

PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 6 of 2007

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* Denotes Private Member's Bill

MEMBERSHIP & STAFF

Chair	Allan Shearan MP, Member for Londonderry
Deputy	Paul Pearce MP, Member for Coogee
Members	Amanda Fazio MLC Judy Hopwood MP, Member for Hornsby Lylea McMahon MP, Member for Shellharbour Robyn Parker MLC Roy Smith MLC Russell Turner MP, Member for Orange
Staff	Catherine Watson, Committee Manager Carrie Chan, Senior Committee Officer Talina Drabsch, Senior Committee Officer Jonathan Elliott, Committee Officer
Panel of Legal Advisers The Committee retains a panel of legal advisers to provide advice on Bills as required.	
Contact Details	Legislation Review Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 3308
Facsimile	02 9230 3052
Email	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc/digests

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. Assisted Reproductive Technology Bill 2007

Issue: Privacy – Part 2 Division 2 – Provision of ART Services; Part 2 Division 3 – Use of Gametes and Part 3 – Central ART Donor Register

17. The Committee considers that an appropriate privacy balance has been achieved between the privacy rights and needs of donor-conceived children, parents, donors, ART providers, and the primacy of the best interests of children conceived using the assisted reproductive technology, with respect to circumstances in aiming to save their lives or preventing serious damage to their health. Therefore, the Committee does not consider personal rights such as privacy concerns have been unduly trespassed.

Issue: Onus of Proof – Part 5 Clause 53(1) Offences; Part 7 Clause 68 Onus of Proof Concerning Reasonable Excuse

20. The Committee notes that Part 5 sets out the appointment of inspectors with the issuance of a certificate of authority to authorise the inspector's exercise of functions; limitation on self-incrimination; search warrants applications; and procedures for disallowance of seizures including applications to the Local Court.

21. The Committee considers that given the above context of procedural rights, along with monetary penalties rather than imprisonment, as well as the overall aims of the Bill to recognise the rights of individuals to have control over the use of their genetic material, to promote the best interests of the child, and to prevent the commercialisation of human reproduction and commercial surrogacy, the reversal onus of proof on defendants that they had a reasonable excuse, does not trespass unduly on personal rights.

Issue: Retrospectivity – Part 4 Surrogacy - Clause 45 Surrogacy Agreements Void

23. This includes agreements made before this legislation commences (clause 45). The Committee will always be concerned with any retrospective effect of legislation which may impact on personal rights. However, since a key part of the objective of this Bill is to prevent the commercialisation of human reproduction by prohibiting commercial surrogacy, which is also consistent with existing law, by making all surrogacy arrangement, void and unenforceable, the Committee is of the view that in the circumstances, the retrospective effect of the proposed section does not trespass unduly on personal rights.

Issue: Provide the executive with unfettered control over the commencement of an Act - Part 1 Clause 2 - Commencement by proclamation.

24. This Bill proposes to commence by proclamation. This is because a lengthy and detailed implementation period is required, during which the Department of Health will consult with stakeholders on regulations under the Bill. The Committee notes that it is important for stakeholders to be involved in the development of the donor register and that they are provided with information on their rights and obligations before the Act commences. Therefore, the Committee considers in these circumstances, the Bill commencing by proclamation rather than on assent, is not an inappropriate delegation of legislative power.

2. Coal Acquisition Legislation Repeal Bill 2007

Commencement by proclamation: Clause 2

8. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the need to allow for a transitional period, the Committee believes that providing for parts of the Bill to commence on proclamation is an appropriate delegation of legislative power.

3. Community Justice Centres Amendment Bill 2007

Commencement by proclamation: Clause 2

14. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the need to provide time for training and to enable community justice centres to prepare for the introduction of a national accreditation system for mediators, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power.

4. Consumer Claims Amendment Bill 2007

Commencement by proclamation: Clause 2

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

5. Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007

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

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

6. Crimes Amendment (Sexual Procurement Or Grooming Of Children) Bill 2007

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

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

7. Murray-Darling Basin Amendment Bill 2007

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

8. Police Amendment Bill 2007

Commencement by proclamation: Clause 2

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

9. Surveillance Devices Bill 2007

Right to privacy: Clause 20

31. The Committee notes that the appropriate use of surveillance devices can assist with the investigation and prosecution of offences. However, this needs to be balanced against the need to ensure that individuals are protected from arbitrary interference with their privacy.

32. The Committee notes that the Bill contains numerous safeguards to ensure that surveillance device warrants are only issued in appropriate circumstances.

- 33. However, the Committee highlights that the maximum period for which a surveillance device warrant is in force has been set at 90 days as opposed to 30 days, with the possibility of its extension where necessary, as recommended by the NSW Law Reform Commission. The Committee was informed by the Minister's Office that the maximum period was set at 90 days as 30 days has been found to be insufficient in the majority of cases. Allowing for a greater maximum period saves resources by reducing the number of applications for an extension.**
- 34. Accordingly, the Committee asks Parliament to consider whether setting the maximum duration period for a surveillance devices warrant at 90 days as opposed to 30 days unduly trespasses on the privacy of individuals.**

Commencement by proclamation: Clause 2

- 37. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the need to provide time for training and the establishment of administrative procedures, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power.**

Part One – Bills

SECTION A: COMMENT ON BILLS

1. ASSISTED REPRODUCTIVE TECHNOLOGY BILL 2007

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

Purpose and Description

1. This Bill legislates for the regulation of assisted reproductive technology services, the registration of assisted reproductive technology service providers and the prohibition of commercial surrogacy; and for other purposes.

Background

2. Consultation has been undertaken with regard to the practice of assisted reproductive technology (ART). This includes the release of a discussion paper by the Department of Health in 1997. A reference group has also been convened to give expert advice on the medical, scientific, social and ethical issues. Public consultation took place with an exposure draft bill. Stakeholders were described as responding very positively to the draft bill.
3. Three principles guide the development of this Bill. The first principle is to recognise obligations already imposed on ART providers by the existing laws (*Medical Practice Act 1992*). The second is to recognise the rights of individuals to have control over the use of their genetic material. The third principle is the best interests of the child. The Bill complements and enhances the current system to clarify and protect the rights and obligations of people involved in ART treatment. It does not duplicate the existing regulatory system that currently applies to the clinical aspects of ART practice.
4. The definition of ‘embryo’ in this Bill is different from the definition of ‘human embryo’ in the Human Cloning for Reproduction and Other Prohibited Practices Act. This Bill is aimed at regulating the social aspects of ART treatment, while the legislation on Human Cloning for Reproduction and Other Prohibited Practices is designed to prohibit certain ethically unacceptable practices.
5. This Bill complements the National Health and Medical Research Council’s Ethical Guidelines on the use of ART in Clinical Practice and Research. The definition of ‘embryo’ in this Bill is described to be consistent with the use of that term in the guidelines.

6. ART services are any medical treatment or procedure that procures or attempts to procure pregnancy other than by sexual intercourse and includes artificial insemination, in-vitro fertilisation and gamete intrafallopian transfer. The collection and storage of gametes is an ART service.
7. Part 5 provides powers for the inspection of premises where ART services are provided and enforcement powers such as the power to enter and inspect premises, request information and records, remove items and obtain and execute a search warrant.
8. Part 6 provides enforcement powers with respect to ART providers. This includes power to prevent an ART provider from providing services if they have contravened relevant legislation such as the *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* and the *Research Involving Human Embryos (NSW) Act 2003*.

The Bill

9. The objects of this Bill are to prevent the commercialisation of human reproduction, and to protect the interests of certain persons affected by assisted reproductive technology (**ART**) treatment. In order to do this, the Bill:
 - (a) requires ART providers to be registered by the Director-General of the Department of Health, and
 - (b) makes certain requirements in relation to the provision of ART services, including requirements that ART services be undertaken by, or under the supervision of, a registered medical practitioner and that counselling services be made available, and
 - (c) places a number of restrictions on the use of gametes and embryos, and
 - (d) requires ART providers to collect information from persons involved in ART treatment and from donors, and
 - (e) requires the Director-General to establish a central ART donor register that permits persons involved in ART treatment and donors to obtain certain information about other persons, including permitting a person born as a result of ART treatment using a donated gamete to obtain information about the donor of the gamete, and**
 - (f) prohibits commercial surrogacy and makes surrogacy agreements void, and
 - (g) provides for enforcement of the proposed Act.

10. Outline of provisions

Part 1 Preliminary

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

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

Clause 3 sets out the objects of the proposed Act which are to prevent the commercialisation of human reproduction and to protect the interests of persons born as a result of ART treatment, persons providing a gamete for use in ART treatment or for research in connection with ART treatment and women undergoing ART treatment.

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

Clause 5 provides that the proposed Act does not limit or otherwise affect the operation of the *Status of Children Act 1996*, the *Mutual Recognition Act 1992* of the Commonwealth or the *Trans-Tasman Mutual Recognition Act 1997* of the Commonwealth.

Part 2 ART providers**Division 1 Registration**

Clause 6 provides that an ART provider must not provide ART services unless the ART provider is a registered ART provider and a person must not advertise or hold out that the person is a registered ART provider unless the person is a registered ART provider.

Clause 7 provides that the Director-General must grant a person's registration as an ART provider if an application for registration is duly made. However, the Director-General must refuse registration or cancel the registration of a person if the person is prohibited under proposed Part 6 from carrying on a business that provides ART services.

