration of community treatment orders

**Clause 57** Duties and functions of affected person and mental health facility (The affected person must comply with the community treatment order. The director of community treatment may take all reasonable steps to have medication administered. A person implementing a treatment plan may enter the land but not the dwelling on which an affected person's residence is without the person's consent for the purpose of implementing the community treatment order).

**Clause 57 (3):** 'Medication may be administered to an affected person for the purposes of a community treatment order without the person's consent if it is administered without the use of more force than would be required if the person had consented to its administration'.

**Clause 58** Breach of community treatment order (Cause the affected person to be informed that any further refusal to comply with order will result in the person being taken to the declared mental health facility. On a further refusal or failure by the affected person to comply, the director may give a written notice, a breach notice, to require the person to accompany a member of staff of the NSW Health Service and give a warning that the assistance of a police officer may be obtained. On a refusal or failure to comply with a breach notice, the director may in writing, make a breach order that the affected person be taken to a specified declared mental health facility).

**Clause 59** Police assistance (A police officer to whose notice a breach order is brought, must, if practicable: apprehend and take or assist in taking the affected person to the mental health facility. A police officer may enter premises to apprehend a person and may apprehend any such person, without a warrant and may exercise any powers conferred by Section 81 on a person who is authorised to take a person to a mental health facility).

13. The Committee notes the application of the same test or criteria, requirements, form, duration and operation of community treatment orders can be made about a person who is detained in a mental health facility and a person who is not, as conferred by Clause 51 (3), and the powers to compel a person in the community who is not detained in a mental health facility to undergo the same criteria, requirements and conditions for community treatment order including medication (Clause 57 (3)), may unduly trespass the person's rights and liberties.

- 14. The Committee has resolved to write to the Minister or Minister Assisting to seek clarification on the scope of these provisions with regard to the same test or criteria, requirements, form, duration and operation of community treatment orders (including medication) can be made about a person who is not detained in a mental health facility as a person who is detained; and expresses concerns that these could have the effect of unduly trespassing on individual liberties.**

**Issue: Clause 58 Breach of community treatment order and Clause 59 Police assistance**

15. The Committee notes that the effect of a breach of a community treatment order appears to be an offence without being clearly stated so, and that the right of individuals not to be deprived of their liberty in the absence of offending on their part is a fundamental element of the rule of law.

- 16. The Committee refers to Parliament the question of whether a breach of a community treatment order is an offence, otherwise, effect of a breach unduly trespasses on individual rights and liberties in the absence of offending on their part.**

**Issue: Schedule 7, Clause 76 Person who ceases to be a forensic patient may be detained as an involuntary patient** (Nothing in this Part prevents the application of Chapter 3 – involuntary admission and treatment in and outside of facilities, to a person who ceases to be a forensic patient or a person from remaining in a mental health facility as a voluntary patient).

17. The Committee notes that compelling a person to be detained as an involuntary patient is a significant trespass to that person's rights and liberties.

- 18. The Committee has resolved to write to the Minister or Minister Assisting to express concerns that if a person ceases to be a forensic patient, any detention of that person as an involuntary patient should not extend unnecessarily beyond the term of a sentence; and any sanction for failing to comply with detention or compulsory community treatment orders should be no more severe than the imposition of the original sentence.**

**Fair trial:**

**Issue: Clause 55 Community treatment order may be made in absence of affected person** (if the person has been given notice of the application).

19. The Committee notes that a community treatment order may be made in the absence of the affected person if the person has been given notice of the application.

- 20. The Committee has resolved to write to the Minister or Minister Assisting, to seek clarification on the importance of the person's right to be heard in any application for compulsory community treatment order (including medication) affecting the person, and expresses the need to protect the interests and needs of the affected person (including children, young people and the elderly) by way of the need for appearance or to legislate for representation such as an advocate, legal representative, nominated friend or guardian.**

**Vulnerable Groups:**

**Issue: The Bill does not make sufficient reference or specific provisions to safeguard the interests or needs of children, young people and the elderly, including the need for guardians, advocates or nominated friends and around the issue of their informed consent.**

- 21. The Committee has resolved to write to the Minister or Minister Assisting, to seek clarification on the need for safeguards to protect the interests and needs of children, young people and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends.**

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**Issue: Clauses 82 to 86 on mental health treatment, psychosurgery; and Clauses 87 to 97 on Electro convulsive therapy**

**Clause 82** definitions.

**Clause 83 Prohibited treatments** (deep sleep therapy, insulin coma therapy, psychosurgery, any other operation or treatment prescribed by the regulations).

**Clause 84 Treatment may be given to patients** (An authorised medical officer of a mental health facility may give or authorise the giving of any treatment including any medication, the officer thinks fit to an involuntary patient or assessable person detained in the facility).

**Clause 85 Administration of excessive or inappropriate drugs** (A medical practitioner must not cause to be administered to a person excessive or inappropriate drugs).

**Clause 86 Review of drug use in mental health facilities**

**Clause 87** definitions

**Clause 88 Offences relating to administration of electro convulsive treatment**

**Clause 89 When electro convulsive therapy may be administered** (to a person other than an involuntary patient if the person meets the requirements for informed consent and medical certification; to an involuntary patient, after an ECT determination by the Tribunal at an ECT inquiry).

**Clause 90 Refusal of treatment by medical superintendent**

**Clause 91 Informed consent requirements**

**Clause 92 Persons impaired by medication incapable of giving informed consent**

**Clause 93 When electro convulsive therapy may be administered to persons other than involuntary patients** (if the person is capable of giving informed consent including a written consent in the prescribed form, and a certificate is given by at least 2 medical practitioners with at least one of whom is a psychiatrist. An authorised medical officer may apply to the Tribunal for an ECT consent inquiry to determine whether the person is capable of giving informed consent and has given that consent).

**Clause 94 When electro convulsive therapy may be administered to involuntary patients**

**Clause 95 Tribunal to hold inquiries promptly**

**Clause 96 Purpose and findings of ECT inquiries** (ECT consent inquiries about voluntary patients; ECT administration inquiries about involuntary patients; ECT determinations that enable treatment of involuntary patients; maximum number of treatments for involuntary patients; increase in maximum number of treatments for involuntary patients; procedures applying to ECT inquiries; duration of ECT determination).

**Clause 97 Electro convulsive therapy register**

22. The Committee notes that the above clauses do not make sufficient reference or specific provisions to safeguard the interests or needs of children, young people (including those aged 14 years or over) and the elderly, including the need for guardians, advocates or nominated friends and around the issue of their informed consent with the exception of Clause 104 which makes specific reference a child under the age of 14 years or a person under guardianship.

**23. The Committee has resolved to write to the Minister or Minister Assisting, to seek clarification on the need for safeguards to protect the interests and needs of children, young people (including those aged 14 years or over), and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends with regard to provisions on mental health treatment, psychosurgery and electro convulsive therapy.**

**Self incrimination and the right to silence:**

**Issue: Clause 139 (1), (3) and (4) Protection from incrimination**

**Clause 139 (1)** (A person is not excused from a requirement to make a statement, to give information, to answer a question or to produce a document on the ground that the statement, information, answer or document might incriminate the person).

**Clause 139 (3)** (Any document produced by a person in compliance with a requirement under this Part is not inadmissible in evidence against the person in criminal proceedings on the ground that the document might incriminate the person).

**Clause 139 (4)** (Further information obtained as a result of a document produced, a statement made or information or answer given in compliance with this Part, is not inadmissible on the ground that the document, statement, information or answer might incriminate the person).

24. The Committee notes that the right against self-incrimination is a fundamental right, which should only be eroded when overwhelmingly in the public interest. As a rule, when a person is compelled to answer incriminating questions, that information should not be used against the person. [Legislative abrogation of the right of silence in the United Kingdom has been held to infringe the right to a fair trial in Article 6 of the European Convention on Human Rights: *Condron v United Kingdom* [2001] 31 EHRR 1.]

25. The Committee notes that the above clauses in effect remove the privilege against self-incrimination by enabling the admissibility of evidence against the person in criminal proceedings.

