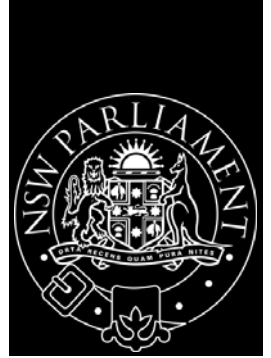


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 10 of 2008

22 September 2008

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* 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.

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 iii).

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 iii).

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 2008

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 2008

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 2008

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 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 2008

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. Child Protection (Offenders Registration) Amendment Bill 2008

Issue: Schedule 1- Proposed Section 19BA

- 7. In the Agreement in Principle speech, the Minister states that the free exchange of information between certain agencies is essential for the effective functioning of the Child Protection Watch Team and management of high-risk offenders. The Committee supports the Minister's view that the restrictions on the release of information in the legislation maintain an appropriate balance between protecting the privacy of the offenders and protecting the safety of children. Australia's responsibilities under Article 3 of the Convention on the Rights of the Child 1990 place paramount importance on the best interests of the child being considered when actions and decisions concerning children are taken. The Committee considers that the current legislative proposals are consistent with those obligations.**

2. Contaminated Land Management Amendment Bill 2008

Issue: Strict Liability

- 22. However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.**
- 23. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance. The Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with and that facilitate the effective regulation and management of contaminated land.**
- 24. Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.**

**Issues: Right to Property and Rule of Law – Schedule 1 [9] – proposed section 40 (3)
Charge on land subject to cost notice – charge is not subject to existing charges and encumbrances:**

- 26. The Committee is concerned that this amendment is unduly trespassing individual rights to property, and refers it to Parliament. The amendment will ensure that payment to a public authority will have priority over every charge or encumbrance existing before such a cost notice as well as priority over every mortgage, lease or other interest already recorded in the Register under the Real Property Act.**

28. The Committee has concerns that the above amendment infringes the rule of law by seeking to legislate its way out of the ordinary proprietary and contractual rules and obligations. The Committee is concerned that this may conflict with the laws on property and contract and also undermine the rule of law and trespass unduly on rights to property, and refers it to Parliament accordingly.

Issue: Reverse Onus of Proof – Schedule 1 [40] - proposed sections 98 (1)(a) and (b) Offences by corporations:

30. The Committee notes that these provisions effectively reverse the onus of proof that requires the EPA to prove all elements of an offence. This is inconsistent with a presumption of innocence.

31. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person such as a director of the corporation. Accordingly, the Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.

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

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

3. Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008

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

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

4. Crimes Amendment (Cognitive Impairment - Sexual Offences) Bill 2008

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

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

5. Dangerous Goods (Road and Rail Transport) Bill 2008

Issue: Strict Liability

15. The Committee, however, notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.

16. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, along with the availability of some kind of defence.

17. The Committee also notes that there is a public interest in ensuring that the provisions of the Bill are complied with and that facilitate the effective regulation and management of safety in the transportation of dangerous goods by road and rail.

18. Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.

Issue: Retrospectivity – Schedule 1, Part 2 – proposed clause 3 (3) – authorised officers:

20. The Committee will always be concerned with retrospective applications of provisions. However, the Committee considers the retrospectivity of the above clause does not trespass unduly on personal rights and liberties as it refers to existing general powers (with minor modification) of authorised officers, and incorporates these powers from the *Protection of the Environment Operations Act 1997* for the Department of the Environment and Climate Change officers, and from the *Occupational Health and Safety Act 2000* for the WorkCover officers.

Issue: Reverse Onus of Proof – Part 2 - proposed sections 11 (2)(a) and (b) Special defence for owners or operators:

22. The Committee notes that these provisions effectively reverse the legal onus of proof that requires the prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence.
23. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person such as an alleged offender. Accordingly, the Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.

Issue: Reverse Onus of Proof – Part 2 - proposed sections 12 (1)(a) and (b) Offences by corporations – liability of directors and managers:

25. The Committee notes that these provisions effectively reverse the onus of proof that requires the prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence.
26. However, as discussed earlier, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person such as a director of the corporation or a manager.
27. Therefore, the Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.

Issue: Ill-Defined and Wide Powers – Part 7, Division 2 – proposed sections 51 (1) and (2) – Orders regarding monetary benefits - No default maximum of penalty

30. The Committee is concerned that the failure to provide a default maximum amount of an additional penalty may constitute ill-defined or wide powers and an inappropriate delegation of legislative power, and accordingly, refers this to Parliament.

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

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

6. Electricity Industry Restructuring (Response to Auditor-General Report)
Bill 2008

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

7. Electricity Industry Restructuring Bill 2008 (No 2)

22. **The Committee is of the view that the right to seek remuneration or compensation is an important right and that these rights should not be removed or restricted by legislation unless there is a clear public interest in doing so. The Committee refers this matter to Parliament.**

Issue: Self incrimination – Proposed Schedule 6, Part 3, Clause 6(3)

28. **The Committee is always concerned when individuals are denied the common law right against self-incrimination. However, in this instance the Committee believes that the public interest justifies the denial of the right to silence in relation to company ownership matters.**

32. **The Committee therefore considers that, on balance, the Bill retains adequate protections for affected landholders.**

40. **The Committee considers that, except in extraordinary circumstances, it is inappropriate for a strict liability offence, particularly one that does not allow for a defence or reasonable excuse. However, the Committee believes that in circumstances such as these, which involve corporations, rather than individuals, it may be appropriate.**

45. **While the Committee is conscious of the government's intent to be flexible in order to achieve maximisation of value to taxpayers, the Committee notes that Clause 8 of the Bill confers powers to the Treasurer that are insufficiently defined and refers this matter to Parliament.**

47. **Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

8. Home Building Amendment Bill 2008

Issue: Strict Liability – Schedule 1 [3] Part 3A, Division 6 – proposed Section 48V (1) - Requirement to notify Director General of court order to pay money in relation to building claim:

19. **The imposition of strict liability may give rise to concern as the authority is not required to prove that the offender intended to commit the breach or offence.**

20. The Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.
21. The Committee also notes that the strict liability provision appears necessary in terms of the public interest in ensuring compliance with the Bill. Accordingly, the Committee considers that it does not trespass unduly on individual rights and liberties.

Issue: Excludes merits review - Schedule 1 [2], proposed section 42A (6):

24. The Committee notes the importance of merits review for protecting individual rights against oppressive administrative action and in upholding the rule of law. The Committee will always be concerned if a Bill purports to oust the jurisdiction of the courts or Tribunal.
25. The Committee is of the view that the proposed section 42A (6) is very broad. It has the potential to deny a person natural justice by removing the opportunity for review of any decision by the Director General to defer or not to defer the operation of the suspension of a licence.
26. The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review of a decision, unless there is a strong public interest in doing so. The Committee refers this to Parliament.

9. Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Bill 2008

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

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

10. Mental Health Legislation Amendment (Forensic Provisions) Bill 2008

Issue: Retrospectivity – Schedule 1 [19] – insertion of Schedule 1, Part 3 *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* – proposed section 5 (Existing patients and persons detained in mental health facilities); Schedule 2 [62] – insertion of Schedule 6, Part 3 Provisions consequent on enactment of *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* – proposed section 20 (Community treatment orders):

27. The Committee, however, considers the retrospectivity of the above provisions may not trespass unduly on personal rights and liberties as they provide arrangements to cover those community treatment orders that were in force immediately before the commencement of the amendment (proposed clause 20 to be inserted by Schedule 2 [62] for a proposed Part 3 of Schedule 6 in the amendment of *Mental Health Act 2007*); and to cover situations of existing patients and persons detained in mental health facilities (proposed clause 5 to be inserted by Schedule 1 [19] for a proposed part 3 of Schedule 1 in the amendment of *Mental Health (Criminal Procedure) Act 1990*).

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

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

11. Retirement Villages Amendment Bill 2008

Issue: Strict Liability

25. The Committee, however, notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.

26. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, with no terms of imprisonment imposed as a penalty.

27. The Committee also notes that there is a public interest in ensuring that the provisions of the Bill are complied with to facilitate the effective regulation and management of the rights and obligations of residents and operators of retirement villages.

28. Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.

Issue: Privacy – Schedule 1 [152] – proposed insertion of section 189A – Director-General may issue warning notices:

- 31. The Committee notes that in certain cases, public interest may override the right to privacy. For example, the threat of publication may encourage operators to comply with the legislation.**
- 32. The Committee further notes that publication of such a notice may not be authorised unless an investigation has been conducted by the Director-General (proposed section 189A (4)).**
- 33. The Committee is of the view that the principle of natural justice and the ability to challenge evidence are important and significant, and should not be undermined unless there are compelling public interest and safety reasons. In accordance with the principle of natural justice and the ability to challenge evidence, the proposed section 189A (5) does provide an opportunity for the concerned person to make representations to the Director-General about the proposed notice within a period of not less than 48 hours before the publication of such a notice, unless the Director-General is not able to contact the person promptly after making reasonable efforts.**
- 34. Therefore, the Committee considers that such a publication of a notice warning persons of particular risks in dealing with a specified operator of a retirement village (proposed section 189A), may not trespass unduly on individual rights and liberties.**

Issue: Retrospectivity – Schedule 1 [167] – insertion of Part 3, Division 1 – proposed section 16 (Amendments extend to existing contracts); insertion of Part 3, Division 2 – proposed section 17 (Liability of former occupant of residential premises for recurrent charges where former occupant is registered interest holder) and proposed section 18 (Liability of former occupant of residential premises for recurrent charges where former occupant is not registered interest holder); insertion of Part 3, Division 5 – proposed section 28 (Amendments relating to annual budgets); proposed section 32 (Settling-in period provisions) and proposed section 36 (Variation of recurrent charges):

- 36. The Committee, however, considers the retrospectivity of the above provisions may not trespass unduly on personal rights and liberties as they provide arrangements to cover those village contracts that were in force immediately before the commencement of the amendment (proposed sections 16, 32, 36); and cover situations of former occupants of residential premises for recurrent charges (proposed sections 17 and 18), as well as proposed or approved annual budgets (proposed section 28).**

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

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

12. Succession Amendment (Family Provision) Bill 2008

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

23. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent (other than the exception of Schedule 2.1), is an inappropriate delegation of legislative power.

13. Tow Truck Industry Amendment Bill 2008

Issue: Strict Liability

20. However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.

21. The strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, with no terms of imprisonment imposed as a penalty.

22. The Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with and that facilitate the effective regulation and management of the tow truck industry.

23. Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.

Issue: Retrospectivity – Schedule 1 [20] – insertion of proposed Schedule 2, Part 5 – proposed clauses 18 (1) and (2) – previous conduct may be taken into account in considering application for 3-year licence or drivers certificate:

25. The Committee will always be concerned with retrospective effects of provisions. However, the Committee considers the retrospectivity of the clauses 18 (1) and (2) in the proposed Part 5 of Schedule 2, to the extent of covering conduct that occurred before the relevant amending subsections, does not trespass unduly on personal rights and liberties. The Committee is of the view that there is a public interest in ensuring the integrity and probity of the system for considering applications for 3-year licence or drivers certificate, which requires that previous conduct may be taken into account.

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

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

14. Vexatious Proceedings Bill 2008

Issue: Retrospectivity:

20. The Committee will always be concerned with retrospective effects of provisions. However, the Committee considers the retrospectivity of the proposed clauses 8 (2)(a) and (b); and proposed clauses 14 (3)(a)(ii) and (b), does not trespass unduly on personal rights and liberties, to the extent of taking into account of any proceedings that have been instituted or conducted, or orders that have been made, before the commencement of the relevant amending sections.

21. The Committee is of the view that there is a public interest in ensuring that courts are able to control vexatious litigants, which requires that previous proceedings or orders before the commencement of the relevant amending sections, may be taken into account by the relevant court.

Issue: Proposed Part 3 - section 14 (6) – Application for leave to institute proceedings:

27. The Committee takes into consideration that the proposed section 14 (6) appears to be consistent with legislation in Queensland and the Northern Territory, where there are also no appeals from a decision disposing of the application by the person who is the subject of a vexatious proceedings order.

28. The Committee notes the strong public interest in excluding an appeal in this context when vexatious litigants may have a tendency to continue to take action to question a court's decision regardless of their merits. Accordingly, the Committee is of the view that the proposed section 14 (6) does not make individual rights and liberties appear unduly dependent on non-reviewable decisions.

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

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

PART ONE – BILLS

1. CHILD PROTECTION (OFFENDERS REGISTRATION) AMENDMENT BILL 2008

SECTION A: COMMENT ON BILLS

Date Introduced:	29 August 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Minister for Police

Purpose and Description

1. The purpose of this Bill is to amend the Child Protection (Offenders Registration) Act 2000 so as to enable specified government agencies to collect and use personal information about a convicted sex offender and to exchange such information with other specified government agencies.

Background

2. The background to this measure is given in the Agreement in Principle speech on 29 August 2008. The Parliamentary Secretary, in her speech on behalf of the Minister for Police, said that the purpose of the Bill is to allow for freer exchange of information between agencies involved in child protection. For this purpose, the Bill introduces an exemption from the *Privacy and Personal Information Protection Act 1998*, and the *Health Records and Information Privacy Act 2002* to facilitate the management of high-risk offenders across multiple agencies through the Child Protection Watch Team. The Parliamentary Secretary said that the Watch Team commenced on a trial basis in south-west Sydney in September 2004 after a 2003 election commitment by the present Government to establish multi-agency child protection teams to manage high-risk offenders at a local level. She said the trial did not become operational until April 2005.
3. The team consists of representatives from the New South Wales Police Force, the Department of Corrective Services, the Department of Juvenile Justice, the Department of Community Services, the Department of Health, Department of Housing, Department of Ageing, Disability and Home Care, and the Department of Education and Training. The Agreement in Principle speech states that an evaluation of the effectiveness of the Watch Team was conducted by the external consultant Jan McClelland and Associates Pty Limited. Their report recommended that the Child Protection Offenders Registration Act 2000 be amended to clearly allow exchange of information on registrable persons along the lines of codes of practice drafted by the Parliamentary counsel's Office for the Child Protection Watch Team Trial. The report recommended that referrals to the Interagency Child Protection Watch Team not require the registrable person's consent.

4. The proposed amendments will allow any Government agency listed in Schedule 1 to collect and use personal information about a convicted sex offender and to disclose that information to other Scheduled agencies providing it is in accordance with the written authorisation given by a member of staff of the agency who has been identified by the agency as being a senior officer of the agency. The McClelland report states that a small group of nominated senior practitioners from agencies should be convened to develop guidelines and checklists for the implementation of the program in country and metropolitan regions.

The Bill

5. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

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

Clause 3 is a formal provision that gives effect to the amendments to the *Child Protection (Offenders Registration) Act 2000* set out in Schedule 1.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent. Section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Proposed section 19BA

Schedule 1 [1] inserts proposed section 19BA into the Act. The proposed section enables any Government agency listed in proposed Schedule 1 (a scheduled agency)

(a) to collect and use personal information about a registrable person (that is, broadly speaking, a convicted sex offender) and (b) to disclose such information to other scheduled agencies in accordance with a written authorisation given by a member of staff of the agency who has been identified by the agency head as being a senior officer of the agency (proposed subsection (1)). An authorisation must specify the period for which it has effect and the agencies to which personal information may be disclosed (proposed subsection (2)). An authorisation may not be given by a senior officer unless he or she is satisfied (a) that there is a risk of “substantial adverse impact” on the registrable person (or some other person or class of persons) if such information is not collected, used or disclosed or

(b) that the collection, use or disclosure of such information is likely to assist in developing, or giving effect to, a case management plan for the registrable person (proposed subsection (3)). “Substantial adverse impact” is defined (in proposed subsection (5)) to include serious physical or mental harm, sexual abuse, significant loss of benefits or other income, imprisonment, loss of housing or the loss of a carer. The proposed section will have effect despite anything to the contrary in the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002* (proposed subsection (4)).

The list of agencies in proposed Schedule 1 will be capable of amendment by the regulations (proposed subsection (6)).

Proposed Schedule 1

Schedule 1 [2] inserts proposed Schedule 1 into the Act. The proposed Schedule lists the following agencies:

The NSW Police Force

The Department of Ageing, Disability and Home Care

The Department of Community Services
 The Department of Corrective Services
 The Department of Education and Training
 The Department of Health
 Housing NSW
 The Department of Juvenile Justice
 The Greater Southern Area Health Service
 The Greater Western Area Health Service
 The Hunter and New England Area Health Service
 The North Coast Area Health Service
 The Northern Sydney and Central Coast Area Health Service
 The South Eastern Sydney and Illawarra Area Health Service
 The Sydney South West Area Health Service
 The Sydney West Area Health Service
 The Children's Hospital at Westmead
 Justice Health

As mentioned above, the proposed Schedule will be capable of amendment by the regulations.

Issues Considered by the Committee

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

Issue: Schedule 1- Proposed Section 19BA

6. Under this new provision, agencies can only exchange personal information related to a convicted sex offender if a senior officer reasonably suspects a risk of "substantial adverse impact" on a person, including the individual, or that a case management plan will be deficient if that information is not exchanged. The information can only be disclosed to other scheduled agencies in accordance with the written authorisation of the senior officer. This provision has the effect of making available to any of the agencies listed in Schedule 1 information that was formerly subject to the privacy laws of the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*. "Substantial adverse impact" is defined to include serious physical or mental harm, sexual abuse, significant loss of benefits or other income, imprisonment, loss of housing or the loss of a carer.

- 7. In the Agreement in Principle speech, the Minister states that the free exchange of information between certain agencies is essential for the effective functioning of the Child Protection Watch Team and management of high-risk offenders. The Committee supports the Minister's view that the restrictions on the release of information in the legislation maintain an appropriate balance between protecting the privacy of the offenders and protecting the safety of children. Australia's responsibilities under Article 3 of the Convention on the Rights of the Child 1990 place paramount importance on the best interests of the child being considered when actions and decisions concerning children are taken. The Committee considers that the current legislative proposals are consistent with those obligations.**

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

Issue: Schedule 1 – Proposed Section 19BA(6)

8. **Schedule 1, which is to be inserted in the Principal Act, contains the list of agencies who may collect and use personal information about a convicted sex offender and who may disclose that information to another scheduled agency. Proposed section 19BA(6) states that the regulations may amend or substitute this Schedule. This provision permits subordinate legislation to amend or take precedence over the primary legislation. Such provisions involve a delegation of legislative power and are always a matter of concern to the Committee. The Explanatory Note does not justify the inclusion of this provision, which was probably added for reasons of convenience. It is the Committee's opinion that the scheduled list of agencies is fundamental to the operation of the Act because amendments to the Schedule determine the ambit of the scheme and the extent to which the confidentiality provisions of the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* are over-ridden. These issues are of a kind that should be examinable by Parliament. It is accordingly the Committee's opinion that proposed Section 19BA(6) inappropriately delegates legislative power.**

The Committee makes no further comment on this Bill.

2. CONTAMINATED LAND MANAGEMENT AMENDMENT BILL 2008

Date Introduced:	26 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Verity Firth MP
Portfolio:	Climate Change and the Environment

Purpose and Description

1. This Bill amends the *Contaminated Land Management Act 1997* to promote the better management of contaminated land and to amend certain other instruments; and for other purposes.
2. It aims to improve and streamline the operation of the Act by clarifying how contaminated land will be regulated and removing unnecessary regulation, strengthening investigation and duty to notify, as well as clarifying reporting and disclosure of information arrangements, expanding cost-recovery provisions, voluntary offset arrangements, and strengthening the offence on false and misleading information.
3. It will replace the term "significant risk of harm" with "significantly contaminated land". However, the factors the Environment Protection Authority (EPA) must consider to decide whether a site is contaminated and whether the contamination is significant to require regulation will remain mostly unchanged.
4. It seeks to combine the currently two distinct stages (the investigation and remediation of contaminated sites), which essentially duplicates regulatory processes, into management orders that cover both. This aims to allow investigation and remediation to be conducted concurrently under management orders and/or approved voluntary management proposals.
5. A new power will be introduced to enable the EPA to require certain persons to carry out preliminary contaminated site investigation to ensure quicker decision-making. The preliminary investigation is intended to be a snapshot study that will enable the EPA to decide if the land is significantly contaminated to require regulation. This is intended to assist in informing the community and addressing the problem as soon as possible.
6. It will also enable the EPA to require an investigation of the extent of contamination, and whether it is significant enough to require regulation where it is reasonably suspected. Those responsible for the contamination would be asked to conduct the preliminary investigation. However, if this is not possible or may result in delays, the landowner could be directed to do so.
7. The Bill provides more objective criteria to trigger the duty to report contamination to the EPA. It seeks to address uncertainty in relation to the duty to notify and the term "significant risk of harm" by removing the significant risk of harm test as the basis for

notifying significantly contaminated sites. It seeks to replace this test with an assessment based on the existing EPA's Guidelines on Significant Risk of Harm from Contaminated Land and the Duty to Report.

8. It clarifies that a person will have a duty to notify if that person should reasonably have been aware of the contamination. It takes into account the person's abilities, experience, qualifications and training and whether the person could reasonably have sought advice that would have made the person aware of the contamination; and the circumstances of the contamination.
9. This Bill supports the widely recognised "polluter pays" principle already incorporated in NSW legislation and clarifies that an owner or occupier of land can be responsible for contamination if it occurs because of inaction.
10. It is proposed to expand the cost recovery provisions to enable the EPA to recover costs and expenses that it incurs in association with the approval and implementation of voluntary management proposals. This is consistent with the EPA's current ability to recover administrative fees in relation to the administration of environment protection licences under the *Protection of the Environment Operations Act 1997*. It proposes to allow the Minister to enter into offset arrangements with the party responsible for contamination.
11. The amendment seeks to provide a way of mitigating the community impacts of contamination. To ensure fairness, the offset arrangements can only be applied to a person responsible for the contamination and cannot include direct financial compensation.
12. The Bill also promotes transparency and better information dissemination. The proposed amendments make it clear that the EPA and local councils can disclose site audit statements and reports without breaching the prohibition on disclosure of information under the Act.
13. These amendments provide greater protection to site auditors and councils who rely on reports in making recommendations about land suitability or providing consents for development. It will be an offence for a person to knowingly or recklessly provide false or misleading information to the EPA or another person, including local councils and accredited site auditors, in relation to a compliance requirement under the Act. This includes information that is required to be provided in relation to the assessment or remediation of site contamination.
14. The Bill clarifies that a management order can be issued to one or more persons who are responsible for the contamination. It also clarifies that the EPA can issue clean-up and prevention notices under the *Protection of the Environment Operations Act 1997* in relation to significantly contaminated land, regardless of whether it is the appropriate regulatory authority under that Act.

Background

15. This Bill was the result of the statutory five-year review of the Act.
16. The EPA will still be required to take into account any increase in the risk of harm that arises from the current and approved uses of the land. Where an increase in the risk

from contamination could occur because of a proposed change in the approved use of the land, this will continue to be managed through the land use planning process under the *Environmental Planning and Assessment Act 1979* so that the land is cleaned up and does not become significantly contaminated land because of the change in the approved use.

17. The duty to notify is not intended to capture the notification of general diffuse urban contamination that is not attributed to a specific industrial or commercial activity.
18. The sites regulated under the Act can often be complex and have contamination from multiple uses. Therefore, amendments include clarifying that more than one person can be responsible for the contamination of land.
19. According to the Agreement in Principle speech:

In summary, the proposed amendments to the Act will reduce red tape and facilitate speedier resolution of contaminated land issues, while bolstering the "polluter pays" principle and improving the operation of the Contaminated Land Management Act. Industry will be able to make commercial decisions with greater speed and certainty, and the reforms will provide the community and the environment with an even more robust, effective and protective regulatory regime.

The Bill

20. The object of this Bill is to amend the Contaminated Land Management Act 1997 (the **Principal Act**):
 - (a) to permit the Environment Protection Authority (the **EPA**) to order certain persons to carry out a preliminary investigation of a site to identify any contamination, and
 - (b) to change the current approach to managing contamination through the declaration of investigation areas and remediation sites and the issuing of investigation and remediation orders in relation to land within those areas by instead providing for the declaration of contaminated land as significantly contaminated land and providing for the issuing of management orders that can require a person to investigate and remediate the contamination of significantly contaminated land, and
 - (c) to allow the EPA to regulate contaminated land if the EPA considers that the contamination is significant enough to warrant regulation instead of first determining whether any contamination presents a significant risk of harm, and
 - (d) to clarify that more than one person may be responsible for contamination, and
 - (e) to clarify that the EPA can approve a voluntary management proposal unconditionally or subject to conditions, and
 - (f) to enable the EPA to recover certain of its costs under the Principal Act, and
 - (g) to enable the EPA to issue clean-up and prevention notices in respect of land regulated under the Principal Act, and
 - (h) to permit a penalty notice to be withdrawn within 28 days after it is issued, and
 - (i) to create a general offence of providing false or misleading information that replaces a more specific offence along those lines, and
 - (j) to allow the regulations to set out when information may be disclosed, and
 - (k) to enable the Minister to enter into arrangements with a person responsible for contamination that cannot be remediated in a reasonable time under which the person provides assistance to affected communities, and
 - (l) to make other minor amendments.

Issues Considered by the Committee

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

Issue: Strict Liability

21. Numerous clauses¹ in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the offender intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence.

22. However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.²

23. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance. The Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with and that facilitate the effective regulation and management of contaminated land.

24. Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.

Issues: Right to Property and Rule of Law – Schedule 1 [9] – proposed section 40 (3) Charge on land subject to cost notice – charge is not subject to existing charges and encumbrances:

25. Proposed section 40 (1) refers to the creation of charge where on the registration of a notice under section 39, a charge is created on the land in relation to which the notice is registered to secure the payment to the public authority specified in the notice. Proposed section 40 (3) reads that: such a charge has priority over every charge or encumbrance to which the land was subject immediately before the notice was registered and, in the case of land under the provisions of the *Real Property Act 1900*, has priority over every mortgage, lease or other interest recorded in the Register kept under that Act.

26. The Committee is concerned that this amendment is unduly trespassing individual rights to property, and refers it to Parliament. The amendment will ensure that payment to a public authority will have priority over every charge or encumbrance existing before such a cost notice as well as priority over every mortgage, lease or other interest already recorded in the Register under the Real Property Act.

¹ Clauses such as in Schedule 1 [9]: proposed section 28 (4) – ongoing maintenance orders; Schedule 1 [15]: duty to report contamination - proposed section 60 (1)(a) and (b); (2)(a) and (b).

² Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

27. The Committee is also of the view that certainty, consistency and stability in law are vital elements of the rule of law, which is essential for the maintenance of personal rights. While the Committee acknowledges that this amendment is consistent with the EPA's current ability to recover administrative fees in other areas, the Committee has concerns that the above amendment will create uncertainty as a charge can be created on the land in relation to securing payment to a public authority at any time after any existing charge or encumbrance to the land. Such a cost notice will also have priority over any existing mortgage, lease or other interest already recorded in the Register before the registration of such a cost notice. The Committee considers that the erosion of the rule of law can only be justified as in the public interest in the most extreme circumstances.

28. The Committee has concerns that the above amendment infringes the rule of law by seeking to legislate its way out of the ordinary proprietary and contractual rules and obligations. The Committee is concerned that this may conflict with the laws on property and contract and also undermine the rule of law and trespass unduly on rights to property, and refers it to Parliament accordingly.

**Issue: Reverse Onus of Proof – Schedule 1 [40] - proposed sections 98 (1)(a) and (b)
Offences by corporations:**

29. Proposed section 98 (1) reads that: If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the person satisfies the court that:

(a) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or

(b) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.

30. The Committee notes that these provisions effectively reverse the onus of proof that requires the EPA to prove all elements of an offence. This is inconsistent with a presumption of innocence.

31. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party³. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person such as a director of the corporation. Accordingly, the Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.

³ Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 38th Parliament (May 1996 – August 1998)*, para 2.108: "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".

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

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

32. The Committee notes that except for certain Schedules (Schedules 1 [5], [10], [13], [27], [29]-[31], [34], [36], [37], [40], [42], [44], [45], [48]-[55] and [57]-[61] which will commence on the date of assent), the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

3. CRIMES (SENTENCING PROCEDURE) AMENDMENT (VICTIM IMPACT STATEMENTS) BILL 2008

Date Introduced: 29 August 2008
House Introduced: Legislative Assembly
Minister Responsible: Hon David Campbell MP
Portfolio: Police

Purpose and Description

1. This Bill amends the *Crimes (Sentencing Procedure) Act 1999* to make further provision with respect to victim impact statements.
2. It will amend the definition of "personal harm" in section 26 of the *Crimes (Sentencing Procedure) Act 1999* by replacing the term "mental illness or nervous shock" with the term "psychological or psychiatric harm". This change will reflect modern legal terms and the terminology used in the Act.
3. The change from "nervous shock" to "psychological or psychiatric harm" will broaden the nature of the harm suffered by a victim or his or her family that may be documented in a victim impact statement. The current wording prevents a victim impact statement documenting harm that is an exacerbation of an existing psychological condition or harm, but that does not reach the threshold of a diagnosed mental illness or psychiatric disorder.
4. Another effect of the change is to make the terminology in the *Crimes (Sentencing Procedure) Act* consistent with that in the *Victims Rights Act 1996* and the *Victims Support and Rehabilitation Act 1996*, which were both amended in 2006 to include the more modern terminology.
5. The Bill will also amend sections 26 and 27 of the *Crimes (Sentencing Procedure) Act* to enable a witness to a sexual offence to provide a victim impact statement. Currently, a witness to other offences covered by division 2 of part 3 of the Act may provide a victim impact statement. However, a witness to sexual assault cannot provide a victim impact statement. Therefore, the Bill will amend section 27 of the *Crimes (Sentencing Procedure) Act* to replace the term "sexual assault" with "prescribed sexual offence". The term "prescribed sexual offence" will have the same meaning it has in the *Criminal Procedure Act 1986*. This will clarify that a victim impact statement is not limited to the offence of "sexual assault" in section 611 of the *Crimes Act 1900*, but may be provided in relation to other offences of a sexual nature, such as indecent assault, persistent sexual abuse of a child, child prostitution and pornography, and child abduction offences.

6. The Bill amends section 30 of the Crimes (Sentencing Procedure) Act to make it clear that a victim impact statement may include photographs, drawings and other images.
7. In relation to incapacity, the Bill inserts a more detailed section 30A (2) in the Crimes (Sentencing Procedure) Act. Proposed new section 30A (2) provides that if a primary victim is incapable of providing information for a victim impact statement by reason of their age, impairment or other incapacity then a representative of the victim, such as a family member or a person with parental responsibility for the victim, may act on their behalf. The new section also makes it clear that children are covered by the provision.
8. In relation to closed-circuit television, new sections 30A (3) and 30A (4) give victims an entitlement to read out their victim impact statements via closed-circuit television (if they were entitled to give evidence via CCTV during the trial). Currently, victims are entitled to give evidence by CCTV in relation to prescribed sexual offences. Vulnerable persons, such as a child or an intellectually impaired person, may also give evidence by CCTV.

