

PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 7 of 2006

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations:

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 2005

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 2005

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 2005

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 2005

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. Children and Young Persons (Care and Protection) Amendment Bill 2006

- | | |
|----|----------------------------------------------------------------------------------------------------------|
| 4. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|----|----------------------------------------------------------------------------------------------------------|

2. Civil Liability Amendment Bill 2006

- | | |
|----|----------------------------------------------------------------------------------------------------------|
| 5. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|----|----------------------------------------------------------------------------------------------------------|

3. Constitution Amendment (Governor) Bill 2006

- | | |
|----|----------------------------------------------------------------------------------------------------------|
| 6. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|----|----------------------------------------------------------------------------------------------------------|

4. Conveyancers Licensing Amendment Bill 2006

- | | |
|----|----------------------------------------------------------------------------------------------------------|
| 4. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|----|----------------------------------------------------------------------------------------------------------|

5. Crimes Amendment (Murder of Police Officers) Bill 2006* Proposed s 19B: Mandatory sentencing

- | | |
|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 12. | The Committee notes that mandatory life sentences may result in a grievous trespass to personal rights and liberties where there is a real possibility of the offence being committed in circumstances other than those so heinous “that the offender forfeits for the rest of his existence his right to be set free”. |
| 13. | The Committee notes proposed s 19B requires life imprisonment for any person who murders a police officer in the execution of the officer’s duties regardless of the circumstances of the case. |
| 14. | The Committee refers to Parliament the question of whether the imposition of mandatory life sentences under proposed s 19B trespasses unduly on personal rights and liberties. |

6. Pharmacy Practice Bill 2006 Power of entry into premises: Clause 150

- | | |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10. | Given the limitations on the entry powers and the significant public interest in ensuring that pharmacists comply with the Bill and complaints against them are fully investigated, the Committee does not consider that the powers of entry and inspection in the Act unduly trespass on personal rights and liberties. |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Prescribing exemptions to restrictions on pharmacy ownership: cl 25(2)

14. The Committee notes that the Bill allows regulations to provide exemptions to the restrictions on ownership of pharmacies.
15. Having regard to the explanation outlined in the second reading speech, and the fact that any such prescribed exemptions will be subject to disallowance by either House of Parliament, the Committee considers that proposed s 25(2) does not inappropriately delegate legislative power.

7. Pipelines Amendment Bill 2006**Schedule 1[14] & [79] & Schedule 2 & Part 3A *EP&A Act***

11. The Committee notes that under the Bill, approval for the construction of pipelines will be assessed under the *EP&A Act* in the same manner as other major infrastructure projects.
12. The Committee refers to Parliament the concerns it previously raised in relation to the regime established under Part 3A of the *EP&A Act* and the question whether the Bill, by enabling pipeline projects to be subject to Part 3A of that Act, makes rights, liberties or obligations unduly dependent on non-reviewable decisions, or insufficiently subjects the exercise of legislative power to Parliamentary scrutiny.

8. Security Industry Amendment (Patron Protection) Bill 2006***Privacy: Clauses 1[4] & [5]**

6. The Committee notes that mandatory drug and alcohol testing are an invasion of a person's privacy. The Committee also notes that the Bill provides for the collection and testing of urine, which involves a significant breach of a person's privacy. The Committee further notes that the sanction for failing to undergo a drug or alcohol test, loss of licence and livelihood, is very serious and therefore a bouncer cannot be said to freely consent to the testing.
7. The Committee notes the public interest in ensuring that bouncers and crowd control workers are not under the influence of alcohol and prohibited drugs while working.
8. The Committee refers to Parliament the question whether the Bill unduly trespasses on a licensed bouncer's right to privacy by providing for mandatory drug and alcohol testing, including urine test.

9. State Property Authority Bill 2006

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

10. Summary Offences Amendment (Display of Spray Paint Cans) Bill 2006

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

11. Valuation of Land Amendment Bill 2006

- | |
|-------------------------------------------------------------------------------------------------------------|
| 4. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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SECTION B: Ministerial Correspondence — Bills Previously Considered

12. Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005

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| 4. The Committee thanks the Attorney for his reply. |
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Part One – Bills

SECTION A: COMMENT ON BILLS

1. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT BILL 2006

Date Introduced:	10 May 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Community Services

Purpose and Description

1. The Bill's object is to make a number of miscellaneous amendments to the *Children and Young Persons (Care and Protection) Act 1998* (the Act) in relation to the care and protection of, and the provision of services to, children and young persons

Background

2. The second reading speech states that the Bill's reforms aim to reinforce a legislative framework which:
 - ensures high quality children's services are provided in NSW in particular by providing for the regulation of out of school hours care services;
 - supports the Children's Court by strengthening and clarifying its existing functions;
 - protects and clarifies the rights of children and young persons to legal representation;
 - strengthens the protection for reporters; and
 - clarifies provisions for the benefit of children and young persons in out of home care.¹

The Bill

3. The Bill makes a large number of amendments to the Act, including amendments relating to:
 - the extension of existing confidentiality and other protection afforded to those concerned in the making of reports about children and young persons [proposed new s 29(3A)];²

¹ The Hon R G Meagher MP, Minister for Community Services, Legislative Assembly *Hansard*, 10 May 2006.

² The protections will apply to any person who has, in good faith, provided to the Director-General information on the basis of which a report was made, and was otherwise in good faith concerned in making such a report or causing such a report to be made: proposed new s 29(3A).

- a range of procedural matters concerning Children's Court proceedings;
- the disclosure of information³ about children and young persons [proposed amended s 3, s 51 and s 154];
- access by children to their personal information and documents [proposed amended s 168];
- the regulation of out of school hours care services⁴ [proposed new Ch 12A]; and
- penalties for offences under the Act [proposed amended s 259(3)].

Issues Considered by the Committee

<p>4. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p>

The Committee makes no further comment on this Bill.

³ The Bill provides for limiting the disclosure of "high level identification" information by the Director-General [under s 51 or s 154, as amended by the Bill]. High level information, in relation to a child or young person who is in the care responsibility of the Director-General, or who is in out-of-home care, is defined as:

- the surnames of the authorised carer of the child or young person and of any other person living in the household of the authorised carer;
- the street address and locality of the authorised carer of the child or young person;
- the landline telephone number of the authorised carer of the child or young person;
- details of the employment or activities of the authorised carer of the child or young person that would be sufficient to identify the authorised carer;
- the name of the school that the child or young person is attending; and
- any other type of information prescribed by the regulations: proposed amended s 3.

⁴ Defined in the Bill as "a service that provides, outside school hours on school days, or at any time during school vacations, care to children who are at school": proposed s 220A.

2. CIVIL LIABILITY AMENDMENT BILL 2006

Date Introduced: 10 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon Bob Debus MP
Portfolio: Attorney General

Purpose and Description

1. The Bill amends the *Civil Liability Act 2002* to make further provision with respect to damages for gratuitous attendant care services and for loss of capacity to provide domestic services.