Clause 8 provides that a registered ART provider must notify the Director-General of certain changes to the ART provider's registered particulars.

Clause 9 requires the Director-General to keep a register of all registered ART providers and to make the register available to the public for inspection.

Division 2 Provision of ART services

Clause 10 permits regulations made under the proposed Act to require an ART provider to meet prescribed infection control standards.

Clause 11 requires an ART provider to ensure that any ART services provided by the ART provider are undertaken by, or under the supervision of, a registered medical practitioner.

Clause 12 requires an ART provider to ensure that counselling services in relation to the provision of ART treatment are available to a woman seeking ART treatment from the ART provider, any spouse of such a woman and any person proposing to provide a gamete to the ART provider.

Clause 13 provides that an ART provider must inform a woman of certain matters before providing ART treatment to the woman if the treatment does not involve the use of a donated gamete or an embryo created using a donated gamete.

Clause 14 provides that an ART provider must inform a woman of certain matters before providing ART treatment to the woman if the treatment involves the use of a donated gamete or an embryo created using a donated gamete. A donor of a gamete must be informed of the same matters.

Clause 15 permits an ART provider to disclose medical information about a donor and offspring of a donor in certain circumstances if a registered medical practitioner has certified that the disclosure is necessary to save a person's life or to warn the person to whom the information is disclosed about the existence of a medical condition that may be harmful to that person or to that person's offspring (including future offspring).

Division 3 Use of gametes

Clause 16 defines certain words and expressions used in the proposed Division.

Clause 17 provides for the giving, modification and revocation of a gamete provider's consent.

Clause 18 provides that an ART provider must not use a gamete to create an embryo outside the body of a woman except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.

Clause 19 provides that an ART provider must not provide ART treatment to a woman using a gamete except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent in relation to the ART treatment for which the gamete may be used and the women who may receive ART treatment using the gamete.

Clause 20 provides that an ART provider must not use a gamete or an embryo for research except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.

Clause 21 provides that an ART provider must not supply a gamete or an embryo to another person (including another ART provider) except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.

Clause 22 provides that an ART provider must not export a gamete or an embryo from this State except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.

Clause 23 provides that an ART provider may only use the gamete of a deceased person in ART treatment if such use is consistent with the consent of the gamete provider and with the consent of the woman receiving the ART treatment.

Clause 24 provides that an ART provider must not provide ART treatment using a gamete provided by a gamete provider more than 5 years before the provision of the ART treatment, unless the ART provider has taken reasonable steps to establish whether the gamete provider is alive.

Clause 25 provides that an ART provider must not store a gamete or an embryo except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent. The proposed section also provides for the maximum period that such a gamete or an embryo may be stored.

Clause 26 provides that an ART provider must not provide ART treatment using a donated gamete if the gamete was obtained from the donor more than 10 years before the provision of the ART treatment unless the Director-General has given written authorisation.

Clause 27 provides that an ART provider must ensure that ART treatment using a donated gamete does not result in offspring of the gamete provider being born, whether or not as a result of ART treatment, to more than 5 women (including the donor and any current or former spouse of the donor).

Clause 28 provides that an ART provider must not use a gamete to create an embryo if the ART provider knows that the gamete provider is a close family member of the other person whose gamete is to be used to create the embryo.

Clause 29 provides that an ART provider must not provide ART treatment to a child and must not obtain a gamete from a child for use in ART treatment or research unless the ART provider obtains a gamete from a child in circumstances where there is a reasonable risk of the child becoming infertile before becoming an adult and the gamete is obtained for the child's future benefit.

Division 4 Records

Clause 30 requires an ART provider to obtain certain prescribed information about persons involved in ART treatment.

Clause 31 requires an ART provider to keep (and retain for 50 years after the record is made or such other period as may be prescribed by the regulations) certain records.

Clause 32 provides that an ART provider that supplies a gamete or an embryo to another ART provider must give the second ART provider a copy of the gamete provider's consent, and may give the second ART provider a copy of any other information required to be obtained by or under the proposed Act, in relation to the gamete or embryo.

Part 3 Central ART donor register

Clause 33 provides that the Director-General is to establish and maintain a central ART donor register relating to donors of gametes, women undergoing ART treatment using donated gametes and offspring of donors.

Clause 34 sets out the objectives of the central ART donor register.

Clause 35 provides that the Director-General may disclose information held on the central ART donor register only in accordance with the proposed Part.

Clause 36 requires the Director-General, if requested, to provide a person whose details are held on the central ART donor register with a copy of any information about that person held on the register.

Clause 37 provides that the Director-General must, if requested, disclose to an adult who was born as a result of ART treatment using a donated gamete, certain information relating to the donor of the gamete including information that identifies the donor and the Director-General must, if requested, disclose to an adult offspring of a donor information relating to other offspring of the donor including information that identifies that other offspring if that other offspring consents to such disclosure.

Clause 38 provides that the Director-General must, if requested, disclose to a parent of a child who was born as a result of ART treatment using a donated gamete, prescribed non-identifying information relating to the donor of the gamete and other offspring of the donor. The Director-General must also disclose information that identifies the donor, but only if the disclosure of that information is reasonably necessary to save the life of the child or to prevent serious damage to the child's health and the information cannot reasonably be obtained by the parent in any other way. A person who is a representative of the child and who has a genuine interest in the welfare of the child may also make an application for the disclosure of information that identifies the donor in the above circumstances if the parent of the child is unwilling or unable to seek the information on the child's behalf.

Clause 39 provides that the Director-General must, if requested, disclose to a donor of a gamete, prescribed non-identifying information relating to a person born as a result of ART treatment using the donated gamete and such other information relating to that person (including information that identifies the person) if the person consents to such disclosure.

Clause 40 permits the Director-General to contact a person who is an offspring of a donor and ask the person whether he or she wishes to consent to disclose information to the donor of the gamete or to other offspring of the donor. The Director-General is not to contact the person unless the person is an adult and the Director-General is of the opinion that the contact is justified in order to promote the welfare and best interests of one or more of the persons concerned.

Clause 41 permits the regulations to prescribe fees in relation to any application or notice under the proposed Part.

Part 4 Surrogacy

Clause 42 defines *commercial surrogacy agreement* and *surrogacy agreement* for the purposes of the proposed Part.

Clause 43 prohibits a person from entering into a commercial surrogacy agreement, arranging a commercial surrogacy agreement or accepting any benefit under a commercial surrogacy agreement.

Clause 44 prohibits a person from publishing, or causing to be published, any publication that solicits commercial surrogacy.

Clause 45 provides that a surrogacy agreement is void, whether made before, on or after the commencement of the proposed section.

Part 5 Inspectors and enforcement

Clause 46 provides that the Director-General may appoint any member of staff of the Department of Health, or any person who the Director-General considers is suitably qualified, to be an inspector for the purposes of the proposed Act.

Clause 47 provides that an inspector may enter and inspect any premises for the purpose of ascertaining whether or not a contravention of the proposed Act or the regulations has occurred.

Clause 48 makes a number of requirements in relation to the exercise of the power of an inspector to enter premises.

Clause 49 provides that an inspector may, by written notice given to a person, require the person to furnish to the inspector such information or records (or both) as the inspector requires by the notice.

Clause 50 provides that an inspector may require a person who the inspector suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for the purposes of the proposed Act to answer questions in relation to those matters.

Clause 51 provides that a person who is required under the proposed Part to answer a question or to produce a thing is not excused from answering the question or producing that thing on the ground that it might tend to incriminate the person or make the person liable to a penalty.

Clause 52 permits an inspector to apply for a search warrant for premises if the inspector believes on reasonable grounds that a provision of the proposed Act or the regulations has been or is being contravened on the premises.

Clause 53 prohibits a person, without reasonable excuse, from neglecting or failing to comply with a requirement made of the person by an inspector, or from hindering or obstructing an inspector.

Clause 54 provides that any person claiming to be entitled to any seized item may make an application to a Local Court for an order disallowing the seizure.

Clause 55 provides for the disposal of items seized under the proposed Part.

Part 6 ART provider—enforcement provisions

Clause 56 provides the circumstances in which a person is taken to be carrying on a business that provides ART services for the purposes of the proposed Part.

Clause 57 provides that the Director-General may prohibit a person from carrying on a business that provides ART services if the Director-General is satisfied that there are reasonable grounds to do so. The Director-General is also able to prohibit certain related persons from carrying on such a business if the person the subject of the prohibition is a corporation or the trustee of a trust.

Clause 58 creates an offence for carrying on a business that provides ART services, or offering to provide ART services, while prohibited under the proposed Part.

Clause 59 provides that the Director-General may require certain persons to provide specified information if a corporation or trustee of a trust is the subject of a prohibition under the proposed Part.

Clause 60 requires a court to notify the Director-General if it convicts a person of an offence under the proposed Act or the *Human Cloning for Reproduction and Other Prohibited Practices Act 2003*.

Clause 61 provides that for the purposes of the proposed Part, the making of an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* in respect of an offence is taken to be a conviction for the offence.

Part 7 Miscellaneous

Clause 62 provides that a person must not make a representation that is false or misleading in a material particular in an application or notice under the proposed Act or in relation to certain requests for information.

Clause 63 provides that proceedings for an offence under the proposed Act or the regulations may be dealt with summarily before a Local Court or before the Supreme Court in its summary jurisdiction.