Background

9. This Bill aims to ensure that victims have a voice and are able to participate in the criminal justice process. The Government introduced legislation in 1997 providing for victim impact statements. The provisions on victim impact statements are found in division 2 of part 3 of the *Crimes (Sentencing Procedure) Act 1999*. Victim impact statements are submitted to the court after an offender has been convicted and before an offender is sentenced.
10. According to the Agreement in Principle speech, this Bill has the support of the courts, the Office of the Director of Public Prosecutions, the Law Society of New South Wales, and the New South Wales Bar Association, as well as groups representing victims of crime, including Enough is Enough, the Homicide Victims Support Group and the Victims of Crime Assistance League.

The Bill

11. The object of this Bill is to amend the *Crimes (Sentencing Procedure) Act 1999* as follows:
 - (a) to extend the circumstances in which a court may receive a victim impact statement,
 - (b) to allow a victim to read out his or her victim impact statement to the court by means of closed-circuit television arrangements or other special arrangements in appropriate cases,
 - (c) to provide that photographs, drawings and other images may be included in a victim impact statement,
 - (d) to make it clear that a victim impact statement may be prepared on behalf of a child by a parent or other person having parental responsibility for the child,
 - (e) to make other minor and consequential changes to that Act.

Outline of provisions

Schedule 1 Amendments

Extension of circumstances in which victim impact statement may be given

At present, the principal Act provides that a court may receive and consider a victim impact statement in proceedings for certain serious offences involving death, the infliction of actual physical bodily harm, sexual assault or an act of actual or threatened violence. The amendments extend the availability of victim impact statements to any case involving a prescribed sexual offence (within the meaning of the *Criminal Procedure Act 1986*). This includes not only the offence ordinarily referred to as sexual assault, but also other sexual offences such as indecent assault, persistent sexual abuse of a child, sexual servitude, child prostitution and pornography and also kidnapping and child abduction offences.

See **Schedule 1 [2], [5] and [7]**. **Schedule 1 [4] and [6]** make consequential amendments.

The amendments will also ensure that a witness to such an offence who suffers personal harm as a direct result of the offence will be treated as a victim of the offence for the purposes of the provisions. See **Schedule 1 [3]**.

Reading of victim impact statements to court

At present, certain persons can give evidence in criminal proceedings by means of closed-circuit television or other special arrangements. These arrangements are available to a complainant in a sexual assault case and to children and intellectually impaired persons. The amendments will enable a victim to whom those arrangements for giving evidence are available to read a victim impact statement to the court in accordance with those same arrangements. See **Schedule 1 [11]**.

Content of victim impact statements

The amendments make it clear that a victim impact statement may include photographs, drawings and other images (for example, photographs of the victim before the offence occurred), subject to any requirements imposed by the regulations.

See **Schedule 1 [8]**.

Victim impact statements for children

At present, the principal Act provides that if a primary victim of an offence is incapable of providing information for a victim impact statement, the victim impact statement can be prepared by a member of the victim's immediate family or other representative of the victim. The amendments make it clear that this applies to children, by providing that any victim who is incapable of preparing a statement (by reason of age, impairment or otherwise) may have a statement prepared on his or her behalf. In addition, the amendments make it clear that a person having parental responsibility for a victim (who may not necessarily be a member of the victim's immediate family) may also prepare a statement on behalf of a victim. See **Schedule 1 [9]**. **Schedule 1 [10]** makes a consequential amendment.

It continues to be the case that a court cannot receive a victim impact statement unless satisfied that the victim to whom the statement relates does not object to the statement being given to the court.

Other amendments

At present, the principal Act allows a victim of an offence who has suffered personal harm to provide a victim impact statement. The amendment updates the definition of **personal harm**, in a manner consistent with the *Victims Rights Act 1996*, so that it includes psychological or psychiatric harm (instead of mental illness or nervous shock). See **Schedule 1 [1]**.

Schedule 1 [12] enables the making of savings and transitional regulations as a consequence of the proposed Act.

Schedule 1 [13] provides that the amendments apply to victim impact statements lodged after the commencement of the amendments.

Issues Considered by the Committee

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

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

12. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

4. CRIMES AMENDMENT (COGNITIVE IMPAIRMENT - SEXUAL OFFENCES) BILL 2008

Date Introduced:	26 June 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General, Justice

Purpose and Description

1. This Bill amends the *Crimes Act 1900* with respect to offences of a sexual nature committed against persons who have a cognitive impairment; and to amend the *Criminal Procedure Act 1986* in relation to the giving of evidence by cognitively impaired persons.
2. The amendments seek to clarify and extend the nature of sexual offences committed against persons who have a cognitive impairment. The Bill replaces the term "intellectual disability" with the term "cognitive impairment". A person has a cognitive impairment if a person has:
 - (a) an intellectual disability; or
 - (b) a developmental disorder (including autistic spectrum disorder); or
 - (c) a neurological disorder; or
 - (d) dementia; or
 - (e) a severe mental illness; or
 - (f) a brain injury, that results in the person requiring supervision or social habilitation in connection with their daily life activities.
3. It also seeks to reform section 66F, which sets out the offence of sexual intercourse with a cognitively impaired person. Currently, section 66F only covers the offence of sexual intercourse, but does not refer to indecent assaults or acts of indecency. An additional subsection will be inserted, which states that consent is not a factor in the existing indecent assault offences and acts of indecency when committed against cognitively impaired victims, where it can be established that the person was responsible for the care of that person, whether generally or at the time of the offence, or where the accused engaged in the conduct had the intention of taking advantage of the person's cognitive impairment. The penalties are in line with the existing indecency offences.
4. The concept of carer in section 66F will be extended to include home-based and volunteer carers which fall beyond the current definition. The current definition only refers to being under the authority of the person in connection with any facility or program providing services to persons with intellectual disabilities. This Bill will replace the existing definition with the broader concept of "person responsible for care". A person is responsible for the care of a person with a cognitive impairment if the person

provides care to that person at a facility at which persons with a cognitive impairment are detained, reside or attend, or at the home of that person in the course of a program under which any such facility or other government or community organisation provides care to persons with a cognitive impairment.

5. The care of a person with a cognitive impairment includes voluntary care, health professional care, education, home care and supervision. This new definition aims to capture those that provide care or supervision outside of a formal institutional setting, and those who are not paid for the services they provide to cognitively impaired persons. The fact that the care or supervision takes place in a facility or at home does not mean that the offence must also take place in that particular setting. An accused person will be considered a person responsible for care if they provide that care or supervision in a facility or at home, even if the offence is committed outside of those settings—for example, in an outdoor setting, another location, or in a vehicle. The new provision clarifies that the care in question includes not only care provided by health professionals, but also unpaid care, as well as education services, home care services, and general supervision.
6. This Bill amends section 66F to insert a specific defence for accused persons who are married to, or in a defacto relationship with, the cognitively impaired person. It also includes a specific defence for procedures done by carers that are for medical and hygienic purposes.
7. It also amends the *Criminal Procedure Act 1986* to insert the new definition of cognitive impairment. The Government introduced a number of reforms in early 2007 to assist vulnerable witnesses in giving their evidence in the criminal justice system. These amendments required a new definition of intellectual impairment.
8. Therefore, the existing definition of "intellectual impairment" in the vulnerable witnesses provisions of the *Criminal Procedure Act 1986* will be replaced by the definition "cognitive impairment". The additional threshold of requiring supervision or social habilitation in connection with daily life activities does not apply here. This is because these provisions are beneficial in nature and seek to provide support to vulnerable witnesses in giving their evidence, rather than grounding the basis for an investigation and prosecution on the basis that the victim had a serious impairment.

Background

9. The law should not deny people with a cognitive impairment the freedom to participate in consensual sexual relationships. However, the law must also protect vulnerable members of society from sexual exploitation. This Bill arises out of the recommendations of the Criminal Justice Sexual Offences Taskforce.
10. A number of government and non-government organisations were represented on the task force, such as the Attorney General's Department, the Director of Public Prosecutions, the Office for Women, judicial officers from the Supreme Court, District Court and Local Court, as well as the Judicial Commission, the New South Wales Women's Legal Service, the Crown Advocate, senior academics, the Law Society, the Department of Community Services, Victims Services, the Violence Against Women Specialist Unit, the New South Wales Police Force, the Legal Aid Commission, the Public Defender's Office, the New South Wales Bar Association, the New South Wales

Department of Health and the New South Wales Rape Crisis Centre. The task force report contained 70 recommendations.

11. The task force recognised that people who have an intellectual disability or other cognitive impairment can be more vulnerable to sexual assault. This was reflected in the original introduction of section 66F of the *Crimes Act 1900*, which criminalises sexual intercourse with intellectually disabled persons when the offender is the carer or is taking advantage of the person's impairment. The task force report highlighted the need to increase the protection that is provided to people with intellectual disabilities and other cognitive impairments. Factors that may likely increase vulnerability to criminal victimisation "are their impaired judgement, deficits in adaptive behaviour, accompanying physical disabilities which may inhibit the person conveying sexual victimisation, the high-risk environments in which they live and work, their lack of knowledge about their rights, and the attraction of some abusers to environments in which they will encounter vulnerable victims".
12. According to the second reading speech, of all the crimes recorded against intellectually disabled people, the most frequent crimes are sexual and physical assault. Most sexual assaults of intellectually disabled people occur in the victim's place of residence, and in many cases the abuser is someone known to the victim. A discussion paper on this issue and draft consultation bill were published and circulated in June 2007 by the Criminal Law Review Division of the Attorney General's department. Submissions were received from a wide range of community organisations and authorities, including the Intellectual Disability Rights Service, the Office of the Public Guardian, the Department Of Ageing, Disability and Home Care, the Victims Advisory Board, the New South Wales Police Force, the Legal Aid Commission, the Office of the Director of Public Prosecutions and a number of magistrates and judges.
13. Currently, the *Crimes Act 1900* sets out sexual offences in divisions 10 and 10A of part 3. Section 66F provides for specific sexual assault offences against victims with an intellectual disability. Consent is not a defence to these offences, as they are designed to capture people taking advantage of the victim's intellectual disability and vulnerability to sexual exploitation. The offences were also to capture carers who take advantage of their charge's disability and vulnerability to sexual exploitation. At present, to apply the current section 66F, the victim must have an intellectual disability defined only as "an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with their daily life activities".
14. Serious intellectual disability is also an aggravating feature that increases the maximum penalty of a number of sexual assault offences in the Crimes Act, such as, sexual assault, indecent assault and sexual servitude. "Serious intellectual disability" is not defined and the concept of "serious" is currently left open to interpretation. The task force recommended that the term "intellectual disability" in divisions 10 and 10A of part 3 of the *Crimes Act 1900* be replaced with an updated term and definition that will reflect a more contemporary understanding of the nature of such disabilities and impairments. This was supported by the submissions received in response to the discussion paper and draft consultation bill. A new definition would provide greater protection to people with a cognitive impairment by addressing the gap between the

existing definition and a wide range of people who are vulnerable to such exploitation but are not currently captured by the existing narrow definition of intellectual disability.

15. According to the second reading speech, the new definition covers all impairments of cognitive capacity, whether a disability, disorder, illness or injury. The additional threshold of supervision or social habilitation in connection with daily life activities, which has been retained from the original section 66F, excludes minor impairments. Further, it was agreed that this new definition should replace the term "serious intellectual disability" as an aggravating feature of the other sexual assault offences, because the requirement for supervision or social habilitation in connection with daily life activities makes the level of impairment sufficiently serious to meet the requirements of those sections.
16. A particular concern of the taskforce, and also from the submissions received in response to the discussion paper—was that there were adequate defences available for persons in a genuine relationship with a cognitively impaired person, and also a defence for a person such as a carer conducting medical or hygienic procedures. This Bill therefore amends section 66F to insert a specific defence for accused persons who are married to, or in a defacto relationship with, the cognitively impaired person. It also includes a specific defence for procedures done by carers that are for medical and hygienic purposes.
17. The Bill also amends the *Criminal Procedure Act 1986* to insert the new definition of cognitive impairment. However, the second reading speech explained that the extensive consultation process conducted by the Criminal Law Review Division with regard to the current amendments had not been completed. It was agreed that those amendments would progress, with a view to clarifying the definition of "intellectual impairment" after the consultation process, in conjunction with this current Bill.

The Bill

18. The object of this Bill is to amend the *Crimes Act 1900* to provide additional protection to persons with a cognitive impairment by clarifying and extending the nature of sexual offences committed against persons who have a cognitive impairment (current offences deal with persons who have an intellectual disability). In particular, the Bill:
 - (a) replaces "intellectual disability" with "cognitive impairment" and provides a detailed definition of ***cognitive impairment***, and
 - (b) revises the elements of such sexual offences and removes the lack of consent as an element of the offences of indecent assault or acts of indecency in addition to sexual intercourse offences, and
 - (c) extends the circumstances in which a person is taken to be responsible for the care of a person with a cognitive impairment to include persons providing voluntary or home-based care to cognitively impaired persons at facilities or under programs for the cognitively impaired.
19. The Bill also amends the *Criminal Procedure Act 1986* in relation to the giving of evidence in criminal proceedings by cognitively impaired persons.
20. Schedule 1 amends the *Crimes Act 1900*. Item [1] of Schedule 1 amends section 61H of the *Crimes Act 1900* by replacing the term "intellectual disability" with "cognitive impairment" and an extended definition.

21. Item [2] of schedule 1 replaces the term "serious intellectual disability" with the term "cognitive impairment" as an aggravating feature that raises the maximum penalty for a number of sexual offences in the *Crimes Act 1900*: section 61J—aggravated sexual assault; section 61M—aggravated indecent assault; section 61O—aggravated act of indecency; section 66C—sexual assault of a child between 10 and 16; and section 80A—sexual assault by forced self-manipulation.
22. Item [3] of schedule 1 amends the alternative verdict provisions in section 61Q regarding the question of consent and cognitive impairment. This provision enables a jury in a trial for an offence of non-consensual sexual intercourse with a cognitively impaired person under sections 61J or 61JA, to bring an alternative verdict under section 66F of sexual intercourse with intent to take advantage of the person's cognitive impairment, in cases where the jury is not satisfied that there was no consent.
23. Item [4] of schedule 1 replaces the old section 66F with a new provision that reflects the new definition of "cognitive impairment" in section 61H. The offences and penalties remain the same as the old provision; however, they are set out slightly differently. The maximum penalty for sexual intercourse with a cognitively impaired person, where the offender is taking advantage of the victim's cognitive impairment, is eight years. This penalty increases to 10 years where the offender is the person responsible for the care of the cognitively impaired person. As before, consent is not an element of these offences, therefore, the penalties are lower than those available for non-consensual sexual intercourse with a cognitively impaired person under section 61J, which is 20 years.
24. The new subsection (1) outlines the meaning of "person responsible for care" as it relates to sexual offences of cognitively impaired people. For the purposes of the new section 66F, a person is responsible for the care of a person who has a cognitive impairment if the person provides care to that person at a facility at which persons with a cognitive impairment are detained, reside or attend, or at the home of that person in the course of a program under which any such facility or other government or community organisation provides care to persons with a cognitive impairment.
25. This section clarifies the class of people, rather than the location of the offence.
26. The new subsection (5) of section 66F extends the existing regime by making it an offence to commit an indecent assault or act of indecency with a cognitively impaired person.
27. Consent will not be a defence to a charge of indecent assault or act of indecency where the accused was responsible for the care of that person, whether generally or at the time of the offence, or the accused engaged in conduct constituting the offence with the intention of taking advantage of that person's cognitive impairment.
28. The range of penalties will be seven years for the indecent assault of a cognitively impaired person, as opposed to 5 years for the indecent assault of a non-impaired person; five years for an act of indecency towards a cognitively impaired child under 16, as opposed to two years for an act of indecency towards a non-impaired child under 16; and three years for an act of indecency towards a cognitively impaired adult, as opposed to 18 months for a non-impaired adult.

29. Proposed new subsection (6) sets out defences for persons who are married or in a de facto relationship with the cognitively impaired person, or persons who perform acts for medical or hygienic purposes. The current defence for an accused who was not aware the other person was cognitively impaired is retained. Item [5] of schedule 1 amends section 80C—sexual servitude—by replacing the term "serious intellectual disability" with the phrase "cognitive impairment" within the meaning in division 10. This imports the new definition inserted into the sexual assault offences in division 10 of part 3 of the *Crimes Act 1900*, into the sexual servitude offences contained in division 10A. The effect of this amendment is identical to those made by items [1] and [2].
30. Item [6] of schedule 1 contains savings and transitional provision for the *Crimes Act 1900*. Schedule 2 sets out amendments to the *Criminal Procedure Act 1986*. Items [1] to [6], [8] to [10], and [12] replace the term "intellectually impaired persons" with the term "cognitively impaired persons" in the following provisions: section 76—recordings of interviews with vulnerable persons; section 91—witnesses may be directed to attend; section 185—recordings of interviews with vulnerable persons; section 306M(1)—definitions; section 306P—application of part; section 306R—evidence to which this division applies; and Section 306ZK—vulnerable persons have a right to the presence of a supportive person when giving evidence.
31. Item [7] replaces section 306M(2)—Definitions—by inserting the new definition of "cognitive impairment". A cognitive impairment includes any of the following: an intellectual disability; a developmental disorder, including an autistic spectrum disorder; a neurological disorder; dementia; a severe mental illness; or a brain injury. Item [11] similarly amends section 306T—wishes of vulnerable person to be taken into account—by replacing subsection (1)(b) with references to cognitive impairment, rather than intellectual impairment.

Issues Considered by the Committee

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

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

32. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.
- 33. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

5. DANGEROUS GOODS (ROAD AND RAIL TRANSPORT) BILL 2008

Date Introduced:	26 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Verity Firth MP
Portfolio:	Climate Change and Environment

Purpose and Description

1. This Bill makes provision for safety in the transport of dangerous goods by road and rail as part of the system of nationally consistent road and rail transport laws; and for other purposes.
2. This Bill incorporates the powers of authorised officers from the *Protection of the Environment Operations Act 1997* for DECC (Department of the Environment and Climate Change) officers, and from the *Occupational Health and Safety Act 2000* for WorkCover officers.
3. It provides for additional penalties up to three times the value of any monetary benefit obtained through non-compliance with the legislation. It will allow the adoption of the model regulations and the updated dangerous goods code.

Background

4. This Bill regulates the transport of flammable, toxic, corrosive and other substances such as petrol, acetylene, liquefied petroleum gas, chlorine, arsenic and acids. Due to their physical, chemical and toxicological properties, these goods pose a significant risk to human life, health, property and the environment, during their transportation.
5. It will replace the current New South Wales *Road and Rail Transport (Dangerous Goods) Act 1997*. All States and Territories will be expected to adopt the principles set out in the national model this year.
6. It adopts the principles set out in a model law that is part of a package of model laws, which includes a model Act, model regulations and a revised seventh edition of the Australian Code for the Transport of Dangerous Goods. The code is based on United Nations model regulations that are revised every two years, including technical changes to improve safety.
7. According to the Agreement in Principle speech:

This new package of legislation will provide the following benefits: improved compatibility with international regulations and codes on the classification, packaging and labelling of dangerous goods; a single set of regulations for domestic road and rail transport operators; a reduction in intermodal inefficiencies for the domestic land

transport industry; an up-to-date list of dangerous goods which will benefit both the transport industry and emergency services by making it easier to identify substances and related requirements; greater acceptance of dangerous goods from New Zealand under mutual recognition arrangements; and an extension of the period of dangerous goods drivers licences from three to five years, resulting in some savings for drivers and transport operators.

8. The package of laws has been prepared by the National Transport Commission on behalf of the Australian Transport Council. The Australian Transport Council is the Commonwealth, State and Territory ministerial forum that provides advice to governments on the coordination and integration of transport and road policy issues.
9. In 2007, the Council agreed that the package of laws should be adopted by all States and Territories. This package of laws aim to ensure that a business in New South Wales can transport dangerous goods across New South Wales and through other States and overseas under a consistent set of packaging, labelling and safety requirements.
10. This Bill maintains the current arrangement in New South Wales where both the Department of the Environment and Climate Change (DECC) and WorkCover New South Wales have been appointed as competent authorities. The DECC and WorkCover regulate dangerous goods transport according to a memorandum of understanding.
11. In general terms, WorkCover is responsible for classification, packaging and labelling issues. The DECC is responsible for regulating on-road and on-rail transport.
12. The main focus of the legislation is to maintain and improve the safe transportation of dangerous goods, however, the inclusion of additional compliance and enforcement provisions aim to reduce the potential commercial benefit to offenders for non-compliance.

The Bill

13. The object of this Bill is to regulate the transport of dangerous goods by road and rail as part of a national scheme and to enable regulations to be made containing the regulatory scheme. The Bill repeals and replaces the *Road and Rail Transport (Dangerous Goods) Act 1997*.

Outline of provisions

Clause 3 sets out the purpose of the proposed Act which is to regulate the transport of dangerous goods by road and rail in order to promote public safety and protect property and the environment.

Clause 4 defines certain words and expressions used in the proposed Act.

Clause 5 provides that the proposed Act will not apply to dangerous goods that are, or form part of, personal safety equipment of persons in a vehicle transporting dangerous goods, or that are in a container that is part of the fuel or battery system of a vehicle's engine or other equipment. This clause also provides that the *Radiation Control Act 1990* and any other laws relating to the storage and handling of dangerous goods (but not relating to the transport of dangerous goods by road or rail) will prevail over the proposed Act.

Part 2 Licensing and safety obligations

Clause 6 creates the following offences relating to the licensing of vehicles involved in the transport of dangerous goods by road or rail:

- (a) prohibiting a prime contractor from using a vehicle to transport dangerous goods by road or rail (other than as the driver of the vehicle) if the regulations require the vehicle to be licensed to transport the goods and that vehicle is not so licenced (maximum penalty 500 penalty units (currently \$55,000) or imprisonment for 2 years, or both, for an individual or 2,500 penalty units (currently \$275,000) for a body corporate),
- (b) prohibiting a person from consigning dangerous goods for transport by road on a vehicle without a licence if the person knows or reasonably ought to know that the regulations require the vehicle to be licensed to transport the goods and that vehicle is not so licenced (maximum penalty 500 penalty units (currently \$55,000) or imprisonment for 2 years, or both, for an individual or 2,500 penalty units (currently \$275,000) for a body corporate),
- (c) prohibiting a person from driving a vehicle transporting dangerous goods by road or rail if the person knows or reasonably ought to know that the regulations require the vehicle to be licensed and the vehicle is not so licensed (maximum penalty 100 penalty units (currently \$11,000)).

Clause 7 creates the following offences relating to the licensing of drivers involved in the transport of dangerous goods by road or rail:

- (a) prohibiting a person from employing, engaging, causing or permitting another person to drive a vehicle transporting dangerous goods by road or rail if the other person is required by the regulations to be licensed to drive the vehicle and the person is not so licensed (maximum penalty 500 penalty units (currently \$55,000) or imprisonment for 2 years, or both, for an individual or 2,500 penalty units (currently \$275,000) for a body corporate),
- (b) prohibiting a person from driving a vehicle transporting dangerous goods by road or rail if the regulations require the person to be licensed to drive the vehicle and the person is not so licensed (maximum penalty 100 penalty units (currently \$11,000)).

Clause 8 makes it an offence to consign, or arrange the transport of, goods that the regulations identify as being too dangerous to transport (maximum penalty 500 penalty units (currently \$55,000) or imprisonment for 2 years, or both, for an individual or 2,500 penalty units (currently \$275,000) for a body corporate).

Clause 9 makes it an offence to fail to ensure that dangerous goods are transported in a safe manner or to fail to comply with a provision of the proposed Act where the person knows or reasonably ought to know that the failure would be likely to endanger the safety of another person or of property or the environment. The maximum penalty for the offences under the proposed section is 500 penalty units (currently \$55,000) or imprisonment for 2 years, or both, for an individual or 2,500 penalty units (currently \$275,000) for a body corporate.

Clause 10 creates a similar offence with higher penalties if the conduct concerned caused the death or serious injury of another person. Specifically, the proposed section provides that a person:

- (a) whose conduct causes the death or serious injury of another person, and
- (b) who owes a duty under proposed section 9 when engaging in that conduct, and
- (c) who is reckless as to the danger of death or serious injury to any person that arises from that conduct, is guilty of an offence.

The offence carries a maximum penalty of 1,000 penalty units (currently \$110,000) or imprisonment for 4 years, or both, for an individual or 5,000 penalty units (currently \$550,000) for a body corporate.

Clause 11 provides for a special defence to prosecutions for an offence against the proposed Act or the regulations for owners and operators of vehicles transporting dangerous goods. A person who is such an owner or operator will not be guilty of the offence if the person establishes that the vehicle was being used at the relevant time by:

- (a) another person not entitled (whether by express or implied authority or otherwise) to use it, other than an employee or agent of the alleged offender, or
- (b) an employee of the alleged offender who was acting at the relevant time outside the scope of the employment, or
- (c) an agent (in any capacity) of the alleged offender who was acting at the relevant time outside the scope of the agency.

Clause 12 provides that a director or person concerned in the management of a corporation is liable for offences committed by the corporation unless they show they were not in a position to influence the conduct of the corporation or, if in such a position, used all due diligence to prevent the offence.

Part 3 Regulations

Clause 13 provides that the Governor may make regulations on a wide range of matters required or permitted to be prescribed by the proposed Act or that are necessary or convenient to be prescribed. The clause sets out a number of particular matters in relation to which regulations may be made, including the identification, classification, labelling, packaging, stowage and transport of dangerous goods, mandatory licensing of persons involved in the transport of dangerous goods and obligations arising in an emergency. The regulations made under the proposed section will contain the regulatory scheme for the transport of dangerous goods by road or rail.

Clause 14 provides that the regulations may apply, adopt and incorporate codes, standards and rules relating to dangerous goods or to transport by road or rail.

Clause 15 enables the regulations to create offences for breach of the regulations with maximum penalties of 60 penalty units (currently \$6,600) for an individual or 300 penalty units (currently \$33,000) for a body corporate.

Part 4 Administration

Division 1 Competent Authorities and their authorised officers

Clause 16 provides that the Environment Protection Authority and the WorkCover Authority are the Competent Authorities for the purposes of the proposed Act. The Competent Authorities are to be responsible for the administration and enforcement of the proposed Act and the regulations.

Clause 17 states that a Competent Authority may appoint a person to be an authorised officer. A Competent Authority may specify that such an appointment is subject to conditions or restrictions and may issue an identification card for a person appointed as an authorised officer.

Clause 18 requires authorised officers, who are not police officers, to carry identification cards while carrying out their duties and, if requested to do so by any person affected by the exercise of a function by an authorised officer under the proposed Act, produce the officer's identification card to the person.

Clause 19 makes it an offence for a person who has been issued with an identification card not to return it as soon as practicable after ceasing to be an authorised officer. The offence carries a maximum penalty of 10 penalty units (currently \$1,100).

Clause 20 empowers a Competent Authority to delegate his or her powers under the proposed Act to authorised officers or any person, or any class of persons, authorized for the purposes of the proposed section by the regulations.

Division 2 Powers of authorised officers

Clause 21 provides that the investigative functions of authorised officers under Chapter 7 and section 319A of the *Protection of the Environment Operations Act 1997* are conferred on authorised officers appointed by the Environment Protection Authority for the purposes of exercising functions under the proposed Act.

Clause 22 provides that the investigative functions of inspectors under Division 2 of Part 5 of the *Occupational Health and Safety Act 2000* are conferred on authorised officers appointed by the WorkCover Authority for the purposes of exercising functions under the proposed Act.

Clause 23 makes it an offence for a person to:

- (a) obstruct, hinder or impede any authorised officer or a person assisting an authorised officer in the exercise of the officer's functions under the proposed Act, or
- (b) intimidate or threaten or attempt to intimidate any authorised officer in the exercise of the officer's functions under the proposed Act.

The offence carries a maximum penalty of 100 penalty units (currently \$11,000) or imprisonment for 6 months, or both, for an individual or 500 penalty units (currently \$55,000) for a body corporate.

Clause 24 makes it an offence for a person to impersonate, or falsely represent that the person is, an authorised officer. The offence carries a maximum penalty of 100 penalty units (currently \$11,000).

Clause 25 provides for the exercise of the powers of authorised officers of other jurisdictions in this State and the exercise of powers in other jurisdictions by authorised officers appointed under the proposed Act.

Part 5 Investigation, improvement and prohibition notices

Division 1 Investigation notices

Clause 26 authorises an authorised officer who has exercised any power under proposed Part 4 to issue an investigation notice to a person if the authorised officer believes on reasonable grounds that it is necessary to issue the notice in order to facilitate the exercise of the authorised officer's powers under that Part.

Clause 27 makes it an offence, while an investigation notice is in force, for the person to whom the notice is issued to fail to:

- (a) stop the use or movement of, or interference with, any substance or thing that is specified in the notice, and
- (b) take measures to prevent the disturbance of any substance or thing that is specified in the notice, or any specified area in which it is located.

The offence carries a maximum penalty of 100 penalty units (currently \$11,000) or imprisonment for 6 months, or both, for an individual or 500 penalty units (currently \$55,000) for a body corporate.

Division 2 Improvement notices

Clause 28 provides that if an authorised officer is of the opinion that any person:

- (a) is contravening any provision of the proposed Act or the regulations, or
- (b) is likely to contravene such a provision, or
- (c) has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated, the authorised officer may issue to the person a notice requiring the person to remedy the contravention or the matters occasioning it within the period specified in the notice (being a reasonable period for the person to comply with the requirements imposed by the notice).

Clause 29 provides that a person who, without reasonable excuse, fails to comply with a requirement imposed by an improvement notice is guilty of an offence that carries a maximum penalty of 100 penalty units (currently \$11,000) or imprisonment for 6 months, or both, for an individual or 500 penalty units (currently \$55,000) for a body corporate.

Division 3 Prohibition notices

Clause 30 provides that if an authorised officer is of the opinion that there is occurring or about to occur any dangerous activity, the authorised officer may issue to the person who has or may be reasonably presumed to have control over the activity a notice prohibiting the carrying on of the activity until the authorised officer has certified in writing that the activity is not or is no longer a dangerous activity.

Clause 31 provides that a person who, without reasonable excuse, fails to comply with a requirement imposed by a prohibition notice is guilty of an offence that carries a maximum penalty of 100 penalty units (currently \$11,000) or imprisonment for 6 months, or both, for an individual or 500 penalty units (currently \$55,000) for a body corporate.

