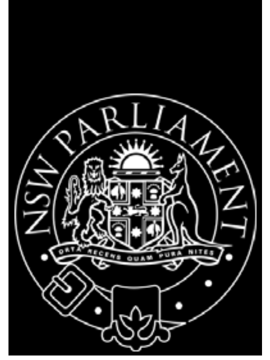

PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

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No 10 of 2009

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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 3).

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 3).

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 2009

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 2009

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 2009

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 2009

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

1. Aboriginal Land Rights Amendment Bill 2009

11. Proposed section 42E(5), which appears to limit the entitlement of a person to damages or any other remedy against a LALC, may trespass unduly on the rights and liberties of individuals. Accordingly, the Committee refers this provision to Parliament for its consideration.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions [s 8A(1)(b)(iii) *LRA*]

Issue: Proposed section 42L – Review of Approval Decisions

15. The Committee is of the view that proposed section 42L, which appears to limit standing to bring proceedings to review a decision by the NSWALC in relation to the approval of a land dealing may trespass unduly on personal rights and liberties. Accordingly, the Committee refers this provision to Parliament for its consideration.

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.

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

2. Crimes (Administration Of Sentences) Amendment Bill 2009

Issue: Schedule 1 [1] – Retrospectivity - proposed section 78A (5) – separation and other variations in conditions of custody of inmates:

21. This Bill will retrospectively prevent the proceedings for false imprisonment and relief sought by way of declaration in response to the leave granted by the Supreme Court in the above case of *Sleiman v Commissioner of Corrective Services & Anor; Hamzy v Commissioner of Corrective Services & Anor* [2009] NSWSC 304.

22. The Committee is of the view that to change the law retrospectively in a manner that adversely affects any person is a significant trespass on personal rights and liberties.

23. This Bill will retrospectively remove rights to sue for false imprisonment or unlawful segregation and action for negligence or trespass for acts or omissions already done but it also removes these rights in cases being considered in proceedings that have commenced.

24. Of serious concern to the Committee is that this Bill seeks to remove these rights in a case where the Supreme Court of New South Wales has already granted leave for instituting proceedings for false imprisonment. The Committee also notes the comments made by the New South Wales Bar Association. By applying the Bill's amendments retrospectively as proposed in the new section 78A (5), the Committee refers this to Parliament as trespassing unduly on personal rights and liberties.

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

Issue: Schedule 1 [1] - Ill-Defined and Wide Powers – amendment of *Crimes (Administration of Sentences) Act 1999* – proposed section 78A – separation and other variations in conditions of custody of inmates:

26. The Committee considers that the scope of the word '*conditions*' and also the scope of the words '*conditions with respect to association with other inmates*', are ill-defined and wide, which may make the rights of the inmates, unduly dependent on insufficiently defined administrative powers. Accordingly, the Committee refers the new section 78A (1) to Parliament.

28. The Committee considers that the broad scope of the phrases in the new section 78A (3), '*the nature of any program*' and '*any intensive monitoring*', could be subject to the exercise of an ill-defined discretion, which may make individual rights unduly dependent on insufficiently defined administrative powers, and refers it to Parliament.

30. The Committee is concerned that both the conditions of separation and the reasons or circumstances for separation of inmates are unclear and unspecified in the Bill. The Committee is particularly concerned that this could make personal rights and liberties unduly dependent on insufficiently defined administrative powers particularly since the review provisions for the segregation custody direction under Division 2 of the Act will not apply to the separation of inmates under the new section 78A.

31. The Committee is of the view that the meaning of '*segregated*' versus the meaning of '*separation*' in the new section 78A (4), appears broad and ill-defined, and may even appear arbitrary and uncertain, which may make personal rights and liberties unduly dependent on insufficiently defined administrative powers. Therefore, the Committee refers this to Parliament.

Issue: Schedule 1 [1] – Excludes review and not require reasons - proposed section 78A (4) – separation and other variations in conditions of custody of inmates:

34. However, the Committee is concerned that the provisions and review process for a segregated custody direction under Division 2 of Part 2 of the Act will not apply to inmates who are separated instead of being subjected to a segregated custody direction, as provided in the new section 78A.

35. The Committee notes the comments made by the New South Wales Young Lawyers' Human Rights Committee, with regard to prisoners held in the HRMU in Goulburn Correctional Centre (SuperMax) who are "effectively held in segregation although they are classified under a disciplinary program and are therefore *denied the right to review procedures available to lawfully segregated inmates*. The NSW Ombudsman made a finding to this effect in relation to two prisoner complaints when it observed that prisoners could be segregated without segregation orders".

36. The Committee takes into consideration the comments made by the Committee Against Torture in relation to supermaximum prisons where the Committee Against Torture in its Concluding Observations about Australia in May 2008, found that: "it is concerned over the harsh regime imposed on detainees in 'supermaximum prisons" and instances of "prolonged isolation…and the effect such treatment may have on their mental health". In this context, the Committee notes that the Commonwealth Government has recently signed the *Optional Protocol* to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in May 2009, which means that parties to the protocol are obliged to allow international inspections of its places of detention, including prisons. Once Australia has ratified the Convention, all prisons and detention facilities will be subject to the monitoring and reporting regimes under the protocol.

37. The Committee also observes further comments made by the New South Wales Young Lawyers' Human Rights Committee: "the broad discretion afforded to the Commissioner of Corrective Services enables the executive to circumvent the operation of administrative law protections. Although the NSW Legislative Council General Purposes Standing Committee found generally that the HRMU did not breach human rights, prisoners being held in the HRMU continue to make complaints about the conditions of their incarceration. Despite assurances by correctional centre administrators *that detention in the HRMU is not segregation, the inability to review ostensibly severe restrictions on liberty* (short of an action for *habeas corpus*) represents a partial derogation from Article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR) and a genuine challenge to Article 10, ICCPR ".

38. Therefore, by taking into consideration of the above commentaries, the Committee refers to Parliament that the new section 78A and subsection (4) could raise concerns that a review, monitoring and reporting process (with requirement to provide reasons) has been precluded for the separation of inmates who are not under a segregation custody direction.

3. Fisheries Management Amendment Bill 2009

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

Issue: Strict Liability; Excessive Punishment; Onus of proof

25. The Committee is of the view that it is appropriate to impose monetary penalties that are of a sufficient severity to act as a deterrent, so long as balanced against the protection of fundamental personal rights and liberties. The Committee notes that the amendments to the Fisheries Management Act are in response to concerns about the black market selling of fish in New South Wales. However, the Committee refers to Parliament the question of whether the increased penalties imposed for the strict liability offences in the Bill properly strike the above balance.

28. The Committee has concerns that Schedule 1[27], which introduces penalties of up to ten years imprisonment and the power of a Court to impose an additional monetary penalty of up to ten times the market value of fish, may be considered to be excessive punishment and unduly trespass on individual rights and liberties. The Committee notes the comments in the Agreement in Principle Speech that the provisions are proposed to respond to the growing problem of black market selling of fish. However, the Committee refers Schedule 1[27] to Parliament to consider whether the penalties imposed by the provisions are excessive.

Issue: Schedule 1[132] - Proposed section 279A - Duty of master to prevent - Contraventions of Act - Excessive Punishment

31. The Committee has concerns that Schedule 1[132] may unduly trespass on the personal rights and liberties of individuals. However, given the comments in the Agreement in Principle Speech that the offence provision was introduced to address a situation where children on boats commit fisheries offences accompanied by adults, the Committee does not consider Schedule 1[132], proposed section 279A to be an undue trespass on personal rights and liberties.

Issue: Schedule 1[133], Proposed section 282C(1) - Prohibition Orders

34. The Committee has concerns that Schedule 1[133] may unduly trespass on personal rights and liberties and be considered to be excessive punishment. Proposed section 282C allows a court to decide from what kinds of fishing or associated activities the offender should be banned, allowing a Court to order than an offender cannot be on a boat or premises of a specified kind. The Agreement in Principle Speech suggests that a prohibition order cannot prevent an offender's right to work in Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights*. However, the Committee still has concerns that Schedule 1[133] may unduly trespass on personal rights and liberties and refers it to Parliament for its consideration.

Issue: Schedules [85] - Power of minister to cancel aquaculture lease -Oppressive Official Powers

Issue: Schedule 1[108], Proposed section 220AA - Stop work orders - Oppressive Official Powers; Procedural Fairness

37. The Committee has concerns that Schedule 1[108], in particular proposed section 220AA(5), which states that the Director General is not required to notify any person who may be affected by the order before making the order, may be an undue trespass on personal rights and liberties and principles of procedural fairness.

Issue: Schedule 1[127] - Special Power to require information – Oppressive Official Powers; self incrimination

41. The Committee is concerned that the powers in Schedules 1[127] to require a person to provide information, answer questions and attend a specified place may unduly trespass on the personal rights and liberties. It is also has particular concerns in relation to proposed section 258B(2), which states that self incrimination is not an excuse for failure to comply with a requirement under proposed section 258A. Accordingly, the Committee refers the provisions to Parliament for its consideration.

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.

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

4. Local Government Amendment (Planning and Reporting) Bill 2009

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

5. Parliamentary Remuneration Amendment (Salary Packaging) Bill 2009*

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

6. Road Transport (General) Amendment (Consecutive Disqualification Periods) Bill 2009

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

Issue: Schedule 1 [6] – Retrospectivity – insertion of provisions in Schedule 1 to the *Road Transport (General) Act 2005* – consequent on enactment of *Road Transport (General) Amendment (Consecutive Disqualification Periods) Act 2009*:

18. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, the Committee considers the following safeguards:

19. Schedule 2.1 proposes the insertion of section 25A (1A), which will amend section 25A of the *Road Transport (Driver Licensing) Act 1998* to make it clear that a driver does not commit the offence of driving while disqualified in relation to a disqualification period the commencement and completion dates of which have been altered by operation of the new section 188A of the *Road Transport (General) Act 2005* unless the Roads and Traffic Authority has previously provided written notice of the altered dates to the driver.

20. Schedule 1 [1] includes proposed section 188A (6) which states that nothing in this section limits any power that a court has: (a) to make an order for licence disqualification (whether or not to be completed concurrently or consecutively with any other licence disqualification), or (b) to annul, quash, set aside or vary a licence disqualification.

21. By taking into account the above safeguards and the purpose of this Bill in bringing forward consecutive disqualification periods to avoid orphan periods with the balancing of interests in public road safety, the Committee is of the view that the retrospective effect is unlikely to unduly trespass on personal rights.

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:

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

1. Reply To Correspondence On Agreement In Principle / Second Reading Speeches And Explanatory Materials Accompanying Bills

The Committee thanks the Attorney General for his reply.

2. Reply To Correspondence On Agreement In Principle / Second Reading Speeches And Explanatory Materials Accompanying Bills

The Committee thanks the Minister for his reply.

Part One – Bills

SECTION A: Comment on Bills

1. ABORIGINAL LAND RIGHTS AMENDMENT BILL 2009

Date Introduced: 25 June 2009

House Introduced: Legislative Assembly

Minister Responsible: The Hon Paul Lynch MP

Portfolio: Aboriginal Affairs

Purpose and Description

1. The *Aboriginal Land Rights Amendment Bill 2009* (the Bill) amends the *Aboriginal Land Rights Act 1983* (Land Rights Act) with respect to land dealings by the Aboriginal Land Councils and community development levies. Bill also makes amendments to other Acts and regulations such as the *Aboriginal Land Rights Regulation 2002*.

2. The objects of the Bill are as follows:

   (a) to require all dealings with land (other than acquisition of land) by the New South Wales Aboriginal Land Council (the NSWALC) to be consistent with its community, land and business plan and any applicable policies of the NSWALC;
   (b) to require all dealings with land (other than acquisition of land) by a Local Aboriginal Land Council (a LALC) to be approved by the NSWALC;
   (c) to specify procedures and requirements for approvals by the NSWALC of land dealings and to provide for assessment of land dealings by expert advisory panels;
   (d) to prohibit registration of land dealings by Aboriginal Land Councils under the *Real Property Act 1900* unless the registration application is accompanied by a registration approval certificate;
   (e) to provide for a system of registration prohibition notices to enforce agreements implementing conditions of approvals of land dealings;
   (f) to provide for a community development levy to be paid by LALCs on dealings with land and for the collection, use and payment of the proceeds of that levy and to provide for matching payments to be made by the NSWALC,
   (g) to re-enact certain provisions relating to land dealings;
   (h) to prohibit the NSWALC from delegating its land dealing approval functions;
   (i) to make other minor and consequential amendments;
   (j) to enable regulations to be made as a consequence of the enactment of the proposed Act and to insert a transitional provision.

Background

3. The Land Rights Act is an important Act that recognises land rights for Aboriginal people in NSW. In May 2004, the NSW Government established a taskforce to

review the Land Rights Act. The Land Rights Act was subsequently amended in 2006 to improve the representation, structure and governance of land councils.[1]

4. This Bill is part of the second and final stage of the implementation of the taskforce's recommendations.[2] As highlighted in the Agreement in Principle Speech, the Bill also incorporates the recommendations to amend the land dealing provisions of the Land Rights Act following the findings of an Independent Commission Against Corruption (ICAC) investigation into Koompahtoo Local Aboriginal Land Council (April 2005).[3]

5. ICAC made seven recommendations in the above report, which included reviewing the oversight function of the NSWLC in relation to land dealings by LALCs and sets clearer guidelines regarding how commercial land development is pursued by LALCs. The Draft Consultation Bill was released in March 2009.

6. Under the Land Rights Act, Aboriginal land councils have statutory functions for the acquisition, management, use, control and disposal of land with freehold title. As stated in the Agreement in Principle Speech, land councils own approximately 82,000 hectares of land in freehold title in New South Wales. As also stated in the Agreement in Principle Speech, as at June 2009, a total of 17,780 land claims had been lodged by Aboriginal land councils; 2,328 had been granted fully or partially to date, 8,719 had been refused; and 8,689 were yet to be determined.

7. As stated in the Agreement in Principle Speech, the Bill amends the Land Rights Act to clarify processes for Aboriginal land councils to follow when they deal with, dispose of or develop land. In the Agreement in Principle Speech, the Minister for Aboriginal Affairs stated that:

> The amendments will increase the confidence of the property industry when engaging in land developments with Aboriginal land councils. They will bring clear and appropriate regulation of the extensive and valuable land holdings of Aboriginal land councils in New South Wales. That regulation is of vital importance. It will invigorate land development partnerships between the property industry and land councils. It will enhance the effectiveness of the Land Rights Act in bringing benefits to Aboriginal people in New South Wales.

8. As stated in the Agreement in Principle Speech, the Bill provides clearer procedures for the approval of land dealings. For example, it clarifies that a land dealing by a LALC that requires approval by the NSWALC that is not the subject of an approval is void. As stated in the Agreement in Principle Speech, these proposed amendments will provide a strong protection against corruption as the validity of a land dealing by a LALC relies on a valid approval of the dealing by the NSWALC. The Bill also creates clearer legal responsibilities in relation to the engagement of land councils with third parties in property development and sales.

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[1] Aboriginal Land Rights Amendment Bill 2006; See also the Legislation Review Digest No 16, 10 November 2006 at p 1.
[2] See NSW Aboriginal Land Council, The Aboriginal Land Rights Act Review at: http://www.alc.org.au/news/alra/index.htm
[3] The Independent Commission Against Corruption, Report on investigation into certain transactions of Koompahtoo Local Aboriginal Land Council (2003) at:http://www.icac.nsw.gov.au/files/pdf/Koompahtoo_Report_pub2_94i.pdf

10. The Bill also establishes clearer processes in relation to the land dealing approval process, requiring all disposals of, and dealings with land by LALCs and the NSWALC to have regard to their community, land and business plans (sections 42D and 42G). As stated in the Agreement in Principle Speech, these proposed amendments will strengthen transparent governance of land councils and will support and promote efficiency in the use and management of land.

11. The Bill also introduces a new system of certification of the application and approval process. The first form of certificate is a dealing approval certificate, which will be required by an LALC before it can deal with land or enter an agreement to deal with land or lodge development applications with local Government authorities. The second form of certificate is a registration approval certificate, which must be obtained by LALCs before they can register dealings on title to land under the *Real Property Act 1900*.

12. Another important amendment is the introduction of a Community Development Levy under proposed Division 4A, which will be paid on certain land dealings. According to the Bill, The NSWACL must match the amount of funds paid by a LALC into the fund. The amendments to the *Aboriginal Land Rights Regulation 2002* also establish a New South Wales Aboriginal Land Council Community Fund to receive the Community Development Levy payable by land councils when engaged in land dealings. However, an LALC is liable to pay the Community Development Levy only for land dealings set out in section 42R(2) of the Bill.

The Bill

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 or days to be proclaimed.

Schedule 1 Amendment of Aboriginal Land Rights Act 1983 No 42

Schedule 1 [3] repeals Division 4 of Part 2 of the Principal Act and inserts proposed Divisions 4 (proposed sections 40–42P) and 4A (proposed sections 42Q–42X).

Proposed Division 4

Proposed section 40 defines words and expressions used in the proposed Divisions. ***Deal with land*** means sell, exchange, lease, mortgage, dispose of or otherwise create or pass a legal or equitable interest in land, grant or release an easement or covenant over land, enter into agreements under certain Acts, subdivide or consolidate land, make a development application and do any other action relating to land that is prescribed by the regulations.

Proposed section 41 defines ***dealing approval certificate*** and ***registration approval certificate*** and makes a dealing approval certificate conclusive evidence of the matters specified in it. A dealing approval certificate is a certificate by the Chief Executive Officer of the NSWALC that a land dealing by the NSWALC complies with the proposed Division or that a land dealing by a LALC has been approved by the NSWALC. A registration approval

certificate is a certificate by the Chief Executive Officer that a registrable instrument (relating to a land dealing by the NSWALC or a LALC) can be registered or recorded under the *Real Property Act 1900* or that a plan or other instrument can be registered under the *Conveyancing Act 1919*.

Proposed sections 42–42B re-enact, with minor variations, sections 40AA, 40AB and 42 of the Principal Act. Proposed section 42C provides that a dealing with land by an Aboriginal Land Council that contravenes proposed section 42D or 42E is void. The provision is in addition to the requirements of or under any other Act or law in relation to a land dealing.

Proposed section 42D prohibits the NSWALC from dealing with land unless it has notified the LALC for the area in which the land is situated of the proposed dealing and considered any comments by the LALC. It also requires the NSWALC not to deal with land unless it has had regard to its community, land and business plan and any applicable policies. The Chief Executive Officer of the NSWALC must give a dealing approval certificate if satisfied that the NSWALC has complied with the proposed Division in relation to a land dealing and must also give a registration approval certificate for a registrable instrument if satisfied that the instrument is a registrable instrument relating to such a dealing. Leases for periods of less than 3 years will not be subject to the proposed section.

Proposed section 42E prohibits a LALC from dealing with land except in accordance with an approval by the NSWALC. Leases for periods of less than 3 years (other than certain social housing management leases) will not be subject to the proposed section. The proposed section also provides that an agreement by a LALC to deal with land is, if the land dealing has not been approved (if required), unenforceable against the LALC.

Proposed section 42F sets out requirements for applications for approval of LALC land dealings by the NSWALC and also contains the power to make regulations about assessment fees and other related matters.

Proposed section 42G sets out requirements for approval of LALC land dealings by the NSWALC. The NSWALC must approve the dealing if it is approved at a meeting of the LALC that complies with the proposed section and the application is in accordance with the proposed Act. However, the NSWALC may refuse to approve a land dealing if it is of the opinion that the land dealing is, or is likely to be, contrary to the interests of LALC members or other Aboriginal persons within the area of the LALC. The proposed section requires any conditions of approval to be able to be satisfied before completion of the land dealing but also enables a condition requiring an agreement relating to ongoing obligations to be entered into.

Proposed section 42H requires the NSWALC to give a LALC a written statement of reasons for a decision to refuse approval of a land dealing or to impose conditions on a land dealing within 28 days after the LALC requests such a statement.

Proposed section 42I enables the NSWALC to constitute expert advisory panels to assess applications for approvals of dealings with land.

Proposed section 42J prohibits the NSWALC from revoking a land dealing approval if the land dealing has been completed (whether or not it is required to be, or has been, registered). It also provides that the relevant approval certificates cease to have effect on revocation of the approval.

Proposed section 42K requires the Chief Executive Officer of the NSWALC to give a dealing approval certificate for a LALC land dealing within 14 days after it is approved by the NSWALC. It also requires a registration approval certificate to be given for a LALC land dealing if the Chief Executive Officer is satisfied that the instrument concerned is a registrable instrument, that any conditions of the NSWALC approval have been met and that any community development levy has been paid.

Proposed section 42L limits the right to bring proceedings in relation to a decision to approve or not to approve a land dealing, under the *Land and Environment Court Act 1979* or for judicial review in any other court, to the LALC concerned.

Proposed section 42M prohibits the Registrar-General from registering or recording a transfer or other dealing relating to land of an Aboriginal Land Council unless the transfer or dealing is accompanied by a registration approval certificate relating to the transfer or dealing or is not required to have such a certificate. A registration or recording prohibited by the proposed section will have no effect.

Proposed section 42N provides for agreements entered into in accordance with a condition imposed by an approval by the NSWALC of a land dealing (a land dealing approval agreement) to be registered on the title of land under the *Real Property Act 1900* or in the General Register of Deeds (in the case of old system title land).

The effect of registration of an agreement will be to make the agreement binding on the successors in title to the owner who entered the agreement.

Proposed sections 42O and 42P establish a system of registration prohibition notices for land subject to a land dealing approval agreement. The NSWALC may lodge a registration prohibition notice with the Registrar-General for recording on the title of land that is subject to a land dealing approval agreement. Notice must be given to the registered proprietors of estates or interests in the land. The Registrar-General is prohibited from registering or recording a land dealing that is prohibited by a registration prohibition notice, except with the consent of the NSWALC. The NSWALC must not refuse consent if the dealing is permitted by the agreement or does not materially affect its performance or enforcement. Proposed Division 4A

Proposed section 42Q provides that words and expressions used in the proposed Division have the same meaning as they have in the *Duties Act 1997*.

Proposed section 42R requires a LALC to pay a community development levy on specified dealings with land and enables related regulations to be made.

Proposed section 42S provides that the community development levy is not payable for transactions between Aboriginal Land Councils.