Background

2. The second reading speech stated:

Until October 2005, so-called *Sullivan v Gordon* damages were awarded by courts in New South Wales in negligence actions. Such damages were said to compensate injured people for the cost of domestic services they were no longer able to provide to others because of their injury. In October 2005 the High Court overruled the award of such damages. The court highlighted a number of uncertainties concerning these damages. It found that they are inconsistent with the principles on which damages are awarded in tort actions. The court also noted the difficulty faced by courts in trying to identify boundaries for *Sullivan v Gordon* damages when there are no clear underlying principles for such damages. The High Court said that it should be a matter for Parliament, not the courts, to decide whether and in what circumstances these damages should be awarded.⁵

3. It was reported in the second reading speech that a recent inquiry by the General Purpose Standing Committee No. 1 of the Legislative Council recommended that the Government consider reinstating *Sullivan v Gordon* type damages. It also reported that the proposals in the Bill were the subject of public consultation, which resulted in several amendments to the draft Bill. Otherwise, the Bill is in substantially the same form as the consultation draft and provides for a “partial reinstatement of *Sullivan v Gordon* damages, with limitations to ensure that those damages are available only in the cases of greatest need.”⁶

The Bill

4. The Bill amends the principal Act:
 - (a) to enable certain claimants who have personal injury claims (including in respect of intentional acts, sexual misconduct, motor accidents, dust-related conditions and smoking and tobacco products) to recover damages for the loss of their capacity to provide gratuitous domestic services to their dependants, and

⁵ Mr Neville Newell, Parliamentary Secretary, Second reading speech, Legislative Assembly Hansard, 10 May 2006.

⁶ Second reading speech.

- (b) to provide a cap on the hourly rate for calculating the amount of *Griffiths v Kerkemeyer* damages that claimants with personal injury claims in respect of dust-related conditions may recover.

Issues Considered by the Committee

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| <p>5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
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The Committee makes no further comment on this Bill.

3. CONSTITUTION AMENDMENT (GOVERNOR) BILL 2006

Date Introduced:	10 May 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Morris Iemma MP
Portfolio:	Premier

Purpose and Description

1. The Bill amends the *Constitution Act 1902* with respect to the administration of the government of the State during the unavailability of the Governor or the Lieutenant-Governor.

Background

2. The second reading speech states:

The Government has been developing government continuity arrangements in the event of a serious terrorist incident or natural disaster. As part of this work, consideration has been given to the constitutional and other legal limits that would apply to Executive Government decision-making in the event of a serious incident. It has become clear that some of the provisions of the Constitution Act may not be effective in certain circumstances. For example, following a significant terrorist incident, the Governor may be prevented from reaching any place where the Executive Council needs to meet to respond to the crisis...

It might, however, be necessary for the Government to take steps to deal with the emergency, such as declaring a state of emergency or making emergency regulations or orders. It might even be necessary to swear in new members of a ministry. The provisions of the Constitution Act allow only the Lieutenant-Governor, who is the Chief Justice of the Supreme Court, or the Administrator, who is the next most senior judge of the Supreme Court, to assume administration if the Governor is outside New South Wales or is "incapacitated".

... The Crown Solicitor advised that the term "incapacity" may not extend to situations beyond physical or mental incapacity. It is possible, therefore, that a situation might arise in which no person would be available to administer the Executive Government of New South Wales during a critical emergency period. Such a situation could arise if the Governor were still in New South Wales but was unable to exercise her functions due to reasons other than her physical or mental incapacity, for example, if she were uncontactable, missing or physically prevented from attending an urgent Executive Council meeting because of the cessation of elements of the communication or transport systems.⁷

⁷ Mr Neville Newell MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 10 May 2006.

The Bill

3. The bill seeks to amend the Constitution Act to allow the Lieutenant-Governor or Administrator to assume administration of the government whenever the Governor is "unavailable" [proposed s 9C].
4. The amendments also provide that the Lieutenant-Governor or Administrator (if the Lieutenant-Governor is unavailable), shall not assume administration of the government where the Governor-General is unavailable, unless:
 - (a) the Premier has concurred in the assumption of administration; or
 - (b) in the event the Premier is not able to be contacted – the next most senior Minister of the Crown (if any) who is able to be contacted has concurred in the assumption, or
 - (c) neither the Premier nor any other Minister of the Crown is able to be contacted to obtain concurrence, and the Lieutenant-Governor or Administrator is of the opinion that the assumption of administration is authorised by sub-section (4B).

The Premier or other Minister is not to give concurrence unless of the opinion that the assumption of administration is authorised by sub-section (4B) [proposed s 9C (4A)].

5. Proposed subsection (4B) provides that an assumption of administration because of any unavailability is authorised if:
 - (a) the powers or functions of the Governor are required to be exercised or performed during that unavailability, or
 - (b) the duration of that unavailability cannot be determined,and the special circumstances require the assumption of administration.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

4. CONVEYANCERS LICENSING AMENDMENT BILL 2006

Date Introduced: 10 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon Diane Beamer MP
Portfolio: Minister for Fair Trading

Purpose and Description

1. This Bill makes a range of amendments to the *Conveyancers Licensing Act 2003* (the Act), including making further provisions with respect to the licensing and regulation of conveyancers.

Background

2. In her second reading speech, the Minister stated that the Act provides a licensing scheme for conveyancers... [ensuring] that only appropriately qualified, fit and proper persons are able to practise as conveyancers.
[I]t removes unnecessary restrictions preventing conveyancing businesses from incorporating, and thus provides for a corporation licence... [T]he new system tightens the supervision and control of employees and clarifies the responsibilities of licensees in charge of a conveyancing business. The Act continues to provide for the keeping of trust accounts and records, and allows for rules of conduct to be prescribed in the regulations. It also includes costs disclosure requirements for conveyancers, and provides for the resolution of costs disputes through the Consumer, Trader and Tenancy Tribunal.⁸

The Bill

3. This Bill:
 - removes the distinction between trust money and controlled money by providing one comprehensive scheme, defining trust money as money received on or on behalf of any person by a licensee in connection with the licensee's conveyancing business;
 - clarifies that Australian legal practitioners, incorporated legal practices and solicitor corporations are disqualified persons for the purposes of the Act and therefore not eligible to hold a licence under that Act;
 - broadens the disqualification provisions relating to undischarged bankrupts and persons concerned in the management of insolvent corporations so that a director or person concerned in the management of an externally-administered body corporate is a disqualified person except in a case of the voluntary winding up of the body corporate;

⁸ The Hon Diane Beamer MP, Minister for Fair Trading, Legislative Assembly Hansard, 10 May 2006.

- extends the category of disqualified persons so that a person cannot avoid disqualifications by resigning within the 12 month period before the appointment of an external administrator;
- clarifies that the Commissioner for Fair Trading can exercise his or her discretionary power to grant a licence to a person that falls within the category of disqualified persons and must consider the steps that could have been taken when the relevant financial difficulties first arose;
- disqualifies persons who have been disqualified from holding certain licences under New South Wales law from holding a licence under the Act; and
- makes other minor and consequential amendments and amendments by way of statute law revision.

Issues Considered by the Committee

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|-------------------------------------------------------------------------------------------------------------------|
| 4. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>. |
|-------------------------------------------------------------------------------------------------------------------|

The Committee makes no further comment on this Bill.

5. CRIMES AMENDMENT (MURDER OF POLICE OFFICERS) BILL 2006*

Date Introduced: 11 May 2006
House Introduced: Legislative Assembly
Member Responsible: Mr Peter Debnam MP

Purpose and Description

1. The Bill amends the *Crimes Act 1900* [Crimes Act] to provide that compulsory life sentences are to be imposed by courts on persons convicted of murdering police officers.
2. A compulsory life sentence is to be imposed if the murder was committed while the police officer was executing his or her duties or as a consequence of, or in retaliation for, actions undertaken by any police officer.

Background

3. The following background was given in the second reading speech:

The bill is predicated upon a belief that police officers are rightfully owed a measure of protection by the community. That is so for at least two reasons.

First, police officers place themselves in positions of risk on behalf of the [community]. Second, an attack on a law enforcement officer strikes at the core of our system of democratic government.