Division 4 General provisions relating to notices

Clause 32 provides that if:

- (a) an authorised officer believes on reasonable grounds that there is occurring or about to occur any dangerous activity, and
- (b) either:
 - (i) a person to whom a notice under proposed section 28 (an improvement notice) or 30 (a prohibition notice) has been given has not complied with the notice, or
 - (ii) giving such a notice to a person would not be appropriate to avert, eliminate or minimise the danger, the authorised officer may take or cause to be taken any action the authorised officer believes on reasonable grounds to be necessary to avert, eliminate or minimise the danger.

Clause 33 provides that an authorised officer may include in a notice under the proposed Part directions as to the measures to be taken to remedy any contravention or matter to which the notice relates or to otherwise comply with the notice.

Clause 34 provides that a person who is issued with a notice under the proposed Part may apply in writing to the relevant Competent Authority for a review of the notice and the Competent Authority is to undertake the review.

Clause 35 provides that a person who is not satisfied with the result of such a review of a notice may appeal against the notice to:

- (a) in the case of a review by the Environment Protection Authority—the Land and Environment Court, or
- (b) in the case of a review by the WorkCover Authority—a Local Court constituted by an Industrial Magistrate sitting alone.

The court to which an appeal is made may, on the appeal, confirm the notice, vary it or revoke it.

Clause 36 provides a process to apply for the stay of certain notices while under review.

Clause 37 deals with the withdrawal of notices.

Clause 38 makes it clear that the revocation or withdrawal of a notice under the proposed Part does not prevent the issue of any other notice.

Clause 39 deals with the service of notices.

Clause 40 provides that an authorised officer may cause a notice containing a copy of or extract from a notice under the proposed Part, or of the matter contained in the notice, to be exhibited at a place of work or on a vehicle concerned in a manner approved by the Competent Authority. It will be an offence for a person to destroy, damage or remove a notice so exhibited except with the approval of the Competent Authority or an authorised officer

(maximum penalty 20 penalty units (currently \$2,200) for an individual or 100 penalty units (currently \$11,000) for a body corporate).

Clause 41 provides that the issue, variation, revocation or withdrawal of a notice under the proposed Part does not affect any proceedings for an offence against the proposed Act or the regulations in connection with any matter in respect of which the notice was issued.

Part 6 Exemptions

Clause 42 enables a Competent Authority to grant an exemption to a person or class of persons from compliance with a provision of the regulations. Failure to comply with a condition in an exemption is an offence that carries a maximum penalty of 100 penalty units (currently \$11,000) or imprisonment for 6 months, or both, for an individual or 500 penalty units (currently \$55,000) for a body corporate. The proposed section also details various procedural and formal requirements relating to exemptions.

Clause 43 deals with the cancellation and variation of exemptions and conditions.

Clause 44 provides for the internal review of certain decisions relating to exemptions made by a Competent Authority.

Clause 45 provides that a person who is not satisfied with the result of such an internal review may appeal against the notice to:

- (a) in the case of a review by the Environment Protection Authority—the Land and Environment Court, or
- (b) in the case of a review by the WorkCover Authority—a Local Court constituted by an Industrial Magistrate sitting alone.

The court to which an appeal under this section is made may, on the appeal, confirm the notice, vary it or revoke it.

Clause 46 provides that the Minister administering the proposed Act may order a suspension or variation of the regulations or specified parts of the regulations.

Part 7 Criminal and other proceedings

Division 1 Proceedings for offences generally

Clause 47 sets out the courts in which proceedings for offences under the proposed Act may be brought and the time within which such proceedings must be brought.

Clause 48 deals with the issuing and serving of penalty notices for offences against the proposed Act and the regulations.

Division 2 Court orders in connection with offences

Clause 49 provides that the proposed Division applies where a court finds that a person has committed an offence against the proposed Act or the regulations (*the offender*) and contains interpretation provisions.

Clause 50 contains machinery provisions.

Clause 51 enables a court to order the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, represents 3 times the amount of any monetary benefits that:

- (a) was received or receivable, by the person or by an associate of the person, from the commission of the offence, and
- (b) in the case of a journey that was interrupted or not commenced because of action taken by an authorised officer in connection with the commission of the offence—would have been received or receivable, by the person or by an associate of the person, from the commission of the offence had the journey been completed.

Clause 52 enables a court that finds the driver of a vehicle guilty of an offence to order either or both of the following:

- (a) that a licence the driver is required to have by the regulations is:
 - (i) cancelled, or
 - (ii) modified or suspended for a specified period,
- (b) that the driver is disqualified for a specified period from obtaining or holding a licence a person is required to have by the regulations.

Clause 53 enables the court, if it considers an offender to be a systematic or persistent offender against the proposed Act or the regulations, to make a supervisory intervention order relating to the offender requiring the offender (at the offender's own expense and for a specified period not exceeding one year) to do any or all of the following:

- (a) to do specified things that the court considers will improve the offender's compliance with the proposed Act or the regulations or specified provisions of the proposed Act or the regulations, including (for example) the following:
 - (i) appointing or removing staff to or from particular activities or positions,
 - (ii) training and supervising staff,
 - (iii) obtaining expert advice as to maintaining appropriate compliance,
 - (iv) installing monitoring, compliance, managerial or operational equipment (including, for example, intelligent transport system equipment),
 - (v) implementing monitoring, compliance, managerial or operational practices, systems or procedures,
- (b) to conduct specified monitoring, compliance, managerial or operational practices, systems or procedures subject to the direction of the Competent Authority or a person nominated by the Competent Authority,
- (c) to furnish compliance reports to the Competent Authority or the court or both as specified in the order,
- (d) to appoint a person to have responsibilities:
 - (i) to assist the offender in improving compliance with the proposed Act and the regulations or specified provisions of the proposed Act or the regulations, and
 - (ii) to monitor the offender's performance in complying with this or specified provisions of the proposed Act and the regulations and in complying with the requirements of the order, and
 - (iii) to furnish compliance reports to the Competent Authority or the court or both as specified in the order.

Clause 54 enables a court to order that an offender be prohibited for a specified period from involvement in the transport of dangerous goods by road or rail.

Clause 55 enables a court to order, in addition to imposing any other penalty imposed on the offender, that any dangerous goods related to the offence and their container to be forfeited to the Crown.

Clause 56 enables a court to order that the offender pay to certain public authorities and persons the costs and expenses incurred, or pay compensation for the loss or damage suffered, by the public authorities and persons as a result of the offence concerned.

Clause 57 enables a public authority or person to recover similar costs, expenses and compensation directly from the offender (after the offence is proved) by way of an action in the Land and Environment Court.

Clause 58 enables a court to order an offender to pay to a Competent Authority costs that:

- (a) were reasonably incurred in taking that action, and
- (b) are directly related to the investigation of the offence.

Those costs include costs for testing, transporting, storing and disposing of the dangerous goods and other evidence.

Part 8 Miscellaneous

Clause 64 provides that the proposed Act binds the Crown.

Clause 65 protects an authorised officer from civil liability for acts or omissions done honestly and in good faith in the course of his or her duties.

Clause 66 restricts the disclosure of information obtained by persons in connection with the administration or execution of the proposed Act.

Clause 67 provides that any term of any contract or agreement that purports to exclude, limit or modify the operation of the proposed Act or the regulations or of any provision of the proposed Act or the regulations is void to the extent that it would otherwise have that effect.

Clause 68 enables a public authority that incurs costs as a result of an incident involving the escape of dangerous goods or an explosion or fire involving dangerous goods, or involving the danger of such an escape, explosion or fire, to recover so much of the costs as were reasonably incurred.

Clause 69 protects a person from civil liability for an act done honestly and in good faith and without any fee, charge or other reward, for the purpose of assisting or attempting to assist in a situation in which an emergency or accident involving dangerous goods occurs or is likely to occur.

Clause 70 requires the Minister administering the proposed Act to publish in the Gazette, as soon as practicable after a regulation is made, details of where any regulation, code, standard or rule applied or adopted by the regulation, or any amendment or replacement of the regulation, code, standard or rule, may be obtained or inspected.

Clause 71 empowers the Minister administering the proposed Act to delegate by instrument in writing to a Competent Authority all or any of the Minister's powers under the proposed Act (other than the power to make an application order or emergency order and the power of delegation).

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains a formal provision that allows regulations of a savings or transitional nature to be made and another provision that saves the appointment of authorised officers appointed under the *Road and Rail Transport (Dangerous Goods) Act 1997*.

Schedule 2 Amendment of other Acts

Schedule 2 makes consequential amendments to the Acts set out in that Schedule. More specifically, **Schedule 2.3** amends section 210 (Freedom from victimisation) of the *Industrial Relations Act 1996* to prohibit an employer or industrial organisation from victimising an employee or prospective employee because the employee or prospective employee has informed any person or body of, or given evidence in relation to, a breach or alleged breach of the proposed Act or the regulations under that Act (or a provision of a law of another State or Territory that corresponds to the proposed Act or the regulations).

Issues Considered by the Committee

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

Issue: Strict Liability

14. Numerous clauses⁴ in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the

⁴ Clauses such as: Part 2 – proposed clause 7; clause 8; Part 4, Division 1 – proposed clause 19; Part 5, Division 1 – proposed clause 27; Part 5, Division 4 – proposed clause 40; Part 6 – proposed clause 42; Part 8 – proposed clause 66.

offender intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence.

- 15. The Committee, however, notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.⁵**
- 16. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, along with the availability of some kind of defence.**
- 17. The Committee also notes that there is a public interest in ensuring that the provisions of the Bill are complied with and that facilitate the effective regulation and management of safety in the transportation of dangerous goods by road and rail.**
- 18. Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.**

Issue: Retrospectivity – Schedule 1, Part 2 – proposed clause 3 (3) – authorised officers:

19. Proposed clause 3 (3) reads: The functions conferred on an authorised officer by Division 2 of Part 4 of this Act extend to matters arising before the commencement of that Division.

- 20. The Committee will always be concerned with retrospective applications of provisions. However, the Committee considers the retrospectivity of the above clause does not trespass unduly on personal rights and liberties as it refers to existing general powers (with minor modification) of authorised officers, and incorporates these powers from the *Protection of the Environment Operations Act 1997* for the Department of the Environment and Climate Change officers, and from the *Occupational Health and Safety Act 2000* for the WorkCover officers.**

Issue: Reverse Onus of Proof – Part 2 - proposed sections 11 (2)(a) and (b) Special defence for owners or operators:

21. Proposed section 11 (2) reads that: If the offence relates to a breach of this Act or the regulations in connection with alleged deficiencies concerning the vehicle or dangerous goods, the defence is not available unless the alleged offender establishes that:
 - (a) the vehicle or dangerous goods had not, before they ceased to be under the alleged offender's control, been driven or transported on a road in Australia in breach of this Act or the regulations or a corresponding law arising in connection with all or any of those alleged deficiencies, and

⁵ Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

- (b) one or more material changes, resulting in the alleged breach, had been made after the vehicle or dangerous goods had ceased to be under the alleged offender's control.

- 22. The Committee notes that these provisions effectively reverse the legal onus of proof that requires the prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence.**
- 23. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party⁶. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person such as an alleged offender. Accordingly, the Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.**

Issue: Reverse Onus of Proof – Part 2 - proposed sections 12 (1)(a) and (b) Offences by corporations – liability of directors and managers:

24. Proposed section 12 (1) reads that: If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that the director or person:
- (c) was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- (d) being in such a position, used all due diligence to prevent the contravention by the corporation.

- 25. The Committee notes that these provisions effectively reverse the onus of proof that requires the prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence.**
- 26. However, as discussed earlier, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person such as a director of the corporation or a manager.**
- 27. Therefore, the Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.**

⁶ Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 38th Parliament (May 1996 – August 1998)*, para 2.108: "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".

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

Issue: Ill-Defined and Wide Powers – Part 7, Division 2 – proposed sections 51 (1) and (2) – Orders regarding monetary benefits - No default maximum of penalty

28. The Bill empowers the court to order the offender to pay as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, that represents 3 times the amount of any monetary benefits, which according to proposed section 51 (1) (a): was received or receivable, by the person or by an associate of the person, from the commission of the offence, and (b): in the case of a journey that was interrupted or not commenced because of action taken by an authorised officer in connection with the commission of the offence – would have been received or receivable, by the person or by an associate of the person, from the commission of the offence had the journey been completed.
29. Proposed subsection (2) reads that: the amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act. Therefore, no default maximum amount is set by the Bill.

30. The Committee is concerned that the failure to provide a default maximum amount of an additional penalty may constitute ill-defined or wide powers and an inappropriate delegation of legislative power, and accordingly, refers this to Parliament.

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

31. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

6. ELECTRICITY INDUSTRY RESTRUCTURING (RESPONSE TO AUDITOR-GENERAL REPORT) BILL 2008

Date Introduced:	28 August 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Michael Costa MLC
Portfolio:	Infrastructure

Purpose and Description

1. This Bill makes further provision for the restructuring of the State electricity industry in connection with the report of the Auditor-General on the proposed restructuring.
2. The object of this Bill is to impose the following additional requirements on the restructuring of the State's electricity industry under the proposed *Electricity Industry Restructuring Act 2008* in response to the report of the Auditor-General on the restructuring:
 - (a) the Government will be required to determine the retention value to the State and a reserve price for State electricity assets before any State electricity assets are transferred to the private sector,
 - (b) the Secretary of the Treasury will be required to continuously evaluate the manner in which the restructuring is proposed to be implemented (including the method and timing of transactions),
 - (c) the lease of a power station must not provide for the lessor to indemnify the lessee in respect of any liability under any carbon pollution reduction scheme of the Commonwealth.
3. The Bill also requires Country Energy to continue the operation of its customer service centres in the localities listed in Schedule 1 to the Bill.
4. It is cognate with the *Electricity Industry Restructuring Bill 2008 (No 2)*.

Background

5. The first Bill (*Electricity Industry Restructuring Bill 2008*) has already been reported on in *Digest No. 8* of 16 June 2008.
6. The *Electricity Industry Restructuring Bill 2008* and the *Community Infrastructure (Intergenerational) Fund Bill 2008* were introduced into the Legislative Assembly on 4 June 2008. The *Community Infrastructure (Intergenerational) Fund Bill 2008* deals with the appropriation of transaction proceeds from a special-purpose infrastructure fund. That Bill and the current Bills should be seen as a single package of legislation.

7. Since June 2008, the Auditor-General (Supplementary Powers) Act has been passed and the Auditor-General's review has been laid before Parliament. According to the Second Reading speech, the Auditor-General's review found there was nothing that caused him to believe:

... that the Government's strategy for the transfer of assets to the private sector as set out in the Strategy Document supplied by the Treasurer is not appropriate for maximising financial value for taxpayers.
8. The Auditor-General did not make any recommendations for amendments to the legislation, the Government has decided to introduce the *Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008* in order to implement suggestions of the Auditor-General's review. It aims to give effect to the results of the Auditor-General's review.
9. The *Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008* addresses issues arising from the Auditor-General's review of the Government's transaction strategy.
10. This Bill provides that the Government is required to determine the retention value and reserve price of the State's electricity assets prior to any transfer to the private sector. These amounts are market sensitive and will be kept confidential. They will not be disclosed to any prospective bidders. They will be taken into account by the Government before undertaking any transactions. They will also provide a benchmark for the Auditor-General once the restructuring is complete to assess its effectiveness in meeting the Government's objectives.
11. The Bill also prohibits the provision of indemnities to lessees of New South Wales generators in relation to liabilities arising under a carbon emissions trading scheme. This ensures that any risk that flows from the introduction of the Commonwealth's carbon pollution reduction scheme is borne by the private sector.
12. According to the Second Reading speech:

The Bill requires the Treasury to continuously evaluate the proposed transaction strategy against the impact of external factors, including financial market conditions, infrastructure capital demand and the carbon pollution reduction scheme, with the scope to delay generator transactions if the Commonwealth's white paper does not provide sufficient certainty. Further, as transactions are completed a review of the State's financial position and particularly the State's forward capital program will be undertaken. In response to the issues raised in the Rural Community Impact Statement the *Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008* will also mandate for the continued operation of Country Energy's customer service centres in support of their distribution network businesses, which will remain in public ownership.

The Bill

13. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the commencement of the provision of the EIR (Electricity Industry Restructuring) Act that authorises the restructuring of the State's electricity industry.

Clause 3 provides for the proposed Act to be construed as if it formed part of the EIR Act.

Clause 4 requires the Government to determine the retention value to the State and a reserve price for State electricity assets before any State electricity assets are transferred to the private sector.

Clause 5 requires the Secretary of the Treasury to continuously evaluate the manner in which the restructuring is proposed to be implemented, including the method and timing of transactions, having regard to specified factors.

Clause 6 prohibits the terms of a lease of a power station from providing indemnity to the lessee in respect of any liability of the lessee under any carbon pollution reduction scheme of the Commonwealth that accrues in connection with the operation of the power station.

Clause 7 requires the continued operation of Country Energy customer service centres in the localities specified in Schedule 1.

Clause 8 is a general regulation-making power.

Schedule 1 Country Energy customer service centre localities

Schedule 1 lists the localities in which Country Energy customer service centres are required to continue to operate.

Issues Considered by the Committee

<p>14. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p>
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The Committee makes no further comment on this Bill.

7. ELECTRICITY INDUSTRY RESTRUCTURING BILL 2008 (NO 2)

Date Introduced:	28 August 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Michael Costa MLC
Portfolio:	Infrastructure

Purpose and Description

1. This Bill provides for the restructuring of part of the State's electricity industry by authorising and facilitating the transfer of certain assets to the private sector:
2. The restructure provides for the lease of the power stations of an electricity generator and the transfer of the rest of its business,
3. The restructure provides for the transfer of the retail business of an electricity distributor and the transfer by initial public offer of the business of an electricity generator (including power stations). The Bill specifically provides that the distribution and transmission assets (the "poles and wires") of an electricity distributor will remain in public ownership.
4. The *Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008* is cognate with this Bill.

Background

5. The first Bill (*Electricity Industry Restructuring Bill 2008*) has already been reported in *Digest No. 8* of 16 June 2008. The same background information and concerns are included in this report since this Bill, the *Electricity Industry Restructuring Bill 2008 (No 2)*, includes very few changes from the first Bill.
6. The *Electricity Industry Restructuring Bill 2008* and the *Community Infrastructure (Intergenerational) Fund Bill 2008* were introduced into the Legislative Assembly on 4 June 2008. The *Community Infrastructure (Intergenerational) Fund Bill 2008* deals with the appropriation of transaction proceeds from a special-purpose infrastructure fund. That Bill and the current Bills should be seen as a single package of legislation.
7. Following the investigation and report by Professor Anthony Owen into electricity supply in New South Wales, it was recognised that there was a critical need for additional investment in baseload capacity from 2013 – 2014. Following on from this, the Government proposed measures designed to secure to State's future energy supply.
8. In order to implement these measures, the Bill will authorise the restructuring of the New South Wales electricity industry to secure the State's future electricity supply. This

restructure involves the sale of the State's retail electricity businesses and the long-term lease of the State's generation assets.

9. The restructure plan provides for the State's electricity distributors – EnergyAustralia, Country Energy and Integral Energy – to transfer their retail business to the private sector while retaining their network distribution businesses. The Bill expressly provides that the distribution and transmission assets (the 'poles and wires') will remain in public ownership.
10. The restructure plan also provides that the State's electricity generators – Macquarie Generation, Delta Electricity and Eraring Energy – the authority to lease their power stations. The Bill expressly provides that, subject to certain exceptions, power stations may only be leased and cannot be transferred.
11. The Bill provides that authorised transfers of the generation and retail assets can be combined in a single transaction, including by way of a public share offer or an initial public offering. If an initial public offering is undertaken, the Bill imposes a shareholding restriction for between three and five years, limiting any individual stake in the float company to no more than between 10% and 15%.
12. The Auditor-General will be able to perform an audit of the process arising from their functions under the *Public Finance and Audit Act 1983*. The Auditor-General has the discretion to report to Parliament on any matter, at any time, that the Auditor-General considers necessary and any such report is to be tabled in Parliament.
13. The Bill includes provisions to ensure that existing employees affected by the reforms will retain their accrued sick leave, annual leave, long service leave and superannuation entitlements. The Bill also expressly allows the making of transfer payments to employees.
14. Consumer protection will be ensured by allowing the State's independent pricing regulator – the Independent Pricing and Regulatory Authority Tribunal (IPART) – the power to set regulated electricity retail prices for households and small business until June 2013, with the possibility of extending the date by regulation. To assist in the execution of their functions, the Bill expands the information-gathering powers of IPART.
15. The Auditor-General did not make any recommendations for amendments to the legislation, the Government has decided to introduce the cognate bill, the *Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008*, in order to implement suggestions of the Auditor-General's review. It aims to give effect to the results of the Auditor-General's review.
16. The Bills aim to ensure that the Government's objectives are met. Four reports have been commissioned to review and recommend improvements to the Government's proposals: the Owen report, the Unsworth review, the Rural Community Impact Statement and the Auditor-General's review.

The Bill

Outline of Provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act. **Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 contains definitions of key terms used in the proposed Act. Schedule contains other definitions. The clause defines *authorised restructuring* to mean the transfer of State electricity assets authorised by Part 2.

Part 2 Restructuring of State electricity industry

Clause 4 authorises the transfer to the private sector of State electricity assets as described in the Overview.

Clause 5 provides that the distribution and transmission assets of an electricity distributor and the transmission system of TransGrid must remain in public ownership.

Clause 6 authorises the transfer of State electricity assets between public sector agencies.

Clause 7 differs from the first introduced Bill. It now reads that it provides the proceeds of the transfer of State electricity assets to the private sector pursuant to the authorised restructuring belong to and are payable directly to the State. The first Bill sets out in detail the proceeds of restructuring with the proceeds paid into the NSW Community Infrastructure (Intergenerational) Fund under the *Community Infrastructure (Intergenerational) Fund Act 2008*. The first Bill sets out how deductions are authorised to be made from the restructure proceeds.

Part 3 Facilitating the authorised restructuring

Division 1 Functions of public sector agencies

Clause 8 provides that the Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of the authorised restructuring.

Clause 9 provides for the establishment of statutory State owned corporations as *restructure* SOC's for the purposes of the authorised restructuring.

Clause 10 provides for the establishment of companies as *restructure companies* for the purposes of the authorised restructuring (including by means of the corporate conversion of a State electricity corporation or restructure SOC).

Clause 11 provides that each State electricity corporation and *restructure entity* (a restructure SOC or restructure company) has and may exercise all such functions as are necessary or convenient for the purposes of the authorised restructuring. The clause also authorises the Treasurer to act for and on behalf of and in the name of a State electricity corporation or restructure entity in the exercise of any of its functions for the purposes of the authorised restructuring.

Clause 12 provides that State electricity corporations and restructure entities are subject to the direction and control of the Treasurer in the exercise of any of their functions for the purposes of the authorised restructuring.

Clause 13 establishes the Electricity Assets Ministerial Holding Corporation to hold State electricity assets acquired by it or transferred to it and to carry on any activities or business that relate to any State electricity assets held by it.

Division 2 Arrangements for transfer of assets, staff and functions

Clause 14 authorises the Treasurer to make vesting orders under Schedule 4 for the purposes of the authorised restructuring.

Clause 15 activates Schedule 5 which provides for the transfer of employment of employees of electricity distributors and electricity generators as a consequence of the authorised restructuring.

Clause 16 deals with the transfer of State electricity assets between public sector agencies and provides that a public sector agency to which State electricity assets are transferred is, as the new operator of those assets, deemed to be an electricity distributor or electricity generator (as appropriate to the assets transferred) and is entitled to be issued with any relevant operating licence.

Clause 17 provides for the Treasurer to give directions for the issue of any relevant authorisation under various laws to a person who becomes or is proposed to become the new operator of State electricity assets pursuant to the authorised restructuring.

Clause 18 authorises the Electricity Assets Ministerial Holding Corporation to acquire land for the purposes of the authorised restructuring by agreement or compulsory acquisition that the Corporation determines to be land on which State electricity assets of an electricity generator are situated or land used or occupied by an electricity generator.

Division 3 Operation of other laws

Clause 19 provides that various State taxes and charges are not payable by public sector agencies in connection with transactions for the purposes of the authorized restructuring and authorises the Treasurer to exempt other persons from liability for State taxes and charges in connection with the authorised restructuring.

Clause 20 authorises the release of information by the Auditor-General for the purposes of the authorised restructuring.

Clause 21 exempts contracts for the sale of land from section 52A of the *Conveyancing Act 1919* when entered into for the purposes of the authorised restructuring.

Clause 22 confers exemption from the *Trade Practices Act 1974* of the Commonwealth and the *Competition Code of New South Wales* for agreements entered into by a State electricity corporation or restructure entity in connection with the management of electricity trading risks.

Clause 23 activates the maximum shareholding restriction provided for by Schedule 6 when the authorised restructuring is effected by the sale of a restructure company by an initial public offer of securities in the company.

Part 4 Miscellaneous

Clause 24 authorises the Treasurer to delegate any function of the Treasurer under the proposed Act to the Secretary of the Treasury or any other officer of the Government Service prescribed by the regulations.

Clause 25 provides for the Act to bind the State and all other Australian jurisdictions.

Clause 26 provides for the provisions of the proposed Act to prevail in the event of an inconsistency between the proposed Act and other State legislation.

Clause 27 provides for the operation of the proposed Act outside the State.

Clause 28 provides for the interpretation of the proposed Act so as not to exceed the legislative power of the State.

Clause 29 authorises the making of regulations to exclude the operation of provisions of the Corporations legislation to matters arising under the proposed Act.

Clause 30 prevents the operation of the proposed Act and the various arrangements and actions that it authorises from constituting a breach of various civil obligations.

Clause 31 protects the validity of provisions of leases of State electricity assets entered into for the purposes of the authorised restructuring.

Clause 32 protects the State from claims for compensation in connection with the enactment or operation of the proposed Act.

Clause 33 provides for the issue of evidentiary certificates by the Treasurer.

Clause 34 provides for how documents are to be given or served for the purposes of the proposed Act.

Clause 35 provides for the director of a corporation to be guilty of an offence committed by the corporation if the director knowingly authorised or permitted the corporation's contravention.

Clause 36 provides for proceedings for offences to be dealt with summarily before a Local Court or before the Supreme Court in its summary jurisdiction.

Clause 37 is a general regulation-making power.

Clause 38 activates Schedule 7 which contains savings and transitional provisions.

Clause 39 activates Schedule 8 which contains amendments to other legislation.

Schedule 1 Interpretative provisions

Schedule 1 contains definitions and other interpretative provisions for the purposes of the proposed Act.

Schedule 2 Provisions concerning restructure SOC

Schedule 2 contains special provisions for the board of directors, chief executive officer, dividends scheme and other procedures of a restructure SOC.

Schedule 3 Corporate conversion of State electricity corporations and restructure SOC

Schedule 3 provides the procedure for the corporate conversion of a State electricity corporation or restructure SOC to a restructure company.

Schedule 4 Vesting of assets, rights and liabilities

Schedule 4 provides for the making of vesting orders by the Treasurer for the purposes of the authorised restructuring. Vesting orders operate to vest assets, rights and liabilities of a State electricity corporation or restructure entity in the transferee specified in the order.

Schedule 5 Transfer of electricity employees

Schedule 5 provides a mechanism for the transfer of employment of employees of electricity distributors and electricity generators and for the terms and conditions of the transferred employment.

Schedule 6 Ownership restrictions in floated restructure companies

Schedule 6 provides for the maximum shareholding restriction that is to be applicable to a restructure company that is sold by means of an initial public offer of shares in the company.

Schedule 7 Savings, transitional and other provisions

Schedule 7 enacts a savings and transitional regulation-making power and contains special provisions for the transfer of power stations and associated assets operated by Eraring Energy.

Schedule 8 Amendment of Acts and Regulation

Schedule 8 makes consequential amendments to various Acts and a Regulation.

Issues Considered by the Committee

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

Issue: Denial of compensation

17. Proposed Clause 32(1) reads:

Compensation is not payable by or on behalf of the State:

- (a) because of the enactment or operation of this Act, or for any consequence of that enactment or operation, or
- (b) because of any statement or conduct relating to the enactment of the Act.

18. However, Clause 32(2) provides that the rule in Clause 32(1) does not extend to compensation payable under a restructure arrangement to a party to the restructure arrangement in connection with the performance of obligations under the restructure arrangement.

19. While the Act enables parties to the restructure agreement to seek compensation for breaches of contract, it expressly excludes third parties affected by the restructure from seeking remuneration or compensation from the Crown or any public sector agency in relation to the restructure.

20. The Committee notes that the government believes that this provision may be necessary to ensure that there is legal finality once the authorised restructuring is completed and that there are precedents for this type of provision in other Acts such as the *Freight Rail Corporation (Sale) Act 2001*.

21. Proposed Schedule 7, Part 2, Clause 2 (4) (b): Provisions relating to Shoalhaven or Warragamba electricity assets, reads:

Any owner of an interest in the land is not entitled to be paid compensation (whether under the *Land Acquisition (Just Terms Compensation) Act 1991* or otherwise) if the land is acquired by compulsory process and the owner is the Sydney Catchment Authority or any other public sector agency.

22. The Committee is of the view that the right to seek remuneration or compensation is an important right and that these rights should not be removed or restricted by legislation unless there is a clear public interest in doing so. The Committee refers this matter to Parliament.

Issue: Self incrimination – Proposed Schedule 6, Part 3, Clause 6(3)

23. Proposed Schedule 6, Part 3, Clause 6 (3) authorises that regulations may make provisions with respect to requiring a person to keep and retain records where the records are relevant to an ownership matter and may also require that person to give

information to the Treasurer or a floated restructure company that is relevant to an ownership matter.

24. The Schedule does not excuse a person from giving information to the Treasurer or a floated restructure company on the ground that the information may tend to incriminate the person or expose the person to a penalty.
25. Generally, the Committee would express reservations about proposed legislation that compels an individual to provide self-incriminating evidence.
26. Proposed Schedule 6, Part 3, Clause 6 (4) provides that any information obtained from a person in compliance with a requirement of regulations made in respect to information gathering by the Treasurer is not admissible against that person in criminal proceedings (other than proceedings for an offence to refuse to provide information).
27. The Committee is always concerned about the denial of the common law right against self-incrimination and believes that it should be balanced against the public interest. However, it is clearly in the public interest that information relating to company ownership matters be divulged to the Treasurer. Further, the information to be provided is company, rather than personal information.