Clause 64 provides that an inspector or other prescribed person (an **authorized officer**) may serve a penalty notice on a person if it appears to the officer that the person has committed an offence under the proposed Act or the regulations, being an offence prescribed by the regulations.

Clause 65 identifies the circumstances in which, if a corporation contravenes a provision of the proposed Act or the regulations, each officer of the corporation is taken to have contravened the same provision.

Clause 66 provides that in a prosecution for an offence against the proposed Act or the regulations, a statement, purporting to be signed by the Director-General or other prescribed person, relating to certain matters is admissible in any proceedings and is evidence of the matters contained in the statement without proof of the signature of the person by whom the statement purports to have been signed.

Clause 67 provides for the giving of notice to persons.

Clause 68 provides that in any proceedings for an offence against a provision of the proposed Act or the regulations, the onus of proving that a person had a reasonable excuse (as referred to in the provision) lies with the defendant.

Clause 69 provides that a requirement made by or under the proposed Act has effect despite any duty of confidentiality or other restriction on disclosure and a disclosure made in accordance with the proposed Act or the regulations by or on behalf of an ART provider does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct.

Clause 70 provides that the Director-General may delegate his or her functions under the proposed Act or the regulations.

Clause 71 provides that the Governor may make regulations under the proposed Act. The regulations may create offences punishable by a penalty not exceeding 10 penalty units.

Clause 72 is a formal provision giving effect to the savings, transitional and other provisions in Schedule 1.

Clause 73 is a formal provision giving effect to the amendments to the Acts specified in Schedule 2.

Clause 74 provides that the Minister is to review the proposed Act as soon as possible after the period of 5 years from the date of assent to the proposed Act.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains provisions of a savings and transitional nature.

Schedule 2 Amendment of other Acts

Schedule 2.1 amends the *Fines Act 1996* to permit penalty notices to be issued under the proposed Act.

Schedule 2.2 amends the *Human Tissue Act 1983* to prevent that Act from continuing to regulate the supply of semen.

Schedule 2.3 amends the *Law Enforcement (Powers and Responsibilities) Act 2002* to permit a search warrant to be issued under the proposed Act.

11.

Issues Considered by the Committee

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

Issue: Privacy – Part 2 Division 2 – Provision of ART Services; Part 2 Division 3 – Use of Gametes and Part 3 – Central ART Donor Register

12. This Bill requires providers to use gametes in accordance with the consent provided by the person from whom they were obtained. The Committee notes that donors will be able to withdraw or modify their consent to the use of their gametes (Part 2, clause 17), at any time before the gamete is implanted in a woman or until an embryo is created.
13. Part 2, clause 15 permits an ART provider to disclose medical information about a donor and offspring of a donor in certain circumstances if a registered medical practitioner has certified that the disclosure is necessary to save a person's life or to warn the person about the existence of a medical condition that may be harmful to that person or to that person's offspring (including future offspring).
14. Part 3 looks at the central ART donor register so that children born from ART procedures using donor gametes or in some circumstances, their parents or other persons with parental responsibility, may access identifying and non-identifying information about their biological parent. Providing information to the register will be mandatory. The Committee notes that the register will not operate retrospectively. However, a creation of a voluntary retrospective register will be facilitated.
15. Part 3, clause 38 provides that the Director-General must also disclose information that identifies the donor, but only if the disclosure of that information is reasonably necessary to save the life of the child or to prevent serious damage to the child's health and the information cannot be reasonably obtained by the parent in any other way. A person who is a representative of the child and who has a genuine interest in the welfare of the child may also make such an application for the disclosure of information that identifies the donor in the circumstances if the parent of the child is unwilling or unable to seek the information on behalf of the child.
16. Children born from the use of donated gametes will be able to place information on the register to be accessed by the donor. However, access to this information will only be given in accordance with the child's consent and that consent can only be given when the child becomes an adult. Such placing of information on the register will be voluntary but the Bill provides for regulations to prescribe non-identifying information that can be released to the donor without consent.
- 17. The Committee considers that an appropriate privacy balance has been achieved between the privacy rights and needs of donor-conceived children, parents, donors, ART providers, and the primacy of the best interests of children conceived using the assisted reproductive technology, with respect to circumstances in aiming to save their lives or preventing serious damage to their health. Therefore, the Committee does not consider personal rights such as privacy concerns have been unduly trespassed.**

Issue: Onus of Proof – Part 5 Clause 53(1) Offences; Part 7 Clause 68 Onus of Proof Concerning Reasonable Excuse

18. Clause 68 provides that in any proceedings for an offence against a provision of this Act or the regulations, the onus of proving that a person had a reasonable excuse (as referred to in the provision such as in clause 53 (1)(a) or (b), lies with the defendant.
19. The Committee is usually concerned when the traditional onus of proof is shifted from the prosecutor to the defendant. However, in the context of inspectors and their powers of enforcement under Part 5, the Committee also notes that a person is not guilty of an offence under clause 53(1)(a) unless it is established by the prosecutor that the inspector warned the person that a failure or refusal to comply with the requirement was an offence (clause 53(2). Similarly, under clause 53(3), a person is not guilty of an offence under clause 53(1)(b) unless it is established by the prosecutor that: (a) the inspector produced at the relevant time the inspector's certificate of authority, and (b) the person was informed by the inspector, or otherwise knew, that the inspector was empowered to exercise the power to which the offence relates.
- 20. The Committee notes that Part 5 sets out the appointment of inspectors with the issuance of a certificate of authority to authorise the inspector's exercise of functions; limitation on self-incrimination; search warrants applications; and procedures for disallowance of seizures including applications to the Local Court.**
- 21. The Committee considers that given the above context of procedural rights, along with monetary penalties rather than imprisonment, as well as the overall aims of the Bill to recognise the rights of individuals to have control over the use of their genetic material, to promote the best interests of the child, and to prevent the commercialisation of human reproduction and commercial surrogacy, the reversal onus of proof on defendants that they had a reasonable excuse, does not trespass unduly on personal rights.**

Issue: Retrospectivity – Part 4 Surrogacy - Clause 45 Surrogacy Agreements Void

22. Part 4 of the Bill covers surrogacy arrangements. This prevents the commercialisation of human reproduction by prohibiting commercial surrogacy. This is consistent with current law, by making all surrogacy arrangements (commercial or altruistic), void and unenforceable.
- 23. This includes agreements made before this legislation commences (clause 45). The Committee will always be concerned with any retrospective effect of legislation which may impact on personal rights. However, since a key part of the objective of this Bill is to prevent the commercialisation of human reproduction by prohibiting commercial surrogacy, which is also consistent with existing law, by making all surrogacy arrangement, void and unenforceable, the Committee is of the view that in the circumstances, the retrospective effect of the proposed section does not trespass unduly on personal rights.**

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

Issue: Provide the executive with unfettered control over the commencement of an Act - Part 1 Clause 2 - Commencement by proclamation.

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| <p>24. This Bill proposes to commence by proclamation. This is because a lengthy and detailed implementation period is required, during which the Department of Health will consult with stakeholders on regulations under the Bill. The Committee notes that it is important for stakeholders to be involved in the development of the donor register and that they are provided with information on their rights and obligations before the Act commences. Therefore, the Committee considers in these circumstances, the Bill commencing by proclamation rather than on assent, is not an inappropriate delegation of legislative power.</p> |
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The Committee makes no further comment on this Bill.

2. COAL ACQUISITION LEGISLATION REPEAL BILL 2007

Date Introduced:	7 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Nathan Rees MP
Portfolio:	Minister for Emergency Services, Minister for Water Utilities

Purpose and Description

1. The purpose of the Bill is to:
 - provide for the amendment, and eventual repeal, of the *Coal Acquisition Act 1981*, the *Coal Ownership (Restitution) Act 1990* and certain other legislation relating to the acquisition and restitution of rights with respect to coal; and
 - abolish the NSW Coal Compensation Board and the NSW Coal Compensation Review Tribunal.

Background

2. Various legislation regarding the acquisition and restitution of rights with respect to coal provides for the payment of compensation to private coal owners who suffered loss as a result of the NSW Government compulsorily acquiring title to coal. Provision was also made for the reversioning of some coal titles, instead of compensation, as well as for the calculation of compensation for claims arising from the reacquisition of coal titles by the NSW Government. The Coal Compensation Board and Coal Compensation Review Tribunal were established to manage the claims process.
3. New claims for compensation have not been able to be lodged since July 1994. The Coal Compensation Board also expects to have considered almost all eligible claims by 31 December 2007. Accordingly, the Bill seeks to abolish the NSW Coal Compensation Board and the NSW Coal Compensation Review Tribunal.¹

The Bill

4. The Bill abolishes the current requirement that the NSW Coal Compensation Board must recommend the acquisition by the Crown of coal that has been granted under the *Coal Ownership (Restitution) Act 1990*: schedule 1.1.
5. The Bill abolishes the NSW Coal Compensation Board with its functions to be transferred to the Director-General of the Department of Primary Industries: schedule 2.3. It also abolishes the NSW Coal Compensation Review Tribunal whose functions are to be transferred to the Land and Environment Court: schedule 2.3.

¹ S K Hornery MP, Legislative Assembly *Hansard*, 7 November 2007.