Those who seek to harm the persons responsible for the enforcement of laws passed by our Parliament should be subject to special punishment.⁹
4. Specifically, the Bill was introduced in the wake of the quashing of the conviction of Motekiai Taufahema for the murder of Senior Constable Glenn McEnallay.¹⁰

The Bill

5. The Bill requires a court to impose a life imprisonment on a person who is convicted of murder of a police officer, if the murder was committed:
 - while in the execution of the police officer's duty; or

⁹ Mr P J Debnam MP, Legislative Assembly *Hansard*, 11 May 2006, citing the then-Attorney General, Hon J G Shaw MLC, in introducing the *Crimes Amendment (Assault of Police Officers) Bill 1997*, Legislative Council *Hansard*, 27 June 1997.

¹⁰ See *Taufema v The Queen* [2006] 152 in which Beazley JA and Howie J agreed with Adams J, who held at paragraph 39 that:

there is no evidentiary basis for a conclusion that the appellant was party to an agreement that all four men would attempt to evade the police officer, as distinct from having made a decision that he would attempt to do so and knew that the others would do the same. Nor was there a basis for concluding that he adverted to the possibility that one of the others might use a gun in the course of evading the officer.

- as a consequence of, or in retaliation for, actions undertaken by that or any other police officer in the execution of the officer's duty [proposed new s 19B].

Issues Considered by the Committee

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

Proposed s 19B: Mandatory sentencing

6. Currently under s 19A of the Crimes Act 1900, a person sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the person's natural life. However, a court may nevertheless impose a sentence for a lesser term.
7. The effect of the Bill would therefore be to remove the court's discretion to impose a sentence other than for the term of the person's natural life if the person is convicted of the offence in proposed s 19B(1).
8. The Committee notes the conclusions of the 1993 report of the UK Committee on the Penalty for Homicide, chaired by Lord Lane, which are cited by Lord Justice Kennedy in the UK Court of Appeal¹¹ and European Court of Human Rights in *Stafford v the UK*¹²:

(1) The mandatory life sentence for murder is founded on the assumption that murder is a crime of such unique heinousness that the offender forfeits for the rest of his existence his right to be set free. (2) That assumption is a fallacy. It arises from the divergence between the legal definition of murder and that which the lay public believes to be murder. (3) The common-law definition of murder embraces a wide range of offences, some of which are truly heinous, some of which are not. (4) The majority of murder cases, though not those which receive the most publicity, fall into the latter category. (5) It is logically and jurisprudentially wrong to require judges to sentence all categories of murderer in the same way, regardless of the particular circumstances of the case before them...
9. The Committee further notes that while the offence in proposed s 19B(1) limits the categories of murder to the murder of a police officer in the execution of the officer's duty, it has no regard to the circumstances under which such an offence may be committed.
10. While the gravity of murdering a police officer in the execution of his or her duty may frequently justify the imposition of the most severe punishment, it is not apparent to the Committee that it will necessarily be of such unique heinousness. Mandating life imprisonment where there is a real possibility of that most severe punishment not fitting the crime is a significant trespass on personal rights and liberties.
11. The Committee also notes that, while the Bill preserves the prerogative of mercy, to rely on the discretion of the executive arm of government to prevent the imposition of unjust penalties would be a gross violation of a person's right to a fair and public hearing by a competent, independent and impartial tribunal as required under Article 14 of the International Covenant on Civil and Political Rights.

¹¹ *R. (Lichniak and Pyrah) v. Secretary of State for the Home Department* [2001] 3 Weekly Law Reports (judgment of 2 May 2001)

¹² Application no. 46295, Judgement 28 May 2002, para 45.

12. The Committee notes that mandatory life sentences may result in a grievous trespass to personal rights and liberties where there is a real possibility of the offence being committed in circumstances other than those so heinous “that the offender forfeits for the rest of his existence his right to be set free”.
13. The Committee notes proposed s 19B requires life imprisonment for any person who murders a police officer in the execution of the officer’s duties regardless of the circumstances of the case.
14. The Committee refers to Parliament the question of whether the imposition of mandatory life sentences under proposed s 19B trespasses unduly on personal rights and liberties.

The Committee makes no further comment on this Bill.

6. PHARMACY PRACTICE BILL 2006

Date Introduced: 11 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon John Hatzistergos MLC
Portfolio: Health

Purpose and Description

1. The Bill provides for the registration of pharmacists, regulates pharmacy businesses, and repeals the *Pharmacy Act 1964*.

Background

2. The second reading speech states:

The bill will replace the Pharmacy Act 1964. The legislation contains more robust professional regulation similar to recent improvements to the regulatory systems for other health professionals, such as medical practitioners and dentists. The pharmacy profession, and the business of pharmacy, is highly regulated at a Federal level. State governments register pharmacists and set standards for pharmacies. The Federal Government controls the overall number and location of pharmacies via the Pharmaceutical Benefits Scheme.

In recognition of this national dimension to the regulation of pharmacy the Council of Australian Governments agreed to conduct a joint national review of pharmacy legislation and the Pharmaceutical Benefits Scheme provisions of the National Health Act. The Council of Australian Governments accepted the final report of the review and referred it to each State for implementation in August 2002. Since that time the New South Wales Department of Health has been engaged in extensive consultation with all relevant stakeholders in the health and pharmacy sectors.

The Bill

3. The objects of the Bill are:
 - (a) to provide for the registration of persons as pharmacists;
 - (b) to regulate the conduct of registered pharmacists;
 - (c) to enable the Board to establish a code of professional conduct for registered pharmacists;
 - (d) to prohibit persons or entities from indicating that an entity is a pharmacy business unless that entity is permitted under the proposed Act to carry on that business;
 - (e) to regulate the carrying on of pharmacy businesses (including providing for procedures for approval of pharmacy premises and registration of holders of pecuniary interests in pharmacy businesses);

- (f) to require registered pharmacists and the holders of pecuniary interests in pharmacy businesses to furnish an annual return to the Board specifying certain information;
- (g) to require registered pharmacists to notify the Board of convictions and criminal findings for various offences, and the courts to notify the Board of certain convictions and criminal findings against registered pharmacists;
- (h) to provide for the making and referral of complaints against registered pharmacists and for disciplinary proceedings in respect of such complaints;
- (i) to provide for appeals against actions of the Board and the Pharmacy Tribunal and for the review of disciplinary action taken under the proposed Act;
- (j) to empower the Board to suspend, or impose conditions on, the registration of a registered pharmacist for the purpose of protecting the public;
- (k) to provide for the referral of matters indicating that a registered pharmacist suffers from an impairment to an Impaired Registrants Panel;
- (l) to provide for the constitution, functions and procedure of the Board, the Pharmacy Care Assessment Committee, Impaired Registrants Panels and the Pharmacy Tribunal;
- (m) to prohibit employers of registered pharmacists from directing or inciting them, to engage in unsatisfactory professional conduct or professional misconduct; and
- (n) to repeal the Pharmacy Act 1964, the Pharmacy (Elections) Regulation 1998 and the *Pharmacy (General) Regulation 1998* and to enact savings, transitional and other provisions consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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

Power of entry into premises: Clause 150

- 4. Clause 150 gives an inspector¹³ the power to enter premises for the purposes of carrying out an investigation in order to ascertain whether the provisions of the Act or the regulations are being complied with or have been contravened, or to investigate a complaint made or intended to be made.
- 5. The Bill gives inspectors very wide powers when inspecting premises, including to:
 - (a) require any person on those premises to produce any records in the possession or under the control of that person relating to the carrying on of the practice of pharmacy (including any records relating to policies or systems in place to ensure safe and competent delivery of services),
 - (b) inspect and take copies of, or extracts or notes from, any such records and, if the inspector considers it necessary to do so for the purpose of obtaining evidence, seize any such records,

¹³ Section 150(1) provides that the Director-General may appoint any person as an inspector for the purposes of this Act. The Director-General is to provide an inspector with a certificate of authority.

