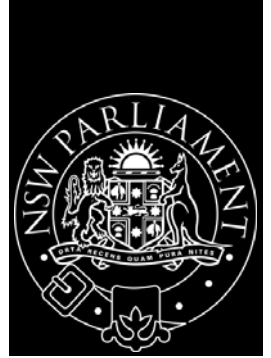


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 8 of 2007

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations:

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought

information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 2007

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

Appendix 2: Index of Ministerial Correspondence on Bills for 2007

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

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

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

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

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

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Casino, Liquor and Gaming Control Authority Bill 2007

Self-incrimination: Part 4

18. The Committee will always be concerned if a Bill removes or restricts a person's right against self-incrimination. The Committee notes that the right against self-incrimination is enshrined in the *International Covenant on Civil and Political Rights*.
19. However, the Committee acknowledges that in some cases this right may be modified if there is a significant public interest in obtaining the information and where the use of that information is restricted. The Committee accepts that there is a public interest in ensuring compliance with the gaming and liquor legislation.
20. The Committee notes the existence of some safeguards in the Bill regarding the use of any information that may incriminate the person providing that information. However, it is questionable whether the limitation on the way in which this information may be used is adequate.
21. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the modification of the right against self-incrimination contained in the Bill unduly trespasses on the rights and liberties of individuals.

Commencement by proclamation: Clause 2

24. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

2. Child Protection (Offenders Registration) Amendment Bill 2007

Issue: Retrospectivity – Proposed section 3F (1) (a) and (1) (b) Child protection registration orders made in relation to foreign offences and offences committed before 15 October 2001 (unless the person was a child at the time that the offence was committed) of Schedule 1 [11]; and proposed section 3F (5) an offence in respect of which a person has been found guilty is spent does not prevent the making of an order under this section.

Issue: Retrospectivity – Schedule 1 [37] of Other Amendments - changes to the definition of *corresponding registrable person* extend to persons who have reporting

obligations imposed under a foreign law before the commencement of the changes, and the new types of child protection registration orders may be made in respect of persons found guilty of offences committed before the commencement of the relevant provisions.

22. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, the Committee notes the safeguard provided in the proposed subsection (2) of 3F: a local court may make an order only if it is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally. The Committee also considers the best interests of children and one of the aims of the Child Protection Register as providing a deterrent to re-offending. Accordingly, the Committee is satisfied that the retrospectivity of the proposed section 3F (1) (a) and (1) (b) and 3F (5) does not, in this case, unduly trespass on individual rights. Similarly, the Committee is satisfied that the retrospectivity of the proposed amendment of Schedule 1 [37] to insert savings and transitional provisions as a consequence of the enactment of the proposed Act, does not unduly trespass on individual rights.

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

24. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether this Bill, other than the exceptions as provided by subsections (2) and (3), to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

3. Civil Liability Amendment (Offender Damages) Bill 2007

Retrospectivity: Schedule 1[8] to [10]

15. The Committee will always be concerned to identify the retrospective effect of legislation that may adversely impact individuals.

16. By applying certain provisions of the Act to an award of damages made against a protected defendant before commencement of the relevant clauses, the Bill has the potential to adversely affect the damages rights of individuals, as the offender damages trust funds provisions contained in Division 6 of Part 2A of the *Civil Liability Act* may be invoked.

17. However, the Committee notes that retrospective application of the relevant clauses already applies in the Act as it currently stands. The Bill seeks to remove any doubts as to their retrospective application and thus end legal challenges to the application of the offender damages trust fund provisions.

18. Accordingly, the Committee asks Parliament to consider whether the retrospective application of certain clauses in the Bill unduly trespasses on the rights of individuals.

4. Commission for Children and Young People Amendment Bill 2007

Issue: Privacy – Schedule 1 [9] – proposed section 39 (2):

- 20. The Committee notes that the current legislation already requires employers to notify the commission of the name and other identifying particulars of an employee against whom relevant employment proceedings have been completed, and given the public interest in protecting children, the Committee is of the view that, on balance, the proposed section 39 (2) of Schedule 1 [9] does not unduly trespass on the right to privacy.**

5. Courts and Other Legislation Amendment Bill 2007

Commencement by proclamation: Clause 2

- 28. Although there may be good reasons why such discretion is required, such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether schedules 2, 4 and 5 of the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.**

6. Crimes (Administration of Sentences) Amendment Bill 2007

Issue: Property and Rule of Law – Proposed section 76A of Schedule 1 [4] – Inmates' money:

- 16. The Committee is concerned that the proposed section 76A of Schedule 1 [4] is made with respect to money that if the inmate had not entered into custody, would have otherwise lawfully belonged to the inmate or the inmate would have been lawfully entitled to. The amendment is being made with respect to money that is lawfully or legally available to the inmate, and not any proceeds from crime. This also contrasts significantly with the current legislation which relates to the confiscation of property (including money) that is unlawfully in the possession of an inmate (current section 75 of the Act), and with respect to sale of unclaimed property and unclaimed money (current section 76). The Committee is concerned that this amendment is unduly trespassing individual rights to property, and refers it to Parliament.**
- 18. The Committee has concerns that the above amendment also infringes the rule of law by seeking to legislate its way out of the ordinary trust rules and obligations which could likely be imposed by the court on the Department of Corrective Services, especially since the Crown Solicitor has advised that the matter is not entirely free from doubt. The Committee is concerned that this may conflict with the laws on trust and also undermine the rule of law and trespass unduly on personal rights and liberties, and refers it to Parliament accordingly.**

Issue: Retrospectivity - Proposed section 97 of Schedule 1 [12] to be inserted after the current Part 11 of Schedule 5 – Inmates’ money:

19. This will extend to any inmates’ money that had been surrendered, paid or received, before the commencement of the amended section. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person, and considers this proposed section trespasses unduly on personal rights and refers this to Parliament.

Issue: Oppressive Official Powers – Proposed new section 141 (3) of Schedule 1 [7] – Decision following review:

21. The Committee notes that certainty is required for any inmate who has been determined by the Parole Authority as to their right to be released on parole, including the actual day for release. The Committee has concerns that the proposal is to be determined administratively (according to the Department’s timing and resources), rather than is currently the situation of fixing the actual day of release, and is of the view that the proposed new section 141 (3) unduly trespasses individual rights and liberties and refers this to Parliament.

Issue: Excessive Punishment – Proposed new section 235G of Schedule 1 [10] – Functions of Departmental compliance and monitoring officers and proposed section 205A of Schedule 2 [2] – Testing for alcohol and drugs:

23. Under the proposed section 235G (6) (c), offender also means an offender referred to in Part 8 of the *Crimes (Sentencing Procedure) Act 1999*, which includes those sentenced to a good behaviour bond. This involves matters of a lesser nature or less serious or minor summary offences. The Committee is of the view that the new proposal of the extended functions of a compliance and monitoring officer to conduct the testing for the presence of alcohol or drugs (with the power to use such force as is reasonably necessary), on those on a good behaviour bond, may be excessive punishment in certain circumstances, especially since alcohol is not an illicit drug. The Committee considers the application of the proposed section 235G (2) (f) to enable the compliance and monitoring officers to conduct drug or alcohol testing on those sentenced with a good behaviour bond under the proposed section 235G (6) (c), appears to be excessive punishment and unduly trespasses personal rights and liberties, and refers this to Parliament.

24. Proposed section 205A of Schedule 2 [2] allows for the testing for alcohol and drugs where an offender is suspected to be under the influence of alcohol or other intoxicating substance, if in attendance at a work site or attendance site. The proposed amendment is silent on the level of consumption or quantity of alcohol. The Committee is concerned that the testing of alcohol (which is not an illicit substance), is allowed for those on community service orders and those on parole especially if the conditions of the order do not prohibit them from consuming alcohol or if the offences that they had committed, were not related to alcohol or drugs. The Committee regards this amendment as unduly trespassing individual rights and liberties, and refers it to Parliament.

7. Gene Technology (GM Crop Moratorium) Amendment Bill 2007

Issue: Exclude judicial and merits review – Proposed Section 7A (11) of Schedule 1 [6]

25. The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review of a decision, even to exclude review of a failure or refusal to make a decision, unless there is a strong public interest in doing so.
26. The Committee is of the view that the proposed section 7A (11) is very broad and draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

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

28. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill, other than Schedule 1 [16], to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

8. Health Legislation Amendment Bill 2007

Commencement by proclamation: Clause 2

5. Although there may be good reasons why such discretion is required, such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether schedule 2.13[4] commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.

9. Law Enforcement And Other Legislation Amendment Bill 2007

Issue: Excessive Punishment – Proposal to omit section 59A (4) assault during public disorder of Schedule 1.2 *Crimes Act 1900* No 40 of Schedule 1 [6]:

23. The Committee notes from the Second Reading speech and the Ombudsman's review that the emergency powers in Part 6A of Schedule 1 have been rarely used except for once. The Committee considers that there is little deterrent value from allowing for the above maximum penalties during a large scale public disorder, given the rarity of such public disorders. The Committee is concerned with the disproportionate severity of the above penalties compared to the general penalty for the same types of assault occurring in a non-public disorder context, and considers it as excessive punishment that unduly trespasses individual rights and liberties, and accordingly, refers this to Parliament.

Issue: Excessive Punishment – Proposed section 8D of Schedule 1.3 *Bail Act 1978* No 161 of Schedule 1 [6]:

25. The Committee is concerned with the disproportionate severity of the above amendment compared to the general presumption for bail for other similar types of assault offences occurring in a non-public disorder context, and considers it as excessive punishment and undermines the right to be treated as innocent, which unduly trespasses individual rights and liberties, and refers this to Parliament.

Issue: Retrospectivity - Proposed insertion of Part 3 to amend Schedule 2 of Schedule 3.1 [23]:

26. This amends Schedule 2 to apply the amendments made by this proposed Act to offences committed before the commencement of this proposed Act and to persons subject to orders before that commencement. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person, and considers this proposed amendment trespasses unduly on personal rights and liberties, and refers this to Parliament.

Issue: Procedural Fairness and Access to Justice - Proposed section 26ZA (3A) compliance with obligation to inform – Schedule 4.1 [7] *Terrorism (Police Powers) Act 2002* No 115:

31. The Committee notes the High Court in *Ebatarinja and Anor v Deland and Ors* (1998) 194 CLR 444 at 454, has held that “If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial.” The Committee also notes that courts have the power to safeguard against an unfair trial by ordering a stay of the proceedings (*Dietrich v The Queen* (1992) 177 CLR 292).

32. The Committee takes into account the Evidence Act, the reasoning behind the High Court and the court’s power to safeguard against unfairness as referred to above when expressing concerns for the same principles of fairness for access to justice and procedural fairness in relation to the proposed section 26ZA, which if enacted, would remove the requirement to arrange for an interpreter for a person under preventative detention, and the Committee considers this as unduly trespassing personal rights, and refers this to Parliament.

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

34. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill, other than Schedule 1.1 [6], 1.2 and 1.3, to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

10. Liquor Bill 2007

Strict liability: Clauses 7, 8, 9, 11, 106, and 117

- 20. Numerous clauses in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the defendant intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence. However, in some circumstances, the imposition of strict liability may be warranted after considering the community impact of the offence, the availability of defences and safeguards, and the type of penalty that may be imposed.**
- 21. The Committee notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. However, it notes the public interest in ensuring compliance with the terms of the Bill, and the threat of imprisonment may serve as an effective deterrence for those tempted to breach its provisions.**
- 22. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the Bill unduly trespasses on the rights and liberties of those charged with certain strict liability offences.**

Reverse onus of proof: Clauses 73, 77, 113, 117 and 120

- 32. The Committee notes that these offences place the onus of proof on the defendant in relation to a number of offences stipulated by the Bill. These relate to key elements of the offences.**
- 33. The Committee notes that the presumption of innocence is a fundamental right. Reversing the onus of proof is inconsistent with this right.**
- 34. However, the Committee notes that a reversal of the onus of proof may be appropriate in some circumstances particularly where knowledge of the factual circumstances is in the possession of one party.**
- 35. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the reversal of the onus of proof in these circumstances unduly trespasses on rights and liberties.**

Right to privacy: Clause 115

- 40. The declaration of a restricted alcohol area may extend to the consumption of alcohol in the home and other private premises. This may interfere with the right to privacy, a fundamental human right.**
- 41. However, the Committee notes that such a declaration may only be made if the Minister is satisfied that it is in the public interest and has the support of the majority of the community likely to be affected by it.**

42. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether cl 115 unduly trespasses on the privacy rights of persons within the affected area.

Right to liberty of movement: Clause 77

47. The Committee notes that cl 77 may intrude on the right of a person to liberty of movement if the person has been refused admission or turned out of licensed premises because of intoxication, and/or violent, quarrelsome or disorderly conduct.
48. However, given the public interest in ensuring that certain persons are precluded from entering the vicinity of licensed premises, that the time in which they may be excluded is limited to six hours, and that provision is made for their re-entry into the vicinity if there are safety concerns, the person needs to obtain transport, or if they reside in the area, the Committee concludes that the Bill does not unduly trespass on the right to freedom of movement.

Commencement by proclamation: Clause 2

51. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

11. Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Bill 2007

Commencement by proclamation: Clause 2

9. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

12. Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2007

Commencement by proclamation: Clause 2

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

13. Occupational Health and Safety Amendment Bill 2007*

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

14. Road Transport (General) Amendment (Heavy Vehicle User Charges) Bill 2007

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

15. Road Transport Legislation (Breath Testing and Analysis) Bill 2007

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

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

16. World Youth Day Amendment Bill 2007

Issue: Exclude judicial and merits review – Proposed Section 44H of Schedule 1 [8] – Protection of exercise of certain functions:

21. The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review, unless there is a strong public interest in doing so.
22. The Committee is of the view that the proposed section 44H is very broad and draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

Issue: Henry VIII clause – which allow amendment of Acts by a regulation – proposed section 58 (2)(f) and (g) regulations of Schedule 1 [10] – requiring persons to submit to searches etc and excluding persons who refuse to submit to such searches:

- 24. The Committee is concerned that allowing regulations to exclude people from the World Youth Day venue or facilities, and allowing regulations to be made in relation to searches of persons and their articles, vehicles or vessels, appear to be a significant delegation of legislative power.**
- 25. The Committee also notes that the ability of Parliament to effectively scrutinise the pre-conditions or criteria for the proper exercising of such search and exclusion powers is dependant on Parliament sitting. Therefore, the Committee considers that this constitutes an inappropriate delegation of legislative power, and refers it to Parliament. The Committee is also of the view that such search powers, would be more appropriate to be made in the principal Act by an amending legislation rather than through the regulations.**

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CASINO, LIQUOR AND GAMING CONTROL AUTHORITY BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Graham West MP
Portfolio:	Minister for Gaming and Racing Minister for Sport and Recreation

Purpose and Description

1. The purpose of the Bill is to constitute the Casino, Liquor and Gaming Control Authority as the licensing and regulatory authority for the purposes of the proposed Liquor Act 2007, the *Casino Control Act 1992*, the *Gaming Machines Act 2001* and the *Registered Clubs Act 1976*. The Casino, Liquor and Gaming Control Authority is to replace the Casino Control Authority. It also takes over the licensing and other regulatory functions of the Licensing Court and the Liquor Administration Board.

Background

2. The Bill is cognate with the Liquor Bill 2007.
3. According to the Agreement in Principle speech:

The Casino, Liquor and Gaming Control Authority Bill 2007 will establish the new authority [the Casino, Liquor and Gaming Control Authority]. The practical outcome of the bill is that the role and responsibilities of the existing Casino Control Authority are expanded to cover the liquor and gaming sectors in addition to the casino sector. The Casino, Liquor and Gaming Control Authority Bill 2007 brings together in one place a range of provisions dealing with administration and other matters. Many of these provisions are currently replicated in the Liquor, Registered Clubs, Gaming Machines, and Casino Control Acts. Having all of these provisions in one Act will help to ensure consistency.¹

The Bill

Constitution and functions of Authority

4. The Bill establishes the Casino, Liquor and Gaming Control Authority: cl 6. It is to be a NSW Government agency but it is not subject to the direction or control of the Minister except as provided in the gaming and liquor legislation.

¹ G J West MP, Legislative Assembly *Hansard*, 28 November 2007.

5. The Authority is to consist of a Chief Executive and other appointed members, one of which is or has been a Judge or has been an Australian lawyer for at least seven years: cl 7.

Probity

6. A member of the Authority, or a member of staff or consultant so designated by the Authority in writing, is not eligible for appointment or to hold a position unless the person possesses the highest standard of integrity: cl 14.
7. A number of restrictions apply to key officials and former key officials such as a prohibition on the holding of any type of gaming or liquor licence: cl 16.
8. A secrecy provision is located in cl 17, restricting a person who acquires information in the exercise of functions under the gaming and liquor legislation from making a record of that information or divulging the information to another person, other than in specified circumstances.

Investigation and enforcement powers

9. A number of investigation and enforcement powers are set out in Part 4. These may be exercised for the following purposes (cl 18):
- determining whether there has been compliance with or a contravention of the gaming and liquor legislation;
 - obtaining information or records for purposes connected with the administration of the gaming and liquor legislation;
 - in connection with exercising the functions of an inspector under the gaming and liquor legislation;
 - administering the gaming and liquor legislation and promoting its objects.
10. Provision is made for the appointment and identification of inspectors in cl 20.
11. The Authority, inspectors and police officers are provided with various powers: to require information and records; of entry and search of premises; and to question persons.

Issues Considered by the Committee

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

Self-incrimination: Part 4

12. Part 4 of the Bill provides the Authority, inspectors and police officers with various investigation powers. Clause 34 provides that it is an offence for a person without lawful excuse to refuse or fail to comply with a requirement made of the person under Part 4.
13. Clause 35(2) provides that a person is not excused from a requirement to furnish records or information or to answer a question on the ground that the record,

information or answer might incriminate the person or make the person liable to a penalty.

14. The right against self-incrimination (or right to silence) is well recognised both at common law and in international law. Article 14(3)(g) of the *International Covenant on Civil and Political Rights* provides that a person has the right 'not to be compelled to testify against himself or to confess guilt'.
15. However, the right against self-incrimination needs to be balanced with the public benefit that may flow from obtaining the information. Nonetheless, any abrogation of the right against self-incrimination should not be more than is justified in the circumstances.
16. There are some safeguards contained in the Bill as it limits the use of information so obtained. Clause 35(3) provides that any information furnished or answer given is not admissible in evidence against the person in criminal proceedings if:
 - the person objected at the time to doing so on the ground that it might incriminate the person; or
 - the person was not warned on the relevant occasion that the person may object to furnishing the information or giving the answer on the ground that it might incriminate the person.
17. However, cl 35(3) does not apply to criminal proceedings for an offence under Part 4. Nor is there any suggestion that it applies to civil proceedings.

- 18. The Committee will always be concerned if a Bill removes or restricts a person's right against self-incrimination. The Committee notes that the right against self-incrimination is enshrined in the *International Covenant on Civil and Political Rights*.**
- 19. However, the Committee acknowledges that in some cases this right may be modified if there is a significant public interest in obtaining the information and where the use of that information is restricted. The Committee accepts that there is a public interest in ensuring compliance with the gaming and liquor legislation.**
- 20. The Committee notes the existence of some safeguards in the Bill regarding the use of any information that may incriminate the person providing that information. However, it is questionable whether the limitation on the way in which this information may be used is adequate.**
- 21. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the modification of the right against self-incrimination contained in the Bill unduly trespasses on the rights and liberties of individuals.**

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

Commencement by proclamation: Clause 2

22. Clause 2 of the Bill specifies that it is to commence on proclamation. This may delegate to the Government the power to commence that Act, or parts of the Act, on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

23. However, the Committee notes that this Bill is part of an extensive reform package regarding the liquor regulatory framework. Accordingly, it is likely that time is required to allow appropriate administrative arrangements to be made.

24. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

The Committee makes no further comment on this Bill.

2. CHILD PROTECTION (OFFENDERS REGISTRATION) AMENDMENT BILL 2007

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

Purpose and Description

1. This Bill amends the *Child Protection (Offenders Registration) Act 2000* and certain other Acts to make further provision with respect to registration and reporting requirements for certain offenders.
2. This Bill will allow police to take and retain DNA samples of registrable persons, and increase the maximum penalty for breaching reporting obligations from 2 years to 5 years.
3. It amends the *Crimes (Forensic Procedures) Act 2000* by inserting proposed Part 7B to enable certain forensic procedures to be carried out on registrable persons when making such reports. This will only be conducted if it appears that the registrable person's DNA profile is not already contained in the offenders index of the DNA database system. The provisions will parallel those already existing for those serious indictable offenders and on untested former offenders in the current Part 7 and Part 7A. This includes the requirement of the person's consent or on the order of a senior police officer or a court.
4. Registrable offences are listed in 2 categories under the Act. Class 1 includes the most serious offences such as child murder and sexual intercourse with a child. Class 2 includes other offences such as acts of indecency against a child and possession of child pornography. The Bill only makes one change to the definition of registrable offences - to recognise the offence of sexual assault by forced self-manipulation, where the person against whom the offence is committed is a child, as a Class 1 offence.
5. It also tightens the circumstances in which adults are required to comply with the reporting obligations of the Act by extending registration requirements to all adults convicted of a Class 2 registrable offence. It will no longer matter whether the sentence includes a term of imprisonment or requires the person to be supervised.
6. The Bill ensures that all persons arriving into NSW, who would be required to register with police in their country of origin, will be required to report their details to the NSW Police Force. Police can currently apply to the court for a child protection registration order when a person is found guilty of an offence that is not a registrable offence. The bill expands the circumstances in which courts can issue child protection registration orders to require someone to comply with the reporting obligations of the Act.

7. The Bill allows courts to issue orders for persons convicted overseas of an offence or offences for conduct that would have constituted a registrable offence if committed in New South Wales. For example, a person may be convicted in another country of possession of pornography in a jurisdiction that does not have the specific offence of possession of child pornography. Secondly, the Bill allows courts to order persons to comply with the reporting obligations of the Act—persons who completed their sentence for what is now defined as a class 1 registrable offence before the Act commenced in October 2001. These orders will not be able to be applied to persons who completed their sentences prior to October 2001, who were children at the time they committed the offence.
8. This Bill also enables courts to order people charged with a registrable offence or offences and released on bail under the *Mental Health (Criminal Procedure) Act 1990* to report to police under the Act. Such persons can be on bail while their fitness to be tried is assessed and a decision is made as to whether a special hearing under the *Mental Health (Criminal Procedure) Act 1990* should be held. Consequently, there is potential for longer delays between a person being released on bail and the court issuing a sentence for forensic patients rather than for others released on bail. In all cases, courts will be able to issue child protection registration orders only when they are satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally.
9. This also introduces a requirement that registrable persons are to report to police all their active electronic communication identifiers, details of service providers, service type and any changes to those details. This includes all active email addresses, chat room identities, as well as all landline and mobile telephone numbers. The information may assist the investigations of the NSW Police Force, particularly in relation to child pornography or grooming and/or procuring of children.
10. Currently, it is difficult to prove a breach under section 9 (2) of the Act as police must provide evidence that a person on the register has lived with a child for more than 14 days or had more than 14 days unsupervised contact with a child over a 12-month period, without telling police as is required under the Act. The Bill proposes that this information will need to be provided to police when persons on the register have lived with a child for only 3 days or more, or had unsupervised contact for 3 days or more in a 12-month period. They will need to let police know of any change in this information within 3 days of the change. Similar amendments were introduced to Victoria's registration scheme.
11. The Bill requires registrable persons to make their initial report to police within 7 days. The introduction of this provision will align NSW with legislation in Western Australia, the Northern Territory and the Australian Capital Territory. Registrable persons will also now be required to present to police any current passports they hold as part of their reporting requirements. This will assist police in confirming the identity of registrable persons from NSW upon their departure from or their entry into Australia.
12. Persons on the register are currently required to report to police their names, together with any other names by which they are known or have previously been known. Based on similar reforms recently introduced to Victoria's scheme, this Bill requires registrable persons to apply to the Commissioner of Police before changing their names. If the commissioner believes that the name change is reasonably likely

to be regarded as offensive by the community, the person's victim or the victim's family—or where it might undermine the ability of the NSW Police Force to supervise and monitor the person—the commissioner will be authorised to prevent him or her from changing his or her name.

Background

13. NSW was the first Australian State to introduce a mandatory system of registration for people who have committed child sex offences and/or other serious offences against children. Since October 2001, registrable persons have been required to report their personal details to the New South Wales Police Force for a set number of years while they are living in the community.
14. Registrable persons are required to inform police where they live, where they work, what car they drive, any children they live with, and more. They are also required to inform police in advance of their intended interstate or international travel arrangements. Apart from being held on the New South Wales Child Protection Register, information regarding registrable persons is uploaded to the Australian National Child Offenders Register [ANCOR]. This database, which is managed by CrimTrac, is used to assist police from other jurisdictions in monitoring child sex offenders.
15. According to the Agreement in Principle speech, the recommended changes followed a period of extensive consultation and a review of the Act.
16. In November 2005, the NSW Ombudsman's review of the register was tabled in Parliament. It found that the implementation of the Act had been largely successful and that the register had the capability to be a significant child protection tool. The Ombudsman's review informed the statutory review of the Act.
17. While the penalty imposed by the courts on such offenders indicates that their conduct is at the lower end of seriousness in relation to registrable offences, however, the nature of the offences such as possession of child pornography, are still serious offences that potentially endanger children and therefore, monitoring by police through the registration process irrespective of the sentence received. Young persons will continue to be exempt from registration if they commit certain Class 2 offences on a single occasion, such as an act of indecency or possessing or publishing child pornography.
18. Schedule 2 amends the *Crimes (Forensic Procedure) Act 2000* to allow police to take and retain the DNA of registrable persons. By having the DNA of persons on the register, more persons who commit child sex crimes will be identified, and they will be identified faster. Police advised that the DNA sample could be taken when registrable persons either make their initial report or make their annual report to police, as required under the Act.
19. Parliament's original intention was that information held on the register should not be available to the public. The Bill exempts documents relating to the register from the *Freedom of Information Act 1989*.