**26 The Committee refers to Parliament, the question of whether the removal of the privilege against self-incrimination in Clause 139 (1), (3) and (4) unduly trespasses on personal rights.**



**Insufficiently defined administrative powers [s 8A(1)(b)(ii) LRA]****Ill-defined and wide powers:****Issue: Clause 150 (2) and (5) Composition of the Tribunal**

**Clause 150 (2)** (Other than in relation to forensic patients, the Tribunal must consist of at least 1 member who is to be the President, a Deputy President or a member who is an Australian legal practitioner, for the purpose of exercising any of its functions).

**Clause 150 (5)** (The regulations may make provisions for or with respect to the members who are to constitute the Tribunal for the exercise of any of its functions).

27. The Committee notes these clauses create uncertainty and the scope for one-person Tribunal panels as being too wide, and questions whether the intention is sufficiently clear to ensure that a full three-person panel sits where substantial or contested matters are heard and that one-person panels are limited to only minor, procedural matters.

**28. The Committee has resolved to write to the Minister or Minister Assisting, seeking clarification on the question of whether the intention is sufficiently clearly expressed to ensure that a full three-person panel sits where substantial or contested matters are heard and that one-person panels are limited to only minor, procedural matters; and that whether these discretions make rights, liberties or obligations unduly dependent on insufficiently defined or wide administrative powers.**

**Insufficient criteria regarding the scope of persons to whom a power would be delegated:**

**Issue: Clause 81 Transport of persons to and from mental health facilities and other health facilities** (A person authorised by this Act includes: a member of staff of NSW Health, an ambulance officer, a police officer and a person prescribed by the regulations, and to take a person to or from a mental health facility or other health facility may: use reasonable force, and restrain the person in any way that is reasonably necessary in the circumstances; A person may be sedated; may carry out a frisk search or an ordinary search of the person if the person reasonably suspects that the other person is carrying anything that would present a danger, or could assist the other person to escape).

29. The Committee notes that the scope of 'a person prescribed by the regulations' is wide and there are no requirements regarding the qualifications or attributes of such persons who may be authorised for the purposes of the proposed section to exercise powers to use reasonable force to restrain a person or carry out a frisk or ordinary search of the person.

**30. The Committee refers to Parliament the question of whether allowing the scope of persons to be prescribed by regulation is an appropriate delegation of legislative power.**

**Issue: Clause 51 (2) Community treatment orders** (The following persons may apply for a community treatment order: authorised medical officer of a mental health facility in which the affected person is detained or is a patient, a medical practitioner who is familiar with the clinical history of the affected person, any other person prescribed by the regulations).

31. The Committee also notes that the scope of 'a person prescribed by the regulations' is wide and there are no requirements regarding the qualifications or attributes of such persons who may be authorised for the purposes of the proposed section to apply for a community treatment order.

**32. The Committee refers to Parliament the question of whether allowing the scope of persons to be prescribed by regulation is an appropriate delegation of legislative power.**

#### **Non-reviewable decisions [s 8A(1)(b)(iii) LRA]**

##### **Exclude judicial review:**

**Issue: Schedule 7, Clause 72 (5) Appeals against decisions of Director-General** (The Tribunal may determine that no further right of appeal may be exercised under this section before the date on which the person is next reviewed by the Tribunal).

33. The Committee notes that the Tribunal may determine that no further right of appeal may be exercised before the date on which the person is next reviewed by the Tribunal, and this excludes from judicial review or merits review by way of a new hearing of any failure or refusal by the Director-General to grant a forensic patient leave of absence.

**34. The Committee has resolved to write to the Minister or Minister Assisting, with concerns that Schedule 7, Clause 72 (5) operates to make personal rights unduly dependent on non-reviewable decisions by excluding judicial review, instead of proposing a reasonable limit to the judicial review period as an appropriate balance between a person's right to challenge the legality or merits by way of a new hearing of such determinations.**

***The Committee makes no further comment on this bill.***

# 17. POLICE SUPERANNUATION LEGISLATION AMENDMENT BILL 2007

Date Introduced:	20 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Finance

## Purpose and Description

1. This Bill amends the *Police Association Employees (Superannuation) Act 1969* and the *Police Regulation (Superannuation) Act 1906* with respect to the payment of compulsory employee superannuation contributions by way of salary sacrifice arrangements, the payment of incapacity benefits and the transfer of benefits to other superannuation schemes, and for other purposes.

## Background

2. The *Police Regulation (Superannuation) Act 1906* governs the Police Superannuation Scheme, which provides superannuation and workers compensation benefits to police officers recruited before the scheme's closure to new members in April 1988. The main aim of this Bill is to allow members to salary sacrifice their compulsory member contributions to the scheme.
3. Members of the Police Superannuation Scheme are required to make contributions at around 6% of salary. These compulsory contributions can only be paid from after tax salary currently. The amendments will allow the members to pay some or all of the compulsory member contributions from pre-tax salary. Similar amendments were passed by Parliament in 2006 to allow members of the State Authorities Superannuation Scheme to pay their compulsory contributions from pre-tax salary. The State Authorities Superannuation Scheme salary sacrifice arrangements came into force from 1 April 2007 and potentially benefit about 60,000 members.
4. The Superannuation Legislation Amendment Bill 2007 is currently before Parliament, which proposes to extend similar salary sacrifice arrangements to another scheme that covers about 28,600 public sector employees.
5. This Bill extends the salary sacrifice arrangements to the Police Superannuation Scheme, with about 3,700 serving police officers potentially to benefit from this. It is anticipated that Pillar Administration and the NSW Police Force will finalise implementation by early 2008.
6. This will also relate to the Commonwealth changes to the taxation of superannuation benefits and the co-contribution measures.
7. The proposed amendments also aim to overcome the effect of the decision in *Morley v SAS Trustee Corporation* [2007] NSWIRComm 90 in which the Industrial Court held

Police Superannuation Legislation Amendment Bill 2007

that, in considering whether an officer was capable of performing the duties of a constable as referred to in Section 14 of the *Police Act 1990* and the officer's duties generally, it was appropriate to have regard to the particular rank or office of the police officer.

## The Bill

8. The objects of this Bill are to amend:
- (a) the *Police Regulation (Superannuation) Act 1906* (the *Principal Act*) which establishes the Police Superannuation Scheme, to allow members of that scheme to have compulsory employee contributions paid on a salary sacrifice basis,
  - (b) the *Principal Act* with regard to the transfer of benefits to other schemes by police executive officers,
  - (c) the *Principal Act* to clarify the circumstances when a police officer or former police officer may be certified to be medically unfit for the purposes of payment of a superannuation allowance or gratuity,
  - (d) the *Principal Act* to enable the payment of gratuities payable to members hurt on duty in respect of loss of limbs, medical expenses and other matters other than from the fund established under the Police Superannuation Scheme,
  - (e) other minor consequential amendments to the *Principal Act* and the *Police Association Employees (Superannuation) Act 1969*.
9. Under the *Police Regulation (Superannuation) Act 1906*, benefits are payable to current and former police officers who have been certified by the SAS Trustee Corporation to be incapable, from infirmity of body or mind, of discharging the duties of the member's office. The amendments aim to clarify that such a certificate is to be provided where a police officer or former police officer is incapable, from infirmity of body or mind, of exercising the functions, including the powers, authorities and duties, of a police officer referred to in Section 14(1) of the *Police Act 1990*, regardless of their actual office, rank or functions when determining incapacity.
10. The Bill also clarifies that senior executive officers can continue to have the right to transfer their benefits out of their scheme at any time, without requiring of them to cease employment before the benefits can be transferred.

## Issues Considered by the Committee

11. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

<p>12. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p>
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***The Committee makes no further comment on this Bill.***

## 18. PRIVATE HEALTH FACILITIES BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Health

**The Bill received assent on 15 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill provides for the licensing and control of private health facilities, to repeal the *Private Hospitals and Day Procedure Centres Act 1988*, and for other purposes.