Proposed section 42T provides that the amount of the community development levy for a transaction is to be the prescribed percentage (if any) of the amount of duty payable for the transaction.

Proposed section 42U provides for the payment to the NSWALC of the amounts of community development levy collected by the Chief Commissioner of State

Revenue, as agreed with the Chief Commissioner, and also requires the NSWALC to match the payments of community development levy made by LALCs.

Proposed section 42V enables the Minister to waive matching payments by the NSWALC in appropriate circumstances.

Proposed section 42W enables regulations to be made with respect to the application of provisions of the *Duties Act 1997* in respect of the community development levy and other matters related to the levy.

Proposed section 42X provides that the proposed Division is to be read together with the *Taxation Administration Act 1996* (other than Part 4 of that Act).

Schedule 1 [1], [2], [6] and [8] make amendments consequential on the amendment made by **Schedule 1 [3]**.

Schedule 1 [4] and [11] amend sections 52 and 106 of the Principal Act to insert notes relating to the powers of LALCs and the NSWALC as statutory corporations.

Schedule 1 [5] inserts proposed section 52AA into the Principal Act. The proposed section re-enacts existing section 41 in relation to LALCs.

Schedule 1 [7] amends section 52G of the Principal Act to require a LALC to exercise its function of approving a land dealing by resolution of its voting members.

Schedule 1 [9] amends section 106 of the Principal Act to include the function of approving land dealings by LALCs in the list of functions of the NSWALC.

Schedule 1 [12] inserts proposed section 106A into the Principal Act. The proposed section re-enacts existing section 41 in relation to the NSWALC.

Schedule 1 [13] amends section 113 of the Principal Act to enable policies to be made by the NSWALC in relation to land dealings by LALCs and in relation to the distribution of amounts from the New South Wales Aboriginal Land Council Community Fund.

Schedule 1 [14] amends section 116 of the Principal Act to prevent the NSWALC from delegating functions relating to the administration of the New South Wales Aboriginal Land Council Community Fund established under proposed section 149A (see **Schedule 1 [16]**).

Schedule 1 [15] amends section 116 of the Principal Act to add approval of land dealings by LALCs to the list of functions that may not be delegated by the NSWALC.

Schedule 1 [16] inserts proposed section 149A into the Principal Act. The proposed section establishes the New South Wales Aboriginal Land Council Community Fund, into which payments of community development levy are to be paid. The Fund is to be used for the management and acquisition of land by LALCs and for community benefit schemes by LALCs and other purposes.

Schedule 1 [10] makes a consequential amendment.

Schedule 1 [17] amends section 150 of the Principal Act to enable amounts in the New South Wales Aboriginal Land Council Community Fund to be taken into account when determining the capital value of the New South Wales Aboriginal Land Council Account.

Schedule 1 [18] inserts proposed section 239A into the Principal Act. The proposed section requires a dispute relating to a decision to approve or not to approve a land dealing to be referred to the Registrar for mediation, conciliation or arbitration if an Aboriginal Land Council proposes to commence legal proceedings.

Schedule 1 [19] amends section 242 of the Principal Act to add members of expert advisory panels to the persons who are protected under that section from personal liability for acts or omissions done in good faith for the purpose of executing that Act or any other Act.

Schedule 1 [20] amends Schedule 4 to the Principal Act to enable regulations containing provisions of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [21] inserts savings and transitional provisions into Schedule 4 to the Principal Act.

Schedule 2 Amendment of other Acts and Instruments

Schedule 2.1 amends the *Aboriginal Land Rights Regulation 2002* to insert proposed Part 10 (Land Dealings) and to make other consequential amendments. The proposed Part:

(a) prescribes the forms for dealing approval certificates and registration approval certificates, and
(b) prescribes requirements for land dealing approval applications and the fees for applications and assessment of applications, and
(c) prescribes the procedures for dealing with applications, including the circumstances when the NSWALC is not required to assess a land dealing approval application, and
(d) contains provisions relating to expert advisory panels, and
(e) contains provisions relating to the community development levy, including the amount of the levy and periods for payment, as well as making provision for the application of specified provisions of the *Duties Act 1997* and interim assessments of liability.

Schedule 2.2 amends the *Environmental Planning and Assessment Act 1979* to enable regulations to be made:
(a) requiring the NSWALC to consent to applications for approval of Part 3A projects relating to LALC land if LALC approval is required as the owner of land, and
(b) requiring the NSWALC to consent to applications for the modification of development consents relating to such land, and
(c) enables regulations containing savings and transitional provisions to be made.

Schedule 2.3 amends the *Environmental Planning and Assessment Regulation 2000* to:

(a) require the consent of the NSWALC to a Part 3A project relating to LALC land if the consent of the LALC is required, and
(b) require the consent of the NSWALC to a development application made in respect of such land, and

(c) require notice of determination of a development application, or an application to modify a development consent, for such land to be given to the NSWALC, and

(d) require the consent of the NSWALC to an application for the modification of development consents relating to such land.

Schedule 2.4 amends the *National Parks and Wildlife Act 1974* to require the consent of the NSWALC to a conservation agreement under that Act relating to LALC land.

Schedule 2.5 amends the *Taxation Administration Act 1996* to provide for the provisions of that Act (which apply to the collection of taxes) to apply to the community development levy.

Schedule 2.6 amends the *Threatened Species Conservation Act 1995* to require the consent of the NSWALC to a biobanking agreement under that Act relating to LALC land and for notice to be served on the NSWALC of any application to transfer LALC land to the Minister on the ground of a contravention of a biobanking agreement.

Schedule 2.7 amends the *Wilderness Act 1987* to require the consent of the NSWALC to a wilderness protection agreement under that Act relating to LALC land.

Issues Considered by the Committee

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

Issue: Proposed section 42E – Approval required for land dealings by Local Aboriginal Land Councils

10. Proposed section 42E sets out the approval required for land dealings by LALCs. Section 42E(4) states that an "agreement to deal with land vested in a Local Aboriginal Land Council that is made by the Council is, if the land dealing is not approved by the New South Wales Aboriginal Land Council and an approval is required, unenforceable against the Local Aboriginal Land Council". Further, proposed section 42E(5) states that: "A person is not entitled to damages, or any other remedy, against a Local Aboriginal Land Council in respect of a warranty or other promise relating to an unenforceable agreement referred to in subsection (4)."

11. **Proposed section 42E(5), which appears to limit the entitlement of a person to damages or any other remedy against a LALC, may trespass unduly on the rights and liberties of individuals. Accordingly, the Committee refers this provision to Parliament for its consideration.**

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions [s 8A(1)(b)(iii) *LRA*]

Issue: Proposed section 42L – Review of Approval Decisions

12. Proposed section 42L(1) states that the only person who has standing to bring proceedings under the *Land and Environment Court Act 1979* or for judicial review in any other court, in relation to a decision to approve or not to approve of a land dealing, or an act or omission of the NSWALC in connection with any such decision, is the LALC concerned.

13. Proposed Section 42L(2) clarifies that the section does not confer any standing on a LALC in respect of Class 3 proceedings under the *Land and Environment Court Act*

1979 in connection with any such decision. Appeals that fall within Class 3 of the *Land and Environment Court Act 1979* are merits appeals.

14. As stated in the Agreement in Principle Speech, the Bill "makes clear that only a local Aboriginal land council that has made an application to the NSWALC for approval of a land dealing may seek judicial review of NSWALC's decision about their application and that no person may seek to have the merits of a decision by the NSWALC considered by a court."

15. The Committee is of the view that proposed section 42L, which appears to limit standing to bring proceedings to review a decision by the NSWALC in relation to the approval of a land dealing may trespass unduly on personal rights and liberties. Accordingly, the Committee refers this provision to Parliament for its consideration.

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.

16. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation, which may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts advice from the Department of Aboriginal Affairs that the inclusion of Clause 2 will ensure that transactions that have already been approved by the NSWALC will not be made unviable by the imposition of a Community Development Levy in proposed section 42R.

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

The Committee makes no further comment on this Bill.

2. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2009

Date Introduced:	23 June 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Robertson MLC
Portfolio:	Corrective Services

The Bill passed both Houses on 24 June 2009 and was assented to on 26 June 2009. The preparation of this report was done in accordance with the *Legislation Review Act 1987* with respect to commenting on Bills as originally presented to Parliament.

Purpose and Description

1. This Bill amends the *Crimes (Administration of Sentences) Act 1999* in relation to the management of inmates. It aims to confirm the current arrangements within the New South Wales correctional system for:

    - the care, control and management of inmates in connection with the designation of inmates for the management of security and other risks; and,

    - the separation of inmates from other inmates in a correctional centre.

2. The amendments make it clear that nothing in the Act requires the placement or conditions of custody of inmates to be the same for all inmates. It also aims to make it clear that a decision to separate an inmate from other inmates does not constitute segregated custody of that inmate.

3. The amendment confirms that inmates may be held separately from other inmates without the making of a segregated custody direction. This involved 2 concepts:

    - "segregated custody" and

    - "separation" of inmates.

4. Segregated custody is the process where the commissioner may direct that an inmate be held in segregated custody if of the opinion that association of the inmate with other inmates constitutes, or is likely to constitute, a threat to the personal safety of any other person, the security of a correctional centre, or the good order and discipline within a correctional centre.

5. Other inmates who are not subject to such a direction may also be subject to constraints or restrictions such as separation of inmates regarding association with other inmates, the number of hours confined to a cell, access to telephones and the ability to work in industries.

6. The Bill aims to give the Department of Corrective Services greater certainty with regard to how it can operate. It aims to confirm the current capacity of the commissioner to

manage the correctional system and the capacity of the commissioner in using different conditions of custody to ensure inmates in that system are appropriately managed.

7. Schedule 1 [1] confirms current arrangements in that the conditions of custody of inmates may vary for different inmates, including with respect to association of inmates in the same correctional centre. The amendment confirms that inmates or groups of inmates may be held separately from other inmates in a correctional centre for the purposes of the care, control or management of a specific inmate or group of inmates. Any such separation may arise from a requirement of the Act or its regulation, the classification or designation of the inmates, any program undertaken by the inmates or any intensive monitoring required of the inmates.

8. The amendment also ensures that anything previously done or omitted that would have been validly done or omitted had the amendment been in force at that time is taken to have been validly done or omitted.

9. Schedule 1[2] aims to confirm that the regulation may make further provision for the designation of inmates for the management of security or other risks. There is already a general regulation-making power contained in section 271 of the *Crimes (Administration of Sentences) Act 1999* with respect to any matter. For consistency with section 79, which provides for some specific regulation-making powers with respect to full-time imprisonment, subsection (c1) is being inserted into the *Crimes (Administration of Sentences) Act 1999*.

Background

10. There are distinctions between classification and designation of inmates and management regimes, compared with segregated custody directions and separation of inmates for management purposes. According to the Agreement in Principle speech:

> A recent case in the Supreme Court has necessitated the need to introduce this bill to reinforce those distinctions and the existing right of the Commissioner of Corrective Services to manage inmates in the appropriate way. This Bill is necessary to confirm the intent of existing legislation and to make it abundantly clear that the conditions for custody for all inmates are not, and do not need to be, identical or equivalent.

11. A direction by the commissioner on segregated custody is made as a result of an explicit, exhibited behaviour by an inmate. The Agreement in Principle speech gave examples such as an assault on a fellow inmate or member of staff, and used where there are no other means of managing the inmate.

12. The Act provides for an independent system of review of segregated custody directions at specified time frames. As part of the daily management of inmates subjected to a segregated custody direction, there may be restrictions imposed on an inmate such as, association with other inmates, the number of hours confined to the cell, access to telephones and the ability to work in industries.

13. However, the Agreement in Principle speech stated that in the New South Wales correctional system, such management restrictions are not limited to inmates subject to a segregated custody direction. According to the Agreement in Principle speech:

> Other inmates who are not subject to such a direction may also be subject to constraints or restrictions regarding association with other inmates, the number of hours confined to a cell, access to telephones and the ability to work in industries. For example, an inmate

> undertaking a specific program, such as the Custody Based Intensive Treatment Program for Sex Offenders, will be located in a closed wing or unit in a correctional centre, and will be able to associate only with inmates undertaking that specific program. A similar situation prevails for inmates subject to a compulsory drug treatment order. These inmates are only located in the Compulsory Drug Treatment Correctional Centre at Parklea. While on stage one of that program, they are prohibited from having any visitors and can only associate with a tightly controlled group of other inmates with similar orders. The Department of Corrective Services also has to deal with inmates who form inmate factions within the system. These inmate factions have the potential to become what the commissioner describes as security threat groups. Once organised, the individual activities of such groups and the fall-out from the rivalries that can arise between them, can pose a real threat to the safety of staff, other inmates and the security of correctional centres. Therefore, for some years now the department has operated the Security Threat Group Intervention Program, which seeks to address the offending behaviour of inmates in these groups. It is a well-grounded principle in New South Wales penal law that inmates may be separated and managed according to their needs—whether, for example, the separation is for the purpose of addressing the inmate's criminogenic needs by way of programs and services, owing to an inmate's intellectual or physical disability, a medical condition or simply on the basis of gender.

14. The Agreement in Principle speech continued to state that:

> Some basic examples of this fundamental tenet may be found in the *Crimes (Administration of Sentences) Regulation 2008*—for instance, clause 30, which provides for the separation of classes of inmates; clause 31, which provides for the separation of inmates on the basis of their sex; clause 32, which provides for the separation of inmates found or suspected to be in an infectious or verminous condition from other inmates; and chapter 2, part 2.2, which relates to the case management and classification of inmates.

The Bill

15. The object of this Bill is to confirm current arrangements for the care, control and management of inmates in connection with the designation of inmates for the management of security and other risks and the separation of inmates from other inmates in a correctional centre.

16. **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.

Schedule 1 Amendment of *Crimes (Administration of Sentences) Act 1999* No 93
Schedule 1 [1] confirms current arrangements that conditions of custody of inmates may vary for different inmates (including with respect to association of inmates in the same correctional centre). The amendment confirms that inmates or groups of inmates may be held separately from other inmates in a correctional centre for the purposes of the care, control or management of the inmates or groups of inmates.
Any such separation may arise from a requirement of the *Crimes (Administration of Sentences) Act 1999* or the regulations, the classification or designation of the inmates, any program undertaken by the inmates or any intensive monitoring required of the inmates. The amendment also confirms that inmates may be held separately from other inmates without the making of a segregated custody direction.
The amendment ensures that anything previously done or omitted that would have been validly done or omitted had the amendment been in force at that time, is taken to have been validly done or omitted.

Schedule 1 [2] confirms that the regulations may make further provision for the designation of inmates for the management of security or other risks.
Schedule 1 [3] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Issues Considered by the Committee

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

Issue: Schedule 1 [1] – Retrospectivity - proposed section 78A (5) – separation and other variations in conditions of custody of inmates:

17. The new section 78A (5) reads: Anything done or omitted that could have been validly done or omitted if this section (and section 79 (c1)) had been in force when it was done or omitted is taken to be, and always to have been, validly done or omitted.

18. The Committee observes that the amendments are retrospective to ensure that anything previously done or omitted that could have been validly done or omitted had the amendments been in force at the time would be taken to have been validly done or omitted, by confirming that inmates could be separated at the discretion of the commissioner.

19. In *Sleiman v Commissioner of Corrective Services & Anor; Hamzy v Commissioner of Corrective Services & Anor* [2009] NSWSC 304, the claim was that the placement in a prison within a prison (known as 'SuperMax', a High Risk Management Unit or HRMU in the Goulburn Correctional Centre), constituted a segregated custody within the meaning of sections 10 and 12 of the *Crimes (Administration of Sentences) Act 1999*. The plaintiffs argued their segregation was made in the absence of lawful authority as the requirements and provisions on segregation under the Act had not been complied with.

20. In *Sleiman v Commissioner of Corrective Services & Anor; Hamzy v Commissioner of Corrective Services & Anor* [2009] NSWSC 304, Adams J at 59 to 63, held the following conclusion:

> The importance of the protection of personal liberty as a fundamental purpose of the common law and the tort of false imprisonment as one of the ways in which the law has extended this protection to individuals can scarcely be overstated. It was recently emphatically reaffirmed by the Court of Appeal in this State: *Ruddock and Ors v Taylor* [2003] NSWCA 262; (2003) 58 NSWLR 269. Of course, there are limits to such liberty and it is necessary, in the interests of society, to imprison, sometimes for long periods and sometimes in segregation, some persons who break the law. But the courts must insist that even that restriction of liberty – as justifiable as it may be – cannot occur unless and cannot go one inch further than the law strictly permits.
>
> So far as prisons are concerned, the Parliament has instituted a structure of laws to govern the responsibilities of those to whom is delegated the custodianship of prisoners of the State. They are given great power and considerable freedom of action. But it is not untrammelled. It is self evident that the isolation of a person from communication with others is a severe and possibly dangerous step. It must be done with considerable care and only when it is truly necessary. It cannot be doubted that for these reasons the Parliament has made specific provision in the Act dealing with the exercise of this power. This demonstrates, amongst other things, that segregated custody is regarded by the Parliament as an exceptional form of custody and requires a unique system of implementation and control, in particular by necessitating a report to the Minister, regular reviews and giving the prisoner the right to apply to the Review Council for a review. In virtually every other aspect of managing a

prisoner's custody the Commissioner has almost unfettered control and authority (albeit subject to various forms of supervision) except where the prisoner is to be segregated.

Having regard to the exceptional character of segregated custody so far as the well being of the prisoner is concerned and the unique regime instituted by the Parliament as a safeguard, it is obvious that compliance with its requirements is no mere matter of legal technicality but of fundamental importance. To place a prisoner in segregation without such compliance and set at nought the safeguards of the Act is a serious departure from the law.

This case is about what the law will do to require obedience to and redress departures from the obligations it imposes. It has nothing to do with the personal merits, or lack of them for that matter, of the prisoner. The law is blind to such considerations. The law will be enforced, not because of what is owed to the prisoner, but because of what it owes itself and the community it serves.

How, then, is the law to be enforced? First, by recognizing the mandatory character of the requirements of the Act; second by permitting a prisoner who alleges that the Act has not been obeyed in his case to approach the Court for relief, providing there is a *prima facie* case and it is not an abuse of process to take proceedings; and, third, by recognizing, though much of a prisoner's liberty is taken, yet some is retained and that, though it might not be great, yet it is important and will be protected. In my view, such liberty – at least arguably – is protected by, and its unlawful restriction is the commission of, the tort of false imprisonment.

21. This Bill will retrospectively prevent the proceedings for false imprisonment and relief sought by way of declaration in response to the leave granted by the Supreme Court in the above case of *Sleiman v Commissioner of Corrective Services & Anor; Hamzy v Commissioner of Corrective Services & Anor* [2009] NSWSC 304.

22. The Committee is of the view that to change the law retrospectively in a manner that adversely affects any person is a significant trespass on personal rights and liberties.

23. This Bill will retrospectively remove rights to sue for false imprisonment or unlawful segregation and action for negligence or trespass for acts or omissions already done but it also removes these rights in cases being considered in proceedings that have commenced.

24. Of serious concern to the Committee is that this Bill seeks to remove these rights in a case where the Supreme Court of New South Wales has already granted leave for instituting proceedings for false imprisonment. The Committee also notes the comments made by the New South Wales Bar Association[4]. By applying the Bill's amendments retrospectively as proposed in the new section 78A (5), the Committee refers this to Parliament as trespassing unduly on personal rights and liberties.

[4] From the Hansard Transcript of the Legislative Council during debate on 23 June 2009, the New South Wales Bar Association made the following comments: "…The fact that the Government is seeking to enact retrospective legislation whilst the litigation in question is still pending is of deep concern…the Association considers that this retrospective approach to overturn litigation currently on foot is unacceptable…The separation of powers between the Executive, the Legislature and the Judiciary becomes blurred when the State in its Executive capacity is a litigant to proceedings and in the face of an adverse outcome seeks to achieve success in that litigation not by an independent determination by the judicial arm of the Government but instead by enacting retrospective legislation to achieve the same effect…"

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

Issue: Schedule 1 [1] - Ill-Defined and Wide Powers – amendment of *Crimes (Administration of Sentences) Act 1999* – proposed section 78A – separation and other variations in conditions of custody of inmates:

25. The new section 78A (1) reads: Nothing in this Act requires the ***conditions*** of custody of inmates to be the same for all inmates or for all inmates in the same correctional centre or of the same classification or designation, including ***conditions with respect to association with other inmates***.

26. The Committee considers that the scope of the word '*conditions*' and also the scope of the words '*conditions with respect to association with other inmates*', are ill-defined and wide, which may make the rights of the inmates, unduly dependent on insufficiently defined administrative powers. Accordingly, the Committee refers the new section 78A (1) to Parliament.

27. The new section 78A (3) reads: In particular, inmates may be separated because of a requirement of this Act or the regulations, because of the classification or designation of the inmates, because of ***the nature of any program*** being undertaken by the inmates or because of ***any intensive monitoring*** that is required of the inmates.

28. The Committee considers that the broad scope of the phrases in the new section 78A (3), '*the nature of any program*' and '*any intensive monitoring*', could be subject to the exercise of an ill-defined discretion, which may make individual rights unduly dependent on insufficiently defined administrative powers, and refers it to Parliament.

29 The new section 78A (4) reads: The making of a ***segregated*** custody direction under Division 2 is not required to authorise a ***separation*** of inmates.

30. The Committee is concerned that both the conditions of separation and the reasons or circumstances for separation of inmates are unclear and unspecified in the Bill. The Committee is particularly concerned that this could make personal rights and liberties unduly dependent on insufficiently defined administrative powers particularly since the review provisions for the segregation custody direction under Division 2 of the Act will not apply to the separation of inmates under the new section 78A.

31. The Committee is of the view that the meaning of '*segregated*' versus the meaning of '*separation*' in the new section 78A (4), appears broad and ill-defined, and may even appear arbitrary and uncertain, which may make personal rights and liberties unduly dependent on insufficiently defined administrative powers. Therefore, the Committee refers this to Parliament.

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

Issue: Schedule 1 [1] – Excludes review and not require reasons - proposed section 78A (4) – separation and other variations in conditions of custody of inmates:

32. The new section 78A (4) reads: The making of a segregated custody direction under Division 2 is not required to authorise a separation of inmates.