<p>28. The Committee is always concerned when individuals are denied the common law right against self-incrimination. However, in this instance the Committee believes that the public interest justifies the denial of the right to silence in relation to company ownership matters.</p>

Issue: Compulsory Acquisition – Proposed Schedule 7, Part 2, Clause 2(4)

29. Schedule 7, Part 2, Clause 2 (4) enables the Treasurer to acquire land by compulsory process. Compulsory acquisition of land may constitute a trespass on personal rights and liberties.
30. The Committee notes that under proposed Schedule 7, Part 2, Clause 2 (4)(c), land may be acquired even if any consent or permission required under State legislation has not been obtained or granted. Ordinarily, the Committee would be concerned that this act would constitute a trespass on personal rights and liberties.
31. However, the Committee also notes that in the same clause, the Treasurer must comply with the terms of the *Land Acquisition (Just Terms Compensation) Act 1991*. This Act provides for minimum periods of notice to be given, rights of review to the Land and Environment Court and methods for determining just compensation.

<p>32. The Committee therefore considers that, on balance, the Bill retains adequate protections for affected landholders.</p>

Issue: Strict Liability – Proposed Schedule 6, Part 1, Clause 3 (3)

33. Proposed Schedule 6, Part 1, Clause 3 (2) makes it an offence if a floated restructure company fails to take reasonable steps to ensure that a prohibited ownership situation exists in relation to the company. Proposed Schedule 6, Part 1, Clause 3 (3) makes this offence a strict liability offence.

34. Under Australian law, offences are generally considered to have two aspects: a physical aspect (the guilty act) and a mental aspect (the intent to commit the offence). In strict liability offences, the prosecution does not need to prove that the accused had the mental aspect (the intent to commit the offence) when seeking a conviction.
35. Strict liability causes concern as it effectively displaces the common law requirement that the prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right to a presumption of innocence.
36. The Committee is of the opinion that it is not appropriate for Bills to specifically create strict liability offences, except in extraordinary circumstances.
37. However, the Committee notes that an offence will only have been committed if the company failed to take “reasonable steps” to ensure a breach of shareholding restrictions did not arise.
38. The Committee notes the difficulty of proving that a corporation had a particular intent to commit a breach and accepts that it is not uncommon for corporate offences to be drafted in this way.
39. Further, while directors of the corporation may also be liable for the offence, they will only be guilty if they knowingly authorised or permitted the contravention. Therefore, the offence is not a strict liability offence in relation to any individual.

40. The Committee considers that, except in extraordinary circumstances, it is inappropriate for a strict liability offence, particularly one that does not allow for a defence or reasonable excuse. However, the Committee believes that in circumstances such as these, which involve corporations, rather than individuals, it may be appropriate.

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

Issue: Ill and widely defined powers – Clause 8

41. The Committee notes that the Bill has been intentionally drafted so as not to be overly prescriptive as to the precise transaction strategy that may be undertaken to ensure that the Government can structure and time transactions based on expert financial advice and market conditions at the time.
42. However, while the Treasurer’s functions appear constrained by Part 2 Clauses 4 and 5, the Committee notes that Clause 8 reads:

The Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of the authorised restructuring. The functions conferred on the Treasurer by any other provision of this Act do not limit the Treasurer’s functions under this section.
43. Generally, the Committee prefers that powers conferred to a Minister be expressed in clearer and strictly defined terms. The Committee considers that Clause 8 provides the Treasurer with powers that are not well articulated and too widely defined.

44. By way of comparison, the Committee notes there are numerous provisions in the Bill that provide for the conferral of powers to the Treasurer that have been expressed in clear and strictly defined terms. For example, Clause 10 provides that the Treasurer may establish companies as restructure companies and provides limited ways in which the Treasurer can execute these powers.

45. While the Committee is conscious of the government's intent to be flexible in order to achieve maximisation of value to taxpayers, the Committee notes that Clause 8 of the Bill confers powers to the Treasurer that are insufficiently defined and refers this matter to Parliament.

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

Issue: Commencement by proclamation – Clause 2

46. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate the power to the Government to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

47. Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

8. HOME BUILDING AMENDMENT BILL 2008

Date Introduced:	29 August 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Linda Burney MP
Portfolio:	Fair Trading

Purpose and Description

1. This Bill amends the *Home Building Act 1989* to make further provision with respect to the suspension of building licences, the taking of disciplinary action and the requirements for home warranty insurance.
2. This aims to provide an incentive for a contractor to comply with tribunal and court orders. At present, a licence cannot be issued or renewed if the applicant has not satisfied any order of the Consumer, Trader and Tenancy Tribunal within the period specified by the tribunal. However, licences under the Home Building Act can be issued for a period up to three years and the taking of disciplinary action may be a lengthy process and covers only non-compliance with a tribunal order. Currently, non-compliance with a court order is not grounds for disciplinary action. Therefore, the Bill aims to address the need for a faster process to provide consumers with the remedies necessary.
3. Proposed section 42A will suspend a home building licence 28 days after the date on which an amount of money is due to be paid under tribunal order. It is proposed that the director general will determine a reasonable period for payment in published guidelines if no period is specified in the order. This is necessary to make the principle that applies to tribunal orders apply equally to court orders.
4. If there were an order staying the operation of the decision pending an appeal, the suspension would take effect when the decision of the court or the tribunal is confirmed on appeal. Therefore, the contractor will not be able to continue in business until it complies with the order. However, Fair Trading will have the capacity to defer operation of this suspension if necessary, for example, if agreed arrangements are in place for payment. Publicly available guidelines will be developed to ensure that this discretion is used appropriately.
5. Under current section 48S of the *Home Building Act 1989*, the Consumer, Trader and Tenancy Tribunal must inform the director general of any order it makes when determining a building claim. This information must be provided as soon as practicable after making the order and must include information about the time limit for compliance. However, there is currently no mechanism for Fair Trading to be informed of court orders involving building claims. This Bill proposes that a licence holder must notify the director general in writing within seven days of details such as the amount of money to be paid and the name of the person to whom the money is to be paid. There is a penalty of 40 penalty units for a corporation, and 20 penalty units in any other

case, for failing to notify the director general. A party to the proceedings may also choose to notify the director general of the making of the order and the terms of the order, which gives another means of notification. Additionally, the loophole whereby disciplinary action cannot be taken against a licensee for failure to comply with a court will be closed by this Bill.

6. The Bill aims to educe the time in determining a home warranty insurance claim. It will provide consumers with the ability to make a home warranty insurance claim as soon as a contractor has their home building licence suspended for non-compliance with a money order. Insurers will be required to provide an insurance contract that allows a claim to be made by a person on whose behalf work is being done, and the person's successors in title, on suspension for non-compliance with an order as though the contractor had died, disappeared or become insolvent. However, the insurer is not liable to pay the amount that is the subject of the order of the tribunal or a court.
7. Under the proposed section 99 (4), the insurer has to only accept liability for the claim where the tribunal or a court has ordered the contractor to pay the beneficiary an amount of money and the contractor has failed to comply with the order.
8. If the builder has other work in progress, those consumers would have to have a money order made in their favour by the tribunal or a court and the builder fail to comply with that order before the insurer is required to accept liability for a claim. The current section 47A of the Home Building Act provides that the director general may appoint a person to coordinate or supervise work where the licence of a builder is suspended or cancelled. If the insurer pays the claim, the insurer can recover from the contractor in a court the amount paid by the insurer under the claim. If after the claim has been paid, the contractor complies with the tribunal or court order or completes the residential building work, the insurer will be able to recover from the beneficiary the amount paid to the beneficiary under the order. This would exclude any amount paid under the order that does not relate to a matter for which the insurer is liable under the contract of insurance.

Background

9. It is a requirement under the Home Building Act that builders contracting for residential building work worth more than \$12,000 must take out home warranty insurance. Home warranty insurance indemnifies the homeowner against loss and damage from the insolvency, disappearance or death of a contractor. Insurance cover is provided for non-completion of work and for breach of statutory warranty. This form of insurance is often known as "last resort" cover and acts as a safety net in the event where there is no longer a contractor in place to build, complete or repair the contracted work.
10. From the Agreement in Principle speech, Fair Trading's research has shown that a significant number of consumers having orders made in their favour are not having the orders enforced. In the five years to 2007, there were 564 money orders issued by the tribunal but not complied with by the required date. Some 160 of these orders related to contracts with 132 contractors that were of sufficient value that a home warranty insurance contract was required. However, these consumers are not able to receive the relief that has been provided by the tribunal or lodge a home warranty insurance claim. An insurance claim cannot be paid until the contractor is declared insolvent or extensive inquiries show that the contractor has disappeared or died. The Bill aims to address these issues.

11. The suspension of a builder's licence for failure to comply with an order only gives relief to the claimant and not every other client of the builder. The risk being insured, therefore, does not change from the current situation. It is the risk of loss from non-completion of work and from not being able to recover compensation for breach of statutory warranty or to have the breaches rectified.
12. The proposed provisions will aim to facilitate more timely access to home warranty insurance and to create an incentive for building contractors to act appropriately when ordered to pay compensation.
13. According to the Agreement in Principle speech, the Bill is consistent with recommendation 18 of the Legislative Council General Purpose Standing Committee No. 2, which conducted an inquiry into the operation of the Home Building Service in 2007, which is as follows:

That the NSW Government adopt the recommendation of the Home Warranty Insurance Scheme Board to introduce an additional trigger to enable consumers to access insurance without having to pursue a builder's bankruptcy or insolvency.
14. The Bill also includes a provision which clarifies an amendment included under the *Home Building Amendment (Statutory Warranties) Act 2006*. On 2 August 2006, the Court of Appeal in the case of *Honeywood as executrix of the estate of the late Neville Honeywood v Munnings and Anor* [2006] NSWCA 215, made a ruling which affected statutory warranties under the *Home Building Act 1989*. The decision held that the statutory warranty provides only one opportunity for action. A party is barred from bringing a second action for different losses arising from the same breach of contract, even when the party was unaware of the losses when the original proceedings were brought.
15. The Court of Appeal ruling had the potential to prevent homeowners from taking action for structural defects that arise after the completion of legal proceedings for less serious matters that may have been addressed at an earlier date. The ruling also had the potential to prevent insurers from obtaining recovery from builders. The *Home Building Amendment (Statutory Warranties) Act 2006* was passed by Parliament and commenced in November 2006 to address the Court of Appeal ruling and to confirm that the statutory warranties are not extinguished by prior legal proceedings. The amendment Act inserted provisions in part 2C of the *Home Building Act 1989* to the effect that enforcing a statutory warranty in proceedings does not prevent the person enforcing the same warranty in relation to other deficiencies that the person did not know about (and could not reasonably be expected to have known about), at the conclusion of the earlier proceedings. The amendments were applied retrospectively to ensure that no person was prevented from taking action in the period between the Court of Appeal ruling and the passage of the legislation.
16. An issue which has since arisen is whether the amendments were limited to legal proceedings and would not overcome the Court of Appeal ruling in circumstances where statutory warranties had been enforced by means of an out of court settlement. Currently, there is a possibility that a court could interpret the 2006 amendments in section 18 (2), which refer to enforcement proceedings, as not applying to enforcement by accord and satisfaction such as out of court settlements. Minor amendments are therefore being proposed to clarify the legislation so that it is clear that a homeowner is able to pursue proceedings for a breach of the same statutory warranty in relation to a

different deficiency even if they resolved a previous breach of statutory warranty through legal proceedings or by accord and satisfaction.

17. The proposed amendments will also flow through to private insurers and the Building Insurers' Guarantee Corporation in recovery proceedings to enforce statutory warranties of persons insured by them.

The Bill

The object of this Bill is to amend the *Home Building Act 1989* (**the Act**) as follows:

- (a) to provide for the automatic suspension of a home building contractor licence or building consultancy licence if the licence holder fails to comply with an order of the Consumer, Trader and Tenancy Tribunal or a court to pay an amount of money in respect of a building claim,
- (b) to require contracts of insurance for residential building work to include provision that enables the person on whose behalf the work is being done to make an insurance claim if the contractor's licence is suspended because of the contractor's failure to pay the person an amount of money ordered by the Tribunal or a court in respect of a building claim,
- (c) to enable disciplinary action to be taken under the Act against a licence holder if the licence holder fails to comply with an order of a court in respect of a building claim,
- (d) to make other amendments of a minor or consequential nature.

Outline of provisions

Schedule 1 Amendments

At present, section 18E (2) of the Act ensures that a person who has, in proceedings, enforced a statutory warranty under Part 2C of the Act in relation to a particular deficiency in work is not prevented from enforcing the same warranty in subsequent proceedings for a deficiency of a different kind in the work.

Schedule 1 [1] makes it clear that the fact that the warranty is enforced otherwise than in proceedings (eg by means of an out of court settlement) does not prevent the subsequent enforcement of the warranty for a deficiency of a different kind in the work.

Schedule 1 [2] provides for the automatic suspension of a contractor licence or building consultancy licence if the licence holder fails to comply with an order of the Tribunal or a court to pay an amount of money in respect of a building claim under Part 3A of the Act. The suspension takes effect 28 days after the date on which the money is due to be paid (unless the decision of the Tribunal or court is stayed pending an appeal). The Commissioner for Fair Trading (referred to as the Director-General in the Act) may also defer the operation of the suspension.

Schedule 1 [3] requires the holder of a contractor licence or building consultancy licence to notify the Commissioner for Fair Trading if a court orders the licence holder to pay an amount of money in respect of a building claim. The Act already provides for the Director-General to be informed of any order made by the Tribunal in respect of a building claim.

Schedule 1 [4] enables disciplinary action to be taken against a licence holder if the licence holder fails to comply with an order of a court in respect of a building claim. At present, non-compliance with an order of the Tribunal is a ground for taking disciplinary action against a licence holder.

Schedule 1 [5] provides that a contract of insurance in relation to residential building work must enable the person on whose behalf the work is being done (and the person's

successors in title) to make an insurance claim if the contractor's licence is suspended because of non-compliance with an order of the Tribunal or a court to pay an amount of money in respect of a building claim. The insurer will only be required to accept liability for such an insurance claim if the contractor has been ordered by the Tribunal or a court to pay the beneficiary an amount of money in respect of a building claim and the contractor has failed to comply with the order. The insurer will be entitled to recover from the contractor the amount the insurer pays under the insurance claim. Alternatively, if the contractor subsequently complies with the money order or completes the residential building work, the insurer will be entitled to recover from the beneficiary the amount the insurer has paid under the insurance claim.

Schedule 1 [6] enables the register of licence particulars maintained by the Commissioner for Fair Trading under the Act to include particulars of any instance of non-compliance with a court order in relation to a building claim.

Schedule 1 [7] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [8] contains transitional provisions that are consequential on the enactment of the proposed Act.

Issues Considered by the Committee

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

Issue: Strict Liability – Schedule 1 [3] Part 3A, Division 6 – proposed Section 48V (1) - Requirement to notify Director General of court order to pay money in relation to building claim:

18. The proposed section 48V (1) reads: If the holder of a licence within the meaning of section 42A is ordered by a court to pay an amount of money in respect of a building claim, the licence holder must, within 7 days after the order is made, notify the Director General in writing of the following particulars:

- (a) the amount of money ordered to be paid,
- (b) the date on which the money is due to be paid if such a date is specified in the order,
- (c) the name of the person to whom the money is to be paid,
- (d) such other particulars as may be prescribed by the regulations.

Maximum penalty: 40 penalty units in the case of a corporation and 20 penalty units in any other case.

19. The imposition of strict liability may give rise to concern as the authority is not required to prove that the offender intended to commit the breach or offence.

20. **The Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.⁷**
21. **The Committee also notes that the strict liability provision appears necessary in terms of the public interest in ensuring compliance with the Bill. Accordingly, the Committee considers that it does not trespass unduly on individual rights and liberties.**

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

Issue: Excludes merits review - Schedule 1 [2], proposed section 42A (6):

22. This proposed section 42A (6) reads: A decision by the Director General to defer, or not to defer, the operation of the suspension of a licence under this section cannot be reviewed by the Administrative Decisions Tribunal in an application for review made under this Act.
23. The proposed section deals with the automatic suspension of licence for failure to comply with order to pay money in relation to building claim. In other words, it deals with the situation that if the holder of a licence fails to comply with a court order or Tribunal order to pay an amount of money in respect of a building claim by the due date, the licence, is subject to this section and can be suspended until such time as the Director General is satisfied that the order has been complied with. Under proposed subclause (5), the Director General may, in writing to the holder of a licence, defer the operation of the suspension of the licence under this section for any period up until the date on which the licence is due for renewal.

24. **The Committee notes the importance of merits review for protecting individual rights against oppressive administrative action and in upholding the rule of law. The Committee will always be concerned if a Bill purports to oust the jurisdiction of the courts or Tribunal.**
25. **The Committee is of the view that the proposed section 42A (6) is very broad. It has the potential to deny a person natural justice by removing the opportunity for review of any decision by the Director General to defer or not to defer the operation of the suspension of a licence.**
26. **The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review of a decision, unless there is a strong public interest in doing so. The Committee refers this to Parliament.**

The Committee makes no further comment on this Bill.

⁷ Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

9. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (DETAINED PERSON'S PROPERTY) BILL 2008

Date Introduced: 29 August 2008
House Introduced: Legislative Assembly
Minister Responsible: Hon David Campbell MP
Portfolio: Police

Purpose and Description

1. This Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* to make further provision with respect to custody of a detained person's property; and to make related amendments.
2. Under the current section 131 (2) (d) of the *Law Enforcement (Powers and Responsibilities) Act 2002*, the custody manager must record the details of any property taken from the detained person in the custody record. The word "details" has been interpreted to mean that each and every item needs to be individually itemised and described in detail. This process has become time consuming and unwieldy.
3. This Bill will amend section 131 (2) (d) to allow for the use of clear tamper-proof bags in which the property will be placed and then sealed. Accountability will be maintained by the tamper-proof seal as well as the requirement for the bag to be physically signed and dated by the detained person to verify that all their property has been placed in the bag. The placing of the property into the bag would be done under camera surveillance where possible.

Background

4. The Premier's Delivery Unit has been working to reduce police paperwork and to improve police efficiencies. In October 2007, the New South Wales Police Force requested that the Premier's Delivery Unit assist in streamlining the charging process by undertaking a review in an attempt to identify potential time saving and red tape reduction opportunities.
5. The Unit produced a report recommending the implementation of many charge-streamlining proposals, which it estimated would save considerable New South Wales Police Force time and allow police to get away from paperwork and back to front-line policing.
6. According to the Agreement in Principle speech, only one of the recommendations required legislative amendment, which is that relating to defendants' personal property.

The Bill

7. The object of this Bill is to implement a time saving proposal identified in an ongoing review aimed at streamlining the police charging process.
8. At present, section 131 (2) (d) of the *Law Enforcement (Powers and Responsibilities) Act 2002* requires the custody manager for a detained person to record details of any property taken from the person in the custody record for the person. The Bill amends that Act to remove this requirement to itemise the property in detail and enables the making of regulations to provide instead for the property to be dealt with by being placed in clear tamper-proof bags.
9. The Bill also amends the *Law Enforcement (Powers and Responsibilities) Regulation 2005* to require property taken from a detained person to be placed in a tamper-proof bag and for the placement of property in the bag to be verified by the detained person by signing the bag. The custody record will then simply record the facts relating to placement of the property in the bag and the detained person's verification of the placement.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Law Enforcement (Powers and Responsibilities) Regulation 2005* set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002

Schedule 1 contains the amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* described in the Overview above.

Schedule 2 Amendment of Law Enforcement (Powers and Responsibilities) Regulation 2005

Schedule 2 contains the amendments to the *Law Enforcement (Powers and Responsibilities) Regulation 2005* described in the Overview above.

Issues Considered by the Committee

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

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

10. The Committee notes that the proposed Act is to commence on a day to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

10. MENTAL HEALTH LEGISLATION AMENDMENT (FORENSIC PROVISIONS) BILL 2008

Date Introduced:	27 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Paul Lynch MP
Portfolio:	Assisting the Minister for Health (Mental Health)

Purpose and Description

1. This Bill amends the *Mental Health (Criminal Procedure) Act 1990* and the *Mental Health Act 2007* with respect to the care, treatment, control and release of forensic patients and patients transferred from correctional centres and the functions of the Mental Health Review Tribunal; and for other purposes.
2. The main proposed changes for decision making are the following. Orders for care, treatment leave and release of forensic patients will be made by a Forensic Division of the tribunal with a specially constituted panel which, under the legislation on matters of release, must be presided over by a sitting or former judge. This aims to provide a level of senior legal oversight to ensure there is regard for the law, legal processes and the public interest.
3. Before making an order for release, the special panel will be required to consider statutory considerations set out in clause 74 of schedule 1. These include matters such as whether the person is mentally ill, whether care, treatment or control is necessary to protect the person or others from serious harm, the possibility of the person's condition deteriorating over time and the likely impact if this should occur.
4. Importantly, where release is proposed, the panel will also be required to consider independent safety reports from a psychiatrist not involved in the care of the person. Where a forensic patient has been made subject to a limiting term under the *Mental Health (Criminal Procedure) Act*, the panel will also be required to have regard to the length of that term and consider whether the person has spent a sufficient time in custody.
5. The tribunal will only be able to release a forensic patient if it is satisfied that the safety of the patient and the public will not be seriously endangered. It will have the power to grant either conditional or unconditional release of a forensic patient. If a patient is granted conditional release, the patient will remain a forensic patient and will be subject to six monthly reviews by the tribunal.
6. The proposed system provides for both the Minister for Health and the Attorney General with a right to make submissions to the panel, where leave or release of a patient is under consideration (proposed clause 76A).

7. Under clause 77A of the Bill, the Minister for Health has a right of appeal on questions of fact and law from decisions of the tribunal and the Attorney General has a right of appeal on questions of law.
8. Amendments to section 160 of the *Mental Health Act 2007* in schedule 2 to the Bill will allow regulations to be made to provide for the establishment and use of a victims register, the notification of victims of tribunal decisions in proceedings relating to forensic patients or correctional patients, and notification of victims of the termination of status of persons as forensic patients. These changes aim to allow the Government to establish and use a victims register and to allow the tribunal to notify victims of key information affecting them, including tribunal decisions, prospective releases and when a forensic patient's status is terminated. These regulations aim to further enhance the current processes recently put in place by the Mental Health Review Tribunal, which will allow victims of crime to make submissions to the tribunal on release issues.
9. Under proposed section 76, the tribunal will be given powers to include in its orders, restrictions to prevent a patient from associating with a victim and to prohibit or restrict a patient from visiting certain places. These restriction orders can be made at the tribunal's own motion or by the victim's application. A victim will have a right of appeal, with leave, from a decision regarding an application for a non-association order or place restriction order.
10. Forensic patient status will generally apply to a person who has been found not guilty of a crime due to their mental illness or who has been found unfit to stand trial. However, correctional patients are persons who are subject to a sentence of imprisonment after having been found guilty of a crime or who have been charged with a crime and refused bail. The Bill will give recognition to the legal distinction between these two classes of patients by classifying inmates and persons on remand who are transferred to a mental health facility as "correctional patients". Correctional patients will have the same access to mental health treatment as forensic patients, but correctional patients will remain subject to their sentence of imprisonment, including the laws and processes that follow.
11. New provisions set out in clause 67 of the Bill will allow the tribunal to make community treatment orders for correctional centre inmates. This means that in accordance with the normal requirements for the granting of a treatment order, an inmate can receive mental health treatment while in a correctional setting. Treatment orders will be used when a patient's condition has been stabilised in hospital to ensure that their mental health will not deteriorate on release back into the community or prison environment.
12. To ensure that there is an adequate implementation of these orders, proposed clause 67 enables an inmate who is subject to a community treatment order to be reviewed by the tribunal every three months rather than the standard six-monthly review for forensic and correctional patients.
13. Changes under the new *Mental Health Act 2007* began the process of allowing treatment orders to be made by the tribunal in relation to a forensic patient to be released conditionally or to be transferred to a correctional centre. This power was subject to confirmation through the exercise of the executive discretion. The new changes will ensure the power is placed with the tribunal.

14. This Bill also proposes to include a new section 76G in the Mental Health (Criminal Procedure) Act which will be similar to those provisions under the civil law, to ensure that agencies involved in providing services to a person or carers or family members are consulted as part of the person's release planning.
15. The Bill will add provisions to the Mental Health (Criminal Procedure) Act to ensure that agencies that may have a role in providing services after release use their best efforts to respond to requests the tribunal may make in performing its functions. This aims to enhance the capacity of the tribunal to assist in developing coordinated service plans for patients on release.

Background

16. This Bill has been developed out of a review of New South Wales mental health legislation that began in 2004, which resulted in a new Mental Health Act in 2007. The Government convened a separate review of the Forensic Provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990*, and appointed the President of the Mental Health Review Tribunal, and former Supreme Court Judge the Hon. Greg James, QC, to conduct it.
17. The review involved extensive consultations with key stakeholders such as victims groups, health professionals and agencies. The consultation process involved a 25-member reference group, chaired by Mr James, made up of representatives of agencies and organisations. After preliminary consultations, a consultation paper was issued in December 2006. Fifty formal submissions were received in response to the paper. Additional consultations were undertaken with doctors, staff, patients and others involved in the forensic mental health systems in New South Wales and elsewhere. The report has been accepted by the Government and was released in April 2008. The majority of its recommendations have been adopted.
18. The report made 34 recommendations, including recommendations for amendments to the forensic provisions of the mental legislation.
19. One of the features of the current New South Wales system is that it makes use of the "executive discretion" to determine the release of forensic patients.
20. Executive discretion is a concept that has been abandoned in most Australian jurisdictions and in equivalent jurisdictions around the world, such as England and Canada. In the James' review, a range of problems was identified with regard to the exercising of executive discretion. These included that the system is cumbersome, bureaucratic and lacks transparency or accountability. It also results in the detention of unconvicted patients in jail for so long that the detention extends longer than public safety would require and longer than any sentence that would have been imposed if the patient had been convicted.
21. The system also presents difficulties for patients, families, carers and victims who may need a transparent process to express their concerns. The review report concluded that for these reasons, decisions on release and leave for forensic patients should be transferred to the Mental Health Review Tribunal.
22. The review made recommendations to ensure the recognition of victims, and all of these recommendations have been adopted and provided for in this Bill by a power to

make regulations for a range of provisions to recognise the role of victims in the forensic decision-making process.

23. Groups representing victims of crime have been consulted during the review. The groups included the Homicide Victims Support Group, Enough is Enough and the Victims of Crime Assistance League. According to the Agreement in Principle speech, they see the move to a specially constituted forensic panel, presided over by a judge or former judge, along with the formal recognition of victims in the legislation, as a major improvement to the current system.
24. The term "forensic patient" generally covers persons who have been found not guilty by reason of mental illness of committing a crime, as well as people who are found to be unfit to stand trial. However, under the current law, the term also includes correctional inmates subject to a term of imprisonment who have been transferred for mental health care. The review report recommended creating a new category of patients treated under mental health legislation to cover persons who are transferred into a mental health facility for mental health care while on remand or serving a sentence of imprisonment in a correctional centre. The current legislation treats these patients as forensic patients. However, as the James' review report concluded, this does not accurately reflect the status of these patients:

... the admission of a remandee or convicted offender to a mental health facility is analogous to the admission of any other member of the community to hospital for mental health treatment.

25. Another important element to come out of the review of the Mental Health Act was the need to support agency cooperation in providing services to persons with a mental illness. This was also a key consideration when looking at forensic patients, which may involve a range of government agencies, such as agencies in the Health portfolio like Justice Health, and other agencies like Corrective Services and Juvenile Justice. At other times, the Department of Ageing, Disability and Home Care or the Department of Community Services, may have a role service provision for patients or their families.

The Bill

The objects of this Bill are to amend the *Mental Health (Criminal Procedure) Act 1990*, the *Mental Health Act 2007* and other legislation for the following purposes:

- (a) to rename the *Mental Health (Criminal Procedure) Act 1990* the *Mental Health (Forensic Provisions) Act 1990*,
- (b) to confer on the Mental Health Review Tribunal (the **Tribunal**), instead of the Minister for Health, the power to order the release of forensic patients from mental health facilities, the power to grant leave to such patients and the power to make orders as to the care, treatment and detention of such patients,
- (c) to establish the Forensic Division of the Tribunal to exercise those functions,
- (d) to provide for appeals from decisions of the Tribunal in exercising those functions,
- (e) to clarify the responsibility for arrangements for care, treatment, security and release of patients transferred from correctional centres to mental health facilities (**correctional patients**) and forensic patients held in correctional centres,
- (f) to set out conditions that may be imposed on an order for release and matters that must be considered by the Tribunal in making decisions,

- (g) to require the Tribunal, when making decisions about all patients, to consider whether care arrangements that may be alternatives to involuntary care are consistent with safe and effective care,
- (h) to make various amendments relating to community treatment orders,
- (i) to provide for the recognition of victims of forensic patients and correctional patients,
- (j) to make other minor and consequential amendments,
- (k) to provide for savings and transitional matters consequent on the enactment of the proposed Act.

Outline of provisions

Clause 3 is a formal provision that gives effect to the amendments to the *Mental Health (Criminal Procedure) Act 1990* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Mental Health Act 2007* and other Acts set out in Schedules 2 and 3.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent. Section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 amends the *Mental Health (Criminal Procedure) Act 1990*

Schedule 2 amends the *Mental Health Act 2007*

Schedule 3 Amendment of other Acts

Schedule 3.1, 3.3–3.8 and 3.10 amend the *Child Protection (Offenders Registration) Act 2000*, *Costs in Criminal Cases Act 1967*, *Crimes (Administration of Sentences) Act 1999*, *Crimes (Appeal and Review) Act 2001*, *Crimes (Sentencing Procedure) Act 1999*, *Criminal Appeal Act 1912*, *Drug and Alcohol Treatment Act 2007* and the *Protected Estates Act 1983* to change references to the old name of the Forensic Provisions Act to the new name.

Schedule 3.2 amends the *Civil Procedure Act 2005* to include becoming a correctional patient in the definition of **a person under legal incapacity**.

Schedule 3.9 amends the *Interpretation Act 1987* to include becoming a correctional patient in the definition of a **mentally incapacitated person**.

Issues Considered by the Committee

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

Issue: Retrospectivity – Schedule 1 [19] – insertion of Schedule 1, Part 3 *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* – proposed section 5 (Existing patients and persons detained in mental health facilities); Schedule 2 [62] – insertion of Schedule 6, Part 3 Provisions consequent on enactment of *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* – proposed section 20 (Community treatment orders):

26. The Committee will always be concerned with retrospective applications of provisions, which may impact adversely on individual rights and liberties.