The Bill

20. The object of this Bill is to amend the Child Protection (Offenders Registration) Act 2000 (**the Principal Act**), the Crimes (Forensic Procedures) Act 2000 and the Freedom of Information Act 1989, for the following purposes:
- (a) to provide that the offence of sexual assault by forced self-manipulation committed against a child is a registrable offence under the Principal Act,
 - (b) to make further provision with respect to classification as a registrable person or a corresponding registrable person under the Principal Act,
 - (c) to provide for further circumstances in which a child protection registration order may be made under the Principal Act,
 - (d) to extend the reporting obligations of persons under the Principal Act,
 - (e) to provide for the suspension of such reporting obligations when a person is also subject to an interim or extended supervision order under the *Crimes (Serious Sex Offenders) Act 2006*,
 - (f) to increase the maximum penalties for failing to comply with reporting obligations and for providing false or misleading information when reporting,
 - (g) to authorise the conduct of certain forensic procedures on registrable persons,
 - (h) to require a registrable person to seek the approval of the Commissioner of Police before making an application to change his or her name under the *Births, Deaths and Marriages Registration Act 1995* or a similar Act of another State or a Territory,
 - (i) to make it offence for a person to disclose information about a registrable person in certain circumstances,
 - (j) to exempt certain documents relating to persons under the Principal Act from the operation of the *Freedom of Information Act 1989*,
 - (k) to provide for a further review of the Principal Act.

The Bill also makes other minor and consequential amendments, including to other Acts.

21. 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.

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

Clause 4 is a formal provision that gives effect to the amendments to the *Crimes (Forensic Procedures) Act 2000* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendment to the *Freedom of Information Act 1989* set out in Schedule 3.

Clause 6 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 4.

Clause 7 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Child Protection (Offenders Registration) Act 2000 No 42

Registrable persons

Under the Principal Act, persons who are found guilty of, and sentenced, in respect of certain offences relating to children are required to report relevant personal information to police and to keep that information up to date. Those persons are referred to as registrable persons under the Principal Act.

The offences that give rise to reporting obligations under the Principal Act are generally categorised into Class 1 offences and Class 2 offences. Class 1 offences are the most serious offences. A longer reporting period applies to persons found guilty of a Class 1 offence than to persons found guilty of

Class 2 offences. **Schedule 1 [2]** makes an offence against section 80A of the *Crimes Act 1900* (Sexual assault by forced self-manipulation), where the offence is committed against a child, a Class 1 offence.

At present, a person is also not required to report under the Principal Act if the person is found guilty of a single Class 2 offence, as long as the person's sentence for the offence does not include a term of imprisonment or other supervision. **Schedule 1 [4]** removes this exclusion, with the result that a person found guilty of a single Class 2 offence may be required to comply with the reporting requirements under the Principal Act.

Corresponding registrable persons

Currently, the Principal Act also requires corresponding registrable persons to comply with the reporting requirements under the Principal Act. Corresponding registrable persons are persons subject to reporting requirements in other jurisdictions that are longer than those provided for by the Principal Act. At present, the class of persons who fall within the definition of corresponding registrable person is prescribed by the regulations. **Schedule 1 [7]** removes the need for the class of persons who are considered to be corresponding registrable persons to be prescribed by the regulations. However, the regulations will be able to exclude any class of persons from falling within the definition.

As a result of the amendment to the definition, and the amendment in **Schedule 1 [24]**, any person who is subject to reporting requirements under a corresponding Act, or who is subject to reporting requirements under any other foreign law in respect of a Class 1 or Class 2 offence, and who would be required to continue to comply with those reporting requirements if he or she were still in that jurisdiction, will be required to comply with the reporting requirements under the Principal Act. This will include persons who are subject to reporting requirements in other jurisdictions that pre-date the commencement of the Principal Act.

Child protection registration orders

At present, the Principal Act provides that a court may order a person found guilty of an offence to comply with the reporting requirements of the Principal Act, even if the offence is not a Class 1 or Class 2 offence. This order is referred to as a **child protection registration order**. A child protection registration order may be made only if the court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally.

Schedule 1 [11] provides for additional types of child protection registration orders. It also removes the current requirement for a review of provisions relating to child protection registration orders (which is now redundant).

Proposed new section 3E provides that a child protection registration order may be made by a Local Court after the conclusion of criminal proceedings in respect of the relevant offence (at present, orders can only be made concurrently with sentencing). An application for such an order by must be made by the Commissioner of Police within 21 days after the person is sentenced.

Proposed section 3F provides that a child protection registration order may be made by a Local Court in relation to a person found guilty of an offence in a foreign jurisdiction and in relation to a person who has been sentenced for a Class 1 offence committed before 15 October 2001. An application for such an order may be made by the Commissioner of Police at any time.

Proposed section 3G provides that a child protection registration order may be made by a court that grants bail to a person in respect of a Class 1 offence or a Class 2 offence under section 10 (3) (b), 14 (b) (ii) or 17 (2) of the *Mental Health (Criminal Procedure) Act 1990*. Those sections relate to the procedure for dealing with an alleged offender in respect of whom a question of unfitness to be tried has been raised. In all cases, a child protection registration order may be made only if the court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally (this concept is explained in proposed section 3H).

Reporting obligations

Schedule 1 [13] provides for additional relevant personal information that must be reported by a registrable person. This includes telephone numbers, internet activity details and any other information prescribed by the regulations. Currently, a registrable person must provide information

about the children residing at a registrable person's address and any children with whom the person has regular unsupervised contact. At present, this information is required to be reported when the relevant child is residing with the person, or when such contact occurs, for at least 14 days in any period of 12 months. **Schedule 1 [14]** reduces that 14-day time period to 3 days. In addition, **Schedule 1 [16]** provides that a change in such information is to be reported within 3 days after the change occurs.

Schedule 1 [15] provides that the period within which an initial report of a registrable person's relevant personal information must be made is 7 days (instead of 14 or 28 days) in certain circumstances.

Schedule 1 [18] makes it compulsory for a registrable person who holds a current passport to present that passport for identification purposes when reporting under the Principal Act. **Schedule 1 [25]** provides for the suspension of reporting obligations under the Principal Act during the period (if any) in which a registrable person is subject to any interim or extended supervision order under the *Crimes (Serious Sex Offenders) Act 2006*.

Schedule 1 [26] and [27] increase the penalties for failing to comply with reporting obligations under the Principal Act and for furnishing false or misleading information in purported compliance with reporting obligations, respectively. Such offences will now carry a maximum penalty of 500 penalty units or imprisonment for 5 years, or both, if dealt with on indictment. (A lower penalty will apply under amendments to the *Criminal Procedure Act 1986* if the offence is dealt with summarily).

Change of name by registrable person

Schedule 1 [28] requires a registrable person to seek the approval of the Commissioner of Police before making an application to change his or her name under the *Births, Deaths and Marriages Registration Act 1995* or a similar law of another State or a Territory. The proposed amendments are closely modelled on proposed amendments to the *Sex Offenders Registration Act 2004* of Victoria. The Commissioner of Police will be able to approve a change of name only if satisfied that the change of name is necessary or reasonable. The Commissioner must not give approval where the change is reasonably likely to be regarded as offensive by a victim of crime or an appreciable sector of the community, or reasonably likely to frustrate the administration of justice in respect of the registrable person.

Other amendments

Schedule 1 [3] provides that, for the purposes of the Principal Act, a sentence includes action taken by a court under section 10A of the *Crimes (Sentencing Procedure) Act 1999*, that is, where a court convicts an offender and disposes of the proceedings without imposing any other penalty.

Schedule 1 [31] makes it an offence (Maximum penalty: 100 penalty units or imprisonment for 2 years, or both) for a person to disclose information about a registrable person except in specified circumstances.

Schedule 1 [34] removes a provision requiring the Ombudsman to monitor the initial operation of the Principal Act, as this provision is now spent.

Schedule 1 [35] provides for a further review of the Principal Act to be undertaken after the period of 5 years from the date of assent of the proposed Act.

Schedule 1 [37] inserts savings and transitional provisions as a consequence of the enactment of the proposed Act. These include provisions that make it clear that:

- (a) the changes to the definition of **registrable person** made by the proposed Act apply only in relation to sentences imposed on or after the commencement of the changes (and accordingly does not affect the current registration of any person), and
- (b) the changes to the definition of **corresponding registrable person** extend to persons who have reporting obligations imposed under a foreign law before the commencement of the changes, and
- (c) the new types of child protection registration orders may be made in respect of persons found guilty of offences committed before the commencement of the relevant provisions.

Schedule 2 Amendment of Crimes (Forensic Procedures) Act 2000 No 59 Carrying out of certain forensic procedures on registrable persons

Currently, the Principal Act provides that registrable persons making a report to police may be subject to fingerprinting and photographing (sections 12E–12H).

Schedule 2 [5] inserts proposed Part 7B into the *Crimes (Forensic Procedures) Act 2000* to enable certain forensic procedures to be carried out on registrable persons when making such reports. The procedures authorised are limited to the following:

- (a) the carrying out of an other-administered buccal swab (an intimate forensic procedure),
- (b) the carrying out of the following non-intimate forensic procedures:
 - (i) a self-administered buccal swab,
 - (ii) the taking of a sample of hair other than pubic hair.

A procedure may be carried out only if it appears that the registrable person's DNA profile is not already contained in the offenders index of the DNA database system under the *Crimes (Forensic Procedures) Act 2000*. The provisions of proposed Part 7B, which parallel those of Part 7 and 7A (which deal with forensic procedures carried out on serious indictable offenders and on untested former offenders, respectively) include:

- (a) a provision that authorises a non-intimate forensic procedure to be carried out on an untested registrable person with the person's consent or on the order of a senior police officer or a court,
- (b) a provision that authorises an intimate forensic procedure to be carried out on an untested registrable person with the person's consent or on the order of a court.

Forensic procedures will be required to be carried out in accordance with the requirements of Part 6 of the *Crimes (Forensic Procedures) Act 2000*.

It will be an offence (punishable by a fine of 50 penalty units or 12 months imprisonment, or both) for an untested registrable person to refuse or fail to permit the procedure to be carried out in accordance with a court order.

Schedule 3 Amendment of Freedom of Information Act 1989 No 5

Freedom of information exemption

Schedule 3 amends the *Freedom of Information Act 1989* so as to exempt documents relating to offenders under the Principal Act from freedom of information requirements, unless an offender wishes to access a document containing information about himself or herself.

Schedule 4 Consequential amendments

Local Court amendments

Schedule 4.1, 4.3 and 4.4 make amendments consequential on the proposed repeal of the *Local Courts Act 1982* and subsequent proposed enactment of the *Local Court Act 2007*.

Amendment of Criminal Procedure Act 1986

Schedule 4.2 amends the *Criminal Procedure Act 1986* so as to provide that indictable offences under section 17 or 18 of the Principal Act are triable summarily on the election of the prosecutor. If the offence is tried summarily the maximum penalty will be 100 penalty units or imprisonment for 2 years, or both.

Issues Considered by the Committee

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

Issue: Retrospectivity – Proposed section 3F (1) (a) and (1) (b) Child protection registration orders made in relation to foreign offences and offences committed before 15 October 2001 (unless the person was a child at the time that the offence was committed) of Schedule 1 [11]; and proposed section 3F (5) an offence in respect of which a person has been found guilty is spent does not prevent the making of an order under this section.

Issue: Retrospectivity – Schedule 1 [37] of Other Amendments - changes to the definition of *corresponding registrable person* extend to persons who have reporting obligations imposed under a foreign law before the commencement of the changes, and the new types of child protection registration orders may be made in respect of persons found guilty of offences committed before the commencement of the relevant provisions.

22. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, the Committee notes the safeguard provided in the proposed subsection (2) of 3F: a local court may make an order only if it is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally. The Committee also considers the best interests of children and one of the aims of the Child Protection Register as providing a deterrent to re-offending. Accordingly, the Committee is satisfied that the retrospectivity of the proposed section 3F (1) (a) and (1) (b) and 3F (5) does not, in this case, unduly trespass on individual rights. Similarly, the Committee is satisfied that the retrospectivity of the proposed amendment of Schedule 1 [37] to insert savings and transitional provisions as a consequence of the enactment of the proposed Act, does not unduly trespass on individual rights.

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

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

23. The Committee notes that except as provided by subsections (2) and (3), the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

24. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether this Bill, other than the exceptions as provided by subsections (2) and (3), to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

3. CIVIL LIABILITY AMENDMENT (OFFENDER DAMAGES) BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General Minister for Justice

Purpose and Description

1. The purpose of the Act is to amend the *Civil Liability Act 2002* to make further provision for medical assessment of disputes and transitional arrangements concerning claims for offender damages.

Background

2. Part 2A of the *Civil Liability Act 2002* sets out special provisions relating to offenders in custody. Part 2A was inserted into the *Civil Liability Act* by the *Civil Liability Amendment (Offender Damages) Act 2004* and has been amended a number of times in recent years. The *Civil Liability Amendment (Offender Damages Trust Fund) Act 2005* introduced a scheme to quarantine awards into a trust fund of damages and compensation made to offenders. This was to enable victims to lodge claims against offenders.²
3. The Bill intends to overcome the repercussions of a number of recent court decisions regarding the operation of Part 2A of the *Civil Liability Act 2002*.³

The Bill

4. Part 2A of the *Civil Liability Act 2002* contains special provisions for offenders in custody. Section 26C of the Act stipulates that no damages are to be awarded unless the injury results in the death of the offender or at least a 15% degree of permanent impairment.
5. The Bill proposes to insert a new requirement into s 26D of the *Civil Liability Act 2002* so a dispute about the degree of permanent impairment of an offender cannot be referred for assessment unless the offender has provided the protected defendant with a medical report that both assesses the degree of permanent impairment to be at least 15% and provides reasons for that assessment.
6. This amendment is designed to overcome some of the difficulties raised by *Hiron v State of New South Wales* [2007] NSWSC 152 (6 March 2007). One of the issues in

² J Hatzistergos MLC, Legislative Council *Hansard*, 28 November 2007.

³ *State of New South Wales v Bujdoso* [2007] NSWCA 44, *Hiron v State of New South Wales* [2007] NSWSC 152 and *State of New South Wales v Napier Keen Pty Limited* [2007] NSWSC 644.

Hiron v New South Wales was the definition of 'medical dispute'. Associate Justice Malpass concluded that a 'medical dispute' refers to:

a dispute between the parties (and not a dispute between medical practitioners) about a specified matter or a question about any of them (these matters being of a medical nature)... it seems to me that the medical dispute in the present case would not be restricted to an issue of whether or not the degree of permanent impairment was at least 15%.... there can be a "medical dispute" in the absence of competing medical assessment as to the degree of permanent impairment'.⁴

7. According to the Agreement in Principle speech:

The ramifications of the Hiron decision are that, without the amendments proposed in this bill, offenders and their solicitors could file process seeking damages for personal injury, cause the Government to expend significant legal and medical costs in investigating the claim, both medically and on the issue of liability, not serve any medical evidence, and then simply apply for the Worker Compensation Commission to determine the threshold question of whether the 15 per cent whole-person impairment threshold has been reached. If the assessment were determined in the Government's favour, the Government would have little prospect of recouping costs expended in relation to work done in investigating the claim, since most offender plaintiffs are impecunious. Costs incurred can be quite substantial.⁵

8. The Bill clarifies what is meant by a claim not being finally determined: schedule 1[4],[5] and [7]. A claim is accordingly not finally determined if:

- a. any period for bringing an appeal as of right in respect of the claim has not expired (ignoring any period that may be available by way of extension of time to appeal, or
- b. any appeal in respect of the claim is pending (whether or not it is an appeal brought as of right).

9. The Bill also clarifies transitional provisions regarding amendments made to the Act in 2006 that require offender damages to be held in trust for the payment of claims by the offender's victim so there is no doubt that the amendments are to extend to cases in which offender damages were awarded before the amendments commenced.

Issues Considered by the Committee

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

Retrospectivity: Schedule 1[8] to [10]

10. The Bill makes a number of amendments to Schedule 1 of the *Civil Liability Act 2002* to clarify that various clauses⁶ apply, for the purpose of the application of Division 6 of Part 2A (Offender damages trust funds), to an award of damages made against a protected defendant before the commencement of the relevant clause (even if proceedings have already been finally determined). An exception is made if the award has been satisfied, either in whole or part, by payment to the person awarded the damages.

11. A 'protected defendant' is defined in s 26A of the *Civil Liability Act* to mean:

⁴ At paras 39 to 41.

⁵ J Hatzistergos MLC, Legislative Council *Hansard*, 29 November 2007.

⁶ The clauses relate to: the deemed commencement of, and application of, amendments to s 3B(1)(a); the definition of 'offender in custody' in s 26A; and the definition of 'personal injury damages' in s 26A.

- the Crown (within the meaning of the *Crown Proceedings Act 1988*) and its servants;
 - a Government department and members of staff of a Government department;
 - a public health organisation (within the meaning of the *Health Services Act 1997*) and members of staff of a public health organisation;
 - any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions;
 - a management company or submanagement company (within the meaning of the CAS Act) and members of staff of such a company.
12. Clause 25 of Schedule 1 of the *Civil Liability Act* provides that the amendment to s 3B(1)(a) made by the *Crimes and Courts Legislation Amendment Act 2006* (regarding an intentional act done with intent to cause injury or death or that is sexual assault or other sexual misconduct) extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of that amendment. The amendment is taken to have always applied. Similarly, the definition of 'offender in custody' in s 26A, as amended in 2006, is taken to have always applied.
13. Section 26L of the *Civil Liability Act* stipulates that the amount of any offender damages awarded to an offender is to be held in trust for the offender by the protected defendant liable to pay those damages and may be paid out only as authorised by Division 6. These damages are to be available to satisfy victim claims against the offender concerned in certain circumstances.
14. As the amendments proposed by the Bill clarify the retrospective application of the 2006 amendments, the Bill potentially has an adverse impact on a person to whom an award of damages has been made, as they may be quarantined into the offender damages trust fund.

15. **The Committee will always be concerned to identify the retrospective effect of legislation that may adversely impact individuals.**
16. **By applying certain provisions of the Act to an award of damages made against a protected defendant before commencement of the relevant clauses, the Bill has the potential to adversely affect the damages rights of individuals, as the offender damages trust funds provisions contained in Division 6 of Part 2A of the *Civil Liability Act* may be invoked.**
17. **However, the Committee notes that retrospective application of the relevant clauses already applies in the Act as it currently stands. The Bill seeks to remove any doubts as to their retrospective application and thus end legal challenges to the application of the offender damages trust fund provisions.**

18. Accordingly, the Committee asks Parliament to consider whether the retrospective application of certain clauses in the Bill unduly trespasses on the rights of individuals.

The Committee makes no further comment on this Bill.

4. COMMISSION FOR CHILDREN AND YOUNG PEOPLE AMENDMENT BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Linda Burney
Portfolio:	Youth, Fair Trading, Volunteering

Purpose and Description

1. This Bill amends the *Commission for Children and Young People Act 1998* in relation to background checking of applicants for employment, the functions and status of the Child Death Review Team and other matters; and to amend the *Parliamentary Electorates and Elections Act 1912* in relation to the audit of child-related conduct declarations.
2. It ensures that working with children background check will apply regardless of whether people are employed to work with children who are related to them (such as commercial babysitters who only babysit relatives, or foster carers who are authorised only to care for relatives).
3. It will clarify and help employers to meet their requirements to report certain matters about employee behaviour to the commission. Employers are required to report if an employee has committed an act of violence against a child or has engaged in certain types of conduct. If an employer has investigated the employee's behaviour and has found that the employee has, or may have, behaved in a prescribed way or used violence against a child, they report it to the commission, which will take it into account in background checking. This is known as a 'relevant employment proceeding'.
4. The Bill provides a precise definition to give employers clarity about when to report. It means the employer will be required to report a relevant employment proceeding when the employer has determined that the conduct has or may have occurred, and what disciplinary action (if any), should be taken.
5. The legislation currently uses the term 'disciplinary proceedings'. However, in some employment settings, this term is given a narrower meaning. For example, the Education Act. This Bill will clarify when matters need to be reported by using the inclusive term 'proceedings (including disciplinary proceedings)'.
6. The current legislation requires employers to notify the commission of the name and other identifying particulars of any employee against whom relevant employment proceedings have been completed. This Bill will require employers to provide sufficient details about the incident so they can be considered in the background checking process such as information on what the person has done, how the child was harmed or the circumstances of the conduct.

7. The Bill will protect employers from liability if they meet their obligations in good faith.
8. The Bill also gives a new power to charge fees for certificates for the self employed, which is consistent with the practice in most government and professional certification schemes.
9. In relation to working with children check, the Bill updates the commission's Act to reflect terminology changes in the Crimes Act, such as substituting the words 'external protection orders' for 'interstate restraint orders'. References to interstate restraint orders are now out of date and the new terminology will mirror the *Crimes (Domestic Violence) Act 2007*.
10. The commission's Act establishes the NSW Child Death Review Team to prevent and reduce the deaths of children in NSW and is required to report on all deaths of people under the age of 18 years in NSW. However, currently, it is unable to report on deaths of children that took place outside NSW such as children who lived in border areas of NSW but who have died interstate (eg Queanbeyan, the Tweed, Albury, Broken Hill).
11. The Bill allows reciprocal arrangements between NSW and other Australian jurisdictions so that the Child Death Review Team will be able to access information about the deaths of NSW children who die elsewhere. It will also ensure that any interstate teams using information from NSW will have to maintain the same confidentiality as the NSW team.
12. The legal status of the Child Death Review Team will be amended. It is currently constituted as a statutory corporation. The Bill will constitute the team as a committee of the commission.
13. The *Parliamentary Electorates and Elections Act 1912* confers on the commission the function of auditing child-related conduct declarations made by candidates elected to the NSW Parliament at a general election or by-election. The commission may need to seek information from the police or a court to determine whether a particular apprehended violence order was taken out to protect a child. The Bill amends the *Parliamentary Electorates and Elections Act 1912* by empowering the commission to request the police and courts to provide copies of documents for the commission to complete an audit.

Background

14. This Bill will correct an anomaly that arose from the amalgamation of the two Acts (the Commission's Act and the *Child Protection (Prohibited Employment) Act 1998*) and reinstates the original intention of Parliament that require all people in primary child-related employment be subject to the background check regardless of whether they are related to the children or not.
15. The Bill will constitute the Child Death Review Team as a committee of the commission, alleviating it of the need for separate financial reporting and in order to save resources. According to the Agreement in Principle speech, the team's functions, powers and independence are said to remain unchanged.

16. In relation to parliamentary child-related conduct declarations, the March 2007 general election was the first time candidates for NSW Parliament were required to make public declarations about whether they had committed certain forms of conduct with the potential to harm children.

The Bill

17. The objects of this Bill are:

(a) to amend the *Commission for Children and Young People Act 1998*:

- (i) to clarify when relevant employment proceedings are taken to have been completed, and thus when they are required to be notified to the Commission for Children and Young People (***the Commission***), and
- (ii) to require full details of such employment proceedings to be notified, and not just the name and identifying particulars of the employee, and
- (iii) to make it compulsory for background checks to be conducted on any preferred applicant for employment in primary child-related employment, even if that person is related to the children he or she will work with, and
- (iv) to establish the Child Death Review Team as a committee of the Commission, rather than a statutory corporation, and to empower the Team to register, classify, analyse and research not only child deaths that occur in New South Wales, but also the deaths of children who ordinarily reside in New South Wales but who die elsewhere, and
- (v) to empower the Commission to charge fees for the issue of certain certificates, and
- (vi) to make other minor amendments, and

(b) to amend the *Parliamentary Electorates and Elections Act 1912* to require the Commissioner of Police, the Registrars of courts and certain other persons to provide the Commission for Children and Young People with access to information that the Commission requires for the purposes of the conduct of audits of the child-related conduct declarations of candidates for election who are subsequently elected to Parliament.

18. 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.

Clause 3 is a formal provision that gives effect to the amendments to the *Commission for Children and Young People Act 1998* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendment to the *Parliamentary Electorates and Elections Act 1912* set out in Schedule 2.

Clause 5 repeals two amending Acts that contain uncommenced provisions concerning relevant employment proceedings.

Clause 6 provides for the repeal of the proposed Act after the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act

will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Commission for Children and Young People Act 1998

Schedule 1 [1] updates a reference to the Act that regulates the annual reporting of the Commission, which was formerly a Department, but is now a statutory corporation.

Schedule 1 [2] updates a cross-reference to the Act under which a defined term is defined.

Schedule 1 [3] and [10] make it clear that relevant employment proceedings, the completion of which is required to be notified to the Commission, include all proceedings (and not just disciplinary proceedings) involving either reportable conduct by an employee or an act of violence committed by an employee in the course of employment and in the presence of a child.

Schedule 1 [4] and [6] narrow the operation of an existing exemption, so that people who are preferred applicants for employment in primary child-related employment will be subject to background checking regardless of whether they are related to the children they work with. Such people will continue to be exempt from the prohibitions on certain persons (prohibited persons) applying for child-related employment with such children, undertaking such employment or remaining in such employment. To achieve this result, the exemption is transferred to the Division that imposes those prohibitions.