- (c) examine and inspect any apparatus or equipment used or apparently used in the course of the practice of pharmacy,
 - (d) take such photographs, films and audio, video and other recordings as the inspector considers necessary,
 - (e) require any person on those premises to answer questions or otherwise furnish information in relation to the carrying on of the practice of pharmacy,
 - (f) require the owner or occupier of those premises to provide the inspector with such assistance and facilities as is or are reasonably necessary to enable the inspector to exercise the functions of an inspector under this section.
6. The Committee considers that the power to enter private land without consent or a warrant is a trespass on the right to privacy¹⁴. Such a power should only be given when overwhelmingly in the public interest to do so.
7. The Committee notes that, although the powers of entry in the Act are very broad, there are limitations on their exercise by inspectors. For instance, an authorised officer cannot enter residential premises without consent or a warrant. They may enter premises only at a reasonable time, and only premises that they believe on reasonable grounds are being used for carrying on the practice of pharmacy. Inspectors may only enter a part of the premises used for residential purposes with the consent of the occupier, or under the authority of a search warrant.
8. If an inspector seizes any records under this section, they may be retained by the inspector until the completion of any proceedings (including proceedings on appeal) in which they may be evidence but only if the person from whom the records were seized is provided, within a reasonable time after the seizure, with a copy of the records certified by an inspector as a true copy.
9. Also, the Committee is of the view that there is a strong public interest in ensuring pharmacists comply with the Bill and that complaints against pharmacists are fully investigated.

10. Given the limitations on the entry powers and the significant public interest in ensuring that pharmacists comply with the Bill and complaints against them are fully investigated, the Committee does not consider that the powers of entry and inspection in the Act unduly trespass on personal rights and liberties.

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

Prescribing exemptions to restrictions on pharmacy ownership: cl 25(2)

11. Clause 25(1) prevents any person having a pecuniary interest in a pharmacy business except for:
- (a) a registered pharmacist,
 - (b) a partner in a pharmacists' partnership,
 - (c) a pharmacists' body corporate or a member of a pharmacists' body corporate.

¹⁴ See, for example, Article 17 of the International Covenant on Civil and Political Rights.

12. However, clause 25(2) allows regulations to prescribe other circumstances in which a person may have a pecuniary interest in a pharmacy business.

13. The second reading speech to the Bill states:

A provision to the same effect [as cl 25(2)] exists in the current Pharmacy Act and is designed to address circumstances such as where a community is in need of pharmacy services but is unable to attract a pharmacist prepared to invest the capital to establish a pharmacy business. In those circumstances regulations could be made authorising an organisation such as a local government authority or an Aboriginal health service to hold a pecuniary interest in a pharmacy business. I emphasise that in these circumstances a registered pharmacist would be in charge of the pharmacy at all times and all professional pharmacy services would have to be undertaken by a registered pharmacist.

Concerns have been raised with the Minister and me that the regulation-making power is too broad and that the potential exists for a future government to make regulations allowing generally for non-pharmacy corporations such as supermarket chains to own and operate pharmacy businesses. I place on the record the Government's view that any such action would be contrary to one of the philosophical underpinnings of the bill: that pharmacies should be owned and operated by pharmacists. The Government reiterates its assurances to the pharmacy profession that the regulation-making powers would not be used in the aforementioned way.

14. The Committee notes that the Bill allows regulations to provide exemptions to the restrictions on ownership of pharmacies.

15. Having regard to the explanation outlined in the second reading speech, and the fact that any such prescribed exemptions will be subject to disallowance by either House of Parliament, the Committee considers that proposed s 25(2) does not inappropriately delegate legislative power.

The Committee makes no further comment on this Bill.

7. PIPELINES AMENDMENT BILL 2006

Date Introduced: 10 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon Joseph Tripodi MP
Portfolio: Energy

Purpose and Description

1. The object of the Bill is to simplify the system of approvals under the *Pipelines Act 1967* (***the Principal Act***) relating to the construction and operation of pipelines and to integrate the system with the development approval process under the *Environmental Planning and Assessment Act 1979* (***the EP&A Act***).

Background

2. In his second reading speech, the Minister said:

The *Pipelines Act* was introduced in 1967. It was designed to develop and regulate cross-country pipeline infrastructure to ensure the safe transportation of gas and liquid petroleum in New South Wales. In the past 39 years 29 pipeline licences have been issued and more than 5,000 kilometres of oil and gas transmission pipelines have been constructed. We now have 3,375 kilometres of high-pressure natural gas pipelines to supply the natural gas energy needs of New South Wales. Natural gas is supplied to many industrial and commercial operations, and more than 900,000 residential gas consumers...

The *Pipelines Act* contains relatively complicated and antiquated procedures for assessing the environmental impacts of the construction and operation of pipelines. This is because the original *Pipelines Act* was introduced well over a decade before the *Environmental Planning and Assessment Act* in 1979. For all these reasons, the Government is moving to streamline the process to make it faster and easier for pipeline infrastructure to be approved.¹⁵

The Bill

3. Currently, the Principal Act (s. 40) exempts pipelines from the operation of the *EP&A Act* (except in relation to the granting of a permit under Part 5 of that Act). The Bill removes this exemption from s. 40, making pipelines subject to the operation of the *EP&A Act* in its entirety, including Part 3A [Schedule 1[79]]. Part 3A provides for a special approval process for major infrastructure and other development projects declared by the Minister or a State environmental planning policy to be a project to which that Part applies.
4. The Bill also amends the Principal Act to require a person to hold a licence in respect of a pipeline even if the pipeline is constructed under an approval or authority under the *EP&A Act* [Schedule 1[14]].

¹⁵ The Hon Joseph Tripodi MP, Minister for Energy and Ports & Waterways, Second reading speech, Legislative Assembly Hansard, 10 May 2006.

5. The Bill amends section 75V of the *EP&A Act* so that a licence under the Principal Act cannot be refused if it is necessary for carrying out a project approved under Part 3A of the *EP&A Act* and the licence is to be substantially consistent with the Part 3A approval [Schedule 2].
6. The effect of the Bill is to transfer the planning and approval of pipelines to the regime under the *EP&A Act*, including enabling pipelines to be declared projects for the purposes of Part 3A of that Act.

Issues Considered by the Committee

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

Parliamentary scrutiny of legislative power [s 8A(1)(b)(v) *LRA*]

Schedule 1[14] & [79] & Schedule 2 & Part 3A *EP&A Act*

7. The Committee notes that under the Bill approval for the construction of pipelines may be assessed under the *EP&A Act* in the same manner as other major infrastructure projects, including being declared a project to which Part 3A of that Act applies. The Committee has previously commented on certain provisions in Part 3A of the *EP&A Act*.¹⁶
8. For example, the Committee has commented on the limited rights to seek administrative review in relation to an approval of a concept plan and judicial review in relation to certain infrastructure projects under Part 3A.¹⁷ In particular, the Committee noted that critical infrastructure projects are exempt from judicial review under that Act, except on application made or approved by the Minister and that this exemption extends to the declaration of a project to be a critical infrastructure project.
9. The Committee has also commented on the fact that under the *EP&A Act* approved major infrastructure and other projects are exempt from numerous statutory provisions ensuring environmental protection and control. Instead, the Minister has the power to set guidelines for environmental assessment requirements for major infrastructure projects (in consultation with the Minister for the Environment). The *EP&A Act* delegates to the Director-General the power to set requirements for environmental assessments under those guidelines.
10. The Committee previously noted that the setting of these environmental assessment requirements is a vital component of the regime for approving major infrastructure and other projects under the *EP&A Act*, but that that Act does not give the Parliament any role in reviewing the guidelines, nor does it provide Parliament with any power to disallow them.¹⁸

11. The Committee notes that under the Bill, approval for the construction of pipelines will be assessed under the <i>EP&A Act</i> in the same manner as other major infrastructure projects.