- 27. The Committee, however, considers the retrospectivity of the above provisions may not trespass unduly on personal rights and liberties as they provide arrangements to cover those community treatment orders that were in force immediately before the commencement of the amendment (proposed clause 20 to be inserted by Schedule 2 [62] for a proposed Part 3 of Schedule 6 in the amendment of *Mental Health Act 2007*); and to cover situations of existing patients and persons detained in mental health facilities (proposed clause 5 to be inserted by Schedule 1 [19] for a proposed part 3 of Schedule 1 in the amendment of *Mental Health (Criminal Procedure) Act 1990*).**

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

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

28. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

11. RETIREMENT VILLAGES AMENDMENT BILL 2008

Date Introduced: 26 June 2008
House Introduced: Legislative Assembly
Minister Responsible: Hon Linda Burney MP
Portfolio: Fair Trading, Volunteering

Purpose and Description

1. This Bill amends the *Retirement Villages Act 1999* to make further provision with respect to the rights and obligations of residents and operators of retirement villages; to establish a scheme for the enforcement of a resident's right to receive payment under a village contract; and for other purposes.
2. It seeks to lift some of the compliance burden from smaller village operators. These are often run by a group of volunteers in regional and country towns. With the consent of residents, the Bill will provide that operators with an annual recurrent income of less than \$50,000 will no longer need to incur the expense of having their annual accounts audited or provide quarterly accounts to residents.
3. Village operators will also no longer need to seek the consent of residents with regard to the continual appointment of the same village auditor from year to year.
4. Operators will also be able to seek the consent of residents not to have to supply them with a budget prior to each financial year, so long as there is consent to do so. Operators will no longer need to seek the consent of residents for increases in recurrent charges that are at or below the rate of inflation. This aims to give an incentive to operators to keep their costs down, in order to help those residents struggling to meet rising costs on fixed incomes.
5. The Bill changes the law regarding the provision of information to retirees thinking about moving into a retirement village. Under the Bill, prospective residents will need to be given a general inquiry document when they make an initial inquiry, followed by a more detailed disclosure statement if they decide to go ahead and express an interest in a particular unit.
6. A significant change is the introduction of a 90-day settling-in period for incoming residents. During this time if a resident passes away, or needs to move to a nursing home or hostel, or finds that retirement village life is not appropriate and elects to move out, they will be liable only for fair market rent for the period of their occupancy and a reasonable administration fee.
7. All operators will be required to notify the Department of Lands that land they own is being used to operate a retirement village. This will lead to the creation of a public

- register of all retirement villages in New South Wales for the first time, which will also provide accurate statistics and assist education and compliance programs.
8. Under the amendments, all capital works, including maintenance, replacement or new improvements, will be treated in the same way. The cost of such work will be shared between the residents and each operator as agreed, with no more than 50 per cent being funded by residents.
 9. Another amendment is that operators will be required to meet any budget deficits at the end of each financial year, rather than rolling them over or asking the residents to pay a special levy. Transitional provisions will be put in place to deal with existing budget deficits.
 10. The Bill requires operators to prepare written safety and emergency procedures and to take reasonable steps to ensure that all residents and staff are familiar with such procedures. They will be required to undertake a safety inspection at least once a year and report back to residents.
 11. Relief is to be given to those volunteers who find themselves elected to the same position on residents committees each year. A three-year cap is proposed to encourage rotation of positions so that other residents become involved.
 12. The maximum number of proxies any person can hold is to be reduced from five to two, and a ballot voting system will be introduced for matters requiring special resolution. This aims to increase the participation level of residents and leads to voting outcomes that are more representative of the resident population.
 13. Operators will be required under this Bill to hold annual management meetings with their residents. Residents will have the opportunity to raise questions before the meetings or during these meetings, and the operator or their representative will be obliged to provide answers in reasonable detail.
 14. The Bill enables residents to add or remove fixtures or to make alterations to the premises with the consent of the operator, which shall not be unreasonably refused.
 15. The Bill also reduces the maximum period of charges from the time when the resident vacates or dies if a resident does not own their premises, from six months to six weeks. This aims to encourage operators to take all reasonable steps to find another resident as soon as possible.
 16. If a retirement village operator becomes bankrupt and the village cannot be sold, this can place residents in a difficult position in terms of getting their money back as an unsecured creditor. To address this, the Bill will introduce a statutory charge, which will give residents priority over certain other registered interest holders in the event of a Supreme Court ordered sale of the village.

Background

17. This Bill amends the current *Retirement Villages Act 1999*, which commenced on 1 July 2000 and regulates the retirement village industry in New South Wales.

18. Hundreds of village operators in New South Wales currently provide accommodation for tens of thousands of retirees. The Agreement in Principle speech explained that:

It is important for both residents and operators that the Government stamps out unfair practices and protects vulnerable consumers while at the same time setting clear guidelines for operators in the management of their villages.
19. According to the Agreement in Principle speech, a consultation draft amendment bill was tabled in November 2006. More than 500 additional letters and submissions have been received since the draft bill was publicly released. Consultation has been conducted during the review process and on the Bill. Many submissions were received from residents of villages and their families, individual village operators and from stakeholder groups: the Retirement Village Association, the Aged and Community Services Association and the Retirement Village Residents Association. As a result of this extensive consultation process, this Bill contains a number of improvements when compared to the exposure draft.
20. The ministerial advisory council specifically considers issues relating to retirement villages and it has played an important role in the development of these amendments.
21. Amendments aim to help better inform prospective residents by providing information at each appropriate stage in the decision-making process.
22. The most significant changes in the Bill concern the treatment of capital maintenance and capital replacement in both the homes of residents and common areas of retirement villages. Out of all of the submissions that were received during the review, this was the biggest issue. The current approach that makes residents responsible for maintenance and operators liable for replacing capital items, is not working, as it creates disputes over definitions, encourages cost shifting and leads to situations where items are repeatedly repaired beyond their economic life.
23. Another major concern for many residents and their families is the ongoing charges they remain liable to pay even though they have moved out of a village or passed away. It can be onerous on those who move to a nursing home or hostel but are faced with paying two lots of fees. The Bill will reduce this period of charge from six months to six weeks.

The Bill

The object of this Bill is to amend the *Retirement Villages Act 1999* (***the principal Act***) as follows:

- (a) to require the operators of retirement villages to hold annual management meetings and to provide certain information at those annual management meetings,
- (b) to make provision for capital maintenance and replacement in respect of property within retirement villages,
- (c) to specify the circumstances in which the operator of a retirement village may vary the recurrent charges that are payable under a village contract without the consent of the residents of the village,
- (d) to specify the circumstances in which the residents of retirement villages may elect not to have an annual budget prepared and to elect not to have the annual accounts of the village audited or to receive copies of the quarterly accounts,

- (e) to require the operator of a retirement village to make good any deficit in the accounts of the retirement village and provide that the operator is not permitted to carry forward any such deficit, or to seek a special levy from the residents of the retirement village to make good any such deficit except as provided by the regulations,
- (f) to require the operator of a retirement village to ensure that the retirement village is generally safe and that emergency and home care services have vehicular access to residential premises within the village,
- (g) to provide for the keeping of records relating to land that is used as a retirement village,
- (h) to limit the period during which a former occupant is required to pay recurrent charges after permanently vacating premises within a retirement village,
- (i) to provide for a settling-in period during which a resident may terminate a village contract,
- (j) to provide that an occupant of residential premises within a retirement village may add or remove fixtures, or make alterations to the premises, with the consent of the operator and that the operator must not unreasonably refuse to give such consent,
- (k) to revise the investigation, compliance and enforcement powers under the principal Act and to bring those powers into line with the *Property, Stock and Business Agents Act 2002*,
- (l) to create a process by which the right to receive a refund of an ingoing contribution paid under a village contract may be enforced,
- (m) to create offences for failing to comply with certain provisions of the principal Act,
- (n) to make other amendments of a minor or consequential nature.

Outline of provisions

Clause 3 is a formal provision that gives effect to the amendments to the principal Act set out in Schedule 1.

Clause 4 makes a consequential amendment to the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Issues Considered by the Committee

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

Issue: Strict Liability

24. Numerous clauses⁸ in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the authority is not required to prove that the person intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence.

⁸ Clauses such as: Schedule 1 [15] – proposed insertion of section 17(5A); Schedule 1 [16] – proposed insertion of section 18 (3); Schedule 1 [32] – proposed insertion of section 24A(1); Schedule 1 [33] – proposed insertion of section 29(1A); Schedule 1 [53] – proposed insertion of sections 72A(1), 72A(4); Schedule 1 [63] – proposed insertion of sections 100(5), 101(1), 102(1); Schedule 1 [71] – proposed insertion of section 106A; Schedule 1 [101] – proposed insertion of section 118(3); Schedule 1 [116] – proposed insertion of section 139(1); Schedule 1 [118] – proposed insertion of section 147(5) .

25. **The Committee, however, notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.⁹**
26. **Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, with no terms of imprisonment imposed as a penalty.**
27. **The Committee also notes that there is a public interest in ensuring that the provisions of the Bill are complied with to facilitate the effective regulation and management of the rights and obligations of residents and operators of retirement villages.**
28. **Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.**

Issue: Privacy – Schedule 1 [152] – proposed insertion of section 189A – Director-General may issue warning notices:

29. The proposed section enables the Director-General to authorise the publication of a notice warning persons of particular risks involved in dealing with a specified operator of a retirement village or with a person who appears to be the operator.
30. The right to privacy is enshrined in Article 17 of the *International Covenant on Civil and Political Rights* which provides that ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’.

31. **The Committee notes that in certain cases, public interest may override the right to privacy. For example, the threat of publication may encourage operators to comply with the legislation.**
32. **The Committee further notes that publication of such a notice may not be authorised unless an investigation has been conducted by the Director-General (proposed section 189A (4)).**
33. **The Committee is of the view that the principle of natural justice and the ability to challenge evidence are important and significant, and should not be undermined unless there are compelling public interest and safety reasons. In accordance with the principle of natural justice and the ability to challenge evidence, the proposed section 189A (5) does provide an opportunity for the concerned person to make representations to the Director-General about the proposed notice within a period of not less than 48 hours before the publication of such a notice, unless the Director-General is not able to contact the person promptly after making reasonable efforts.**

⁹ Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

34. Therefore, the Committee considers that such a publication of a notice warning persons of particular risks in dealing with a specified operator of a retirement village (proposed section 189A), may not trespass unduly on individual rights and liberties.

Issue: Retrospectivity – Schedule 1 [167] – insertion of Part 3, Division 1 – proposed section 16 (Amendments extend to existing contracts); insertion of Part 3, Division 2 – proposed section 17 (Liability of former occupant of residential premises for recurrent charges where former occupant is registered interest holder) and proposed section 18 (Liability of former occupant of residential premises for recurrent charges where former occupant is not registered interest holder); insertion of Part 3, Division 5 – proposed section 28 (Amendments relating to annual budgets); proposed section 32 (Settling-in period provisions) and proposed section 36 (Variation of recurrent charges):

35. The Committee will always be concerned with retrospective applications of provisions.

36. The Committee, however, considers the retrospectivity of the above provisions may not trespass unduly on personal rights and liberties as they provide arrangements to cover those village contracts that were in force immediately before the commencement of the amendment (proposed sections 16, 32, 36); and cover situations of former occupants of residential premises for recurrent charges (proposed sections 17 and 18), as well as proposed or approved annual budgets (proposed section 28).

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

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

37. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

12. SUCCESSION AMENDMENT (FAMILY PROVISION) BILL 2008

Date Introduced:	26 June 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General, Justice

Purpose and Description

1. This Bill amends the *Succession Act 2006* to ensure that adequate provision is made for members of the family of a deceased person, and certain other persons, from the estate of the deceased person; to repeal the *Family Provision Act 1982*; and for other purposes.
2. The National Committee for Uniform Succession Laws submitted reports on proposed national uniform laws on family provisions to the Standing Committee of Attorneys-General in December 1997 and July 2004. The New South Wales Law Reform Commission Report 110 *Uniform succession laws: family provision* (May 2005) sets out draft model provisions to implement the earlier reports. These provisions enable a court to override the terms of a deceased person's will or the distribution of a deceased person's estate on intestacy if it determines it is necessary to do so to ensure that the family and other dependants of a deceased person are adequately provided for. The *Family Provision Act 1982* of New South Wales was used as a basis for the model provisions.
3. The key aspects of this Bill, which depart from the model bill include the following. First, the model bill did not adopt the eligibility requirements for an application for family provision that are currently in place in New South Wales. Currently the Family Provision Act provides that the following people are automatically entitled to apply for provision: the spouse of the deceased; a person with whom the deceased was living in a domestic relationship; and the adult or non-adult child of the deceased. Former spouses of the deceased and other dependents, including grandchildren, are also entitled to apply, but the Act requires the court to determine whether there are factors that warrant the making of the application before going on to consider an application.
4. The model bill, however, restricts the list of those who are automatically entitled to make an application for provision to spouses, de-facto partners and non-adult children of the deceased. It contains a "catch-all" category of claimant allowing anyone to whom the deceased owed a responsibility to provide maintenance, education or advancement in life to apply to the court for a family provision order. Such a change may lead to a flood of new claims being made on estates from people who are not currently entitled to apply in New South Wales. Adult children would also be forced to demonstrate the requirement of the deceased's responsibility to them. This may lead to more lengthy and expensive litigation, as adult children seek to prove they meet this requirement.

5. This Bill does not adopt the model bill eligibility provisions. It retains the approach taken in the current Act with one modification: the current Act provides that those living in a domestic relationship with the deceased are automatically entitled to eligibility. This Bill replaces “domestic relationship” with “de-facto relationship” based on the model bill’s restriction of this entitlement to de-facto. This Bill also creates a new category of "applicant": a person in a close personal relationship with the deceased. This applicant has to meet the same requirements imposed on former spouses and other dependents before being entitled to have the application considered by the court.
6. It seeks to prevent people from making unmeritorious claims and accessing money from the deceased's estate to fund their legal costs without any restriction. It gives the court specific rule-making powers to: make rules in relation to costs, including the costs payable out of the estate and the costs in relation to estates worth less than \$750,000; make rules relating to the use of expert witnesses and other means of proof of medical reports, valuations. Such items are sometimes the most expensive component of the costs of a case; and make rules relating to applications that can be dealt with on the papers, which will allow the court to cut costs by determining simple cases without a hearing.
7. The Bill contains a regulation-making power that enables regulations to be made with to respect costs in family provision proceedings, including the fixing of maximum costs that can be paid out of the estate or notional estate. It also contains the power to make regulations regarding advertising of legal services in connection with proceedings for family provision, which seeks to prevent the exploitation of the vulnerable.
8. The proposed section 98 makes it clear that the Government's object is to encourage settlement of family provision matters before they go to a hearing, if possible. The court will be required to refer all matters to mediation before making an order unless there are special reasons why the matter should not be mediated. Mediation would not be advisable in circumstances where there is a threat of violence or a power imbalance between the parties.
9. Proposed section 59 (3) reflects the model bill by providing that the court may order an additional provision for a previously successful applicant for a family provision order when it can be demonstrated either that there has been a substantial detrimental change in that eligible person’s circumstances since a family provision order was last made in that eligible person's favour (proposed section 59 (3) (a)). Proposed section 59 (3) (b) covers the situation of when the family provision order was made, the evidence about the nature and extent of the deceased person's estate did not reveal the existence of certain property and the court would have considered the estate to be substantially greater in value if the property's existence were known.
10. As to evidence of statements made by the deceased, the model bill does not include a provision based on section 32 of the current Act. New section 32 clarifies the circumstances in which evidence can be adduced about statements that were made by the deceased during his or her lifetime. For example, the deceased might have stated that a child was being left less in the deceased's will because the child had already been given his or her share of the estate. This evidence could be useful in ascertaining the testator's reasons for making the will in the way that it was made.
11. The Bill re-enacts section 32 in the new section 101. The court will continue to be able to make interim family provision orders if there is a pressing need for financial support.

Background

12. This Bill implements the recommendations of the uniform succession laws project, a project initiated by the Standing Committee of Attorneys-General [SCAG] aimed at developing model laws to be used as the basis for reform of succession law in all Australian States and Territories.
13. Consistent succession laws across jurisdictions will lead to benefits, including simplifying or lowering the costs of administering the estates of people who have moved between, or held assets in, different jurisdictions.
14. The National Committee for Uniform Succession Laws project was established to examine four areas of succession law: the law of wills, family provision, intestacy, the administration of estates, and to prepare model bills.
15. The first of the national committee reports, on the law of wills, was implemented in New South Wales in 2006 with the enactment of the *Succession Act 2006*. This Bill will become chapter three of the Succession Act. According to the second reading speech, as the rest of the national committee's reports are implemented, they will be included in the Succession Act.
16. The national committee produced two reports on family provision, which were considered and endorsed by the Standing Committee of Attorneys-General in 1997 and 2004. The 2004 report included model legislation prepared by the New South Wales Parliamentary Counsel's Office. The national committee chose to make the existing New South Wales *Family Provision Act 1982* the basis of the model family provision bill.
17. This Bill seeks to repeal the Family Provision Act and implement the model bill endorsed by the Standing Committee of Attorneys-General. According to the second reading speech, some changes have been made to take into account the specific policy concerns of the New South Wales Government, and suggestions made by an expert committee, which the Government established to provide advice on the reforms to succession law. The committee was made up of: Justice Young, Chief Judge in Equity; Justice Windeyer; the Probate Registrar of the Supreme Court; the Public Trustee; representatives for the Law Society and Bar Association; Ross Ellis, representing the Trustee Associations of Australia, Les Handler, the co-author of the loose-leaf service on succession law; and a representative from the Guardianship Tribunal.
18. The Bill provides the court with power to make a family provision order in favour of a person who was unsuccessful in his or her application for provision only if it can be demonstrated that when the family provision order was made, there was substantial property in the estate, which was not disclosed. If substantial property is overlooked, it could mean that persons otherwise deserving a provision would not be successful because there is not enough estate for provision to be made to all deserving applicants.
19. The model bill restricts the list of those who are automatically entitled to make an application for provision to spouses, de-facto partners and non-adult children of the deceased. It contains a "catch-all" category of claimant allowing anyone to whom the deceased owed a responsibility to provide maintenance, education or advancement in

life to apply to the court for a family provision order. According to the second reading speech, such a change may lead to a flood of new claims on estates from people who are not currently entitled to apply in New South Wales. Adult children would need to demonstrate the requirement of the deceased's responsibility to them. This may then lead to more lengthy and expensive litigation, as adult children seek to prove they meet this requirement.

20. This Bill also addresses concerns about the increasing and disproportionate costs of family provision proceedings. There are several examples of cost blowouts in family provision proceedings in New South Wales given in the second reading speech. For instance, a case in which the legal costs reached \$605,000 for a relatively modest estate. The judge commented that the legal costs were far greater than the amount that any of the claimants could have hoped to receive in a family provision order and called the case "a dark stain on the administration of justice". Another was a case where costs approached \$100,000 for an estate valued at less than \$400,000. In that case, the applicant tried to appeal after failure in the first instance. The applicant's appeal was dismissed both because it was without merit and because further litigation might have left a beneficiary of the State without her home. Another was a case regarding an estate of \$412,000, which occupied a half-day hearing, where the costs were \$90,000.
21. According to the second reading speech, there is a minority of practitioners who exploit the highly emotionally charged nature of these cases, on the assumption that all costs are paid out of the estate. The Supreme Court has recognised this and is currently implementing its own strategies, such as intensive case management, the introduction of a new practice note for family provision, and a more restrictive approach to the recovery of costs.

The Bill

The objects of this Bill are:

- (a) to amend the *Succession Act 2006* (**the 2006 Act**) to enact, with some modifications, the model provisions as a new Chapter 3 of that Act, and
- (b) to enable the making of regulations to control costs and advertising of legal services in relation to such applications, and
- (c) to repeal the *Family Provision Act 1982* (**the 1982 Act**), and
- (d) to make various provisions of a savings, transitional or consequential nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act (with the exception of Schedule 2.1) on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Succession Act 2006* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to various other Acts set out in Schedule 2.

Clause 5 repeals the *Family Provision Act 1982*.

Clause 6 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Issues Considered by the Committee

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

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

22. The Committee notes that Clause 2 provides for the commencement of the proposed Act (with the exception of Schedule 2.1) on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

23. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent (other than the exception of Schedule 2.1), is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

13. TOW TRUCK INDUSTRY AMENDMENT BILL 2008

Date Introduced: 26 June 2008
House Introduced: Legislative Assembly
Minister Responsible: Hon Reba Meagher MP
Portfolio: Health

Purpose and Description

1. This Bill amends the *Tow Truck Industry Act 1998* to make further provision in relation to tow truck operators licences, drivers' certificates and the regulation of the tow truck industry.
2. The main objectives are to improve the regulation of the tow truck industry, reduce red tape, protect customers and protect the safety of drivers at accident scenes. This Bill will amend the *Tow Truck Industry Act* in several areas. The Act will be changed to allow operators and drivers with proven track records to apply for three-year licences and certificates at a discounted rate, provided that they meet certain eligibility requirements. There are amendments to cap charges relating or ancillary to towing work to prevent unscrupulous operators charging excessive fees for minor towing-related services. The changes will increase driver safety and improve driver conduct at accident scenes by preventing the practice of drivers carrying hawkers with them who harass consumers into signing towing agreements. Various miscellaneous amendments will clarify provisions to assist with the interpretation of the Act and strengthen the regulatory framework.
3. One of the key amendments will extend the maximum period for which tow truck operators licences and drivers certificates may be granted from 12 to 36 months. Currently, tow truck operators and drivers are required to hold an operators licence and drivers certificate respectively. These licences and certificates are only issued for a maximum period of 12 months. This means that industry is required to submit documents each year, which is time consuming and costly. These arrangements are burdensome for operators and drivers who have a good disciplinary record and who have maintained the same business structure and operations since entering the industry. To reduce this burden, the amendments will extend the maximum period for which a licence or certificate can be issued from 12 months to three years.
4. The new three-year licences and certificates will be offered at a discounted rate to the single year renewal fee. However, the new three-year licences and certificates will only be available to drivers with a proven track record and who have a good disciplinary record. For operators to be eligible, they must have been operating under the same operators licence in continuum for three years before the lodgement of an application.

5. In the case of a driver, s/he must have held a continuous drivers certificate for five years before the lodgement of the application for the new certificate or licence. To be eligible, the driver, licensee or any close associates of the licensee also must not be under investigation by the RTA in relation to a breach of their licence or certificate, or any other contravention of the Act or regulations, and must not have committed actions in the five years before the application lodgement which would warrant the suspension, revocation or cancellation of a licence. As with the existing arrangements, operators will still be required to provide a certificate of currency to confirm that all insurance requirements have been fulfilled.
6. Criminal names checks, driver licence checks and vehicle registration checks will continue to be done by the RTA. Additionally, if a new three-year licence or certificate is revoked or cancelled, the driver or licensee will be ineligible to make an application for a new extended licence or certificate until they satisfy the relevant criteria. If there is a suspension, the operator or driver will not be able to resume the three-year licence or certificate but will automatically be placed on a licence or certificate not exceeding 12 months.
7. Another main feature of this Bill is the provision for the capping of charges relating to procedures and tasks that are related or ancillary to towing. The Bill will allow the RTA to determine the maximum charges that may be charged by operators and drivers for ancillary components of a tow.
8. Another key amendment relates to the carrying of unauthorised passengers in tow trucks. Under the current section 67 of the Act, a person must not travel as a passenger in a tow truck that is travelling to or from the scene of a motor vehicle accident unless they are a passenger or driver of the motor vehicle involved in the accident or they hold a tow truck driver certificate. The intent of this section is to prevent tow truck drivers arriving at accident scenes with passengers who, upon arrival at the scene, engage tow truck drivers from competing companies in arguments or violence in order to distract, intimidate and delay them in their efforts to legally obtain a towing authorisation. This tactic allows the tow truck driver who carries such a passenger to obtain a towing authorisation at the expense of other competing drivers.
9. The current penalty for breaching this section is imposed against the person who travels as the passenger. However, it is difficult to obtain credible proof of identity and residential details of the passenger so that a penalty can be imposed. The amendment in this Bill will mean that the tow truck driver who drove the passenger to the accident scene will also be penalised. The addition of such a penalty will aim to be an effective measure in deterring tow truck drivers from this type of activity.
10. Another important amendment relates to the compliance of drivers at accident scenes. Currently, under section 66 of the Act, a driver of a tow truck at an accident scene must comply with any reasonable direction given by an authorised officer, police officer or emergency services officer. However, some tow truck businesses have sent two certified drivers in one tow truck to an accident scene to get around these directions. For example, when instructed to leave an accident scene by a police officer, one of the drivers will hand the towing authorisation booklet to the other driver, who then persists in soliciting the tow. The police can issue an infringement notice to both drivers for failing to comply with their direction.

11. However, as the provision specifies compliance with directions from authorised officers by the driver of the truck, the police are required to prove which individual was the driver of the tow truck. As this cannot often be proven, charges can be dismissed when the matter comes before a court. Therefore, it is proposed to amend the Act to replace "the driver of the truck" with "a certified driver". This aims to eliminate ambiguities in relation to driver conduct at accident scenes.
12. The Bill also introduces an amendment to specify that the Act does not apply to the towing, salvage and storage of some vehicles such as forklift trucks, golf buggies and ride-on mowers. These types of vehicles were never meant to be captured by the legislation and the amendment aims to clarify this situation.

Background

13. In 2007 the Government introduced reforms to improve the administration of the tow truck industry. The former Tow Truck Authority was dissolved and the Roads and Traffic Authority [RTA] was established as the industry regulator on 1 December 2007.
14. According to the agreement in principle speech, the amendments in this Bill have the support of the New South Wales Police Force and other key industry stakeholders, such as the Insurance Council of Australia, the Waste Contractors and Recyclers Association, and reputable operators within the industry.
15. Another key feature of this Bill is the amendment to provide for the capping of charges relating to procedures that are related or ancillary to towing. Currently, the Government may set maximum prices that operators and drivers may charge for the towing, salvage, or storage of motor vehicles. This is to prevent disreputable industry operatives from taking advantage of motorists at accident scenes when they are vulnerable and/or in a state of stress and confusion and from charging high fees to tow and store their motor vehicle. Although maximum charges are prescribed, there are still unscrupulous operators and drivers who impose unnecessary and inflated charges associated with tasks ancillary or related to towing, such as, charges that are not captured under towing, salvage or storage but which are associated with towing.
16. The charges disguise as drop fees, which are commissions paid by smash repairers to tow truck drivers for the delivery of accident-damaged motor vehicles. Drop fees can range from \$150 to several thousands of dollars.
17. Another key amendment relates to the carrying of unauthorised passengers in tow trucks. The intent of the current section 67 of the Act, is to prevent tow truck drivers arriving at accident scenes with passengers who engage tow truck drivers from competing companies in arguments or violence in order to distract, intimidate and delay them in their efforts to legally obtain a towing authorisation. This tactic allows the tow truck driver who carries such a passenger to obtain a towing authorisation at the expense of other competing drivers.
18. According to the agreement in principle speech, it is not uncommon for the offending passenger to leave the scene of the accident once police arrive or once directed to leave by police. However, by this stage, the tow truck driver who has brought the passenger has already obtained a towing authorisation.

The Bill

The object of this Bill is to amend the *Tow Truck Industry Act 1998* (**the Act**):

- (a) to extend the maximum duration of a tow truck operators licence, or a drivers certificate, from one year to 3 years, but only if the applicant requests a 3-year licence or certificate and satisfies other probity requirements, and
- (b) to require tow truck operators to maintain a holding yard and to provide reasonable access to motor vehicles being held in the operator's holding yard, and
- (c) to allow the regulations, rather than the Roads and Traffic Authority (**the RTA**), to cap all fees and charges for the towing, storage and salvage of a motor vehicle, as well as for any related or ancillary service, and
- (d) to extend the prohibition on touting and soliciting for work at the scene of an accident, so that it begins to apply immediately after a towing authorisation is obtained by any person in accordance with the Act or after a police officer has organised for the towing of the relevant motor vehicle, and to ensure that an authorised officer, police officer or emergency services officer may direct any certified driver at the scene of an accident, not just the actual driver of a tow truck, and
- (f) to make it an offence for the driver of a tow truck to allow a person to travel as a passenger in the driver's tow truck that is proceeding to or from the scene of an accident, except in certain circumstances.

Schedule 1 Amendments

Application of Act to certain motor vehicles

Schedule 1 [1] makes it clear that the Act does not apply to the towing, salvage and storage of some motor vehicles (such as forklifts, golf buggies and ride-on mowers).

Extension of duration of some tow truck operators licences and drivers certificates to 3 years

Schedule 1 [2] and [9] require an applicant for a tow truck operators licence or a drivers certificate to specify the term of licence or certificate sought.

Schedule 1 [8] and [11] extend the maximum duration of a licence or drivers certificate from one year to 3 years, but only if the applicant satisfies certain probity requirements.

Schedule 1 [12] provides that, if a 3-year licence or drivers certificate is suspended, the licence or certificate, once re-instated, is to continue only until the next anniversary of its issue.

Schedule 1 [13] provides for the review of a decision to grant a licence or drivers certificate for a lesser term than that applied for.

Obligations to maintain, and provide access to, holding yards

Schedule 1 [3] requires an application for a tow truck operators licence to specify each place intended to be used as a holding yard in carrying on the applicant's business as a tow truck operator.

Schedule 1 [4] provides that the RTA may refuse to grant an application for a tow truck operators licence on the ground that the applicant has not specified an appropriate place as a holding yard.

Schedule 1 [5] makes it a condition of a licence that the licensee must maintain at least one holding yard.

Schedule 1 [6] makes it a condition of a licence that the licensee must allow the owner of a motor vehicle stored at any holding yard used by the licensee reasonable access to the motor vehicle, during business hours, to collect items from the motor vehicle.

Conditions relating to charging for towing, salvage or storage and connected work

Schedule 1 [7] and [10] impose conditions on a tow truck operators licence and a drivers certificate relating to the fees that can be charged for towing or salvage of a motor vehicle, or

(only in the case of a licence) for storage of a motor vehicle, or for any service that is related to or ancillary to the towing, salvage or storage of a motor vehicle. They also impose conditions that provide that a licensee or certified driver must not charge a fee for work that was not actually done by or on behalf of the licensee or certified driver.

Schedule 1 [14] provides for fees and charges to be capped by the regulations, rather than by the RTA. In addition to towing, salvage and storage (which are currently regulated), the regulations can cap fees and charges for any service related to or ancillary to the towing, salvage or storage of a motor vehicle. The regulations can specify services for which the licensee or certified driver cannot charge a fee.

Schedule 1 [15] makes a consequential amendment.

Obligation to periodically update licence and certificate particulars

Schedule 1 [7] also imposes conditions on a tow truck operators licence requiring the holder of a 3-year licence to periodically confirm particulars of the licence and requiring the holder of any licence to notify the RTA of any changes in licence particulars.