### Background

2. This Bill replaces the *Private Hospitals and Day Procedure Act 1988* and is a reintroduction of a bill that was introduced in November 2006 but which has lapsed. This Bill is reintroduced with some amendments. It is part of the review under the National Competition Principles Agreements.
3. Private hospitals have been licensed and regulated in NSW since 1908 when the Private Hospitals Act was passed. This was followed by the *Private Health Facilities Act 1982* that regulated private hospitals and nursing homes, and then the *Private Hospitals and Day Procedure Centres Act 1988*.
4. Over the past 25 years, there has been a continuing development of clinical and technological change. This Bill aims to remove the current licensing distinction between private hospitals and day procedure centres. Day procedure centres were first licensed as a separate type of facility due to the *Private Health Establishments (Day Procedure Centres) Amendment Act 1987*. Since then, there have been developments in medical, surgical and anaesthetic techniques and with many facilities offering 23-hour care, which do not require a hospital bed and other procedures requiring extended overnight recovery. These services can be provided in facilities that meet standards in between those prescribed for private hospitals and day procedure centres.
5. The Bill also aims to remove bed cap. The Private Hospitals and Day Procedure Centres Act currently imposes a statewide cap on the number of private hospital beds. This is done by the Director-General of NSW Health refusing an application for a private hospital licence if grant of the licence would result in an increase in the number of patients who can be accommodated overnight in the private hospitals in NSW. This has resulted in a market in private hospital beds where operators who have been granted bed approvals could sell the approvals to other operators. The current bed cap does not allow for the Director-General of NSW Health to control the type of private hospital service or its location.

6. The proposed planning mechanism by which the Director-General could refuse a licence if it would result in more than an adequate number of health services available in a clinical or geographical area ensures planning for a co-ordinated expansion of health services. This will apply to all licensed private health facilities, not just full service hospitals.
7. Licensing standards will be made by regulation, along with a regulatory impact statement.

## The Bill

8. The objects of this Bill are to repeal the *Private Hospitals and Day Procedure Centres Act 1988* and to provide for the licensing of private health facilities and the conduct of these facilities.
9. The Bill proposes to remove the licensing distinction between private hospitals and day procedure centres.
10. It also proposes to remove the current cap on the number of private hospital beds, and replaces it with planning power where the Director General of NSW Health may refuse an application if it would result in more than an adequate number of health services becoming available in a particular clinical or geographic area or which would undermine the provision of co-ordinated health services.
11. The investigation and enforcement provisions have been enhanced. Clause 5 provides that licensing standards for private health facilities may be made by regulation.
12. Clause 7(4)(c) allows the Director General of NSW Health to develop planning guidelines and apply them when considering an application for a licence.
13. Clause 8 provides that when a licence is approved in principle, that approval may be renewed a maximum of 6 times.
14. Clause 29 allows for the Director General to suspend a licence.
15. Clause 39 relates to medical advisory committees, which requires the licensee of each facility to appoint a medical advisory committee for the facility.
16. Part 4 of the Bill provides for the licensee of a private health facility to apply root cause analysis methodology to investigate serious adverse events at the facility. Part 4 provides for the appointment of root cause analysis teams and investigations by those teams into serious adverse incidents. Clause 42 provides that when a reportable incident happens in a private health facility, the licensee is to appoint a root cause analysis team to investigate. Clause 43 provides that the team does not have the authority to investigate into the conduct of individual practitioner. Clause 44 does provide that a team must notify the licensee and the medical advisory committee if it is of the opinion that its investigation raises issues of individual unsatisfactory professional conduct.
17. Clauses 45, 46 and 47 provide a non-disclosure regime for information held by a team.

18. Part 5 deals with enforcement. Clause 51 allows authorised officers to enter and inspect premises other than residential premises for the purposes of determining if there has been a contravention of the legislation, regulations or a licence condition. Clause 52 allows for authorised officers to issue improvement notices to a licensee. Failure to comply with an improvement notice is an offence. Clause 57 provides that the Director-General of NSW Health may direct a licensee to engage an external expert to advise the licensee on the conduct of the facility.
19. Clause 62 provides that when a corporation contravenes a provision, each person who is a director or is involved in its management is taken to have committed the offence if that person knowingly authorised or permitted the contravention.

## Issues Considered by the Committee

20. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

<p><b>21. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p>
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***The Committee makes no further comment on this Bill.***

## 19. PROFESSIONAL STANDARDS AMENDMENT (MUTUAL RECOGNITION) BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. Barry Collier, MP on behalf of the Hon. David Campbell, MP.
Portfolio:	Police

**The Bill received assent on 15 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill amends the *Professional Standards Act 1994* with regard to the mutual recognition of New South Wales and interstate schemes for the limitation of occupational liability.

### Background

2. Professional standards legislation has been enacted in all states and territories to facilitate the capping of occupational liability. The legislation also protects consumer interests with regard to insurance and risk management, complaints and disciplinary procedures. In NSW, there are currently 8 schemes approved under the *Professional Standards Act 1994*. They cover accountants, legal practitioners, engineers, surveyors and valuers. This Bill implements the decision of the Standing Committee of Attorneys-General that states and territories amend their professional standards legislation to ensure mutual recognition between jurisdictions of approved schemes in other jurisdictions.

### The Bill

3. This Bill amends the *Professional Standards Act 1994* (the *Principal Act*) with regard to the mutual recognition of New South Wales and interstate schemes for the limitation of occupational liability. Item 1 of Schedule 1 inserts new definitions. An occupational association may submit a proposed scheme to the Professional Standards Council for approval or may ask the Council to prepare a scheme. Item 3 provides that a proposed scheme may indicate an intent to operate in NSW only or in both NSW and one or more interstate jurisdictions. The Council is required to advertise a proposed scheme, to consider comments and submissions on the scheme. Item 4 provides that if a proposed scheme indicates an intent to operate in more than one jurisdiction, the scheme must be advertised in each of those jurisdictions. Item 5 of the Bill provides that if a proposed scheme indicates an intent to operate in more than one jurisdiction, the Council must consider the matters outlined under the professional standards legislation, along with any other matters in the professional standards legislation of the interstate jurisdictions. The Bill also



covers submission to the Minister, publication in the *Government Gazette*, rights to challenge a scheme, court orders to void an interstate scheme, review rights, amendment or revocation, termination of an interstate scheme, and the duration of schemes.

## Issues Considered by the Committee

4. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

***The Committee makes no further comment on this Bill.***

## 20. RURAL COMMUNITIES IMPACTS BILL 2007\*

Date Introduced: 31 May 2007  
House Introduced: Legislative Assembly  
Member Responsible: Mr Andrew Stoner MP

### Purpose and Description

1. The purpose of the Bill is to require Ministers to consider, by preparation of rural communities impact statements, the likely impact of certain legislation and government proposals on rural communities.

### Background

2. According to the Agreement in Principle speech, the Bill is to ensure that government decisions are not made without due consideration of their impact on rural communities.<sup>27</sup> Similar Bills were introduced in 2004 and 2006.

### The Bill

3. Proposed s 3 defines 'rural community' as those areas of NSW outside the Sydney, Newcastle and Wollongong metropolitan areas.
4. The Bill requires rural communities impact statements to be written by the Rural Communities Impact Assessment Unit (proposed s 5). The statement is to include (proposed s 6):
  - (a) a detailed description of any costs likely to be placed on businesses in the rural community as a result of compliance;
  - (b) an examination of the likely impact of such costs on development and employment in the rural community;
  - (c) special emphasis on the modelling of the likely impact on the rural community that would occur or remain five years later;
  - (d) an examination of the likely impact on the social structures and wellbeing of the rural community;
  - (e) an examination of the likely impact on the availability of public transport, health services, education facilities, policing, courts, government advisory services and infrastructure provision in the rural community; and
  - (f) an examination of the likely impact on the natural environment, having regard to the need to balance economic and social wellbeing with environmental sustainability.

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<sup>27</sup> Mr A J Stoner MP, *Legislative Assembly Hansard*, 31 May 2007.