¹⁶ See the Committee's comments on the *Environmental Planning and Assessment Amendment (Infrastructure & Other Planning Reform) Bill 2005*, Legislation Review Digest No 7 of 2005. The Committee also commented in this report on self-incrimination and insufficiently defined administrative powers.

¹⁷ Ibid.

¹⁸ Ibid.

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| <p>12. The Committee refers to Parliament the concerns it previously raised in relation to the regime established under Part 3A of the <i>EP&A Act</i> and the question whether the Bill, by enabling pipeline projects to be subject to Part 3A of that Act, makes rights, liberties or obligations unduly dependent on non-reviewable decisions, or insufficiently subjects the exercise of legislative power to Parliamentary scrutiny.</p> |
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The Committee makes no further comment on this Bill.

8. SECURITY INDUSTRY AMENDMENT (PATRON PROTECTION) BILL 2006*

Date Introduced: 11 May 2006
House Introduced: Legislative Council
Member Responsible: Rev the Hon Dr. Gordon Moyes MLC

Purpose and Description

1. The object of this Bill is to amend the *Security Industry Act 1997* to introduce a number of new measures designed to enhance the safety of patrons while in licensed venues and to reduce the number of violent incidents in or around licensed venues.

Background

2. In his second reading speech, Reverend the Hon Dr Gordon Moyes MLC stated:
[The Bill] ... has been developed in close consultation with the peak bodies that represent the security industry. Consultation has taken place with the Australian Security Industry Association, the Institute of Security Executives, and the Building Service Contractors Association of Australia. I have also received a joint submission by those organisations, in conjunction with the Australian Hotels Association... I point out also that two Australian States, South Australia and Western Australia, have similar testing programs as the one proposed by the Bill.¹⁹

The Bill

3. The Bill amends the Principal Act:
 - to require the Commissioner of Police to refuse an application for a bouncer's licence if the person has not provided a statement by a medical practitioner certifying that the person is both physically and psychologically fit to do that type of work [Schedule 1 [1]];
 - to enable the Commissioner, in determining whether an applicant is a fit and proper person to be licensed under the Act, to have regard to information about the applicant obtained by the Commissioner in accordance with an information sharing arrangement under the *Fair Trading Act 1987* (eg, consumer complaints and probity assessments matters) [Schedule 1 [2]];
 - to allow police officers to require bouncers while on duty to undergo a random breath or other test for drugs or alcohol [proposed s. 28B];
 - to allow the revocation of a bouncer's licence for failing to undergo a drug or alcohol test, or returning a positive test [Schedule 1[4]]; and
 - to require that a bouncer's licence must be worn at chest level and be clearly readable at all times.

¹⁹ Reverend the Hon Dr Gordon Moyes MLC, Second Reading Speech, Legislative Council Hansard, 11 May 2006.

Issues Considered by the Committee

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

Privacy: Clauses 1[4] & [5]

4. These clauses provide for mandatory random tests of on-duty bouncers for alcohol and other drugs. The Committee is of the view that random drug tests intrude on a person's privacy. Whether such intrusion is a breach of the person's privacy depends on whether the person concerned freely consents to the privacy intrusion. Under the Bill, a person who does not comply with a request to undergo a test will lose their licence and, consequently, their livelihood. Therefore, it cannot be said that a person required to undergo a random drug or alcohol test can freely consent to the test.
5. The Bill authorises both breath analysis tests and considerably more invasive tests using hair or urine. According to the Privacy Committee of NSW, urine collected for the purposes of drug testing requires close observation of the collection of the urine, including of the genital area, to ensure that the sample is not tampered with. This is clearly a significant intrusion of a person's physical privacy and can be embarrassing and humiliating.²⁰ Obviously, breath and hair analysis tests are not as intrusive of privacy.

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| <ol style="list-style-type: none">6. The Committee notes that mandatory drug and alcohol testing are an invasion of a person's privacy. The Committee also notes that the Bill provides for the collection and testing of urine, which involves a significant breach of a person's privacy. The Committee further notes that the sanction for failing to undergo a drug or alcohol test, loss of licence and livelihood, is very serious and therefore a bouncer cannot be said to freely consent to the testing.7. The Committee notes the public interest in ensuring that bouncers and crowd control workers are not under the influence of alcohol and prohibited drugs while working.8. The Committee refers to Parliament the question whether the Bill unduly trespasses on a licensed bouncer's right to privacy by providing for mandatory drug and alcohol testing, including urine test. |
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The Committee makes no further comment on this Bill.

²⁰ The Privacy Committee of NSW, Report No 64, *Drug Testing in the Workplace*, October 1992, p.13.

9. STATE PROPERTY AUTHORITY BILL 2006

Date Introduced: 10 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon Michael Costa MLC
Portfolio: Treasurer

Purpose and Description

1. The objects of this Bill are:
 - (a) to establish the State Property Authority (the Authority) as a statutory corporation representing the Crown, and
 - (b) to set out the Authority's objectives and functions, which are principally to improve operational efficiencies in the use of properties of government agencies (being land or interests in land) and to manage, acquire and dispose of properties for the government and government agencies, and
 - (c) to enable the Governor to transfer to the Authority specified property of a government agency by order published in the gazette.

Background

2. The second reading speech states:

[The establishment of a Property Authority] was a key recommendation of a review of the management of government property, and it was reviewed and endorsed by the independent New South Wales Audit of Expenditure and Assets.

For many years the Government has followed a decentralised model of property asset ownership and management. That is, individual agencies have managed the assets provided to them, including property acquisitions and disposals...

Agencies may underestimate the cost of their property assets, resulting in their being underutilised. They may also be unaware that other agencies may be able to use particular properties more fully. These factors will contribute to the disposal of surplus assets not being given a high priority. Outside the Crown Property Portfolio there are few mechanisms to facilitate cross agency sharing of assets. The key element of the reform package, which will come from the legislation ... is the creation of a central Property Authority to manage owned property assets and to centrally manage those leased properties that lie outside the Crown Property Portfolio.²¹

The Bill

3. The Bill provides for:
 - The Constitution and management of the authority [proposed Part 2];
 - The objectives and functions of the authority [proposed Part 3];

²¹ Mr Neville Newell MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 10 May 2006.

- Transfers relating to the property of government agencies [proposed Part 4]; and
- Other miscellaneous provisions [proposed Part 5].

Issues Considered by the Committee

<p>4. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p>

The Committee makes no further comment on this Bill.

10. SUMMARY OFFENCES AMENDMENT (DISPLAY OF SPRAY PAINT CANS) BILL 2006

Date Introduced: 10 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon Bob Debus MP
Portfolio: Attorney General

Purpose and Description

1. This Bill amends the *Summary Offences Act 1988* to regulate the display of spray paint cans in shops.

The Bill

2. This Bill aims to reduce the theft of spray paint cans, thereby reducing the amount of graffiti in the community, by requiring that retailers who sell spray paint cans properly secure them if they are displayed in areas to which members of the public are permitted to access.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

11. VALUATION OF LAND AMENDMENT BILL 2006

Date Introduced: 10 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon Tony Kelly MLC
Portfolio: Lands

Purpose and Description

1. The object of this Bill is to amend the *Valuation of Land Act 1916* so as to make further provision with respect to valuations under that Act.