Schedule 1 [5] empowers the Commission to charge fees for the issue of certificates to self-employed persons, certifying that the persons are not prohibited persons within the meaning of the *Commission for Children and Young People Act 1998*.

Schedule 1 [7] omits a redundant provision about a review that has already occurred.

Schedule 1 [8] makes it clear that relevant employment proceedings are completed, and are therefore required to be reported to the Commission, when a finding has been made by an employer as to whether the alleged reportable conduct, or the alleged commission of an act of violence, occurred or may have occurred, and a decision has been made by the employer as to what action (if any) is to be taken against the employee in respect of the finding.

Schedule 1 [9] requires an employer who notifies the Commission that relevant employment proceedings have been completed to also notify sufficient details of the proceedings concerned to the Commission, or an approved screening agency that requests the information, for the purposes of background checking by the Commission or that approved screening agency or for the purposes of the Commission exercising its function of maintaining a database of completed relevant employment proceedings.

Schedule 1 [11] establishes the Child Death Review Team as a committee of the Commission, rather than a statutory corporation. The old Team is abolished by Schedule 1 [16].

Schedule 1 [12] provides that any function that the Child Death Review Team may exercise with respect to child deaths occurring in New South Wales may also be exercised by the Team in connection with the death of a child dying outside the State while ordinarily resident in the State. The amendment also provides that the Convenor of the Child Death Review Team may enter into an agreement or arrangement for the exchange of information between the Child Death Review Team and an equivalent body of another State or Territory.

Schedule 1 [13] empowers the Convenor of the Child Death Review Team to disclose information in a way that gives effect to any such agreement or arrangement.

Schedule 1 [14] clarifies that the protection from personal liability provided to the Commission and certain persons is available for anything omitted to be done in good faith in the execution of the *Commission for Children and Young People Act 1998*, as well as for anything done in good faith.

Schedule 1 [15] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [16] makes savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Parliamentary Electorates and Elections Act 1912

Schedule 2 imposes a duty on the Commissioner of Police, the Registrars of courts and certain other persons prescribed by the regulations to provide the Commission for Children and Young People with access to information that the Commission requires for the purposes of conducting an audit of a child-related conduct declaration made by a candidate for election who is subsequently elected to Parliament. Under the new provision, a person is not prevented from complying with that duty by any provision of any Act or law that otherwise restricts or denies access to records.

Issues Considered by the Committee

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

Issue: Privacy – Schedule 1 [9] – proposed section 39 (2):

19. This Bill will require employers to provide sufficient details about the reportable incident so they can be considered in the background checking process such as information on what the person has done, how the child was harmed or the circumstances of the conduct (proposed section 39 (2) of Schedule 1 [9]).

20. The Committee notes that the current legislation already requires employers to notify the commission of the name and other identifying particulars of an employee against whom relevant employment proceedings have been completed, and given the public interest in protecting children, the Committee is of the view that, on balance, the proposed section 39 (2) of Schedule 1 [9] does not unduly trespass on the right to privacy.

The Committee makes no further comment on this Bill.

5. COURTS AND OTHER LEGISLATION AMENDMENT BILL 2007

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

Purpose and Description

1. The purpose of the Bill is to:
 - amend the *Coroners Act 1980* in relation to the suspension and continuation of inquests and inquiries;
 - amend the *Land and Environment Court Act 1979* in relation to privilege and conciliation conferences;
 - amend the *Legal Profession Act 2004* in relation to a transitional matter; and
 - amend the *Young Offenders Act 1997* in relation to miscellaneous matters and to make consequential amendments to certain Regulations.

Background

2. The *Young Offenders Act 1997* was established 10 years ago to provide procedures for dealing with child offenders through the use of youth justice conferences, cautions and warnings instead of court proceedings. Prior to its introduction, the NSW Government had set up a working party to examine the concept of a conferencing scheme for young offenders in NSW and to improve police cautioning. Members of the working party included representatives from the NSW Attorney General's Department, the Department of Juvenile Justice, NSW Police, Ministry for Police and the Department of Corrective Services. The *Young Offenders Act* was based on the report of the working party.⁷
3. According to the Agreement in Principle speech, the Bill implements a number of recommendations arising from the statutory review of the *Young Offenders Act 1997* undertaken by the Attorney General's Department, and the NSW Law Reform Commission Report – *Young Offenders*.⁸
4. The Bill also amends the *Coroners Act 1980* to restore the interpretation of s 20 that existed prior to the decision of the Supreme Court in *Innes v NSW Senior Deputy State Coroner*.⁹

⁷ NSW Law Reform Commission, *Young Offenders*, Report 104, 2005, para 2.54.

⁸ NSW Law Reform Commission, *Young Offenders*, Report 104, 2005.

⁹ [2007] NSWSC 1209.

The Bill

Amendment of Young Offenders Act 1997

Aboriginal and Torres Strait Islander children

5. The Bill amends s 3 to provide that one of the objects of the Act is to establish and use youth justice conferences to deal with alleged offenders in a way that addresses the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.

Meaning of 'victim'

6. The Bill amends s 5 of the Act to expand the definition of 'victim' to include people who suffer psychological harm as the result of an Act that does not amount to mental illness or nervous shock, and to also include people who suffer financial harm other than property loss.

Application of Young Offenders Act 1997 to persons who are no longer children

7. The Bill inserts s 7A to provide that the Act applies to a person who was a child when an offence covered by the Act was committed or alleged to have been committed and is under the age of 21 years when dealt with under the Act. The Act currently limits application of the Act to persons who are still a child when being dealt with under the Act.

Period for deciding whether to deal with child under Young Offenders Act 1997

8. The Bill amends s 9 to confirm that an investigating official has at least 14 days to consider whether a child should be dealt with under Part 3 or 4 of the Act or referred to a specialist youth officer under Part 5 of the Act.

Admission of offences

9. The Bill amends s 10 to provide that one of the circumstances in which an admission by a child of an offence is an admission for the purposes of the Act is if the child is aged 14 years or over and the admission takes place in the presence of an adult chosen by the child. The amendment lowers the relevant age from 16 years to 14 years.

Warnings

10. The Bill inserts a new s 16A to enable an investigating official who gives a warning to a child, or a youth liaison officer, to notify the parents that a warning has been given. However, such notification cannot be made if the official believes that the disclosure would pose an unacceptable risk to the safety, welfare or wellbeing of the child.
11. An amendment to s 17 requires the Commissioner of Police to ensure that a record of warning made under the Act is destroyed or expunged once the person to whom the record relates turns 21.

Cautions

12. The Bill inserts s 24A to provide that prior to a caution being given to a child, the person arranging for the caution may:
 - seek a written statement from any victim of the offence concerned that describes the harm occasioned to the victim by the offence; and
 - give guidance to any such victim as to the kind of matters that are appropriate for inclusion in the statement; and
 - provide any such statement received by the person to the person giving the caution to the child.
13. Section 28 is amended to enable a student or probationary police officer to be present for training purposes when a caution is given to a child, provided that consent to the officer's presence has been given by the child and an adult present with the child.
14. The Bill amends s 29 to confirm that a person proposing to give a caution to a child under the Act may defer if a person responsible for the child or an adult chosen by the child is not present or if the child's capacity to understand is affected by alcohol or another drug.
15. The Bill inserts s 33A to require the Commissioner of Police to ensure that any finger prints or palm prints obtained from, or photographs taken of, a child in connection with an offence are destroyed if a caution has been given under the Act in relation to the offence.

Youth justice conferences

16. Section 42 is amended to clarify that the obligation of a conference administrator to appoint a conference convenor for a youth justice conference only arises when the administrator is satisfied that a referral for that purpose has been made under Part 5 of the Act.
17. Section 43 is amended to require a youth justice conference to be convened within 28 days following a referral (rather than 21 days) unless the conference administrator reasonably considers that it is not practicable to do so.
18. The Bill amends s 47 to enable a police officer to be present during a youth justice conference for training purposes, provided that consent has been given by the conference convenor, child, any victim and a person responsible for the child (if present).

Disclosure of records and criminal history

19. Section 66 is amended to enable records of or relating to cautions and conferences under the Act to be divulged to certain authorised officers of the Department of Juvenile Justice. Records of warnings may also be divulged to youth liaison officers for the purpose of notifying the parents of a child that a warning has been given to the child.

20. The Bill amends s 68 so that limitations on the need for a person to disclose warnings, cautions or conferences given or conducted under the Act in relation to the person that are set out in s 68 do not apply in relation to an application by a person from employment in child-related employment within the meaning of Part 7 of the *Commission for Children and Young People Act 1998*.

Delegation of functions of Director-General

21. The Bill inserts s 62A to provide that the Director-General may delegate the exercise of any function to a Deputy Director-General of the Department of Juvenile Justice or any other person prescribed by the regulations.

Abolition of Youth Justice Advisory Committee

22. The Bill repeals s 70 which provides for the constitution of a Youth Justice Advisory Committee.

Amendment of Coroners Act 1980

23. The Bill clarifies that s 20 of the *Coroners Act* allows a coroner to continue an inquest or inquiry that was previously terminated under s 19. The State Coroner or a coroner authorised by the State Coroner may resume or commence or dispense with a suspended inquest or inquiry if the coroner who adjourned or did not commence an inquest or inquiry is unavailable.
24. The Bill also replaces references to the termination of an inquest or inquiry with references to the suspension of an inquest or inquiry.

Amendment of Land and Environment Court Act 1979

25. The Bill amends s 34 of the *Land and Environment Court Act 1979* to provide that the same privilege that applies to judicial proceedings regarding defamation applies in relation to conciliation conferences and documents produced in relation to such conferences.

Amendment of Legal Profession Act 2004

26. The Bill amends cl 26(1)(c) of Schedule 9 of the *Legal Profession Act 2004* to provide that a reference to a legal practitioner of a specified period of standing is to be read as a reference to an Australian lawyer of that period of standing.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

27. Clause 2 of the Bill provides that Schedules 2, 4 and 5 are to commence on proclamation. This may delegate to the Government the power to commence those parts of the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

- 28. Although there may be good reasons why such discretion is required, such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether schedules 2, 4 and 5 of the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

6. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Council
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Attorney General, Justice

Purpose and Description

1. This Bill amends the *Crimes (Administration of Sentences) Act 1999* and the regulations under that Act in relation to the management of correctional centres; and for other purposes.
2. It makes amendments in relation to inmates' money, the date on which an inmate becomes eligible for parole, drug and alcohol testing of offenders under a community service order, the appointment and functions of compliance and monitoring officers, stop orders on forwarding mail to exempt persons and exempt bodies, the powers of the commissioner, and minor, consequential and ancillary matters.
3. It is also proposed to amend the *Crimes (Administration of Sentences) Act 1999* so that if an offender is arrested and admitted into custody whilst on parole that any time served, until the State Parole Authority has formally revoked the parole order, counts toward the 12-month wait before parole can be re-considered. This will be achieved by amending the definition of the "parole eligibility date".
4. It also seeks to replace the current subsection (3) of section 141 of the Act to make it that the Parole Authority need only to specify a period during which an offender is to be released on parole and leaving the actual day to be determined administratively having regard to the need to ensure that arrangements are in place to enable the offender to make the move from custody rather than, as is presently the case, to fix the actual day of release.
5. Amendment will allow probation and parole officers to test offenders for alcohol and drug use whilst under community services orders. Probation and parole officers do not currently have the authority to test for drugs or alcohol if they suspect that the offender is under the influence of alcohol or drugs. This amendment will allow probation and parole officers to use the result of alcohol or drug testing as evidence that an offender has either breached a community service order on the grounds of being under the influence of alcohol or drugs or not breached an order.
6. Currently, the functions of compliance and monitoring officers in section 235G of the Act are confined to full-time inmates on external leave from a correctional centre, periodic detainees, home detainees and offenders under community service orders. This Bill proposes to extend the range of offenders for whom compliance and monitoring officers' functions relate to such as parolees, offenders subject to an extended supervision order or interim extended supervision order under the *Crimes*

(*Serious Sex Offenders*) Act 2006, and offenders subject to a good behaviour bond. It also permits compliance and monitoring officers to use as much force as is reasonably necessary in the exercise of their functions.

7. The Bill proposes to amend the principal regulation with respect to inmate mail to enable an exempt body or person to specifically write to the Commissioner of Corrective Services to request that mail from a particular offender not be sent to them. This may be done in circumstances where a member of Parliament who is an exempt person under the regulation has previously received abusive or threatening letters from that offender.
8. It also includes an amendment to allow the commissioner to authorise any person to exercise the functions, duties and responsibilities of a correctional officer.

Background

9. This Bill aims to improve the administration of sentences and the management of correctional centres.
10. According to the Second Reading Speech, if the courts find that the Department of Corrective Services holds inmates' moneys on trust, then ordinary trust obligations would be imposed upon the Department of Corrective Services. Consequently, certain actions of the department's, such as pooling the money into one account and using the interest, could be deemed a breach of trust. The Crown Solicitor has advised that whilst this is improbable the matter is not entirely free from doubt. Therefore, this Bill proposes an amendment to make it clear that ordinary trust obligations are not imposed upon the Department of Corrective Services with respect to moneys held on behalf of inmates.
11. An inmate has different sources of money such as money in their possession when they first enter into custody, earnings from work conducted within the correctional centre, earnings from day-leave employment, money given to inmates from visitors, moneys transferred from inmates' bank accounts and other welfare payments which are payable upon release, such as rental assistance from Centrelink. In the Second Reading Speech, the interest earned from this money is described to be used by the Department of Corrective Services to purchase items for the benefit of visitors and inmates, such as equipment for children in visiting areas.
12. In order to improve community safety, and in keeping with priority R2 of the State Plan to reduce reoffending, the Bill proposes to extend the range of offenders for whom compliance and monitoring officers' functions relate to such as including parolees, offenders subject to an extended supervision order or interim extended supervision order under the *Crimes (Serious Sex Offenders) Act 2006*, and offenders subject to a good behaviour bond.

The Bill

13. The objects of this Bill are:
 - (a) to amend the *Crimes (Administration of Sentences) Act 1999* (**the principal Act**) so as:

- (i) to clarify the provisions with respect to the appointment and functions of compliance and monitoring officers, and
 - (ii) to enable the Commissioner to authorise persons who are not correctional officers to exercise specified correctional officer functions, and
 - (iii) to provide that an offender who is taken into custody while on release on parole (otherwise than following revocation of parole) does not become eligible for further parole until 12 months after he or she is taken into custody, and
 - (iv) to make further provision with respect to money that is held on behalf of offenders held in full-time imprisonment, and
 - (v) to make provision of a minor, consequential or ancillary nature, and
 - (vi) to make further provision of a savings or transitional nature, and
- (b) to amend the *Crimes (Administration of Sentences) Regulation 2001* (**the principal Regulation**) so as:
- (i) to enable an exempt person (such as a Member of Parliament) or exempt body (such as the Ombudsman, the Judicial Commission or the Anti-Discrimination Board) to ask the Commissioner not to forward to them any mail from specified offenders, and
 - (ii) to enable an offender under a community service order to be tested for drugs and alcohol while in attendance to perform community service work, and
 - (iii) to make provision of a minor, consequential or ancillary nature, and
- (c) to make a consequential amendment to the *Crimes (Serious Sex Offenders) Act 2006*.

14. Outline of provisions

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

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

Clause 3 is a formal provision that gives effect to the amendments to the *Crimes (Administration of Sentences) Act 1999* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Crimes (Administration of Sentences) Regulation 2001* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendment to the *Crimes (Serious Sex Offenders) Act 2006* set out in Schedule 3.

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

Schedule 1 Amendment of Crimes (Administration of Sentences) Act 1999

Compliance and monitoring officers

Schedule 1 [10] substitutes section 235G of the principal Act. The proposed section differs from the existing section in that it extends the range of offenders with respect to whom a compliance and monitoring officer may exercise functions (proposed subsection

(6)), extends the range of functions that a compliance and monitoring officer may exercise, but restricts their exercise to offenders who are of or above the age of 18 years (proposed subsection (2)) and expressly permits the use of reasonable force (proposed subsection (5)). **Schedule 1 [1]** inserts a definition of ***compliance and monitoring officer*** into section 3 (1).

Exercise of correctional officer functions by persons other than correctional officers

Schedule 1 [9] amends section 235 of the principal Act so as to enable the Commissioner to authorise a person who is not a correctional officer to exercise correctional officer functions. The amended section will provide that such a person is taken to be a correctional officer while exercising any such function, so giving the person the same immunities as a correctional officer and subjecting the person to the same accountabilities as a correctional officer.

Eligibility for parole of offenders returned to custody while on parole

An offender who is subject to imprisonment becomes eligible for parole on what is described as his or her “parole eligibility date”. That date is defined to be the date on which the offender first becomes eligible for release on parole (determined at the time the offender is sentenced) or, if the offender is returned to custody following revocation of parole, the date occurring 12 months after the date on which he or she is so returned. **Schedule 1 [2]** amends the definition of ***parole eligibility date*** in section 3 of the principal Act so as to ensure that the same 12-month waiting period applies if the offender is taken into custody otherwise than following revocation of parole (such as if the offender is imprisoned for a new offence).

Money held on behalf of offenders in full-time imprisonment

Schedule 1 [4] inserts a new section 76A into the principal Act. The proposed section requires money held on behalf of offenders subject to full-time imprisonment to be deposited into a bank or other authorised deposit-taking institution, allows it to be invested, and allows the proceeds of investment to be applied for the benefit of such offenders, and their families, in such manner as the Commissioner may determine.

Minor, consequential and ancillary amendments

Schedule 1 [3] amends sections 21, 41D, 52, 55, 190, 204 and 235A of the principal Act so as to replace references to “legal practitioner” with references to “Australian legal practitioner”. These amendments reflect changes in nomenclature brought in by the *Legal Profession Act 2004*.

Schedule 1 [5] and [6] amend sections 81 and 104 of the principal Act, dealing with the obligations of offenders under periodic detention orders and home detention orders, so as to make it clear that an offender must not only permit home visits by correctional officers and other members of staff of the Department of Corrective Services but must also permit them entry to the home.

Schedule 1 [7] replaces subsection (3) of section 141 of the principal Act with proposed subsections (3) and (3AA) so as to make it clear that the Parole Authority need only to specify a period during which an offender is to be released on parole (leaving the actual day to be determined administratively having regard to the need to ensure that arrangements are in place to enable the offender to make the transition from custody) rather than, as is presently the case, to fix the actual day of release.

Schedule 1 [8] makes a consequential amendment to section 141 (3A).

Savings and transitional provisions

Schedule 1 [11] amends clause 1 of Schedule 5 to the principal Act so as to enable savings and transitional regulations to be made in connection with the enactment of the proposed Act.

Schedule 1 [12] inserts a new Part 12 into Schedule 5 to the principal Act. The proposed Part contains savings and transitional provisions with respect to the proposed section 76A (see Schedule 1 [4]) and the substituted section 235G (see Schedule 1 [10]).

Schedule 2 Amendment of Crimes (Administration of Sentences) Regulation 2001

Stop orders on forwarding of mail to exempt persons and exempt bodies

Schedule 2 [1] amends clause 110 of the principal Regulation so as to enable an exempt body or exempt person (that is, a body or person to whom an offender is ordinarily entitled to send, and from whom an offender is ordinarily entitled to receive, unopened mail) to ask the Commissioner not to forward mail from a particular offender (perhaps because previous mail from that offender has been abusive or threatening). Mail that is from any such offender that is addressed to a body or person from whom such a request has been made may be confiscated and dealt with as the Commissioner directs.

Drug and alcohol testing of offenders attending to perform community service work

Schedule 2 [2] inserts a new clause 205A into the principal Regulation. The proposed clause requires an offender under a community service order who is in attendance at a work site or attendance site to undergo testing for alcohol and drugs if required to do so by an authorised officer. These requirements parallel similar requirements that apply under clauses 146 and 148 to offenders who are in full-time or periodic detention.

Minor, consequential and ancillary amendments

Schedule 2 [3] amends clause 217 of the principal Regulation so as to bring it into line with the provisions to be amended by Schedule 1 [5] and [6] and Schedule 3.

Schedule 2 [4] substitutes clause 281 of the principal Regulation so as to update provisions that prescribe the order of ranking of correctional officers and of certain Departmental officers.

Schedule 2 [5] substitutes the definition of *legal practitioner* in the Dictionary to the principal Regulation so as to reflect changes in nomenclature brought in by the *Legal Profession Act 2004*. The amendment reflects the amendments to be made to the principal Act by Schedule 1 [3].

Schedule 3 Amendment of Crimes (Serious Sex Offenders) Act 2006

Schedule 3 substitutes section 11 (a) of the *Crimes (Serious Sex Offenders) Act 2006* so as to bring it into line with the provisions to be amended by Schedule 1 [5] and [6] and Schedule 2 [3].

Issues Considered by the Committee

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

Issue: Property and Rule of Law – Proposed section 76A of Schedule 1 [4] – Inmates' money:

15. An inmate has different sources of money such as money in their possession when they first enter into custody, earnings from work conducted within the correctional centre, earnings from day-leave employment, money given to inmates from visitors,

moneys transferred from inmates' bank accounts and other welfare payments which are payable upon release, such as rental assistance from Centrelink. The money (until repaid), is being proposed to be deposited in any form of investment approved by the Treasurer. Interest from such investment may be applied for the benefit of inmates and their families in such manner as the commissioner may determine.

16. The Committee is concerned that the proposed section 76A of Schedule 1 [4] is made with respect to money that if the inmate had not entered into custody, would have otherwise lawfully belonged to the inmate or the inmate would have been lawfully entitled to. The amendment is being made with respect to money that is lawfully or legally available to the inmate, and not any proceeds from crime. This also contrasts significantly with the current legislation which relates to the confiscation of property (including money) that is unlawfully in the possession of an inmate (current section 75 of the Act), and with respect to sale of unclaimed property and unclaimed money (current section 76). The Committee is concerned that this amendment is unduly trespassing individual rights to property, and refers it to Parliament.

17. According to the Second Reading Speech, with respect to the proposed section 76A of Schedule 1 [4], if the courts find that the Department of Corrective Services holds inmates' moneys on trust, then ordinary trust obligations would be imposed upon the Department of Corrective Services. Therefore, certain actions of the department's, such as pooling or depositing the money into one account and using the interest, could be deemed a breach of trust. The Crown Solicitor has advised that whilst this is improbable the matter is not entirely free from doubt. Therefore, this Bill proposes the above amendment to ensure that ordinary trust obligations are not imposed upon the Department of Corrective Services with respect to moneys held on behalf of inmates.

18. The Committee has concerns that the above amendment also infringes the rule of law by seeking to legislate its way out of the ordinary trust rules and obligations which could likely be imposed by the court on the Department of Corrective Services, especially since the Crown Solicitor has advised that the matter is not entirely free from doubt. The Committee is concerned that this may conflict with the laws on trust and also undermine the rule of law and trespass unduly on personal rights and liberties, and refers it to Parliament accordingly.

Issue: Retrospectivity - Proposed section 97 of Schedule 1 [12] to be inserted after the current Part 11 of Schedule 5 – Inmates' money:

19. This will extend to any inmates' money that had been surrendered, paid or received, before the commencement of the amended section. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person, and considers this proposed section trespasses unduly on personal rights and refers this to Parliament.

Issue: Oppressive Official Powers – Proposed new section 141 (3) of Schedule 1 [7] – Decision following review:

20. This seeks to replace the current subsection (3) of section 141 of the Act to make it that the Parole Authority need only to specify a period during which an offender is to

be released on parole and leaving the actual day to be determined administratively rather than, as is presently the case, to fix the actual day of release.

- 21. The Committee notes that certainty is required for any inmate who has been determined by the Parole Authority as to their right to be released on parole, including the actual day for release. The Committee has concerns that the proposal is to be determined administratively (according to the Department's timing and resources), rather than is currently the situation of fixing the actual day of release, and is of the view that the proposed new section 141 (3) unduly trespasses individual rights and liberties and refers this to Parliament.**

Issue: Excessive Punishment – Proposed new section 235G of Schedule 1 [10] – Functions of Departmental compliance and monitoring officers and proposed section 205A of Schedule 2 [2] – Testing for alcohol and drugs:

- 22.** Currently, the functions of compliance and monitoring officers in section 235G of the Act are confined to full-time inmates on external leave from a correctional centre, periodic detainees, home detainees and offenders under community service orders. This Bill proposes to extend the range of offenders for whom compliance and monitoring officers' functions relate to such as parolees, offenders subject to an extended supervision order or interim extended supervision order under the *Crimes (Serious Sex Offenders) Act 2006*, and offenders subject to a good behaviour bond. It also permits compliance and monitoring officers to use as much force as is reasonably necessary in the exercise of their functions. Proposed section 235G (2) (f) include functions of a correctional officer in relation to the testing of offenders for the presence of alcohol or drugs.

- 23. Under the proposed section 235G (6) (c), offender also means an offender referred to in Part 8 of the *Crimes (Sentencing Procedure) Act 1999*, which includes those sentenced to a good behaviour bond. This involves matters of a lesser nature or less serious or minor summary offences. The Committee is of the view that the new proposal of the extended functions of a compliance and monitoring officer to conduct the testing for the presence of alcohol or drugs (with the power to use such force as is reasonably necessary), on those on a good behaviour bond, may be excessive punishment in certain circumstances, especially since alcohol is not an illicit drug. The Committee considers the application of the proposed section 235G (2) (f) to enable the compliance and monitoring officers to conduct drug or alcohol testing on those sentenced with a good behaviour bond under the proposed section 235G (6) (c), appears to be excessive punishment and unduly trespasses personal rights and liberties, and refers this to Parliament.**

- 24. Proposed section 205A of Schedule 2 [2] allows for the testing for alcohol and drugs where an offender is suspected to be under the influence of alcohol or other intoxicating substance, if in attendance at a work site or attendance site. The proposed amendment is silent on the level of consumption or quantity of alcohol. The Committee is concerned that the testing of alcohol (which is not an illicit substance), is allowed for those on community service orders and those on parole especially if the conditions of the order do not prohibit them from consuming alcohol or if the offences that they had committed, were not related to alcohol or drugs. The Committee regards this amendment as unduly trespassing individual rights and liberties, and refers it to Parliament.**

The Committee makes no further comment on this Bill.