Schedule 1 [10] also imposes conditions on a drivers certificate requiring the holder of a 3-year drivers certificate to periodically confirm particulars of the certificate and requiring the holder of any certificate to notify the RTA of any changes in the certificate's particulars.

Prohibition on touting or soliciting for towing work at scene of accident

Schedule 1 [16] amends the existing provision creating an offence of touting or soliciting for towing work at the scene of an accident by providing that, although a person who is lawfully attempting to obtain, or lawfully dealing with, a towing authorisation is exempt from the prohibition on touting or soliciting for work, that exemption ceases once a towing authorisation is obtained by another person or the person is informed that a police officer has organised for the towing of the relevant motor vehicle.

Power to give directions at scene of accident

Schedule 1 [17] ensures that an authorised officer, police officer or emergency services officer may give directions to any certified driver at the scene of an accident, not just the actual driver of a tow truck.

Prohibition on carrying passengers in tow trucks

Schedule 1 [18] makes it an offence for the driver of a tow truck to allow a person to travel as a passenger in the driver's tow truck that is proceeding to or from the scene of an accident unless the person was the driver of, or was a passenger in, a motor vehicle involved in the accident or is a certified driver who is travelling as a passenger for the purpose of assisting the driver of the tow truck in carrying out towing work. (At present only the passenger would be guilty of an offence if the driver allowed him or her to travel in the tow truck.)

Savings and transitional provisions

Schedule 1 [19] provides for the making of savings and transitional regulations as a consequence of the enactment of the proposed Act.

Schedule 1 [20] makes savings and transitional provisions consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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

Issue: Strict Liability

19. Numerous clauses¹⁰ in the Bill provide for strict liability offences or are silent on knowledge or intention. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the offender intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence.

20. However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.¹¹

21. The strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, with no terms of imprisonment imposed as a penalty.

22. The Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with and that facilitate the effective regulation and management of the tow truck industry.

23. Accordingly, the Committee considers that the Bill does not trespass unduly on rights and liberties of those that may be charged with certain strict liability offences.

Issue: Retrospectivity – Schedule 1 [20] – insertion of proposed Schedule 2, Part 5 – proposed clauses 18 (1) and (2) – previous conduct may be taken into account in considering application for 3-year licence or drivers certificate:

24. Proposed clause 18 (1) reads: Section 22 (2), as substituted by the amending Act, extends to conduct that occurred before the substitution of the subsection. Proposed clause 18 (2) reads: Section 31 (2), as substituted by the amending Act, extends to conduct that occurred before the substitution of the subsection.

25. The Committee will always be concerned with retrospective effects of provisions. However, the Committee considers the retrospectivity of the clauses 18 (1) and (2) in the proposed Part 5 of Schedule 2, to the extent of covering conduct that occurred before the relevant amending subsections, does not trespass unduly on personal rights and liberties. The Committee is of the view that there is a public interest in ensuring the integrity and probity of the system for considering applications for 3-year licence or drivers certificate, which requires that previous conduct may be taken into account.

¹⁰ Clauses such as in Schedule 1 [16]: proposed section 63 (1) – touting or soliciting for towing work at scene of accident; Schedule 1 [16]: proposed section 63A – touting or soliciting for repair work at scene of accident; Schedule 1 [18]: proposed section 67 (2) – passengers in tow trucks.

¹¹ Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

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

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

26. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

14. VEXATIOUS PROCEEDINGS BILL 2008

Date Introduced:	26 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Police

Purpose and Description

1. This Bill makes provision with respect to vexatious proceedings in the courts and tribunals of the State.
2. It is designed to expand the powers of the courts to control vexatious litigants. A vexatious litigant is a person who frequently and persistently seeks to commence legal action without reasonable grounds or for improper purposes. Vexatious litigants often repeat arguments that have already been rejected, disregard the practices and rulings of courts and tribunals or persistently attempt to abuse legal processes. Actions taken by vexatious litigants can often result in the waste of public resources, the harassment of defendants in litigation and the incurring of unnecessary costs.
3. The Bill aims to enhance the court's ability to control vexatious litigants in several ways. First, it will allow an authorised court to take into account any proceedings that a vexatious litigant may have brought in any Australian court or tribunal. Second, it will allow the court to make orders where proceedings have been instituted in a tribunal. Third, it clarifies both the powers of the court and its procedures. Fourth, it sets out comprehensive definitions. Fifth, it will enable orders to be made in relation to people who may be acting in concert with a vexatious litigant.
4. It continues the power of the Supreme Court and the Land and Environment Court to make orders but it also enables the Industrial Relations Commission in Court Session to make orders in relation to vexatious litigants. Under the *New South Wales Constitution Act 1902*, these courts are superior courts of record of equivalent status. It is appropriate that they be authorised to make vexatious proceedings orders. However, with the more specialist nature of the Land and Environment Court and the Industrial Relations Commission, their ability to make orders will be limited to proceedings in their respective jurisdictions. Consistent with the model bill, the Supreme Court will deal with applications for orders against a person who has commenced proceedings in any other court or tribunal.
5. This Bill enables applications to be made to an authorised court for a vexatious proceedings order. Currently, the Attorney General or the person forced into wrongful litigation (the aggrieved person), may make an application to the court for an order to restrain a vexatious litigant. The Bill expands the range of people who may apply for a vexatious proceedings order to include the Solicitor General and the registrar of the relevant court. It also allows people who have a sufficient interest in the matter to apply to the court for an appropriate order.

6. To ensure that there is no abuse of the process, people claiming a sufficient interest must first obtain the leave of the court to make the application. Currently, New South Wales legislation provides that a court may only make an order to restrain a vexatious litigant where a person "habitually and persistently and without any reasonable grounds" institutes vexatious legal proceedings. This is a stricter threshold test than that adopted under the new Queensland and Northern Territory Acts and by the High Court.
7. According to the agreement in principle speech, this Bill follows the approach taken in the Queensland and Northern Territory jurisdictions by providing that the court may make a vexatious proceedings order if it is satisfied that a person has "frequently" instituted or conducted vexatious proceedings in Australia. This new threshold test has been chosen to make it easier to obtain a vexatious proceedings order against a vexatious litigant. In applying this simplified test, the court may have regard to proceedings instituted in, or orders made by, any Australian court or tribunal.
8. The court will also be able to make an order when a person is acting in concert with a person who is the subject of a vexatious proceedings order or has frequently instituted or conducted vexatious proceedings. This includes, but is not limited to, a relative or associate who may institute proceedings on behalf of the vexatious litigant. To ensure that the person's rights are protected, the person must be given the opportunity to be heard in relation to the matter. When a vexatious proceedings order is made, the court can order a stay of all, or part, of any proceedings already instituted by the person, or prohibit the person from instituting proceedings.
9. The court will be able to make other any other orders that it thinks fit, for example, an order directing that the person may only file documents by mail or give security for costs. A vexatious proceedings order may be varied or set aside by order of the court of its own motion or following an application. An authorised court may reinstate a vexatious proceedings order prohibiting a person from instituting proceedings if the court is satisfied that, within five years of the order having been set aside, the person has instituted or conducted vexatious proceedings in an Australian court or tribunal, or acted in concert with another person.
10. A person who is the subject of a vexatious proceedings order or a person acting in concert with such a person may apply to the appropriate authorised court for leave to institute proceedings that are the subject of an order. The court may dispose of such an application by either dismissing the application or granting it. Consistent with legislation in Queensland and the Northern Territory, there is no appeal from a decision disposing of the application.
11. This Bill also provides for the establishment of a register of vexatious proceedings orders and related orders. The register will be maintained by the Supreme Court on behalf of all authorised courts. The register will be accessible by the legal profession and members of the public and published on the court's website.

Background

12. This Bill, according to the agreement in principle speech, is based on model legislation approved by the Standing Committee of Attorneys General. Both Queensland and the Northern Territory have recently introduced legislation consistent with the model bill.

13. According to the agreement in principle speech, “the Government recognises the harm caused to, and costs incurred by, opposing parties and other participants in the justice system as a result of persistent litigation by vexatious litigants. Vexatious litigants abuse court processes by repetitively pursuing frivolous applications, raising spurious defences, refusing reasonable settlement offers, failing to pay costs after being ordered to do so and launching unmeritorious appeals. These actions impinge on the effectiveness and efficiency of the justice system and make the process more expensive for everyone. Innocent parties can be dragged through the courts, often at great financial and emotional cost”.
14. At present, both the New South Wales Supreme Court and the Land and Environment Court have the power to make orders relating to a vexatious litigant. The relevant provisions provide that the Attorney General or an aggrieved person may seek orders to restrain a vexatious litigant from continuing any proceedings or from bringing fresh proceedings in any New South Wales court except by leave. The Supreme Court may also make orders relating to a vexatious litigant who has instituted proceedings in any inferior court. However, there are limitations to these provisions in operation.
15. From the agreement in principle speech:

The Vexatious Proceedings Bill seeks to protect the fundamental right of citizens to approach the courts to seek justice in accordance with the law while preserving the efficiency of the justice system and shielding other participants in the justice system from unmeritorious actions. The proposed new legislation will achieve greater consistency with other Australian States and Territories in dealing with vexatious litigants. The bill has been the subject of extensive consultation with stakeholders, including the heads of jurisdiction and the legal profession.

The Bill

16. Section 84 of the *Supreme Court Act 1970* currently enables the Supreme Court to make orders to prevent litigants from continuing or instituting vexatious proceedings in the Supreme Court or in any other court of the State. However, the Supreme Court may only make such an order if it is satisfied that the litigant has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in the courts of the State. In determining whether this test is satisfied, the Supreme Court is limited to examining action taken by a litigant in the State.
17. Section 70 of the *Land and Environment Court Act 1979* confers a comparable power on the Land and Environment Court in relation to vexatious proceedings instituted in that Court.
18. The objects of this Bill are:
 - (a) to enact provisions (which are largely based on model provisions developed by the Standing Committee of Attorneys-General) that expand the power of the Supreme Court to make orders restricting proceedings by vexatious litigants, including provisions that enable the Court:
 - (i) to make such orders if satisfied that a litigant has frequently instituted or conducted vexatious proceedings, and
 - (ii) to make such orders against persons acting in concert with vexatious litigants, and

- (iii) to make such orders in relation to proceedings instituted or conducted by litigants in tribunals as well as in courts, and
 - (iv) to take into account, when making such orders, conduct in the courts and tribunals of other Australian jurisdictions, and
- (b) to confer comparable powers on the Land and Environment Court in relation to vexatious litigants in that Court and on the Industrial Court in relation to vexatious litigants in the Industrial Relations Commission, and
- (c) to repeal section 84 of the *Supreme Court Act 1970* and section 70 of the *Land and Environment Court Act 1979* and to make provision for matters of a savings and transitional nature consequent on the repeal of those sections.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 defines the term ***proceedings*** for the purposes of the proposed Act. The definition encompasses both civil and criminal proceedings before the courts and tribunals of the State.

Clause 5 provides for when proceedings are instituted for the purposes of the proposed Act.

Clause 6 defines the term ***vexatious proceedings*** to include:

- (a) proceedings that are an abuse of the process of a court or tribunal, and
- (b) proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and
- (c) proceedings instituted or pursued without reasonable ground, and
- (d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

Clause 7 provides that the proposed Act does not limit or otherwise affect the inherent jurisdiction or powers of courts and tribunals apart from the proposed Act to restrict vexatious proceedings before them.

Part 2 Vexatious proceedings orders

Clause 8 enables certain courts to make orders (***vexatious proceedings orders***) restricting a vexatious litigant or a person acting in concert with such a person from continuing or instituting legal proceedings. The courts that will be able to make such orders (***authorised courts***) are the Supreme Court, the Land and Environment Court and the Industrial Court.

In making a vexatious proceedings order, an authorised court must be satisfied that a litigant has brought vexatious proceedings on a frequent basis or that a person is acting in concert with such a litigant. This test for determining when to make a vexatious proceedings order is less onerous than the current test which requires a court to be satisfied that a person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.

In determining whether to make a vexatious proceedings order against a person, an authorised court can consider all legal actions instituted or conducted, and all orders made, in Australia. This includes actions instituted or conducted and orders made prior to the commencement of the proposed section.

An authorised court will be able to make a vexatious proceedings order of its own motion or on the application of any of the following persons:

- (a) the Attorney General,
- (b) the Solicitor General,
- (c) the appropriate registrar for the court,

- (d) a person against or in relation to whom another person has instituted or conducted vexatious proceedings,
- (e) a person who, in the opinion of the court, has a sufficient interest in the matter.

The kinds of vexatious proceedings orders that an authorised court will be able to make will depend on the court making the order. The Supreme Court will have the most extensive powers. It will be able to make any of the following orders in relation to a person:

- (a) an order staying all or part of any proceedings in New South Wales already instituted by the person,
- (b) an order prohibiting the person from instituting proceedings in New South Wales,
- (c) any other order that the Court considers appropriate in relation to the person.

The Land and Environment Court will have comparable powers, but limited to restricting proceedings in that Court. Similarly, the Industrial Court will have power to make orders restricting proceedings in the Industrial Relations Commission (whether in Court Session or otherwise).

Clause 9 enables an authorised court, by order, to set aside or vary a vexatious proceedings order that it has made.

Clause 10 enables an authorised court, by order, to reinstate a vexatious proceedings order it has set aside that prohibited a person from instituting proceedings if satisfied that, within 5 years of the vexatious proceedings order being set aside, the person has:

- (a) instituted or conducted vexatious proceedings in an Australian court or tribunal, or
- (b) acted in concert with another person who has instituted or conducted vexatious proceedings in an Australian court or tribunal.

Clause 11 provides for the publication of certain orders made under the proposed Act. Any such orders are to be recorded in a publicly available register and published in the Gazette.

Part 3 Particular consequences of vexatious proceedings orders

Clause 12 provides for the authorised courts (an *appropriate authorised court*) that may grant leave to institute proceedings that would otherwise be prohibited by a vexatious proceedings order. An appropriate authorised court is:

- (a) the authorised court that made the vexatious proceedings order, and
- (b) in the case of a vexatious proceedings order made by the Supreme Court that operates to prohibit proceedings being instituted in the Land and Environment Court—the Land and Environment Court, and
- (c) in the case of a vexatious proceedings order made by the Supreme Court that operates to prohibit proceedings being instituted in the Industrial Relations Commission (whether in Court Session or otherwise)—the Industrial Court.

Clause 13 provides for the consequences when an authorised court makes a vexatious proceedings order prohibiting a person from instituting proceedings. The person will not be able to institute proceedings unless an appropriate authorised court grants leave for the proceedings to be instituted. A failure to obtain such leave before instituting proceedings will result in a stay of the proceedings and, ultimately, in the dismissal of the proceedings. If there is any doubt, the authorised court, or the court or tribunal in which the proceedings are instituted, can declare that the proceedings are subject to the proposed section and can make any other appropriate order.

Clause 14 provides for how applications for leave to institute proceedings are to be made. An applicant must file an affidavit with the application. The content of the affidavit is set out in the proposed section. An applicant cannot appeal a decision to dismiss the application and not to grant leave.

Clause 15 sets out the circumstances in which an appropriate authorised court can dismiss an application for leave to institute proceedings. The court must dismiss the application if the

affidavit required in support of the application does not substantially comply with the application requirements, the proceedings are vexatious or there is no prima facie ground for the proceedings.

Clause 16 sets out the circumstances and process by which an application for leave to institute proceedings can be granted by an appropriate authorised court. The applicant is to serve the proposed defendant or respondent, and the other listed persons. All such relevant persons have an opportunity to be heard at the hearing for the application for leave. The court can grant leave only if satisfied that the proceedings are not vexatious and that there are one or more prima facie grounds for the proceedings.

Part 4 Miscellaneous

Clause 17 enables an authorised court to make orders prohibiting or restricting the disclosure, publication or broadcast of evidence and certain other information arising in proceedings under the proposed Act if it considers it necessary to do so in order to protect the welfare of a person or for any other reason.

Clause 18 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 19 enables rules of court to be made for the purposes of proceedings under the proposed Act.

Clause 20 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Clause 21 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.

Clause 22 provides for the review of the proposed Act in 5 years.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. In particular, it enables pending applications for orders against vexatious litigants to be dealt with under existing provisions and provides for existing orders against vexatious litigants to continue to have effect as such under the proposed Act.

Schedule 2 Amendment of other Acts

Schedule 2.1 repeals section 70 of the *Land and Environment Court Act 1979*.

Schedule 2.2 repeals section 84 of the *Supreme Court Act 1970* and makes a consequential amendment to that Act.

Issues Considered by the Committee

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

Issue: Retrospectivity:

19. Numerous clauses¹² in the Bill could give the effect of retrospectivity by taking into account of proceedings instituted or conducted, and orders made, before the commencement of the relevant amending sections.

¹² Clauses such as in proposed Part 2, clauses 8 (2)(a) and (b) – making of vexatious proceedings order – when orders may be made; in proposed Part 3, clauses 14 (3)(a)(ii) and (b) – application for leave to institute proceedings.

- 20. The Committee will always be concerned with retrospective effects of provisions. However, the Committee considers the retrospectivity of the proposed clauses 8 (2)(a) and (b); and proposed clauses 14 (3)(a)(ii) and (b), does not trespass unduly on personal rights and liberties, to the extent of taking into account of any proceedings that have been instituted or conducted, or orders that have been made, before the commencement of the relevant amending sections.**
- 21. The Committee is of the view that there is a public interest in ensuring that courts are able to control vexatious litigants, which requires that previous proceedings or orders before the commencement of the relevant amending sections, may be taken into account by the relevant court.**

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

Issue: Proposed Part 3 - section 14 (6) – Application for leave to institute proceedings:

22. Proposed section 14 applies to a person (the applicant) who is (1)(a): subject to a vexatious proceedings order prohibiting the person from instituting proceedings, or (1)(b): acting in concert with another person who is subject to such an order. According to proposed section 14 (6): Despite any other Act or law, the applicant may not appeal from a decision disposing of the application.
23. The Committee notes the importance of judicial and merits review for protecting individual rights against oppressive administrative action and in upholding the rule of law. The Committee will always be concerned if a Bill purports to oust the jurisdiction of the courts. However, the Committee notes that in some instances, policy considerations may determine that an appeal or review is not necessary.
24. This proposed section provides that a person who is the subject of a vexatious proceedings order or a person acting in concert with such a person, may apply to the appropriate authorised court, for leave, to institute proceedings that are the subject of an order. The court may then decide to dispose of such an application by either dismissing the application or granting it.
25. According to proposed section 14 (6), there is no appeal from a decision disposing of the application. The Committee notes that this appears to be also consistent with legislation in Queensland and the Northern Territory.
26. The Committee further notes the second reading speech that introduced a similar legislation into the Northern Territory Parliament, which stated the rationale for no further appeal from the court's decision to dismiss such an application:
- ...A decision by the Supreme Court is made after consideration of all the relevant facts. It is considered necessary to block off another avenue of appeal, as vexatious litigants tend by their nature to take action in any way possible to question a court's decision, regardless of the merit of their position.

- 27. The Committee takes into consideration that the proposed section 14 (6) appears to be consistent with legislation in Queensland and the Northern Territory, where there are also no appeals from a decision disposing of the application by the person who is the subject of a vexatious proceedings order.**

28. The Committee notes the strong public interest in excluding an appeal in this context when vexatious litigants may have a tendency to continue to take action to question a court's decision regardless of their merits. Accordingly, the Committee is of the view that the proposed section 14 (6) does not make individual rights and liberties appear unduly dependent on non-reviewable decisions.

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

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

29. The Committee notes that the proposed Act is to commence on a day to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

PART TWO – REGULATIONS

SECTION A: REGULATIONS FOR THE SPECIAL ATTENTION OF PARLIAMENT UNDER S 9(1)(B) OF THE *LEGISLATION REVIEW ACT 1987*

Outline of the Regulation/Issues

Crimes (Administration of Sentences) Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9 1(a) of the *Legislation Review Act 1987*, resolve to refer this report to Parliament on the Regulation.

Grounds for comment

Personal rights/liberties	<p>Legal professional privilege, access to legal representation and privilege against self incrimination:</p> <p>The Committee is of the view that clauses 108 (8), 109 and that of excluding exempt persons such as legal practitioners from the operation of clause 108 unless the application of the exempt person to the Commissioner of Corrective Services is successful (with no conditions attached), could form undue trespasses on individual rights and liberties to legal professional privilege, access to legal representation and the privilege against self incrimination.</p> <p>The Committee is of the view that the extent to which monitoring and restrictions of otherwise confidential communications is authorised by this Regulation (and not by an amending Act) is inconsistent with the legal protection conventionally conferred on lawyer-client relationships. Legal professional privilege is a common law right in Australia and is acknowledged by the High Court to be a fundamental human right or civil right.</p> <p>Another concern to the Committee is the potential use of any evidence obtained from the monitoring (from inspecting, reading and copying) of correspondence, including the</p>
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	<p>admissibility of any such evidence against the inmate or that could be used to incriminate the inmate.</p> <p>Oppressive official powers – denial of access to Official Visitors:</p> <p>The Committee is of the view that clauses 156 (5) and 159 (5) unduly trespass on personal rights and liberties including the right to access and be heard by Official Visitors, who have a legislated responsibility to ensure the health, safety and welfare of inmates.</p>
Business impact	
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	The Committee is concerned that clauses 156 (5) and 159 (5) of the Regulation, which exclude the right to be visited by Official Visitors, may contravene or be in conflict with the legislation, <i>Terrorism (Police Powers) Act 2002</i> , with respect to the humane treatment of persons detained (section 26ZC).
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	Regulatory Impact Statement was not provided or received.
Other	
Persons contacted	Attorney-General's and Minister for Justice's Office

Explanatory Note

The object of this Regulation is to remake, with minor modifications, the *Crimes (Administration of Sentences) Regulation 2001* (to be repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*).

This Regulation deals with the following matters:

- (a) full-time imprisonment (Chapter 2), including provisions with respect to the following:
- (i) admission procedures (Part 2.1),
 - (ii) case management and classification (Part 2.2),
 - (iii) correctional centre routine (Part 2.3),
 - (iv) visits and communications (Part 2.4),
 - (v) correctional centre discipline (Part 2.5),
 - (vi) inmates' requests and complaints (Part 2.6),
 - (vii) release procedures (Part 2.7),
 - (viii) other miscellaneous matters (Part 2.8),

- (b) periodic detention (Chapter 3), including provisions with respect to the following:
 - (i) preliminary matters (Part 3.1)
 - (ii) admission procedures (Part 3.2),
 - (iii) periodic detention routine (Part 3.3),
 - (iv) work site routine (Part 3.4),
 - (v) leave of absence (Part 3.5),
 - (vi) other miscellaneous matters (Part 3.6),
- (c) home detention (Chapter 4),
- (d) compulsory drug treatment detention (Chapter 5),
- (e) community service work (Chapter 6),
- (f) parole (Chapter 7),
- (g) revocation by the State Parole Authority of certain orders (Chapter 8),
- (h) administrative matters (Chapter 9), including provisions with respect to the following:
 - (i) correctional officers and departmental officers (Part 9.1),
 - (ii) conduct of members of correctional staff regarding alcohol and drugs (Part 9.2),
 - (iii) matters concerning the government body "Justice Health" (Part 9.3),
 - (iv) use of firearms (Part 9.4),
 - (v) bravery and meritorious service awards (Part 9.5),
 - (vi) the Serious Offenders Review Council (Part 9.6),
 - (vii) other miscellaneous matters (Part 9.7).

This Regulation adopts Australian/New Zealand Standard AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*, as in force on 1 September 2008.

This Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including section 271 (the general power to make regulations) and various other provisions referred to in the Regulation.

Comment

Legal professional privilege, access to legal representation and privilege against self incrimination:

1. This Regulation adds a new Part 2.4, Division 6 with regard to written communications with inmates. Clause 107 is a new section with regard to certain privileged letters and parcels. However clause 107 (8) states that clause 107 (certain privileged letters and parcels) does not apply to any letter or parcel to which clause 108 applies.
2. Clause 108 is a new section that applies to correspondence with Category AA and Category 5 inmates. Category AA is the category of male inmates who, in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment. Category 5 is the category of female inmates who, in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

3. The new clause 108 applies to all letters and parcels that are sent by a Category AA male inmate or Category 5 female inmate to any other person (including an exempt body or an exempt person), or to a Category AA male inmate or Category 5 female inmate from any other person (including an exempt body and an exempt person). An exempt body means: the Ombudsman, the Judicial Commission, the NSW Crime Commission, the Police Integrity Commission, the Anti Discrimination Board, the Administrative Decisions Tribunal, the Independent Commission Against Corruption, the Privacy Commissioner, the Legal Aid Commission, the Legal Services Commissioner or the Legal Services Tribunal or the Commonwealth Ombudsman, the Commonwealth Human Rights and Equal Opportunity Commission (now called the Human Rights Commission) or the Australian Crime Commission. An exempt person means a Member of Parliament, a legal practitioner or a police officer.
4. Under clause 108 (2), the general manager of a correctional centre or a nominated officer *must* open, inspect, read and copy any letter or parcel received from an inmate and addressed to a person or received from a person (other than an exempt body *but not* an exempt person such as a legal practitioner). Under (5), as soon as practicable after receiving from an exempt body (*not* an exempt person such as a legal practitioner), the nominated officer must deliver the letter or parcel to the inmate without opening, inspecting or reading it, *but only if* (a) the letter or parcel is contained in an envelope or package addressed to the general manager with a note to the effect that it is to be delivered to the inmate without being opened, inspected or read by any person other than the inmate, and (b) the nominated officer has confirmed with the exempt body that it has sent it and addressed it to the inmate.
5. Clause 108 (8) deals specifically with exempt persons (such as a legal practitioner) where the Commissioner *may* (but not must), on the application of an exempt person, make an order declaring that this clause is to apply (either unconditionally or subject to conditions) to letters and parcels sent to or from that person as if that person were an exempt body.
6. A legal practitioner must therefore apply for the clause to operate but this is still subject to the Commissioner then determining whether to make an order declaring that clause 108 is to apply, with conditions or unconditionally, to letters and parcels sent to or from that person as if that person were an exempt body.
7. Clause 108 (9) states that the clause applies to fax transmissions in the same way as it applies to letters and parcels.
8. Under clause 108 (6), a register must also be kept for each correctional centre for recording details with respect to each letter or parcel.
9. Clause 108 (3) states that the inmate need not be informed of any action taken if the letter or parcel (other than the ones addressed to or received from an exempt body) were opened, inspected, read and copied or if the letter or parcel contained prohibited goods and they were confiscated.
10. The new clause 109 deals with correspondence with legal practitioner whereby *subject to the new clause 108*, the Regulation is otherwise, not to be construed so as to limit correspondence between an inmate and the inmate's legal practitioner in respect of any matters affecting the inmate's trial, conviction or imprisonment.

11. The Committee reported on the then *Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007* in its *Legislation Review Digest Report Number 1 of 27 June 2007* including concerns on the right and access to legal representation for detainees and clauses which allow amendment of Acts by a regulation in relation to the making of any provision of the *Crimes (Administration of Sentences) Act 1999* to not apply in relation to detainees under the *Terrorism (Police Powers) Act 2002*.
12. The Committee, at the time, wrote to the then Minister for Police 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*. To date, no reply has been received as yet. However, this Regulation is a result of the amended *Terrorism (Police Powers) Act 2002* which allowed a regulation such as this, to make for exclusions or exceptions from the *Crimes (Administration of Sentences) Act 1999*.
13. The Committee is concerned that the new clauses 108 (8) and 109 would in practice, restrict and even prohibit contact with a legal practitioner unless the content and meaning of the communications through the inmate's and legal practitioner's correspondence could be monitored (by inspecting, reading and copying). Subclause (8) reads: The Commissioner may, on the application of an exempt person, make an order declaring that this clause is to apply (either unconditionally or subject to conditions) to letters and parcels sent to or from that person as if that person were an exempt body and, on making of such an order, this clause so applies. Clause 109 reads: Subject to clause 108, this Regulation is not to be construed so as to limit correspondence between an inmate and the inmate's legal practitioner in respect of any matters affecting the inmate's trial, conviction or imprisonment.
14. The Committee is of the view that the extent to which monitoring and restrictions of otherwise confidential communications is authorised by this Regulation (and not by an amending Act) is inconsistent with the legal protection conventionally conferred on lawyer-client relationships. Legal professional privilege is a common law right in Australia and is acknowledged by the High Court to be a fundamental human right or civil right¹³.
15. The rationale behind the protection under the common law is not just for the importance of privacy but that legal professional privilege relates more fundamentally to the proper administration of justice as observed in the High Court¹⁴. It was held that the privilege is not a "mere rule of evidence, it is a substantive and fundamental common law principle"¹⁵.

¹³ *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543: "Australian courts have classified legal professional privilege as a fundamental right or immunity" at 563 per McHugh J; "Legal professional privilege is also an important human right deserving of special protection" at 575 per Kirby J.

¹⁴ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 133, per Deane J: [Legal professional privilege] "plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen – particularly the weak, the unintelligent and the ill-informed citizen – under the law".

¹⁵ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 132, per Deane J.

16. The practical effect of the monitoring or restrictions of correspondence (subject to the Commissioner of Corrective Services making an order with possible conditions which have been left undefined and unspecified in the clause) is the likely effect on the candour of parties. This would impair the exercise of the right to legal professional privilege. In *Grant v Downs* (1976) 135 CLR 674, the High Court identified a public interest of promoting frank exchanges, at 685, per Stephen, Mason and Murphy JJ: “keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor”.
17. Another concern to the Committee is the potential use of any evidence obtained from the monitoring (from inspecting, reading and copying) of correspondence, including the admissibility of any such evidence against the inmate or that could be used to incriminate the inmate if the Commissioner does not make an order to declare that clause 108 applies to letters and parcels sent to or from that exempt person or makes such a declaration but subject to conditions (the discretion and scope of which had been left wide and undefined).
18. The Committee is of the view that clauses 108 (8), 109 and that of excluding exempt persons such as legal practitioners from the operation of clause 108 unless the application of the exempt person to the Commissioner of Corrective Services is successful (with no conditions attached), could form undue trespasses on individual rights and liberties to legal professional privilege, access to legal representation and the privilege against self incrimination. Accordingly, the Committee refers this to Parliament.

Oppressive official powers – denial of access to Official Visitors:

19. This Regulation has remade Part 2.6, Division 1 (Official Visitors) with regard to inmates’ requests and complaints. Clause 155 on notice of availability of Official Visitors mirrors the previous clause 154 and clause 156 mirrors the previous clause 155 on complaints and inquiries. However, the difference is the new clause 156 (5) reads that: Nothing in this clause permits an Official Visitor to deal with a complaint or inquiry received from a Category AA male inmate or Category 5 female inmate.
20. Category AA is the category of male inmates who, in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment. Category 5 is the category of female inmates who, in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.
21. Under the new Division 2, clause 159 deals with requests to Minister, Commissioner or Official Visitors, and which also mirrors the former clause 158. However, the difference is the new clause 159 (5) reads: Despite any other provision of this Regulation, a Category AA male inmate or Category 5 female inmate is not entitled, and is not to be permitted, to speak with an Official Visitor.