6. Clause 4 of the Bill repeals the following Acts and instruments:
- Coal Acquisition Act 1981
 - Coal Acquisition (Compensation) Arrangements 1985
 - Coal Acquisition (Re-acquisition Arrangements) Order 1997
 - Coal Mining (Amendment) Act 1981
 - Coal Acquisition (Transitional Provisions) Regulation 1982
 - Coal Ownership (Restitution) Act 1990
 - Coal Ownership (Restitution) Regulation 2005

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 provides that cl 4 and Schedule 2 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. However, there may be good reasons why such discretion is required. According to the Agreement in Principle speech, the Bill is to commence in stages to allow for a transitional period.²

- 8. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the need to allow for a transitional period, the Committee believes that providing for parts of the Bill to commence on proclamation is an appropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

² S K Hornery MP, Legislative Assembly *Hansard*, 7 November 2007.

3. COMMUNITY JUSTICE CENTRES AMENDMENT BILL 2007

Date Introduced:	9 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 *Community Justice Centres Act 1983* to:
 - (a) specify the objects of that Act;
 - (b) abolish the Community Justice Centres Council;
 - (c) confer certain functions on the Director of Community Justice Centres that were previously exercised by the Community Justice Centres Council;
 - (d) enable the Director to seek advice from any person or body in relation to the Director's functions and the achievement of the object of the Act and to establish advisory committees for that purpose;
 - (e) provide for mediators at Community Justice Centres to be persons employed under the *Public Sector Employment and Management Act 2002*;
 - (f) enable the Director to accept disputes for mediation that have been referred by a court or tribunal without the consent of all the parties to the dispute (currently, only voluntary mediation is undertaken by Community Justice Centres);
 - (g) require mediators under the *Community Justice Centres Act 1983* to report to the Director-General of the Department of Community Services information obtained during the exercise of their mediation functions about children at risk of harm; and
 - (h) alter the requirements as to who must consent to the admission in evidence in proceedings of certain privileged information and documents arising from a mediation session.

Background

2. A pilot community justice centres program was established for the provision of mediation services in 1980. Following the success of the pilot centres at Wollongong, Bankstown and Surry Hills, the *Community Justice Centres Act 1983* was passed to establish the scheme permanently.

3. The NSW Law Reform Commission published its report on community justice centres in 2005.³ The Attorney General's Department subsequently consulted with various parties about the recommendations made in the report including the Chief Magistrate, the Aboriginal Justice Advisory Council, the Law Society of NSW, the Legal Aid Commission, the Women's Legal Service, the Department of Aboriginal Affairs, the Department of Local Government, the Department of Housing, NSW Police and the Combined Community Legal Centres Group of NSW. The Bill seeks to implement a number of the recommendations made by the Law Reform Commission report.

The Bill

Object of Act

4. The Bill proposes to insert section 3 into the *Community Justice Centres Act 1983* to set out the object of the Act as 'to provide for the establishment and operation of Community Justice Centres for the purpose of:
- (a) providing dispute resolution and conflict management services, including the mediation of disputes;
 - (b) training persons to be mediators;
 - (c) promoting alternative dispute resolution;
 - (d) contributing to the development of alternative dispute resolution in New South Wales by entering into connections and partnerships with the legal profession, courts, tribunals, the academic sector and other providers of alternative dispute resolution services; and
 - (e) undertaking other matters incidental to the provision of dispute resolution and conflict management services'.

Abolition of Community Justice Centres Council and role of Director

5. The Bill abolishes the Community Justice Centres Council: schedule 1[5]. According to the Agreement in Principle speech, the Community Justice Centres Council proposed its own dissolution and the establishment of community advisory committees in its place.⁴
6. The Bill proposes to insert s 13A to provide that the Director may seek advice regarding the Director's functions and achieving the object of Act: schedule 1[10]. Advisory committees may be established for this purpose.

Mediators and staff of Community Justice Centres

7. The Bill proposes to insert a new s 12 into the *Community Justice Centres Act 1983* specifying that the Director and staff of Community Justice Centres, including mediators, are to be employed under the *Public Sector Employment and Management Act 2002*: schedule 1[8].

³ NSW Law Reform Commission, *Community Justice Centres*, Report 106, 2005.

⁴ B J Collier MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 9 November 2007.

8. The Bill proposes to insert s 29A into the Act to provide that it is the duty of a mediator to make a report to the Director-General of the Department of Community Services as soon as practicable if he or she has reasonable grounds to suspect that a child is at risk of harm within the meaning of s 23 of the *Children and Young Persons (Care and Protection) Act 1998* and those grounds arose during the course of or from the mediator's work as a mediator.

Mandatory mediation referred by court or tribunal

9. The Bill proposes to insert s 20A into the Act regarding the provision of mandatory mediation services. It is to apply to disputes that are referred by court or tribunal order to Community Justices Centres for mediation without the consent of all parties to the dispute. Proposed s 20A(2) enables the Director to accept or decline a dispute for mediation. If accepted, the Director must provide a written report on the outcome of the mediation or attempted mediation to the referring court or tribunal. Should the Director refuse to accept the dispute for mediation, he or she must provide the referring court or tribunal written notice of the decision and the reasons for it.
10. A party to the mediation session is able to withdraw from the mediation session at any time.

Privileged information and documents

11. Section 28 of the Act provides that evidence of anything said or of any admission made in, or a document prepared for, a mediation session is not admissible in any proceedings before any court, tribunal or body. An exception is currently made if the persons attending or named during the mediation session and/or named in the document consent to admission of the evidence or document. The Bill proposes to amend this exception so that it allows for the admission of such evidence where the persons in attendance at the mediation session consent to admission of the evidence or document: schedule 1[27].

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

12. Clause 2 of the Bill specifies that Schedule 1[4], [7], [8], [17], [18], [20], [30], [32] and [33] and Schedule 2.1 and 2.2 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.
13. According to the Agreement in Principle speech, some of the amendments are to commence by proclamation to 'ensure a measured and appropriate transition to the new arrangements'.⁵ It noted that the amendments would assist community justice centres with preparing for the introduction of a national accreditation system for mediators. Further, providing for commencement by proclamation allows mediators to

⁵ B J Collier MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 9 November 2007.

update their training regarding the new reporting obligations imposed by the Bill in relation to children at risk of harm.

14. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the need to provide time for training and to enable community justice centres to prepare for the introduction of a national accreditation system for mediators, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

4. CONSUMER CLAIMS AMENDMENT BILL 2007

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

Purpose and Description

1. The purpose of the Bill is to amend the *Consumer Claims Act 1998* to make further provision with respect to the jurisdiction and powers of the Consumer, Trader and Tenancy Tribunal relating to consumer claims.

Background

2. The *Consumer Claims Act 1998* commenced operation in March 1999. A statutory five year review of the *Consumer Claims Act 1998* was completed and the Office of Fair Trading published an issues paper for public consultation. 22 submissions were received and a report was published in March 2005.
3. According to the Agreement in Principle speech:

this Bill delivers a range of refinements and improvements to the Consumer Claims Act to significantly improve the Consumer, Trader and Tenancy Tribunal's ability to resolve disputes between consumers and traders effectively. It comes as a result of the Government's statutory review, which involved extensive consultation with stakeholders, and it deserves to receive strong support.⁶

The Bill

4. The Bill proposes to insert s 2A into the *Consumer Claims Act 1998* to set out the objects of the Act as:
 - to provide remedies to consumers concerning the supply of goods and services; and
 - to simplify and improve dispute resolution for parties concerned in consumer disputes.
5. Proposed s 3A clarifies that the Consumer, Trader and Tenancy Tribunal may hear and determine a consumer claim, arising from or in connection with the supply of goods or services to the consumer, against a supplier who is not the direct supplier of the goods or services.
6. The Bill proposes to amend s 7 to clarify that the Consumer, Trader and Tenancy Tribunal may hear and determine consumer claims only where:

⁶ L J Burney MP, Legislative Assembly *Hansard*, 7 November 2007.

- the applicable goods or services were supplied in NSW;
 - a contract or other agreement to which the claim relates contemplates that the goods or services would be supplied in NSW; or
 - a contract or other agreement to which the claim relates was made in NSW.
7. The Bill proposes to amend s 7 to extend the limitation period applying to the lodging of consumer claims with the Consumer, Trader and Tenancy Tribunal so the Tribunal may not hear and determine a claim lodged more than: three years after the cause of action giving rise to the claim; or after ten years of the supply of the relevant goods or services.
8. The range of orders that the Consumer, Trader and Tenancy Tribunal may make in determining a consumer claim are expanded by the proposed amendment of s 8.
9. Proposed amendments to s 8 also ensure that the Consumer, Trader and Tenancy Tribunal cannot determine a claim, and may only adjourn or dismiss the proceedings, where the claimant fails to present his or her case but does not formally withdraw the proceedings.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

10. 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.

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| <p>11. Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.</p> |
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The Committee makes no further comment on this Bill.

5. CRIMES AMENDMENT (CONSENT – SEXUAL ASSAULT OFFENCES) BILL 2007

Date Introduced:	7 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 Act 1900* to deal with consent in relation to sexual assault offences.