Background

2. The second reading speech states:

The [Valuation of Land] Act was amended in 2000 to give effect to recommendations of the Walton inquiry report. At that time some provisions were removed from the Land Tax Management Act 1956 and incorporated into the Valuation of Land Act. The amendments set out in this bill are aimed at addressing problems with various sections of the Act and correcting anomalies that have been identified in practice, some of which have arisen as a result of the 2000 amendments.²²

The Bill

3. The amendments:
 - allow the Valuer-General to make a new valuation of land on his or her own initiative (at present, certain land can only be re-valued on the application of a rating or taxing authority) [proposed s 14A];
 - remove a reference to certain conservation agreements under the *National Parks and Wildlife Act 1974*. Land subject of such agreement is not ratable, and therefore does not need to be valued [proposed s 14D(1)];
 - update the definition of Crown lease restricted. The current definition includes a number of obsolete references [proposed s 14I];
 - ensure that, for the purposes of valuing land, assumptions can be made about the manner in which other land may be used may also be made about the land being valued [proposed s 14K];
 - provide that only the person who incurred expenditure subdividing land or undertaking certain work to increase the value of the land is eligible for an allowance from the Director-General when valuing the land. The allowance will cease once the person who incurred the expenditures sells the land [proposed ss 14M and 14V];
 - allow two or more people to qualify for a subdivision allowance [proposed s 14S];

²² Mr Neville Newell MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 10 May 2006.

- allow land that is situation partly in one valuation district and partly in another to be valued as a whole parcel and then apportioned between local government areas (currently, the land is valued separately) [proposed s 28];
- provide for the valuation of land of which part only is ratable or taxable. The current sections do not refer to land of which only part is taxable [proposed s 28A];
- remove the power of the Valuer-General to fix the time within which persons may object to a valuation, as this is inconsistent with section 35, which sets a period of 60 days [proposed s 29];
- provide that a person who objects to a valuation give notice of the objection to every other person whom notice of the valuation is required to be given [proposed s 29 3B];
- omit provisions that require the Valuer-General to furnish certain persons with statements of land rating factors and improved rating factors. This information is redundant given the information that the Valuer-General is required to furnish under the section 14I; and
- authorise the Valuer-General to supply New South Wales public authorities with information about land valuations. The valuer general is already authorised to supply such information to Commonwealth public authorities [proposed s 76].²³

Issues Considered by the Committee

<p>4. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p>

The Committee makes no further comment on this Bill.

²³ Explanatory Note, *Valuation of Land Amendment Bill 2006*.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

12. TERRORISM (POLICE POWERS) AMENDMENT (PREVENTATIVE DETENTION) ACT 2005

Date Introduced: 17 November 2005
House Introduced: Legislative Assembly
Minister Responsible: The Hon Bob Debus MP
Portfolio: Attorney General

Background

1. The Committee reported on this Bill in its Digest No 15 of 2005 and wrote to the Attorney General raising 16 questions on matters of concern, which are set out in the following correspondence.

Minister's Reply

2. In his letter dated 15 May 2006, the Attorney General advised the Committee that:

The simple answer to many of the drafting issues raised [by the Committee] is that NSW was obliged to implement a scheme that was based largely on the preventative detention scheme developed by the Commonwealth. This scheme arose from an agreement reached by Australian leaders and the Council of Australian Governments meeting of 27 September 2005. Having said that, I believe that the Government has taken many steps to improve the basic scheme for implementation here in NSW.
3. The Attorney General also answered each question specifically, as set out in the following correspondence.

Committee's Response

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| 4. The Committee thanks the Attorney for his reply. |
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PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

25 November 2005

Our Ref: LRC 1638

The Hon Bob Debus MP
Attorney General
Level 36 Governor Macquarie Tower
1 Farrer Place SYDNEY NSW 2000

Dear Attorney General

Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No. 15 of 2005*.

The Committee resolved to write to you for advice and clarification on the following matters.

Interim and final preventative detention orders

The Committee is of the view that preventative detention orders (PDOs) are inconsistent with the fundamental right to liberty and right not to be detained arbitrarily. The Committee is also of the view that where legislation provides for derogation from these rights, it should also provide safeguards to minimise the trespass on those rights. In this regard, the Committee notes that judicial oversight of the PDO regime in this Bill is an important safeguard.

Nonetheless, the Committee is of the view that this safeguard is weakened by other aspects of the legislation, including the low threshold test of "reasonable suspicion" for the making of a PDO.

The Committee seeks your advice on:

- (i) why the threshold for granting an interim and final PDO is "reasonable suspicion" and not the higher test of "reasonable belief";
- (ii) why the Bill does not prescribe a maximum number of PDOs that can be made in relation to the same person to prevent their being detained for an indefinite period; and
- (iii) the justification for setting 14 days, rather than a lesser period, as the maximum period a person may be detained under a PDO.

Prohibited contact orders

The Committee notes that prohibited contact orders impose significant restraints on a person's enjoyment of their fundamental rights.

The Committee also notes that the Bill provides that the detained person may ask the Court to revoke a prohibited contact order. However, the Committee also notes that the person may not be able to enforce that right as the Bill does not require them to be notified either of the making of the order or its contents, but expressly provides that they do not need to be so informed when they are arrested under the PDO to which the prohibited contact order relates.

The Committee seeks your advice as to:

- (iv) why the Bill does not provide for a detained person to be informed of a prohibited contact order.

Fair Trial: Right to a hearing & burden of proof in hearings before Supreme Court

The Committee notes that an interim PDO may be made without a hearing. The Committee also notes that the lack of a hearing process before a court for authorising any form of preventative detention significantly aggravates the trespass on the right to freedom from arbitrary detention and the right to a fair trial.

To provide greater protection against a possible trespass on rights caused by the lack of hearing, the Committee is of the view that the Bill should expressly provide that the Supreme Court must be satisfied that there are urgent circumstances warranting the granting of an interim PDO before it makes such an order.

The Committee also notes that the Bill does not stipulate the relevant burden or standard of proof to be applied by the Supreme Court in considering an application for a PDO. In particular, it does not define that the applicant bears the burden of proof. Given the serious consequences for a person who is subject to such an order, the Committee considers that the right to a fair trial would require that the standard of proof borne by the applicant should be the higher criminal standard of "beyond reasonable doubt".

The Committee seeks your advice as to why:

- (v) the Bill does not expressly provide that the Supreme Court must be satisfied that there are urgent circumstances warranting the granting of an interim PDO before it makes such an order; and
- (vi) the Bill does not expressly provide that the applicant bears the burden of proving beyond reasonable doubt that the making of a PDO is warranted.

Self Incrimination and the right to silence

The Committee notes that the privilege against self-incrimination is an important rule of law principle and a fundamental human right. The Committee also notes that the Bill does not protect this right against certain significant intrusions.

In this regard, the Committee seeks your advice as to why the Bill does not protect this right by:

- (vii) providing that any statements made by a detainee during preventative detention are inadmissible in subsequent proceedings; or
- (viii) requiring the detaining officer to caution a detainee that anything they do say may be used against them in legal proceedings; and
- (ix) expressly excluding questioning by non-police officers.

Right to legal representation & right to have a lawyer of one's own choosing

The Committee notes that the right to have legal counsel of one's own choosing is an important attribute of the right to a fair trial and a fundamental human right recognised under international law and the common law.

The Committee also notes that the Bill provides for a person detained under a PDO to have legal representation and to choose his or her own lawyer, subject to some significant restrictions. These restrictions trespass the right to have a lawyer of one's own choosing.

Having regard to the importance of this fundamental right, the Committee seeks your advice on the need for the Bill:

- (x) to restrict the matters on which a detained person may seek legal advice while detained under a PDO; and
- (xi) to monitor so closely all communications between the detained person and their lawyer, thereby undermining the right to legal representation and the protection of legal professional privilege.

The Committee also notes that the Bill can further abridge a person's right to choose their own lawyer by way of a prohibited contact order, which the Supreme Court may grant if satisfied that a relatively low test of - the "prohibited contact order will assist in achieving the purposes of the preventative detention order" - has been met.