7. GENE TECHNOLOGY (GM CROP MORATORIUM) AMENDMENT BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Council
Minister Responsible:	The Hon Ian MacDonald MLC
Portfolio:	Primary Industries, Energy, Mineral Resources, State Development

Purpose and Description

1. This Bill amends the *Gene Technology (GM Crop Moratorium) Act 2003* to make further provision with respect to cultivation in New South Wales of licensed GM food plants and to extend the operation of that Act; to amend the *Gene Technology (New South Wales) Act 2003* with respect to the application of Commonwealth gene technology laws in this State; and for other purposes.
2. This extends the operation of the *Gene Technology (GM Crop Moratorium) Act* until 1 July 2011, as the current legislation is due to expire on 3 March 2008.
3. A new objects clause will be inserted with the object of the legislation to establish a regime to regulate the commercial cultivation of GM food plants in NSW and the conduct of experiments on GM food plans in NSW for marketing purposes. The Bill will repeal the current moratorium order process and be replaced with a blanket moratorium and a scheme for approving the cultivation of GM food crops.
4. If a GM food crop has been licensed by the Commonwealth for commercial release, there will be an automatic prohibition on its cultivation in NSW unless the following is in place. The GM food crop must be approved for the commercial cultivation in accordance with the requirements of the proposed Bill. Exemption can be granted for experimental purposes such as research where the cultivation of GM food crop will be prevented.
5. To obtain the approval, the industry must establish that it meets certain criteria that address market requirements. These include the industry's capacity to manage the commercial cultivation such as demanded by domestic and international markets for the GM food plant. The industry must also identify the threshold levels for the accidental or unintended presence of GM traits in food plants that are acceptable in the relevant domestic and international markets. The Minister also needs to be satisfied that the industry has supply chain management processes that address the accidental or unintended presence thresholds such as the need to segregate GM food plants and non GM food plants. The industry needs to demonstrate that it has obtained or can obtain any relevant approvals regarding the importation of the GM food plants.
6. The Bill provides for the establishment of an expert committee, to provide advice to the Minister on whether an industry meets the criteria. The NSW Agricultural Advisory

Council on Gene Technology will be abolished by this Bill. The expert committee will need to disclose pecuniary interests and there are provisions on how confidential information should be dealt with.

7. The Minister will have power to revoke an order, to be supported by departmental inspectors with the power to enter and inspect premises. It will be an offence to knowingly cultivate a GM food plant in contravention of the Act.
8. NSW will not be able to modify by regulations the application of the Commonwealth's gene technology laws, as a consistent national approach to regulation is needed.

Background

9. The Commonwealth Government and NSW Government have distinct roles with regard to the regulation of genetically modified (GM) crops. The Gene Technology Agreement defines these roles and is signed by the Commonwealth and all Australian States and Territories in 2001. The Commonwealth is responsible for ensuring that dealings with GM organisms or GMOs (including a GM crop), are safe for people and the environment. The Commonwealth Office of the Gene Technology Regulator assesses applications for dealings with GMOs. The concept of 'dealing' is broad and includes everything from conducting experiments to commercial production. The Commonwealth office determines any potential impact on health and the environment. The role of NSW is to manage market or trade issues affecting GM crops. NSW has a role in the regulation of a GM crop only after the Office of the Gene Technology Regulator has granted a licence for the commercial use of that GM crop in the first place.
10. In 2003, the Commonwealth granted licences for the commercial release of 2 types of GM canola. In response, NSW imposed moratorium orders under the Gene Technology (GM Crop Moratorium) Act, which have prevented the commercial cultivation of GM canola in NSW. Queensland does not have a moratorium in place because canola is generally not grown there.
11. The NSW Government has received a review report on the *Gene Technology Act 2003* from the former leader of The Nationals and former Minister for Agriculture (the Hon Ian Armstrong) along with a panel (Dr Kathryn Adams, lawyer and scientist; and Professor Timothy Reeves, a scientist in agricultural systems research). The panel conducted consultations across NSW. The review received 1,375 submissions and had more 31 meetings with various stakeholders. The panel recommended that NSW extend the Act and remove the moratorium on the cultivation of GM canola. The review recommended that it is time to amend the legislation to recognise the increased level of understanding and acceptance of the benefits from GM food crop production. The market conditions have changed and farmers need to compete in the international market.
12. According to the Second Reading Speech, the Bill has the support of the National Farmers' Federation, the NSW Farmers Association, and Agrifood Awareness Australia.
13. The Victorian Premier Mr John Brumby also announced that Victoria would end its moratorium on canola crops and a consideration process would be implemented for

other crops recommended for commercial release by the Office of the Gene Technology Regulator.

14. The NSW and Victorian Governments will be the first 2 states to lift the bans on genetically modified (GM) crops and they stated that farmers will enjoy better profits after the lifting of these bans. However, the growing of GM canola has been criticised by some farmers and environmental groups, including concerns with contamination from the GM crops.
15. Under the proposed Bill, NSW farmers will be able to choose what type of canola crop they grew. This puts them on a level playing field with overseas farmers, including export opportunities to the US and Canada.
16. Tasmania is reviewing its ban. South Australia is considering an expert report on GM crops with its current moratorium due to expire in April 2008. The rest of the Australian states and territories retain the bans.
17. The Victorian Government made its decision after the Commonwealth Government recommendations in a review report by Sir Gustav Nossal, which also gave clearance for GM canola.

The Bill

18. The object of this Bill is to amend the *Gene Technology (GM Crop Moratorium) Act 2003* (the **Principal Act**):
 - (a) to postpone the expiry of the Principal Act from 3 March 2008 to 1 July 2011, and
 - (b) to restate the objects of the Principal Act, and
 - (c) to replace provisions of the Principal Act relating to the making of moratorium orders to prohibit the cultivation of GM food plants with a blanket moratorium on the commercial cultivation of genetically modified food plants (**GM food plants**) except as permitted under the Principal Act, and
 - (d) to establish a scheme for approving a GM food plant or class of GM food plant for commercial cultivation in New South Wales but only if:
 - (i) a GMO licence is in force under the *Gene Technology Act 2000* of the Commonwealth which authorises dealings of the kind necessary for the commercial cultivation of the GM food plant or GM food plants of that class, and
 - (ii) the industry or sector of the industry that deals with that GM food plant or class of GM food plants meets defined criteria, and
 - (e) to provide for the establishment of an **Expert Committee (in place of the Advisory Council presently established under the Principal Act) to provide advice on whether industries or sectors of industry dealing with GM food plants meet those defined criteria, and**
 - (f) to make various transitional and consequential provisions.
19. The Bill also amends the *Gene Technology (New South Wales) Act 2003* (the **NSW Act**). At present, section 5 of the NSW Act applies the *Gene Technology Act 2000* of

the Commonwealth (the **Commonwealth Act**) and certain other Commonwealth gene technology laws as laws of New South Wales and automatically applies any amendments to those Commonwealth laws as laws of this State. Section 6 (1) of the NSW Act modifies the Commonwealth Act as applied to prohibit the Regulator from granting a licence for a dealing that would involve an intentional release of a GMO into the New South Wales environment if the dealing is in contravention of a moratorium order made under the Principal Act. Section 6 (2) and (3) of the NSW Act enable regulations to be made modifying the Commonwealth laws as applied.

20. The Bill omits section 6 (1) as a consequence of the proposed amendment of Division 1 of Part 2 of the Principal Act described above. It also omits section 6 (2) and (3) so that New South Wales will no longer be able to modify by regulations the Commonwealth gene technology laws as automatically applied. It also makes consequential amendments to sections 4 and 5 of the NSW Act.

21. 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 (other than Schedule 1 [16] which is to commence on the date of assent), on a day or days to be proclaimed.

Clause 3 is a formal provision that gives effect to the amendments to the *Gene Technology (GM Crop Moratorium) Act 2003* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Gene Technology (New South Wales) Act 2003* set out in Schedule 2.

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

Schedule 1 Amendment of Gene Technology (GM Crop Moratorium) Act 2003 No 12

Objects of Principal Act

Schedule 1 [1] replaces section 3 of the Principal Act so as to restate the objects of that Act.

Moratorium on commercial cultivation of licensed GM food plants

Section 6 of the Principal Act currently enables the Minister to make moratorium orders prohibiting the cultivation in New South Wales of a specified GM food plant or class of GM food plants. Section 7 makes it an offence to contravene such an order. Section 8 enables the Minister to make orders conferring exemptions from the operation of moratorium orders.

Schedule 1 [6] replaces sections 6 and 7 of the Principal Act with proposed sections 6–7A.

Proposed section 6 imposes a blanket moratorium prohibiting the cultivation in New South Wales of certain GM food plants that are licensed to be dealt with by the *Gene Technology Act 2000* of the Commonwealth unless the GM food plants have been approved for commercial cultivation by the Minister for Primary Industries, or cultivation of the GM food plants for the principal purpose of conducting experiments is permitted by an exemption, under the Principal Act. Proposed section 7 makes it an offence to contravene this blanket prohibition.

Proposed section 7A sets out a scheme for the Minister to approve the commercial cultivation of a licensed GM food plant in all or part of New South Wales by an order published in the Gazette made on the application by a representative of the relevant industry involved in or proposing to be involved in the commercial cultivation of the GM food plant.

An order may only be made if certain criteria set out in proposed section 7A (3) are met by the relevant industry and the Minister must take into account whether or not the GM food plant is authorised or permitted to be cultivated in another State or Territory. The criteria must be addressed in the application for the making of the order and the Minister may only make the order if satisfied, on the advice of an Expert Committee, that the industry meets the requirements.

Schedule 1 [2]–[5], [7]–[9] and [11]–[15] make consequential amendments.

Expert Committee

Section 13 of the Principal Act currently establishes and makes provision for a New South Wales Agricultural Advisory Council on Gene Technology (the **Advisory Council**). The Advisory Council has various functions, including giving the Minister advice on various matters relating to GM food plants and making recommendations as to whether the Minister should make exemption orders.

Schedule 1 [10] omits section 13 and replaces it with proposed section 13 which establishes the New South Wales Expert Committee on Gene Technology (the **Expert Committee**) in place of the Advisory Council. The Expert Committee has such functions as are conferred or imposed on it by or under the Principal Act or by the Minister and, in particular, has the function of evaluating and providing advice to the Minister as to whether an industry meets the criteria that must be met before an order approving the commercial cultivation of a licensed GM food plant is made. The Expert Committee is to consist of persons appointed by the Minister to represent food plant industries or who have appropriate expertise, qualifications and experience that will enable them to make a valuable contribution to the Expert Committee.

Schedule 1 [10] also inserts proposed sections 13A and 13B to provide for confidentiality of information obtained by the Expert Committee and for disclosure by Committee members of direct or indirect pecuniary interests in matters considered or about to be considered at meetings of the Committee that may raise conflicts of interest.

Expiry of Principal Act

Schedule 1 [16] amends section 43 of the Principal Act to postpone the expiry of that Act from 3 March 2008 to 1 July 2011.

Savings, transitional and other provisions

Schedule 1 [17] enables the making of regulations of a savings and transitional nature.

Schedule 1 [18] provides for the existing members and independent chairperson of the Advisory Council to continue in office as members and chairperson of the Expert Committee.

Schedule 2 Amendment of Gene Technology (New South Wales) Act 2003 No 11

Schedule 2 makes the amendments to the *Gene Technology (New South Wales) Act 2003* described in the Overview.

Issues Considered by the Committee

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

Issue: Exclude judicial and merits review – Proposed Section 7A (11) of Schedule 1 [6]

22. The proposed section reads:

The Minister's determination of, or failure or refusal to determine, an application or decision to revoke an order under this section may not be challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings or restrained, removed or otherwise affected by any proceedings.

23. The Committee notes the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law. The Committee will always be concerned if a Bill purports to oust the jurisdiction of the courts.

24. The Committee is also of the view that the proposed section is very broad. It has the potential to deny a person natural justice by removing the opportunity for review of any decision or even failure or refusal to make a determination by the Minister.

25. The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review of a decision, even to exclude review of a failure or refusal to make a decision, unless there is a strong public interest in doing so.

26. The Committee is of the view that the proposed section 7A (11) is very broad and draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

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

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

27. The Committee notes that except for Schedule 1 [16] which is to commence on the date of assent, the rest of the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

28. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill, other than Schedule 1 [16], to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

8. HEALTH LEGISLATION AMENDMENT BILL 2007

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

Purpose and Description

1. The purpose of the Act is to amend various Acts and regulations to make provision with respect to health professional disciplinary tribunals and certain mental health matters relating to medical or dental students and to make miscellaneous amendments.

Background

2. According to the Agreement in Principle speech, the Bill:

proposes amendments to a number of pieces of health legislation, namely various health professional registration Acts, the *Health Administration Act 1982*, the *Health Services Act 1997*, the *New South Wales Institute of Psychiatry Act 1964*, the *Poisons and Therapeutic Goods Act 1966*, the *Public Health Act 1991* and the *Smoke-free Environment Act 2000*.¹⁰

The Bill

3. The Bill, as noted in the Explanatory Notes, amends various health Acts and regulations so as:
 - (a) to allow the Chairperson or Deputy Chairperson of a health professional disciplinary tribunal to continue to sit on the Tribunal after the expiry of the person's term of appointment in certain circumstances, and
 - (b) to extend the existing power of disciplinary tribunals, professional standards committees and Boards established under health professional legislation may issue orders precluding the disclosure of particular types of information that are capable of identifying a person to include orders in respect of information, pictures and other material, and
 - (c) to increase the maximum penalty for a breach by a corporation of a non-disclosure order imposed by the Nurses and Midwives Tribunal or a professional standards committee under the *Nurses and Midwives Act 1991* to 150 penalty units, and
 - (d) to require the Medical Board and the Dental Board (as appropriate) to be notified if a registered medical student or a registered dental student becomes a mentally incapacitated person, and

¹⁰ N Hay MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 30 November 2007.

- (e) to remove a restriction on registered dental therapists carrying out dental auxiliary activities other than as an officer or employee of or a contractor to a public sector agency or prescribed body, and
- (f) to make provision with respect to payments out of the accounts of health professional boards, and
- (g) to enable the Director-General of the Department of Health to delegate functions relating to the provision of ambulance services to a public sector body appointed for the purpose of exercising those functions, and
- (h) to enable a Committee of Review under the *Health Services Act 1997* to refer matters to the Medical Board or the Dental Board (as appropriate) to be dealt with as a complaint where the Committee is of the opinion that serious concerns exist in relation to the performance or competence of an appellant, that the appellant has engaged in conduct that may constitute professional misconduct or unsatisfactory professional conduct, or the appellant may suffer from an impairment, and
- (i) to provide that no liability attaches to a person in connection with the conduct of a disciplinary review of a member of the NSW Health Service, and
- (j) to make it clear that the supply or fitting of a prosthesis or therapeutic device is a health service within the meaning of the *Health Services Act 1997*, and
- (k) to entitle persons with medical qualifications granted overseas to be registered as a medical practitioner in certain circumstances, and
- (l) to enable the Medical Board to order a medical practitioner who is the subject of a complaint or inquiry to be examined by a specified registered health practitioner, and
- (m) to make it clear that the Medical Board and the Registrar can delegate functions to groups of persons, including committees established under the *Medical Practice Act 1992*, and
- (n) to provide that certain senior employees and executives may be appointed as a member of the New South Wales Institute of Psychiatry, and
- (o) to provide that no personal liability attaches to a person in connection with the exercise of the person's functions as a performance assessor under the *Nurses and Midwives Act 1991*, and
- (p) to enable fees to be charged in connection with an application for an optometrists drug authority, and
- (q) to enable regulations to be made setting infection control standards to be followed in the practice of pharmacy, and

- (r) to enable the Director-General to make an order to prohibit or restrict certain persons from possessing, supplying or prescribing poisons in certain circumstances, and
- (s) to authorise the Director-General to require a medical practitioner involved in the treatment of a person the subject of a report notifying a Category 3 medical condition to provide information to complete or correct the report, and
- (t) to enable the prohibition of the sale of tobacco products with a distinctive fruity, sweet or confectionery-like character, and
- (u) to prohibit the sale of tobacco products by a vendor carrying the products for sale on his or her person or from a mobile or temporary structure, and
- (v) to empower authorised inspectors to issue penalty notices for offences under the *Smoke-free Environment Act 2000*.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

4. Clause 2 of the Bill provides that schedule 2.13[4] is to commence on proclamation. This may delegate to the Government the power to commence that part of the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

- 5. Although there may be good reasons why such discretion is required, such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether schedule 2.13[4] commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

9. LAW ENFORCEMENT AND OTHER LEGISLATION AMENDMENT BILL 2007

Date Introduced: 28 November 2007
House Introduced: Legislative Council
Minister Responsible: The Hon John Hatzistergos MLC
Portfolio: Attorney General, Justice

Purpose and Description

1. This Bill amends the Law Enforcement (Powers and Responsibilities) Act 2002, the Terrorism (Police Powers) Act 2002, the Crimes (Serious Sex Offenders) Act 2006 and other Acts to make further provision with respect to police powers and serious sex offenders; and for other purposes.
2. Amendment to section 87M will allow police officers to seize and detain any item that is likely to be used to contribute to or inflame a public disorder where there is an authorisation in place.
3. A new proposed section 87MB will enable police to deal with large groups of people who marshal outside a target area with the intent to travel to and participate in a riot.
4. Section 87N allows the emergency use of the powers under the division in circumstances where an authorisation under section 87D has not yet been given. Amendments will ensure 2 additional safeguards. The first safeguard is that the emergency use of the powers must be pre-approved by a senior police officer of or above the rank of Inspector. This pre-approval can be given in writing or orally, and it can be given over the phone or police radio. The second safeguard will be a 3 hour time limit on the use of these emergency powers before an authorisation under section 87D must be given. A redrafted section 87O will ensure that the Ombudsman will continue to keep these powers under scrutiny.
5. Schedule 2 to the Bill contains amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* that relate to the dispersal of intoxicated persons. Item [2] enacts new section 198 to confer on police officers the power to give directions to a person in a group of 3 or more seriously intoxicated persons in a public place for any such person to leave the place and not return for a period that does not exceed 6 hours. The power is exercisable if the police officer believes on reasonable grounds that the person's behaviour is likely to cause injury to other persons, damage to property or otherwise gives rise to a risk to public safety. The new proposed powers will complement the existing "move-on" provisions in part 14 of the Act.
6. Schedule 3 amends the *Crimes (Serious Sex Offenders) Act 2006* and the *Bail Act 1978*. Item [1] amends section 3 to make it clear that the primary object of the Act is to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community. Items [2], [6], [7] and [18] provide that applications are to be brought in the name of the State of New South Wales. Item [21] inserts proposed section 24A, which entitles the Attorney

General to act on behalf of the State of New South Wales for the purposes of applications under that Act. Item [5] amends section 11 to enable a condition that a person resides at an address approved by the Commissioner of Corrective Services to be imposed on an extended supervision order or interim supervision order. Item [9] inserts proposed section 14A into the Act, which enables an application to be made to the Supreme Court for a continuing detention order against a person who has been found guilty of the offence of failing to comply with the requirements of an extended supervision order or interim supervision order.

7. Item [15] amends section 17 to require the Supreme Court to consider the nature of the breach before making a determination in relation to an application under proposed section 14A. Item [16] inserts proposed section 17A, which revokes any existing parole order if the person is made the subject of a continuing detention order under proposed section 14A. Item [20] amends section 22 to provide that if a matter the subject of an appeal is remitted by the Court of Appeal to the Supreme Court the order concerned continues in force. The Court of Appeal may make an interim order revoking or varying an extended supervision order or a continuing detention order if a matter is remitted to the Supreme Court. Item [19] amends section 20 to allow for the arrest of a person in respect of whom a warrant of commitment has been issued as a result of a continuing detention order but who is currently not in custody.
8. Schedule 3.2 makes amendments to the *Bail Act 1978* to provide for a presumption against bail for the summary offence of breaching an extended supervision order and to add an offence to the serious personal violence offences listed for the purposes of the presumption against bail for repeat offenders. Item [1] inserts proposed section 8F into the *Bail Act 1978*. The proposed section creates a presumption against bail for a person who is accused of the offence of breaching an extended supervision order or interim supervision order. Item [2] amends section 9D of the *Bail Act 1978* to add the offence of attempting or assaulting with intent to have sexual intercourse with a child between 10 and 16, under section 66D of the *Crimes Act 1900*, to the list of personal violence offences for which a repeat offender may only be granted bail in exceptional circumstances. Item [3] amends section 32 of the *Bail Act 1978* to make it clear that the section that contains the matters to be taken into account when considering a bail application applies to offences to which proposed section 8F applies but does not prevent consideration of matters relevant to the question of whether bail should not be refused. Item [4] amends section 38 of the *Bail Act 1978* to require an authorised officer or court to record the reasons for granting bail for an offence to which proposed section 8F applies.
9. Schedule 4 of the Bill makes various amendments to the *Terrorism (Police Powers) Act 2002* arising from a legislative review of that Act. Sections 18 and 22 are amendments to clarify the existing power to stop, enter and search vehicles, vessels and aircraft. Section 26U is amended to provide that when a preventative detention order is in force in relation to a person, the power to enter and search premises for the person includes the power to enter and search vehicles, vessels and aircraft for the person. Section 27A is amended to extend the covert search warrant provisions to the search of vehicles, vessels and aircraft.
10. Section 23 deals with the identification and other details that a police officer is required to disclose when exercising a special police power. The amendment clarifies that the information may only be provided after the power is exercised if it is not

reasonably practicable to provide the information before or at the time of exercising the power. This makes the provision consistent with similar provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

11. The Preventative Detention Scheme in part 2A of the Act does not permit orders to be made against children under the age of 16 years. Section 26E is amended to provide that if a child under the age of 16 years is inadvertently detained, the child should be released into the care of a parent or other appropriate person. This change takes up a submission made by the Department of Community Services.
12. Section 27U of the covert search warrant scheme is amended to clarify that occupier notices are to be served on each person who was believed to be concerned in the terrorist act for which the warrant was executed and who were occupiers of the subject premises at the time of the search.

Background

13. The Bill deals with amendments arising out of the NSW Ombudsman's review of the Cronulla riots emergency powers, as well as implementing the Government's election commitment to introduce move-on powers targeted specifically towards groups of intoxicated people.
14. Part 6A of Schedule 1 was enacted following the Cronulla riots in December 2005. The powers are emergency powers, designed to allow police to prevent and control large-scale public disorder, when existing general policing powers are not sufficient. At the time these powers were created, the lemma Government provided for a two-year Ombudsman review. The NSW Ombudsman has provided their review and has found that these powers have been used rarely. From the Seconding Reading speech, the Ombudsman observed:

Police appear to have been responsible and appropriately measured in their use of the Part 6A emergency powers to date. The available evidence indicates that authorisations to use the powers were only granted in circumstances where senior police were genuinely of the view that other, less intrusive policing measures would be insufficient to restore order or prevent further attacks.

Significantly, there were a number of public order incidents, or threats to public order, where senior commanders considered whether to authorise the use of the Part 6A powers, but opted not to as other effective and appropriate options were available to police.

On the rare occasions that use of the Part 6A powers was authorised, such authorisations generally appear to have been well founded, and in accordance with the legislative requirements and the intention of Parliament.

15. According to the Second Reading speech, the Ombudsman's review found that the authorisation process was an important safeguard, the use of cordons and roadblocks had been effective, and the emergency use of powers without authorisation happened only once. The review noted that the powers had not been tested fully as they had not been used that often. There have been occasions when police have considered using the powers but were able to deal with the situation with general police powers.

16. Recommendation 2 of the Ombudsman Review also proposed that Parliament consider whether further safeguards are required to provide an assurance of the right to peaceful assembly. In the Second Reading speech:

The Government is therefore of the view that no legislative requirement is required to guarantee the right of peaceful assembly. The Act is clear that authorisations are not for circumstances like peaceful assemblies. However, in implementing recommendation 4 the Government will provide further safeguards in relation to the right of peaceful assembly by ensuring that part 6A, police procedures regarding the authorisation and review process, includes particular reference to peaceful assemblies.

17. However, the safeguards in relation to the right of peaceful assembly has not been currently addressed in the proposed Part 6A.
18. An amendment to section 87M will allow police officers to seize and detain any item that is likely to be used to contribute to or inflame a public disorder, when there is an authorisation in place. In the Second Reading speech, examples of clothing such as t-shirts and materials with racist messages and iconography with inflammatory or derogatory messages are given.
19. Schedule 3 amends the *Crimes (Serious Sex Offenders) Act 2006* and the *Bail Act 1978* as part of the Government's commitment to ensure the protection of the community from serious recidivist sex offenders.