Background

2. Under the *Crimes Act 1900*, the offence of sexual assault is committed if a person has sexual intercourse with another person without that other person's consent and knowing or being reckless that the other person does not consent.
3. This Bill arises out of the recommendations of the Criminal Justice Sexual Offences Task Force Report, published in April 2006. A discussion paper and draft consultation bill were released to the public in May 2007.
4. The NSW Bureau of Crime Statistics and Research figures showed that the cumulative effect of ongoing reforms in sexual assault prosecution had an impact in terms of increases in convictions in the Local Court, increases in guilty pleas and increases in convictions at trial.
5. The Second Reading Speech when the Bill was introduced stated that:

Modernisation of the law relating to consent, in particular, is aimed at bringing about both a cultural shift in the response to victims of sexual assault by the community and by key participants within the criminal justice system. Reform of the law of consent for those reasons is supported by a study released in August 2007 by the Australian Institute of Criminology. The results of that study show that juror judgments in rape trials are influenced more by the attitudes, beliefs and biases about rape that jurors bring with them into the courtroom than by the objective facts presented, and that stereotypical beliefs about rape and its victims still exist within the community.

The report found that some members of the community still hold the view that women often say "no" when they mean "yes", that women who are raped often ask for it, and that rape results from men not being able to control their need for sex and responsibility for rape is therefore removed. This bill reflects the views of the greater majority of the community of New South Wales who strongly reject those outdated views.

6. This Bill aims to amend the *Crimes Act 1900* to define 'consent' for the purposes of sexual assault offences as free and voluntary agreement to sexual intercourse; to include in the cases when consent is or may be negated (incapacity to consent, intoxication, persons who are asleep or unconscious, unlawful detention, intimidatory or coercive conduct and abuse of a position of authority or trust); and to provide that

a person commits sexual assault if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

7. Proposed section 61HA(2) provides a statutory definition that a person consents to sexual intercourse if the person freely and voluntarily agrees to the intercourse. This is consistent with the definition in the Model Criminal Code.
8. There is currently no statutory definition of consent in NSW. This amendment serves a few purposes. Firstly, the definition will articulate what does and does not amount to consent. It will have an educational function for the community and jurors, including standard directions to juries. Lack of consent is still a matter of fact to be determined by a jury or trier of fact. Secondly, the statutory definition enacts a more contemporary definition than is available under the common law.
9. The current common law test is subjective, requiring the Crown to prove that the accused knew the complainant was not consenting or was reckless as to whether the complainant was consenting, from the subjective point of view of the accused. The accused assertion that s/he had a belief that the other person had consented is difficult to refute even if the circumstances are unreasonable. This does not protect victims of sexual assault when the accused has genuine but unreasonable views about appropriate sexual conduct. The subjective test fails to ensure a reasonable standard of care is taken to ascertain if the other person is consenting.
10. In NSW, the common law has already recognised that an accused person possesses the requisite intent to have non-consensual intercourse (or guilty mind), when they have failed to turn their mind to the issue at all. The proposed section 61HA(3) retains recklessness but also provides an additional third limb: it provides that the person knows that the other person does not consent if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse. This further ensures that the trier of fact must have regard to all the circumstances, including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse but does not include any self-induced intoxication of the person.
11. The exclusion of self-induced intoxication as a relevant circumstance reflects the current provisions in Division 11A of the Crimes Act in relation to intoxication. Self-induced intoxication cannot be taken into account in relation to the mens rea (guilty mind) for sexual assault offences.
12. Proposed section 61HA(8) makes it clear that the provisions do not limit the grounds on which it may be established that a person does not consent to sexual intercourse.
13. If consent to sexual intercourse is negated because of any of the non-violent threats, the accused will be subject to prosecution for sexual assault, which carries a maximum penalty of imprisonment of 14 years instead of the current maximum period of 6 years under the separate offence in section 65A, which currently refers to sexual intercourse procured by intimidation, coercion and other non-violent threats. This is a consequence of Item [3] of schedule 1 repealing section 65A when the amendments deal with the circumstances in which consent may be negated.

The Bill

14. The object of this Bill is to amend the *Crimes Act 1900*:

- (a) to define “consent” for the purposes of sexual assault offences as free and voluntary agreement to sexual intercourse, and
- (b) to include in the cases when consent to sexual intercourse is or may be negated: incapacity to consent, intoxication, persons who are asleep or unconscious, unlawful detention, intimidatory or coercive conduct and abuse of a position of authority or trust, and**
- (c) to provide that a person commits sexual assault if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

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 a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Crimes Act 1900* set out in Schedule 1.

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

At present, section 61R of the *Crimes Act 1900* provides for a number of matters relating to consent for the purposes of the offences of sexual assault (section 61I), aggravated sexual assault (section 61J) and aggravated sexual assault in company (section 61JA). To facilitate a number of changes in relation to consent, **Schedule 1 [2]** repeals section 61R and **Schedule 1 [1]** inserts proposed section 61HA. The changes are outlined below.

Meaning of consent

Consent is an element in each of the offences under sections 61I, 61J and 61JA. Proposed section 61HA (2) provides that a person **consents** to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse. This is consistent with the definition in the Model Criminal Code, recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Chapter 5—Sexual Offences Against the Person.

Knowledge about consent

Knowledge is also an element of each of the offences under sections 61I, 61J and 61JA. Section 61R (1) currently provides that a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse knows that the other person does not consent to the sexual intercourse.

Proposed section 61HA (3) retains recklessness, but also provides that the person knows that the other person does not consent to the sexual intercourse if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse. The subsection further provides that the trier of fact (ie a jury or a judge disposing of a matter without a jury) must have regard to all the circumstances of the case, including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but not including any self-induced intoxication of the person.

Negation of consent

Proposed section 61HA (4) and (5) provide that a person does not consent to sexual intercourse with another person:

- (a) if the person does not have the capacity to consent, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent because the person is unconscious or asleep, or
- (c) if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- (d) if the person consents because the person is unlawfully detained, or
- (e) if the person consents under a mistaken belief as to the identity of the other person, that the other person is married to the person or that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means).

The circumstances set out in paragraphs (c) and (e), above, replace similar provisions currently set out in section 61R (2).

Proposed section 61HA (6) provides that the grounds on which it may be established that a person does not consent to sexual intercourse include:

- (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or
- (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
- (c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

Proposed section 61HA (7) provides that a person is not to be regarded as consenting to sexual intercourse by reason only of the fact that the person does not offer actual physical resistance to the sexual intercourse. This replaces a similar provision currently contained in section 61R (2) (d).

Proposed section 61HA (8) makes it clear that the above provisions do not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

Other amendments

Schedule 1 [3] repeals section 65A (Sexual intercourse procured by intimidation, coercion and other non-violent threats) of the *Crimes Act 1900* as a consequence of the amendments dealing with circumstances in which consent may be negated. As a result, if consent to sexual intercourse is negated because of any such non-violent threat, the accused will be subject to prosecution for sexual assault (which carries a maximum penalty of imprisonment for 14 years instead of the current maximum period of 6 years under the separate offence in section 65A).

Schedule 1 [4] contains a savings and transitional provision consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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

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

16. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to

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

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

The Committee makes no further comment on this Bill.

6. CRIMES AMENDMENT (SEXUAL PROCUREMENT OR GROOMING OF CHILDREN) BILL 2007

Date Introduced:	7 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 Act 1900* with respect to the sexual procurement or grooming of children, and to make consequential amendments to other Acts.

Background

2. The Second Reading Speech provided the following about the Bill:

This bill makes it an offence for an adult to procure or groom a child for any unlawful sexual activity. It aims to capture the kinds of grooming activities commonly engaged in by paedophiles, whether online, through electronic communications or through any other means or activities. The offences of procuring and grooming have been drafted as separate offences in this bill, which is appropriate given that grooming is a preparatory offence and procuring involves more substantial acts. The offences are directed against people who are actively engaging with children in ways that make the children more likely to participate in sexual activity. Grooming can include a wide range of behaviour including conduct that encourages a child to believe they have romantic feelings for the adult or desensitising the child to the thought of engaging in sexual activity with the adult. Procuring a person to engage in sexual activity includes encouraging, enticing, recruiting or inducing—whether by threat, promises or otherwise—in relation to that activity. For example, procuring offences would apply when a person offered money to a child to engage in sexual acts or promised them gifts or some other form of benefit. The Government is committed to ensuring that such activities are outlawed and offenders punished in line with community expectations.

3. Unlike existing Commonwealth legislation, this Bill does not limit grooming or procuring offences to those undertaken by electronic communications as the process is not confined to the Internet.
4. Australia is a signatory to the *1989 Convention on the Rights of the Child*. Article 34 states that there is an obligation to protect children from ‘all forms of sexual exploitation and sexual abuse’. Signatories are required to take steps to prevent the ‘inducement of coercion of a child to engage in any unlawful sexual activity’.
5. Proposed section 66EB (5) clarifies that a child does not have to exist for an offence to have been committed in order to include that a reference in the Bill to a child includes a reference to any person who pretends to be a child so long as the accused person believes that the person was a child. This provision addresses investigations where a law enforcement officer assumes a false identity.

