

SUMMARY OF CONCLUSIONS

1. Aboriginal Land Rights Amendment Bill 2009

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| 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. |
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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

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| 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. |
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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.

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| 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. |
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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:

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| 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 <i>Sleiman v Commissioner of Corrective Services & Anor; Hamzy v Commissioner of Corrective Services & Anor</i> [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

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| 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

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

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| 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 <i>International Covenant on Economic, Social and Cultural Rights</i> . 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. |
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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*:

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| 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 <i>Road Transport (Driver Licensing) Act 1998</i> 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 <i>Road Transport (General) Act 2005</i> 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:

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| 23. | The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the <i>Legislation Review Act 1987</i> . |
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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.
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**2. Reply To Correspondence On Agreement In Principle /
Second Reading Speeches And Explanatory Materials
Accompanying Bills**

The Committee thanks the Minister for his reply.
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