33. The Committee notes that Bell J in the earlier case, *Hamzy v Commissioner of Corrective Services* [2007] NSWSC 1469, explained the provisions and process of review available for segregated custody of inmates as enacted under Division 2 of Part 2 of the *Crimes (Administration of Sentences) Act 1999* including sections 10 (1) and (2); section 12 (1) and section 16. Bell J at 9 to 13 provided the following summary on the relevant provisions and process for the segregated custody of inmates:

> "Division 2 of Part 2 of the Act makes provision for the segregated custody of prisoners pursuant to a segregated custody direction. This is a regime that is distinct from the provisions in the regulations to the Act for the punishment of inmates for disciplinary infractions.
>
> Section 10(1) provides that the Commissioner may direct that an inmate be held in segregated custody if he is of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to (a) the personal safety of any other person, (b) the security of a correctional centre or, (c) good order and discipline within a correctional centre. The general manager of a correctional centre may exercise the Commissioner's functions under s 10(1) in relation to the correctional centre and must notify the Commissioner of that fact and of the grounds on which the segregated custody direction was given.
>
> Section 12(1) provides that an inmate, subject to a segregated custody direction, is to be detained in isolation from all other inmates or in association only with such other inmates as the Commissioner (or General Manager of the correctional centre in the exercise of the Commissioner's functions under sections 10 or 11) may determine.
>
> **A regime for the review of segregated custody directions is provided by s 16 of the Act.** The General Manager of a correctional centre where an inmate is held in segregated custody must submit a report about the segregated custody direction to the Commissioner within 14 days after the date is given. Within 7 days after receipt of the report the Commissioner is required to review the segregated custody direction and either made or confirm it. In the event that the Commissioner confirms the order he may amend its terms.
>
> If the direction is confirmed the General Manager of the correctional centre in which the inmate is held subject to the direction must submit a further report about the direction to the Commissioner within three months and within each subsequent period of three months after this period. Within 7 days after each occasion on which the Commissioner receives any further report he must review the segregated custody direction".

34. However, the Committee is concerned that the provisions and review process for a segregated custody direction under Division 2 of Part 2 of the Act will not apply to inmates who are separated instead of being subjected to a segregated custody direction, as provided in the new section 78A.

35. The Committee notes the comments made by the New South Wales Young Lawyers' Human Rights Committee[5], with regard to prisoners held in the HRMU in Goulburn Correctional Centre (SuperMax) who are "effectively held in segregation although they are classified under a disciplinary program and are therefore *denied the right to review procedures available to lawfully segregated inmates*. The NSW Ombudsman[6] made a finding to this effect in relation to two prisoner complaints when it observed that prisoners could be segregated without segregation orders".

[5] From a submission made to The Federal Attorney-General on the Inquiry into an Australian Charter of Human Rights, 1 September 2008.

[6] NSW Ombudsman, Annual Report 2004 – 2005, p 112.

36. The Committee takes into consideration the comments made by the Committee Against Torture in relation to supermaximum prisons where the Committee Against Torture in its Concluding Observations about Australia in May 2008, found that: "it is concerned over the harsh regime imposed on detainees in 'supermaximum prisons" and instances of "prolonged isolation…and the effect such treatment may have on their mental health"[7]. In this context, the Committee notes that the Commonwealth Government has recently signed the *Optional Protocol* to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in May 2009, which means that parties to the protocol are obliged to allow international inspections of its places of detention, including prisons. Once Australia has ratified the Convention, all prisons and detention facilities will be subject to the monitoring and reporting regimes under the protocol.

37. The Committee also observes further comments made by the New South Wales Young Lawyers' Human Rights Committee[8]: "the broad discretion afforded to the Commissioner of Corrective Services enables the executive to circumvent the operation of administrative law protections. Although the NSW Legislative Council General Purposes Standing Committee found generally that the HRMU did not breach human rights, prisoners being held in the HRMU continue to make complaints about the conditions of their incarceration. Despite assurances by correctional centre administrators *that detention in the HRMU is not segregation, the inability to review ostensibly severe restrictions on liberty* (short of an action for *habeas corpus*[9]) represents a partial derogation from Article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR) [10] and a genuine challenge to Article 10, ICCPR [11]".

38. Therefore, by taking into consideration of the above commentaries, the Committee refers to Parliament that the new section 78A and subsection (4) could raise concerns that a review, monitoring and reporting process (with requirement to provide reasons) has been precluded for the separation of inmates who are not under a segregation custody direction.

The Committee makes no further comment on this Bill.

[7] Consideration of Reports Submitted by States Parties Under Article 19 of The Convention, Concluding observations of the Committee Against Torture, CAT/C/AUS/CO/1, 15 May 2008, cited in a submission to the Federal Attorney General, from NSW Young Lawyers' Human Rights Committee, 1 September 2008.

[8] From a submission to the Federal Attorney General on the Inquiry into an Australian Charter of Human Rights, made by the NSW Young Lawyers' Human Rights Committee, 1 September 2008

[9] *Habeas corpus* means a prerogative writ ordering a person detaining another to bring up the detainee before a court in order that the legality of the detention may be tested.

[10] Article 9 (4) of the *International Covenant on Civil and Political Rights*: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

[11] Article 10 of the *International Covenant on Civil and Political Rights*: "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person…3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation…"

3. FISHERIES MANAGEMENT AMENDMENT BILL 2009

Date Introduced:	26 June 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Ian MacDonald MLC
Portfolio:	Primary Industries

Purpose and Description

1. The Bill amends the *Fisheries Management Act 1994* (the Fisheries Management Act) to make further provision for the management of fishery resources. The Bill also amends other Acts, including the *Criminal Procedure Act 1986*, *Land and Environment Court Act 1979*, *Local Court Act 2007*, *Local Courts Act 1982* and *Marine Parks Act 1997*.

2. The Fisheries Management Act is designed to maintain and preserve fish stocks in New South Wales by regulating both commercial and recreational fishing with a system of offence provisions and penalties.

3. The Bill makes a number of important amendments to the Fisheries Management Act, consistent with other State and national fisheries legislation. Key reforms include the recognition of Aboriginal cultural fishing and the strengthening of enforcement provisions against illegal fishing.

Background

4. As stated in the Agreement in Principle Speech, there has been consultation with the Minister for Police, the Attorney General's Department of Aboriginal Affairs, the Office of the Director of Public Prosecutions, the Department of Water and Energy, the Minister for Regulatory Reform, the Treasurer, the Minister and Minister Assisting the Minister for Climate Change, Environment and Water in relation to the Bill.

5. The Bill has also been informed by two reviews of fisheries legislation and practices in New South Wales, namely the Report on Illegal Fishing for Commercial Gain or Profit in New South Wales by Mick Palmer in May 2004 (the Palmer Report) and the Review of the New South Wales Indigenous Fisheries Strategy for NSW Fisheries by Tyagarah Consultants.

6. The Bill also contains amendments that support The Australian Institute of Criminology's report, "A National Study of Crime in the Australian Fishing Industry" (2007), which endorsed the findings of the Palmer Report.[12] The Bill makes a number of important changes, which are discussed briefly below.

[12] Judy Putt and Katherine Anderson, A national study of crime in the Australian fishing industry, The Australian Institute of Criminology, Research and Policy Series, No 76 (2007) at http://www.aic.gov.au/documents/5/D/6/{5D6D36A1-3D6F-47BA-82AC-56DA79114CA6}rpp76.pdf

Aboriginal Cultural Fishing[13]

7. As stated in the Agreement in Principle Speech the customary association of Aboriginal people with fisheries resources is recognised for the first time through the proposed amendments. The Bill amends the Fisheries Management Act to formally recognise Aboriginal cultural fishing. It amends the objects of the Act:

> …to recognise the spiritual, social and customary significance to Aboriginal people of fisheries resources and protects and promotes the continuation of Aboriginal cultural fishing.

8. Aboriginal cultural fishing is defined in the Bill as:

> fishing activities and practices carried out by Aboriginal persons for the purpose of satisfying their personal, domestic or communal needs, or for educational or ceremonial purposes or other traditional purposes, and which do not have a commercial purpose.

9. The Bill also allows permits for Aboriginal cultural fishing to be issued to a group as well as an individual, making it easier for Aboriginal communities to fish for large ceremonies such as weddings or birthdays as more than one person will be able to fish under one permit.

Illegal Fishing for Commercial Gain

10. The Palmer Report found that illegal harvesting and black market selling of fish in New South Wales is widespread, deeply entrenched and poses significant economic and environmental threats to the sustainability of the New South Wales fishery.

11. The Palmer Report made a number of recommendations to address this issue, including increasing the powers of the Courts in relation to those convicted of fisheries offences; increasing the powers of Fisheries officers to act on suspected illegal fishing activity; imposing higher penalties for a range of offences; and giving the Courts and the Minister the power to order an offender to restore fish habitat if they are found to have damaged it.

12. There are a number of amendments in the Bill to address the issue of black market illegal fishing, for example the Bill amends the Fisheries Management Act by deeming that all fish held at commercial premises are held for sale. The Bill also requires an owner or occupier of the commercial premises to record all fish in their possession or held at the premises.

13. The Bill also introduces amendments relating to threatened species, for example it removes a defence that currently allows anglers to target and catch threatened species. The Bill also makes changes to give fisheries officers power to seize boats and motor vehicles if a person has unlawful fishing gear, provided it is reasonably capable of catching commercial quantities of fish.

Amendments to Penalties

[13] See also Cultural Fishing in NSW, The Department of Primary Industries, May 2009 at http://www.dpi.nsw.gov.au/fisheries/habitat/protecting-habitats/cultural-fishing

14. The Abalone Total Allowable Catch Committee's 2007-2008 assessment highlighted that the penalties imposed for illegal abalone fishing in New South Wales are much lower than those in Victoria and Tasmania. Accordingly, the Bill introduces higher penalties for illegal abalone fishing, bringing New South Wales in line with other States.[14]

15. The Bill also introduces incremental penalties for first and subsequent offences, providing higher penalties for certain offences that were committed in circumstances of aggravation, for example significantly exceeding bag limits for certain species of fish. The Bill also has higher penalty for certain first offences, for example it doubles the penalty for taking special protected fish species such as estuary cod and eastern blue devil fish.

16. Serious fisheries crime in trafficking certain species, such as abalone and eastern rock lobster, will also now be an indictable offence. The new trafficking offences will also be brought under the *Confiscation of the Proceeds of Crime Act 1997*.

Prohibition Orders

17. Under the current legislation, a Court can prohibit a repeat offender from engaging in particular commercial fishing activities, or from being on any boat or in any premises associated with those activities. The Bill makes amendments to allow a Court to decide what kinds of fishing or association activity the offender should be banned from carrying out. These changes were recommended by the Palmer Report and are consistent with legislation in Victoria, Tasmania and South Australia.

The Jurisdiction of Local Courts

18. The Bill also makes changes to the jurisdiction of Local Courts for fishing offence prosecutions. The maximum penalty that the Local Court can impose is $10,000, which means that more serious matters must be heard in the Supreme Court or the Land and Environment Court. The Bill increases the maximum penalty that the Local Court can impose to 200 penalty units ($22,000) and enables it to deal with the forfeiture of boats and motor vehicles worth up to $60,000 (the jurisdictional limit of the Local Court's General Division).

The Bill

19. The objects of the Bill are to amend the Fisheries Management Act as follows:

(a) to increase penalties for certain fisheries offences,

(b) to establish higher penalties for certain second or subsequent offences and for certain offences committed in circumstances of aggravation,

(c) to allow additional monetary penalties (to reflect the market value of fish taken) to be imposed in respect of certain offences,

[14] See also the Australian Fisheries National Compliance Strategy 2004-2009 at http://www.afma.gov.au/management/compliance/docs/compliance_strategy_2005.pdf

(d) to extend regulation making powers in the principal Act relating to bag limits, prohibited size fish and other matters,

(e) to create a new indictable offence of trafficking in fish,

(f) to recognise, protect and promote Aboriginal cultural fishing activities and practices,

(g) to make further provision with respect to share management fisheries,

(h) to tighten record-keeping requirements for fish sellers and for others who take possession of fish,

(i) to extend the circumstances in which charter fishing arrangements are required to be licensed,

(j) to give effect to a uniform national scheme relating to Commonwealth cooperative fishing arrangements,

(k) to make further provision with respect to the grant of aquaculture permits and leases, and for the recovery of rental payments on aquaculture leases,

(l) to authorise quarantine orders to be made in respect of pet shops and commercial aquariums,

(m) to transfer from the regulations to the principal Act the list of diseases and noxious fish and marine vegetation that are the subject of the regulatory arrangements under the principal Act,

(n) to give the Minister further powers with respect to quarantine areas,

(o) to make further provision for the protection of areas where salmon an trout spawn,

(p) to prohibit the importation of live marine vegetation that is not indigenous to New South Wales,

(q) to require notice to be given to the Minister of certain works that affect waterways,

(r) to authorise the making of stop work orders to prevent certain activities that may damage fish habitat or obstruct free passage of fish,

(s) to create a new offence of interfering with fish of a threatened species an to make further provision with respect to the protection of threatened species generally,

(t) to give further powers to fisheries officers to require information for the purposes of the principal Act,

(u) to impose a duty on the master of a fishing boat to prevent contravention of the principal Act,

(v) to increase the jurisdictional limit of a Local Court under the principal Act,

(w) to enable restoration orders to be issued in respect of certain contraventions of the principal Act and to expand the types of orders that ca be made in respect of repeat offenders.

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 or days to be appointed by proclamation.

Schedule 1 Amendment of Fisheries Management Act 1994 No 38

Penalties for offences

Schedule 1 [11] relates to the offences of possessing and selling prohibited size fish. The maximum penalty for a first offence is increased and there is a higher maximum penalty for a second or subsequent offence. Two further offences (with higher penalties) are created for possessing or selling fish in circumstances of aggravation, which is defined as possessing or selling a commercial quantity of a priority species of fish.

Schedule 1 [12] and [16] increase the maximum penalty for the offences of taking and possessing more fish than the daily bag limit and provide for an increased maximum penalty for a second or subsequent offence.

Schedule 1 [13] and [17] create further offences (with higher penalties) of taking and possessing more fish than the daily bag limit in circumstances of aggravation, which is defined as taking or possessing a commercial quantity of a priority species of fish.

Schedule 1 [19] provides that a court that finds a person guilty of an offence related to taking or possessing more than the daily limit of a priority species of fish can impose an additional monetary penalty of up to 10 times the market value of the fish the subject of the offence.

Schedule 1 [15] makes a consequential amendment.

Schedule 1 [8] gives effect to proposed Schedule 1B, which contains a list of the fish that are priority species for the purposes of the new aggravated offences and sets out the commercial quantity of those fish. The Governor may amend the Schedule by regulation made on the recommendation of the Minister.

Schedule 1 [136] inserts the proposed Schedule.

Schedule 1 [6] provides for an increased maximum penalty for a second or subsequent offence of taking or being in possession of fish in contravention of a fishing closure. It also increases the maximum penalty for a first offence of being in possession of fish in contravention of a fishing closure.

Schedule 1 [21] increases the maximum penalty for taking and being in possession of protected fish and provides for an increased maximum penalty for a second or subsequent offence.

Schedule 1 [23] provides for an increased maximum penalty for a second or subsequent offence of taking or selling fish that are protected from commercial fishing. This amendment is explained further below.

Schedule 1 [28] and [29] provide for an increased maximum penalty for a second or subsequent offence of unlawful use of fishing gear or possession of illegal fishing gear.

Schedule 1 [35] increases the maximum penalty for possessing fish that were illegally taken and provides an increased maximum penalty for a second or subsequent offence.

Schedule 1 [46] and [57] increase the penalties for contravening a condition of an endorsement on a licence.

Schedule 1 [54] provides for an increased maximum penalty for a second or subsequent offence of commercial fishing without a licence.

Schedule 1 [4] makes it clear that if a provision of the principal Act provides for an increased maximum penalty for a second or subsequent offence, an offence is to be regarded as a second or subsequent offence only if a conviction was recorded in relation to the other offence and the other offence occurred on a separate occasion.

Regulation-making powers relating to bag limits and other matters

Schedule 1 [14] and [18] enable the regulations to specify a maximum limit of zero for the daily limits for taking and possessing fish, so that any taking of the fish is prohibited.

Schedule 1 [9] and [10] extend the power to make regulations declaring fish to be prohibited size fish, so that the regulations may declare different prohibited size fish for different classes of persons or for different circumstances and may specify the size of fish by reference to the number of individuals in any specified weight.

Schedule 1 [20] relates to the offence of possessing protected fish. The purpose of the amendment is to allow fish to be declared by the regulations to be protected fish absolutely or conditionally. If fish are absolutely protected, it will be an offence to be in possession of the fish in this State, whether or not the fish were taken from the waters of this State. If the fish are not absolutely protected, it will be an offence to be in possession of the fish in this State, but a defence to a prosecution of the offence if the person in possession proves that the fish were taken from waters outside this State.

Schedule 1 [22] allows the regulations to declare fish to be protected absolutely or conditionally from all or a class of commercial fishing. At present, it is only possible to declare a species of fish to be absolutely protected from all commercial fishing. As a consequence of the change,

Schedule 1 [23] makes it an offence to take or sell fish protected from commercial fishing only if the fish were taken in breach of the declaration. However, similarly to the amendments relating to protected fish described above, the new provision allows the regulations to declare the sale of fish protected from commercial fishing to be absolutely prohibited. If the fish are absolutely protected from all commercial fishing it will be an offence to sell the fish in this State whether or not they were taken from the waters of this State.

Schedule 1 [26] makes a consequential amendment.

Schedule 1 [24] enables the regulations to declare a specified species of fish or specified waters to be protected, absolutely or conditionally, from all or a class of recreational fishing. This is similar to existing provisions in relation to commercial fishing. It will be an offence to take fish in breach of such a declaration.

Schedule 1 [7] makes a consequential amendment.

Trafficking in fish

Schedule 1 [27] creates a new offence of trafficking in an indictable species of fish with a maximum penalty of 10 years imprisonment. A person traffics in an indictable species of fish if the person dishonestly takes, sells, receives or possesses fish of an indictable species in contravention of another provision of the principal Act or the regulations and the quantity is not less than the indictable quantity. The indictable species and indictable quantity of fish are specified in Schedule 1C to the principal Act (as inserted by **Schedule 1 [136]**). The Governor may, by regulation made on recommendation of the Minister, amend Schedule 1C. A court that finds a person guilty of a trafficking offence may impose an additional monetary penalty of up to 10 times the market value of the fish the subject of the offence.

Aboriginal cultural fishing

Schedule 1 [1] makes it an object of the principal Act to recognise the spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect and promote Aboriginal cultural fishing.

Schedule 1 [2] defines ***Aboriginal cultural fishing*** as fishing activities and practices carried out by Aboriginal persons for the purpose of satisfying their personal, domestic or communal needs or for educational, ceremonial or other traditional purposes, and which do not have a commercial purpose.

Schedule 1 [37] provides that the Minister may issue a fishing permit to a person for Aboriginal cultural fishing purposes.

Schedule 1 [42] provides that the Minister may not issue a permit to a person for those purposes if it would be inconsistent with native title rights and interests or an indigenous land use agreement within the meaning of the *Native Title Act 1993* of the Commonwealth.

Schedule 1 [38] provides that a permit may authorise a specified person or class of persons, in addition to the permit holder, to take and possess fish or marine vegetation as authorised by the permit. This will enable permits to be issued in respect of activities of a particular group (rather than a particular person).

Schedule 1 [39] makes a consequential amendment.

Share management fisheries

Schedule 1 [44] and [45] clarify the provisions relating to the duration of an endorsement on a commercial fishing licence, so that it is no longer necessary for the management plan for a fishery to specify the period for which an endorsement remains in force. Instead, the relevant period will be specified in the endorsement.

Schedule 1 [47] and [48] make it clear that if the maximum shareholding permitted in a share management fishery is decreased, existing shareholders are not required to sell any of their shares that exceed the new maximum limit.

Schedule 1 [49] makes it clear that when a review is conducted of a share management plan for a fishery and a new management plan is made, shares under that management plan are renewed for 10 years from the commencement of the new management plan. If a new management plan is not made after a review, the shares are renewed for 10 years from the expiry of the shares under the existing management plan.

Schedule 1 [50] authorises the Minister to cancel shares that are forfeited under the principal Act. At present, the shares must be sold. Generally speaking, when forfeited shares are sold the purchase price is paid to the Consolidated Fund. If shares are forfeited because of a failure to pay a community contribution or other amount, the purchase price is paid to the shareholder after deduction of the amounts owing under the principal Act.

Schedule 1 [51] makes further provision for the deductions that can be made before the purchase price is paid to the Consolidated Fund, or paid to the shareholder, as the case requires. In a case where the purchase price is to be paid to the Consolidated Fund, the amendment authorises the deduction from the purchase price, and payment to the Commercial Fishing Trust Fund, of any amount payable to that Fund by the shareholder. In a case where the purchase price must be paid to the shareholder after deduction of amounts owing, the amendment authorises the reasonable expenses incurred in selling the forfeited shares (in addition to amounts owing) to be deducted from the purchase price. The amendment also makes it clear that the Minister can recover the reasonable costs incurred in the sale in cases where the purchase price is insufficient to cover those costs and that the Minister is not liable to pay any community contribution or other amount under the principal Act that becomes payable after shares are forfeited.

Schedule 1 [52] clarifies that the Director-General of the Department of Primary Industries (the ***Director-General***) is required to register a dealing in shares in the Share Register only if the Director-General has approved the transaction.

Schedule 1 [53] removes a redundant reference to the cancellation of shares.

Record keeping

Schedule 1 [60] replaces the current requirements for the keeping of records of the sale and possession of fish, which only apply to the sale and possession of the quantities of fish prescribed by the regulations. Under the new provisions, any person who sells fish must make and give to the purchaser a record of the sale (irrespective of the quantity of fish) and must also make a record concerning the person's acquisition of the fish. The seller must keep the records for 5 years after the fish are sold and must produce a copy of the record when requested to do so by a fisheries officer. In addition, a person in possession of fish must produce a prescribed record when requested by a fisheries officer, if the person is a fishing industry participant (that is, the holder of a fishing authority or a person carrying on the business of selling or processing fish) or if the person has more than the commercial quantity of fish prescribed by the regulations. The amendment also provides for an increased maximum penalty for a second or subsequent offence against the new provisions, and for a higher penalty for corporate offenders.