6. The proposed section 66EB (7) provides that it is a defence if the accused reasonably believed that the other person was not a child. However, consent is not a defence to an offence under this section.
7. Proposed section 66EB (4) provides that an unlawful sexual activity need not be particularised. In other words, it is necessary to prove that the child was or was to be procured for unlawful sexual activity but it is not necessary to specify or to prove any particular unlawful sexual activity. The procuring or grooming activity forms the conduct element of the actus reus (guilty act) that constitutes the offence rather than the unlawful sexual activity per se.
8. Proposed section 66EB (8) provides for an alternative verdict in cases where a person is charged with a procuring offence and if the jury is not satisfied that the offence is proven but is nevertheless, satisfied that a grooming offence is proven. In such cases, the jury has the option to acquit the person of the procuring offence but find them guilty of a grooming offence. The NSW penalties are described in the Second Reading Speech, as being brought in line with penalties in other States and the Commonwealth, and as forming part of the NSW Government's plan for enhancing child protection in NSW.

The Bill

9. The object of this Bill is to make it an offence for an adult to procure or groom a child for unlawful sexual activity. The proposed preparatory offences will be subject to the following range of penalties depending on the age of the child (irrespective of the nature of the sexual activity for which the child has been procured or groomed):
 - (a) Procuring a child under 14 years of age—Imprisonment for 15 years,
 - (b) Procuring a child under 16 years of age—Imprisonment for 12 years,
 - (c) Grooming a child under 14 years of age—Imprisonment for 12 years,
 - (d) Grooming a child under 16 years of age—Imprisonment for 10 years.

10. Outline of provisions

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

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

Clause 3 is a formal provision that gives effect to the amendments to the *Crimes Act 1900* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the consequential amendments to the *Criminal Procedure Act 1986* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to a consequential amendment to the *Child Protection (Offenders Registration) Act 2000* 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.

Schedule 1 Amendment of *Crimes Act 1900*

Schedule 1 [1] inserts proposed section 66EB into the *Crimes Act 1900* to make it an offence for an adult to procure or groom a child under 16 years of age for unlawful sexual activity, with the range of maximum penalties set out in the Overview. Proposed section 66EB (1) defines expressions used in the proposed section.

“Conduct” is defined to include communication by the internet, and “unlawful sexual activity” is defined to include acts of sexual intercourse or indecency with children and child prostitution and pornography offences.

Proposed section 66EB (2) provides that the procurement offence is committed if an adult person intentionally procures a child for unlawful sexual activity with that adult person or another person.

Proposed section 66EB (3) provides that the grooming offence is committed if an adult person engages in any conduct that exposes a child to indecent material (or provides a child with an intoxicating substance) with the intention of making it easier to procure the child for unlawful sexual activity with that adult person or another person.

Proposed section 66EB (4) provides that it is not necessary to specify or prove the particular unlawful sexual activity for which the child was or was to be procured.

Proposed section 66EB (5) extends the offence to a case in which a person who is being procured pretends to be a child (for example, by an investigating official in any communication over the internet).

Proposed section 66EB (6) requires the age of the child to be set out in the charge before the higher maximum penalties for children under 14 years can be imposed.

Proposed section 66EB (7) provides a defence if the accused reasonably believed that the person concerned was not a child.

Proposed section 66EB (8) makes provision for alternative verdicts.

Schedule 1 [2] ensures that the consent of the child is not a defence to a prosecution for an offence under proposed section 66EB.

Schedule 1 [3] extends the personal violence offences to which the AVO provisions of the Principal Act apply to the offences under proposed section 66EB.

Schedule 2 Consequential amendments to *Criminal Procedure Act 1986*

Schedule 2 [1] extends the procedural protections for child victims of sexual offences (and other related provisions) of the Act to offences under proposed section 66EB of the *Crimes Act 1900*.

Schedule 2 [2] enables proceedings for the offences under proposed section 66EB of the *Crimes Act 1900* to be heard and determined summarily without a jury in certain cases.

Schedule 3 Consequential amendment to *Child Protection (Offenders Registration) Act 2000*

Schedule 3 extends the child sex offender registration scheme to persons convicted of offences under proposed section 66EB of the *Crimes Act 1900*.

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.

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

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

The Committee makes no further comment on this Bill.

7. MURRAY-DARLING BASIN AMENDMENT BILL 2007

Date Introduced:	6 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Philip Koperberg MP
Portfolio:	Climate Change, Environment and Water

Purpose and Description

1. This Bill amends the *Murray–Darling Basin Act 1992* to approve an amendment to the Murray–Darling Basin Agreement to facilitate the operation of the Murray–Darling Basin Commission’s water business on appropriate commercial principles; and for other purposes.

Background

2. Arrangements for the sharing of water from the rivers comprising the Murray–Darling Basin are the subject of an agreement entered into on 24 June 1992 between the Commonwealth, New South Wales, Victoria and South Australia (the ***Murray Darling Basin Agreement***). Legislative approval to that agreement was given when Parliament enacted the *Murray–Darling Basin Act 1992*.
3. The Commonwealth, New South Wales, Queensland, Victoria, South Australia and the Australian Capital Territory have subsequently entered into an agreement (the ***Murray–Darling Basin Amending Agreement 2006***) to further amend the Murray–Darling Basin Agreement so as to facilitate the operation of the Murray–Darling Basin Commission’s water business on appropriate commercial principles.
4. This Bill aims to enable improved business practices for River Murray Water, which is the water business unit of the Murray-Darling Basin Commission. The purpose of the Murray-Darling Basin Agreement is to provide and coordinate effective planning and management for the equitable, efficient and sustainable use of the water, land and other environmental resources of the Basin. The agreement establishes the legal framework for natural resource management, water distribution, asset management and financial disbursements between the jurisdictions.
5. The three main effects of the amendments will be firstly, to facilitate improved business practices for the commission’s water business (River Murray Water). Secondly, it will clarify the original agreement in the limiting of Queensland’s liability. Thirdly, it will attach supplementary details and make a typographical correction to the basin salinity management schedule (schedule C of the agreement).
6. The Bill will give the Murray-Darling Basin Ministerial Council the powers to establish and manage a long term renewals annuity fund for River Murray Water to provide for capital renewals and major cyclic maintenance. It will also allow the Murray-Darling Basin Commission to undertake borrowings for that purpose, and to re-assign the

management of critical infrastructure between the relevant State governments. It will vary cost-sharing arrangements for up to 5 years and to establish new thresholds from time to time for financial levels of works.

The Bill

7. The object of this Bill is to amend the *Murray–Darling Basin Act 1992* so as to give legislative approval to the Murray–Darling Basin Amending Agreement 2006. As a consequence of that approval, the Murray–Darling Basin Agreement will be amended in accordance with the terms of the Murray–Darling Basin Amending Agreement 2006. A copy of the agreement (as subsequently amended on 3 June 2002) is set out in Schedule 1 to that Act.

8. 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 *Murray–Darling Basin Act 1992* set out in Schedule 1.

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

9. Schedule 1 Amendments

Schedule 1 [1] amends the definition of **Agreement** in section 4 (1) to reflect the adoption of the Murray–Darling Basin Amending Agreement 2006.

Schedule 1 [2] inserts a definition of **Amending Agreement 2006** into section 4 (1).

Schedule 1 [3] inserts proposed section 6B. The new section gives legislative approval to the Murray–Darling Basin Amending Agreement 2006.

Schedule 1 [4] inserts proposed Schedule 3. The new Schedule contains the text of the Murray–Darling Basin Amending Agreement 2006.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

8. POLICE AMENDMENT BILL 2007

Date Introduced:	7 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 *Police Act 1990* and the *Police Integrity Commission Act 1996* following the statutory review of the *Police Act 1990*.

Background

2. The report on the statutory review of the *Police Act 1990* was completed in 2006. The report made 56 recommendations, a number of which were implemented by the *Police Amendment (Miscellaneous) Act 2006*. According to the Agreement in Principle speech, the Police Amendment Bill 2007 addresses the remaining recommendations, namely employment-related matters to ensure further consistency between the *Police Act 1990* and the *Public Sector Employment and Management Act 2002* as well as matters relating to complaints under Part 8A of the *Police Act*.⁷ Development of the Bill involved consultation with the NSW Police Force, the Police Integrity Commission, the NSW Ombudsman, the Police Association of NSW, and the Ministry for Police.

The Bill

Consistency with Public Sector Employment and Management Act 2002

3. The Bill makes a number of changes to the *Police Act 1990* to align it more closely with similar provisions in the *Public Sector Employment and Management Act 2002*. These amendments include:
 - providing that the Minister may appoint an acting Commissioner of Police (rather than the Governor on the recommendation of the Minister) if the office of Commissioner is vacant or the Commissioner is suspended, sick or absent: schedule 1[1];
 - enabling the Commissioner and executive officers to be reappointed before their term of office expires: schedule 1[3] and [5];
 - enabling an allowance to be paid to a member of the NSW Police Force who is exercising all or any of the functions of a position, even though the person has not been appointed to act in the position: schedule 1[4];
 - providing that a contract of employment of an executive officer may constitute the instrument of appointment: schedule 1[6];

⁷ D A Campbell MP, Legislative Assembly *Hansard*, 7 November 2007.

- empowering the Commissioner to retire executive officers, non-executive officers, and non-executive administrative officers found on medical grounds to be unfit to discharge or incapable of discharging the duties of their position: schedule 1[7], [13] and [16];
- providing for the appointment of officers to act in non-executive police officer positions and non-executive administrative officer positions if the positions are vacant or if the holders are suspended, sick or absent (rather than using temporary appointments): schedule 1[8] and [14];
- providing that the position of a non-executive officer or a non-executive administrative officer becomes vacant if the officer abandons his or her employment in the NSW Police Force: schedule 1[12] and [15];
- setting out circumstances when a person may be employed as a temporary employee and clarifying that such employment is subject to any other provisions of the Act concerning the employment of temporary employees: schedule 1[17];
- stipulating that the maximum period for temporary employment at any one time is three years and that the reemployment of a temporary employee is to be in accordance with guidelines issued by the Commissioner: schedule 1[18].