5. Proposed s 9 requires that a rural communities impact statement is prepared and considered by the relevant Minister or Government Member of Parliament, in addition to any other relevant submissions or matters, before a Bill is considered by Cabinet. A copy of the rural communities impact statement is to be tabled in Parliament prior to the debate on the Bill (proposed s 10).
6. Part 4 of the Bill sets out the requirements regarding the assessment of the likely impact of proposed statutory rules on rural communities. A Minister before submitting a proposed statutory rule to the Governor must ensure that a rural communities impact statement has been prepared and that consideration has been given to that statement and any other relevant submissions or matters. The rural communities impact statement for a proposed statutory rule must be included in any required regulatory impact statement and must accompany the notice of the making of a statutory rule.
7. A Minister, before recommending to the Governor the making of a proposed State environmental planning policy, must, in accordance with Part 5 of the Bill, ensure that a rural communities impact statement has been prepared and was made available to the public when the proposed policy was publicly exhibited, and give consideration to the likely impact on the rural community. Similar requirements apply to local and regional environmental plans for local government areas outside metropolitan areas.
8. Part 6 of the Bill requires a rural communities impact statement to be prepared in relation to every decision put before Cabinet regarding the proposed introduction or increase of taxes, charges and fees to be imposed on residents or businesses in the rural community or that could be expected to impact the rural community. An obligation is placed on the Premier to ensure that Cabinet does not consider any relevant decision unless a rural communities impact statement has been prepared and circulated to each Cabinet member before the decision is made and that each Cabinet member has given consideration to the impact on the rural community.
9. The Rural Communities Impact Assessment Unit is to be established as a branch of the Department of Premier and Cabinet under Part 7 of the Bill. Each Department is to have at least one person whose duties involve or include liaison with the Rural Communities Impact Assessment Unit.
10. Proposed s 24 sets out the circumstances in which compliance with the Act is not necessary. It enables the Premier to certify in writing his or her opinion that in the special circumstances of the case public interest requires that compliance with the Act is not necessary. Special circumstances may include, but are not limited to, the need to ensure the safety of people, the environment or property in the case of an emergency, and the need to ensure the security of the State. However, the Act must be complied with within 10 sitting days after the introduction of the Bill, or within four months of a statutory rule or environmental planning instrument being made.
11. The Speaker of the Legislative Assembly and the President of the Legislative Council are to report on non-compliance in relation to the tabling of rural communities impact statements regarding a Bill or statutory rule.

## **Issues Considered by the Committee**

**12. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.**

***The Committee makes no further comment on this Bill.***

## 21. SENATOR'S ELECTIONS AMENDMENT BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. John Aquilina, MP on behalf of the Hon. Morris Iemma, MP
Portfolio:	Citizenship

**The Bill received assent on 6 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill amends the *Senators' Elections Act 1903* to omit the provision that is inconsistent with Commonwealth legislation relating to the close of the electoral rolls for the election of Senators for New South Wales.

### Background

2. The Commonwealth has recently amended the Commonwealth *Electoral Act 1913* to reduce the close-of-rolls period for Commonwealth elections from 7 days to 3 days after the writ for an election has been issued. This reduced close-of-rolls period to enrolled electors who need to update their details. For most new enrolments and re-enrolments, the roll will close at 8pm on the day on which the writ is issued. The effect of the Commonwealth reforms is inconsistent with the close-of-rolls section in the NSW *Senators' Elections Act*, which provides for the rolls to close for the election of senators from NSW 7 days after the writ is issued. NSW has serious concerns about the Commonwealth amendments. Many voters do not update their enrolment details until they become aware that an election has been called. The Prime Minister has a broad discretion to determine the timing of the election, the effect of these reforms is that it will be too late for many people to enrol once a Commonwealth election is called. However, under the Commonwealth Constitution, the NSW Government cannot prevent the Commonwealth reforms. The close-of-rolls provision in the NSW Act has no legal force and has been displaced by the Commonwealth close-of-rolls provisions. NSW cannot leave the NSW Act as it is because this would create a direct inconsistency with the Commonwealth Act. This Bill proposes to repeal the close-of-rolls provision in Section 4 of the *Senators' Elections Act*.

### The Bill

3. This Bill amends the *Senators' Elections Act 1903* (the *Principal Act*) to omit the provision that is inconsistent with Commonwealth legislation relating to the close of the electoral rolls for the election of Senators for NSW by repealing the close-of-rolls provision in Section 4 of the Act.

## Issues Considered by the Committee

4. The Committee notes that there are no issues identified under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

***The Committee makes no further comment on this Bill.***

## 22. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2007

Date Introduced:	5 June 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Morris Iemma MP
Portfolio:	Premier and Citizenship

### Purpose and Description

1. The purpose of the Bill is to repeal and amend certain Acts and instruments and for the purpose of effecting statute law revision.

### Background

2. It was noted in the Agreement in Principle speech that:

The Statute Law (Miscellaneous Provisions) Bill 2007 continues the well-established statute law revision program that is recognised by all members as a cost-effective and efficient method for dealing with minor amendments. The form of the bill is similar to that of previous bills in the statute law revision program. The bill includes two additional schedules to deal specifically with statute law revision amendments consequential on the enactment of the Legal Profession Act 2004 and the Police Amendment (Miscellaneous) Act 2006. Schedule 1 contains policy changes of a minor and non-controversial nature that the Minister considers does not warrant the introduction of a separate amending bill. That schedule contains amendments to 55 Acts and instruments.<sup>28</sup>

### The Bill

3. The objects of this Bill are:
  - (a) to make minor amendments to various Acts (proposed Schedule 1), and
  - (b) to amend certain other Acts and instruments for the purpose of effecting statute law revision (proposed Schedules 2-4), and
  - (c) to repeal certain Acts and provisions of Acts (proposed Schedule 5), and
  - (d) to make other provisions of a consequential or ancillary nature (proposed Schedule 6).

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<sup>28</sup> Ms S K Hornery MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 June 2007.

## Issues Considered by the Committee

### Issues arising under section 8(1)(b)

**Commencement: Schedule 1.12 [4]-[8], 1.13, 1.17 [1], 1.23, 1.26, 1.27 [1], 1.29, 1.30 [1], 1.31, 1.32, 1.38, 1.39, 1.40, 1.41, and 1.55 [4], [5], [7]-[9].**

4. These provisions are taken to commence with the commencement and repeal of complementary State and Commonwealth legislation, if the relevant State and Commonwealth legislation commences after the date of assent to the Statute Law (Miscellaneous Provisions) Bill 2007.
5. All other provisions commence on assent, except as provided below.

### Retrospectivity: Schedule 1.1 [2]

6. Schedule 1.1 [2] amends section 120 of the *Aboriginal Land Rights Act 1983* to clarify that the Chairperson of the New South Wales Aboriginal Land Council is to be full-time.
7. The amendment is taken to have commenced on 7 February 2007, which is the date that section 120 commenced.

<p><b>8. The Committee considers that, as no person is detrimentally affected by the retrospective operation of this amendment, this provision does not trespass on personal rights or liberties.</b></p>
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### Commencement by proclamation: Schedule 1.5, 1.11, 1.48, and 1.49

9. The Committee notes that providing for part of an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence that Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

<p><b>10. The Committee has resolved to write to the Minister to seek advice as to why the Bill is to commence on proclamation rather than on assent and to indicate a likely timetable for commencement.</b></p>
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***The Committee makes no further comment on this Bill.***



## 23. TERRORISM (POLICE POWERS) AMENDMENT (PREVENTATIVE DETENTION ORDERS) BILL 2007

Date Introduced:	29 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. David Campbell, MP
Portfolio:	Police, the Illawarra

**The Bill received assent on 15 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill amends the *Terrorism (Police Powers) Act 2002* in relation to the detention in a correctional or juvenile detention centre of a person who is subject to a preventative detention order.

### Background

2. Section 26X of the *Terrorism (Police Powers) Act 2002* currently provides for an arrangement to be made by relevant authorities for the detention in a correctional or juvenile detention centre of a person subject to a preventative detention order, and authorises the regulations to exclude the application to any such person of any provisions of the legislation relating to the detention in a correctional or juvenile detention centre.
3. In September 2005, a special meeting of the Council of Australian Governments (COAG) was held on counter-terrorism. The Commonwealth, State and Territory Governments agreed to enact legislation to implement preventative detention orders to prevent terrorist acts or to preserve evidence relating to terrorist acts. State and Territory governments agreed to enact legislation providing for preventative detention for up to 14 days. However, constitutional issues meant complementary Commonwealth legislation could only provide for preventative detention for up to 48 hours only.
4. In December 2005, the NSW *Terrorism (Police Powers) Amendment (Preventative Detention) Act* introduced Part 2A, preventative detention orders, into the *Terrorism (Police Powers) Act*. Part 2A enables a designated NSW police officer to apply to the Supreme Court for a preventative detention order of a person aged 16 years or over for up to 14 days to prevent an imminent terrorist act or to preserve evidence of a terrorist act.
5. Police can make arrangements with the Commissioner of Corrective Services for a preventative detainee to be detained in a correctional centre under Section 26X of the *Terrorism (Police Powers) Act 2002*. Currently, there are no provisions excluded

by the regulation. It is implied that both Acts of the *Crimes (Administration of Sentences) Act 1999* or the *Children (Detention Centres) Act 1987* apply to the extent that they are not otherwise excluded. However, there may be ambiguity as to whether this is so. In order to remove any doubt that the original intention of the legislation was for preventative detainees to be subject to the same rules regarding their care, control and management as all other inmates, this proposed bill amends the *Terrorism (Police Powers) Act 2002* to clarify that the above Acts also apply to preventative detainees.