Charter fishing

Schedule 1 [61] and [62] clarify that a boat is a charter fishing boat for the purposes of Part 4A (Charter fishing management) of the principal Act if it is used for recreational fishing activities on a commercial basis. This includes where persons using the boat pay for the right to fish from the boat or for connected services (such as accommodation), where the boat is being used by members of a club or organisation that charges membership fees, and other arrangements prescribed by the regulations.

Co-operative fisheries management arrangements

Schedule 1 [5] and [63]–[72] make amendments to reflect the uniform national scheme for the management of co-operative fisheries consequent on the enactment of the *Fisheries Legislation Amendment (Cooperative Fisheries Arrangements and Other Matters) Act 2006* of the Commonwealth. The relevant changes to the Commonwealth Act:

(a) allow a co-operative fisheries arrangement to be varied, and
(b) allow a co-operative fisheries arrangement to provide for the management of part of a fishery in accordance with a law of the State, and the management of other parts of the fishery in accordance with a law of the Commonwealth or of another State.

Aquaculture permits and leases

Schedule 1 [74] makes it clear that an aquaculture permit is not required for aquaculture undertaken by the Minister under an aquaculture industry development plan or otherwise for the purposes of the administration of the principal Act.

Schedule 1 [75] provides that an aquaculture permit must specify the type of aquaculture that is authorised to be undertaken under the permit, rather than the species of fish or marine vegetation, as is currently the case.

Schedule 1 [76] provides that the type of aquaculture specified may include the species that can be cultivated or kept under the permit, the things that can be cultivated from fish or marine vegetation kept under the permit and the part of the life cycle of a species during which the species may be cultivated.

Schedule 1 [25], [73] and [77]–[80] make consequential amendments.

Schedule 1 [81] and [83] make similar amendments in respect of aquaculture leases.

Schedule 1 [82] removes the public consultation requirements in relation to an application for an aquaculture lease if the area to which the application relates is the subject of an aquaculture industry development plan and the type of aquaculture proposed is a type that is suitable in that area according to the development plan.

Schedule 1 [84] removes the 3-month grace period for overdue rental payments for an aquaculture lease, so that interest may be charged on overdue rental as soon as it becomes overdue, rather than only after it has remained unpaid for 3 months.

Schedule 1 [85] allows the Minister to cancel an aquaculture lease as soon as any rental payment or other amount due under the lease is not paid on time, rather than having to wait until the amount has remained unpaid for 2 years.

Diseases affecting fish and marine vegetation

At present, the Minister may declare an area a quarantine area because of the presence or suspected presence of diseases affecting fish or marine vegetation.

Schedule 1 [89] provides that the Minister may declare pet shops and commercial aquariums as quarantine areas, in addition to areas of water, areas in the vicinity of water and areas subject to aquaculture permits.

Schedule 1 [90] and [91] provide that the Minister may require owners or occupiers of land or premises within a quarantine area, as well as aquaculture permit holders, to take certain action within quarantine areas.

Schedule 1 [92] allows a fisheries officer to enter any quarantine area (not only areas subject to aquaculture permits) to take the required action, if the owner, occupier or permit holder has not taken the action.

Schedule 1 [93] and [94] make minor consequential amendments. Under the amendments made by **Schedule 1 [88]**, declared diseases will be specified in Schedule 6B to the principal Act (as inserted by **Schedule 1 [137]**) rather than in the regulations. The Governor may, by regulation made on the recommendation of the Minister, amend the Schedule.

Schedule 1 [95] enables the Minister, by order published in the Gazette, to exempt a declared disease from certain provisions of Division 4 (Diseased fish and marine vegetation) of Part 6 of the principal Act. In the case of an emergency, the Minister continues to be able to make urgent declarations, by order published in the Gazette, providing that a disease is a declared disease.

Schedule 1 [87] makes a consequential amendment.

Schedule 1 [86] re-locates the definition of ***disease*** currently found in section 182 (2) of the principal Act.

Damaging salmon and trout spawning areas

Schedule 1 [97] increases the maximum penalty for damaging gravel beds in waters in which salmon or trout spawn from 100 penalty units to 1,000 penalty units (currently, $110,000).

Schedule 1 [98] provides that a person is conclusively taken to have known that the waters were waters in which salmon or trout spawn if the act or omission constituting the offence occurred in the course of carrying out development or an activity for which development consent or other approval was required but not obtained or the act or omission constituted a failure to comply with any such development consent or approval.

Noxious fish and noxious marine vegetation

Under the amendments made by **Schedule 1 [99]**, noxious fish and marine vegetation will be specified in Schedule 6C to the principal Act (as inserted by **Schedule 1 [137]**), rather than in the regulations. The Governor may, by regulation made on the recommendation of

the Minister, amend the Schedule. Schedule 6C may also provide that a specified species of fish or marine vegetation is noxious in specified waters only.

Schedule 1 [100] enables the Minister, by order published in the Gazette, to declare that certain provisions in the principal Act relating to noxious fish and noxious marine vegetation do not apply in respect of specified noxious fish or marine vegetation. In the case of an emergency, the Minister continues to be able to make urgent declarations, by order published in the Gazette, declaring a specified species of fish or marine vegetation to be noxious.

Schedule 1 [3] makes a consequential amendment.

Prohibition on importation of live fish and live marine vegetation

Schedule 1 [104] restates the offence of importing live fish and creates a new offence of importing live marine vegetation. It will be an offence to bring into New South Wales any live fish or marine vegetation of a species prescribed by the regulations, except under the authority of a permit issued by the Minister. It will also be an offence to sell, buy or possess fish or marine vegetation knowing that it has been brought into New South Wales in contravention of those provisions. The offences do not apply to indigenous fish or marine vegetation.

Schedule 1 [101] and [102] makes consequential amendments.

Works affecting waterways

Schedule 1 [105] requires a person (other than a public authority) to notify the Minister in writing 28 days before commencing any construction or modification work on a dam, weir or reservoir on a waterway. The requirement does not apply in respect of any works approved by a public authority or by the Minister for Planning under Part 3A of the *Environmental Planning and Assessment Act 1979*.

Stop work orders

Schedule 1 [108] enables the Director-General to make a stop work order in relation to actions that are being carried out without a permit (or in contravention of a permit) under Division 3 or 4 of Part 7, or section 219, of the principal Act. The relevant provisions prohibit dredging or reclamation work, actions that may harm mangroves or other marine vegetation, and actions that may obstruct fish passage, except as authorised by a permit issued by the Minister. A stop work order may be issued if the action being carried out is likely to damage fish habitat or obstruct free passage of fish. Such an order may last for 40 days (and may be extended) and takes effect from the date on which the person carrying out the action is notified or the date on which a copy of the order is affixed in a conspicuous place in the vicinity of the relevant waters (whichever is the sooner). Provision is made for appeals to the Land and Environment Court against a decision to issue an order.

Threatened species conservation

Schedule 1 [116] makes it an offence for a person to interfere with fish of a threatened species. Interfering includes harassing, chasing, or tagging fish and any activity the purpose of which is to attract or repel fish, or any other activity prescribed by the regulations. It is a defence to the offence if the act or omission was carried out in accordance with certain

licences and permits under the principal Act or the *Threatened Species Conservation Act 1995*. It is also a defence if the act or omission was reasonably necessary to prevent a risk to human health or to deal with a serious threat to human life or property or done in accordance with a direction given by a fisheries officer.

Schedule 1 [109] extends the power to make regulations that prohibit certain actions on specified critical habitat to enable regulations to be made that prohibit or regulate such actions in specified waters or within a prescribed distance of fish or marine vegetation of a threatened species or their habitat.

Schedule 1 [110] and [112] clarify an existing defence to prosecution for certain offences related to threatened species. The defence applies if the act or omission constituting the offence was a routine fishing activity. The amendment makes it clear that the defence is only available if the person charged satisfies the court that, on becoming aware of taking any threatened species of fish, the person took immediate steps to return the fish to its natural environment with the least possible injury.

Schedule 1 [36] clarifies that the general defence for the accidental taking of fish that applies to any offence under the principal Act or regulations does not apply to offences relating to threatened species, because defences to offences against Part 7A of the principal Act are contained in that Part.

Schedule 1 [113] extends the circumstances in which a court may order a person to carry out restoration work (in addition to or instead of paying a fine) so that the court may make such an order for any person convicted of any offence against Part 7A (Threatened species conservation) of the principal Act if the offence has caused damage to any threatened species, population or ecological community or their habitat. At present, the provision is limited to offences causing damage to critical habitat. If a person does not comply with the requirements of such an order,

Schedule 1 [114] enables the Minister to cause the actions specified in the order to be carried out, to claim or realise any security provided by the person to meet the costs of carrying out those actions and to recover those costs from the person in a court of competent jurisdiction.

Schedule 1 [115] allows a court that makes a community service order against a person convicted of an offence related to threatened species to recommend that the community service work include restoring damaged habitat or work that otherwise assists in achieving the objects of Part 7A (Threatened species conservation) of the principal Act.

Schedule 1 [111] makes a minor statute law revision amendment.

Power to require information

Schedule 1 [121]–[124] clarify that a fisheries officer who requires a person to produce records or answer questions in relation to commercial fishing may do so either orally or by notice in writing and may require the person to produce the records immediately or at a specified place within a specified period. **Schedule 1 [125]** increases the maximum penalty for not complying with such a requirement from 50 penalty units to 1,000 penalty units in the case of a corporation (currently, $110,000) or 200 penalty units in any other case (currently, $22,000). Similarly,

Schedule 1 [126] clarifies that a person who is required by a fisheries officer to provide information (including their name and address) must provide that information immediately or within the period specified by the fisheries officer.

Schedule 1 [127] inserts a new provision that enables a fisheries officer to require information from a person or a corporation whom the officer suspects on reasonable grounds to have information that is required for the purposes of Part 7 (Protection of aquatic habitats) or Part 7A (Threatened species conservation) of the principal Act. A person who fails to comply with a requirement under this section is guilty of an offence with a maximum penalty of 1,000 penalty units in the case of a corporation or 200 penalty units in any other case.

Schedule 1 [127] also inserts a new provision that provides that a person must be warned that failure to comply with a requirement to provide information is an offence. A person is not excused from complying on the grounds of self-incrimination. However, information given by a person under such a requirement is inadmissible in proceedings against the person (other than proceedings relating to a failure to comply with the requirement to provide information) if the person objects or is not warned of his or her right to object.

Schedule 1 [118]–[120] make it clear that a fisheries officer has the power to enter a public place at any time, without having to give any notice that would be required before entry to commercial premises.

Duty of master of a boat to prevent contraventions of Act

Schedule 1 [132] imposes a duty on a master of a boat to prevent another person on the boat from committing certain serious fishing offences. If a person on board a boat commits a serious fishing offence (whether or not that person is charged with or convicted of the offence), the master of the boat is guilty of an offence. The maximum penalty is the same as the maximum penalty for the offence that the other person on the boat committed. It is a defence if the person charged proves that the person took reasonable precautions to ensure compliance with the principal Act, was not aware of the other person's conduct and could not have reasonably prevented the commission of the offence.

Proceedings for offences

Schedule 1 [130] increases the maximum monetary penalty a Local Court can impose for an offence under the principal Act or regulations from $10,000 to 200 penalty units, which is currently $22,000. Currently, a Local Court may also order the forfeiture of a boat or motor vehicle, which is valued at no more than $10,000, and is seized in connection with a fisheries offence under the principal Act.

Schedule 1 [128] increases the maximum value of a boat or vehicle that can be forfeited to the jurisdictional limit of the Local Court, which is currently $60,000.

Schedule 1 [129] and [131] provide that an offence against section 21B (Trafficking in fish) is an indictable offence. The amendment to the *Criminal Procedure Act 1986* in Schedule 2.1 provides that the offence is to be dealt with summarily unless the prosecutor elects otherwise.

Prohibition orders for repeat offenders

Schedule 1 [133] expands the court's power to make a prohibition order in respect of a repeat offender so that, in addition to prohibiting the person from engaging in specified commercial fishing activities or from being on a specified kind of boat in certain waters, the order may prohibit the person from being in possession of specified fishing gear or species of fish or marine vegetation and from being on any specified commercial fishing premises.

Restoration orders

Schedule 1 [134] inserts new provisions relating to the making of restoration orders and other actions that may be taken by the Minister or a court against certain persons whose conduct constitutes a serious fisheries offence and has damaged fishery resources. A ***serious fisheries offence*** is defined and includes offences relating to fishing closures, prohibited size fish and bag limits, trafficking in fish, illegal fishing gear, and contravening conditions of endorsements on fishing licences. Under proposed section 282I, the Minister may order a person who has contravened the principal Act and caused damage to a fishery resource (whether or not that person has been charged with or found guilty of an offence) to carry out actions that the Minister reasonably considers to be necessary to mitigate or rectify the damage. If the person does not comply with the order, the Minister may cause the actions specified in the order to be carried out and may recover from the person the reasonable costs of complying with the order. A person against whom an order is made may appeal against the making of the order to a Local Court, and the Local Court may determine the appeal by confirming the order, revoking the order or revoking the order and making a new order.

Under proposed section 282J, a court that convicts a person of a serious fisheries offence may, in addition to imposing a fine, order a person to carry out actions the court considers necessary to mitigate or rectify the damage. The court may require a person to provide security for the performance of any obligation imposed under the order. If the person does not comply with the order, the Minister may cause the actions specified in the order to be carried out and may claim or realise any security provided by the person, or recover s a debt from the person, the reasonable costs of complying with the order. In addition, a court that makes a community service order against a person who has been convicted of a serious fisheries offence may recommend that the community service work include work that restores damage to any fishery resource or otherwise to enhance, maintain or protect fishery resources.

Other miscellaneous amendments

Schedule 1 [33] and [34] make it clear that a recreational fisher must have an official receipt in his or her immediate possession when taking fish, that is, the person must be able to immediately produce the receipt if required.

Schedule 1 [32] provides that the Director-General is to make appropriate arrangements to ensure that a person who pays a recreational fishing fee is issued with an official receipt.

Schedule 1 [30] defines ***official receipt*** as the hard copy receipt (or a copy of that receipt) if the fee was paid in person, the receipt number if the fee was paid over the telephone or by electronic means, or any other evidence of payment prescribed by the regulations.

Schedule 1 [40] clarifies that an application for a permit is to be in a form approved by the Minister.

Schedule 1 [117] extends the circumstances in which a person is presumed to be engaged in fishing activities for commercial purposes to include if the person is in possession of fishing gear that cannot be lawfully used by a commercial fisher or a recreational fisher and the fishing gear is capable of being used to take more fish than a recreational fisher is entitled to take.

Schedule 1 [58] provides that money paid into various Trust Funds (such as the Commercial Fishing Trust Fund and the Recreational Fishing (Freshwater) and (Saltwater) Trust Funds), which comes mainly from fees and charges paid under the principal Act, can be used for taking measures to maintain and protect the fisheries, in addition to measures to enhance the fisheries, as is currently the case.

Schedule 1 [31] makes a consequential amendment to extend the purposes of fishing fees to enhancing, maintaining and protecting recreational fishing.

Schedule 1 [135] gives the Minister a general power to waive or refund any fees, charges, rental payments or other contributions payable under the principal Act or the regulations, if the Minister considers it is appropriate to do so.

Schedule 1 [103] and [106] remove an ambiguity in the definition of ***waterway***. The amendment makes it clear that the offence of releasing live fish into waters without a permit extends to any flowing stream of water, whether natural or artificially
regulated (such as by weirs, dams or pumping). Similarly, the Minister's power to require a person carrying out construction work on waterways to provide a fishway or fish by-pass applies to any flowing stream of water, whether natural or artificially
regulated.

Schedule 1 [96] requires an appeal to the Land and Environment Court under the
principal Act to be made within 30 days of receiving notice of the decision to which the appeal relates. The amendment also provides that an appeal does not operate to automatically stay a decision appealed against.

Schedule 1 [43] enables regulations to be made in relation to the fees payable in respect of an application for a permit under the principal Act (in addition to, or instead of, a fee for the issue of a permit).

Schedule 1 [41] and [107] make consequential amendments.

Schedule 1 [55] and [56] provide that a declaration that a fishery is a restricted fishery is no longer required to specify the duration of the declaration, so that a fishery remains a restricted fishery until the declaration is revoked by the regulations or until the expiry of any specified period.

Schedule 1 [59] removes an outdated reference to the *Fisheries Act 1935*.

Schedule 1 [2] inserts a definition of ***share management plan*** in the principal Act,
which is defined as a management plan for a share management fishery.

Savings and transitional provisions

Schedule 1 [138] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [139]–[144] insert savings and transitional provisions consequent on the amendments.

Schedule 2 Amendment of other Acts

Schedule 2.1 Criminal Procedure Act 1986 No 209

Schedule 2.1 provides that the new indictable offence of trafficking in certain species of fish (as inserted by Schedule 1 [27]) is to be dealt with summarily unless the prosecutor elects for the offence to be dealt with on indictment.

Schedule 2.2 Land and Environment Court Act 1979 No 204

Schedule 2.2 ensures that appeals in relation to the stop work orders that amendments in Schedule 1 allow the Director-General to make can be heard by the Land and Environment Court.

Schedule 2.3 Local Court Act 2007 No 93

Schedule 2.3 enables the Local Court, in its special jurisdiction, to hear proceedings on an appeal against a restoration order made by the Minister under the provisions to be inserted in the principal Act by Schedule 1.

Schedule 2.4 Local Courts Act 1982 No 164

Schedule 2.4 enables the Local Court, in its jurisdiction under Part 6 of the *Local Courts Act 1982*, to hear proceedings on an appeal against a restoration order made by the Minister under the provisions to be inserted in the principal Act by Schedule 1.

Schedule 2.5 Marine Parks Act 1997 No 64

Schedule 2.5 [1] makes it clear that, in applying certain enforcement provisions of the *Fisheries Management Act 1994* (Divisions 1–4 of Part 9 of that Act) to the *Marine Parks Act 1997*, a reference to a forfeiture offence is a reference to an offence declared by the regulations under the *Marine Parks Act 1997* to be a forfeiture offence. This allows the seizure powers conferred by the enforcement provisions of the *Fisheries Management Act 1994* to be applied to offences under the *Marine Parks Act 1997*.

Schedule 2.5 [2] increases the maximum monetary penalty that the Local Court may impose for an offence against the *Marine Parks Act 1997* or the regulations made under that Act from $20,000 to $22,000.

Schedule 2.5 [4] provides that the increased penalty applies only to offences committed after the commencement of the amendment.

Schedule 2.5 [3] enables savings and transitional regulations to be made as a consequence of 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; Excessive Punishment; Onus of proof

20. Numerous clauses in the Bill provide for strict liability offences, with increased penalties. For example, Schedule 1[11], proposed sections 16(1) and 16(3) make it an offence to possess or sell a prohibited size of fish. Further, proposed sections 16(2) and 16(4) provide offences of possessing or selling a prohibited size of fish "in circumstances of aggravation", as defined in proposed section 16(5). Schedule 1[12] provides penalties relating to bag limits.

21. Other examples include, schedules 1 [14] and [18] which enable the regulations to specify a maximum limit of zero for the daily limits for taking and possessing fish, so that any taking of the fish is prohibited. Further, Schedule 1[19] provides for additional monetary penalties for bag limit offences involving priority species. Schedule 1[19] allows a court to impose an additional penalty of up to ten times the market value of the fish subject to the offence. There are also a number of offence provisions in relation to record keeping in Schedule 1 [60].

22. Other important amendments are the provisions in Schedule 1[98] relating to aquatic habitat, which include a presumption in certain circumstances that a person knows that an area is a place where salmon or trout spawn or are likely to spawn. Further, Schedule 1[117] includes amendments relating to commercial fishing activities, extending the circumstances in which a person is presumed to be engaged in fishing activities for commercial purposes to include if they are in possession of fishing gear that cannot be lawfully used by a commercial fisher or a recreational fisher and the fishing gear is capable of being used to take more fish than a recreational fisher is entitled to take.

23. Strict liability offences do not require a prosecutor to provide that a person concerned intended to commit the offence. It is sufficient for the prosecutor to prove that the person did the act that constituted the offence, regardless of the person's intention. Accordingly, strict liability offences displace the common law requirement that the prosecutor must prove *mens rea* or guilty mind and may trespass on the fundamental rights of an accused person, for example the fundamental right to presumption of innocence.

24. There are circumstances in which it may be appropriate to impose strict liability, particularly in areas of public safety or to ensure the integrity of the regulatory scheme. Accordingly, the imposition of strict liability will not always unduly trespass on personal rights and liberties and that 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.[15]

[15] See also the Legislation Review Committee's comments regarding the Fisheries Management Amendment Bill, Digest 2 of 2006 at p 18.

25. The Committee is of the view that it is appropriate to impose monetary penalties that are of a sufficient severity to act as a deterrent, so long as balanced against the protection of fundamental personal rights and liberties. The Committee notes that the amendments to the Fisheries Management Act are in response to concerns about the black market selling of fish in New South Wales. However, the Committee refers to Parliament the question of whether the increased penalties imposed for the strict liability offences in the Bill properly strike the above balance.

Issue: Schedule 1[27]; Proposed Sections 21B; 21C - Excessive Punishment

26. Proposed section 21B provides for the offence of trafficking in an indictable species of fish. Under the proposed Section 21B, a person traffics in an indictable species of fish if they dishonestly take, sell, receive or possess fish of an indictable species and by the taking, selling, receiving or possession of the fish contravene another provision of the Act or the regulations and the quantity of fish of an indictable species taken, sold, receive or possessed is not less than an indictable quantity of the species.

27. Proposed Schedule 1[27] provides for an indictable offence of trafficking in fish, with a maximum penalty of ten years imprisonment. Under proposed section 21C, a Court that finds a person guilty of a trafficking offence may impose an additional monetary penalty of up to ten times the market value of the fish the subject of the offence.

28. The Committee has concerns that Schedule 1[27], which introduces penalties of up to ten years imprisonment and the power of a Court to impose an additional monetary penalty of up to ten times the market value of fish, may be considered to be excessive punishment and unduly trespass on individual rights and liberties. The Committee notes the comments in the Agreement in Principle Speech that the provisions are proposed to respond to the growing problem of black market selling of fish. However, the Committee refers Schedule 1[27] to Parliament to consider whether the penalties imposed by the provisions are excessive.