The Bill

20. The objects of this Bill are as follows:
- (a) following a statutory review of Part 6A of the *Law Enforcement (Powers and Responsibilities) Act 2002*, to lift the sunset provision on the exercise of special police powers in relation to large-scale public disorders (and related increased penalties for assault during such disorders and presumptions against bail for offences committed during such disorders) and to amend those powers,
 - (b) to amend that Act to confer on police officers power to “move-on” groups of seriously intoxicated persons in public places who are likely to cause injury to persons or damage to property or otherwise risk public safety,
 - (c) to amend the *Crimes (Serious Sex Offenders) Act 2006* and the *Bail Act 1978* in relation to serious sex offenders, in particular to extend continuing detention orders to such offenders who breach extended supervision orders or interim supervision orders,
 - (d) to make a number of changes relating to the exercise of terrorism-related police powers following a statutory review of the *Terrorism (Police Powers) Act 2002*.

21. 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 (the amendments lifting the sunset provisions relating to public disorders are to commence on the day before the sunset provisions were to take effect).

Clause 3 is a formal provision that gives effect to the amendments to the Acts and Regulation set out in Schedules 1–4.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act

will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments relating to large-scale public disorders

Schedule 1.1 Law Enforcement (Powers and Responsibilities) Act 2002 No 103

Schedule 1.1 [1] limits the nature and extent of authorisations of special powers during large-scale public disorders to a level that is appropriate to the public disorder concerned.

Schedule 1.1 [2] extends the current power to seize and detain vehicles, mobile phones and other communication devices to things of any kind.

Schedule 1.1 [3] enables a police officer to stop a vehicle (and exercise powers in relation to the vehicle and its occupants) on a road or road-related area that is not in the target area of a formal authorisation given for a large-scale public disorder if the police officer suspects on reasonable grounds that the occupants of the vehicle have participated or intend to participate in the public disorder and is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder.

Schedule 1.1 [4] simplifies the existing emergency power of a police officer to stop a vehicle (and exercise powers in relation to the vehicle and its occupants) on a road or road-related area without a formal authorisation having been given for the large-scale public disorder, so that the power may be exercised if the police officer suspects on reasonable grounds that such a disorder is occurring or threatened in the near future and that the occupants of the vehicle have participated or intend to participate in the disorder. The amendment imposes an additional requirement that the approval of a police officer of or above the rank of Inspector is required before any such power is exercised by a police officer, and limits the exercise of the power to a maximum of 3 hours after the approval is given.

Schedule 1.1 [5] provides, in connection with the existing provision for the monitoring of police powers relating to public disorders, for reports to the Ombudsman by the Commissioner of Police within 3 months after the powers are exercised (rather than at the time of their exercise), and for the Ombudsman's annual report to Parliament to include a report on the Ombudsman's scrutiny of the exercise of those powers.

Schedule 1.1 [6] lifts the expiry of Part 6A relating to public disorder police powers (the powers were due to sunset on 15 December 2007).

Schedule 1.2 Crimes Act 1900 No 40

Section 59A of the *Crimes Act 1900* provides a maximum penalty for assault during a large-scale public disorder of 5 years instead of the general penalty of 2 years (if no actual bodily harm was caused) and of 7 years instead of a general penalty of 5 years (if actual bodily harm was caused). The amendment lifts the expiry of that section (the section was due to sunset on 15 December 2007).

Schedule 1.3 Bail Act 1978 No 161

Section 8D of the *Bail Act 1978* provides for a presumption against bail in the case of the offence of riot and any other offence punishable by imprisonment for 2 years or more that is committed in the course of a large-scale public disorder (or the exercise of police powers during the disorder). The amendment lifts the expiry of that section (the section was due to sunset on 15 December 2007).

Schedule 2 Amendment of Law Enforcement

(Powers and Responsibilities) Act 2002 relating to dispersal of intoxicated persons

Schedule 2 [2] enacts a new section 198 to confer on police officers the power to give directions to a person, in a group of 3 or more seriously intoxicated persons in a public place, for any such person to leave the place and not return (for a period that does not exceed 6 hours). The power is exercisable if the police officer believes on reasonable

grounds that the person's behaviour is likely to cause injury to other persons, damage to property or otherwise gives rise to a risk to public safety.

Schedule 2 [1] transfers from existing section 198 a provision that concerns the related power in section 197 for the dispersal of persons in public places who are causing an obstruction, harassment or intimidation or fear or who are suspected of being involved in drug trafficking.

Schedule 2 [3] extends the existing provisions relating to the giving of directions to groups of people to the proposed power relating to the dispersal of intoxicated persons.

Schedule 2 [4]–[6] make consequential and other minor amendments.

Schedule 2 [7] authorises the making of savings and transitional regulations.

Schedule 3 Amendments relating to serious sex offenders

Schedule 3.1 Crimes (Serious Sex Offenders) Act 2006 No 7

The Schedule amends the Act:

(a) to clarify the objects of the Act, and

(b) to provide for proceedings for extended supervision orders and continuing detention orders for serious sex offenders to be taken by the State of New South Wales rather than the Attorney General, and

(c) to enable the Supreme Court to make a continuing detention order against a sex offender who breaches an extended supervision order or interim supervision order.

Schedule 3.1 [1] substitutes section 3 to make it clear that the primary object of the Act is to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community, and to change the other object of the Act to encouraging such offenders to undertake rehabilitation.

Schedule 3.1 [2] amends section 6 to provide that the State of New South Wales, rather than the Attorney General, is to make applications for extended supervision orders against sex offenders. **Schedule 3.1 [3] and [4]** make consequential amendments.

Schedule 3.1 [5] amends section 11 to enable a condition that a person reside at an address approved by the Commissioner of Corrective Services to be imposed on an extended supervision order or interim supervision order.

Schedule 3.1 [6] amends section 13 to provide that the State of New South Wales, rather than the Attorney General, is to make applications for the variation or revocation of extended supervision orders or interim supervision orders against sex offenders.

Schedule 3.1 [7] amends section 14 to provide that the State of New South Wales, rather than the Attorney General, is to make applications for continuing detention orders against sex offenders. **Schedule 3.1 [8] and [11]** make consequential amendments.

Schedule 3.1 [9] inserts proposed section 14A to enable the State of New South Wales to apply to the Supreme Court for a continuing detention order against a person who has been found guilty of the offence of failing to comply with the requirements of an extended supervision order or interim supervision order.

Schedule 3.1 [10], [12]–[14] and [17] make consequential amendments.

Schedule 3.1 [15] amends section 17 to require the Supreme Court to consider the nature of the failure to comply with an extended supervision order or interim supervision order and the likelihood of further failures to comply before making an order on an application under proposed section 14A.

Schedule 3.1 [16] inserts proposed section 17A to revoke a parole order if the person subject to the order is made the subject of a continuing detention order under proposed section 14A.

Schedule 3.1 [18] amends section 19 to provide that the State of New South Wales, rather than the Attorney General, is to make applications for the variation or revocation of continuing detention orders or interim detention orders against sex offenders.

Schedule 3.1 [19] amends section 20 to enable the arrest of a person in respect of whom a warrant of commitment is issued as a result of a continuing detention order and who is not in custody.

Schedule 3.1 [20] amends section 22 to provide that, if a matter the subject of an appeal is remitted by the Court of Appeal to the Supreme Court, the order concerned continues in force. The Court of Appeal may make an interim order revoking or varying an extended supervision order or a continuing detention order if a matter is remitted to the Supreme Court.

Schedule 3.1 [21] inserts proposed section 24A to enable the Attorney General (or other prescribed person) to act on behalf of the State of New South Wales for the purposes of applications under the Act.

Schedule 3.1 [22] amends Schedule 2 to enable regulations to be made containing savings or transitional provisions as a consequence of the enactment of the proposed Act.

Schedule 3.1 [23] amends Schedule 2 to apply the amendments made by the proposed Act to offences committed before the commencement of the proposed Act and to persons subject to orders before that commencement.

Schedule 3.2 Bail Act 1978 No 161

The proposed Schedule amends the Act to provide for a presumption against bail for an offence of breaching an extended supervision order and to add an offence to the serious personal violence offences listed for the purposes of the presumption against bail for repeat offenders.

Schedule 3.2 [1] inserts proposed section 8F to create a presumption against bail for a person who is accused of the offence of breaching an extended supervision order or interim supervision order under the *Crimes (Serious Sex Offenders) Act 2006*.

Schedule 3.2 [2] amends section 9D to add the offence of attempting, or assaulting with intent, to have sexual intercourse with a child between 10 and 16 (under section 66D of the *Crimes Act 1900*) to the list of serious personal violence offences for which a repeat offender may only be granted bail in exceptional circumstances.

Schedule 3.2 [3] amends section 32 to make it clear that that section (which contains the matters to be taken into account when considering a bail application) applies to offences to which proposed section 8F applies but does not prevent consideration of matters relevant to the question of whether bail should not be refused.

Schedule 3.2 [4] amends section 38 to require an authorised officer or court to record the reasons for granting bail for an offence to which proposed section 8F applies.

Schedule 3.2 [5] amends Schedule 1 to apply the presumption against bail for an offence of breaching an extended supervision order or interim supervision order to offences committed before the commencement of proposed section 8F, if the person is charged after that commencement. The amendment also applies section 9D of the Bail Act to offences under section 66D of the *Crimes Act 1900* committed before the commencement of the amendment, if the person is charged after that commencement.

Schedule 4 Amendments relating to terrorism

Schedule 4.1 Terrorism (Police Powers) Act 2002 No 115

Schedule 4.1 [1] and [2] amend sections 18 and 22 to provide that, when the exercise of special police powers is authorised in connection with a terrorist act or threatened terrorist act, the power to stop and search vehicles, vessels and aircraft includes the power to enter vehicles, vessels and aircraft.

Schedule 4.1 [5] and [6] amend section 26U to provide that, when a preventative detention order is in force in relation to a person, the power to enter and search premises for the person includes the power to enter and search vehicles, vessels and aircraft for the person.

Schedule 4.1 [8] amends section 27A to provide that the covert search warrant scheme in Part 3 in relation to premises extends to vehicles, vessels and aircraft.

Schedule 4.1 [3] amends section 23 (which relates to the identification and other details that a police officer is required to disclose when exercising a special police power) to make it clear that the information may only be provided after the power is exercised if it is not reasonably practicable to provide the information before or at the time of exercising the power.

Schedule 4.1 [4] amends section 26E (which precludes the making of a preventative detention order in relation to a child under 16 years of age and which requires the release from detention of any such child who is inadvertently detained under such an order) to require the child to be released into the care of a parent or other appropriate person.

Schedule 4.1 [7] amends section 26ZA to provide that a police officer detaining a person under a preventative detention order need not comply with the requirement under that section to arrange for an interpreter if the officer believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance not reasonably practicable.

Schedule 4.1 [9] amends section 27U (which provides for the service of an occupier's notice if a Judge approves the notice after the execution of a covert search warrant) to make it clear that service on a person who was believed to be concerned in the terrorist act for which the warrant was executed is only required if that person occupied the relevant premises when the warrant was executed.

Schedule 4.2 Terrorism (Police Powers) Regulation 2005

Schedule 4.2 amends clause 4 (which prescribes the positions of senior police officers who may be delegated authority by the Commissioner of Police to authorize applications for covert search warrants) so that the current positions are described by reference to the relevant area of responsibility rather than by reference to the specific position title.

Issues Considered by the Committee

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

Issue: Excessive Punishment – Proposal to omit section 59A (4) assault during public disorder of Schedule 1.2 Crimes Act 1900 No 40 of Schedule 1 [6]:

22. Section 59A of the *Crimes Act 1900* provides a maximum penalty for assault during a large scale public disorder of 5 years instead of the general penalty of 2 years (if no actual bodily harm was caused) and of 7 years instead of a general penalty of 5 years (if actual bodily harm was caused). The amendment lifts the expiry of that section (the section was due to sunset on 15 December 2007).

23. **The Committee notes from the Second Reading speech and the Ombudsman's review that the emergency powers in Part 6A of Schedule 1 have been rarely used except for once. The Committee considers that there is little deterrent value from allowing for the above maximum penalties during a large scale public disorder, given the rarity of such public disorders. The Committee is concerned with the disproportionate severity of the above penalties compared to the general penalty for the same types of assault occurring in a non-public disorder context, and considers it as excessive punishment that unduly trespasses individual rights and liberties, and accordingly, refers this to Parliament.**

Issue: Excessive Punishment – Proposed section 8D of Schedule 1.3 *Bail Act 1978* No 161 of Schedule 1 [6]:

24. Section 8D of the *Bail Act 1978* provides for a presumption against bail in the case of the offence of riot and any other offence punishable by imprisonment for 2 years or more that is committed in the course of a large scale public disorder (or the exercise of police powers during the disorder). The amendment lifts the expiry of that section (the section was due to sunset on 15 December 2007).

25. The Committee is concerned with the disproportionate severity of the above amendment compared to the general presumption for bail for other similar types of assault offences occurring in a non-public disorder context, and considers it as excessive punishment and undermines the right to be treated as innocent, which unduly trespasses individual rights and liberties, and refers this to Parliament.

Issue: Retrospectivity - Proposed insertion of Part 3 to amend Schedule 2 of Schedule 3.1 [23]:

26. This amends Schedule 2 to apply the amendments made by this proposed Act to offences committed before the commencement of this proposed Act and to persons subject to orders before that commencement. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person, and considers this proposed amendment trespasses unduly on personal rights and liberties, and refers this to Parliament.

Issue: Procedural Fairness and Access to Justice - Proposed section 26ZA (3A) compliance with obligation to inform – Schedule 4.1 [7] *Terrorism (Police Powers) Act 2002* No 115:

27. This amends section 26ZA to provide that a police officer detaining a person under a preventative detention order need not comply with the requirement under that section to arrange for an interpreter if the officer believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance not reasonably practicable.
28. In the context of court proceedings, a recommendation of the Australian Law Reform Commission in its report no. 38, *Evidence*, and as a result, section 30 of the Commonwealth *Evidence Act 1995*, which codifies when a witness in a court is entitled to an interpreter:

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

29. This reverses the ordinary position at common law in favour of allowing an interpreter unless the witness is sufficiently competent to allow the evidence to be given in English, and similar provisions apply in New South Wales, South Australia and the Australian Capital Territory in their Evidence legislation. The ability to communicate through an interpreter should still apply out of the court context, in terms of being detained in police custody such as under a preventative detention order, including the detainee's ability to understand, to be understood, and to make an adequate reply to questions.

30. The Australian Senate Legal and Constitutional Affairs Committee's report on its Inquiry into Legal Aid and Access to Justice (June 2004) also discussed the need for interpreters to improve access to justice.

31. **The Committee notes the High Court in *Ebatarinja and Anor v Deland and Ors* (1998) 194 CLR 444 at 454, has held that "If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial." The Committee also notes that courts have the power to safeguard against an unfair trial by ordering a stay of the proceedings (*Dietrich v The Queen* (1992) 177 CLR 292).**

32. **The Committee takes into account the Evidence Act, the reasoning behind the High Court and the court's power to safeguard against unfairness as referred to above when expressing concerns for the same principles of fairness for access to justice and procedural fairness in relation to the proposed section 26ZA, which if enacted, would remove the requirement to arrange for an interpreter for a person under preventative detention, and the Committee considers this as unduly trespassing personal rights, and refers this to Parliament.**

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

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

33. The Committee notes that except as provided by subsection (2), where Schedule 1.1 [6], 1.2 and 1.3 are taken to have commenced on 14 December 2007, the rest of the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

34. **Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill, other than Schedule 1.1 [6], 1.2 and 1.3, to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

10. LIQUOR BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Graham West MP
Portfolio:	Minister for Gaming and Racing Minister for Sport and Recreation

Purpose and Description

1. The Bill proposes to regulate and control the sale and supply of liquor and the use of premises on which liquor is sold or supplied. It also proposes to repeal the *Liquor Act 1982*.

Background

2. This Bill is cognate with the *Casino, Liquor and Gaming Control Authority Bill 2007* and the *Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Bill 2007*.
3. The Bill is designed to give effect to reforms arising from the 2003 NSW Summit on Alcohol Abuse and the National Competition Policy review of liquor licensing legislation. Exposure drafts of the Bills were released in November 2005 as part of a public consultation process and more than 900 submissions were received in response.
4. According to the Agreement in Principle speech:

The Liquor Bill 2007, the Casino, Liquor and Gaming Control Authority Bill 2007 and the Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Bill 2007 make up a reform package that will benefit the community for many years to come. The bills represent a complete rewriting of the New South Wales liquor licensing laws. They include comprehensive changes to the liquor regulatory framework which reduce complexity and cost. These changes simplify and modernise the law to aid understanding and enforcement.¹¹

The Bill

5. The Bill proposes to replace the *Liquor Act 1982* in order to simplify the liquor licensing system and regulatory framework and to enhance liquor harm minimisation measures.
6. Part 2 of the Bill sets out the principal offences relating to the sale and supply of liquor.
7. The various types of liquor licences are established in Part 3. These include:
 - Hotel licences, including a general bar licence;

¹¹ G J West MP, Legislative Assembly *Hansard*, 28 November 2007.

- Club licences;
 - On-premises licences;
 - Packaged liquor licences;
 - Producer/wholesaler licences; and
 - Limited licences.
8. Part 4 establishes licensing procedures and related matters, including licence applications, the granting of licences, and licence removals and transfers.
 9. Part 5 provides for the regulation and control of licensed premises. Provisions relate to conduct on licensed premises, the exclusion of persons from licensed premises, disturbance complaints, closure orders, and late hour entry declarations.
 10. Provisions concerning miscellaneous offences and regulatory controls are located in Part 6. Division 2 of Part 6 enables the regulations to declare particular locations as restricted alcohol areas if certain conditions are met. The sale, supply or consumption of liquor on any premises within such an area may be restricted or prohibited.
 11. Special provisions relating to minors are set out in Part 7.
 12. Part 8 provides for the making of local liquor accords between licensees and other parties.
 13. The disciplinary action that may be taken by the Casino, Liquor and Gaming Control Authority should a complaint about a licensee, manager or close associate of a licensee be made out is found in Part 9.
 14. Part 10 is concerned with criminal proceedings and related matters.
 15. The following are the principal reforms made by the Bill, as noted in the Explanatory Notes:
 - (a) to provide for a more flexible liquor licensing system to be administered by the new Casino, Liquor and Gaming Control Authority (*the Authority*) which will take over the liquor licensing and regulatory functions of the Licensing Court and the Liquor Administration Board (both of which will be abolished by the proposed Act),
 - (b) to rationalise the types of liquor licences that may be granted by the Authority, including a new type of hotel licence (*a general bar licence*) for bars that will not be able to sell take-away liquor or have gaming machines,
 - (c) to bring registered clubs under the new liquor licensing system,
 - (d) to streamline the liquor licensing process by removing the practice of making formal objections against licence applications in court, while ensuring that applications for hotel, club and bottle shop licences, as well as other significant applications such as licence removals and authorisations for extended trading, are subject to proper assessment by the Authority and community-based consultation,

- (e) to introduce a standard trading period (being 5 am to midnight, except for Sundays when it will be 10 am to 10 pm) that will apply to on-premises liquor sales as well as take-away liquor sales and to enable the Authority to authorise extended trading hours in certain circumstances,
- (f) to enable the regulations to shorten the standard trading period in relation to specified classes of licensed premises and to provide for extended trading after midnight when special events are being held,
- (g) to prohibit in all cases the take-away sale of liquor on Good Friday or Christmas Day,
- (h) to introduce a number of new regulatory measures, including the making of late hour entry declarations to prevent patrons entering licensed premises during late trading times and providing for the sale, supply or consumption of liquor to be restricted in areas of the State that are declared to be restricted alcohol areas,
- (i) to enable the Director of Liquor and Gaming to determine complaints about noise and disturbance in relation to licensed premises,
- (j) to expand the existing prohibition on selling liquor products that are desirable to minors to cover liquor products that are indecent or offensive and to enable the Director of Liquor and Gaming to also restrict or prohibit the promotion of liquor in certain circumstances,
- (k) to provide for the taking of disciplinary action by the Authority against licensees and certain other persons (including the imposition of a fine or the cancellation or suspension of the relevant licence),
- (l) to provide for a review by the Administrative Decisions Tribunal of any disciplinary action taken by the Authority under the proposed Act,
- (m) to provide for the establishment of local liquor accords with the aim of eliminating or reducing alcohol-related violence or anti-social behaviour,
- (n) to rationalise and extend the existing exemptions from liquor licensing requirements, in particular by allowing bed and breakfast establishments and retirement villages to supply liquor without a licence in certain circumstances,
- (o) to continue the operation, under the new licensing scheme, of existing liquor licences and to preserve existing trading entitlements and authorisations.

Issues Considered by the Committee

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

Strict liability: Clauses 7, 8, 9, 11, 106, and 117

16. Numerous clauses throughout the Bill impose strict liability in relation to various offences. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the prosecution prove beyond reasonable doubt

that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

17. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance.
18. However, a number of the strict liability provisions include terms of imprisonment up to 12 months as part of the maximum penalty. The offences to which terms of imprisonment apply include the following:
 - Selling liquor without the authorisation of a licence – cl 7 (max penalty: 100 penalty units or imprisonment for 12 months, or both)
 - Keeping or using unlicensed premises for the purpose of selling liquor – cl 8 (max penalty: 100 penalty units or imprisonment for 12 months, or both)
 - The sale or supply of liquor contrary to licence – cl 9 (max penalty: 100 penalty units or imprisonment for 12 months, or both)
 - A licensee failing to comply with any conditions to which the licence is subject – cl 11 (max penalty: 100 penalty units or imprisonment for 12 months, or both)
 - The delivery of liquor from unlicensed premises – cl 106 (max penalty: 50 penalty units or imprisonment for six months, or both)
 - The sale or supply of liquor to minors – cl 117 (max penalty: 100 penalty units or 12 months imprisonment or both). Various defences are available. This clause is also discussed below in the section on reverse onus of proof.
19. The Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with and that facilitate the effective regulation of the liquor industry.

20. Numerous clauses in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the defendant intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence. However, in some circumstances, the imposition of strict liability may be warranted after considering the community impact of the offence, the availability of defences and safeguards, and the type of penalty that may be imposed.

21. The Committee notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. However, it notes the public interest in ensuring compliance with the terms of the Bill, and the threat of imprisonment may serve as an effective deterrence for those tempted to breach its provisions.

22. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the Bill unduly trespasses on the rights and liberties of those charged with certain strict liability offences.

Reverse onus of proof: Clauses 73, 77, 113, 117 and 120

23. Clause 73 makes it an offence for a licensee to permit intoxication, or any indecent, violent or quarrelsome conduct on the licensed premises. It is also an offence to sell or supply liquor to an intoxicated person.

24. Clause 73(4) provides that, in the event that an intoxicated person is on licensed premises, the licensee is taken to have permitted intoxication of the licensed premises unless the licensee proves that:

- the licensee and the licensee's employees or agents: asked the intoxicated person to leave the premises; contacted, or attempted to contact, a police officer for assistance in removing the person from the premises; and refused to serve the person any alcohol after becoming aware that the person was intoxicated; or
- the intoxicated person did not consume alcohol on the licensed premises.

25. Clause 77 of the Bill provides that it is an offence for a person who has been refused admission to, or turned out of, licensed premises in accordance with cl 77 because the person was intoxicated, violent, quarrelsome or disorderly, to re-enter or attempt to re-enter the premises within 24 hours of being refused admission or being turned out. The person must also not, without reasonable excuse, remain in the vicinity of the premises or re-enter the vicinity of the premises within six hours of being refused admission or turned out.

26. A person is considered to have a reasonable excuse for remaining in or re-entering the vicinity of the premises if:

- the person reasonably fears for his or her safety if he or she does not remain in, or re-enter the vicinity of the premises;
- the person needs to remain in, or re-enter, the vicinity of the premises in order to obtain transport; or
- the person resides in the vicinity of the premises.

The burden of proving a reasonable excuse is on the defendant.

27. Clause 113 provides that it is an offence for a person to carry, offer or expose liquor for the purpose of sale. A defence is provided if the defendant can prove that the liquor was carried, offered or exposed for the purpose of a sale that may lawfully be made.

28. Clause 117 lists a number of offences involving the sale or supply of liquor to minors. A number of defences are provided including:

- proving that the person to whom the liquor was supplied or sold was at least 14 years old and provided an evidence of age document reasonably accepted as

applying to the person and as proving that the person was at least 18 years old (regarding the supply of liquor to a minor on licensed premises);

- proving that the defendant was authorised to supply liquor to, or obtain liquor from licensed premises on behalf of, the minor by the parent or guardian (regarding the offences of supplying liquor to a minor on other than licensed premises and obtaining liquor for minors from licensed premises);
- proving that liquor was supplied to a minor on licensed premises by the parent or guardian of the minor (regarding the offence of a licensee allowing liquor to be sold or supplied to a minor on licensed premises).

The burden of proving that a person was a parent or guardian of a minor or was authorised by the parent or guardian rests on the defendant.

29. Clause 120 provides that it is an offence for a responsible adult accompanying a minor to allow the minor to consume liquor on the licensed premises. The defendant has the burden of proving that he or she was not the responsible adult at the relevant time.
30. These provisions effectively reverse the onus of proof that requires the prosecution to prove all elements of an offence as they relate to key elements of the offences. This is inconsistent with a presumption of innocence, a fundamental right clearly established by Article 14(2) of the *International Covenant on Civil and Political Rights* which states 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.
31. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party. According to the Senate Standing Committee for the Scrutiny of Bills:

Where legislation provides that a particular state of belief is to constitute an excuse for carrying out an action which would otherwise be a crime, and in that way allows a defence to a person who is accused of committing one, the Committee will more readily accept the onus of proof being placed on him or her to prove that excuse.¹²

- 32. The Committee notes that these offences place the onus of proof on the defendant in relation to a number of offences stipulated by the Bill. These relate to key elements of the offences.**
- 33. The Committee notes that the presumption of innocence is a fundamental right. Reversing the onus of proof is inconsistent with this right.**
- 34. However, the Committee notes that a reversal of the onus of proof may be appropriate in some circumstances particularly where knowledge of the factual circumstances is in the possession of one party.**
- 35. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the reversal of the onus of proof in these circumstances unduly trespasses on rights and liberties.**

¹² Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 38th Parliament (May 1996 – August 1998)*, para 2.108.

