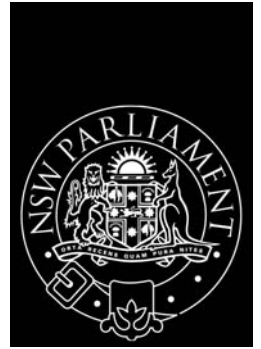


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

ANNUAL REVIEW

July 2006-June 2007

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly. Legislation Review Committee.

Annual Report July 2006-June 2007, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW]: The Committee, 2008, vi, 17 p. ; 30cm

Chair: Mr Allan Shearan MP

24 June 2008

ISBN 978-1-921012-76-1

1. Legislation Review Committee—New South Wales

2. Legislation Review Committee – Annual Report July 2006-June 2007 (2008)

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Report; No. 2.

Table of Contents

Membership & Staff (1 July 2006 to 24 March 2007)	iv
Membership & Staff (21 June 2007 to 30 June 2007)	v
CHAPTER ONE - INTRODUCTION	1
Committee's functions and procedure	1
CHAPTER TWO - SCRUTINY OF BILLS	3
Bills considered	3
"Rights and liberties"	3
Issues arising in Bills considered	3
CHAPTER THREE - SCRUTINY OF REGULATIONS	9
Regulations considered	9
Issues arising in Regulations considered	9
CHAPTER FOUR - OPERATIONAL ISSUES	11
Membership of Committee	11
Operational Issues	11
CHAPTER FIVE - STATISTICS AND OUTCOMES	13
CHAPTER SIX - OTHER ACTIVITIES OF THE COMMITTEE	15
Strict and Absolute Liability Offences: Responses to the Discussion Paper	15
CHAPTER SEVEN - CONCLUSION	17

Membership & Staff (1 July 2006 to 24 March 2007)

Chair Allan Shearan MP, Member for Londonderry

Vice Chair Virginia Judge MP, Member for Strathfield

Members Shelley Hancock MP, Member for South Coast

Robyn Parker MLC

Paul Pearce MP, Member for Coogee

Penny Sharpe MLC

Russell Turner MP, Member for Orange

Peter Wong MLC

Staff Russell Keith, Committee Manager

Indira Rosenthal, Senior Committee Officer

Mel Keenan, Senior Committee Officer

Carly Sheen, Committee Officer

Melanie Carmeci, Assistant Committee Officer

Contact Details Legislation Review Committee

Legislative Assembly

Parliament House

Macquarie Street

Sydney NSW 2000

Telephone 02 9230 2899

Facsimile 02 9230 3052

E-mail legislation.review@parliament.nsw.gov.au

URL www.parliament.nsw.gov.au

Membership & Staff (21 June 2007 to 30 June 2007)

Chair	Allan Shearan MP, Member for Londonderry
Vice Chair	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
	Vacant, Committee Officer
	Vacant, Assistant Committee Officer
Contact Details	Legislation Review Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 3418
Facsimile	02 9230 3052
E-mail	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au

Chair's Forward

The Legislation Review Committee has the important function of informing Members of Parliament of the human rights implications of Bills and reviewing new Regulations on any ground, including their impacts on personal rights and on business. This Report highlights the work of the Committee over the 2006-07 financial year. The Committee has a demanding workload, and has reported to Parliament on 104 Bills and 9 Regulations, considered a further 186 Regulations (including 10 proposed postponements of repeal of Regulations), and published 10 editions of the *Legislation Review Digest*.

Important achievements of the Committee included receiving public submissions in relation to the Discussion Paper on Strict and Absolute Liability, and the publication of the Final Report in October 2006 in response to the submissions. Submissions closed in August 2006 with respect to the Discussion Paper on Strict and Absolute Liability. There were 22 public submissions published by the Committee in relation this discussion paper. The discussion paper is a chance for the Committee to receive input from government and the community in relation to issues of strict and absolute liability that arise repeatedly in its scrutiny of Bills. This assists the Committee in the development of consistent and well-founded principles by which to test legislative proposals.

During this reporting period, the 53rd Parliament concluded. The General Election was held on 24 March 2007 and the 54th Parliament commenced on 8 May 2007. As a consequence, there were some changes to the membership and Deputy Chair of the Committee and its secretariat staff. With the commencement of the 54th Parliament, the Committee held its first meeting on 26 June 2007.

One of the challenges the Committee is still continually facing is the timeframe within which it considers Bills. The limitation of the five calendar day adjournment of the second reading debate (now referred to as Agreement in Principle in the Legislative Assembly) presents difficulties at times for detailed consideration of complex legislation, particularly when a large number of Bills are introduced in the same week. The Committee remains of the view that providing for a longer adjournment period for the second reading (or Agreement in Principle) debate would greatly assist it in fulfilling its scrutiny function under the Act.