Issue: Schedule 1[132] - Proposed section 279A - Duty of master to prevent - Contraventions of Act - Excessive Punishment

29. The Committee also notes Schedule 1[132], which states that a person commits an offence if they are the master of a boat while it is being used for any fishing activities and another person on the boat commits a serious fisheries offence while the boat is being used for fishing activities. However, proposed section 279A provides a number of defences, for example if the person issued proper instructions and took reasonable care, if the serious fisheries offence occurred without the person's knowledge and the person could not by the exercise of reasonable diligence have precented the commission of the serious fisheries offence. The proposed section provides that the maximum penalty is the maximum penalty for a serious fisheries offence, as defined in proposed section 279A(5).

30. As stated in the Agreement in Principle Speech, this amendment was based on recommendation of the Palmer Report and "seeks to address the situation where children, accompanied by adults, claim that fish illegally caught or found on a boat are theirs alone." The Agreement in Principle Speech continues to state that: "due to the principles applied to young offenders, it is almost impossible to prosecute the real

offenders for illegal fishing in these circumstances." Accordingly, Schedule 1[132] makes the master of a boat jointly liable for any fisheries offences committed on board that boat, subject to various defences.

31. The Committee has concerns that Schedule 1[132] may unduly trespass on the personal rights and liberties of individuals. However, given the comments in the Agreement in Principle Speech that the offence provision was introduced to address a situation where children on boats commit fisheries offences accompanied by adults, the Committee does not consider Schedule 1[132], proposed section 279A to be an undue trespass on personal rights and liberties.

Issue: Schedule 1[133], Proposed section 282C(1) - Prohibition Orders

32. The Committee has concerns in relation to Schedule 1[133], which provides that a court that convicts a repeat offender of a fisheries offence may, on application by the prosecutor, make an order that prohibits the offender from doing any or all of the following: engaging in specified fishing activities; being in possession of specified fishing gear; being in possession of fish or marine vegetation of a specified species; being on a boat of a kind specified in the order while on or adjacent to any waters or waters specified in the order; or being on any specified premises (that are premises in which fish are sold or in which any commercial fishing activity is conducted).

33. As stated in the Agreement in Principle Speech, under the current legislation when a repeat offender is convicted of a fisheries offence, the court can prohibit them from engaging in particular commercial fishing activities, or from being on any boat or in any premises associated with those commercial fishing activities. It continues to state that: "a prohibition order cannot prevent an offender from fishing recreationally or from working in the fishing industry. If a prohibition order is made against an individual, it is because he or she has been continually and blatantly fishing illegally. Preventing him or her only from taking part in commercial fishing activities may not be a strong enough deterrent".

34. The Committee has concerns that Schedule 1[133] may unduly trespass on personal rights and liberties and be considered to be excessive punishment. Proposed section 282C allows a court to decide from what kinds of fishing or associated activities the offender should be banned, allowing a Court to order than an offender cannot be on a boat or premises of a specified kind. The Agreement in Principle Speech suggests that a prohibition order cannot prevent an offender's right to work in Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights*. However, the Committee still has concerns that Schedule 1[133] may unduly trespass on personal rights and liberties and refers it to Parliament for its consideration.

Issue: Schedules [85] - Power of minister to cancel aquaculture lease -Oppressive Official Powers

35. Schedule 1[85] amends section 177 of the Fisheries Management Act to allow a Minister to cancel a aquaculture lease as soon as any rental payment or other amount due under the lease is not paid on time, rather than having to wait until the amount has remained unpaid for 2 years. Under section 177 of the Fisheries Management Act, the Minister may, by notice served on the lessee under an aquaculture lease, call on the lessee to show cause why the lease should not be cancelled on a number of grounds, including the non payment of a rental payment. Although this amendment may be considered to unduly oppressive to a lessee, the

Committee is of the view that it is not an undue trespass, particularly given the requirement in section 177 of the Fisheries Management Act that the Minister must serve a notice on the lessee to show cause why the lease should not be cancelled and also consider representations provided by the lessee.

Issue: Schedule 1[108], Proposed section 220AA - Stop work orders - Oppressive Official Powers; Procedural Fairness

36. Schedule 1[108] states that the Director General may issue a stop-work order to prevent unauthorised works that are damaging fish habitats or blocking the free passage of fish. The Director General may, by making a further order under the provision, extend the order for such further period or periods of 40 days as he see fit. According to proposed section 220AA(5), the Director General is not required, before making an order under the section, to notify any person who may be affected by the order. The maximum penalty for non compliance with an order is 1000 penalty units for an individual, with an additional 500 penalty units for each day the offence continues, with higher penalties for corporations.

37. The Committee has concerns that Schedule 1[108], in particular proposed section 220AA(5), which states that the Director General is not required to notify any person who may be affected by the order before making the order, may be an undue trespass on personal rights and liberties and principles of procedural fairness.

Issue: Schedule 1[127] - Special Power to require information – Oppressive Official Powers; self incrimination

38. Schedule 1[127], proposed section 258A provides a special power to fisheries officers to require any person whom the fisheries officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for the purposes of Part 7 or 7A to answer questions in relation to those matters. Part 7A of the Fisheries Management Act relates to threatened species conservation and Part 7 of the Fisheries Management Act relates to the protection of aquatic habitats.

39. Schedule 1[127] also gives powers to a fisheries officer to, by notice in writing, require a person to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered. The provision makes it an offence to fail to comply with the requirement of a fisheries officer without a reasonable excuse. The maximum penalty in case of a corporation is 1000 penalty units or in any other case, 200 penalty units.

40. Proposed section 258B includes a number of provisions relating to the requirements to provide information or answer questions, for example it provides that a warning must be given on each occasion that the power is exercised by a fisheries officer that failure to comply with a requirement under proposed section 258B is an offence. However, proposed section 258B(2) states that a person is not excused from an information requirement on the ground that the record, information or answer might incriminate the person or make them liable to a penalty.

41. The Committee is concerned that the powers in Schedules 1[127] to require a person to provide information, answer questions and attend a specified place may unduly trespass on the personal rights and liberties. It is also has particular concerns in relation to proposed section 258B(2), which states that self incrimination is not an excuse for failure to comply with a requirement under proposed section 258A. Accordingly, the Committee refers the provisions to Parliament for its consideration.

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.

42. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation, which may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts advice from Department of Primary Industries that postponed commencement in Clause 2 is necessary to allow for the finalisation of amendments to relevant Regulations.

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

The Committee makes no further comment on this Bill.

4. LOCAL GOVERNMENT AMENDMENT (PLANNING AND REPORTING) BILL 2009

Date Introduced:	25 June 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Barbara Perry MP
Portfolio:	Local Government

Purpose and Description

1. This Bill amends the *Local Government Act 1993* to make further provision for strategic planning and reporting by councils; and for other purposes.

2. The object of this Bill is to improve long-term strategic planning and resource management by local councils.

3. The proposed changes replace the current management planning process with an integrated long-term framework. The Bill requires each council to develop a long-term community strategic plan for their local government area. The plan must address social, economic, environment and civic leadership issues in the community in an integrated manner and be for a period of at least 10 years. It must identify the long-term aspirations and priorities for the community.

4. There is a requirement for councils to consider State Government plans when developing their community strategic plan. This is to ensure that councils consider issues and priorities that have been identified in their region to enable these to be included in the plan.

5. Each council will have to develop a community engagement strategy that sets out how they are going to engage their community as part of the community strategic plan. The Bill mandates the community strategic plan and the community engagement strategy to be based on the New South Wales Government's social justice principles of equity, access, participation and rights.

6. The Bill also introduces a four-year delivery program. Each newly elected council will be required to develop a delivery program in the first nine months of its elected term. This program, similar to the current management plan, will identify the strategies and principal activities that the council will implement during its term of office to achieve the long-term objectives in the community strategic plan.

7. This Bill requires councils to develop an annual operational plan. The operational plan sets out the activities that the council will undertake in the next financial year to implement the strategies identified in the delivery program. The operational plan includes the annual budget, the statement of a council's revenue policy and its annual rates, fees and charges. A council resourcing strategy forms part of these changes.

8. The strategy includes long-term planning for the assets, money and people that the council has available to implement the Delivery Program. Developing this strategy will also help councils to identify and address infrastructure needs in line with the national

frameworks for local government financial sustainability. Councils will be required to develop a 10-year financial plan and 10-year asset management plans. The Bill provides councils with the framework to ensure they meet future requirements that may be attached to Federal Government funding programs.

9. The council's annual report will continue to include statutory requirements such as information on legal expenses, contracts awarded, councillor fees and expenses, and senior staff salaries. At the end of each council electoral term, a council will need to prepare a report detailing the implementation and effectiveness of the Community Strategic Plan. This report will identify the progress of a local government area in achieving its strategic objectives. The report must address the performance of the council and other organisations against the civic leadership, and social, environmental and economic strategic objectives.

10. The requirement for councils to report on the state of the environment will continue. The Bill provides flexibility for councils in how they develop this report, which will be required every four years at the end of each electoral term.

11. Amendments are made to the Council Charter, the role of a councillor, and the role of the general manager. Mayors and councillors, with the support of the general manager and council officers, will play a civic leadership role in engaging with the community and guiding the development of the Community Strategic Plan. It also ensures that mayors and councillors are focussed on the strategic direction of the council. Under these amendments, mayors and councillors will oversee the performance of the council's administration in achieving the objectives set out in the Community Strategic Plan.

12. To assist councils with the move to the new planning and reporting framework, transitional provisions will allow councils to choose when to commence the new framework over the next three years. This will allow the first group of councils that are well progressed to move onto the new framework from 1 July 2010, while other councils can choose to follow the next year, in 2011, and the third group of councils will commence in 2012. All councils will be operating under the new framework from the September 2012 elections. The transitional approach aims to allow councils in the second and third groups to develop their plans over a longer period and to learn from the councils in the first group.

Background

13. According to the Agreement in Principle speech, this Bill has been developed by the Department of Local Government in consultation and in partnership with the local government sector, as well as in consultation with Local Government and Shires Associations, Local Government Managers Australia, the Institute of Public Works and Engineers Australia and the Planning Institute Australia. It constitutes one of the biggest reforms for local government in 16 years.

14. The Bill will be supported by the *Local Government (General) Amendment (Planning and Reporting) Regulation 2009*, along with mandatory guidelines and a supporting manual. The Department of Local Government is also developing a support program for councils. An exposure draft bill and supporting package had been subject to public consultation. This included the Department conducting nine information sessions across New South Wales to provide mayors, councillors and council officers with the opportunity to be informed about what is in the reform package.

15. From the Agreement in Principle speech:

> All the submissions made to the exhibition of the exposure draft Bill were supportive. A recent media release from the Presidents of the Local Government and Shires Associations, Councillors Genia McCaffery and Bruce Miller respectively, stated:
>
> Local Government has come a long way in terms of strategic planning, but there is still room for improvement and this offers us the opportunity to take the next step.
>
> Many of our councils in New South Wales already have comprehensive plans for their communities and some are already acting on some of the recommendations in anticipation of the guidelines being released.
> Councils with limited resources will also be able to use them to guide and ease their transition into the process of developing comprehensive and integrated strategic plans.

16. Social planning by councils will remain as a critical part of their business, but will be integrated into a more strategic and streamlined approach to planning.

17. There are a number of regional approaches to state of the environment reporting, and under the reforms, this approach will continue. State of the environment reporting at a regional or catchment level provides opportunities for councils to work together to gain efficiencies, as well as to work together on environmental projects with catchment management authorities and other State Government agencies.

The Bill

18. The object of this Bill is to amend the *Local Government Act 1993*:

(a) to require a council to develop a community strategic plan for the local government area that identifies the main priorities and aspirations of the local community for the achievement of a socially, environmentally and economically sustainable future and covers a period of at least 10 years (the plan is developed and endorsed by the council following engagement with the local community pursuant to a community engagement strategy), and
(b) to require a council to have a long-term resourcing strategy for the provision of the resources required to achieve the objectives established by the community strategic plan, and
(c) to require a council to have a 4-year delivery program detailing the principal activities to be undertaken by the council to implement the strategies established by the community strategic plan (replacing the current requirement for councils to have a management plan detailing the council's future activities and revenue policies), and
(d) to require a council's delivery program to be supported by an annual operational plan detailing the activities to be engaged in by the council as part of the delivery program covering that year and providing a statement of the council's revenue policy for that year, and
(e) to consolidate and streamline annual reporting requirements for councils to reflect the replacement of the management plan with a delivery program and operational plan (with provision for the matters to be reported on to be included in the regulations) and to require a council's annual report for the year prior to the year in which an ordinary election is held to include a report on achievements in implementing the community strategic plan and a state of the environment report, and
(f) to provide for the Director-General of the Department of Local Government to establish integrated planning and reporting guidelines to impose requirements in connection with the preparation, development and review of, and the contents of, community strategic plans, resourcing strategies, delivery programs, operational

plans, community engagement strategies, annual reports and state of the environment reports, and

(g) to amend a council's charter to include specific reference to long-term strategic planning on behalf of the local community, planning for the assets for which the council is responsible and the promotion of social justice principles, and

(h) to include in the role of a councillor a civic leadership role in guiding the development of the community strategic plan and responsibility for monitoring the implementation of the council's delivery program, and

(i) to include as a function of the general manager of a council the function of assisting the council in connection with the development and implementation of the community strategic plan and council's resourcing strategy, delivery program and operational plan and the preparation of its annual report and state of the environment report, and

(j) to provide transitional arrangements for the phasing in of the new planning and reporting requirements over a 3-year period.

19. **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.

Schedule 1 Amendment of *Local Government Act 1993* No 30

Schedule 1 [1] amends a council's charter to include specific reference to long-term strategic planning on behalf of the local community, planning for the assets for which the council is responsible and the promotion of social justice principles.
Schedule 1 [2], [5], [7]–[9], [11] and [13]–[18] make consequential amendments.
Schedule 1 [3] requires a community strategic plan and a council's delivery program and operational plan to be publicly available free of charge.
Schedule 1 [4] provides that the role of a councillor includes a civic leadership role in guiding the development of the community strategic plan and responsibility for monitoring the implementation of the council's delivery program.
Schedule 1 [6] provides that it is a function of the general manager of a council to assist the council in connection with the development and implementation of the community strategic plan and the council's resourcing strategy, delivery program and operational plan and the preparation of its annual report and state of the environment report.
Schedule 1 [10] replaces existing provisions that require the preparation by a council of a management plan with respect to its work, activities and revenue policy with the following provisions for strategic planning by councils:

Proposed section 402 requires each local government area to have a community strategic plan that has been developed and endorsed by the council and that identifies the main priorities and aspirations for the future of the local government area covering a period of at least 10 years. A community strategic plan must establish strategic objectives together with strategies for achieving those objectives. A council is also required to establish and implement a community engagement strategy for engagement with the local community in connection with the development of the community strategic plan.

Proposed section 403 requires a council to have a long-term resourcing strategy for the provision of the resources required to implement the strategies established by the community strategic plan.

Proposed section 404 requires a council to have a delivery program detailing the principal activities to be undertaken by the council to implement the strategies established by the community strategic plan and including a method of assessment to determine the effectiveness of each principal activity detailed in the delivery program in implementing the strategies and achieving the strategic objectives at which the activity is directed. A council must establish a new delivery program after each ordinary election to cover the principal activities of the council for the 4-year period commencing on 1 July following the election.

Proposed section 405 requires a council to have an operational plan that is adopted before the beginning of each year and details the activities to be engaged in by the council during the year as part of the delivery program covering that year. An operational plan must include a statement of the council's revenue policy for the year covered by the operational plan.

Proposed section 406 requires the Director-General to establish integrated planning and reporting guidelines (***the guidelines***) that will impose requirements in connection with the preparation, development and review of, and the contents of, the community strategic plan, resourcing strategy, delivery program, operational plan, community engagement strategy, annual report and state of the environment report of a council.

Schedule 1 [12] makes the following changes to the annual reporting requirements for councils:

> (a) a council will report annually on its achievements in implementing its delivery program and the effectiveness of the principal activities undertaken in achieving the objectives at which those activities are directed (instead of reporting on its achievements with respect to the objectives and performance targets set out in its management plan, as at present),
> (b) a council's annual report in the year in which an ordinary election is held will also be required to report on the council's achievements in implementing the community strategic plan over the previous 4 years,
> (c) an annual report must be prepared in accordance with the guidelines,
> (d) the detailed content of an annual report will be provided for in the regulations and the guidelines rather than being set out in the *Local Government Act 1993*,
> (e) an annual report in the year in which an ordinary election is held will be required to include a state of the environment report.

Schedule 1 [19] inserts a savings and transitional regulation-making power.

Schedule 1 [20] provides for the phasing-in of the proposed new strategic planning provisions over a 3-year period to 30 June 2012 and also provides for the continued application to a council of the existing management plan and annual report provisions until the council is covered by the new strategic planning provisions.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

5. PARLIAMENTARY REMUNERATION AMENDMENT (SALARY PACKAGING) BILL 2009*

Date Introduced:	26 June 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Richard Torbay MP
Portfolio:	Speaker, Independent

Purpose and Description

1. This Bill amends the *Parliamentary Remuneration Act 1989*, the *Parliamentary Contributory Superannuation Act 1971* and the *Constitution Act 1902* with respect to the provision of employment benefits and the making of superannuation contributions for members of Parliament by way of salary sacrifice.

2. This Bill aims to enable members of Parliament access to salary packaging arrangements similar to those available to New South Wales public sector employees. It will remove some anomalous limits on the contributions to superannuation accounts that apply to members of Parliament.

3. It does not contain proposals for "packageable" items that are not already widely available in other employment arrangements. It requires other remuneration of members to be reduced by the cost of any item to be packaged. This funding will come from the members for packaging arrangements.

4. The amendments to the *Parliamentary Remuneration Act 1989* will confer on the Parliamentary Remuneration Tribunal the power to determine the availability of salary packaging benefits for members of Parliament. The power is limited to benefits already available to public servants. The amendments will also ensure that any benefits are cost neutral to the Government by requiring that the cost of providing a benefit be offset against remuneration.

5. The Executive Manager, Department of Parliamentary Services, will be nominated as the "designated employer" for salary-packaging arrangements. The Executive Manager will determine the cost of the relevant items so that they may be offset.

6. The amendments to the *Parliamentary Contributory Superannuation Act 1971* will allow members to salary sacrifice part or all of their compulsory contributions to the Parliamentary Contributory Superannuation Fund. Currently, members of the old superannuation scheme cannot sacrifice any part of their remuneration, which is inconsistent with the position for public servants in the old defined benefit schemes. It is also inconsistent with those members of Parliament first elected at the 2007 election and who are not members of the old parliamentary superannuation scheme.

7. The proposed amendments to the *Constitution Act 1902* aim to ensure that participation in the proposed arrangements does not trigger section 13 of the *Constitution Act* so as to disqualify the member.

Background

8. The types of salary packaging arrangements proposed in this Bill are commonly used throughout the public and private sectors in Australia as a means of providing benefits to employees without additional cost to employers.

9. From the Agreement in Principle speech:

> I believe the recent focus on parliamentary remuneration and the claims of official expenditure, particularly in the United Kingdom, mean that it is timely to undertake a re-examination of some of the aspects of this issue in New South Wales. The bill proposes a transparent new system for members to access some very commonplace, modern employment benefits in a straightforward and cost-effective way. It does so by enabling the Parliamentary Remuneration Tribunal to determine that salary packaging is available for some items that can already be packaged by public sector employees, members of the teaching service and police officers. It creates an alternative, more transparent way to cover some of the ordinary work-related costs of all parliamentarians.

10. The proposal is in line with a scheme that already exists for members of Parliament in Western Australian.

11. According to the Agreement in Principle speech:

> The Parliamentary Remuneration Tribunal, which is charged with the statutory role of independently determining the remuneration available to members, has been recommending change for some years. In its latest annual report, the tribunal noted that the electoral allowance may be reduced if members were otherwise provided with a motor vehicle.

12. Items that the Parliamentary Remuneration Tribunal could approve in a salary-packaging arrangement include additional voluntary contributions to superannuation and one 100 per cent private novated motor vehicle lease. The current prohibitions and caps on pre-tax contributions to superannuation by members of Parliament are anomalous in Australia, since caps were removed for New South Wales public servants back in 2006. The Commonwealth has also recently removed the cap on superannuation contributions by its members of Parliament.

13. Before any amendments to the *Parliamentary Contributory Superannuation Act 1971* can be passed in the Legislative Assembly, the Parliamentary Remuneration Tribunal must certify that the amendments are warranted. The Parliamentary Remuneration Tribunal has provided such certification and the Speaker has tabled the certificate to the House.

The Bill

14. The objects of this Bill are to amend the *Parliamentary Remuneration Act 1989*, the *Parliamentary Contributory Superannuation Act 1971* and the *Constitution Act 1902* as follows:

    (a) to enable employment benefits to be provided to members of Parliament by way of salary sacrifice, on the same basis as those benefits are provided to members of the Government Service,

(b) to enable members of the Parliamentary Contributory Superannuation Scheme to make contributions by way of salary sacrifice to that Scheme and to make additional salary sacrifice superannuation contributions to other funds,

(c) to confer powers on the Parliamentary Remuneration Tribunal (the ***Tribunal***) to determine matters relating to employment benefits for members of Parliament,

(d) to make it clear that the provision of employment benefits and the making of salary sacrifice superannuation contributions do not constitute a ground for disqualification from Parliament on the ground of entering a contract or agreement for or on account of the Public Service of New South Wales,

(e) to make other minor and consequential amendments,

(f) to enable regulations containing savings and transitional provisions to be made consequential on the proposed Act.

15. **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.

Schedule 1 Amendment of *Parliamentary Remuneration Act 1989* No 160

Employment benefits and superannuation contributions

Schedule 1 [3] inserts proposed Part 2A (proposed sections 6A–6C) into then *Parliamentary Remuneration Act 1989* (the ***Remuneration Act***). Proposed section 6A confers on a member of Parliament an entitlement to be provided with employment benefits, if the member elects to have those benefits and the election is approved by the designated employer. An employment benefit is a benefit of a kind approved by the Tribunal and is to be paid for by reducing the member's potential remuneration by the cost of the benefit.