Right to privacy: Clause 115

36. Clause 115 enables the regulations to declare any area of NSW specified in the regulations to be a restricted alcohol area and to restrict the sale, supply, possession or consumption of liquor on any premises (whether or not licensed premises) in any such restricted alcohol area.
37. 'Premises' are defined in cl 4 as: a building or structure; land or a place (whether built on or not); or a vehicle, vessel or aircraft. Accordingly, the requirements relating to a restricted alcohol area may apply to the consumption of liquor in the home.
38. This arguably interferes with the right to privacy. Article 17 of the International Covenant on Civil and Political Rights provides that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'.
39. However, the Bill does contain a number of safeguards. Clause 116 provides that the Minister may only recommend the making of a regulation declaring a restricted alcohol area if satisfied that it is in the public interest and has the support of the majority of the community likely to be affected by the declaration. The Minister is required to consult with the Commissioner of Police, the relevant local Councils, persons or organisations prescribed by the regulations, and other appropriate persons before making the regulation.

- 40. The declaration of a restricted alcohol area may extend to the consumption of alcohol in the home and other private premises. This may interfere with the right to privacy, a fundamental human right.**
- 41. However, the Committee notes that such a declaration may only be made if the Minister is satisfied that it is in the public interest and has the support of the majority of the community likely to be affected by it.**
- 42. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether cl 115 unduly trespasses on the privacy rights of persons within the affected area.**

Right to liberty of movement: Clause 77

43. Clause 77 of the Bill provides that it is an offence for a person who has been refused admission or turned out of licensed premises because the person was intoxicated, violent, quarrelsome or disorderly to re-enter or attempt to re-enter the premises within 24 hours of being refused admission or being turned out. The person must also not, without reasonable excuse, remain in the vicinity of the premises or re-enter the vicinity of the premises within six hours of being refused admission or turned out.
44. Clause 77 arguably restricts the right of the individual to liberty of movement by excluding such a person from the vicinity of the licensed premises. Article 12(1) of the International Covenant on Civil and Political Rights states, 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement...' However, the right to liberty of movement is not without limitation as article 12(3) provides 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and

freedoms of others, and are consistent with the other rights recognized in the present Covenant’.

45. The restriction on remaining in or re-entering the premises or the vicinity of the premises is not absolute. A person is considered to have a reasonable excuse for remaining in or re-entering the vicinity of the premises if:
- the person reasonably fears for his or her safety if he or she does not remain in, or re-enter the vicinity of the premises;
 - the person needs to remain in, or re-enter, the vicinity of the premises in order to obtain transport; or
 - the person resides in the vicinity of the premises.
46. The Committee acknowledges that there may be a public interest in ensuring that certain persons are excluded from the vicinity of licensed premises. The Committee notes that, according to the Agreement in Principle speech, this will ‘help address problems where intoxicated persons who are ejected or refused entry remain outside a venue causing trouble. These people often attempt to re-enter the venue surreptitiously, and are an ongoing problem for licensees’.¹³

47. The Committee notes that cl 77 may intrude on the right of a person to liberty of movement if the person has been refused admission or turned out of licensed premises because of intoxication, and/or violent, quarrelsome or disorderly conduct.

48. However, given the public interest in ensuring that certain persons are precluded from entering the vicinity of licensed premises, that the time in which they may be excluded is limited to six hours, and that provision is made for their re-entry into the vicinity if there are safety concerns, the person needs to obtain transport, or if they reside in the area, the Committee concludes that the Bill does not unduly trespass on the right to freedom of movement.

Commencement by proclamation: Clause 2

49. Clause 2 of the Bill specifies that it is to commence on proclamation. This may delegate to the Government the power to commence that Act, or parts of the Act, on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.
50. However, the Committee notes that this Bill is part of an extensive reform package regarding the liquor regulatory framework. Accordingly, it is likely that time is required to allow appropriate administrative arrangements to be made.

¹³ G J West MP, Legislative Assembly *Hansard*, 28 November 2007.

51. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

The Committee makes no further comment on this Bill.

11. MISCELLANEOUS ACTS (CASINO, LIQUOR AND GAMING) AMENDMENT BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Graham West MP
Portfolio:	Minister for Gaming and Racing Minister for Sport and Recreation

Purpose and Description

1. The purpose of the Bill is to amend various Acts as a consequence of the enactment of the *Liquor Act 2007* and the *Casino, Liquor and Gaming Control Authority Act 2007* (should they pass).

Background

2. This Bill is cognate with the Liquor Bill 2007.
3. The Liquor Bill 2007 proposes to create a new liquor licensing system. This system is to be administered by the Casino, Liquor and Gaming Control Authority which will assume the functions of the Licensing Court and the Liquor Administration Board. The Casino, Liquor and Gaming Control Authority will replace the Casino Control Authority for the purposes of the *Casino Control Act 1992*.

The Bill

4. The Bill makes consequential amendments to the *Casino Control Act 1992*, the *Registered Clubs Act 1976* and the *Gaming Machines Act 2001*, amongst others, as a result of the proposed *Liquor Act 2007* and the proposed *Casino, Liquor and Gaming Control Authority Act 2007*.
5. The Bill proposes to remove provisions from the *Registered Clubs Act 1976* relating to the sale and supply of liquor in clubs. Certificates of registration are also to be replaced by club licences. The *Registered Clubs Act 1976* is subsequently to focus on the management and accountability of clubs.
6. The Bill also proposes to remove various provisions relating to the probity of key officials exercising functions under the gaming and liquor legislation, as well as the investigation powers of police officers and inspectors. These provisions are to be consolidated in the proposed *Casino, Liquor and Gaming Control Authority Act 2007*.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

7. Clause 2 of the Bill specifies that it is to commence on proclamation. This may delegate to the Government the power to commence that Act, or parts of the Act, on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.
8. However, the Committee notes that this Bill is part of an extensive reform package regarding the liquor regulatory framework. Accordingly, it is likely that time is required to allow appropriate administrative arrangements to be made.
9. **The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.**

The Committee makes no further comment on this Bill.

12. MOTOR ACCIDENTS COMPENSATION AMENDMENT (CLAIMS AND DISPUTE RESOLUTION) BILL 2007

Date Introduced:	27 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Watkins MP
Portfolio:	Minister for Transport Minister for Finance

Purpose and Description

1. The purpose of the Bill is to amend the *Motor Accidents Compensation Act 1999* to make further provision for claims procedures and assessment, dispute resolution and medical assessment.

Background

2. A compulsory third party personal injury insurance scheme for motor accidents has existed in NSW since 1942.¹⁴ The *Motor Accidents Act 1988* provided for fault-based, modified common law compensation. Significant changes to this scheme were made by the *Motor Accidents Compensation Act 1999*. The 1999 Act provided for the early payment of medical costs and established a Claims Assessment and Resolution Service to reduce the adversarial nature of the claims process through its independent claims assessment and resolution service. The Act also changed the threshold test for claiming damages for non-economic loss, setting a minimum of 10% permanent whole body impairment.¹⁵
3. According to the Agreement in Principle speech:

The purpose of the Bill is to make further efficiency improvements in the motor accidents claims and dispute resolution processes and procedures currently operating under the Motor Accidents Compensation Act 1999. These reforms build on the Government's 1999 overhaul of the Motor Accidents Compensation Scheme and continue the Government's commitment to providing people injured in motor vehicle accidents with faster and less formal methods for resolving motor accident compensation claims and disputes outside of the court system....

The Motor Accidents Authority has also engaged in extensive consultation with representatives from the insurance industry, legal profession, medical assessors and claims assessors to identify strategies to improve the operation of the Motor Accidents Assessment Service. This consultation has identified a number of procedural and process changes to promote greater scheme efficiency as well as facilitate earlier resolution of motor accident claims.¹⁶

¹⁴ The scheme was established by the *Motor Vehicles (Third Party Insurance) Act 1942*.

¹⁵ The source for information in this paragraph is: *Review: Motor Accidents Compensation Act 1999*, Tabled in the NSW Legislative Council 24 October 2002 by the Hon John Della Bosca MLC.

¹⁶ D V Judge MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 27 November 2007.

The Bill

4. The Explanatory Notes record that the object of the Bill is to amend the *Motor Accidents Compensation Act 1999* (the Act):
- (a) to make various amendments to provisions concerned with the assessment of medical disputes between claimants and insurers about motor accident injuries and the review of those assessments, including amendments with respect to the matters within the jurisdiction of medical assessors and the independence of medical assessors, and
 - (b) to make various amendments to provisions dealing with the procedures for assessment by the Motor Accidents Claims Assessment and Resolution Service (CARS) of motor accident claims and disputes, and
 - (c) to clarify the duty of claimants to provide all relevant particulars of their claims and to provide a procedure for a claim to be deemed to have been withdrawn if the required particulars have not been provided within 30 months after the accident, and
 - (d) to require the parties to a claim to participate in a settlement conference and exchange offers of settlement before assessment of the claim by CARS, and to require the exchange of all documents on which the parties propose to rely for the assessment of the claim, and
 - (e) to make it clear, for the purposes of the duty of an insurer to make an offer of settlement once an injury has stabilised, that stabilisation is the point at which recovery has been reached, and
 - (f) to require payment of damages assessed by CARS within the time prescribed by the regulations and to provide for the payment of interest on damages not paid within the required time, and
 - (g) to make it clear that the limits imposed by the Act on damages that may be recovered for injuries resulting from motor accidents in NSW extend to damages assessed and recovered outside NSW, and to provide for the recovery by insurers of damages awarded outside NSW in excess of the claimant's entitlement under NSW law, and
 - (h) to require an insurer who has accepted liability on a claim to make interim payments for economic loss in cases of financial hardship, and
 - (i) to make it clear that payments by insurers for "as incurred" hospital, medical and other payments are subject to apportionment where contributory negligence is established, and
 - (j) to require that a motor accident in respect of which a motor accident claim is to be made must be reported to police within 28 days after the accident, and
 - (k) to increase from \$500 to \$5,000 the maximum amount payable by an insurer under the Accident Notification Form scheme (under which an insurer accepts provisional liability and makes early payments for treatment expenses of a person injured in a

motor accident), and to include payment for past loss of earnings in the scheme, and

- (l) to make it clear that the obligation of an insurer to make payments under the Accident Notification Form scheme does not apply once a full claim has been made, and
- (m) to extend the Accident Notification Form scheme to the Nominal Defendant in the case of an accident involving an uninsured motor vehicle, and
- (n) to remove the current exclusion on recovery of motor accident damages for the first 5 days of economic loss, and
- (o) to make it clear that the duty of care owed by the driver of a motor vehicle to another person is not affected by the other person's knowledge about the driver's skill or experience, and
- (p) to provide for an annual payment from CTP insurers for the cost of CTP scheme liability for workers compensation claims, and
- (q) to extend the MAA Medical Guidelines to hospital, medical and other payments made by insurers after acceptance of liability, and
- (r) to provide for the approved motor accident claim form to authorise disclosure of relevant information by an insurer, and
- (s) to provide for the making and enforcement of costs orders by CARS assessors, and
- (t) to provide for the regulations to prescribe rates at which the costs of travel to attend for a medical examination or assessment or for rehabilitation are to be paid to injured persons, and
- (u) to provide for the statutory position of Principal Claims Assessor, and
- (v) to make other minor, consequential or savings and transitional amendments.

The Bill also makes consequential amendments:

- (a) to the *Civil Procedure Act 2005* to enable a court to make an interim award of damages for economic loss on a motor accident claim if the award is necessary to avoid financial hardship, and
- (b) to the *Statutory and Other Offices Remuneration Act 1975* to provide for the remuneration of the new statutory position of Principal Claims Assessor.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

5. Clause 2 of the Bill specifies that it is to commence on proclamation. This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill

13. OCCUPATIONAL HEALTH AND SAFETY AMENDMENT BILL 2007*

Date Introduced:	29 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Mr Barry O'Farrell MP
Portfolio:	Private Member, Leader of the Opposition

Purpose and Description

1. This Bill amends the *Occupational Health and Safety Act 2000*, and related Acts, following the 5-year statutory review of that Act.
2. The key changes proposed within this legislation involve the inclusion of legally binding agreements between employers and WorkCover. These enforceable undertakings would focus on better safety results rather than costly legal action.
3. Other key changes include a requirement for employees to take reasonable care for their own safety, and clarification to recognise that people with a duty of care must do what is "reasonably practical" to ensure health and safety in the workplace. Where appropriate, the offence provisions in the *Occupational Health and Safety Act 2000* have been amended to include, as an element of the offence, "reasonably practicable", "reasonably necessary" or "without reasonable excuse" (for example, the duty to ensure health and safety so far as is reasonably practicable).
4. Further main changes include the introduction of new fraud offences for making false representations or for obtaining financial advantage by deception, and adding an advisory role to the statutory functions of WorkCover. This reflects a new approach from that authority to place greater emphasis on the provision of advice, systems and education.
5. Section 10 (3) (b) of the *Occupational Health and Safety Act 2000* excludes private dwellings (and plant or substances used in such dwellings) from the duty imposed on a person who has control of premises used by people as a place of work to ensure that the premises are safe and without risks to health. Schedule 1 [9] amends this paragraph so that the exclusion extends to common property that no resident has an exclusive right to occupy.
6. Section 23 of that Act provides that it is an offence for an employer to, among other things, dismiss an employee because the employee makes a complaint about a workplace matter that the employee considers is not safe or is a risk to health, or because the employee is a member of an OHS committee or is an OHS representative. Proposed section 23A makes it clear that an employee who is dismissed because of one of those reasons may apply to the Industrial Court of NSW for an order for reinstatement or re-employment.

7. Section 26 of the *Occupational Health and Safety Act 2000* currently provides that a director or person concerned in the management of a company is liable for the contravention of the Act or regulations by the corporation unless that person used all due diligence to prevent the contravention by the corporation or was not in a position to influence the conduct of the corporation in relation to its contravention of the provision. Schedule 1 [20] substitutes section 26, replacing the current provision with a new provision that is more consistent with the *Corporations Act 2001* of the Commonwealth and captures a wider range of persons involved in a corporation. The proposed new provision provides that an officer of a corporation (within the meaning of the Commonwealth Act) is liable for a contravention of the Act or regulations by the corporation if the contravention is attributable to that officer's failing to take reasonable care. The proposed new provision sets out the matters that must be taken into account in determining whether a contravention is attributable to an officer's failure to take reasonable care and provides that an officer who is a volunteer is not liable for such a contravention.
8. Schedule 1 [21] enables the regulations to extend the operation of section 8 (Duties of employers), Division 2 (Duty to consult) of Part 2, section 20 (Duties of employees), section 23 (Unlawful dismissal or other victimisation of employee) and any other prescribed provision of the *Occupational Health and Safety Act 2000* to clothing outworkers and employees of clothing outworkers.

Background

9. This proposed legislation followed an extensive 10-month review by the former Labor Government of the State's *Occupational Health and Safety Act 2000*. Over that 10 months and following consultations with unions, employees and employers, a series of proposals were developed to improve the balance of workplace safety matters to ensure a more practical approach that guaranteed workers and employers understood their responsibilities and sought to provide an environment in which both worked together in order to improve safety within our workplaces.
10. The Bill requires employers and employees to consult on workplace safety matters, which aims to develop a spirit of cooperation across NSW workplaces.
11. The Agreement in Principle speech provided an example of why businesses are seeking these reforms, which is a case highlighted more than a year ago by the *Australian*. Rob Partridge used to run a small plumbing company on the New South Wales Central Coast. In 1998 there was an accident in which an elderly patient at a retirement village was killed after a thermostat failed and she was scalded in the bath. WorkCover prosecuted Mr Partridge over the accident. This case demonstrates the extraordinary level of duty of care imposed under the existing New South Wales Occupational Health and Safety Act. Despite that he had not installed the thermostat and was rarely at the retirement village, Mr Partridge was deemed to be "in control" of the premises for plumbing purposes. It did not matter that he had strictly followed the manufacturer's instructions in servicing the thermostat. He had tested the device 3 months before the accident. The internal fault it developed could be detected only with the aid of stereo microscopic magnification—not something usually done by the average plumber. In the article Mr Partridge said the following about this case:

It wrecked my life. I had a good business, a lot of clients; mentally it's devastated me. I had to plead guilty. The barrister said, 'It's going to cost you \$50,000 to fight it, and WorkCover only has to find one minor thing you did wrong, remotely connected to it'.

The article continued:

The most serious fault the industrial court could attach to Partridge was that he failed to gather information "regarding the expected lifespan of the mixing valve and consequently failed to advise [the retirement village] as to the need to replace the mixing valve when the valve's lifespan had expired.

12. This was the outcome of the above case despite the device having been tested 3 months earlier and having been found to be acceptable.
13. Mr Barry O'Farrell, MP, who introduced this Bill, in the Agreement in Principle speech mentioned that before the State election, the State Government considered identical reforms.

The Bill

14. The object of this Bill is to amend the *Occupational Health and Safety Act 2000*, and related Acts, following the 5-year statutory review of that 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 (except for the provisions that are specified to commence on a day or days to be appointed by proclamation).

Clause 3 is a formal provision that gives effect to the amendments to the *Occupational Health and Safety Act 2000* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Workplace Injury Management and Workers Compensation Act 1998* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendments to the *Industrial Relations Act 1996* set out in Schedule 3.

Clause 6 is a formal provision that gives effect to the amendments to the *Crimes (Sentencing Procedure) Act 1999* set out in Schedule 4.

Clause 7 is a formal provision that gives effect to the amendments to the *Fines Act 1996* set out in Schedule 5.

Clause 8 is a formal provision that gives effect to the amendments to the mine safety legislation specified in Schedule 6 as set out in that Schedule.

Clause 9 is a formal provision that gives effect to the amendments to the *Occupational Health and Safety Regulation 2001* set out in Schedule 7.

Clause 10 provides for the repeal of the proposed Act on the day following the day on which all of the provisions of the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of *Occupational Health and Safety Act 2000*

Schedule 1 [1] makes it clear that it is an object of the *Occupational Health and Safety Act 2000* to encourage employers, employees and others to take an active role to protect themselves and other people in the workplace against risks to health or safety.

Schedule 1 [3] inserts a note to indicate that the role and functions of WorkCover in securing the objectives of the *Occupational Health and Safety Act 2000* are set out in

sections 22 and 23 of the *Workplace Injury Management and Workers Compensation Act 1998*.

Section 10 (3) (b) of the *Occupational Health and Safety Act 2000* excludes private dwellings (and plant or substances used in such dwellings) from the duty imposed on a person who has control of premises used by people as a place of work to ensure that the premises are safe and without risks to health. **Schedule 1 [9]** amends this paragraph so that the exclusion extends to common property that no resident has an exclusive right to occupy.

Schedule 1 [11] clarifies that the consultation process that employers are required to undertake under the *Occupational Health and Safety Act 2000* is to be carried out only so far as is reasonably practicable.

Schedule 1 [12] inserts proposed section 17A into the *Occupational Health and Safety Act 2000*. Proposed section 17A provides for an inspector to determine any disagreement between employers and employees with respect to consultation arrangements on the request of either party.

Schedule 1 [14] imposes a duty on employees to take reasonable care for their own health and safety while at work (with a maximum penalty for a contravention of this duty being 45 penalty units in the case of a previous offender or 30 penalty units in any other case).

Schedule 1 [19] inserts proposed section 23A into the *Occupational Health and Safety Act 2000*. Section 23 of that Act provides that it is an offence for an employer to, among other things, dismiss an employee because the employee makes a complaint about a workplace matter that the employee considers is not safe or is a risk to health, or because the employee is a member of an OHS committee or is an OHS representative. Proposed section 23A makes it clear that an employee who is dismissed because of one of those reasons may apply to the Industrial Court of NSW for an order for reinstatement or re-employment.

Schedule 1 [17] makes a consequential amendment.

Section 26 of the *Occupational Health and Safety Act 2000* currently provides that a director or person concerned in the management of a company is liable for the contravention of the Act or regulations by the corporation unless that person used all due diligence to prevent the contravention by the corporation or was not in a position to influence the conduct of the corporation in relation to its contravention of the provision.

Schedule 1 [20] substitutes section 26, replacing the current provision with a new provision that is more consistent with the *Corporations Act 2001* of the Commonwealth and captures a wider range of persons involved in a corporation. The proposed new provision provides that an officer of a corporation (within the meaning of the Commonwealth Act) is liable for a contravention of the Act or regulations by the corporation if the contravention is attributable to that officer's failing to take reasonable care. The proposed new provision sets out the matters that must be taken into account in determining whether a contravention is attributable to an officer's failure to take reasonable care and provides that an officer who is a volunteer is not liable for such a contravention.

Schedule 1 [21] enables the regulations to extend the operation of section 8 (Duties of employers), Division 2 (Duty to consult) of Part 2, section 20 (Duties of employees), section 23 (Unlawful dismissal or other victimisation of employee) and any other prescribed provision of the *Occupational Health and Safety Act 2000* to clothing outworkers and employees of clothing outworkers.

Where appropriate, the offence provisions in the *Occupational Health and Safety Act 2000* have been amended to include, as an element of the offence, "reasonably practicable", "reasonably necessary" or "without reasonable excuse" (for example, the duty to ensure health and safety so far as is reasonably practicable) (see **Schedule 1 [5], [7], [8], [10], [15], [16], [32], [38], [39], [42] and [49]**). **Schedule 1 [4]** inserts proposed section 7A into the *Occupational Health and Safety Act 2000*. Proposed section 7A clarifies that a duty

imposed to ensure health and safety so far as is reasonably practicable requires the elimination of risks so far as is reasonably practicable and the reduction of these risks to the lowest level reasonably practicable (if elimination is not reasonably practicable). The matters that are relevant in determining what is reasonably practicable in relation to ensuring health and safety are also set out in proposed section 7A. **Schedule 1 [22]** omits the current defence in section 28 of the Act as a consequence of these amendments.

Schedule 1 [29] inserts Division 2 (proposed sections 46A–46D) and Division 3 (proposed sections 46E–46G) into Part 4 of the *Occupational Health and Safety Act 2000*. Proposed Division 2 makes provision for WorkCover to make guidelines with respect to the application of certain provisions of the Act and how it may exercise a discretion under the Act or regulations. The process for making, amending and revoking the guidelines is provided for in the Division. Proposed Division 3 allows WorkCover to provide advice to a person who has a duty under the Act or regulations about complying with that duty. Any written advice must also be given to an OHS employee representative.

Schedule 1 [30] clarifies that where a person is required to give evidence in writing or orally to an inspector under section 62 of the *Occupational Health and Safety Act 2000*, that person can do so by answering questions or otherwise furnishing information. **Schedule 1 [31]** makes provision for the recording of any such oral evidence.

Schedule 1 [33] provides that section 101 (Service of notices) of the *Occupational Health and Safety Act 2000* applies to the service of notices under Division 2 (Powers of inspectors) of Part 5 of the Act.

Section 77 of the *Occupational Health and Safety Act 2000* gives an authorised representative of an industrial organisation the power to enter premises for the purpose of investigating any suspected breach of the occupational health and safety legislation. **Schedule 1 [35]** provides for any dispute about the entitlement of an authorised representative to enter the premises to be referred to the Industrial Relations Commission if WorkCover is unable to resolve the dispute.

Schedule 1 [36] makes it an offence for an authorised representative, who enters premises for the purposes of investigating a suspected breach, to deliberately hinder or obstruct the occupier of the premises (maximum penalty: 100 penalty units).

Schedule 1 [37] makes provision for an authorised representative of an industrial organisation of employees to enter a place of work to discuss matters relating to occupational health and safety with a member, or person eligible to be a member, of that organisation. The discussion may only take place while the person is on a work break and the authorised representative must give the occupier of the place of work 24 hours notice before entering the premises.

Schedule 1 [40] and [41] require an inspector who issues an improvement or prohibition notice to give a copy of the notice to the chairperson of the OHS committee or a specified OHS representative (where a committee does not exist).

Schedule 1 [43] inserts Division 5 (proposed sections 103A–103E) into Part 6 of the *Occupational Health and Safety Act 2000*. The proposed Division provides WorkCover with an additional enforcement option in respect of a contravention or alleged contravention of the Act or the regulations by allowing WorkCover to accept a written undertaking by a person to remedy a contravention or prevent any further contravention. The Division does not apply to a contravention of section 32A (Reckless conduct causing death at workplace by person with OHS duties) of the Act.

While an undertaking is in force, proceedings may not be instituted against the person in respect of the contravention to which the undertaking relates. Procedures for the acceptance, withdrawal and enforcement of undertakings are set out in the proposed Division. Proposed section 103E makes provision with respect to the admissibility of evidence concerning an undertaking.