Complaints against police

4. The Bill also amends the *Police Act 1990* to clarify that complaints made directly to the Police Integrity Commission or the Ombudsman are not required to be registered in the complaints information system unless so directed: schedule 1[20]. According to the Agreement in Principle speech, this is to assist in the protection of the identity of complainants where necessary.⁸
5. The Bill clarifies that the power to investigate a complaint includes the power to take any action necessary to resolve the complaint in the manner that the Commissioner thinks fit: schedule 1[21]. This includes alternative dispute management methods.
6. The Bill provides that the Commissioner or the Ombudsman may decide to take no further action regarding a complaint. However, each must notify the other of such a decision: schedule 1[22]. The Ombudsman may request the Commissioner to review a decision to take no further action regarding a complaint: schedule 1[23].

⁸ D A Campbell MP, Legislative Assembly *Hansard*, 7 November 2007.

Functions of Ombudsman relating to complaints

7. The Bill amends the *Police Act 1990* to enable the Ombudsman to report to the Minister and the Commissioner on any matter connected with the exercise of the Ombudsman's functions under the *Police Act* regarding complaints: schedule 1[24].
8. The Bill enables the Ombudsman to make special reports to Parliament regarding any matter arising in connection with the exercise of his or her functions under the *Police Act* regarding complaints about the conduct of police officers. The Ombudsman may omit any matter from a copy of a report given to a complainant or police officer if the Ombudsman believes it to be in the public interest. The Ombudsman must omit critical police information from copies of reports given to complainants or police officers: schedule 1[25].
9. The Bill enables the Ombudsman to consult with the Minister about matters other than complaints related to the exercise of the Ombudsman's functions under Part 8A: schedule 1[26].
10. It enables the Ombudsman to publish police information to the Minister as well as the Commissioner: schedule 1[27].

Police Integrity Commission Act 1996

11. The Bill also amends the *Police Integrity Commission Act 1996* to provide that an investigation by the Commissioner of Police may be commenced or resumed if the Police Integrity Commission notifies the Commissioner of Police (rather than the Ombudsman) that it has completed its investigation into a police complaint or has decided to discontinue the investigation: schedule 2[1].

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

12. 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.

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|---|
| <ol style="list-style-type: none">13. Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power. |
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The Committee makes no further comment on this Bill.

9. SURVEILLANCE DEVICES BILL 2007

Date Introduced:	6 November 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Minister for Police

Purpose and Description

1. The Bill proposes to replace the *Listening Devices Act 1984* with new legislation that in addition to regulating the use of listening devices also regulates the installation, use and maintenance of:
 - **data surveillance devices** – defined as devices or programs capable of being used to record or monitor the input of information into or output of information from a computer;
 - **optical surveillance devices** – defined as devices capable of being used to record visually or observe an activity; and
 - **tracking devices** – defined as electronic devices capable of being used to determine or monitor the geographical location of a person or object.

Background

2. The Joint Working Group of the Standing Committee of Attorneys-General and the Australasian Police Ministers' Council on National Investigation Powers developed national legislation to facilitate the use of surveillance devices by law enforcement agencies in cross-border investigations. This model law was published in the November 2003 Report on Cross-Border Investigative Powers for Law Enforcement and has been implemented in Queensland, Victoria and Tasmania.
3. The purpose of the Bill is to implement this national legislation in NSW, but with some modifications. This will mean that it will not be necessary to obtain a warrant in every State or Territory that a suspect enters; warrants and emergency authorisations issued in NSW will be recognised in those jurisdictions that have adopted the model law.
4. The Bill also implements 'a more modern regulatory scheme for law enforcement surveillance devices'.⁹

The Bill

5. The objects of the Bill are:
 - (a) to regulate the installation, use, maintenance and retrieval of surveillance devices,

⁹ D A Campbell MP, Legislative Assembly *Hansard*, 6 November 2007.

- (b) to restrict the use, publication and communication of information obtained through the use of surveillance devices or otherwise connected with surveillance device operations,
- (c) to establish procedures for law enforcement officers to obtain warrants or emergency authorisations for the installation, use, maintenance and retrieval of surveillance devices,
- (d) to create offences relating to the improper installation or use of surveillance devices,
- (e) to impose requirements for the secure storage and destruction of records, and the making of reports to judicial officers and Parliament, in connection with surveillance device operations,
- (f) to recognise warrants and emergency authorisations issued in other jurisdictions for the installation and use of surveillance devices,
- (g) to repeal the *Listening Devices Act 1984*,
- (h) to make consequential amendments to various other Acts and regulations.

Regulation of installation, use and maintenance of surveillance devices

- 6. Part 2 of the Bill regulates the installation, use and maintenance of surveillance devices, which include data surveillance devices, listening devices, optical surveillance devices and tracking devices. It generally prohibits the installation, use and maintenance of listening devices, tracking devices and data surveillance devices as well as the installation, use and maintenance of optical surveillance devices without consent (clauses 7 to 10). A number of exemptions are provided, including where the installation, use or maintenance of the surveillance device is in accordance with a warrant or emergency authorisation.
- 7. The publication or communication of private conversations or recordings of activities that have come to the person's knowledge as the result of the unlawful use of a listening device, optical surveillance device, or tracking device is generally prohibited (there are some exceptions): cl 11. Nor may a person possess a record of a private conversation or the carrying on of an activity if it was obtained in contravention of Part 2: cl 12. Similarly, the publication or communication of any information obtained by the use of a data surveillance device in contravention of Part 2 is prohibited: cl 14.
- 8. It is an offence to manufacture, supply or possess a surveillance device with the intention of using it or it being used unlawfully: cl 13.

Warrants

- 9. Part 3 of the Bill provides for different types of warrants and who may issue them.
- 10. Surveillance device warrants and retrieval warrants may be issued by eligible Judges or Magistrates under Part 3: clauses 15 and 16. However, there are limits to the types of warrants that may be issued by eligible Magistrates. An eligible Magistrate

- may only issue a surveillance device warrant regarding the use of a tracking device. Magistrates may only issue a retrieval warrant for a tracking device if he or she issued the original warrant regarding its use.
11. A law enforcement officer may apply for the issue of a surveillance device warrant if he or she suspects or believes on reasonable grounds that (cl 17):
 - (a) a relevant offence has been, is being, is about to be or is likely to be committed;
 - (b) an investigation into that offence is being, will be or is likely to be conducted in this jurisdiction or in this jurisdiction and in one or more participating jurisdictions; and
 - (c) the use of a surveillance device is necessary for the purpose of an investigation into that offence to enable evidence to be obtained of the commission of that offence or the identity or location of the offender.
 12. Part 3 allows for a remote application to be made by telephone, fax, or email where it is impracticable for the application to be made in person and the immediate use of the surveillance device is necessary: cl 18.
 13. A surveillance device warrant may only be issued if the Judge or Magistrate is satisfied that there are reasonable grounds for the suspicion or belief founding the application for the warrant, having regard to (cl 19):
 - the nature and gravity of the alleged offence in respect of which the warrant is sought;
 - the extent to which the privacy of any person is likely to be affected;
 - the existence of any alternative means of obtaining the evidence or information sought to be obtained and the extent to which those means may assist or prejudice the investigation;
 - the extent to which the information sought to be obtained would assist the investigation;
 - the evidentiary value of any information sought to be obtained; and
 - any previous warrant sought or issued under Part 3 or a corresponding law in connection with the same offence.
 14. The maximum period during which the warrant may be in force is 90 days (cl 20) but the law enforcement officer to whom the warrant was issued may apply for an extension prior to its expiry (cl 22).
 15. A surveillance device warrant may authorise (cl 21):
 - (a) the use of a surveillance device on or in specified premises or a vehicle;
 - (b) the use of a surveillance device in or on a specified object or class of object;

- (c) the use of a surveillance device in respect of the conversations, activities or geographical location of a specified person or a person whose identity is unknown;
 - (d) the use of a surveillance device on or about the body of a specified person.
16. A law enforcement officer who believes that use of a surveillance device under warrant is no longer necessary is required to immediately notify the chief officer. If the chief officer is satisfied that the surveillance device is no longer necessary for obtaining evidence of the commission of the relevant offence or the identity or location of the offender then he or she must ensure that the use of the surveillance device is discontinued as soon as possible and cause an application to be made for revocation of the warrant: cl 24.
17. Clause 31 provides for the emergency use of surveillance devices by enabling a law enforcement officer to use a surveillance device without a surveillance device warrant if he or she, on reasonable grounds, suspects or believes that:
- (a) an imminent threat of serious violence to a person or substantial damage to property or that a serious narcotics offence will be committed exists;
 - (b) the use of a surveillance device is immediately necessary for the purpose of dealing with that threat;
 - (c) the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted; and
 - (d) it is not practicable in the circumstances to apply for a surveillance device warrant.
18. However, the law enforcement officer must apply to a Judge for approval of the exercise of such powers within five business days: cl 33. The Judge must consider (cl 34):
- (a) the nature of the threat of serious violence to a person or substantial damage to property or the commission of a serious narcotics offence;
 - (b) the extent to which issuing a surveillance device warrant would have helped reduce or avoid the threat;
 - (c) the extent to which law enforcement officers could have used alternative methods of investigation to help reduce or avoid the threat;
 - (d) how much the use of alternative methods of investigation could have helped reduce or avoid the threat;
 - (e) how much the use of alternative methods of investigation would have prejudiced the safety of the person or property because of delay or for another reason;
 - (f) whether or not it was practicable in the circumstances to apply for a surveillance device warrant.