6. However, there will be provisions in the Acts and in the subordinate legislation that should not apply. The current Section 26X(3) allows for these provisions to be excluded by regulation. It is proposed that an amending regulation will be prepared in the near future to specify which provisions do not apply, such as entitlement of inmates to visits or communication with people outside the detention centre.

## The Bill

7. This Bill proposes to amend the *Terrorism (Police Powers) Act 2002* to ensure that the *Crimes (Administration of Sentences) Act* and the *Children (Detention Centres) Act*, may apply to persons detained in custody subject to a preventative detention order. The object of this Bill is to make it clear that the provisions of the *Terrorism (Police Powers) Act 2002* apply to any such person, except to the extent that any such provision:
  - (a) is inconsistent with a requirement of that Act or the arrangement made for the person's detention, or
  - (b) entitles a person to visit the person or entitles the person to communicate with another person (because that Act makes detailed provision for such matters), or
  - (c) is excluded by the regulations.

The proposed Section 26X (2A) aims to clarify that the provisions of the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* apply to any person detained under a preventative detention order, except to the extent that such provision: firstly, is inconsistent with a requirement of the Act or the arrangement made for the person's detention; secondly, entitles a person to visit the person or entitles the person to communicate with another person because the Act makes detailed provision for such matters; or thirdly, is excluded by the regulations.

Clause 2 provides for the commencement of the proposed Act on the date of its assent.

Clause 3 gives effect to the amendment to the *Terrorism (Police Powers) Act 2002* set out in Schedule 1.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Oppressive official powers:

#### Issue: Clause 26X (2A) Arrangement for detainee to be held in prison

8. The Committee notes the bill may provide that the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* would not apply with regard to the right to be visited or to communicate with another person.
9. The Bill enables future amending regulations to potentially exclude the following current rights for visits by Official Visitors appointed by the Government and who have a legislated responsibility to ensure the health, safety and welfare of detainees, provided under the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987*:

In relation to juveniles, Section 8A(4) of the *Children (Detention Centres) Act 1987* that provides for the Official Visitor – a person appointed by the Minister with the right to confer privately with any person who is detained in the detention centre.

Section 37F of the *Children (Detention Centres) Act 1987* gives the Chief Executive Officer of Justice Health access to detention centres, detainees and the medical records for the purpose of providing health services to detainees; preventing the spread of infectious diseases; keeping medical records of detainees; providing advice to the director general on the diet, exercise, clothing, capacity to work and general hygiene of detainees.

Section 21 of the *Children (Detention Centres) Regulation 2005* provides for visits by legal practitioners to discuss legal business in which the detainee has an interest.

In relation to adults, Section 224 of the *Crimes (Administration of Sentences) Act 1999* gives the Chief Executive Officer of Justice Health access to correctional centres, offenders and medial records to ensure legislative compliance with regard to medical, surgical or dental treatment or to the health of offenders.

Section 228 of the *Crimes (Administration of Sentences) Act 1999* provides for each correctional complex, correctional centre and periodic detention centre to have at least one Official Visitor appointed by the Minister, and for the Official Visitor to visit at least once per month to give interviews with offenders and to receive and deal with complaints.

10. The Committee also notes Section 26ZC of the current *Terrorism (Police Powers) Act 2002* on Humane treatment of person being detained:
  - (1) A person being taken into custody, or being detained, under a preventative detention order:
    - (a) must be treated with humanity and with respect for human dignity; and

- (b) must not be subjected to cruel, inhuman or degrading treatment by anyone exercising authority under the order or implementing or enforcing the other.

A criminal penalty is imposed (with a maximum period of 2 years imprisonment) on anyone contravening the above.

- 11. The Committee refers to Parliament the question of whether this Bill unduly trespasses on personal rights and liberties including the right to be heard by Official Visitors and the Chief Executive Officer of Justice Health, with the right to health services.**
- 12. The Committee has resolved to write to the Minister to seek clarification on whether the clause contravenes or is in conflict with Section 26ZC with regard to the humane treatment of persons detained if the bill could exclude the right to be visited by Official Visitors and by the Chief Executive Officer of Justice Health, who have a legislated responsibility to ensure the health, safety and welfare of detainees.**

**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]**

**Right and access to legal representation:**

**Issue: Clause 26X (2A) Arrangement for detainee to be held in prison**

13. The Committee notes the uncertainty as to whether future amending regulations would further narrow down the person's access and right to communicate with or be visited by legal representation that are currently restricted under Section 26ZG under the present Act. Section 21 of the *Children (Detention Centres) Regulation 2005* provides for visits by legal practitioners to discuss legal business in which the detainee has an interest. This provision may no longer be applicable if it is excluded by future amending regulations under the proposed clause in the bill.
14. The right to legal counsel of one's own choosing is a fundamental human right recognised under international law<sup>29</sup> and the common law. The right is an attribute of the right to a fair trial. The fundamental importance of the lawyer-client relationship is well established in our legal system and there is a high degree of protection for communications between clients and their lawyers.

- 15. The Committee notes that the right to have legal counsel of one's own choosing and the right to access a lawyer are important attributes of the right to a fair trial and form a fundamental human right recognised under international law and the common law.**
- 16. The Committee refers to Parliament the question as to whether this proposed clause could unduly trespass on the fundamental right of a detained person to have legal counsel of his or her own choosing and to have access to legal counsel.**

<sup>29</sup> See Article 14(3)(b) of the *International Covenant on Civil and Political Rights*, which sets out the accused person's right to 'communicate with counsel of his own choosing', and the *Convention on the Rights of the Child*, Articles 37(d) and 40.

**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]****Excessive Punishment:**

17. The Committee notes that all persons who have been arrested and charged, let alone detained but not charged, have the right to be presumed innocent until proven guilty beyond reasonable doubt. This includes the right to be treated as though innocent.
18. **The Committee refers to Parliament the question as to whether this bill unduly trespasses on personal rights and liberties by excessively punishing the person detained who have not been charged and have not been proven guilty beyond reasonable doubt, by excluding the rights to communicate with or visits by officials with regard to the health, safety and well-being of detainees.**
19. **The Committee refers to Parliament the question as to how the object of preventative detention to prevent terrorist acts or to preserve evidence relating to terrorist acts could be achieved by the exclusion of such rights to communicate with or to be visited by such officials.**
20. **The Committee also refers to Parliament the question of whether the existing prohibited contact orders provided under the present Act are sufficient for the purposes of the Act without requiring this bill to exclude rights afforded to all inmates and detainees.**

**Delegation of legislative powers [s 8A(1)(b)(iv) LRA]****Clauses which allow amendment of Acts by a regulation:****Issue: Clause 26X (2A)(c) Arrangement for detainee to be held in prison**

21. The proposed Section 26X (2A) aims to clarify that the provisions of the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* apply to any person detained under a preventative detention order, except to the extent that such provision: (2A)(c) is excluded by the regulations.
22. The Committee notes that allowing regulations to make any provision of the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* to not apply in relation to detainees under the *Terrorism (Police Powers) Act 2002* is a very broad power which could, in theory, enable regulations to be made to undermine the operation of those Acts. There are currently no amending regulations under this bill.
23. **The Committee has resolved to write to the Minister to seek clarification as to the circumstances in which such regulations may make for exclusions or exceptions from the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987*.**
24. **The Committee refers to Parliament the question of whether the proposed clause is an inappropriate delegation of legislative power.**

***The Committee makes no further comment on this Bill.***

## 24. TRANSPORT ADMINISTRATION AMENDMENT (PORTFOLIO MINISTER) BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Morris Iemma MP
Portfolio:	Premier, Citizenship

**The Bill received assent on 6 June 2007. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. This Bill amends the *Transport Administration Act 1988* to remove the prohibition on the portfolio Minister being a shareholder in a State owned corporation constituted under the Act.