Schedule 1 [44] inserts Part 6A (proposed sections 103F—103L) into the *Occupational Health and Safety Act 2000*. Proposed section 103G makes provision for the issue of safety recommendation notices by employee safety representatives (being a chairperson of an OHS committee or an OHS representative) if the employee safety representative believes that an employer is contravening the Act or regulations or is likely to repeat or continue a past contravention. The safety recommendation notice cannot be issued until the employee safety representative has consulted with the employer. The notice may require the employer to remedy the contravention within a specified time period and may include recommendations as to the measures to be taken to remedy the contravention. Once such a notice has been issued, the employer must comply with the notice within 7 days unless the employer requests WorkCover to arrange for an inspector to attend the workplace and inquire into the matter. The employee safety representative may also request the attendance of an inspector if the employer has not fully complied with the notice within 7 days. The inspector is required to make a determination in respect of whether or not the requirements of the notice are to be confirmed. If confirmed, the inspector must issue an improvement or prohibition notice. The notice is withdrawn if the inspector fails to confirm it. Proposed section 103I provides for the review of a determination of an inspector to withdraw the notice. The review is conducted by WorkCover and WorkCover's decision may then be appealed to the Local Court in certain circumstances. Proposed section 103J makes it an offence for an employee safety representative to misuse his or her powers with respect to safety recommendation notices (maximum penalty: 45 penalty units in the case of a previous offender and 30 penalty units in any other case).

Schedule 1 [45] provides that proceedings for an offence against the *Occupational Health and Safety Act 2000* or the regulations may be instituted by WorkCover (rather than an inspector as currently provided for in the Act).

Schedule 1 [50] inserts proposed sections 136A and 136B into the *Occupational Health and Safety Act 2000*.

Proposed section 136A (1) makes it an offence for a person to obtain or attempt to obtain, by deception, any financial advantage (for himself or herself or any other person) in connection with any authority conferred by or under the Act on the person (or other person) if the person knows or has reason to believe that the person (or other person) did not have that authority (maximum penalty: 500 penalty units or imprisonment for 2 years, or both). Proposed section 136A (2) makes it an offence for a person to hold himself or herself out as having an accreditation, licence or other authorisation conferred by or under the Act if the person doesn't have (and is aware that he or she doesn't have) that authorisation (maximum penalty: 70 penalty units).

Proposed section 136B makes provision for WorkCover to communicate certain information to an officer or authority engaged in administering or executing a law of another Australian jurisdiction relating to occupational health and safety.

Schedule 1 [51] enables the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of *Workplace Injury Management and Workers Compensation Act 1998*

Schedule 2 [1] and [2] amend the provisions of the *Workplace Injury Management and Workers Compensation Act 1998* that set out the general and specific functions of WorkCover so that the advisory and educational functions of WorkCover are noted in those provisions. WorkCover's role in assisting employers, workers and others to comply with occupational health and safety legislation and eliminate or reduce risks to health and safety is also noted.

Schedule 3 Amendment of *Industrial Relations Act 1996*

Schedule 3 [1] and [2] amend section 196 of the *Industrial Relations Act 1996* to provide for a right of appeal to the Full Bench of the Industrial Court against an interlocutory judgment or order given or made by a member of that Court (in the same terms as the appeal that lies to the Court of Criminal Appeal from a Supreme Court judge in indictable proceedings).

Schedule 3 [3] omits section 197A of the *Industrial Relations Act 1996* to remove the right of appeal by WorkCover, the Department of Primary Industries or the Director of Public Prosecutions to the Full Bench of the Industrial Court against a decision of the Industrial Court or a Local Court constituted by an Industrial or other Magistrate to acquit a person of an offence under certain occupational health and safety legislation.

Schedule 4 Amendment of *Crimes (Sentencing Procedure) Act 1999*

Schedule 4 amends section 27 of the *Crimes (Sentencing Procedure) Act 1999* so that a victim impact statement may be tendered to the Industrial Court in relation to offences under the *Occupational Health and Safety Act 2000* involving reckless conduct causing death. Currently, victim impact statements in relation to OHS offences being dealt with by the Industrial Court can only be tendered with respect to general duties offences involving a fatality or actual physical bodily harm.

Schedule 5 Amendment of *Fines Act 1996*

Schedule 5 [1] and [2] make provision for information about whether or not a fine, that was imposed for an offence against the *Occupational Health and Safety Act 2000*, has been paid to be disclosed to the next of kin of any person that was killed as a result of the commission of the offence.

Schedule 6 Amendment of mine safety legislation

Schedule 6.1 [2] omits section 150 (Bringing concerns regarding health, safety or welfare to the attention of operators) of the *Coal Mine Health and Safety Act 2002* as a consequence of the amendment to the *Occupational Health and Safety Act 2000* in

Schedule 1 [29] (the introduction of WorkCover guidelines and compliance advice).

Schedule 6.2 [2] makes a similar consequential amendment to section 131 (Bringing concerns regarding health, safety or welfare to the attention of operators) of the *Mine Health and Safety Act 2004*.

Issues Considered by the Committee

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

14. ROAD TRANSPORT (GENERAL) AMENDMENT (HEAVY VEHICLE USER CHARGES) BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Council
Minister Responsible:	The Hon Eric Roozendaal MLC
Portfolio:	Roads, Commerce

Purpose and Description

1. This Bill amends the *Road Transport (General) Act 2005* with respect to incremental pricing for mass, dimension, load restraint and access concessions for heavy vehicles and evidence relating to intelligent transport systems; and to make consequential amendments to the *Road Transport (Heavy Vehicles Registration Charges) Act 1995* and other instruments.
2. This Bill is cognate with the *Road Transport Legislation (Breath Testing and Analysis) Bill 2007*.
3. This will amend the *Road Transport (General) Act 2005* to extend the exemptions that can be issued for heavy vehicles to include a dimension, load restraint and/or access requirement. It will create a regulation-making power with regard to the application of incremental pricing charges to these exemptions, including mass limit exemptions issued under the Act. The incremental pricing scheme is voluntary and if the charges are too high for the operator, they may choose not to participate.
4. The Bill will amend the evidentiary provisions of the Intelligent Access Program by specifying that evidence under the program may be rebutted only by a person who has relevant specialised knowledge.
5. It will allow regulations to require funds raised through incremental pricing to be returned to the relevant road authority. This includes local councils. For the first time, local councils and the Roads and Traffic Authority (RTA) will be able to receive compensation from heavy vehicles directly related to the cost impact of heavy vehicle activity. Councils will still have to give their approval before the RTA will allow the vehicles access.

Background

6. This Bill implements the Road Reform Plan announced by the Council of Australian Governments this year as a response to the Productivity Commission's final inquiry report on the efficient pricing of road and rail freight transport. The Productivity Commission identified some inefficiencies in the current heavy vehicle road pricing arrangements. The first phase of the Road Reform Plan is the review and voluntary trials of incremental pricing by the end of 2008.

7. Incremental pricing involves the application of a direct user charge to heavy vehicles in exchange for a productivity initiative such as increased mass limits and/or enhanced access. Heavy vehicles will be directly paying for the cost impact of their vehicle activity subject to the condition that they produce improved safety outcomes.
8. The trials will also give an opportunity to test electronic monitoring and billing technologies.
9. NSW is disadvantaged under the current charging arrangements. The current revenue returned directly to NSW from heavy vehicle charges does not reflect the cost impact of heavy vehicle activity on the State.
10. This Bill will ensure that individual heavy vehicle operators only pay for the roads they use and not for the activity of other trucks.

The Bill

11. The object of this Bill is to amend the *Road Transport (General) Act 2005* and the *Road Transport (Heavy Vehicles Registration Charges) Act 1995* to enable the implementation of decisions by the Council of Australian Governments in its 2007 Road Reform Plan with respect to trials for incremental pricing schemes for higher mass and other innovative vehicles.
12. For that purpose, the Bill amends those Acts and the Road Transport (Heavy Vehicles Registration Charges) Regulation 2006 as follows:
 - (a) to provide for excess permits for vehicles and loads and to repeal provisions relating to heavy vehicle permits under the *Road Transport (Heavy Vehicles Registration Charges) Act 1995*,
 - (b) to enable regulations to be made to establish incremental pricing (based on user activity and impact) for additional mass, dimension, load restraint and access concessions,
 - (c) to make other consequential amendments and to save existing excess weight permits and heavy vehicle permits.
13. The Bill also amends the *Road Transport (General) Act 2005* and the *Road Transport (Mass, Loading and Access) Regulation 2005* to provide for evidentiary presumptions as to the operation of or information generated by intelligent transport systems to be able to be rebutted only by persons who have relevant specialised knowledge.
14. Outline of provisions

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

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

Clause 3 is a formal provision that gives effect to the amendments to the *Road Transport (General) Act 2005* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Act and instruments set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act

will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Road Transport (General) Act 2005

Schedule 1 [1] amends section 11A of the *Road Transport (General) Act 2005* (the **RTG Act**) to enable regulations to be made specifying the nature of the evidence that may or may not be used to rebut an evidentiary presumption concerning the operation and functioning of intelligent transport systems or information obtained from such systems.

Schedule 1 [2] amends section 20 of the RTG Act to insert definitions of **access requirement**, **incremental pricing charges** and **incremental pricing scheme**.

Incremental pricing charges are defined as charges to road users, for concessions relating to mass, dimension, load restraint or access requirements, that are based on road users' activities, or likely activities, as a consequence of the concessions and the impact of those activities.

Schedule 1 [4] substitutes section 27 of the RTG Act to enable the Roads and Traffic Authority (the **Authority**) to grant excess permits exempting vehicles from mass, dimension, load restraint or access requirements. A permit may be granted subject to conditions.

Schedule 1 [3] makes a consequential amendment.

Schedule 1 [5] inserts proposed section 28A into the RTG Act. The proposed section enables regulations to be made for or with respect to matters relating to incremental pricing charges for mass, dimension, load restraint or access concessions for vehicles. The regulations may cover matters including determination of incremental pricing charges, payment of charges, provision of information, the use of information obtained by intelligent transport systems and other information, evidentiary matters and other matters.

Schedule 1 [7] amends section 76 of the RTG Act to extend references to concessions to include exemptions from access requirements and to update a reference to excess weight permits. **Schedule 1 [6], [9] and [10]** make consequential amendments.

Schedule 1 [8] amends section 77 of the RTG Act to extend the offence of failing to comply with a concession to access requirements.

Schedule 1 [11] amends Schedule 1 to the RTG Act to enable regulations containing savings or transitional provisions to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [12] amends Schedule 1 to the RTG Act to continue existing excess weight permits in force and deems them to have been made under the new section 27.

Schedule 2 Amendment of other Act and instruments

Schedule 2.1 amends the *Road Transport (Heavy Vehicles Registration Charges) Act 1995* to omit provisions providing for the issuing of heavy vehicle permits and the charges for such permits (**Schedule 2.1 [5], [7] and [16]**). Consequential amendments are made to that Act to remove references to heavy vehicle permits, permit charges and repealed provisions (**Schedule 2.1 [1]–[4], [6] and [8]–[15]**).

That Act is also amended to enable regulations containing savings or transitional provisions to be made as a consequence of the enactment of the proposed Act and to continue existing heavy vehicle permits in force and deem them to be excess permits under the new section 27 of the RTG Act (**Schedule 2.1 [17] and [18]**).

Schedule 2.2 amends the *Road Transport (Heavy Vehicles Registration Charges) Regulation 2006* to omit provisions and references relating to heavy vehicle permits and related matters.

Schedule 2.3 amends the *Road Transport (Mass, Loading and Access) Regulation 2005* to provide that an evidentiary presumption relating to the accuracy or reliability, or the correct or proper operation of, or information provided by, an intelligent access system may only be

rebutted in proceedings by evidence adduced from a person who has relevant specialised knowledge.

Issues Considered by the Committee

<p>15. The Committee has not <i>identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</i></p>
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The Committee makes no further comment on this Bill.

15. ROAD TRANSPORT LEGISLATION (BREATH TESTING AND ANALYSIS) BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Council
Minister Responsible:	The Hon Eric Roozendaal MLC
Portfolio:	Roads, Commerce

Purpose and Description

1. This Bill amends the *Road Transport (Safety and Traffic Management) Act 1999* and certain other legislation with respect to the measurement of concentrations of alcohol in breath samples.
2. This Bill is cognate with the *Road Transport (General) Amendment (Heavy Vehicle User Charges) Bill 2007*.
3. The purpose is to allow the NSW Police Force to measure and report concentrations of alcohol in both a person's blood and/or breath. This ensures that NSW meets national standards concerning evidential breath analysers and to ensure that results from the breath analysing instruments are admissible in court.
4. The NSW Police Force also carries out breath analysis on boat operators, ferry operators, train drivers, bus drivers and police officers. Consequential amendments will need to be made to other legislation.

Background

5. Currently in New South Wales, the concentration of alcohol revealed by a breath test or breath analysis is required to be measured by reference to the amount of alcohol in grammes in 100 millilitres of blood.
6. The National Measurement Institute has developed a new standard for evidential breath analysers. (NMI R 126, *Pattern Approval Specifications for Evidential Breath Analysers*). This Standard provides for the concentration of alcohol revealed by new breath measuring devices to be measured by reference to the amount of alcohol in grammes in 210 litres of exhaled breath.
7. An amount of alcohol in grammes present in breath when measured by reference to 210 litres of breath is equivalent to the same amount of alcohol in grammes present in blood when measured by reference to 100 millilitres of blood. For example, a concentration of alcohol of 0.05 grammes can be expressed either by reference to alcohol in 210 litres of breath or 100 millilitres of blood.
8. The matters in this Bill have come from changes to the specifications of evidential breath analysers by the National Measurement Institute. Current evidential breath analysing instruments work by obtaining a sample of breath and measuring the

amount of alcohol in the breath before converting it to the concentration of alcohol in a person's blood.

9. The national standards have been changed so the results of evidential breath analysers must now be displayed as the concentration of alcohol present in grammes of alcohol in 210 litres of breath rather than in grammes of alcohol per 100 millilitres of blood. Changes to the specifications of evidential breath analysers are governed by the *National Measurement Act 1960* and the *National Measurement Regulations 1999*. All Australian States and Territories are bound by that legislation.
10. All Australian jurisdictions have amended or are in the process of amending their road transport legislation to comply with the new standards.

The Bill

11. The objects of this Bill are:
 - (a) to amend the *Road Transport (Safety and Traffic Management) Act 1999* and other legislation permitting breath testing or breath analysis to enable the concentration of alcohol revealed by a breath sample to be expressed in terms of the amount of alcohol in grammes in 210 litres of breath (as well as by reference to alcohol in 100 millilitres of blood for older breath measuring devices), and
 - (b) to make consequential amendments to certain other legislation.

12. 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, subject to certain exceptions. Schedule 1 [14] and [15] commence on the date of assent to the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the *Road Transport (Safety and Traffic Management) Act 1999* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to certain other legislation set out in Schedules 2 and 3.

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

Schedule 1 Amendment of Road Transport (Safety and Traffic Management) Act 1999

Schedule 1 amends the *Road Transport (Safety and Traffic Management) Act 1999*:

- (a) to enable the concentration of alcohol revealed by a breath test or breath analysis to be measured by reference to alcohol in the breath as well as in the blood, and
- (b) to enable the approval of breath analysing instruments and other breath testing devices that provide readings of alcohol concentration by reference to exhaled breath rather than blood, and
- (c) to make provision for matters of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other legislation dealing with breath testing or analysis

Schedule 2 makes comparable amendments to those made by Schedule 1 to other Acts and Regulations that provide for the determination of concentrations of alcohol by breath testing or breath analysis. The following Acts and Regulations are amended:

- (a) the *Children (Detention Centres) Act 1987* and *Children (Detention Centres) Regulation 2005*,
- (b) the *Crimes (Administration of Sentences) Act 1999* and *Crimes (Administration of Sentences) Regulation 2001*,
- (c) the *Marine Safety Act 1998*,
- (d) the *Passenger Transport Act 1990* and *Passenger Transport (Drug and Alcohol Testing) Regulation 2004*,
- (e) the *Police Act 1990* and *Police Regulation 2000*,
- (f) the *Rail Safety Act 2002* and *Rail Safety (Drug and Alcohol Testing) Regulation 2003*.

Schedule 3 Consequential amendment of legislation

Schedule 3 makes amendments to various Acts and Regulations that are consequential on the amendments made by Schedules 1 and 2.

Issues Considered by the Committee

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

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

13. The Committee notes that subject to certain exceptions such as Schedule 1 [14] and [15] to commence on the date of assent, the rest of the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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

The Committee makes no further comment on this Bill.

16. WORLD YOUTH DAY AMENDMENT BILL 2007

Date Introduced:	28 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Deputy Premier, Transport, Finance

Purpose and Description

1. This Bill amends the *World Youth Day Act 2006* to make further provision in relation to the planning, co-ordination and delivery of government services in relation to World Youth Day 2008 and related events; and for other purposes.
2. It will facilitate the use of the Randwick racecourse for World Youth Day events. The Bill makes it clear that the Australian Jockey Club, its chairman and committee are authorised to use or permit the use of Randwick racecourse for World Youth Day, and to enter into agreements with the State of New South Wales for the use of Randwick racecourse. The Bill will allow the Minister to give the authority, and other persons authorised by the authority, a right to enter Randwick racecourse and to carry out works there for the purposes of World Youth Day.
3. Regulations will be made under this Bill to set up a Randwick Racecourse Project Steering Committee to assist the authority in its planning and management role for the use of Randwick racecourse.
4. It proposes an offence to delay or obstruct a person lawfully entering Randwick racecourse or carrying out works there for World Youth Day. It will also be an offence to damage the works without lawful excuse.
5. The Bill will also restrict the use of air space, aerial advertising and advertising on buildings and structures in and around specified World Youth Day venues and facilities.
6. Under the *World Youth Day Act 2006*, the World Youth Day period is currently 1 to 31 July 2008. During this period certain powers can be exercised and various activities are prohibited, including the use of illegal car parks, selling prescribed articles, using community land, removing unattended vehicles, road closures and using restricted traffic lanes. For operational purposes and to ensure that there is an ability to extend the period, should it become necessary, the Bill enables the period to be extended by regulation.
7. The Bill also extends the period during which planning approval will not be required for temporary structures installed for the purposes of World Youth Day events and facilities. Currently, if the structures are removed by 1 August 2008, no planning approval will be required as long as the authority has provided permission for the structure. This Bill extends this period to 1 September 2008 as the current deadline may not provide enough time to remove all the temporary structures from World Youth Day venues and facilities.

8. Members of the NSW Rural Fire Service and the State Emergency Service will be able to assist the authority, other government agencies and the NSW Police Force in the delivery of services for World Youth Day events, including crowd management and traffic or pedestrian control, as long as the Commissioner of the Rural Fire Service or Director General of the State Emergency Service has agreed to that assistance.

Background

9. World Youth Day is a series of international and Australian events aimed at young people aged between 16 and 35 years from around the world, leading to a vigil and mass to be celebrated by the Pope at Randwick racecourse on 20 July 2008. It is estimated that up to 500,000 people will attend the papal mass, many from overseas. It is estimated to be larger in scale than the Olympics, with higher international numbers participating in the event. The event is unticketed so planning is based on crowd modelling and analysis of previous World Youth Day events as well as known registrations of pilgrims.
10. The NSW Government established the World Youth Day Coordination Authority in 2006 to plan, coordinate and provide government services for World Youth Day 2008. The authority is working together with other government agencies and the Local Organising Committee of the Catholic Church to ensure public safety and security, and the provision of sufficient public transport and accommodation for participants.
11. Randwick racecourse will be the venue for the overnight vigil and final mass of World Youth Day. The Australian Jockey Club is the lessee of Randwick racecourse. Negotiations have been ongoing with the Australian Jockey Club for access to the site, and a heads of agreement between the New South Wales Government and the Australian Jockey Club for the use of the site was reached on 14 November 2007.
12. In the Agreement in Principle speech, the heads of agreement is said to cover a range of compensation for the use of Randwick racecourse to a value of approximately \$40 million, with the Commonwealth Government contributing half. It is said to bring benefits to the Australian Jockey Club and the New South Wales racing industry, with a significant amount of money going towards upgrading facilities at Rosehill and Warwick Farm racecourses.
13. There was bipartisan assistance of the Federal Government in securing this agreement.
14. The Bill will restrict the use of air space, aerial advertising and advertising on buildings and structures in and around specified World Youth Day venues and facilities. These restrictions are in line with the restrictions imposed during the Sydney 2000 Olympic Games. It is necessary to restrict the air space over key World Youth Day venues and facilities to ensure the security and amenity of the Pope and the participants. Aircraft will be prohibited from entering the restricted airspace without permission from Air Services Australia, excluding aircraft being used for emergencies, police or military reasons.
15. Contracted bus operators for regular passenger services will be required to provide sufficient services for World Youth Day events in accordance with the provisions of existing contractual arrangements. The Director General of the Ministry of Transport

may direct the operator to provide such services as the director general determines are necessary for World Youth Day events, and may determine a price or prices for such services. This will be required only when a negotiated outcome between the director general and the contract holder cannot be reached. It is a discretionary power which the director general may use if required.

The Bill

16. The object of this Bill is to make various amendments to the *World Youth Day Act 2006 (the Principal Act)* to make further provision in relation to the planning, co-ordination and delivery of services in relation to World Youth Day 2008 and related events.

17. Outline of provisions

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

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

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

Clause 4 is a formal provision that gives effect to the amendment to the *Passenger Transport Act 1990* set out in Schedule 2.

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

Schedule 1 Amendment of World Youth Day Act 2006

Amendments relating to terms and expressions

Schedule 1 [1] inserts a number of definitions into section 3 of the Principal Act for the purposes of that Act.

The Principal Act currently defines the **World Youth Day period** to be the period from 1 July 2008 to 31 July 2008, inclusive. Under that Act certain functions may be exercised and certain provisions have effect during that period. **Schedule 1 [2]** and **[4]** replace the definition of **World Youth Day period** in section 3 of the Principal Act, and insert proposed section 3B into that Act, to provide that the end of that period may be extended by the regulations. However, the regulations may not prescribe a day that is later than 31 December 2008.

For added clarity and certainty, **Schedule 1 [4]** inserts proposed section 3A into the Principal Act to provide that the Minister administering the Principal Act, currently the Deputy Premier (**the Minister**) may designate specified areas as **World Youth Day declared areas**. **Schedule 1 [3]** amends the definition of **World Youth Day venue or facility** to provide that World Youth Day declared areas (along with other venues and facilities) are such venues or facilities for the purposes of the Principal Act.

Currently section 37 of the Principal Act provides that until 1 August 2008, certain activities may be carried on despite the fact that the activity is not authorised by or is contrary to or inconsistent with an environmental planning instrument or development consent applying to the land. **Schedule 1 [6]** and **[7]** amend section 37

of the Principal Act to provide that such activities may be carried out until the specified **expiry date**. The **expiry date** is defined as 1 September 2008 or such later date as is prescribed by the regulations (being a date that is not later than 31 December 2008).

Currently sections 45 (Illegal car parks) and 46 (Control of sale and distribution of articles in certain public places) of the Principal Act contain provisions that have effect during the World Youth Day period. **Schedule 1 [9]–[13]** amend those sections to provide that the relevant provisions have effect during a defined **parking control period** and **sales control period**, respectively. Both are defined to be the period from 1 July 2008 to 31 July 2008, inclusive, or such other period as may be prescribed by the regulations (being a period that does not begin before 1 June 2008 or end after 31 December 2008).

Amendment relating to use of Randwick Racecourse for World Youth Day events

Schedule 1 [8] inserts proposed Part 9A (proposed sections 44A–44J) into the Principal Act to deal with the use of Randwick Racecourse for World Youth Day events.

Proposed section 44A makes it clear that a reference in the proposed Part to the use of Randwick Racecourse for the purpose of a World Youth Day event includes:

- (a) holding a World Youth Day event at Randwick Racecourse, and
- (b) making preparations for any such event, and
- (c) cleaning up and restoring Randwick Racecourse after any such event, and
- (d) such supplemental, incidental or consequential acts as may be necessary or expedient for carrying out any action referred to in paragraph (a), (b) or (c).

The proposed section also provides that for the purposes of the proposed Part, a **WYD event agreement** is a written agreement between the AJC and the State of New South Wales for the use of Randwick Racecourse for the purposes of one or more World Youth Day events that provides that it is a comprehensive agreement for the use of the Racecourse.

Proposed section 44B makes it clear that despite any other written or unwritten law, or any other instrument, the AJC, and the Chairman and the Committee of the AJC, may and are authorised to:

- (a) use Randwick Racecourse, or permit that Racecourse to be used, for the purposes of one or more World Youth Day events, and
- (b) enter into one or more agreements with the State of New South Wales for the use of Randwick Racecourse for the purposes of any such event.

Proposed section 44C provides that the Minister may direct persons or bodies, or persons or bodies belonging to a class of persons or bodies, prescribed by the regulations to take specified actions, or cease or refrain from taking specified actions, for the purpose of carrying out a WYD event agreement or otherwise enabling the use of Randwick Racecourse for the purposes of one or more World Youth Day events.

Further, proposed section 44C (5) provides that a person or body to whom a direction relates, must not:

- (a) contravene or fail to comply with a direction given under the proposed section, or
- (b) cause or permit another person or body to contravene or fail to comply with such a direction.

Directions may be enforced in proceedings brought under proposed section 57A (see below).

Proposed section 44D provides that if no WYD event agreement is in force, the Minister may, by order, specify the maximum amount of compensation (other than compensation for

loss in relation to acts or omissions that cause personal injury to a person or the death of a person) that is to be paid to the AJC and other persons in connection with that use of Randwick Racecourse. If such a maximum amount is specified, the State and any authority of the State is not liable to pay any other compensation to the AJC or such other persons in connection with that use of Randwick Racecourse (other than compensation for loss in relation to acts or omissions that cause personal injury to a person or the death of a person).

Proposed section 44F makes it an offence for a person to:

- (a) intentionally delay or obstruct another person who is:
 - (i) lawfully carrying out any work to facilitate the holding of World Youth Day events at Randwick Racecourse, or
 - (ii) lawfully entering, or attempting to enter, Randwick Racecourse for such a purpose, or
- (b) without lawful excuse, intentionally interfere with or damage any works or structure at Randwick Racecourse that facilitate the use of the Racecourse for World Youth Day events, or
- (c) cause or permit another person to do anything referred to in paragraph (a) or (b).