Proposed section 6B confers on the Tribunal functions with regard to employment benefits, including power to fix the type of benefits to be provided and to make provision for their costing. However, they must be benefits of a kind available to members of the Government Service.

Proposed section 6C enables the Minister to direct the Tribunal to make a special determination as regards employment benefits.

Schedule 1 [10] amends section 14C of the Remuneration Act to amend the definition of the ***salary*** of a member of Parliament for superannuation purposes to include the cost of employment benefits and salary sacrifice amounts paid for superannuation on behalf of the member.

Schedule 1 [12] inserts proposed section 14EA into the Remuneration Act to extend the provisions enabling members of Parliament to make additional superannuation contributions by way of salary sacrifice to members who are continuing members of the Parliamentary Contributory Superannuation Scheme.

Schedule 1 [13] and [16] amend section 14F of the Remuneration Act to recognize the role of the designated employer (rather than the Treasurer) in approving salary sacrifice contributions for superannuation by members of Parliament.

Schedule 1 [13] also amends that section to bring it into line with the provisions of other public sector superannuation legislation that define salary sacrifice contributions for superannuation.

Schedule 1 [14] amends section 14F of the Remuneration Act to remove the limitation of 50% on the amount of salary that may be sacrificed by members of Parliament for superannuation.

Schedule 1 [20] amends section 15 of the Remuneration Act to make it clear that employment benefits are subject to the provisions of any relevant determination of the Tribunal.

Schedule 1 [21] amends section 15 of the Remuneration Act to make it clear that the costs of employment benefits and salary sacrifice contributions are payable in the same way as salaries of members of Parliament.

Machinery and consequential amendments

As a consequence of the conferral of additional powers on the Tribunal by the proposed Act, provisions of the Remuneration Act have been rearranged so that the general provisions relating to the Tribunal have been removed from Part 3 (which currently relates to additional entitlements) and collected in a new Part 3B.

Schedule 1 [5] substitutes section 9 of the Remuneration Act to limit the operation of that provision to the conferral of functions on the Tribunal relating to additional entitlements.

Schedule 1 [6] and [7] make amendments to sections 10 and 12A of the Remuneration Act consequential on the extension of the Tribunal's powers.

Schedule 1 [18] inserts a heading for the new Part 3B of the Remuneration Act.

Schedule 1 [23] amends Schedule 3 to the Remuneration Act to enable regulations containing savings and transitional provisions to be made consequentially on the enactment of the proposed Act.

Schedule 1 [24] amends Schedule 3 to the Remuneration Act to preserve existing elections to make additional superannuation contributions.

Schedule 2 Amendment of other Acts

Schedule 2.1 *Constitution Act 1902* No 32

Schedule 2.1 amends the *Constitution Act 1902* to make it clear that a member of Parliament who elects or agrees to be provided with, or receives, employment benefits (including salary sacrifice contributions for superannuation) is not affected by the prohibition in section 13 of that Act, which disqualifies members who benefit from public contracts.

Schedule 2.2 *Parliamentary Contributory Superannuation Act 1971* No 53

Schedule 2.2 [4] inserts proposed section 18AA into *Parliamentary Contributory Superannuation Act 1971* (the ***Superannuation Act***). The proposed section enables the contributions that are required to be made from a member of Parliament's salary for superannuation under that Act to be paid instead as salary sacrifice contributions. The amount of the superannuation contributions, together with the amount necessary to meet any tax payable by the trustees of the Parliamentary Contributory Superannuation Scheme for the salary sacrifice contributions, is to be foregone as remuneration by the member. A member who wishes to have salary sacrifice contributions made must make an election to, and have it approved by, the designated employer and the trustees.

Schedule 2.2 [1] amends section 3 of the Superannuation Act to insert definitions of ***designated employer*** and ***salary sacrifice contribution***.

Schedule 2.2 [2] amends section 3 of the Superannuation Act to include as salary for the purposes of the Superannuation Act (and as part of the basis of determining the benefits of a member) the cost of any employment benefits and the amount of any salary sacrifice contributions.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

6. ROAD TRANSPORT (GENERAL) AMENDMENT (CONSECUTIVE DISQUALIFICATION PERIODS) BILL 2009

Date Introduced:	25 June 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Roads

Purpose and Description

1. This Bill amends the *Road Transport (General) Act 2005* to make further provision for the commencement of consecutive driver licence disqualifications and to make consequential amendments to certain other legislation.

2. The main purpose is to amend road transport legislation to remove an anomaly where a person becomes eligible to apply for a licence even though disqualification periods set by the courts are still to be served.

3. This Bill does not aim to introduce new licence disqualification penalties. It seeks to ensure that all licence disqualification periods that have been ordered by the courts are served before a licence can be issued.

4. In the case of serial offenders, the person may have had several licence disqualification periods ordered by the courts. These may have been ordered to be served concurrently, consecutively or a mixture of both, to result in a continuous chain of licence disqualification periods over many years. If a convicted person sought judicial review of a court's decision, the review could be an appeal, an annulment and rehearing or a matter being set aside or, an application to quash a declaration under the Habitual Offender Scheme.

5. When a person is successful in their application for review, the related disqualification period is also removed. This can cause a gap in what was previously a continuous chain of licence disqualification periods. The disqualification periods that follow the gap become future ‘orphan periods’ of disqualification. This leads to the situation of a person becoming eligible to apply for a licence during the gap period, even though a future disqualification is still to be served.

6. This Bill aims to ensure that this gap is closed by introducing a provision so that any future orphan disqualification periods are brought forward automatically by statute to recreate a continuous period of licence disqualification.

7. When a court specifies when the disqualification period is to start and end, then these court-ordered disqualification periods cannot be brought forward. However, an application can be made to the court under section 43 (2) of the *Crimes (Sentencing Procedure) Act 1999* for the court to reconsider its original decision should it determine there was an error. However, some courts have ruled that there was no error at the time the court made its original decision and they see no reason to change the original order.

The need to make an application under section 43 (2), then places an unnecessary burden on the offender and on the court.

8. Proposed section 188A will provide that where a disqualification is removed or reduced following a court review and a gap is created in what would be a continuous chain of disqualification periods, any future orphan disqualification period that followed will be brought forward so that there is no gap and the continuous disqualification period is maintained. Proposed section 188A will also provide that where a matter that was successfully reviewed is further prosecuted by police and they are successful, any new licence disqualification period is to be served at the end of all other licence disqualification periods applying to the person.

9. A proposed subsection will be introduced into section 25A of the *Road Transport (Driver Licensing) Act 1999* that will make the offence of driving while disqualified not apply if the new section 188A causes the status of a driver to change from unlicensed to disqualified when the Roads and Traffic Authority has not advised the person of the change.

Background

10. The Agreement in Principle speech explained that this Bill has been developed through consultation involving the Roads and Traffic Authority, the Attorney General's Department and the courts administration.

11. Currently, section 187 of the *Road Transport (General) Act 2005* allows a court to convict a person of a major driving offence and apply a licence disqualification. Some examples include drink and drug driving, Crimes Act offences involving the use of motor vehicles, and driving in a manner or speed that is dangerous.

12. Section 188 of the Act sets out the minimum, maximum and automatic periods of licence disqualification applying to the major offences. Rule 10-2 of the *Road Rules 2008* sets the licence disqualification periods that apply for excessive speeding offences. These provisions require the licence disqualification periods to commence on the date of conviction.

13. Section 201 of the *Road Transport (General) Act 2005* provides for a period of licence disqualification following a declaration that the person is a habitual offender. The *Road Transport (Driver Licensing) Act 1998* provides periods of licence disqualification for unauthorised driving.

14. According to the Agreement in Principle speech:

> The changes in the Bill are needed because the current legislation does not provide for all future orphan disqualification periods to be automatically brought forward. Adoption of the proposed reforms also ensures that where a person has gone to the effort of having a matter reviewed by the court and is successful in having a disqualification overturned on review, the person rightfully gains the benefit of that effort and is eligible to apply for a licence earlier.

The Bill

15. The objects of this Bill are:

    (a) to amend the *Road Transport (General) Act 2005* to bring forward the commencement and completion dates for a new driver licence disqualification of a

person that is to be completed consecutively with a previous driver licence disqualification that ends prematurely, so as to avoid any period during which the person ceases to be disqualified from holding a driver licence before the new disqualification commences, and

(b) to make consequential amendments to the *Road Transport (Driver Licensing) Act 1998* and *Road Transport (General) Regulation 2005*.

16. **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.

Schedule 1 Amendment of *Road Transport (General) Act 2005* No 11
Schedule 1 [1] inserts proposed section 188A in the *Road Transport (General) Act 2005* to bring forward the commencement and completion dates of consecutive driver licence disqualifications in the circumstances referred to in the Overview.
Schedule 1 [2]–[4] make consequential amendments to sections 189 and 201 of that Act.
Schedule 1 [5] amends clause 1 of Schedule 1 to the *Road Transport (General) Act 2005* to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.
Schedule 1 [6] inserts a provision in Schedule 1 to the *Road Transport (General) Act 2005* to ensure that proposed section 188A extends to driver licence disqualifications imposed before the commencement of the proposed section that have already commenced when, or will commence after, the proposed section commences.

Schedule 2 Consequential amendment of other legislation
Schedule 2.1 amends section 25A of the *Road Transport (Driver Licensing) Act 1998* to make it clear that a driver does not commit the offence of driving while disqualified in relation to a disqualification period the commencement and completion dates of which have been altered by operation of proposed section 188A of the *Road Transport (General) Act 2005* unless the Roads and Traffic Authority has previously provided written notice of the altered dates to the driver. **Schedule 2.2** makes a consequential amendment to clause 6 of the *Road Transport (General) Regulation 2005*.

Issues Considered by the Committee

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

Issue: Schedule 1 [6] – Retrospectivity – insertion of provisions in Schedule 1 to the *Road Transport (General) Act 2005* – consequent on enactment of *Road Transport (General) Amendment (Consecutive Disqualification Periods) Act 2009*:

17. Schedule 1 [6] inserts provisions in Schedule 1 to the *Road Transport (General) Act 2005* to ensure that the proposed section 188A extends to driver licence disqualifications imposed before the commencement of the proposed section that have already commenced when, or will commence after, the proposed section commences.

18. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, the Committee considers the following safeguards:

19. Schedule 2.1 proposes the insertion of section 25A (1A), which will amend section 25A of the *Road Transport (Driver Licensing) Act 1998* to make it clear that a driver does not commit the offence of driving while disqualified in relation to a disqualification period the commencement and completion dates of which have been altered by operation of the new section 188A of the *Road Transport (General) Act 2005* unless the Roads and Traffic Authority has previously provided written notice of the altered dates to the driver.

20. Schedule 1 [1] includes proposed section 188A (6) which states that nothing in this section limits any power that a court has: (a) to make an order for licence disqualification (whether or not to be completed concurrently or consecutively with any other licence disqualification), or (b) to annul, quash, set aside or vary a licence disqualification.

21. By taking into account the above safeguards and the purpose of this Bill in bringing forward consecutive disqualification periods to avoid orphan periods with the balancing of interests in public road safety, the Committee is of the view that the retrospective effect is unlikely to unduly trespass on personal rights.

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 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. However, the Committee accepts the advice received from the Minister’s office, that the decision was made by the Roads and Traffic Authority for the following reasons:

> “In operation, the effect of the amendments proposed in the Bill will be to alter a person’s licence status; for example, from being unlicensed to being disqualified, or from being disqualified for a particular offence to being disqualified for a different offence. As the change in status is by operation of law, the person affected may not be aware of the change in licence status in the absence of notice from the Authority. In order to ensure that a person does not, in the absence of notice, suffer a greater sanction consequent on the change in licence status, proposed section 25A(1A) provides that a driver affected by the operation of the proposed amendments is not guilty of driving while disqualified unless the Authority has previously given written notice of the altered dates to the driver.
>
> The reasoning behind commencement on proclamation, rather than immediately on assent, is to ensure that appropriate administrative arrangements and systems are designed and operational to support the issue of the notices to affected persons, prior to the amendments commencing. The RTA is developing these arrangements and supporting systems with a view to commencement as soon as possible after assent to the Bill”.

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

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE

1. REPLY TO CORRESPONDENCE ON AGREEMENT IN PRINCIPLE / SECOND READING SPEECHES AND EXPLANATORY MATERIALS ACCOMPANYING BILLS

Correspondence Date: 2 June 2009
Minister: Hon John Hatzistergos MLC
Portfolio: Attorney General; Industrial Relations

Background

1. The Committee wrote to the Attorney General and all Ministers on 2 June 2009 regarding the following matters. Issues such as commencement by proclamation (which may give rise to an inappropriate delegation of legislative power) and retrospectivity are recurring matters of concern, which have been frequently reported in the Committee's Digest reports.The Committee has also previously written to the Premier on 28 November 2008 concerning these matters. The Premier has replied in a letter received by the Committee on 20 May 2009.
2. In order to assist Parliament in determining whether the power to commence an Act by proclamation is appropriate, the Committee wrote to the Attorney General to seek his consideration to include relevant information with respect to reasons for commencement by proclamation in the Agreement in Principle (or Second Reading) Speeches if an explanation had not been included in the Explanatory Note when introducing Bills in the future.
3. With regard to provisions that have retrospective effect, the Committee also sought the consideration of the Attorney General to provide relevant helpful information and reasons in the Agreement in Principle (or Second Reading) speeches when introducing Bills in the near future if the information had not been provided in a Bill's Explanatory Note.

Minister's Reply

4. The Attorney General wrote his reply in a letter received on 8 July 2009:

> Thank you for your letter of 2 June 2009, regarding explanatory materials accompanying Bills.
>
> I note the Committee's views on matters it considers should be covered by Agreement in Principle and Second Reading speeches. I have brought your letter to the attention of relevant officers in my Department.

Committee's Response

The Committee thanks the Attorney General for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

2 June 2009

Our Ref:LRC2984

Attorney General
Governor Macquarie Tower
Level 33, 1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General

Re: Agreement in Principle/Second Reading Speeches and Explanatory Materials Accompanying Bills

As you are aware, pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee reports on any Bill with issues of concern in its *Legislation Review Digest*.

It is apparent that issues such as commencement by proclamation (which may give rise to an inappropriate delegation of legislative power) and retrospectivity are recurring matters of concern, which have been frequently reported in the Committee's Digest reports.

The Committee notes the practice of the Senate Standing Committee on the Scrutiny of Bills is to encourage helpful information and explanation in the Explanatory Note for provisions that may warrant the special attention of Parliament. Such an approach could usefully be adopted in respect of our own legislation.

By way of background information, the Committee notes that the Scrutiny of Acts and Regulations Committee in Victoria has adopted the following Practice Note 1 on 17 October 2005, to advise legal and legislation officers of their Committee's expectations in respect to information that should be provided to the Parliament concerning provisions in Bills that test or invoke their Committee's terms of reference:

> "...To avoid needless Ministerial correspondence the Committee strongly refers that explanatory material be provided at the time a Bill is introduced in Parliament in either the Second Reading Speech and or the explanatory memorandum. Provisions frequently of concern to the Committee include –
>
> 1.1 Unexplained retrospective provisions
>
> 1.2 Unexplained wide delegation of powers and functions provisions
>
> 1.3 Unexplained commencement by proclamation or delayed commencement in excess of 12 months
>
> 1.4 Insufficient or unhelpful explanatory materials."

The Committee has written to the Premier on 28 November 2008 concerning the above matter. The Premier has replied in a letter received by the Committee on 20 May 2009.

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In relation to the matter of commencement by proclamation, the Premier advised that:

> "It remains a matter for Parliament to determine whether a power to commence an Act by proclamation is appropriate. Ministers have on many occasions addressed the need for such commencement provisions in Agreement in Principle or have provided specific advice to your Committee to assist it in advising Parliament as to whether such a power is appropriate".

In order to assist Parliament in determining whether such a power to commence an Act by proclamation is appropriate, the Committee would like to seek your consideration to include relevant information with respect to reasons for commencement by proclamation in the Agreement In Principle (or Second Reading) Speeches if an explanation had not been included in the Explanatory Note when introducing Bills in the future.

The Premier has also advised the Committee with the following in his letter:

> "I note that Ministers already endeavour to highlight in Agreement in Principle speeches, or during Parliamentary debate, the rationale for certain provisions which also may be of concern to the Committee. For example, a Minister introducing a Bill which has some retrospective operation will often explain the reasons for the relevant provisions and their intended operation in the Agreement in Principle speech.
>
> I understand that in other jurisdictions where guidance has been issued, your counterpart Committees have been the bodies responsible for issuing that guidance material. I understand it is open to your Committee to issue similar guidelines, if the Committee considers it appropriate to do so.
>
> I am sure that Ministers will take into account any guidelines your Committee issues, although it will remain a matter for Ministers to determine how best to inform Parliament of matters relevant to a Bill".

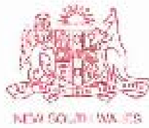
At this stage, without developing a formal guideline as such, the Committee would also like your consideration to provide relevant helpful information and reasons in the Agreement in Principle (or Second Reading) speeches when introducing Bills in the near future if the information had not been provided in a Bill's Explanatory Note.

The Committee appreciates an appropriate primary liaison contact person from your office and/or from a relevant Departmental office for any future communication in respect of Bills to be introduced into Parliament by you.

The Committee would like to thank you in advance. If you need further information, please contact Ms Catherine Watson, Committee Manager, on 9230 2036 or by email: Catherine.Watson@parliament.nsw.gov.au

Yours sincerely

Allan Shearan MP
Chair



NEW SOUTH WALES

ATTORNEY GENERAL

The Hon Allan Shearan MP
Chair
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

- 8 JUL 2009

Dear Mr Shearan

Thank you for your letter of 2 June 2009, regarding explanatory materials accompanying Bills.

I note the Committee's views on matters it considers should be covered by Agreement in Principle and Second Reading speeches. I have brought your letter to the attention of relevant officers in my Department.

The contact officer in my Office in relation to Bills for which I am responsible is Mr Simon Lees. Mr Lees may be contacted on telephone 9228 4977 or email simon.lees@hatzistergos.minister.nsw.gov.au.

Yours faithfully

(John Hatzistergos)

Postal: GPO Box 5341 Sydney NSW 2001 Telephone: (02) 9228 4977 Facsimile: (02) 9228 3600

2. REPLY TO CORRESPONDENCE ON AGREEMENT IN PRINCIPLE / SECOND READING SPEECHES AND EXPLANATORY MATERIALS ACCOMPANYING BILLS

Correspondence Date: 2 June 2009
Minister: Hon John Della Bosca MLC
Portfolio: Health; Central Coast

Background

1. The Committee wrote to all Ministers on 2 June 2009 regarding the following matters. Issues such as commencement by proclamation (which may give rise to an inappropriate delegation of legislative power) and retrospectivity are recurring matters of concern, which have been frequently reported in the Committee's Digest reports.

2. The Committee has also previously written to the Premier on 28 November 2008 concerning these matters. The Premier has replied in a letter received by the Committee on 20 May 2009.

3. In order to assist Parliament in determining whether the power to commence an Act by proclamation is appropriate, the Committee wrote to all Ministers to seek their consideration to include relevant information with respect to reasons for commencement by proclamation in the Agreement in Principle (or Second Reading) Speeches if an explanation had not been included in the Explanatory Note when introducing Bills in the future.

4. With regard to provisions that have retrospective effect, the Committee also sought the consideration of all Ministers to provide relevant helpful information and reasons in the Agreement in Principle (or Second Reading) speeches when introducing Bills in the near future if the information had not been provided in a Bill's Explanatory Note.

Minister's Reply

5. The Minister for Health and the for the Central Coast wrote his reply in a letter received on 10 July 2009:

> Thank you for your letter concerning Minister's Agreement in Principle / Second Reading speeches and the inclusion in those speeches of material to explain the rationale for including in a Bill provisions that either commence an Act by proclamation or provisions that have retrospective effect.

I am of the view that it is entirely appropriate for Parliament to have the benefit of this information when considering a Bill and agree with your request that it be incorporated in the relevant speeches. Those officers in my Department who are responsible for developing legislation have been requested to ensure that these matters are addressed in the future.

Committee's Response

The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

2 June 2009

Our Ref:LRC2984

Minister for Health
Governor Macquarie Tower
Level 30, 1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Re: Agreement In Principle/Second Reading Speeches and Explanatory Materials Accompanying Bills

As you are aware, pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee reports on any Bill with issues of concern in its *Legislation Review Digest*.

It is apparent that issues such as commencement by proclamation (which may give rise to an inappropriate delegation of legislative power) and retrospectivity are recurring matters of concern, which have been frequently reported in the Committee's Digest reports.

The Committee notes the practice of the Senate Standing Committee on the Scrutiny of Bills is to encourage helpful information and explanation in the Explanatory Note for provisions that may warrant the special attention of Parliament. Such an approach could usefully be adopted in respect of our own legislation.

By way of background information, the Committee notes that the Scrutiny of Acts and Regulations Committee in Victoria has adopted the following Practice Note 1 on 17 October 2005, to advise legal and legislation officers of their Committee's expectations in respect to information that should be provided to the Parliament concerning provisions in Bills that test or invoke their Committee's terms of reference:

> "...To avoid needless Ministerial correspondence the Committee strongly refers that explanatory material be provided at the time a Bill is introduced in Parliament in either the Second Reading Speech and or the explanatory memorandum. Provisions frequently of concern to the Committee include –
>
> 1.1 Unexplained retrospective provisions
>
> 1.2 Unexplained wide delegation of powers and functions provisions
>
> 1.3 Unexplained commencement by proclamation or delayed commencement in excess of 12 months
>
> 1.4 Insufficient or unhelpful explanatory materials."

The Committee has written to the Premier on 28 November 2008 concerning the above matter. The Premier has replied in a letter received by the Committee on 20 May 2009.

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In relation to the matter of commencement by proclamation, the Premier advised that:

> "It remains a matter for Parliament to determine whether a power to commence an Act by proclamation is appropriate. Ministers have on many occasions addressed the need for such commencement provisions in Agreement in Principle or have provided specific advice to your Committee to assist it in advising Parliament as to whether such a power is appropriate".

In order to assist Parliament in determining whether such a power to commence an Act by proclamation is appropriate, the Committee would like to seek your consideration to include relevant information with respect to reasons for commencement by proclamation in the Agreement in Principle (or Second Reading) Speeches if an explanation had not been included in the Explanatory Note when introducing Bills in the future.