### Background

2. This Bill allows the Minister for Transport to have dual roles as both the portfolio Minister and a voting shareholder. This aims to put the Minister in a better position to work with rail and ferry operators to improve their operational performance, including for the Minister to be able to have a seat at the table in formulating statements of corporate intent for the Government's rail and ferry operators, which are prepared annually and set out the objectives. The statements also set the performance targets. There is no general prohibition in the State Owned Corporations Act to prevent the portfolio Minister from being appointed as a voting shareholder. The prohibitions in the Transport Administration Act were initially introduced in relation to the Rail Infrastructure Corporation and FreightCorp at the time when regulatory control was needed to be separated from commercial control. At that time, rail access arrangements were still to be put in place and FreightCorp, which has now been privatised, was operating in a competitive market.
3. State-owned corporations usually have 2 shareholders, such as the Premier, the Minister for Finance or the Treasurer and the other shareholder being the relevant portfolio Minister. The Minister for Transport was originally prohibited from being a shareholder because he had a role in regulating the transport industry and it was considered inappropriate for the Minister to also have a role in the commercial operations. Therefore, in order to avoid any conflict of interest and to encourage competition, the Minister for Transport had a regulatory function only. The Government finds that change is required now because the Minister for Transport has been given the responsibility for the Finance portfolio as well as the Transport portfolio. The conflict between the Minister's regulatory role and the corporations' commercial role also no longer exists as there is no competition in the marketplace in which the corporations operate.

## The Bill

4. This Bill aims to remove provisions in the *Transport Administrative Act 1988* that prohibit the portfolio Minister (the Minister for Transport) from being a voting shareholder of Rail Corporation NSW, Transport Infrastructure Development Corporation, Rail Infrastructure Corporation or Sydney Ferries.

## Issues Considered by the Committee

5. The Committee notes that there are no issues identified under s 8A (1)(b) of the *Legislation Review Act 1987*.

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| <ol style="list-style-type: none"><li>6. <b>The Committee has not identified any issues under s 8A (1)(b) of the <i>Legislation Review Act 1987</i>.</b></li></ol> |
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***The Committee makes no further comment on this Bill.***

## 25. WAR MEMORIAL LEGISLATION AMENDMENT (INCREASED PENALTIES) BILL 2007

Date Introduced:	30 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Police, Illawarra

### Purpose and Description

1. This Bill amends the *Summary Offences Act 1988*, the *Anzac Memorial (Building) Act 1923* and the *Anzac Memorial (Building) By-Laws 1937* to increase penalties for certain offences relating to war memorials under the *Summary Offences Act 1988* and the By-laws; and for other purposes.

### Background

2. This Bill proposes amendments to the *Summary Offences Act 1988*, the *Anzac Memorial (Building) Act 1923* and the *Anzac Memorial (Building) By-laws 1937* to double the maximum penalties for those who deface, vandalise, deliberately damage or behave inappropriately around a war memorial. The *Anzac Memorial (Building) Act 1923* deals with the Anzac Memorial in Hyde Park, Sydney and the *Summary Offences Act 1988* deals with offences to protect the memorials in cities and towns across NSW.
3. This Bill supports the Government's pre-election promise to double the penalties for criminal or inappropriate behaviour around war memorials. It pays implements the Government's Respecting our Diggers policy to ensure ongoing respect for war veterans and places of remembrance. Depending on the seriousness, criminal behaviour such as malicious damage can already be dealt with by the provisions under Section 195 of the Crimes Act, which carries a maximum penalty of 5 years imprisonment and offensive conduct under Section 4 of the Summary Offences Act, which carries a maximum penalty of 6 penalty units or \$600 and 3 months imprisonment.
4. The war memorials honour those who have fought for the country and are a reminder of the bravery of individuals and the loss suffered by their loved ones and the nation.
5. The Coalition announced on 23 January 2007 of the introduction of a National Symbols Protection Bill and the strengthening of the Summary Offences Act. The Coalition is foreshadowing amendments to the effect that the Coalition's policy was to increase the penalty to 100 penalty units (\$11,000), which is even more than this Bill's proposal of increasing penalties from 20 penalty units to 40 penalty units (\$4,400) under the Summary Offences Act for anyone who wilfully defaces a protected place such as a war memorial.



6. The Coalition foreshadows amendment to the Bill, where the Bill proposes to amend the Summary Offences Act to increase the penalty for a person who commits any nuisance or any offence or indecent act in or on any war memorial to 20 penalty units (\$2,200), the Coalition would increase the penalty to 100 penalty units (\$11,000). The Coalition's bill also proposed to amend the Summary Offences Act to increase the penalties for the desecration of shrines, monuments and statues, including war memorials, to be the same as those provided for the desecration of Aboriginal sites under the *National Parks and Wildlife Act 1974*.

## The Bill

7. The objects of this Bill are to amend the *Summary Offences Act 1988*, the *Anzac Memorial (Building) Act 1923* and the *Anzac Memorial (Building) By-laws 1937* to:
- (a) double the maximum penalty for offences under the Summary Offences Act relating to protected places (including war memorials), and
  - (b) double the maximum penalty for offences under the Anzac Memorial (Building) By-laws, and
  - (c) double the maximum amount that a person who has been convicted of an offence under these By-laws may be ordered to pay for the repair or restoration of damage caused by the offence.

Schedule 1 [1] amends the *Summary Offences Act 1988* with regard to increasing the maximum penalty from 20 to 40 penalty units (\$4,400) for Section 8 (2) of the Act for a person who wilfully damages or defaces any protected place, including a war memorial. Schedule 1 [2] increases the maximum penalty from 10 to 20 penalty units (\$2,200) for a person who commits any nuisance or any offensive or indecent act in or on any war memorial.

Schedule 2 [1] amends Section 9(3) of the *Anzac Memorial (Building) Act 1923* which provides the By-laws that create an offence punishable by a penalty not exceeding 20 penalty units and amends this to increase the maximum penalty to 40 penalty units (\$4,400). Schedule 2 [2] amends the Act to increase the maximum amount from 20 to 40 penalty units (\$4,400) for a person convicted of an offence under the By-laws when ordered to pay as the cost of or a contribution to the cost of the repair or restoration of any damage caused by the convicted conduct.

Schedule 3 [1] amends the *Anzac Memorial (Building) By-laws 1937* to increase the penalty from 10 to 20 penalty units (\$2,200) for other offences relating to the conduct of persons within the dedicated area and prohibiting persons from entering the Anzac Memorial Building during hours that the Anzac Memorial Building is closed. Schedule 3 [2] increases the maximum penalty from 20 to 40 penalty units (\$4,400) for By-law 12 of the Act for a person who damages or impairs or does anything likely to damage or impair the Anzac Memorial Building.

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

#### Issue: Excessive punishment

8. The Committee notes its concerns with the Bill's proposal to double the maximum penalties in relation to the above offences, particularly with respect to the ability of certain people to pay the increased maximum amounts (such as \$4,400), and how this may disadvantage them by sending them to imprisonment by default due to their inability to pay, which may unduly trespass on personal rights and liberties.
9. However, the Committee also weighs up the seriousness of defacement, vandalism, deliberate damage or inappropriate behaviour around a war memorial with regard to honouring those who have fought for the country, their bravery and the loss suffered by their loved ones and the nation.
10. The Committee refers to statistics and research published by the NSW Bureau of Crime Statistics and Research (BOCSAR) with regard to recent figures on malicious damage to property offences in NSW and trends in recorded incidents of graffiti in NSW. It appears the most frequent place for graffiti incidents to take place in 2005 was residential premises (22%), followed by business or commercial premises (17%) and then outdoor or public place (12)<sup>30</sup>. Over two-thirds of the persons identified for graffiti offending were under the age of 18 years old and over half of all identified persons were young males<sup>31</sup>. BOCSAR<sup>32</sup> suggested that it is possible that a greater number of young people come into contact with NSW Police not because they offend more frequently but because they are more visible to police or are less experienced offenders.
11. Another recent BOCSAR publication looked at malicious damage to property offences in NSW in 2005, and found that the most frequent targets of malicious damage are private dwellings, private vehicles and commercial buildings. With regard to the use of graffiti, the damage was done to schools and commercial buildings. Malicious damage was found to be more prevalent in regional NSW than in Sydney<sup>33</sup>. The peak three-hour period was between 6pm and 9pm and most likely to take place on a Friday or a Saturday. Only 13% of victims reported that the cost of the damage was \$1,000 or more<sup>34</sup>. Malicious damage incidents are rarely witnessed. The majority of the ones identified by police were male, with over one-third (35.3%) of alleged offenders under the age of 18<sup>35</sup>. It also found that police commenced action against a suspected offender in only 13% of malicious damage incidents<sup>36</sup>. Alcohol was

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<sup>30</sup> Williams, S., and Poynton, S., Recent Trends in Recorded Incidents of Graffiti in New South Wales 1996 – 2005, Crime and Justice Statistics Bureau Brief, Issue paper no. 34, April 2006, NSW Bureau of Crime Statistics and Research, p. 2.