The proposed offence carries a maximum penalty of 500 penalty units (currently \$55,000).

Proposed section 44G limits compensation that is payable in respect of the use of Randwick Racecourse. The proposed section provides that no compensation is payable by or on behalf of the State or an authority of the State, or the company WYD 2008 (ACN 118 060 987), or the AJC, the Committee of the AJC (or the Chairman and its members), or the members of the AJC, for an act or omission that is a Randwick Racecourse WYD event-related matter or that arises (directly or indirectly) from a Randwick Racecourse WYD event-related matter. A **Randwick Racecourse WYD event-related matter** is defined to be the holding of any World Youth Day event at Randwick Racecourse, any preparations for any such event, any clean up and restoration of Randwick Racecourse after any such event and the exercise of functions under the Principal Act in relation to Randwick Racecourse.

The limitation on compensation set out in the proposed section:

- (a) applies only in respect of acts done or omitted to be done in good faith, and
- (b) does not apply to acts or omissions that cause personal injury to a person or the death of a person, and
- (c) does not apply to compensation paid or payable to the AJC or any other person for loss connected with the use of Randwick Racecourse for World Youth Day events under:
 - (i) a WYD event agreement, or
 - (ii) an order under proposed section 44D.

The proposed section also clarifies the personal liability of the Chairman and members of the Committee of AJC, and the members of the AJC, in relation to Randwick Racecourse WYD event-related matters.

Proposed section 44H provides that the exercise by the Minister or the Authority, (or their delegates) of a function conferred or imposed on them by or under a provision of the proposed Part may not be:

- (a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings, or
- (b) restrained, removed or otherwise affected by any proceedings.

Proposed section 44I provides that a Randwick Racecourse Project Steering Committee may be established by regulation and have functions delegated to it.

Proposed section 44J provides that anything permitted, required, directed or authorised to be done by a person by or under the Principal Act to enable Randwick Racecourse to be used for the purpose of one or more World Youth Day events may be done despite any of the following:

- (a) the *Australian Jockey Club Act 1873* and any by-laws under that Act,
- (b) the *Thoroughbred Racing Act 1996* and any instrument under that Act,
- (c) the Australian Rules of Racing (within the meaning of the *Thoroughbred Racing Act 1996*).

Miscellaneous amendments

Schedule 1 [14] inserts proposed sections 46A–46F into the Principal Act.

Proposed section 46A deals with the control of aircraft within airspace over certain World Youth Day events.

Proposed section 46B controls certain unauthorised advertising material on buildings and structures, and enables a person authorised by the Authority to obliterate or remove that unauthorised advertising material at certain sites (as specified by the Minister by order in the Gazette).

Proposed section 46C deals with the control of advertising in airspace visible from certain World Youth Day venues or facilities.

Proposed section 46D provides that the State Emergency Service and the NSW Rural Fire Service may assist the Authority in the delivery of services for World Youth Day events, including (but not limited to) crowd management services and access control services for venues or facilities and traffic or pedestrian control.

Proposed section 46E implies certain terms into the service contracts for regular bus services under the *Passenger Transport Act 1990* to enable the Director-General of the Ministry of Transport to direct the bus operators to provide bus services for World Youth Day events.

Proposed section 46F provides that the operation of the Principal Act (and, in particular, any action of any person in compliance with proposed section 46B (which relates to the obliteration or removal of advertising material)) is not to be regarded as a breach of contract or confidence or otherwise as a civil wrong or giving rise to any remedy under any contract or other instrument.

Schedule 1 [15] replaces section 50 (Claims for compensation) of the Principal Act. This consequential amendment is made necessary by the inclusion of the specific compensation provisions relating to Randwick Racecourse in proposed section 44G.

Schedule 1 [16] inserts proposed section 51A into the Principal Act to provide that the Minister may delegate certain of the Minister's functions conferred or imposed by or under the Principal Act to specified authorised persons.

Schedule 1 [17] inserts proposed section 57A into the Principal Act to provide that the Authority may bring proceedings in the Supreme Court for an order to remedy or restrain a contravention (or a threatened or an apprehended contravention) of the Principal Act (including a direction under proposed section 44C or a condition of an authorisation under proposed section 44E) or certain agreements in connection with the use of Randwick Racecourse.

Schedule 1 [18] amends section 58 (Regulations) of the Principal Act to provide that regulations under that Act may be made in relation to searches of persons and their articles, vehicles or vessels as a condition of entry to any World Youth Day venue or facility and for excluding persons who refuse to submit to such searches from World Youth Day venues or facilities and, more generally, the use of Randwick Racecourse for World Youth Day events.

Issues Considered by the Committee

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

Issue: Exclude judicial and merits review – Proposed Section 44H of Schedule 1 [8] – Protection of exercise of certain functions:

18. The proposed relevant subsection reads:

44H (2) The exercise by any protected person of any protected function may not be:

- (a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings, or
- (b) restrained, removed or otherwise affected by any proceedings.

44H (3) Without limiting subsection (2), that subsection applies whether or not the proceedings relate to any question involving compliance or non-compliance, by a protected person, with the provisions of this Part or the rules of natural justice (procedural fairness).

Under subsection (1) of 44H, a protected person is the Minister (including a delegate of the Minister) or the World Youth Day Coordination Authority (including a delegate of the Authority).

19. The Committee notes the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law. The Committee will always be concerned if a Bill purports to oust the jurisdiction of the courts.
20. The Committee is also of the view that the proposed section is very broad. It has the potential to deny a person natural justice by removing the opportunity for review of any question of compliance or non-compliance by the Minister, the Minister's delegate, the Authority or its delegate).

- 21. The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review, unless there is a strong public interest in doing so.**
- 22. The Committee is of the view that the proposed section 44H is very broad and draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.**

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

Issue: Henry VIII clause – which allow amendment of Acts by a regulation – proposed section 58 (2)(f) and (g) regulations of Schedule 1 [10] – requiring persons to submit to searches etc and excluding persons who refuse to submit to such searches:

- 23. This inserted section 58 (Regulations) of the Principal Act allows that regulations be made in relation to searches of persons and their articles, vehicles or vessels as a condition of entry to any World Youth Day venue or facility and for excluding persons who refuse to submit to such searches from World Youth Day venues or facilities.**

- 24. The Committee is concerned that allowing regulations to exclude people from the World Youth Day venue or facilities, and allowing regulations to be made in relation to searches of persons and their articles, vehicles or vessels, appear to be a significant delegation of legislative power.**
- 25. The Committee also notes that the ability of Parliament to effectively scrutinise the pre-conditions or criteria for the proper exercising of such search and exclusion powers is dependant on Parliament sitting. Therefore, the Committee considers that this constitutes an inappropriate delegation of legislative power, and refers it to Parliament. The Committee is also of the view that such search powers, would be more appropriate to be made in the principal Act by an amending legislation rather than through the regulations.**

The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Outline of the Regulation/Issues

Criminal Procedure Amendment (Briefs of Evidence) Regulation 2007

Recommendation

That the Committee, for the purposes of s 9(1)(b)(i) of the *Legislation Review Act 1987*, resolve to report that:

- i) the Committee holds genuine concerns that this Regulation trespasses unduly on individual rights and liberties, especially for defendants in the 12 months of trial, without adequate protection in respect of procedural fairness, and refers this Regulation to Parliament.

Grounds for comment

Personal rights/liberties	The Committee holds genuine concerns that this regulation may trespass unduly on individual rights and liberties such as principles on fair trials and procedural fairness.
Business impact	
Objects/spirit of Act	The object of this Regulation is to amend the <i>Criminal Procedure Regulation 2005</i> to prescribe a 12-month trial scheme allowing prosecutors to give short briefs of evidence to defendants. The aim is to save police time and increase the number of early guilty pleas.
Alternatives/effectiveness	The Regulation may not be effective with respect to its objective, instead, it may lead to: <ul style="list-style-type: none"> • Increase in the number of defended hearings in the Local Court • Increase in court time set aside for defended hearings • Need for police and witnesses to attend court to give evidence • Increase in the number of guilty

	pleas on the hearing date.
Duplicates/overlaps/conflicts	
Needs elucidation	The Agreement in Principle speech for the related Bill (which enables regulations such as this one), noted that the brief of evidence may be replaced by a comprehensive facts sheet with copies of police evidence to be attached. However, the legislation does not provide for this. There is the potential for the requirement of the brief of evidence to be removed and not be replaced by a detailed facts sheet.
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	Deputy Director-General, Criminal Law Review Division, NSW Attorney General's Department
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Explanatory Note

Section 183 of the *Criminal Procedure Act 1986* requires briefs of evidence to be given by prosecutors to defendants in proceedings for certain offences and specifies what is to be included in those briefs. An amendment made by the *Criminal Procedure Amendment (Local Court Process Reforms) Act 2007* enables the regulations to make other provision for the content of briefs of evidence required under section 183.

The object of this Regulation is to amend the *Criminal Procedure Regulation 2005* to prescribe a 12-month trial scheme allowing prosecutors to give short briefs of evidence to defendants. The trial scheme will apply to proceedings for summary offences and for indictable offences specified in Table 2 in Schedule 1 to the *Criminal Procedure Act 1986* that are dealt with summarily, but only in cases where a brief of evidence is required to be served.

This Regulation is made under the *Criminal Procedure Act 1986*, including sections 4 (the general regulation-making power) and 183.

Comment

26. The proposed Clause 24A of Schedule 1 Amendments aims to introduce short briefs of evidence in certain circumstances to reduce the time spent by police officers in producing statements for inclusion in certain briefs of evidence. This applies only to proceedings for summary offences, including for indictable offences in Table 2 of Schedule 1 of the *Criminal Procedure Act 1986*, that are dealt with summarily at the Local Court for which brief of evidence is required to be served on the accused person if there is no guilty plea.
27. Table 2 list of offences is broad and includes various offences against the person (eg common assault and other forms of assault); stalking and intimidation; larceny and certain other property offences which do not exceed \$5,000; offences relating to

drugs where the amount is not more than the applicable small quantity; possession of implement of housebreaking; other property offences; false instruments where the value does not exceed \$5,000; offences relating to participation in criminal groups; offences relating to firearms and dangerous weapons; certain firearms offences; offences relating to fires; publishing of child pornography; attempts to commit any offence mentioned in Table 2 offences; accessories before or after the fact to any offence mentioned in Table 2 offences; abettors of any offence mentioned (other than Part 3) of Table 2 offences if the offence is a minor indictable one; conspiracies to commit any offence in Table 2 offences; and various other offences.

28. Proposed clause 24A (3) provides the definition of 'prescribed statement' of a non-material witness, in relation to a brief of evidence required to be served under section 183 of the *Criminal Procedure Act 1986*. This includes:
 17. police officer who provides evidence that the preconditions of the exercise of a power have been satisfied or establishes that the evidence on which the prosecutor relies was obtained in accordance with the law (for example, the custody manager has cautioned the accused under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*);
 18. police officer who was responsible for the movement of, or recording the movement of, a thing connected with the offence or the investigation of the offence (for example, a police officer who conveys DNA or a drug sample);
 19. police officer who operated a device that produced or caused the production of a document, photograph, video or any other thing relied on by the prosecutor to prove the prosecution's case;
 20. any other police officer who provides evidence that corroborates evidence of another officer whose statement relates to a process or procedure (for example, a police officer, other than the investigating officer, who was present when the accused was interviewed);
 21. a person who is a medical practitioner, nurse, paramedic or other health care professional if all the notes of the person (for example, doctor's treatment notes) have been included in the brief of evidence.
1. Clause 24A (4) proposes that the above documents are no longer required to be included in the brief of evidence to be served to the accused person, so long as the brief includes a summary list of what such statement would have included.
2. The Committee holds genuine concerns that this regulation may trespass unduly on individual rights and liberties such as principles on fair trials and procedural fairness. The rationale for the Committee's concerns include:
 - (a) The invisibility of the pre-trial process or procedure over the conduct, admissibility and regulation of evidence of confessions or admissions during police interrogation and investigation.
 - (b) Difficulties in challenging confessional evidence or damaging admissions relate to the lack of independent source of verification apart from the defendant and the interviewing officer.

- (c) The Wood NSW Royal Commission into the Police in 1995 found various practices (including threatening suspects; unlawful interrogations; false evidence) revealed in evidence by police witnesses.
- (d) As recommended at 29 in the 1990 NSW Law Reform Commission's Report on *Police Powers of Detention and Investigation After Arrest*, there should be a system aimed at increasing confidence in the integrity of police investigative methods and the evidence subsequently produced; regularising the treatment of persons in custody and the safeguards to persons in custody of police; and reducing the delays and costs by reducing the time spent on challenges to the admissibility of Crown evidence.
- (e) The Government then introduced the *Crimes Amendment (Detention After Arrest) Act 1997*, which addressed some of the issues from the NSW Law Reform Commission's Report. The Act provides for a custody manager to inform the person that they have a right to communicate with a friend, relative, guardian or independent person or lawyer unless the custody manager believes on reasonable grounds not to do so for certain reasons. Obligations are placed on custody manager to provide medical assistance if required and custody records are to be maintained.
- (f) The courts and the High Court of Australia have dealt with issues of police powers and the admissibility of evidence obtained in contravention of fairness principles, including the question of the admissibility of alleged confessional evidence: *Driscoll v The Queen* (1977) 15 ALR 47; *R v Carter* [1984] 3 NSWLR 635; *Stephens v R* (1985) 58 ALR 753; *Carr v R* (1988) 81 ALR 236; *Duke v R* (1988) 83 ALR 650; and *McKinney v R* (1991) 171 CLR 468. The development in these cases, has been from the argument that the unsigned confessional evidence should have been excluded (*Driscoll*) to the need for judicial warnings on the difficulties facing an accused to dispute alleged confessional evidence in situations where other means of corroboration are not available to the accused (*McKinney*).
- (g) The *Evidence Act 1995* also contains provisions on circumstances in which admissions made by the defendant are not to be admitted at trial including exclusion of improperly or illegally obtained evidence and the need to caution accused persons. The lack of inclusion of documents in briefs of evidence may make it harder for defendants to dispute any alleged illegally obtained evidence during police investigation or questioning, as well as delay the proceedings with applications to the court for ordering the service of such documentation previously not included.
- (h) The need for good practice to increase the confidence in the integrity of police investigative methods and police procedures, as well as the evidence subsequently produced through the evidence in briefs to show that the preconditions of the exercise of a power have been satisfied or that the evidence on which the prosecutor relies upon was lawfully obtained.
- (i) The inclusion of the above contents in the briefs of evidence may support the promotion of a greater focus on the relevant issues, the minimisation of any applications by the accused to the courts for orders on the service of documents not previously included in the brief of evidence, the promotion of

guilty pleas in appropriate cases, and reduction of time and delays for all parties.

3. Clause 24A is to operate for a trial period on accused persons who were charged with the relevant offences on or after 12 November 2007 and before 12 November 2008. However, the regulation does not contain clauses on who will undertake the review and when the review will be completed.
4. As outlined in paragraph 5 above, the Committee is concerned that the rights and liberties of defendants may be affected without adequate protection during the trial period.
5. The Legislation Review Committee has already commented on the *Criminal Procedure Amendment (Local Court Process Reforms) Bill 2007*, which when it commences, would enable regulations (such as this one), to make other provision for the contents of briefs of evidence required under section 183 of the Act. The Committee has already raised concerns with the Bill as unduly trespassing the rights and liberties of the defendant and interfering with procedural fairness.
6. The Law Society of NSW has raised concerns regarding the Bill as it considers that it would be inappropriate for a lawyer to advise a defendant to plead guilty without seeing the relevant evidence. The Law Society argues that the proposed legislation (and similarly, this regulation) may have the effect of increasing the number of not guilty pleas rather than achieving the legislative objective of reducing the administrative workload of police. The Agreement in Principle speech noted that the brief of evidence may be replaced by a comprehensive facts sheet with copies of police evidence to be attached. However, the legislation does not provide for this. There is the potential for the requirement of the brief of evidence to be removed and not be replaced by a detailed facts sheet.
7. The Law Society in its Journal article of August 2007 (page 7), commented that the reality for the criminal system is that the service of briefs results in a plea or a shorter hearing as well as it leads to better police practice. It suggested that the amendments will not lead to savings for police, rather, there would be an increase in court time set aside for defended hearings as well as an increase in the number of defended hearings in the Local Court and an increase in the need for police and witnesses to give evidence in court.
8. The Law Society in its journal article has also requested that the Attorney General's Department consult all relevant stakeholders in relation to the regulation as it understood that only the NSW Police Force was involved in its development.
9. In its submission to the NSW Attorney General with regard to the proposed amendment to clause 24 of the *Criminal Procedure Regulation 2005*, which this regulation aims to amend, the Law Society wrote:

The summary offences in which a brief will no longer have to be served, such as offensive conduct, can involve complex matters of fact and law. The service of a brief saves court time and resources by ensuring that all parties know in advance of the hearing what the relevant issues are, how many witnesses are required, how long the hearing is likely to last and whether the matter is still to be defended at all.

The [Law Society's] Committee is concerned that these reforms signal a move towards abolishing the service of briefs in summary matters altogether. In the Agreement in Principle speech, the Minister for Police commented that the evaluation of the 12-month trial will also consider "whether there should be further reforms to increase efficiency" and that "[t]he trial as proposed by the Attorney will extend the scheme to other specific summary matters".

10. The background context was since 1997, when the NSW Government introduced the *Justices Amendment (Briefs of Evidence) Bill 1997* to provide for the service of copies of briefs of evidence in proceedings for offences dealt with summarily in the Local Court, the Government stated then that it was unfair to the defendant that the defendant be advised only of the offence that is charged and the alleged facts that constitute the offence. That bill was passed to ensure fairer hearings as defendants could be prepared in advance of the prosecution case. The former Attorney General summarised the benefits of the reforms back in 1997:
 - Summary hearings would become more focused on relevant issues and be disposed of more quickly
 - Shorter more focused hearings would save time and money for all parties
 - Provisions of a brief would assist defendants in providing instruction to their lawyers
 - Police officers would spend less time at court waiting to give evidence
 - It would likely increase guilty pleas.
11. The Committee notes that the Law Society in its submission to the Attorney General, argues that the same rationale behind the introduction of the 1997 reforms still remains valid today. The Law Society suggests that the proposed amendments will lose the benefits of the 1997 reforms as summarised above. The amendments may instead lead to:
 - Increase in the number of defended hearings in the Local Court
 - Increase in court time set aside for defended hearings
 - Need for police and witnesses to attend court to give evidence
 - Increase in the number of guilty pleas on the hearing date.
12. That the Committee, for the purposes of s 9(1)(b)(i) of the *Legislation Review Act 1987*, resolve to report that:
 - i) the Committee holds genuine concerns that this Regulation trespasses unduly on individual rights and liberties, especially for defendants in the 12 months of trial, without adequate protection in respect of procedural fairness, and refers this Regulation to Parliament.

Appendix 1: Index of Bills Reported on in 2007

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Crimes (Forensic Procedures) Amendment Bill 2007	5
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Crimes (Sentencing Procedure) Amendment Bill 2007	4
Criminal Legislation Amendment Bill 2007	4
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Transport Administration Amendment (Portfolio Minister) Bill 2007	1
Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2007*	2
University of Technology (Kuring-gai Campus) Bill 2007*	2
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Commission for Children and Young People Amendment Bill 2005	Minister for Community Services	25/11/05	25/08/06	10	
Companion Animals Amendment Bill 2005	Minister for Local Government	25/11/05	15/12/05	1	
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05	23/11/05	1	
Correctional Services Legislation Amendment Bill 2006	Minister for Justice	02/06/06		8	
Crimes Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05	12/12/05	1	
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006	Premier	26/09/06	17/10/06	13,15	
Crimes Legislation Amendment (Gangs) Bill 2006	Minister for Police	05/09/06		10	
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05	19/04/06	5	
Crimes (Serious Sex Offenders) Bill 2006	Minister for Justice	28/04/06		5	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07			1
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07			1
Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006	Attorney General	02/06/06	02/08/06	8,9	
Education Legislation Amendment Bill 2006	Minister for Education and Training	10/11/06		16	
Education Legislation Amendment (Staff) Bill 2006	Minister for Education and Training	09/05/06	23/05/06	6,8	
Fair Trading Amendment Bill 2006	Minister for Fair Trading	02/06/06	07/06/06	8,12	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07		1,7
Local Government Amendment (Waste Removal Orders) Bill 2006	Minister for Local Government		09/06/06	8,9	

Bill	Minister/Member	Letter sent	Reply received	Digest 2006	Digest 2007
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07			1
Motor Accidents Compensation Amendment Bill 2006 and Motor Accidents (Lifetime Care and Support) Bill 2006	Minister for Commerce	24/03/06	26/04/06	3,5	
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/05	12/01/06	2	
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05	03/01/05	1	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07		1,2
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	Attorney General	25/11/05	16/05/06	7	
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07			1
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	Minister for Gaming and Racing	09/05/06	24/05/06	6,8	
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	Minister for Transport	25/11/05 28/04/06	05/04/06	5	
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05	28/11/05	1	
Water Management Amendment Bill 2005	Minister for Natural Resources	25/11/05	05/09/06	11	

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

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentar y scrutiny
Administrative Decisions Tribunal Amendment (Confidential Documents) Bill 2007*	N, R				
Agricultural Industry Services Amendment Bill 2007		N, R			
Anti-Discrimination Amendment (Offender Compensation) Bill 2007	N, R				
APEC Meeting (Police Powers) Bill 2007	N, R, C		N, R		
Assisted Reproductive Technology Bill 2007	N			N	
Bail Amendment Bill 2007	N, R			N, R	
Biofuel (Ethanol Content) Bill 2007	N, R			N, R	
Brothels Legislation Amendment Bill 2007	N, R		N, R	N, R	
Casino, Liquor and Gaming Control Authority Bill 2007	N, R			N	
Channel 7 Former Epping Site Protection Bill 2007*	N, R				
Child Protection (Offenders Registration) Amendment Bill 2007	N			N, R	
Child Protection (Offenders Registration) Amendment (Suspended Sentences) Bill 2007	N				
Civil Liability Amendment (Offender Damages) Bill 2007	N, R				
Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2007				N, R	
Climate Futures Bill 2007*	N, R				
Commission for Children and Young People Amendment Bill 2007	N				
Consumer Claims Amendment Bill 2007				R	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentar y scrutiny
Courts and Other Legislation Amendment Bill 2007				R	
Crimes (Administration of Sentences) Amendment Bill 2007	N, R				
Crimes Amendment Bill 2007				N, R	
Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007				N, R	
Crimes Amendment (Sexual Procurement Or Grooming Of Children Bill				N, R	
Crimes (Domestic and Personal Violence) Bill 2007				R	
Crimes (Forensic Procedures) Amendment Bill 2007	N			R	
Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007	N, R				
Crimes (Sentencing Procedure) Amendment Bill 2007	N			N, R	
Criminal Legislation Amendment Bill 2007	N, R			N, R	
Criminal Procedure Amendment (Local Court Process Reforms) Bill 2007	N			N, R	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	N			N, C	
Drug and Alcohol Treatment Bill 2007	R, N, C			N, R	
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2007			N		
Energy and Utilities Administration Amendment (Climate Change Fund) Bill 2007				N	
Evidence Amendment Bill 2007				N	
Evidence (Audio and Audio Visual Links) Amendment Bill 2007	N, R			R	
Food Amendment Bill 2007	N			C	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentar y scrutiny
Gene Technology (GM Crop Moratorium) Bill 2007			N, R	R	
Guardianship Amendment Bill 2007	N, C, R		N	N, C	
Health Legislation Amendment Bill 2007				R	
Housing Amendment (Community Housing Providers) Bill 2007				N, R	
Human Cloning and Other Prohibited Practices Amendment Bill 2007	N, R				
Jury Amendment Bill 2007				R	
Law Enforcement and Other Legislation Amendment Bill 2007	N, R			N, R	
Law Enforcement (Powers and Responsibilities) Amendment Bill 2007				N, R	
Liquor Bill 2007	N, R				
Local Court Bill 2007				R	
Local Government Amendment Bill 2007				R	
Mental Health Bill	N, R, C	N, C	N, C	N, R	
Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Bill 2007				N	
Miscellaneous Acts (Local Court) Amendment Bill 2007				R	
Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2007				R	
Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill 2007*	N				
Police Amendment Bill 2007				R	
Renewable Energy (New South Wales) Bill	N			N	

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	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentar y scrutiny
Road Transport (General) Amendment (Written-off Vehicles) Bill 2007	N			N, R	
Road Transport Legislation (Breath Testing and Analysis) Bill 2007				N, R	
Road Transport (Safety and Traffic Management) Amendment (Novice Drivers) Bill 2007				R	
Security Industry Amendment (Patron Protection) Bill 2007*	N				
Statute Law (Miscellaneous Provisions) Bill 2007	N			N, C	
Summary Offences Amendment (Spray Paint Cans) Bill 2007	N				
Surveillance Devices Bill 2007	N, R				
Sydney Water Catchment Management Amendment Bill 2007	N, R			R	
Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007	N, R, C			N, C, R	
Tow Truck Industry Amendment Bill 2007				N, R	
University of Technology (Kuring-gai Campus) Bill 2007*	N, R			N, R	
War Memorial Legislation Amendment (Increased Penalties) Bill 2007	N, R				
World Youth Day Amendment Bill 2007			N, R	N, R	

Key

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

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

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2006
Environmental Planning and Assessment Amendment (Designated Development) Regulation 2007	Minister for Planning	03/07/07	10/09/07	2, 3