The Committee seeks your advice as to why the Bill:

- (xii) does not provide for a rebuttable presumption against granting the prohibited contact order in relation to a lawyer that can be displaced if it can be shown that the that a nominated lawyer (who would be subject to the prohibited contact order) poses a *serious* security risk (ie, contact would increase the imminent risk of a terrorist act, or would lead to the destruction of evidence).

Legal Professional Privilege

The Committee notes that legal professional privilege is a common law right in Australia that has been acknowledged by the High Court to be a fundamental human right.

The Committee notes that the Bill trespasses on this right by prohibiting contact with a lawyer unless the police can effectively monitor the content and meaning of the communications between the detained person and their lawyer. This requirement also substantially diminishes the enjoyment by the detained person of their fundamental right to legal representation.

The Committee seeks your advice as to:

- (xiii) the need to monitor lawyer client communications in the manner prescribed by the Bill rather than in a manner that would better protect fundamental rights, such as that used in relation to material seized under a search warrant.

Strict Liability Offences

The Committee notes under proposed section 26ZC it is an offence for a person exercising authority over detained persons to contravene the obligation to treat them with humanity and with respect for human dignity. This provision carries a maximum penalty of 2 years imprisonment but does not appear to include a fault element.

While respect for human rights of detained persons is paramount, the Committee is of the view that the offence provision itself must respect the fundamental importance of the fair trial principle and avoid the prospect of punishing 'innocent' persons who lack sufficient blameworthiness.

The Committee seeks your advice as to why:

- (xiv) proposed section 26ZC does not expressly state the fault element for the offence under that section, especially given that it provides for a term of imprisonment upon conviction.

Rights of the Child

The Committee notes that proposed section 26E deals with the wrongful detention of a minor, stipulating that the police officer must release the person as soon as practicable.

Given the particular vulnerability of children, the Committee seeks your advice as to why:

- (xv) the Bill does not expressly provide that "as soon as practicable" refers to the ability of the child to be handed over to its parents or guardians and not to the needs of the police officer.

Right to compensation

The Committee seeks your advice on:

- (xvi) the practicability of providing a compensation regime for innocent persons who suffer damage to their liberty, reputation, family life or employment as a result of the exercise of a preventative detention order.

Yours sincerely



Allan Shearan MP
Chairman



ATTORNEY GENERAL

2006/CLRD0213
LRC 1638

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



15 MAY 2006

Dear Mr Shearan,

Terrorism (Police Powers) Amendment (Preventive Detention) Act 2005

Thank you for your letter dated 25 November 2005 regarding the *Terrorism (Police Powers) Amendment (Preventive Detention) Act 2005*.

The simple answer to many of the drafting issues raised in your letter is that NSW was obliged to implement a scheme that was based largely on the preventative detention scheme developed by the Commonwealth. This scheme arose from an agreement reached by Australian Leaders and the Council of Australian Governments meeting of 27 September 2005. Having said that, I believe that the Government has taken many steps to improve the basic scheme for implementation here in NSW.

I am happy to go through and answer your queries in order.

- (i) **Why the threshold of granting an interim and final PDO is reasonable suspicion and not a higher test of a reasonable belief**

This was an element derived from the Commonwealth scheme.

- (ii) **Why the Act does not prescribe a maximum number of PDOs that can be made in relation the same person to prevent their being detained for indefinite period**

I understand the Committee's concern that the scheme conceivably allows for "rolling warrants" amounting to indefinite detention without charge.

The aim of the preventive detention scheme is not to provide the ability for law enforcement agencies to keep a person in a constant state of preventive detention and s26K is designed to prevent "rolling warrants". It is, however, difficult to justify on policy grounds the complete prohibition on a second or subsequent order in relation to a particular person where the requisite test, set out in section 26D, is met. It would be an unsatisfactory situation if a person

went on to commit a terrorist act solely because there was a technical bar on seeking a further order despite the tests being satisfied.

There are a number of strong safeguards that will count against the use of "rolling warrants", they are:

- the fact that these orders will be overseen by the Supreme Court who will be monitoring carefully any possible abuse of process;
- the requirement that each application must contain details of previous applications and orders, allowing the Supreme Court to detect improper use; and
- most importantly, the fact that a person, who appears to be intimately involved in an imminent terrorist attack will be charged with a substantive offence rather than preventatively detained on a continuing basis.

(iii) The justification for setting 14 days, rather than a lesser period, as the maximum a person may be detained under a PDO

This was an element of the scheme agreed upon at COAG and implemented by all Australian States and Territories. The length of time was settled on operational police advice and by reference to the UK precedent.

(iv) Why the Act does not provide for a detained person to be informed of a prohibited contact order.

This was an element derived from the Commonwealth scheme.

The orders are designed to prevent suspected co-conspirators from conferring or tipping each other off. The secrecy of the order is designed to prevent a detained person from discerning the extent of police knowledge of the alleged planning and conspiracy to commit a terrorist act.

The orders will have a limited application as police will only need to seek a prohibited contact order against a person with whom the detained person is entitled to make contact under the scheme.

In some circumstances, therefore, a detained person will be able to deduce that a prohibited contact order has been made against a particular person, for example, if they are a family member or employee whom they are entitled to contact. If this were to happen, the Act rightly provides for the ability of the detained person to make an application for the revocation of the order.

The Government is of the view that the provision as drafted adequately balances competing policies.

(v) The Act does not expressly provide that the Supreme Court must be satisfied that there are urgent circumstances warranting the granting of an interim PDO before it makes such an order

Urgency is not an operative factor in these circumstances. The relevant considerations are set out in s26D.

- (vi) **The Act does not expressly provide that the applicant bears the burden of proof beyond reasonable doubt that the making of the PDO is warranted**

The Supreme Court may only make an order if satisfied of the requirements under s26D. The applicant in the proceedings bears the onus of proof and that onus of proof is reasonable suspicion.

- (vii) **Providing that any statements made by the detainee during preventive detention are inadmissible in subsequent proceedings**

Section 281 of the *Criminal Procedure Act 1986* governs the admissibility of admissions made by suspects.

- (viii) **Requiring the detaining officer to caution the detainee that anything they do say may be used against them in legal proceedings.**

Questioning is not permitted whilst being held in preventative detention. A person must be fully informed of the effect of the PDO (s26Z).

- (ix) **Expressly excluding questioning by non-police offices**

This was a formulation derived from the Commonwealth scheme. There is, however, absolutely no intention to allow non-police officers to question a person who has been preventatively detained in the circumstances where police officers have been specifically enjoined from doing so.

- (x) **To restrict the matters on which a detained person may seek legal advice, while detained under a PDO**

- (xi) **To monitor so closely all communications between the detained person and their lawyer, thereby undermining the right to legal representation and the protection of legal professional privilege**

- (xii) **Does not provide for a rebuttable presumption against granting the prohibited contact order in relation to a lawyer that can be displaced if it can be shown that a nominated lawyer (who would be subject to the prohibited contact order) poses a serious security risk (ie contact would increase in the imminent risk of a terrorist act, or would lead to the destruction of evidence).**

- (xiii) **The need to monitor lawyer client communications in the manner prescribed in the Bill rather than in a manner that would better protect fundamental rights, such as that used in relation to material seized under search warrant.**

The Act tries to balance two important principles the right of the detained person to have access to legal counsel, and the possibility that a detained person will hinder further investigations by tipping off persons still at large, arranging to have evidence hidden or destroyed, or urging others to harm or intimidate witnesses.

In attempting to reconcile these two principles the Act allows the detained person to have access to a lawyer but requires that such contact be monitored by police.

Police, however, are not free to simply listen in and do whatever they like with what they hear. A monitor is prohibited from publishing what they hear to anyone if the communication is for a legitimate purpose.

The penalty for violating this safeguard is a maximum of 5 years imprisonment. Legal client privilege is also specifically preserved.