<sup>31</sup> See Williams and Poynton, p. 3.

<sup>32</sup> Fitzgerald, J., Graffiti in New South Wales, Crime and Justice Statistics Bureau Brief, March 2000, NSW Bureau of Crime Statistics and Research.

<sup>33</sup> Howard, M., Malicious Damage To Property Offences in New South Wales, Crime and Justice Bulletin, Number 10, September 2006, NSW Bureau of Crime Statistics and Research, p. 3.

<sup>34</sup> See Howard, M., p. 5.

<sup>35</sup> Howard, M., p. 5.

<sup>36</sup> Howard, M., p. 6.

- flagged as an associated factor in 13% of the sampled police narratives<sup>37</sup>. However, the proportion of malicious damage incidents involving alcohol could be higher. In malicious damage incidents where the offender was known, almost half (49.5%) were flagged as alcohol-related. The most frequent targets of alcohol-related malicious damage were found to be private dwellings, followed by commercial buildings.
12. The Committee notes the discussion or conclusion which the BOSCAR publication reached. It found that given the high prevalence of malicious damage incidents and the low probability of being detected and prosecuted, "it is unlikely that imposing more severe penalties would serve as a deterrent for many offenders. Instead, the literature suggests that malicious damage would be best addressed by improving prevention methods within the community. These measures could include structural designs that reduce opportunities to commit malicious damage, such as improved lighting and greater opportunities for natural surveillance...or physical barriers that prevent the defacing of walls and fences, such as protective coatings/material or vegetation."<sup>38</sup> Rapid restoration of damage may also discourage opportunistic offending.
  13. In regards to the above research and findings by BOCSAR, the Committee notes that increasing the maximum penalty by doubling the current penalty units may not necessarily act as a deterrent to prevent defacement, vandalism or deliberate damage around a war memorial. The BOCSAR figures based on police and court data also showed that it is likely to be young males under the age of 18 who would be affected by the doubling of penalty units under this Bill, also due to their high visibility to police, alcohol-related behaviour, or are less experienced offenders. The Committee notes that this group of offenders is the least likely to be in a position to pay any increased fines.
  14. The Committee notes that the effect of the Bill contradicts or conflicts with the intention and aims of legislation such as the *Young Offenders Act 1997* which looks at cautioning, warning, conferencing, and diverting juveniles from the criminal legal system. The Young Offenders Act covers offences under the Summary Offences Act, and does not exclude offences under the Anzac Memorial (Building) Act and the Anzac Memorial (Building) By-laws.
  15. Given the BOSCAR research and findings as to an appropriate deterrent, the Committee is of the view that the most effective way to redress the damage to the seriousness of defacement, vandalism, deliberate damage or inappropriate behaviour around a war memorial with regard to honouring those who have fought for the country, their bravery and the loss suffered by their loved ones and the nation, would be to involve the offenders to restore or repair the damage caused by their conduct instead of imposing an increased penalty amount, which they or their family members are unlikely to be in the position to pay, with the unintended effect of sending them to prison for fine default or inability to pay the penalty amount.
  16. The Committee also notes that the doubling of the maximum penalty unit proposed for memorial places is disproportionate to the penalty for damaging other common

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<sup>37</sup> Howard, p. 6.

<sup>38</sup> Howard, p. 10.

and more frequent target places such as private residential places, educational institutions or commercial or business places which are 'unprotected places'.

- 17. The Committee notes the potential incapacity of certain people such as young people to pay the proposed increased maximum amounts or penalty of \$2,200 or \$4,400, the low deterrence and the likely impact of imprisonment arising from their inability to pay, which also potentially conflicts with the *Young Offenders Act 1997* with regard to cautions, warnings, and conferencing. The Committee also notes and that the increased penalty units are disproportionate to the penalty units for damaging non-protected places and as such, may constitute an undue trespass on personal rights and liberties.**
- 18. The Committee refers to Parliament the question of whether the doubling of penalty units is an undue trespass on personal rights and liberties in light of the above research and findings from the NSW Bureau of Crime Statistics and Research, and suggests that Parliament might consider whether the more effective option is to make amendments to enable offenders to participate in the restoration or repair of the damage inflicted rather than doubling the penalty units and maximum amounts.**

***The Committee makes no further comment on this Bill.***

## Part Two – Regulations

### SECTION A: REGULATIONS ABOUT WHICH THE COMMITTEE IS SEEKING FURTHER INFORMATION

#### Outline of the Regulation/Issues

#### Environmental Planning and Assessment Amendment (Designated Development) Regulation 2007

#### Recommendation

That the Committee:

- 1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to review and report to Parliament on the Regulation; and
- 2) write to the Minister:
  - a) suggesting a regulation specifically dealing with sewer mining to encourage water recycling initiatives may be worthy of consideration as an alternative to this proposed regulation.
  - b) that the Committee notes the Court of Appeal (*Residents Against Improper Development Incorporated & Anor v Chase Property Investments Pty Ltd* [2006] NSWCA 323 (23 November 2006) held at 179, that “it would be contrary to the intent of the legislation now in force to hold that an activity which falls within one of the categories listed in Pt 1 of Schedule 3 should necessarily lose that character because it only forms part of a greater development or is not the main purpose of the development in respect of which the application has been made”.
  - c) And the Committee expresses concerns that the proposed regulation would appear contrary to the intent and spirit of the *Environmental Planning and Assessment Act 1979* with regard to environmental protection and management, to hold that an activity that the Parliament considered to have potential for environmental harm (in Schedule 3) should lose that character if it formed part of a greater development or is not the main purpose or just ancillary of that development.

#### Grounds for comment

Personal rights/liberties	
Business impact	Simplifies the assessment process and reduces red tape for private industry, commerce and agricultural ventures
Objects/spirit of Act	Contrary to the intent and spirit of the <i>Environmental Planning and Assessment Act</i>

	<i>1979 and the objects of the Environmental Planning and Assessment Regulation 2000</i>
Alternatives/effectiveness	Write to the Minister suggesting a regulation specifically dealing with sewer mining to encourage water recycling initiatives may be worthy of consideration as an alternative to this proposed regulation.
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	Potential threats to environmentally sensitive areas and to public health and water quality

Persons contacted	
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## Explanatory Note

This proposed Regulation amends the *Environmental Planning and Assessment Regulation 2000* to:

- (a) remove storage facilities for sewage or effluent and some small-scale sewerage systems or works (including those that reuse sewage or effluent) from the categories of development that are prescribed as designated development, and
- (b) make it clear that (apart from some sewerage systems or works) ancillary development (which would otherwise be considered to be designated development) is not designated development if it is ancillary to other development and is not proposed to be carried out independently of that other development.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 77A and 157 (the general regulation-making power).

## Comment

### Background:

19. This regulation has been introduced to overrule a NSW Supreme Court of Appeal decision, *Residents Against Improper Development Incorporated & Anor v Chase Property Investments Pty Ltd* [2006] NSWCA 323 (23 November 2006), in favour of a Blue Mountains community group that took legal action in response to a proposal to build a resort of 84-dwelling development, to be called Parklands, which would require an on-site sewage treatment plan.
20. Parklands is an 11-hectare heritage property located about one kilometre from the Blackheath village and about the same distance from the Blue Mountains World Heritage area. The sewage treatment plan would be situated about 150 metres from Popes Glen Creek, which flows through the World Heritage area into the Grose River

and the Hawkesbury-Nepean River. The treated effluent is to be dispersed across the property.