22. The Committee had reported on the then *Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007* in its *Legislation Review Digest Report Number 1 of 27 June 2007* including concerns on the right to be heard by Official Visitors.
23. The Committee, at the time, also wrote to the then Minister for Police, to seek clarification on whether the clause in the then amending Bill contravened or would be in conflict with Section 26ZC of the *Terrorism (Police Powers) Act 2002* with regard to the humane treatment of persons detained if the clause excluded the right to be visited by Official Visitors (who have a legislated responsibility to ensure the health, safety and welfare of inmates). To date, no reply has been received as yet. However, this Regulation is a result of the amended *Terrorism (Police Powers) Act 2002* which allowed a regulation such as this, to make for exclusions or exceptions from the *Crimes (Administration of Sentences) Act 1999*.
24. The Committee is of the view that clauses 156 (5) and 159 (5) unduly trespass on personal rights and liberties including the right to access and be heard by Official Visitors, who have a legislated responsibility to ensure the health, safety and welfare of inmates. The Committee is also concerned that these clauses of the Regulation, which exclude the right to Official Visitors, may contravene or be in conflict with the legislation, *Terrorism (Police Powers) Act 2002*, with respect to the humane treatment of persons detained (section 26ZC). Therefore, the Committee refers these matters to the attention of Parliament.
25. The Committee has resolved to refer this report to Parliament on the Regulation.

Outline of the Regulation/Issues

Liquor Regulation 2008

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 drawing his attention to the observations of the Committee in relation to the costing of the Regulatory proposal.

Grounds for comment

Personal rights/liberties	<p>Strict liability offences: This regulation contains a number of strict liability offences. These give rise to concern to the Committee as such provisions may be seen as contrary to the presumption of innocence. These clauses are listed in the Notes accompanying this report. For the most part they relate to the display of notices and responsible service obligations connected with the sale and consumption of alcohol.</p> <p>The Committee is of the view that these provisions are in the public interest as they have been formulated to support the objectives of the Liquor Act 2007, specifically to regulate the sale, supply and consumption of liquor in a way that is consistent with the expectations and needs of the community. The Committee is accordingly of the view that these provisions do not trespass unduly on personal rights and liberties.</p>
Business impact	<p>Costing the Regulatory proposal: The regulatory impact statement frequently refers to the costs to the liquor industry and to licensees flowing from the particular provisions of the administrative based regulatory system established under the new Liquor Act. However the RIS makes no attempt to estimate these costs.</p>

	Some effort should have been made to quantify the costs to industry of the regulatory arrangements, particularly as many of the fees are contained in the proposed regulation. Other costs arising from meeting and processing procedural requirements such as the preparation of Community Impact Statements should have been identified. It should have been possible to form a reasonable estimate of the cost of preparing and serving such documents. The submission by the Coles Group Ltd estimated these procedural requirements as potentially involving significant costs.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	See earlier comments.
Other	

Persons contacted	Mr Peter Cox NSW Office of Liquor, Gaming and Racing
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Explanatory Note

The object of this Regulation is to provide for the following matters under the Liquor Act 2007:

- (a) application fees for liquor licences and for other authorisations and approvals under the new Act,
- (b) the advertising of applications and the preparation of community impact statements in relation to certain applications,
- (c) the conditions to which liquor licences and other licence-related authorisations are subject, including requirements relating to the display of signs on licensed premises concerning underage drinking,
- (d) harm minimisation measures such as the requirement to undertake responsible service of alcohol training, the requirement to provide drinking water on licensed premises and the declaration of certain products as undesirable liquor products,
- (e) transitional provisions consequent on the new Act,
- (f) miscellaneous matters such as prescribing certain substances as liquor and machinery matters such as specifying the offences that may be dealt with by way of penalty notice.

This Regulation is made under the Liquor Act 2007, including section 159 (the general regulation-making power) and the various other provisions referred to in the Regulation.

Comment

1. The RIS makes numerous comments throughout the text that costs arising from various provisions of the Regulation will impact on applicants and the liquor industry though in no case are these costs estimated or quantified. Even in the absence of such information, the RIS frequently asserts that the benefits of the regulation

outweigh its costs. This may be correct, though it has not been demonstrated. The Committee recommends that in future, a more purposeful effort should be undertaken to arrive at an informative costing of any new regulatory proposal. This action would be consistent with the Guidelines of Schedule 1 of the Subordinate Legislation Act which states that implementation by means of a statutory rule should not normally be undertaken unless the anticipated benefits outweigh the anticipated costs to the community.

2. Strict liability offences commented upon previously: **Clause 31** Sale or supply of liquor to minors prohibited -notice to be displayed in licensed premises; **Clause 32** Sale of liquor through Internet site -notice to be displayed; **Clause 33** Bar areas of hotels and clubs; **Clause 34** Use off certain areas by accompanied minors - notice to be displayed in hotels on licensed public entertainment venues; **Clause 40** Obligations of licensee as to responsible service of alcohol; **Clause 41** Obligations of staff members as to responsible service of alcohol; **Clause 42** Obligations in relation to persons carrying on certain security activities; **Clause 50** Discount liquor promotions or advertisements.

Outline of the Regulation/Issues

Tow Truck Industry Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9(1)(b) of the *Legislation Review Act 1987*, resolve to review and report to Parliament on the Regulation; and
- 2) write to the Minister drawing his attention to the Committee's observations on various matters arising under the Subordinate Legislation Act 1989.

Grounds for comment

Personal rights/liberties	
Business impact	Note following remarks.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	The Regulatory Impact Statement (RIS) contained a satisfactory identification of the objectives sought to be achieved by the proposal and these were usefully set in the context of the legislative framework governing the tow truck industry. The RIS examined in detail five options by which the objectives of the regulation might be wholly or substantially achieved. The effectiveness of each option was weighed against the four others. The central weakness in the assessment was the inadequate appraisal of the costs arising from the regulatory proposal. Where costs were discussed they were usually described as minimal and fundamental to the scheme. Insufficient effort was made to assess the expected overall regulatory charges. The RIS did not assess the administrative costs arising from the regulation either to business or to the Government. The identification of these costs should have been relatively straightforward as the RTA had the benefit of previously administering a similar regulation.
Other	

Persons contacted	
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Explanatory Note

The object of this Regulation is to remake, with minor changes, the Tow Truck Industry Regulation 1999 which is repealed on 1 September 2008 by section 10 (2) of the Subordinate Legislation Act 1989.

The Regulation makes provision for the following matters:

- (a) further particulars that are to be included in an application for a tow truck operators licence (a licence) and in an application for a tow truck drivers certificate (a drivers certificate),
- (b) the payment of application fees for licences and drivers certificates,
- (c) the prescribed offences that disqualify an applicant from holding a licence or drivers certificate for a period of 10 years from the date the applicant was convicted or found guilty of the offence,
- (d) further grounds on which the Roads and Traffic Authority may refuse an application for a licence or drivers certificate,
- (e) further licence and drivers certificate conditions,
- (f) an exemption from holding "on-hook" liability insurance in respect of tow trucks used solely for towing vehicles for wrecking purposes,
- (g) other miscellaneous matters relating to licences and drivers certificates, including the variation of conditions and pending applications,
- (h) the manner in which towing authorisations are to be completed, signed and dealt with,
- (i) additional licence conditions and requirements in relation to holding yards,
- (j) other miscellaneous offences, including offences relating to misuse of licences and drivers certificates, the inspection of tow trucks, conduct of the tow truck drivers, record-keeping and invoices,
- (k) the offences that are prescribed so that they may be dealt with by way of penalty notice and the penalty payable when dealt with in that manner,
- (l) certain other miscellaneous matters, including exemptions for interstate tow trucks, tow truck drivers and operators.

This Regulation is made under the Tow Truck Industry Act 1998, including section 105 (the general regulation-making power).

Comment

1. **Submissions:** The RTA received 21 submissions arising out of the regulatory proposal and made several important changes to the regulation as a result of them. Certain material issues are mentioned in the following notes.
2. **Metal recyclers:** New clause 12 exempts towing operators who use a tow truck solely for the purpose of towing motor vehicles for metal recycling or vehicle dismantling by a motor vehicle wrecker from the existing requirement to hold on-hook liability insurance. The RTA reports that this new exemption will result in direct cost savings for the metal recycling industry. This is seen as going some way to meeting the arguments of members of the Australian Council of Recyclers who maintain in their submissions that Hiap (crane) vehicles used solely to carry wrecked motor vehicle for recycling or dismantling should be exempt from the obligation to hold a licence under the *Tow*

Truck Act 1998. They maintain the scrap metal industries operations do not fall within the spirit or intent of the *Tow Truck Industry Act* and Regulations. This issue is of long-standing and would appear to the Committee to justify a fuller analysis. In the RTA's letter to the Association dated 10 July 2008 it appeared to be contemplating an arrangement under which an exemption would be granted to recyclers subject to conditions. The Committee notes however that in the RTA's summary of submissions on the regulatory proposals it speaks of retaining the present licensing obligations for recyclers and supports this by referring to the NSW Police submission, which also expresses the same view. Under Schedule 2 of the *Subordinate Legislation Act 1989* what is required to be weighed up in respect to this matter are the anticipated benefits to the community from licensing recyclers and whether these outweigh the anticipated costs to the community, bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups and any sector of industry and commerce that may be affected.

3. **Additional class of tow truck:** The NRMA recommended the creation of an additional class of tow truck dedicated to break down towing only. The RTA responded by indicating that it already had power under the Act to determine different classes of licence for different types of towing work and was presently examining the introduction of different classes of licenses.
4. **Fee reduction:** the NRMA in its submission sought a fee reduction on the basis that many regional, country and remote towing operators are currently experiencing considerable economic hardship. It said these operators find it extremely difficult to attract suitably qualified tow truck drivers to maintain a viable and suitable tow industry presence. Low or infrequent tow volumes in these areas place further financial pressure on sustaining a towing business, so that existing towing operators are leaving the industry. The RTA responded to this submission by stating that the current *Tow Truck Industry Bill 2008* contains provisions for variations to licensing fees based on location and the type of towing performed. This appears to indicate that the RTA will be examining this issue, which would be an appropriate course in terms of Schedule 2 of the *Subordinate Legislation Act 1989*.
5. ***Drug Misuse and Trafficking Act 1985*:** The Attorney General's Department in its submission said that the proposal to extend clauses 7 and 16 to apply to offences relating to the cultivation, supply or possession of a prohibited plant should be limited to circumstances where the cultivation, supply or possession of the plant is undertaken for a commercial purpose as defined by the *Drug Misuse and Trafficking Act 1985*. This recommendation was adopted. The Attorney General's Department also said that, in relation to those provisions, it should be clarified that a conviction against a "close associate" will constitute only a discretionary ground for refusal of a licence. This recommendation has also been acted upon.

Outline of the Regulation/Issues

World Youth Day Amendment Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9(1)(b) of the *Legislation Review Act 1987*, resolve to refer this report to Parliament on the Regulation.

Grounds for comment

Personal rights/liberties	<p>Clause 5 (2) with regard to prohibition of certain advertising on buildings and structures: section 46B (8)(b) - The scope of the words 'otherwise inappropriate in the circumstances' is too ill-defined and wide, which may make the rights of the affected owner or occupier, or the holder of a lease or licence, unduly dependent on insufficiently defined administrative powers.</p> <p>Clause 7 (1)(b) with regard to control of conduct within World Youth Day declared areas, where the clause 7 (1) reads: An authorised person may direct a person within a World Youth Day declared area to cease engaging in conduct that: (b) causes annoyance or inconvenience to participants in a World Youth Day event –</p> <p>Recent Federal Court decision on 15 July 2008, in <i>Evans v State of New South Wales</i> [2008] FCAFC 130, where the Court declared that "cl 7 (1)(b) is invalid to the extent to which it is applied to conduct which causes annoyance to participants in World Youth Day events". The Court found the law could be misused to infringe on people's rights to freedom of speech. The Committee also concludes that this could impact on the freedom of speech and could trespass unduly on individual rights. The scope of the words 'annoyance or inconvenience' would be too ill-defined and</p>
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	wide, which could have made individual rights unduly dependent on insufficiently defined administrative powers.
Business impact	The ill-defined and wide powers arising from the proposed clause 5 (2), may have an adverse impact on the business community with regard to its prohibition of advertising on buildings and structures.
Objects/spirit of Act	Federal Court found the definitions of 'annoyance' and 'inconvenience' were too broad and the scope of the laws was uncertain. It found that in giving the World Youth Day Coordination Authority the power to set the regulations, the Government would not have intended to infringe on freedom of speech.
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	<p>It could be an inappropriate delegation of legislative powers where matters such as the definitions of 'annoyance or inconvenience', should be regarded by Parliament through the definition of words in the principal Act.</p> <p>The ability of Parliament to effectively scrutinise the criteria or grounds for the proper exercising of such powers is dependant on Parliament sitting, which could not be done during a winter recess, and could lead to an inappropriate delegation of legislative power.</p> <p>The Committee is of the view that such powers contained in clauses 4 to 8, could more appropriately be made in the principal Act by an amending legislation rather than through the current regulation that commenced on the date of gazettal (25 June 2006), when Parliament is no longer sitting during its' winter recess.</p> <p>The Committee notes that any recommendation on disallowance would by now, be redundant to address the initial concerns since this Regulation has already commenced on the date of gazettal (25 June 2006) and its application has also commenced and finished with the end of the World Youth Day period.</p>

Persons contacted	
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Explanatory Note

The object of this Regulation is to amend the *World Youth Day Regulation 2008* to make provision for a number of matters under the *World Youth Day Act 2006* (**the Act**). In particular, the Regulation:

- (a) prescribes the types of articles that may not be sold or distributed without the approval of World Youth Day Co-ordination Authority (**the Authority**) in certain Authority controlled areas during the sales control period specified under section 46 of the Act (proposed clause 4 (1)), and
- (b) deals with applications for such approvals under section 47 of the Act (proposed clause 4 (2)–(5)), and
- (c) provides for an exemption from the prohibition under section 46B of the Act against certain advertising material on buildings or structures in declared advertising controlled sites for material that was fixed to or placed on the building or structure before the area became an advertising controlled site (proposed clause 5 (1)), and
- (d) provides that the Authority may remove that exemption in certain circumstances (proposed clause 5 (2)), and
- (e) prescribes dates and locations so as to determine what airspace is advertising controlled airspace for the purposes of section 46C of the Act and for which periods it is so controlled (proposed clause 6), and
- (f) empowers police officers and authorised members of the State Emergency Service and the Rural Fire Service to direct a person within a World Youth Day declared area to cease engaging in conduct that is a risk to the safety of the person or others, causes annoyance or inconvenience to participants in a World Youth Day event or obstructs a World Youth Day event (proposed clause 7 (1)), and
- (g) makes it an offence (carrying a maximum penalty of 50 penalty units, currently \$5,500) to fail, without reasonable excuse, to comply with such a direction (proposed clause 7 (2)), and
- (h) provides that a person's entry to a World Youth Day declared area (or any part of a declared area) is subject to the condition that the person must comply with such of the following requests as may be made of the person:
 - (i) a request by a search officer (being a police officer or a member of an SES unit or the NSW Rural Fire Service, but only where assisting officers at a point of entry) that the person undergo a search conducted by electronic means (such as by passing an electronic detection device over or in close proximity to the person or by the person passing through a detection device),
 - (ii) a request by a search officer that the person allow a search of articles in the person's possession and identify articles in the person's possession,
 - (iii) a request by a search officer that the person remove his or her overcoat, coat or jacket or similar article of clothing and any gloves, shoes and hat (or other headwear), and allow an examination of those items,
 - (iv) if the person enters in a vehicle or vessel—a request by a search officer that the person open the vehicle or vessel, or part of it, for inspection and allow the vehicle, vessel or part to be searched (proposed clause 8 (1)), and

- (i) provides that such a search officer may exclude a person who refuses such a request from entry to the World Youth Day declared area or part of the area concerned (proposed clause 8 (2)), and
- (j) provides that the Authority may appoint employees of local councils as rangers under the Act (proposed clause 9), and
- (k) provides for the issue of penalty notices for contraventions of certain provisions of the Act and the *World Youth Day Regulation 2008* (proposed clause 10 and proposed Schedule 1).

This Regulation is made under the *World Youth Day Act 2006*, including sections 46, 46B, 46C, 54, 55 and 58 (the general regulation-making power).

Comment

1. Schedule 1 [3] – insertion of clause 5 (2) with regard to prohibition of certain advertising on buildings and structures: section 46B (8)(b), where clause 5 (2) reads: Advertising material ceases to be so exempt if the Authority serves a notice on a person who is the relevant owner or occupier of, or the holder of a lease or licence relating to, the building or structure to or on which the advertising material is fixed or placed stating that, in the opinion of the Authority, the material is obscene, offensive to the public or *otherwise inappropriate in the circumstances*.
2. The Committee is concerned that the scope of the words ‘otherwise inappropriate in the circumstances’ is too ill-defined and wide, which may make the rights of the affected owner or occupier, or the holder of a lease or licence, unduly dependent on insufficiently defined administrative powers, and refers this to Parliament.
3. The Committee is also concerned that the ill-defined and wide powers arising from the proposed clause 5 (2), may have an adverse impact on the business community with regard to its prohibition of advertising on buildings and structures, and refers this to Parliament.
4. Schedule 1 [3] – insertion of clause 7 (1)(b) with regard to control of conduct within World Youth Day declared areas, where the clause 7 (1) reads: An authorised person may direct a person within a World Youth Day declared area to cease engaging in conduct that: (b) causes annoyance or inconvenience to participants in a World Youth Day event.
5. The Committee notes the recent Federal Court decision on 15 July 2008, in *Evans v State of New South Wales* [2008] FCAFC 130, where the Court declared that “cl 7 (1)(b) is invalid to the extent to which it is applied to conduct which causes annoyance to participants in World Youth Day events”.
6. The ‘No To Pope Coalition’ took the NSW Government to the Federal Court and argued that clause 7 (1)(b) of the Regulation was unconstitutional because it would make their peaceful protest illegal. The Federal Court found the definitions of ‘annoyance’ and ‘inconvenience’ were too broad and the scope of the laws was uncertain. It found that in giving the World Youth Day Coordination Authority the power to set the regulations, the Government would not have intended to infringe on freedom of speech. However, the Court said the law could be misused to infringe on people’s rights.

7. Therefore, the Committee draws the attention of Parliament to the above decision of the Federal Court in relation to the validity of clause 7 (1)(b) with regard to the ill-defined and broad scope of 'annoyance or inconvenience' to participants in a World Youth Day event, which a person must not, without reasonable excuse, fail to comply with a direction given to that person under subclause (1)(b), where the maximum penalty (clause 7 (2)) for such a non-compliance is 50 penalty units (\$5,500). The Committee also concludes that this could impact on the freedom of speech and could trespass unduly on individual rights.
8. The Committee notes that mental element or intention would not have been required to be proven by the authority. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the offender intended to commit the offence, and this may be seen as contrary to the right to the presumption of innocence.
9. The Committee further comments on the scope of the words 'annoyance or inconvenience' as too ill-defined and wide, which would have made individual rights unduly dependent on insufficiently defined administrative powers.
10. The Committee also considered it could be an inappropriate delegation of legislative powers where matters such as the definitions of 'annoyance or inconvenience', should be regarded by Parliament through the definition of words in the principal Act.
11. Under a similar issue of concern, the present Committee during the current session of Parliament, considered the *World Youth Day Amendment Bill 2007* at the time it was introduced, and had commented on Henry VIII clauses that allowed amendment of Acts by a regulation. In relation to that Bill at the time, the concern was with regard to the Principal Act allowing that regulations be made in relation to searches of persons and their articles, vehicles or vessels as a condition of entry to any World Youth Day venue or facility and for excluding persons who refuse to submit to such searches.
12. In particular, the Committee noted that the ability of Parliament to effectively scrutinise the pre-conditions or criteria for the proper exercising of such powers is dependant on Parliament sitting. Therefore, the Committee considered that this constituted an inappropriate delegation of legislative power. The Committee was of the view that such powers, would be more appropriate to be made in the principal Act by an amending legislation rather than through the regulations.
13. With respect to the current Regulation and clause 7 and clauses 4 to 8, similar concerns are raised. The Committee, again, notes that the ability of Parliament to effectively scrutinise the criteria or grounds for the proper exercising of such powers is dependant on Parliament sitting, which could not be done during a winter recess, and could lead to an inappropriate delegation of legislative power. The Committee is of the view that such powers contained in clauses 4 to 8, could more appropriately be made in the principal Act by an amending legislation rather than through the current regulation that commenced on the date of gazettal (25 June 2006), when Parliament is no longer sitting during its' winter recess.
14. The Federal Court dismissed the second aspect of the No To Pope Coalition's challenge by upholding the section of the Regulations (clause 4 of the Regulation: section 46 of the *World Youth Day Act 2006*), that referred to prescribed items which could not be distributed. The Court found the banning of the unauthorised sale of certain items such as stickers, badges and T-shirts, was not unconstitutional and did

not stop free political communication. It further said the Coalition would not be prohibited from distributing out condoms and leaflets under the Regulation.

15. The Committee notes that any recommendation on disallowance would by now, be redundant to address the initial concerns since this Regulation has already commenced on the date of gazettal (25 June 2006) and its application has also commenced and finished with the end of the World Youth Day period.
16. The Committee has resolved to refer this report to Parliament on the Regulation.

SECTION B: REGULATIONS FOR WHICH NO FURTHER ACTION IS REQUIRED UNDER S 9(1)(A) OF THE *LEGISLATION REVIEW ACT 1987*

Outline of the Regulation/Issues

Casino Control Amendment (Liquor) Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9(1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	<p>Strict Liability:</p> <p>The imposition of strict liability may be seen as contrary to the right to the presumption of innocence.</p> <p>However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties.</p> <p>Most of the strict liability provisions in the Regulation appear necessary in terms of encouraging compliance with the provisions and the public interest in ensuring that compliance. Accordingly, the Committee considers that the strict liability provisions of the Regulation do not trespass unduly on individual rights and liberties.</p> <p>Reversal of Onus:</p> <p>Provisions in the Regulation effectively reverse the onus of proof that requires the Authority to prove all elements of an offence.</p> <p>However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person. Accordingly, the</p>
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	<p>Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.</p> <p>Retrospectivity:</p> <p>The Committee considers the retrospectivity of the provisions may not trespass unduly on personal rights and liberties as they provide arrangements or appointments that were in force immediately before the commencement of the amendments (that is, before 1 July 2008), to ensure their certainty and continuity by taking them to be in force or done for the purposes of the corresponding provision of the <i>Casino Control Act 1992</i>.</p>
Business impact	The Committee considers that those provisions that appear to have an impact on business are applicable to all relevant licensed premises or licensees. Therefore, any impact will be neutral as the Regulation will not advantage or disadvantage one licensee or licensed premise over another.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	
Persons contacted	

Explanatory Note

The object of this Regulation is to make amendments to the *Casino Control Regulation 2001* that are consequential on the enactment of the *Liquor Act 2007* and on the amendments made to the *Casino Control Act 1992* by the *Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Act 2007*. In particular, the provisions of the *Liquor Act 1982* that are set out in the *Casino Control Regulation 2001* and that apply to licensed premises in the casino and the casino environs are replaced by modified provisions of the *Liquor Act 2007*.

This Regulation is made under the *Casino Control Act 1992*, including sections 89 and 170 (the general regulation-making power).

Comment

Strict Liability

1. Numerous provisions¹⁶ in the Regulation provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the offender intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence.
2. However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.¹⁷
3. Most of the strict liability provisions in the Regulation appear necessary in terms of encouraging compliance with the provisions and the public interest in ensuring that compliance. The Committee notes that there is a public interest in ensuring that the provisions of the Regulation are complied with and that facilitate the effective regulation of the responsible sale, supply, service and promotion of liquor and the management of licensed premises.
4. Accordingly, the Committee considers that the strict liability provisions of the Regulation do not trespass unduly on individual rights and liberties.

Reversal of Onus

5. Numerous provisions¹⁸ in the Regulation effectively reverse the onus of proof that requires the Authority to prove all elements of an offence. This is inconsistent with a presumption of innocence.

¹⁶ Provisions such as to be inserted by Schedule 1 [4] Part 4A Responsible service of alcohol training: clauses 34C – obligations of licensee as to responsible service of alcohol; 34D – obligations of staff members as to responsible service of alcohol; 34E – obligations in relation to persons carrying on certain security activities; provisions to be inserted by Schedule 1 [13] Schedule 6 – Part 2 Principal offences relating to sale and supply of liquor: clause 7 – licence required to sell liquor; cl 8 – keeping or using unlicensed premises; cl 9 – sale or supply of liquor contrary to licence; Part 3 Licence: cl 11 (2) – licence conditions – general provisions; Part 4 Licensing procedures and related matters: cl 40 (5) – licence applications; cl 66 – appointment of managers; cl 69 – notice of appointments; Part 5 Regulation and control of licensed premises: cl 73 – prevention of excessive consumption of alcohol on licensed premises; cl 74 – sale of stolen goods and possession, use or sale of drugs on licensed premises; cl 77 (6) – non-voluntary exclusion of persons from licensed premises; cl 78 (8) – banning orders; cl 82 (6) – short term closure of licensed premises; cl 84 (7) – order by Authority for long term closure of licensed premises; cl 88 – effect of late hour entry declaration; cl 92 – control of business conducted on licensed premises; cl 95 – name of licensed premises; cl 97 (4) – breath analysis equipment; Part 6 Miscellaneous offences and regulatory controls: cl 100 – sale of undesirable liquor products; cl 101 (7) – authority may restrict or prohibit sale or supply of undesirable liquor products; cl 102 (3) – authority may restrict or prohibit undesirable promotion of liquor; cl 107 – production of licence on licensed premises; cl 111 – carrying liquor away from licensed premises; cl 113 – carrying liquor for sale; Part 7 Special provisions relating to minors: cl 117 – offences relating to sale or supply of liquor to minors; cl 118 – offences relating to consumption etc of liquor by minor; cl 119 – licensee not to allow minors to sell or supply liquor on licensed premises; cl 120 – responsible adult not to allow minor to consumer liquor on licensed premises; cl 123 (1) and (3A) – minor not to enter or remain on licensed premises; cl 124 – licensee not to allow minors to enter or remain in certain licensed premises; cl 125 – responsible adult not to leave minor unaccompanied on licensed premises; cl 127 – notices to be displayed in relation to minors on licensed premises; and cl 129 – minor must not use false evidence of age.

¹⁷ Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

¹⁸ Provisions such as to be inserted by Schedule 1 [13] Part 2 Principal offences relating to sale and supply of liquor: cl 7 (3) – licence required to sell liquor; Schedule 1 [13] Part 4 Licensing procedures and related matters: cl 69 (6) – notice of appointments; cl 70 – liability of licensee for contravention by manager; cl 71 (2) – liability of directors etc of corporate licensees; Schedule 1 [13] Part 5 Regulation and control of licensed premises: cl 73 (4) and (5) – prevention of excessive consumption of alcohol on licensed premises; cl 74 (5) –

6. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party¹⁹. The Committee considers that in this context, the knowledge of the factual circumstances will be peculiarly in the possession of a person. Accordingly, the Committee considers the reversal of the onus of proof in these circumstances does not trespass unduly on rights and liberties.

Business Impact

7. Some provisions²⁰ in the Regulation appear to have an impact on business. However, the Committee considers that those provisions will be applicable to all relevant licensed premises or licensees. Therefore, any impact will be neutral as the Regulation will not advantage or disadvantage one licensee or licensed premise over another. The Committee also notes the public interest in ensuring businesses to comply with the responsible practices in the sale, supply, service and promotion of alcohol.

Retrospectivity

8. The Committee will always be concerned with retrospective applications of provisions.
9. The Committee, however, considers the retrospectivity of the provisions²¹ may not trespass unduly on personal rights and liberties as they provide arrangements or appointments that were in force immediately before the commencement of the amendments (that is, before 1 July 2008), to ensure their certainty and continuity by taking them to be in force or done for the purposes of the corresponding provision of the *Casino Control Act 1992*.
10. The Committee has resolved that no further action is required with regard to this Regulation.

sale of stolen goods and possession, use or sale of drugs on licensed premises; cl 77 (10) – non voluntary exclusion of persons from licensed premises; cl 95 (8) – name of licensed premises; Schedule 1 [13] Part 6 Miscellaneous offences and regulatory controls: cl 113 (3) and (4) – carrying liquor for sale; Schedule 1 [13] Part 7 Special provisions relating to minors: cl 117 (3); (5) (7); (9) and (10) – offences relating to sale or supply of liquor to minors; cl 120 (2) – responsible adult not to allow minor to consume liquor on licensed premises; cl 124 (7) – licensee not to allow minors to enter or remain in certain licensed premises; and cl 125 (2) – responsible adult not to leave minor unaccompanied on licensed premises.

¹⁹ Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 38th Parliament (May 1996 – August 1998)*, para 2.108: “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”.

²⁰ Provisions such as to be inserted by Schedule 1 [8]: clause 35C – discount liquor promotions or advertisements; Schedule 1 [13] Part 5 Regulation and control of licensed premises: cl 81 – decision by Authority in relation to complaint; Division 4 Closure orders: cl 82 – short term closure of licensed premises; cl 83 – urgent application for short term closure order; cl 84 – order by Authority for long term closure of licensed premises; cl 85 – further long term closure orders; Division 5 Late hour entry declarations: cl 87 – authority may make late hour entry declaration; Schedule 1 [13] Part 6 Miscellaneous offences and regulatory controls: cl 99 (2) – responsible sale, supply, service or promotion of liquor; cl 101 – authority may restrict or prohibit sale or supply of undesirable liquor products; and cl 102 – authority may restrict or prohibit undesirable promotion of liquor.

²¹ Schedule 1 [13] Part 11 Miscellaneous provisions: Schedule 1 Savings and transitional provisions – clause 26 – general savings provision.