(xiv) Section 26ZC does not expressly state the fault element for the offence under that section, especially given that it provides for a term of imprisonment upon conviction.

The offence is summary in nature. The Act clearly sets out the strict requirements of a person who has authority under the Act and any person who is detaining a suspect in these unusual conditions will be fully aware of their duties. Under these circumstances a strict liability offence is appropriate. This emphasises that the Act places a positive duty on a person to treat a person humanely.

(xv) The Act does not expressly provide that “as soon as practicable”, refers to the ability of the child to be handed over to its parents or guardians and not to the needs of the police officer.

The term “as soon as practicable” is a term familiar to NSW Police and is used a number of times in other detention schemes such as Part 9 of the *Law Enforcement Powers and Responsibilities Act 2002*.

Any police officer who attempts to interpret “as soon as practicable” in a way that allows them to artificially extend the detention of a juvenile will be exposing NSW Police to a suit for unlawful detention.

- (xvi) **The applicability of providing a compensation regime for innocent persons, who suffered damage to their liberty, reputation, family life or employment as a result of the exercise of preventive detention order.**

The Act places no bars on people seeking compensation from the State when they are of the view that they have been illegally or improperly subjected to preventative detention.

Yours sincerely



BOB DEBUS

Part Two – Regulations

SECTION A: REGULATIONS ABOUT WHICH THE COMMITTEE IS SEEKING FURTHER INFORMATION

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Electricity (Consumer Safety) Regulation 2006	03/02/06	537	28/04/06	
Health Records and Information Privacy Regulation 2006	10/03/06	1160	28/04/06	
Motor Accidents Compensation Regulation 2005	26/08/05	5609	28/04/06	
Photo Card Regulation 2005	09/12/05	10042	28/04/06	

Appendix 1: Index of Bills Reported on in 2006

	Digest Number
Air Transport Amendment Bill 2006	2
Appropriation (Budget Variations) Bill 2006	6
Careel Bay Protection Bill 2006*	2
Child Protection (International Measures) Bill 2006	2
Children and Young Persons (Care and Protection) Bill 2006	7
Civil Liability Amendment Bill 2006	7
Constitution Amendment (Governor) Bill 2006	7
Conveyancers Licensing Amendment Bill 2006	7
Courts Legislation Amendment Bill 2006	4
Crimes and Courts Legislation Amendment Bill 2005	1
Crimes Amendment (Murder of Police Officers) Bill 2006*	7
Crimes Amendment (Organised Car and Boat theft) Bill 2006	4
Crimes (Serious Sex Offenders) Bill 2006	5
Crimes (Sentencing Procedure) Amendment Bill 2006	5
Crimes (Sentencing Procedure) Amendment (Gang Leaders) Bill 2006*	3
Education Legislation Amendment (Staff) Bill 2006	6
Electricity Supply Amendment (Protection of Electricity Works) Bill 2006	6
Environmental Planning and Assessment Amendment Bill 2006	2
Environmental Planning and Assessment Amendment (Reserved Land Acquisition) Bill 2006	4
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	2
Firearms Amendment (Good Behaviour Bonds) Bill 2006*	2
Fisheries Management Amendment Bill 2006	2
Freedom of Information Amendment (Open Government-Disclosure of Contracts) Bill 2005	1
Independent Commission Against Corruption Amendment (Operations Review Committee) Bill 2006	5
Industrial Relations Amendment Bill 2006	3
James Hardie (Civil Liability) Bill 2005	1
James Hardie (Civil Penalty Compensation Release) Bill 2005	1
James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005	1
Judicial Officers Amendment Bill 2006	6
Jury Amendment (Verdicts) Bill 2006	5
Land Tax Management Amendment (Tax Threshold) Bill 2006	2

	Digest Number
Law Enforcement (Controlled Operations) Amendment Bill 2006	3
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	1
Legal Profession Amendment Bill 2006	5
Local Government Amendment (Miscellaneous) Bill 2006	6
Motor Accidents Compensation Amendment Bill 2006	3
Motor Accidents (Lifetime Care and Support) Bill 2006	3
Motor Vehicle Repairs (Anti-steering) Bill 2006*	4
National Parks and Wildlife (Adjustment of Areas) Bill 2006	2
Pharmacy Practice Bill 2006	7
Pipelines Amendment Bill 2006	7
Police Amendment (Death and Disability) Bill 2005	1
Protection of the Environment Operations Amendment (Waste Reduction) Bill 2006	3
Public Sector Employment Legislation Amendment Bill 2006	3
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	3
Security Industry Amendment (Patron Protection) Bill 2006*	7
Smoke-free Environment Amendment (Removal of Exemptions) Bill 2006*	4
State Property Authority Bill 2006	7
Summary Offences Amendment (Display of Spray Cans) Bill 2006	7
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	6
Valuation of land Amendment Bill 2006	7
Water Management Amendment (Water Property Rights Compensation) Bill 2006	5
Workers Compensation Legislation Amendment Bill 2006	4
Workers Compensation Legislation Amendment (Miscellaneous Provisions) Bill 2005	1

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

Bill	Minister/Member	Letter sent	Reply received	Digest 2005	Digest 2006
Commission for Children and Young People Amendment Bill 2005	Minister for Community Services	25/11/05		15	
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	11	1
Crimes Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05	12/12/05	11	1
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05	19/04/06	6	5
Crimes (Serious Sex Offenders) Bill 2006	Minister for Justice	28/04/06			5
Education Legislation Amendment (Staff) Bill 2006	Minister for Education and Training	09/05/06			6
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	8	1
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	Attorney General	25/11/05	16/05/06	15	7
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	Minister for Gaming and Racing	09/05/06			6
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	Minister for Transport	25/11/05 28/04/06	05/04/06	15	5
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05	28/11/05	13	1
Water Management Amendment Bill 2005	Minister for Natural Resources	25/11/05		15	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Careel Bay Protection Bill 2006*	R				
Crimes Amendment (Murder of Police Officers) Bill 2006*	R				
Crimes (Sentencing Procedure) Amendment Bill 2006	R				
Crimes (Serious Sex Offenders) Bill 2006	R, C				
Education Legislation Amendment (Staff) Bill 2006	R, C	R, C	R, C	R, C	R, C
Electricity Supply Amendment (Protection of Electricity Works) Bill 2006	R				
Environmental Planning and Assessment Amendment Bill 2006	R				
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	N				
Fisheries Management Amendment Bill 2006	R				
Jury Amendment (Verdicts) Bill 2006	R				
Law Enforcement (Controlled Operations) Amendment Bill 2006	R				
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	R				
Motor Accidents (Lifetime Care and Support) Bill 2006	R, C		R, C	R	R
Motor Accidents Compensation Amendment Bill 2006	R, C		R, C		
Motor Vehicles Repairs (Anti-steering) Bill 2006	R				
Pipelines Amendment Bill 2006			R		R
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	R				

Legislation Review Committee

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Security Industry Amendment (Patron Protection) Bill 2006*	R				
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006		R, C			

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2006

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2006
Centennial Park and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	29/04/05	19/01/06	1
Companion Animals Amendment (Penalty Notices) Regulation 2005	Minister for Local Government	12/09/05	21/12/05	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	Minister for Planning	12/09/05	24/12/06	3
Hunter Water (General) Regulation 2005	Minister for Utilities	04/11/05	09/01/06	1
Protection of the Environment Operations (Waste) Regulation 2005	Minister for the Environment	04/11/05	29/11/05	1
Stock Diseases (General) Amendment Regulation 2005	Minister for Primary Industries	12/09/05	07/02/06	1
Workers Compensation Amendment (Advertising) Regulation 2005	Minister for Commerce	12/09/05	28/11/05	1