Recognition of corresponding warrants and authorisations

19. Part 4 provides for the recognition of corresponding warrants and authorisations.

Compliance and monitoring

20. Compliance and monitoring provisions are located in Part 5 of the Bill. There is a general prohibition on the use, communication or publication of protected information: cl 40. A number of exceptions apply.
21. Clause 44 requires a person to whom a surveillance device is issued to furnish a report to a Judge or Magistrate and the Attorney General. The Attorney General is to report within three months of the end of the financial year on: the number of applications for warrants and the number issued; the number of applications for emergency authorisations and the number of authorisations given; and any other relevant information relating to the use of surveillance devices (cl 45). This report is to be tabled in Parliament.
22. The Ombudsman is required to occasionally inspect the records of each law enforcement agency to determine the extent of compliance with the requirements of the Act: cl 48.

Issues Considered by the Committee

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

Right to privacy: Clause 20

23. The grant of a surveillance device warrant authorises a range of actions including:
 - the use of a surveillance device on or in specified premises or a vehicle;
 - the use of a surveillance device in or on a specified object or class of object;
 - the use of a surveillance device in respect of the conversations, activities or geographical location of a specified person or a person whose identity is unknown;
 - the use of a surveillance device on or about the body of a specified person.
24. It also encompasses the installation, use and maintenance of the surveillance device and permits the entry by force if necessary onto or into the premises or vehicle or other specified premises that adjoin or provide access to the premises.
25. The issue of surveillance device warrants thus need to be well-regulated to protect against the arbitrary interference with the privacy of individuals. Some protection of privacy is afforded by article 17(1) of the *International Covenant on Civil and Political Rights* which states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'.
26. However, surveillance can be an extremely valuable tool in the investigation and prosecution of offences. There will accordingly be circumstances in which the use of surveillance devices is considered to be in the interests of the broader community.
27. Numerous safeguards are built into the Bill regarding the issue of surveillance device warrants to protect against the unwarranted interference with the privacy of individuals:

- an independent party, namely an eligible Judge or Magistrate, is required to consider a number of factors when determining whether a surveillance device warrant should be issued, including the extent to which the privacy of any person is likely to be affected;
 - the use of a surveillance device must be discontinued once it is apparent that that it is no longer necessary for obtaining evidence;
 - whilst the Bill provides for the emergency use of surveillance devices, approval must still be obtained from a Judge within five business days; and
 - numerous reporting obligations.
28. Clause 20(1)(b)(ix) of the Bill requires a surveillance device warrant to specify the period during which the warrant is in force, which must not be more than 90 days. The *Listening Devices Act 1984*, in contrast, limited the maximum period to 21 days.
29. The NSW Law Reform Commission in its report on surveillance noted that a 30 day maximum for the duration of a warrant is in the interest of greater privacy protection and accountability, provided an application for an extension can be made.¹⁰
30. The Committee was informed by the Minister's Office that the maximum period was set at 90 days as 30 days has been found to be insufficient in the majority of cases. The provision of a greater maximum period may save resources by reducing the number of applications that need to be made to have this period extended.

- 31. The Committee notes that the appropriate use of surveillance devices can assist with the investigation and prosecution of offences. However, this needs to be balanced against the need to ensure that individuals are protected from arbitrary interference with their privacy.**
- 32. The Committee notes that the Bill contains numerous safeguards to ensure that surveillance device warrants are only issued in appropriate circumstances.**
- 33. However, the Committee highlights that the maximum period for which a surveillance device warrant is in force has been set at 90 days as opposed to 30 days, with the possibility of its extension where necessary, as recommended by the NSW Law Reform Commission. The Committee was informed by the Minister's Office that the maximum period was set at 90 days as 30 days has been found to be insufficient in the majority of cases. Allowing for a greater maximum period saves resources by reducing the number of applications for an extension.**
- 34. Accordingly, the Committee asks Parliament to consider whether setting the maximum duration period for a surveillance devices warrant at 90 days as opposed to 30 days unduly trespasses on the privacy of individuals.**

¹⁰ NSW Law Reform Commission, *Surveillance: Final Report*, Report 108, May 2005, p 78.

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**Commencement by proclamation: Clause 2**

35. 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. However, there may be good reasons why such discretion is required.
36. According to the Agreement in Principle speech, the Bill is to commence on proclamation to allow for training and the establishment of administrative procedures.¹¹

37. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the need to provide time for training and the establishment of administrative procedures, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

¹¹ D A Campbell MP, Legislative Assembly *Hansard*, 6 November 2007.

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Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007	6
Crimes (Forensic Procedures) Amendment Bill 2007	5
Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007	1

	Digest Number
Crimes (Sentencing Procedure) Amendment Bill 2007	4
Criminal Legislation Amendment Bill 2007	4
Criminal Procedure Amendment (Local Court Process Reforms) Bill 2007	2
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	1
Crown Law Officers Legislation Amendment (Abolition of Life Tenure) Bill 2007	4
Drug and Alcohol Treatment Bill 2007	1
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2007	1
Educational Support for Dyslexic Children Bill 2007*	2
Electricity Supply Amendment (Offences) Bill 2007	2
Energy and Utilities Administration Amendment (Climate Change Fund) Bill 2007	2
Evidence Amendment Bill 2007	4
Fair Trading Amendment (Funeral Goods and Services) Bill 2007	1
Food Amendment Bill 2007	4
Government Publicity Control Bill 2007*	2
Government Schools (Infrastructure Register) Bill 2007*	2
Guardianship Amendment Bill 2007	1
Housing Amendment (Community Housing Providers) Bill 2007	3
Human Cloning and Other Prohibited Practices Amendment Bill 2007	1
Industrial and Other Legislation Amendment (APEC Public Holiday) Bill 2007	1
Judicial Officers Amendment Bill 2007	1
Jury Amendment Bill 2007	5
Law Enforcement (Powers and Responsibilities) Amendment Bill 2007	4
Liquor Amendment (Small Bars and Restaurants) Bill 2007*	3
Liquor Amendment (Special Events Hotel Trading) Bill 2007	3
Mental Health Bill 2007	1
Motor Dealers Amendment Bill 2007	2
Murray-Darling Basin Amendment Bill 2007	6
National Parks and Wildlife Amendment (Leasing and Licensing) Bill 2007	2
Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill 2007*	2
Partnership Amendment (Venture Capital) Bill 2007	3
Police Amendment Bill 2007	6
Police Superannuation Legislation Amendment Bill 2007	1
Private Health Facilities Bill 2007	1
Professional Standards Amendment (Mutual Recognition) Bill 2007	1

	Digest Number
Protection of the Environment Operations Amendment (Waste) Bill 2007	2
Renewable Energy (New South Wales) Bill 2007	2
Road Transport (General) Amendment (Written-off Vehicles) Bill 2007	4
Road Transport (Safety and Traffic Management) Amendment (Novice Drivers) Bill 2007	5
Roads Amendment (Lane Cove Tunnel Filtration) Bill 2007*	4
Royal Rehabilitation Centre Sydney Site Protection Bill 2007*	2
Rural Communities Impacts Bill 2007*	1
Security Industry Amendment (Patron Protection) Bill 2007*	2
Senator's Elections Amendment Bill 2007	1
Standard Time Amendment (Daylight Saving) Bill 2007	2
Statute Law (Miscellaneous Provisions) Bill 2007	1
Summary Offences Amendment (Spray Paint Cans) Bill 2007	4
Superannuation Legislation Amendment Bill 2007	2
Surveillance Devices Bill 2007	6
Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007	1
Tow Truck Industry Amendment Bill 2007	4
Trade Measurement Legislation Amendment Bill 2007	3
Transport Administration Amendment (Countrylink Pensioner Booking Fee Abolition) Bill 2007*	5
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
War Memorial Legislation Amendment (Increased Penalties) Bill 2007	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2006	Digest 2007
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07			1
Children (Detention Centres) Bill 2006	Minister for Juvenile Justice	02/06/06	27/06/06	8, 9	
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			1
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				
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	
Channel 7 Former Epping Site Protection Bill 2007*	N, R				
Child Protection (Offenders Registration) Amendment (Suspended Sentences) Bill 2007	N				
Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2007				N, R	
Climate Futures Bill 2007*	N, R				
Consumer Claims Amendment Bill 2007				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 (Forensic Procedures) Amendment Bill 2007	N			R	
Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007	N, R				

Legislation Review Committee

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentar y scrutiny
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	
Food Amendment Bill 2007	N			C	
Guardianship Amendment Bill 2007	N, C, R		N	N, C	
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 (Powers and Responsibilities) Amendment Bill 2007				N, R	
Mental Health Bill	N, R, C	N, C	N, C	N, 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	

	(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 (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				
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				

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