Outline of the Regulation/Issues

Contaminated Land Management Regulation 2008

Recommendation

That the Committee:

1) for the purposes of s 9 (1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	
Business impact	The Regulatory Impact Statement (RIS) concludes that the proposed Regulation would result in costs similar to the current regulation. It says these costs are small relative to the benefits of the proper management of contaminated land. The changes in the proposed regulation are either administrative or allow for greater cost recovery of administrative costs.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	<p>The Department of Environment and Climate Change released the RIS and a draft Regulation for public comment on 25 June 2008. Nine responses were received and the submissions supported most of the provisions of the proposed regulation. The RIS considered three options for the regulatory proposal. It concluded that the third option would result in more appropriate cost recovery. The RIS states efficiency is improved when consumers and producers of regulated products or activities recognise the administrative costs involved in regulation.</p> <p>NSW benefits from the reduction of potential harm to human health and the environment under the regulatory framework. Currently, NSW taxpayers contribute a large proportion of the cost of maintaining the quality control processes. The proposed regulation would reduce the proportion that NSW taxpayers</p>

	<p>contribute and increase the proportion that site owners and site auditors pay.</p> <p>The regulation introduces penalty infringement notices on the grounds that this will allow more timely action to be taken to reduce potential harm to health and the environment. The issue of infringement notices for minor offences is expected to act as a deterrent and encourage compliance with the requirements of the Act.</p>
Other	

Persons contacted	
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Explanatory Note

The object of this Regulation is to remake, with some amendments, the provisions of the Contaminated Land Management Regulation 1998 which is repealed on 1 September 2008 by section 10 (2) of the Subordinate Legislation Act 1989.

The amendments made by this Regulation are as follows:

- (a) the fees in relation to accreditation as a site auditor are increased as is the rate at which the Environment Protection Authority (the EPA) may recover certain costs,
- (b) a notification that land is contaminated is no longer required to be in a prescribed form, instead it is to be given in the manner and form approved by the EPA,
- (c) a number of offences under the Act are prescribed as offences in respect of which a penalty notice (on-the-spot fine) may be issued.

This Regulation also makes provision with respect to the following:

- (a) the time within which an application for renewal of accreditation as a site auditor must be made,
- (b) the particulars to be included in a site auditor's annual return,
- (c) the additional material that the EPA is to maintain a record of,
- (d) the time within which a statement of reasons for certain determinations of the EPA must be provided to persons requesting them,
- (e) savings and formal matters.

This Regulation is made under the Contaminated Land Management Act 1997, including sections 34, 50 (2) (c), 51 (5), 52 (1) (c) and (9), 53D (3), 58 (1) (f), 92A, 106 (2) and 112 (the general regulation-making power).

Outline of the Regulation/Issues

Environmentally Hazardous Chemicals Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9 (1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	
Business impact	<p>The Regulatory Impact Statement comments that the <i>Environmentally Hazardous Chemicals Act 1985</i> (EHC Act) is regarded as the State's key chemicals management law. It provides a framework for the assessment and management of environmentally hazardous chemicals and declared chemical wastes in NSW.</p> <p>The <i>Environmentally Hazardous Chemicals Regulation 2008</i> is a short instrument containing administrative provisions relating to the operation of the Act and Regulation. The regulatory review identified the main issue that needed to be addressed was the recovery of the costs associated with the administration of functions under the Act and regulations, most notably to account for increases in the complexity of applications for technology assessments that have occurred since the previous regulation was made.</p> <p>The fees for EHC Act licensees to carry on prescribed activities in relation to environmentally hazardous chemicals have been updated by the Regulation to reflect the changes in administrative and compliance costs since 1999. The RIS states that under the polluter-pays principle, the costs of administering EHC legislation should not be subsidised by the NSW community, but rather paid by the industry that handles environmentally hazardous chemicals and therefore generates a public need for regulation. Under the Regulation a greater</p>

	proportion of these fixed economic costs are apportioned to industry than to the wider NSW community.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	The regulatory proposal and the alternative options have been satisfactorily assessed in accordance with the requirements of the <i>Subordinate Legislation Act 1989</i> . The Department of Environment and Climate Change released an RIS and draft Regulation for public comment in May 2008. Members of the Government's Hazardous Chemicals Advisory Committee and current licence holders were formally invited to comment on the draft Regulation.
Other	
Persons contacted	

Explanatory Note

The object of this Regulation is to remake, with some amendments, the *Environmentally Hazardous Chemicals Regulation 1999* which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation increases a number of fees payable under the *Environmentally Hazardous Chemicals Act 1985* (the Act).

This Regulation also makes provision with respect to the following:

- (a) the matters to be included in certain applications and notices made or issued under the Act,
- (b) the time within which appeals under the Act may be made,
- (c) the form of a receipt for property seized by authorised officers and the manner of advertising the proposed forfeiture of seized property,
- (d) the information to be included in registers under the Act,
- (e) the appointment of alternate members of the Hazardous Chemicals Advisory Committee,
- (f) the payment of fees,
- (g) savings and formal matters.

This Regulation is made under the *Environmentally Hazardous Chemicals Act 1985*, including sections 13 (2) and (3), 19 (2), 28 (1) (b) and (3) (a), 29A (2) (b) and (4) (a), 37 (1), 38 (1), 39 (1), 45 (3), 48 (3) (b), 52 (2) and 58 (the general regulation-making power) and clause 4 of Schedule 1.

Outline of the Regulation/Issues

Public Trustee Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9 (1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	
Business impact	The Public Trustee operates within the Government's commercial framework as a self funded enterprise. There is an expectation from Government that the Public Trustee's pricing structure will generate fees to enable recovery of the costs of providing services. The Regulation establishes a level of fees permitting the recovery of the Public Trustee's costs and retains the right to charge commission for work conducted as executor, administrator or trustee. The Regulation also allows the Public Trustee to charge long-term trust fees. The Law Society and the New South Wales Bar Association strongly support the Regulation. The Probate Judge and Registrar of the Supreme Court are of the view that the proposed new limits for elections and small estates are reasonable.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	The Regulatory Impact Statement prepared for this regulatory proposal meets the requirements of the <i>Subordinate Legislation Act 1989</i> .
Other	
Persons contacted	

Explanatory Note

The object of this Regulation is to remake the *Public Trustee Regulation 2001* which is due to be repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation makes provision with respect to the following matters:

- (a) the fees, commission and charges payable in connection with the administration of estates by the Public Trustee,
- (b) the fees payable for managing the common fund under section 36A of the *Public Trustee Act 1913* and for trust investment planning by the Public Trustee,
- (c) other matters required to be prescribed in relation to the administration of estates,
- (d) the duty of the Public Trustee to maintain an index of wills,
- (e) the duties of members of staff of the Public Trustee.

In remaking the *Public Trustee Regulation 2001*, this Regulation makes the following substantive changes:

- (a) expressing the maximum fees that may be charged by the Public Trustee for certain attendances, and for real estate inspections and valuations, and the maximum charges that may be imposed by the Public Trustee for searches of records, in terms of an hourly rate rather than a single amount;
- (b) providing for an increase in:
 - (i) the maximum fees that may be charged, or the rate at which fees may be charged, by the Public Trustee under the Regulation, and
 - (ii) the maximum charges that may be imposed, or the rate at which charges may be imposed, by the Public Trustee under the Regulation, and
 - (iii) the minimum charges that may be imposed by the Public Trustee in relation to certain commissions payable under the Regulation, in connection with the administration of estates by the Public Trustee,
- (c) changing the basis for determining fees chargeable under the Regulation in relation to the lodgment of tax returns on behalf of estates and the remuneration of registrars engaged as agents in the administration of estates,
- (d) removing the power of the Public Trustee to charge a fixed commission on the income received on the account of any trust committed to its administration or management for 2 years or more and introducing instead a progressive scale of trust fees chargeable by the Public Trustee in respect of any such long-term trust.

This Regulation is made under the *Public Trustee Act 1913*, including sections 9 (1), 18A, 34A (1), 34C (1), 50 and 59 (the general regulation-making power).

Comment

1. The RIS states that the current fees and charges gazetted in 2001 are based on costs determined in 1999. Since then, the CPI has increased 27.63%. The regulatory proposal is based on bringing fees and charges into line with CPI movements, and thereafter aligning future fee reviews with annual CPI changes.
2. When preparing the Regulatory Impact Statement the Public Trustee calculated that the hourly rate for cost recovery in core business activity was \$110. If this amount was adjusted by CPI since 1999 the current hourly rate for cost recovery would be \$138. This calculation includes cost of salaries and on costs. The favoured option, which was adopted, was to include a profit component in the rate that brings it to \$150 per hour.

Outline of the Regulation/Issues

Rural Fires Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9 (1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	
Business impact	The Regulatory Impact Statement (RIS) states that it is expected that the incidence of property loss due to major bushfires will be reduced as a result of the remake of the proposed regulation compared to the base case of having no regulation. The RIS says that it is assumed conservatively that the average cost of bushfires in NSW per annum is approximately \$65 million. The RIS also states that in the absence of the regulation significant social and economic costs would have been incurred. The RIS provides detailed compliance costs of human resources, recurrent equipment and capital costs, and the costs of monitoring compliance and costs of administration.
Objects/spirit of Act	The object of the regulation is to replace, with only minor changes in substance, the <i>Rural Fires Regulation 2002</i> which is repealed by section 10 of the <i>Subordinate Legislation Act 1989</i> . The RIS states that the other objectives of the regulation are to provide administrative support to assist in conserving, protecting and managing the safety of persons and property exposed to fires in the rural fire districts in New South Wales.
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	The regulatory proposal has been prepared in accordance with the requirements of the <i>Subordinate Legislation Act 1989</i> .
Other	

Persons contacted	
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Explanatory Note

The object of this Regulation is to replace, with only minor changes in substance, the *Rural Fires Regulation 2002* which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

The Regulation makes provision for the following:

- (a) membership of rural fire brigades and the constitutions for such brigades,
- (b) the discipline of officers and members of rural fire brigades and groups of rural fire brigades and removal from membership,
- (c) the constitution, membership and procedure of Bush Fire Management Committees,
- (d) fire prevention,
- (e) the giving of notices required under the *Rural Fires Act 1997 (the Act)*,
- (f) miscellaneous matters relating to bravery and other awards, voluntary work, managed land, fire permit conditions, bush fire prone land, bush fire hazard reduction, applications for bush fire safety authorities and bush fires hazard reduction certificates, bush fire safety authorities and penalty notices.

This Regulation is made under the *Rural Fires Act 1997*, including section 135 (the general regulation-making power) and the sections referred to in this Regulation.

Comment

1. The RIS notes that in regard to the Regulation no benefits such as increased revenue to an industry or other increases in cash flows are directly created, rather, the impact on the community is through a reduction in costs.
2. The RIS states the recurrent costs of the Regulation as \$11,172,384. These comprise the costs of human resources, the costs of equipment, the costs of monitoring compliance and the costs of administration. The capital costs are estimated at \$5,825,644.
3. The RIS states that the financial costs are offset by an avoidance of an increase in the number of deaths related to bush fires; an avoidance of an increase in the number of injuries due to bushfires; an avoidance of an increase in the amount of property damage due to bush fires, and an avoidance of an increase in the social costs due to bush fires.
4. The RIS also says that significant social and economic costs are saved due to a reduced impact on family and friends of persons killed.
5. Eleven submissions were received relating to the regulatory proposal. These were given appropriate consideration in accordance with the requirements of the *Subordinate Legislation Act 1989*. All submissions supported the proposed regulation.

Outline of the Regulation/Issues

Swimming Pools Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9 (1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	<p>This regulation prescribes a number of strict liability offences by way of penalty notices under sections 7(1), 12, 14, 15(1), 16, 17(1) and 23(3). Each of these carries a prescribed penalty not exceeding \$220. These prescribed offences relate to provisions such as requirements for child resistant barriers and their maintenance designed to safeguard children using outdoor and indoor swimming pools.</p> <p>The making of each of these provisions is authorised by section 35 of the <i>Swimming Pools Act 1992</i>. The Committee considers these strict liability offences are adequately justified by the need to protect the lives of children. Accordingly the Committee does not consider that these provisions trespass unduly on personal rights and liberties.</p>
Business impact	<p>This Regulation replaces the Swimming Pools Regulation 1998. That earlier Regulation was based on an Australian Standard for safety barriers for swimming pools, which has now been superseded. This regulation will affect businesses producing safety barriers for swimming pools to the extent that new swimming pools will be required to comply with the standards set out in the new Australian standard. Existing swimming pools may continue to comply with the older Australian standard.</p>
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	

SLA, ss 4,5,6, Sched 1, 2	A copy of the Regulatory Impact Statement was not provided to the Committee within the period required by Section 5(4) of the <i>Subordinate Legislation Act 1989</i> . Consequently the Committee did not assess the adequacy of that statement.
Other	
Persons contacted	

Explanatory Note

The object of this Regulation is to remake, with some changes, the provisions of the *Swimming Pools Regulation 1998*. That Regulation is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

The current *Swimming Pools Regulation 1998* includes provisions prescribing standards of design, construction, installation and maintenance of fences and gates for, or means of access to, swimming pools that are based on an Australian Standard published in 1986. That standard has been replaced. The most up-to-date standard is Australian Standard AS 1926.1–2007 Swimming Pool Safety, Part 1: Safety barriers for swimming pools, which is applied by this Regulation. Under this Regulation:

- (a) new swimming pools will be required to comply with the standards set out in the new Australian Standard, and
- (b) existing swimming pools may continue to comply with the older Australian Standard, and the other standards in the *Swimming Pools Regulation 1998*, but may comply with the new Australian Standard (see clause 23).

This Regulation contains provisions dealing with the following matters under the *Swimming Pools Act 1992* (the Act):

- (a) standards of design, construction, installation and maintenance of child-resistant barriers that are required to surround outdoor swimming pools and doors and windows leading to outdoor swimming pools (clauses 5–7),
- (b) standards of restricting access to indoor swimming pools (clause 8),
- (c) standards of restricting access to the water contained in spa pools (clause 9),
- (d) the erection of warning signs near swimming pools, and the contents of such signs (Part 3),
- (e) applications to local authorities (such as councils) for exemptions from barrier requirements that are impracticable or unreasonable in particular cases (Part 4),
- (f) certificates of compliance that a swimming pool complies with the Act's requirements regarding the restriction of access to swimming pools (Part 5),
- (g) the contents of directions made by local authorities to order compliance with the Act (clause 19),
- (h) the form of certificates of identification to be issued by local authorities to inspectors (clause 20 and Schedule 1),
- (i) public access to the Australian Standard, and to a guideline, referred to in the Regulation (clause 21),
- (j) penalty notices for offences under the Act (clause 22),
- (k) savings and formal matters (clauses 1–4 and 24).

This Regulation refers to Australian Standard AS 1926.1–2007 Swimming Pool Safety, Part 1: Safety barriers for swimming pools and to Guideline 7: Cardiopulmonary Resuscitation, published by the Australian Resuscitation Council (copies of which can be inspected at the head office of the Department of Local Government or at the office of any local government

council or other local authority—see clause 21). This Regulation is made under the *Swimming Pools Act 1992*, including sections 7 (1) (b), 8 (2), 9 (2), 10 (2), 12 (d), 14, 17, 20, 22, 23, 24, 27 (2), 35 and 38 (the general regulation-making power).

Comment

1. Under section 35 of the *Swimming Pools Act 1992* the payment of a penalty notice offence is not regarded as an admission of liability nor can it be used to prejudice any civil claim, action or proceeding arising out of the same occurrence.

Outline of the Regulation/Issues

Threatened Species Conservation (Biodiversity Banking) Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9 (1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

<p>Personal rights/liberties</p>	<p>The Regulation contains detailed consultation provisions. These provide the public with an opportunity to make submissions on any review of biobanking assessment methodology or on any proposal to amend, repeal or replace the methodology. These submissions must be examined by the Director- General and reported on to the Minister. Minor changes in methodology do not require public consultation. These requirements support the consent provisions in section 127F and of the Principal Act. Further safeguards relating to the impact of the Regulation are contained in the review of biobanking assessment methodology, which is required two years after the publication of the Regulation and every five years thereafter. Consultation as to the impact of the proposed Regulation was also carried out during the regulatory impact assessment phase.</p>
<p>Business impact</p>	<p>The proposed Regulation and Biobanking Assessment Methodology were released for public comment in December 2007. Copies of the draft Regulation, the RIS and methodology were provided to key industry and environment organisations, members of the Ministerial Reference Group , local councils and to key government agencies affected by the proposals. The public exhibition process led to several changes to the Regulation . A summary of the issues raised through submissions and the Department of Environment and Climate Change responses were placed on the</p>

	<p>Departmental website.</p> <p>The RIS states that the biobanking agreement between the Minister and biobank site owner will include a schedule of payments from the Biobanking Trust Fund over time. The RIS says the investment of funds in order to meet this schedule entails potential financial risks for the Minister and the biobank site owner. The RIS states the biobanking agreement and the Regulation includes several provisions to control these risks. The object of the Fund is to provide a means of making long-term financial provision for land management.</p> <p>The RIS states that the biobank owner faces the risk that payments may eventually cease. However, it says this risk - which depends in part on financial market performance - is considered small by the Department who expects that biobank owners are more likely to receive payments exceeding the scheduled payments set out in the biobanking agreement.</p> <p>The Department states that in the event of poor investment returns, biobank site owners will have the option to retain capital in their Biobanking Trust Fund account by delaying payments and extending the timing for performance of high cost management actions with agreement from DECC. Once the account is back at sustainable levels, payments will recommence and the site owner will need to carry out deferred management actions.</p> <p>It needs to be recognised that the risks involved in the scheme do not arise from a mandatory arrangement imposed on persons with an interest in the land but from a voluntary one agreed to by all parties.</p>
Objects/spirit of Act	The provisions of the Regulation derive from the specific requirements of Part 7A of the <i>Threatened Species Conservation Act 1995</i> and are in accord with the general objects of that legislation.
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	

Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	In accordance with the requirements of the <i>Subordinate Legislation Act 1989</i> the Regulatory Impact Statement estimates the overall costs of the key tasks involved in running the biobanking scheme. These are set out in Table 1 to the RIS. These have been calculated based on the estimated time and skills required to undertake the tasks once the scheme is up and running and staff are working at full capacity. Other formal requirements of the <i>Subordinate Legislation Act 1989</i> relating to publication and content of the RIS and consultation upon it have been satisfied.
Other	
Persons contacted	

Explanatory Note

The object of this Regulation is to make provision for the administration of the biobanking scheme established by Part 7A of the *Threatened Species Conservation Act 1995* (the Act). The Regulation makes provision for the following matters:

- (a) requiring the biobanking assessment methodology to identify areas of high biodiversity conservation value (including areas with highly cleared vegetation types that are not in low condition) and to restrict the circumstances in which a biobanking statement may be issued in respect of development having an impact on those areas,
- (b) requiring the review of the biobanking assessment methodology 2 years after publication and every 5 years thereafter,
- (c) prescribing the circumstances in which the biobanking assessment methodology can be amended, repealed or replaced,
- (d) excluding certain types of land from being designated as a biobank site,
- (e) matters that the Minister is to consider before entering into a biobanking agreement,
- (f) the procedure for requesting the Minister to enter into, vary or terminate a biobanking agreement (including the fees involved),
- (g) the procedure for applying to retire a biodiversity credit,
- (h) contributions to cost recovery by holders of biodiversity credits and applicants for a biobanking statement,
- (i) additional grounds for refusal to issue a biobanking statement,
- (j) payments to the Biobanking Trust Fund on a first transfer of biodiversity credits,
- (k) payments from that Biobanking Trust Fund to owners of biobank sites for or towards the management costs of the biobank site,
- (l) other matters relating to the management of the Biobanking Trust Fund,
- (m) registers to be kept under the Act,
- (n) calculation of fees and contributions under the Act,
- (o) other miscellaneous matters relating to the administration of the scheme.

Comment

1. **Red Flag Rules** - the Red Flag Rules in the biobanking assessment methodology are intended to protect areas with high biodiversity conservation values. Various submissions objected to the inclusion in the rules of a discretion to vary red flags. In response the Department states a process allowing red flag variations provides some limited flexibility regarding impacts on red flag areas where objective scientific criteria are met. However, the Minister agreed to the process for any red flag variations to be included in the Regulation so as to ensure that the process is clear and transparent.
2. **Fees** - the draft Regulation set a fee of \$500 a day for assessment of biobank sites or preparation of management plans by DECC officers. This fee was challenged in the submissions as being too low. The Regulation will now no longer set specific fees for assessment of biobank sites or preparation of management plans. The Biobanking Annual Report will include information on scheme administration costs. A related issue raised in the submissions is that the scheme should be operated on a full cost-recovery basis. In reply the Department states that it is estimated that the Biobanking Scheme will achieve 80% cost recovery for ongoing scheme administration, not including scheme set-up costs and reviews. The Department says it is reasonable for DECC to cover 20% of the cost of administration in the early stages to encourage participation.
3. **Eligibility criteria for biobank sites and generation of biobank credits** - following public submissions the terms of the Regulation were amended to allow biobank sites to be established on land with a conservation covenant or on land receiving incentive funding as well as other categories of public land but that credits would only be received for management actions over and above the existing legal obligations.
4. The Regulation provides for the review of the biobanking assessment methodology two years after publication. This will enable any need for change in the provisions of the scheme to be promptly dealt with. The review involves public participation.

SECTION C: NOTIFICATION OF POSTPONEMENT OF REGULATIONS UNDER S 11 OF THE *SUBORDINATE LEGISLATION ACT 1989*

Notification of the Proposed Postponement of the Repeal of the Environment Planning and Assessment Regulation 2000 (4)

...

Minister for Planning

Issues

1. By email correspondence received 28 July 2008, the Department of Planning advised the Committee that the Minister for Regulatory Reform has agreed to the Minister for Planning's request to postpone the repeal of the above regulation.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponement of the repeal of the regulation.

Comment

Environmental Planning And Assessment Regulation 2000

3. The Minister has proposed the postponement of the repeal of the above regulation for the fourth time, until 1 September 2009.
4. The need for the postponement has arisen from the substantial changes that have been recently made to the legislation (*Environmental Planning and Assessment Amendment Bill 2008*, which has now been passed). The *Environmental Planning and Assessment Act 1979* and other Acts and instruments will be amended to improve the NSW planning system. The changes are part of the Government's planning reform agenda regarding areas such as exempt and complying development, plan making, development assessment, development contributions and certification. Extensive amendments to the Regulation will be required as a consequence of these reforms.
5. The Minister for Regulatory Reform has advised that arrangements will be made for the submission to the Executive Council of an order under the *Subordinate Legislation Act 1989* for the postponement of the repeal.

Appendix 1: Index of Bills Reported on in 2008

	Digest Number
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Appropriation (Parliament) Bill 2008	8
Appropriation (Special Offices) Bill 2008	8
Auditor-General (Supplementary Powers) Bill 2008	9
Australian Jockey Club Bill 2008	7
Board of Adult and Community Education Repeal Bill 2008	5
Building Professionals Amendment Bill 2008	7
Child Protection (Offenders Registration) Amendment Bill 2008	10
Children and Young Persons (Care and Protection) Amendment (Body Piercing and Tattooing) Bill 2008	7
Children (Criminal Proceedings) Amendment Bill 2008	8
Children (Detention Centres) Amendment Bill 2008	8
Clean Coal Administration Bill 2008	5
Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2008	8
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	5
Contaminated Land Management Amendment Bill 2008	10
Conveyancing Amendment (Mortgages) Bill 2007*	1
Courts and Crimes Legislation Amendment Bill 2008	8
Crimes Amendment (Cognitive Impairment – Sexual Offences) Bill 2008	10
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Crimes Amendment (Rock Throwing) Bill 2008	6
Crimes (Administration of Sentences) Legislation Amendment Bill 2008	5
Crimes (Forensic Procedures) Amendment Bill 2008	9

	Digest Number
Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008	9
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008	10
Criminal Case Conferencing Trial Bill 2008	4
Dangerous Goods (Road and Rail Transport) Bill 2008	10
Dividing Fences and Other Legislation Amendment Bill 2008	5
Education Amendment Bill 2008	4
Election Funding Amendment (Political Donations and Expenditure) Bill 2008	9
Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008	10
Electricity Industry Restructuring Bill 2008	8
Electricity Industry Restructuring Bill 2008 (No 2)	
Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*	2
Environmental Planning and Assessment Amendment Bill 2008	7
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	4
Exotic Diseases of Animals Amendment Bill 2008	8
Fair Trading Amendment (Mandatory Funeral Industry Code) Bill 2008*	5
Filming Related Legislation Amendment Bill 2008	8
Fines Amendment Bill 2008	4
Firearms Amendment Bill 2008*	8
First State Superannuation Amendment Bill 2008	7
Food Amendment (Public Information on Offences) Bill 2008	2
Gaming Machines Amendment (Temporary Freeze) Bill 2008	2
Gas Supply Amendment Bill 2008	4
Growth Centres (Development Corporations) Amendment Bill 2008	4
Health Services Amendment (Mandatory Background Checks of Medical Practitioners) Bill 2008*	9

	Digest Number
Hemp Industry Bill 2008	6
Higher Education Amendment Bill 2008	5
Home Building Amendment Bill 2008	10
Housing Amendment (Tenant Fraud) Bill 2008	4
Human Tissue Amendment (Children in Care of State) Bill 2008	7
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008*	8
Jury Amendment Bill 2008	7
Justices of the Peace Amendment Bill 2008	5
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property Bill) 2008	10
Local Government Amendment (Election Date) Bill 2008	2
Local Government Amendment (Elections) Bill 2008	4
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008	9
Marine Parks Amendment Bill 2007	1
Marine Safety Amendment Bill 2008	8
Medical Practice Amendment Bill 2008	6
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	10
Mining Amendment Bill 2008	3
Miscellaneous Acts Amendment Bill 2008	6
National Gas (New South Wales) Bill 2008	5
National Parks and Wildlife (Leacock Regional Park) Bill 2008	3
Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008*	3
Peak Oil Response Plan Bill 2008*	6
Police Integrity Commission Amendment (Crime Commission) Bill 2008	9
Port Macquarie-Hastings Council Election Bill 2008*	5

	Digest Number
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008*	8
Public Sector Employment Management Amendment Bill 2008	4
Retirement Villages Amendment Bill 2008	10
Road Transport Legislation Amendment Bill 2008	9
Road Transport Legislation Amendment (Car Hoons) Bill 2008	2
Shop Trading Bill 2008	8
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	3
Snowy Mountains Cloud Seeding Trial Amendment (Extension) Bill 2008	6
Sporting Venues Authorities Bill 2008	6
State Arms, Symbols and Emblems Amendment (Black Opal) Bill 2008	5
State Emergency and Rescue Management Amendment (Botany Emergency Works) Bill 2008	5
State Revenue Legislation Amendment Bill 2008	4
State Revenue and Other Legislation Amendment (Budget) Bill 2008	8
Statute Law (Miscellaneous Provisions) Bill 2008	8
Strata Management Legislation Amendment Bill 2008	7
Succession Amendment (Family Provision) Bill 2008	10
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	6
Superannuation Administration Amendment Bill 2008	4
TAFE (Freezing of Fees) Bill 2007*	1
Thoroughbred Racing Amendment Bill 2008	9
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	9
Totalizator Amendment Bill 2008	2
Tow Truck Industry Amendment Bill 2008	10
Vexatious Proceedings Bill 2008	10
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	5

	Digest Number
Western and Crown Lands Amendment (Special Purpose Leases) Bill 2008	8
Workers Compensation Amendment Bill 2008	5
Workers Compensation Legislation Amendment (Financial Provisions) Bill 2008	8

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1	
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08			
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08			9
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning				8
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2	
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Board of Adult and Community Education Repeal Bill 2008	N, R				
Building Professionals Amendment Bill 2008	N, R			N, R	
Child Protection (Offenders Registration) Amendment Bill 2008	N				
Children (Criminal Proceedings) Amendment Bill 2008	N			N, R	
Coal and Oil Shale Workers (Superannuation) Amendment Bill 2008	N				
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	N, R			N	
Contaminated Land Management Amendment Bill 2008	N, R			N, R	
Courts and Crimes Legislation Amendment Bill 2008	N				
Crimes Amendment (Cognitive Impairment – Sexual Offences) Bill 2008				R	
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Crimes Amendment (Rock Throwing) Bill 2008	N, R			N, R	
Crimes (Administration of Sentences) Legislation Amendment Bill 2008			N		
Crimes (Forensic Procedures) Amendment Bill 2008	N, C				
Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008	N, R		N, R		
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008				R	
Criminal Case Conferencing Trial Bill 2008	N, R				
Dangerous Goods (Road and Rail Transport) Bill 2008	N			R	
Dividing Fences and Other Legislation Amendment Bill 2008				N, R	
Education Amendment Bill 2008	N, R				
Election Funding Amendment (Political Donations and Expenditure) Bill 2008				N, R	
Electricity Industry Restructuring Bill 2008	N, R	N, R		N, R	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Electricity Industry Restructuring Bill 2008 (No 2)	N, R	N, R		R	
Environmental Planning and Assessment Amendment Bill 2008	N, R	N, R	N, R	N, R	N, R
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	N, R	N, R			
Filming Related Legislation Amendment Bill 2008				N, R	
Food Amendment (Public Information on Offences) Bill 2008				R	
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Hemp Industry Bill 2008	N, R		N, R	N, R	
Home Building Amendment Bill 2008	N		N, R		
Housing Amendment (Tenant Fraud) Bill 2008	N, R	R			
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008	N				
Jury Amendment Bill 2008	N				
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Bill 2008				R	
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008				N, R	
Marine Safety Amendment Bill 2008				N, R	
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	N			R	
Medical Practice Amendment Bill 2008	N, R			N, R	
Mining Amendment Bill 2008	N				
Miscellaneous Act Amendment (Same Sex Relationships) Bill 2008	N			N, R	
National Gas (New South Wales) Bill 2008					N
Police Integrity Commission Amendment (Crime Commission) Bill 2008	N		N		
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008		N, R		N, R	
Public Sector Employment and Management Amendment Bill 2008	R				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Retirement Villages Amendment Bill 2008	N			R	
Road Transport Legislation Amendment Bill 2008	N			N, R	
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				
Sporting Venues Authorities Bill 2008	N				
State Emergency and Rescue Management Amendment (Botany Emergency Works Bill 2008	N				
State Revenue Legislation Amendment Bill 2008	N, R				
Statute Law (Miscellaneous Provisions) Bill 2008	N			N, R	
Strata Management Legislation Amendment Bill 2008				N, R	
Succession Amendment (Family Provision) Bill 2008				R	
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	N, R			N, R	
Thoroughbred Racing Amendment Bill 2008			N, R	N, R	
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	N				
Tow Truck Industry Amendment Bill 2008	N			R	
Vexatious Proceedings Bill 2008	N			R	
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	N, R				
Western Crown Lands Amendment (Special Purpose Leases) Bill 2008		N, R			
Workers Compensation Amendment Bill 2008	N, R				

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2007

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2007
Road Transport (Safety and Traffic Management) (Road Rules) Amendment (Mobility Parking Scheme) Regulation 2007	Minister for Roads	04/12/07	25/03/08	3