21. At the time of the application, the Sydney Water sewerage treatment plant servicing the area within which the site is located had limited spare capacity so that only 8,571 litres per day of sewage generated by the proposed development can be disposed to the existing Sydney Water reticulated sewerage system. An estimated 26,633 litres per day of sewage to be generated by the proposed development is proposed to be treated by an on-site sewerage treatment plant (the proposed STP). The proposed STP is situated within approximately 150 metres of the Pope Glens Creek and within 250 metres of dwellings not associated with the development.

#### NSW Supreme Court of Appeal's Decision:

22. The Court of Appeal, *Residents Against Improper Development Incorporated & Anor v Chase Property Investments Pty Ltd* [2006] NSWCA 323 (23 November 2006), unanimously held that on-site sewage treatment plants that are near environmentally sensitive areas such as water courses or neighbouring houses are designated developments under Schedule 3 of the Environmental Planning and Assessment Regulation and so would require an environmental impact statement (EIS) under Section 78A of the *Environmental Planning and Assessment Act 1979*. The court rejected the developer's submission that if a sewage treatment works is ancillary to another purpose, such as a resort, then it should not be considered as a designated development where no EIS should be needed.
23. Part 1 of Schedule 3 to the 2000 Regulation contained a list of 34 categories under the heading 'What is designated development?' 'Sewerage systems or works' is under Category 29. In the proposed development in the Court of Appeal case, the 'sewerage systems or works' referred to in par (4)(a), (b), (c) and (g) of Category 29 applied to the proposed STP. The developers even conceded that 'taken in isolation' the proposed STP was designated development (at 15 in *Residents Against Improper Development Incorporated & Anor v Chase Property Investments Pty Ltd* [2006] NSWCA 323 (23 November 2006)).
24. The Court of Appeal found that once the development is characterised as permissible, the function of the development control process required by the Environment Planning and Assessment Act is to assess the impact of the proposal on the environment. The designation system where the development is identified as designated development controls the procedure for the assessment of an application for such development which is permissible with consent.
25. The Court of Appeal held that at 111, "Once the factual enquiry as to whether a particular form of development falls within one of the designations set out in Pt 1 of Schedule 3, that is the end of the inquiry. That activity, being designated development, if made the subject of a development application must comply with the requirements of s78A(8)(a) that the application be accompanied by an environmental impact statement". At 112, "it was conceded that the proposed STP fell within the statutory description in category 29(4) of Pt 1 of Schedule 3 and was, therefore, a sewerage system or work declared to be designated development for the purposes of

the EPA Act. It therefore did not matter whether the proposed STP was ancillary to some other form of development proposed by the application for the site and this was so irrespective of whether that development was to be regarded as the dominant use of the site or whether the proposed STP was to be regarded as an independent use of that part of the site on which it was to be located”.

Business Impact:

26. The proposed regulation also makes changes to Schedule 3 in relation to sewer mining, which is a type of water recycling that involves the removal of effluent from a sewer system for treatment and use, and returns the remaining waste to the sewerage system. The proposed regulation aims to implement actions identified by the Government’s metropolitan water plan to encourage water recycling in industry by removing the need to prepare EIS for sewer mining projects for industrial or for low capacity use.
27. The Committee notes the business impact of simplifying the assessment process and reducing red tape on private industry, commerce and agricultural ventures in order to promote water recycling initiatives.
28. The proposed regulation also amends Schedule 3, Clause 29 to remove minor sewage treatment works and sewage storage systems, and deals with ancillary development, which is not capable of independent use and so should not trigger the designated development requirements. This also reduces the red tape and simplifies the assessment process for industry.

Objects / Spirit of Act:

29. The Court of Appeal (*Residents Against Improper Development Incorporated & Anor v Chase Property Investments Pty Ltd* [2006] NSWCA 323 (23 November 2006) held at 179, that “it would be contrary to the intent of the legislation now in force to hold that an activity which falls within one of the categories listed in Pt 1 of Schedule 3 should necessarily lose that character because it only forms part of a greater development or is not the main purpose of the development in respect of which the application has been made”.
30. The Committee notes that the objectives of the Environmental Planning and Assessment Act focus on the need for environmental protection, environmental management and opportunity for public involvement. It would appear contrary to the intent of the legislation to hold that an activity that the Parliament considered to have potential for environmental harm (in Schedule 3) should lose that character if it formed part of a greater development or is not the main purpose of that development.



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Other - Potential threats to environmentally sensitive areas and to public health and water quality

31. One of the challenges identified by the Hawkesbury/Nepean Catchment Authority is the amount of effluent flowing into the river from sewage treatment plants. The catchment authority finds that effluent from 39 sewage treatment plants discharges into the Hawkesbury/Nepean river system and this leads to high levels of nutrients in creeks and drainage lines which threaten the water quality and the health of a river system that supplies drinking water to Sydney, the Blue Mountains and to the Illawarra.
32. The Committee notes the effect of this proposed regulation extends beyond the Parklands development proposal, that it restricts the circumstances in which an EIS for a sewage treatment plant is required, and that even when the circumstances fit, the need for an EIS is waived if the sewage treatment plant is ancillary to some other development and is not to be carried out independently of that other development.
33. Developments requiring on-site sewage disposal are likely to be located in remote or sensitive environmental areas where sewerage infrastructure does not currently exist, and they have the potential to contaminate groundwater and pose other health risks.

The Committee is conscious of balancing the issues of business impact, the need to reduce red tape, and to promote water recycling and the need to protect sensitive environmental areas and public health interests. Accordingly, the Committee has resolved to write to the Minister suggesting a regulation specifically dealing with sewer mining to encourage water recycling initiatives may be worthy of consideration as an alternative to this proposed regulation.



## Appendix 1: Index of Bills Reported on in 2007

	Digest Number
Anti-Discrimination Amendment (Offender Compensation) Bill 2007	1
APEC Meeting (Police Powers) Bill 2007	1
Appropriation Bill 2007; Appropriation (Parliament) Bill 2007; Appropriation (Special Offices) Bill 2007; Payroll Tax Bill 2007; State Revenue and Other Legislation Amendment (Budget) Bill 2007	1
Births, Deaths and Marriages Registration Amendment Bill 2007	1
Child Protection (Offenders Registration) Amendment (Suspended Sentences) Bill 2007	1
Commission for Children and Young People Amendment (Parliamentary Joint Committee) Bill 2007	1
Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007	1
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	1
Drug and Alcohol Treatment Bill 2007	1
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2007	1
Fair Trading Amendment (Funeral Goods and Services) Bill 2007	1
Guardianship Amendment Bill 2007	1
Human Cloning and Other Prohibited Practices Amendment Bill 2007	1
Industrial and Other Legislation Amendment (APEC Public Holiday) Bill 2007	1
Judicial Officers Amendment Bill 2007	1
Mental Health Bill 2007	1
Police Superannuation Legislation Amendment Bill 2007	1
Private Health Facilities Bill 2007	1
Professional Standards Amendment (Mutual Recognition) Bill 2007	1
Rural Communities Impacts Bill 2007*	1
Senator's Elections Amendment Bill 2007	1
Statute Law (Miscellaneous Provisions) Bill 2007	1
Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007	1
Transport Administration Amendment (Portfolio Minister) Bill 2007	1
War Memorial Legislation Amendment (Increased Penalties) Bill 2007	1

## Appendix 2: Bills that received comments under s 8A of the Legislation Review Act in 2007

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Anti-Discrimination Amendment (Offender Compensation) Bill 2007	N, R				
APEC Meeting (Police Powers) Bill 2007	N, R, C		N,R		
Child Protection (Offenders Registration) Amendment (Suspended Sentences) Bill 2007	N				
Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007	N, R				
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	N			N, C	
Drug and Alcohol Treatment Bill 2007	R, N, C			N, R	
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2007			N		
Guardianship Amendment Bill 2007	N, C, R		N	N, C	
Human Cloning and Other Prohibited Practices Amendment Bill 2007	N, R				
Mental Health Bill	N, R, C	N, C	N, C	N, R	
Statute Law (Miscellaneous Provisions) Bill 2007	N			N, C	
Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007	N, R, C			N, C, R	
War Memorial Legislation Amendment (Increased Penalties) Bill 2007	N, R				

Key

- R Issue referred to Parliament
- C Correspondence with Minister/Member
- N Issue Noted