The Premier has also advised the Committee with the following in his letter:

> "I note that Ministers already endeavour to highlight in Agreement in Principle speeches, or during Parliamentary debate, the rationale for certain provisions which also may be of concern to the Committee. For example, a Minister introducing a Bill which has some retrospective operation will often explain the reasons for the relevant provisions and their intended operation in the Agreement in Principle speech.
>
> I understand that in other jurisdictions where guidance has been issued, your counterpart Committees have been the bodies responsible for issuing that guidance material. I understand it is open to your Committee to issue similar guidelines, if the Committee considers it appropriate to do so.
>
> I am sure that Ministers will take into account any guidelines your Committee issues, although it will remain a matter for Ministers to determine how best to inform Parliament of matters relevant to a Bill".

At this stage, without developing a formal guideline as such, the Committee would also like your consideration to provide relevant helpful information and reasons in the Agreement in Principle (or Second Reading) speeches when introducing Bills in the near future if the information had not been provided in a Bill's Explanatory Note.

The Committee appreciates an appropriate primary liaison contact person from your office and/or from a relevant Departmental office for any future communication in respect of Bills to be introduced into Parliament by you.

The Committee would like to thank you in advance. If you need further information, please contact Ms Catherine Watson, Committee Manager, on 9230 2036 or by email: Catherine.Watson@parliament.nsw.gov.au

Yours sincerely

Allan Shearan MP
Chair

John Della Bosca MLC
Minister for Health
Minister for the Central Coast
Leader of the Government in the Legislative Council

A76895
M09/4938

10 JUL 2009

Mr A Shearan MP
Chair
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

Thank you for your letter concerning Minister's Agreement in Principle /second Reading speeches and the inclusion in those speeches of material to explain the rationale for including in a Bill provisions that either commence an Act by proclamation or provisions that have retrospective effect.

I am of the view that it is entirely appropriate for Parliament to have the benefit of this information when considering a Bill and agree with your request that it be incorporated in the relevant speeches. Those officers in my Department who are responsible for developing legislation have been requested to ensure that these matters are addressed in the future.

If the staff of your Committee would like to discuss this matter further please contact Jill Cunningham, Parliamentary Liaison Officer on (02) 9228 4777.

Yours sincerely

John Della Bosca MLC

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Part Two – Regulations

SECTION A: COMMENT ON REGULATIONS

Assisted Reproductive Technology Regulation 2009

Recommendation

That the Committee:

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

Grounds for comment

Personal rights/liberties	Part 3 of the ART Regulation, which relates to information and records may be considered to impact on the rights of individuals to privacy. However, the Committee is of the view that the appropriate balance has been struck between this right and the interest of, for example children who are conceived as a result of ART treatment. The Regulation provides a number of strict liability offences, for example Clause 14, Part 3 and Clause 18, Part 4. However, the Committee is of the view that these provisions do not unduly trespass on personal rights liberties, particularly given the maximum penalty of 10 penalty units for each strict liability offence.
Business impact	There are a number of fees associated with the Regulation, which may impose a number of costs and impact on the businesses of ART providers. Examples include Clauses 4, 6 and 17. However, the Committee notes the comments in the Regulatory Impact Statement, that these fees are necessary to achieve the objectives of the ART Regulation and Act.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	

Explanatory Note

Then Assisted Reproductive Technology Act 2007 (the Act) regulates assisted reproductive technology services, including assisted reproductive technology treatment (ART treatment) such as artificial insemination and in-vitro fertilisation, and provides for the registration of assisted reproductive technology service providers (ART providers).

This Regulation makes provision with respect to the following:

(a) the registration of ART providers, including additional matters to be included in applications for registration, application fees and annual registration fees,
(b) the additional events and changes that registered ART providers must give notice of to the Director-General of the Department of Health,
(c) the infection control standards that certain ART providers must meet,
(d) the qualifications required to provide counselling services under the Act,
(e) the steps required to be taken by an ART provider in certain circumstances to establish whether a person, who earlier provided a gamete, is still alive,
(f) the information about a donated gamete, or embryo created using a donated gamete, that an ART provider must provide to another ART provider,
(g) the collection of information about gamete providers and about offspring born as a result of ART, and the keeping of records of that information,
(h) the matters to be entered in the central ART donor register and information required to be provided by ART providers for inclusion on that register,
(i) the disclosure of information to a person born as a result of ART treatment using a donated gamete, to any such person's parents and to the donor of a gamete,
(j) savings, transitional and formal matters.

This Regulation is made under the Assisted Reproductive Technology Act 2007, including sections 7 (2), (3) (e) and (8), 8 (1) (e), 10, 12 (2) (b), 24 (3) (b), 27 (4) (c), 30 (1), 31 (1) (a) (i) and (c), 33 (2) and (5), 37 (1) and (2) (a), 38 (1) (a) and (b), 39 (1) (a), 41 and 71 (the general regulation-making power) and clauses 1 (1) and 3 (2) of Schedule 1. Parts 1 and 4 and clauses 4–8 of this Regulation comprise or relate to matters set out in Schedule 3 to the Subordinate Legislation Act 1989, namely matters of a machinery nature, matters of a savings or transitional nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

Comment

Information and Records - Privacy

1. The Assisted Reproductive Technology (ART) Regulation 2009 provides for a system of mandatory registration of all ART providers in NSW and establishes a donor register, which will allow children conceived as a result of ART treatment using donated gametes to access identifying and non-identifying information about their donor parent.

2. Part 3 of the Regulation relates to information about gamete providers and sets out the information to be entered into a central ART donor register and the information that must be disclosed to offspring, parents and donors. Accordingly, there are a number of clauses relating to information and records, which may be considered to

impact on the right of individuals to privacy. Examples of these clauses are provided below:

3. Section 27 of the ART Act prohibits an ART provider from providing ART treatment using donated gametes if the treatment is likely to result in offspring of the donor being born to more than five women. For the purposes of section 27(4)(c) of the ART Act, Clause 11 provides that certain information must be provided to an ART provider, for example the number of women who are pregnant as a result of ART treatment provided by the ART provider using a gamete of a the donor.

4. Clause 12(1) of the Regulation relates to information that must be collected from a gamete provider who provides gametes only for their own use or use by the gamete providers spouse. The Clause states that an ART provider, who obtains a gamete from a gamete provider must obtain the gamete provider's full name, date of birth and residential address.

5. Clause 12(2) relates to information that must be collected about a gamete provider who provides donated gametes to be used by a person other than the gamete provider or the gamete provider's spouse. The Clause requires ART providers to collect a range of information, including any medical history or genetic test results of the donor or the donor's family that are relevant to the future health of a person undergoing ART treatment involving the use of the donated gamete or any offspring born as a result of that treatment or any descendent of such offspring.

6. Clause 13(1) provides information about the records to be kept by an ART provider for the purposes of section 31(1)(a)(i) of the ART Act. Accordingly, Clause 13 ensures that ART providers will keep proper records of donors and offspring born as a result of ART treatment using donated gametes.

7. Clause 14 states that for the purposes of section 33(5) of the Act, an ART provider must provide to the Director-General, within 2 months after the birth of a live offspring born as a result of ART treatment, provided by the ART provider, using a donated gamete: the records in relation to the gamete that the ART provider is required to keep under section 31 (1)(a)(i) and (iii) of the Act, and the records in relation to the offspring that the ART provider is required to keep under section 31(1)(c) of the Act. Clause 14 prescribes a maximum penalty of 10 penalty units.

8. Clause 15 provides the information that is to be entered into the central ART donor register for the purposes of section 33(2) of the ART Act and Clause 16 provides for the disclosure of information on the central ART donor register. Clause 16 specifies the information that must be disclosed to adult offspring, parents and donors.

9. The Committee notes that these provisions in Part 3 of the Regulation, which allow personal information to be collected and entered into a central ART donor register as well as disclosed to certain individuals may be considered to impact on the rights of individuals to privacy. However, given that the purpose of the Regulation is to benefit children who are conceived as a result of ART treatment through the use of donor gametes, the Committee considers that an appropriate balance has been achieved through balancing this right with the needs of donor conceived children, parents, donors, ART providers.

Strict Liability

10. Clause 18, Part 4 of the Regulation also provides that: “For the purposes of Clause 3 (2) of Schedule 1 to the Act, an ART provider must not store a donated gamete that was obtained from a donor before the commencement of section 25 of the Act for any longer than 10 years after the date the gamete was obtained from the donor or such longer period as may be authorised by the Director-General under this clause.” The maximum penalty is 10 penalty units. The Committee has concerns with respect to the strict liability provisions in Clause 18 (as well as Clause 14) may trespass unduly on rights and liberties.

11. However, the Committee notes that strict liability will not always 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] Accordingly, the Committee is of the view that given the maximum penalties imposed by the Clauses are 10 penalty units personal rights and liberties are not unduly trespassed by these provisions.

Fees

12. The Regulation requires a number of fees to be paid in Clauses 4 ($2,500 registration fee for the purposes of section 7(2) of the Act), Clause 6 (a prescribed annual registration of $1,770) and Clause 17 (fees of $50 for applications or notices).

13. However, the Committee notes the comments in the Regulatory Impact Statement with respect to the costs associated with the Regulation. The Regulatory Impact Statement provides that: “By requiring a registration fee to be paid, the Regulation imposes direct costs on ART providers. However, the registration fee is reflective of the costs involved in processing applications and maintaining the ART provider register.” Further, in relation to the application or submission of a notice to access information, the Regulatory Impact Statement provides that “this cost is a minimal amount that will assist the Department in recouping the costs incurred in processing applications and notices made under Part 3”.

14. There are also a number of costs that will be imposed on ART providers through the requirements in the Regulation to collect and record information about donors and offspring. The Regulatory Impact Statement provides that “while the ART Regulation imposes some costs on ART providers and consumers, the cost is minimal and necessary in order to ensure that the ART Regulation assist in helping the ART to achieve its objectives of preventing the commercialisation of human reproduction and protecting the interests of persons born as a result of ART treatment, person providing gametes and women undergoing ART treatment”. Accordingly, the Committee is of the view that the costs imposed by the Regulation are reasonable in order to achieve the objectives of the ART Act and Regulation.

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

Criminal Procedure Amendment (Briefs of Evidence) Regulation 2009

Recommendation

That the Committee for the purposes of s 9(1A) of the *Legislation Review Act 1987* resolves to report to Parliament in relation on this Regulation.

Grounds for comment

Personal rights/liberties	The Committee has concerns that this Regulation may trespass unduly on individual rights and liberties, for example principles of procedural fairness and the right to a fair trial.
Business impact	
Objects/spirit of Act	The object of the Regulation is to extend until 2011, the operation of a trial scheme under Clause 24 of the Criminal Procedure Regulation 2005 (which lists the kind of proceedings for which prosecutors are not required to serve briefs of evidence) and Clause 24A of that Regulation (which allows prosecutors to give short briefs of evidence to defendants in certain circumstances).
Alternatives/effectiveness	As noted in previous Digests, the Regulation may not be effective and may lead to an increase in the number of defended hearings in the Local Court; an increase in court time set aside for defended hearings; the need for police and witnesses to attend court to give evidence and an increase in the number of guilty pleas on the hearing date.
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	Criminal Law Review Division, Attorney General's Department NSW

Explanatory Note

The object of this Regulation is to extend from 30 June 2009, until 1 July 2011 the operation of the trial scheme under Clause 24 of the Criminal Procedure Regulation 2005, which lists the kinds of proceedings for which prosecutors are not required to serve briefs of evidence) and clause 24A of that Regulation (which allows prosecutors to give short briefs of evidence to defendants in certain circumstances). The Regulation is made under sections 4 (the general regulation making power), sections 183 and 187 of the Criminal Procedure Act 1986.

Comment

1. The initial amendments to the Criminal Procedure Regulation 2005, through the Criminal Procedure Amendment (Briefs of Evidence) Regulation 2007 introduced a trial scheme relating to short briefs of evidence. The Criminal Procedure Amendment (Briefs of Evidence) Regulation 2008 continued the trial scheme for a further 12 months until June 2009.

2. The initial Regulatory amendments introduced short briefs of evidence in certain circumstances (Clause 24A). The object of the amendment was to reduce the time spent by police officers in producing statements of non-material witnesses for inclusion in certain briefs of evidence.

3. The amendments applied only to proceedings for summary offences, including indictable offences in Table 2 of Schedule 1 of the Criminal Procedure Act 1986, for which a brief of evidence is required to be served under section 183 of the Act. A detailed outline of the trial scheme and relevant provisions was provided in Digest No 11 of 2008, and Digest No 8 of 2007.

4. In Digest No 8 of 2007, the Committee expressed concerns that the Criminal Procedure Amendment (Briefs of Evidence) Regulation 2007 would trespass unduly on personal rights and liberties, for example principles of procedural fairness and the right to a fair trial. The Committee expressed similar concerns in Digest no 11 of 2008 in relation to the Criminal Procedure Amendment (Briefs of Evidence) Regulation 2008, which extended the initial 12 month trial period to 30 June 2009.

5. The Criminal Procedure Amendment (Briefs of Evidence) Regulation 2009 extends the operation of this trial period until 2011. Accordingly, the Committee expresses the same concerns that it did in relation to the Criminal Procedure Amendment (Briefs of Evidence) Regulation 2008 in Digest No 11 of 2008, particularly given the extension of the trial scheme for a further three year period until 2011. The Committee is particularly concerned that the Regulation impacts on the rights of accused to procedural fairness and the right to a fair trial.

Fisheries Management (Aquaculture) Amendment Regulation 2009

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to report to Parliament on the Regulation

Grounds for comment

Personal rights/liberties	Ill-defined and wide powers which may make rights and liberties unduly dependent upon insufficiently defined administrative powers: The refunds (for the appropriate proportion instead of the discretionary partial or full refund) would have been mandatory before the commencement of the new clause 41 (5)(b) in the amendment of the *Fisheries Management (Aquaculture) Regulation 2007*. The Committee notes that this amendment will, instead give the Minister for Primary Industries the discretion to partly or fully refund the proportion of rent, contributions or other amounts paid in advance by the holder of an aquaculture lease when the lease is terminated. The Committee is concerned that this Ministerial discretion for either partial or full refund could be ill-defined and wide, which may make the rights of such lease holders upon termination of lease, unduly dependent on insufficiently defined administrative powers. The Committee is also concerned that this discretionary partial or full refund could deprive aquaculture lease holders of their right to an appropriate amount of refund if such amounts have been paid in advance for a period after the date of termination. This is in contrast to the former provision which made it mandatory under these circumstances to refund the appropriate proportion.
Business impact	
Objects/spirit of Act	

Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	

Explanatory Note

The objects of this Regulation are as follows:

(a) to allow certain activities (including small scale ornamental fish breeding and keeping fish for live sale in certain circumstances) to be undertaken without an aquaculture permit,
(b) to make further provision in relation to annual contributions paid by class A aquaculture permit holders to the Minister for Primary Industries as security,
(c) to remove the 3-month limit on the duration of aquaculture permits for charitable or non-profit making purposes,
(d) to give the Minister for Primary Industries the discretion to refund all or part of any rent or contributions paid in advance by the holder of an aquaculture lease when the lease is terminated (at present, refunds are mandatory in certain circumstances).

This Regulation is made under the *Fisheries Management Act 1994*, including sections 144, 152, 165 and 289 (the general regulation-making power).

Comment

Ill-defined and wide powers which may make rights and liberties unduly dependent upon insufficiently defined administrative powers:

1. The Committee is concerned that Schedule 1 [7] which amends the *Fisheries Management (Aquaculture) Regulation 2007*, will omit clause 41 (5)(b) and instead insert the new clause 41 (5)(b) on how rent for an aquaculture lease is to be calculated by giving the Minister for Primary Industries the discretion to refund all or part of any rent or contributions paid in advance by the holder of an aquaculture lease when the lease is terminated.

2. The new clause 41 (5)(b) reads: *may*, if any rent, contributions or other amounts have been paid to the Minister for a period occurring after the date of termination, *partly or fully refund the proportion of* rent, contributions or other amounts paid in advance.

3. This is contrasted with the former clause 41 (5) which reads: If any aquaculture lease is terminated for any reason, the Minister: (b) *must*, if any rent, contributions or other amounts have been paid to the Minister for a period occurring after the date of termination, *refund the appropriate proportion* of rent, contributions or other amounts paid in advance.

4. The Committee notes that this amendment will give the Minister for Primary Industries the discretion to partly or fully refund the proportion of rent, contributions or other amounts paid in advance by the holder of an aquaculture lease when the lease is terminated. The refunds (for the appropriate proportion instead of the discretionary partial or full refund) would have been mandatory under these circumstances before the commencement of the new clause 41 (5)(b).

5. The Committee is concerned that this Ministerial discretion for either partial or full refund could be ill-defined and wide, which may make the rights of such lease holders upon termination of lease, unduly dependent on insufficiently defined administrative powers.

6. The Committee is also concerned that this discretionary partial or full refund could deprive aquaculture lease holders of their right to an appropriate amount of refund if such amounts have been paid in advance for a period after the date of termination. This is in contrast to the former provision which made it mandatory under these circumstances to refund the appropriate proportion.

7. The Committee has resolved to refer this report to Parliament on the Regulation.

Law Enforcement (Powers And Responsibilities) Amendment (Criminal Organisations) Regulation 2009

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) refer to Parliament with regard to the following concerns in relation to undue trespasses on personal rights to privacy and property, and in relation to the broad covert search warrant powers that may trespass on personal rights and liberties, especially of those persons who are not suspected of serious criminal activity.

Grounds for comment

Personal rights/liberties	Following on from the Committee's Digest report number 6 of 2009, the Committee still holds concerns with the lowered threshold for applying for criminal organisation search warrants from 'reasonable belief' to 'reasonable suspicion', along with the longer warrant duration of 7 days rather than the 3 days period. This may lead to oppressive powers where the rights to privacy and enjoyment of property could be unduly trespassed. The Committee still holds concerns following on from its Digest report number 2 of 2009, where the Committee considered that the broad covert search warrant powers significantly trespassed on personal rights and liberties, particularly in regard to persons not suspected of serious criminal activity.
Business impact	
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 prescribe the form of criminal organisation search warrants and related documents under Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (***the Act***) as a consequence of amendments made to the Act by the *Criminal Organisations Legislation Amendment Act 2009*. This Regulation also makes some miscellaneous amendments in respect of other kinds of search warrants under the Act.

This Regulation is made under the *Law Enforcement (Powers and Responsibilities) Act 2002*, including sections 66, 67 and 238 (the general regulation-making power).

Comment

1. The Committee has referred to Parliament the concerns raised in relation to the *Criminal Organisations Legislation Amendment Bill 2009* when that Bill was introduced in its Digest report number 6 of 12 May 2009. This Regulation is based on the amendments made to the *Law Enforcement (Powers and Responsibilities) Act 2002* by the *Criminal Organisations Legislation Amendment Act 2009*.

2. Following on from the Committee's Digest report number 6 of 2009, the Committee still holds concerns with the lowered threshold for applying for criminal organisation search warrants from 'reasonable belief' to 'reasonable suspicion', along with the longer warrant duration of 7 days rather than the 3 days period, which may lead to oppressive powers where the rights to privacy and enjoyment of property could be unduly trespassed.

3. In its Digest report number 2 of 10 March 2009, the Committee also referred to Parliament and wrote to the NSW Attorney General in relation to the *Law Enforcement (Powers And Responsibilities) Amendment (Search Powers) Bill 2009* when that Bill was introduced.

4. The *Law Enforcement (Powers And Responsibilities) Amendment (Search Powers) Act 2009* amended the *Law Enforcement (Powers and Responsibilities) Act 2002* including Part 5, to enable Supreme Court judges to issue covert search warrants that, in addition to authorising the exercise of powers for standard search warrants, also enable specially authorised police officers and staff of the NSW Crime Commission and the Police Integrity Commission, to enter and search premises covertly for the purposes of investigating serious criminal offences. Service of occupier's notices in relation to covert search warrants may also be deferred for up to 6 months (with possible extensions up to 3 years) after entry to the premises. Consequential amendments were made to the *Law Enforcement (Powers and Responsibilities) Regulation 2005*. This Regulation is a consequence based on these amendments.

5. The Committee still holds concerns following on from its Digest report number 2 of 2009, where the Committee considered that the broad covert search warrant powers significantly trespassed on personal rights and liberties, particularly in regard to persons not suspected of serious criminal activity.

6. Therefore, the Committee refers this Regulation to Parliament with regard to the above concerns in relation to undue trespasses on personal rights to privacy and property, and in relation to the broad covert search warrant powers that may trespass on personal rights and liberties, especially of those persons who are not suspected of serious criminal activity.

Liquor Amendment (Special License Conditions) Regulation 2009

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the Legislation Review Act 1987, resolves to refer the Regulation to Parliament.

Grounds for comment

Personal rights/liberties	The Committee notes that provision of a strict liability offence in proposed Clause 6 of the Regulation, with a maximum penalty of 100 penalty units or imprisonment for 12 months (or both) may be considered to be an undue trespass on personal rights and liberties, in particular those of licensees.
Business impact	The Committee notes that the special conditions in the Regulation, in particular Clause 6 may have an adverse impact on the business of the affected premises, particularly if other licensed premises in the same area are not subject to the same special conditions.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	

Explanatory Note

This Regulation amends the special licence conditions applying to the licensed premises specified in Schedule 4 to the *Liquor Act 2007* so as:

(a) to provide the licensee of any such premises with the option of distributing free drinking water or food to patrons, and actively encouraging the consumption of water, during the 10-minute periods in every hour after midnight in which the licensee would otherwise be required to stop selling or supplying liquor to patrons,

(b) to require the licensee to record in a register the details of certain incidents (such as those involving violence or anti-social behavior) occurring in or about the licensed premises during the standard trading period (e.g. before midnight),

(c) to make it clear that an exemption from the special licence conditions may apply to a specified part of licensed premises rather than to the whole of the licensed premises.

The new condition relating to the standard trading hours incident register does not start until 1 December 2009. Incident registers for all late trading venues (and not just those specified in Schedule 4 to the Act) are already required under section 56 of the Act in relation to incidents occurring outside the standard trading period. The Regulation is made under the *Liquor Act 2007*, including section 11 (1A).

Comment

1. Schedule 1 [1], proposed Clause 6 states that for a continuous period of 10 minutes during each hour of the restricted service period:

   (a) the sale or supply of liquor on declared premises must cease, or
   (b) the licensee must:
      (i) distribute free drinking water or food (or both) to patrons; and
      (ii) actively encourage patrons to consume water.

2. The Committee is of the view that the inclusion of the word “must” in proposed Clause 6(a) and (b) directs licensees to comply with the special conditions, rather than providing licensees with an option whether to comply with the special conditions with respect to the distribution of free drinking water and food.

3. Section 11(2) of the Liquor Act 2007 states that a licensee must comply with any conditions to which the licence is subject. The maximum penalty is 100 penalty units or imprisonment for 12 months (or both).

4. Section 11(3) also provides that a condition to which a licence is subject includes any provision of this Act that imposes a requirement or restriction (other than as an offence) on or in relation to the licence, licensee or licensed premises concerned.

5. The Committee has noted previously that the imposition of such special conditions appear to impose strict liability.[17] However, the imposition of strict liability may be considered reasonable in some cases. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community; the potential penalty and the availability of any defences or safeguards.[18]

6. The Committee is particularly concerned that maximum penalty provided in s 11(2) of the Liquor Act 2007, namely 100 penalty units or 12 months imprisonment (or both) will unduly trespass on personal rights and liberties. Accordingly, the Committee refers proposed Clause 6 of the Regulation to Parliament for its consideration.

7. Finally, the Committee notes that the special conditions may have the potential to adversely impact the business of the affected premises, particularly if other competing licensed premises in the area or vicinity are not subjected to the same special conditions.

[17] Liquor Amendment (Special License Conditions) Regulation 2008, Digest No 1 of 2009 at p 43.
[18] Legislation Review Committee, Strict and Absolute Liability: Responses to Discussion Paper, Report No 6, 17 October 2006, p 4.

Public Health (Tobacco) Regulation 2009

Recommendation

The Committee for the purposes of s 9(1A) of the Legislation Review Act 1987, resolves that that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	There are a number of strict liability offence provisions in the Regulation that may be considered to unduly trespass on personal rights and liberties, for example Clauses 5, 6 16 and 17. However, the maximum penalty imposed by the Regulation ranges from 20 to 25 penalty units, with no terms of imprisonment. Accordingly, the Committee is of the view that these provisions do not unduly impact on personal rights and liberties.
Business impact	The strict liability offences and requirements in the Regulation may be considered to adversely impact businesses. The Committee also notes the prescription of fees in Schedule 4. However, the Committee considers that the appropriate balance has been achieved between the Regulation's impact on business and the public interest of the legislation, in particular the protection of children from tobacco advertising.
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 prescribe the following matters for the purposes of the *Public Health (Tobacco) Act 2008*:
(a) requirements in relation to advertising on packaging of tobacco products,
(b) requirements in relation to advertising of tobacco products on retail premises, including the manner in which prices of tobacco products may be displayed,
(c) health warnings and other notices and statements that must or may be displayed at retail premises at which tobacco products are sold and on tobacco vending machines,
(d) savings and transitional provisions consequent on the enactment of that Act, including requirements in relation to the display of tobacco products and non-tobacco smoking

products by existing retailers of those products during lead-in periods allowed by that Act in relation to certain new offences,
(e) the fee for an application to be classified as a specialist tobacconist for the purposes of the savings and transitional provisions and the manner of making such applications,
(f) the form of giving notice of the commencement of tobacco retailing,
(g) offences against that Act for which penalty notices may be issued.

This Regulation is made under the *Public Health (Tobacco) Act 2008*, including sections 9 (2) (c), 14 (1), 16, 39 (2) and 58 (the general regulation-making power) and clauses 1 and 5 of Schedule 1.

Comment

Strict Liability

1. There are a number of strict liability offences provided by clauses in this Regulation. For example, Clause 5 states that a person who causes or permits a tobacco product to be packed in a package that contains any statement alluding to sporting, sexual or business success; or depicts, wholly or in part, people or cartoon characters; or depicts scenes or activities, or contains words representations or illustrations, that have appeal to children or young persons, or displays any hologram is guilty of an offence. The maximum penalty imposed by Clause 5 is 20 penalty units.

2. Clause 6 also provides requirements with respect to health warnings on packages containing tobacco products with a maximum penalty of 20 penalty units and Part 4 has a number of strict liability offences relating to health warnings at point of sale (Clause 16); and notices regarding sales to minors at point of sale (Clause 17), both with a maximum penalty of 25 penalty units. Schedule 3 also deals with penalty notice offences under the Act.

3. The Committee considers that the imposition of strict liability will not always unduly trespass on personal rights and liberties. Accordingly, it may be relevant to consider the impact of the offence on the community; the penalty imposed and the availability of any defences or safeguards.[19]

4. The Committee is of the view that many of the strict liability provisions have been included to encourage compliance with provisions in the Regulation that aim to protect children.[20] As stated in the Regulatory Impact Statement, Clause 5 of the Regulation ensures that images that may be appealing to children (such as cartoon characters) may not be displayed on packets, and other words and images that may appeal to young people, such as those that allude to sexual or sporting success, may not be used on tobacco packets or cartons.

5. The Committee also notes that the maximum penalty imposed under the Regulation range from 20 and 25 penalty units (with no terms of imprisonment). Accordingly, the Committee is of the view that the strict liability provisions in the Regulation do not unduly trespass on personal rights and liberties.

[19] Legislation Review Committee, Strict and Absolute Liability: Responses to Discussion Paper, Report No 6, 17 October 2006, p 4.
[20] See also Public Health (Tobacco) Bill 2008, Legislation Review Digest, No 11, 21 October, 2008 at p 39.

Costs

6. The Committee also notes that the Regulatory Impact Statement comments on the business impact of the provisions in the Regulation that relate to tobacco advertising. As stated in the Regulatory Impact Statement, the costs associated with the proposed regulation fall into four broad categories:

   - the costs associated with restrictions on advertising;
   - costs associated with displaying prescribed signs;
   - costs associated with tobacco retailers notifying the Director-General of Health of their existence and with specialist tobacconists applying for the Director-General's designation of them as specialist tobacconists;
   - and other costs.

7. The proposed Regulation is designed to support the objects of the Public Health (Tobacco) Act 2008, which include to reduce the incidence of smoking and other consumption of tobacco products and non-tobacco products, particularly by young people. It recognises that the consumption of tobacco products adversely impacts on the health of the people of NSW and places a substantial burden on the State's health and financial resources.

8. The above objects are achieved through the Regulation by regulating the packaging, advertising and display of tobacco products and non-tobacco smoking products; prohibiting the supply of those products to children and reducing the exposure of children to environmental tobacco smoke.

9. The Committee is of the view that although costs will be associated with the Regulation to businesses (in particular tobacco retailers), the appropriate balance has been achieved between the Regulation's impact on business and the community benefits of the Regulation, in particular the protection of children from tobacco advertising.

Rail Safety (Offences) Amendment Regulation 2009

Recommendation

That the Committee for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to review and report to Parliament on the Regulation.

Grounds for comment

Personal rights/liberties	Strict Liability: The imposition of strict liability in Clause 35 may be seen as contrary to the right to the presumption of innocence. However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. Although the Committee has concerns regarding the impact of the provisions on juvenile offences, it notes that Clause 35 does not include any penalties of imprisonment. The Committee is of the view that by limiting the penalties to a maximum of 20 (Clause 35(1)) and 10 penalty units (Clause 35(2)), personal rights and liberties are not unduly trespassed.
Business impact	
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 replace the graffiti and vandalism offence in the *Rail Safety (Offences) Regulation 2008* with an offence relating to vandalism and fixing posters. Offences relating to graffiti are now contained in the *Graffiti Control Act 2008*. A consequential amendment is also made to enable a rail safety officer to direct a person who is damaging or defacing property by means of a graffiti implement on a train or railway land to leave the train or land. This Regulation is made under the *Rail Safety Act 2008*, including sections 131 and 174 (the general regulation-making power).

Comment

1. Proposed Clause 35(1) provides that a person must not affix any poster to or destroy or damage, any train, any part of the infrastructure of a railway or any property on railway land or monorail works. The maximum penalty for breaching Clause 35(1) is 20 penalty units ($2200). Proposed Clause 35(2) provides that a person must not,

without reasonable excuse, have in his or her possession on any train, any part of a railway, on any railway land or on any part of monorail works any thing intended for use in damaging property. The maximum penalty for breaching Clause 35(2) is 100 penalty units ($1100).

2. The Committee notes its comments in Digest No 13 of 2009 in relation to the *Graffiti Control Bill 2009*. The Committee made comments in Digest No 13 of 2009 regarding offence provisions such as ss 4 and 5, which include a maximum penalty of imprisonment (or a monetary penalty). It commented on the appropriateness of these penalties, particularly in cases when offenders are juveniles. However, the Committee was of the view that the monetary penalties imposed by these sections were sufficiently moderate and did not unduly trespass on personal rights and liberties.

3. Proposed Clauses 35(1) and 35(2) of the Regulation are both strict liability offences that with a maximum monetary penalty of 20 penalty units ($2200) (Clause 35(1) and 10 penalty units ($1100) (Clause 35(2)).[21] There is no penalty of imprisonment for an offence under Clauses 35(1) or 35(2) of the Regulation.

4. The imposition of strict liability is often seen as contrary to the fundamental right to be presumed innocent until proven guilty as a person is presumed to have committed the offence irrespective of their intention. Article 14(2) of the *International Covenant on Civil and Political Rights* provides that: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.

5. However, 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.[22]

6. The Committee previously held concerns expressed in Digest No 13 of 2009 about the penalties imposed by the *Graffiti Control Bill 2009,* in particular the appropriateness of a penalty of imprisonment on juvenile offenders. However, the Committee notes that this Regulation does not impose penalties of imprisonment. It also considers that the maximum monetary penalties have been set at an appropriate level, having regard to the objects of the Regulation. Accordingly, the Committee is of the view that, given that the maximum penalties imposed are 20 penalty units (Clause 35(1)) and 10 penalty units (Clause 35(2)), there is no undue trespass on personal rights and liberties by the Regulation.

[21] Legislation Review Committee, Strict and Absolute Liability: Responses to the Discussion Paper, Report No 6, 17 October 2006.

SECTION B: POSPONEMENT OF REPEAL OF REGULATIONS

Notification of Postponement

S. 11 Subordinate Legislation Act 1989

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF THE ENVIRONMENT PLANNING AND ASSESSMENT REGULATION 2000 (4)

…

File Ref: LRC 315

Minister for Planning

Issues

1. By correspondence received 25 June 2009, the Minister for Planning advised the Committee that she has written to the Premier requesting a postponement of 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 2010.

4. The need for the postponement has arisen from recent and proposed changes to the Regulation in connection with the staged implementation of the *Environmental Planning and Assessment Amendment Act 2008* and other reforms as outlined in Attachment A to the Minister's correspondence.

5. The Minister wrote that there are exceptional circumstances to justify a further one-year postponement, including an extension necessary to allow the current suite of planning reforms to be implemented. A one year extension would also permit consideration in a review of the Regulation of the outcomes of the Legislative Council Inquiry into the NSW Planning Framework, and a current review concerning economic growth and competition through the planning system. A proposed timetable for a full review of the EP&A Regulation is provided in Attachment B to the Minister's letter.

NSW | The Hon **Kristina Keneally** MP
Minister for Planning | Minister for Redfern Waterloo

Mr Allan Shearan MP
Committee Chairperson
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Y09/1227

Dear Mr Shearan

This letter is to provide the Legislation Review Committee with notice of my intention to seek a further one year postponement of the repeal of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation).

I have written to the Premier requesting a postponement of the repeal of the EP&A Regulation until 1 September 2010. Under the Subordinate Legislation Act 1989, the Regulation was scheduled for staged repeal on 1 September 2006. However, due to ongoing planning reforms, three one year extensions have been granted, postponing the repeal date to 1 September 2009.

I consider there are exceptional circumstances to justify a further one-year postponement. Most importantly, I consider an extension necessary to allow the current suite of planning reforms to be implemented, including giving time for stakeholders to become familiar with, and benefit from, the improvements those reforms make to the planning system.

Recent and proposed changes to the Regulation in connection with staged implementation of the Environmental Planning and Assessment Amendment Act 2008 and other reforms, are outlined in Attachment A.

A one year extension would also permit consideration in a review of the Regulation of the outcomes of the Legislative Council Inquiry into the NSW Planning Framework, and a current review concerning economic growth and competition through the planning system (for which the Minister for Regulatory Reform and I have recently released a Discussion Paper *Promoting Economic Growth and Competition through the Planning System*).

A proposed timetable for a full review of the EP&A Regulation, should the requested one-year postponement be granted, is attached (Attachment B).

Yours sincerely

The Hon Kristina Keneally MP
Minister for Planning
Minister for Redfern Waterloo

Attachments:
A. Implementing Planning Reforms: Amendments introduced in 2008-2009 and Proposed amendments to be introduced in July 2009
B. Proposed Timetable for Review and Preparation of a Draft EP&A Regulation 2010

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office@keneally.minister.nsw.gov.au

Notification of Postponement

S. 11 Subordinate Legislation Act 1989

Paper No: 5208

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF THE GAMING MACHINES REGULATION 2002 (4)

...

File Ref: LRC 56

Minister for Gaming and Racing

Issues

1. By correspondence received 27 July 2009, the Minister for Gaming and Racing advised the Committee that he has written to the Premier requesting a postponement of 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

Gaming Machines Regulation 2002

3. The Minister has proposed the postponement of the repeal of the above regulation for the fourth time, until 1 September 2010.

4. The Minister advised that on 26 May 2009, he wrote to the Premier requesting that the repeal of this regulation be postponed until 1 September 2010 as the Parliamentary Counsel's Office (PCO) advised that they would be unable to provide a suitable consultation draft of the proposed regulation in time for the consultation requirements of the *Subordinate Legislation Act 1989* and Better Regulation Principles to be adequately met. This was due to the commitment of resources on several priority Bill matters for the Budget Session of the Parliament.

MINISTER FOR GAMING AND RACING
MINISTER FOR SPORT AND RECREATION

Mr Allan Shearan MP
Chair, Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan,

The operation of the *Subordinate Legislation Act 1989* will bring about the staged repeal of the *Gaming Machines Regulation 2002* on 1 September 2009.

On 26 May 2009, I wrote to the Premier requesting that the repeal of this Regulation be postponed until 1 September 2010 as the Parliamentary Counsel's Office (PCO) advised that they would be unable to provide a suitable consultation draft of the proposed Regulation in time for the consultation requirements of the *Subordinate Legislation Act 1989* and Better Regulation Principles to be adequately met. This was due to the commitment of resources on several priority Bill matters for the Budget Session of the Parliament.

The Department of Premier and Cabinet has subsequently indicated that it will recommend to the Minister for Regulatory Reform that the proposed postponement be approved, subject to the Legislation Review Committee being notified.

As this will be the fourth occasion that the Regulation will be postponed, I am writing to advise you of the proposed postponement in accordance with section 11(4) of the *Subordinate Legislation Act 1989*.

Yours sincerely

Kevin Greene MP
Minister for Gaming and Racing
Minister for Sport and Recreation

Level 36, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 Telephone: (02) 9228 5331 Facsimile: (02) 9228 5549

Appendix 1: Index of Bills Reported on in 2009

	Digest Number
Aboriginal Land Rights Amendment Bill 2009	10
Appropriation Bill 2009	9
Appropriation (Budget Variations) Bill 2009	4
Appropriation (Parliament) Bill 2009	9
Appropriation (Special Offences) Bill 2009	9
Associations Incorporation Bill 2009	2
Barangaroo Delivery Authority Bill 2009	2
Biofuel (Ethanol Content) Amendment Bill 2009	3
Casino Control Amendment Bill 2009	9
Children and Young Persons (Care and Protection) Amendment Bill 2009	6
Children and Young Persons (Care and Protection) Amendment (Children’s Employment) Bill 2009	2
Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009	2
Civil Procedure Amendment (Transfer of Proceedings) Bill 2009	6
Coroners Bill 2009	8
Courts and Other Legislation Amendment Bill 2009	8
Crimes (Administration of Sentences) Amendment Bill 2009	10
Crimes (Administration of Sentences) Amendment (Private Contractors) Bill 2009	2
Crimes (Appeal and Review) Amendment Bill 2009	2
Crimes (Criminal Organisations Control) Bill 2009	5
Crimes (Forensic Procedures) Amendment Bill 2009	7
Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Bill 2009	5
Criminal Legislation Amendment Bill 2009	6

	Digest Number
Criminal Organisations Legislation Amendment Bill 2009	6
Education Amendment Bill 2009	3
Education Amendment (Educational Support For Children With Significant Learning Difficulties) Bill 2008*	1
Education Amendment (Publication of School Results) Bill 2009	9
Electricity Supply Amendment (Energy Savings) Bill 2009	7
Electricity Supply Amendment (GGAS Abatement Certificates) Bill 2009	8
Energy Legislation Amendment (Infrastructure Protection) Bill 2009	7
Fisheries Management Amendment Bill 2009	10
Food Amendment (Meat Grading) Bill 2008*	1
Game and Feral Animal Control Amendment Bill 2009	8
Garling Inquiry (Clinician and Community Council) Bill 2009*	5
Gas Supply Amendment (Ombudsman Scheme) Bill 2009	5
Government Information (Information Commissioner) Bill 2009	9
Government Information (Public Access) Bill 2009	9
Government Information (Public Access) (Consequential Amendments and Repeal) Bill 2009	9
GreyHound Racing Bill 2009	5
Harness Racing Bill 2009	5
Hawkesbury-Nepean River Bill 2009	4
Health Legislation Amendment Bill 2009	4
Heritage Amendment Bill 2009	7
Home Building Amendment (Insurance) Bill 2009	6
Hurlstone Agricultural High School Site Bill 2009	3, 6
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009	4
Land Acquisition (Just Terms Compensation) Amendment Bill 2009	7

	Digest Number
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	2
Liquor Amendment (Special License) Conditions Bill 2008	1
Local Government Amendment (Planning and Reporting) Bill 2009	10
Mining Amendment (Safeguarding Land And Water) Bill 2009*	7
Motor Accidents Compensation Amendment Bill 2009	6
Motor Accidents (Lifetime Care And Support) Amendment Bill 2009	7
Motor Sports (World Rally Championship) Bill 2009	9
NSW Lotteries (Authorised Transaction) Bill 2009	8
NSW Trustee and Guardian Bill 2009	8
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	2
National Parks and Wildlife (Broken Head Nature Reserve) Bill 2009	9
Occupational Licensing Legislation Amendment (Regulatory Reform) Bill 2009	8
Parliamentary Remuneration Amendment (Salary Packaging) Bill 2009	10
Parking Space Levy Bill 2009	3
Personal Property Securities (Commonwealth Powers) Bill 2009	9
Racing Legislation Amendment Bill 2009	5
Real Property and Conveyancing Legislation Amendment Bill 2009	4
Residential Tenancies Amendment (Mortgagee Repossessions) Bill 2009	8
Road Transport (General) Amendment (Consecutive Disqualification Periods) Bill 2009	10
Road Transport Legislation Amendment (Traffic Offence Detection) Bill 2009	9
Rookwood Necropolis Repeal Bill 2009	8
Rural Lands Protection Amendment Bill 2009	8
State Emergency and Rescue Management Amendment Bill 2009	8
State Emergency Service Amendment Bill 2009	9

	Digest Number
State Revenue Legislation Amendment Bill 2009	9
State Revenue Legislation Further Amendment Bill 2009	9
Statute Law (Miscellaneous Provisions) Bill 2009	9
Surveillance Devices Amendment (Validation) Bill 2009	4
Succession Amendment (Intestacy) Bill 2009	5
Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008	1
Transport Administration Amendment (CountryLink Pensioner Booking Fee Abolition) Bill 2009	3
Western Lands Amendment Bill 2008	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1		
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12	
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	6/02/09		9	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07	13/2/09	1		2
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		12/06/08		8	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7		
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13	
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	5/01/09		14	2
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07	22/01/09	1		2
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8
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		
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Aboriginal Land Rights Amendment Bill 2009	N, R		N, R	N	
Associations Incorporation Bill 2009		N, R			N, R
Barangaroo Delivery Authority Bill 2009	N				
Biofuel (Ethanol Content) Amendment Bill 2009	N			N	N, R
Courts and Other Legislation Amendment Bill 2009	R, N				
Crimes (Administration of Sentences) Amendment Bill 2009	R, N, C	N, R	N, R		
Crimes (Criminal Organisations Control) Bill 2009	R, N		R		
Crimes (Forensic Procedures) Amendment Bill 2009	N				
Criminal Legislation Amendment Bill 2009		N			
Criminal Organisations Legislation	R, N			N	
Electricity Supply Amendment (GGAS Abatement Certificates) Bill 2009	N				
Fisheries Management Amendment Bill 2009	R, N			N	
Game and Feral Animal Control Amendment Bill 2009	R, N				
Gas Supply Amendment (Ombudsman Scheme) Bill 2009				N	
GreyHound Racing Bill 2009				N	
Harness Racing Bill 2009				N	
Hawkesbury-Nepean River Bill 2009				N	
Health Legislation Amendment Bill 2009	N				
Heritage Amendment Bill 2009	N			N, R	
Home Building Amendment (Insurance) Bill 2009	N				
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009				N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Land Acquisition (Just Terms Compensation) Amendment Bill 2009	N				
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	N, R, C	R			
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
Motor Accidents Compensation Amendment Bill 2009				N	
Motor Sports (World Rally Championship) Bill 2009	N				
NSW Lotteries (Authorised Transaction) Bill 2009	R, N				
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	N		N	N	
Occupational Licensing Legislation Amendment (Regulatory Reform) Bill 2009	R, N				
Parking Space Levy Bill 2009				N	N, C
Racing Legislation Amendment Bill 2009				N	
Road Transport (General) Amendment (Consecutive Disqualification Periods) Bill 2009	N			N	
Real Property and Conveyancing Legislation Amendment Bill 2009	N, R				
Succession Amendment (Intestacy) Bill 2009	N			N	
Surveillance Devices Amendment (Validation) Bill 2009	N, R				
Western Lands Amendment Bill 2008				R	

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

Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12	
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10	