The Committee appreciates the responses from Ministers and their staff to its correspondence and inquiries, and I would like to thank Ministers for their assistance. I also thank Members for their constructive comments on the *Legislation Review Digests*.

I would like to, finally, express my appreciation of the other Committee members, both current and former, and the Secretariat for their commitment and hard work.



Allan Shearan MP
Chair

Chapter One - Introduction

- 1.1 The Legislation Review Committee considers all Bills introduced into Parliament and all new Regulations in accordance with s 8A and s 9 of the *Legislation Review Act 1987* (the Act).
- 1.2 This Report briefly:
- describes the work of the Committee over the course of the last financial year;
 - highlights the main issues that have arisen in the Committee's consideration of Bills and Regulations;
 - identifies certain procedural issues; and
 - notes some issues for future consideration.

Committee's functions and procedure

- 1.3 The Committee has the functions of reviewing all Bills introduced into Parliament and all Regulations subject to disallowance.
- 1.4 The Committee's function with respect to Bills is set out in s 8A of the Act. Section 8A(1)(b) requires the Committee to report to Parliament on whether a Bill:
- (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.
- 1.5 The Committee's functions with respect to Regulations are set out in s 9 of the Act. Under s 9(1), the Committee is to consider whether the special attention of Parliament should be brought to a Regulation on any ground, including that:
- (i) the Regulation trespasses unduly on personal rights and liberties,
 - (ii) the Regulation may have an adverse impact on the business community,
 - (iii) the Regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) 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) the objective of the Regulation could have been achieved by alternative and more effective means,
 - (vi) the Regulation duplicates, overlaps or conflicts with any other Regulation or Act,
 - (vii) the form or intention of the Regulation calls for elucidation, or
 - (viii) 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.

Further functions of the Committee under s 9 are to report on the systematic review of Regulations from time to time, and on any questions on Regulations referred to the Committee by a Minister. The Committee also considers proposals to postpone the automatic repeal of Regulations under the *Subordinate Legislation Act 1989*.

Scrutiny of Bills

- 1.6 The Committee reports on its consideration of Bills in its *Digest*. The *Digest* is normally tabled out of session on the Friday or Monday afternoon before a sitting week, or in the House on the Tuesday afternoon of a second consecutive sitting week. This timing ensures that Members have the *Digest* prior to the resumption of the second reading or Agreement in Principle debate (following the adjournment after the second reading or Agreement in Principle speech).
- 1.7 The Committee's report on any given Bill is based on the Bill itself, the Minister or Private Member's second reading speech, and, where necessary, on expert legal advice. Where it requires further clarification of any issue regarding a Bill, the Committee writes to the mover of the Bill. This correspondence is published in the *Digest*.
- 1.8 The Secretariat to the Committee advises the Committee in its consideration of most Bills and Regulations. The Committee also retains a panel of expert legal advisers to assist it further in the preparation of its reports to Parliament on Bills and complex areas of law. Over the last 12 months, the Committee has sought advice from these experts in relation to two Bills.

Scrutiny of Regulations

- 1.9 The wider terms of reference and longer timeframe for Regulations (15 sitting days instead of 5 calendar days) leads the Committee to adopt different procedures for its Regulation scrutiny function.
- 1.10 Rather than flagging issues for debate in the House, the Committee usually enters into correspondence with the responsible Minister to seek further information regarding any concerns the Committee may have on a Regulation. If a Regulation requires further investigation, the Committee may seek submissions from, and hold hearings with, interested parties.
- 1.11 Once the Committee has concluded its consideration of a Regulation, it publishes correspondence with the Minister in its *Digest*. If the Committee has significant continuing concerns, it may also include a report in the *Digest* drawing the Regulation to the attention of Parliament.
- 1.12 The Committee publishes any unanswered correspondence on Regulations after 3 months. The Committee thanks Ministers for their timely responses but notes that there were two Regulations ¹ which the Committee has not received a response.

¹ *Native Vegetation Amendment (Private Native Forestry) Regulation (No 2) 2006* and *Road Transport (General) Regulation 2005*.

Chapter Two - Scrutiny of Bills

Bills considered

2.1 In the last 12 months with the conclusion of the 53rd Parliament and the commencement of the 54th Parliament on 8 May 2007, the Committee published 10 *Digests* reporting on 104 Bills. In the previous 2005-06 reporting period, the Committee published 16 *Digests* reporting on 128 Bills.

“Rights and liberties”

2.2 The scrutiny criteria in s 8A(1)(b) of the Act can be divided into two broad types:

- (a) scrutiny as to how the Bill could adversely affect personal rights and liberties; and
- (b) scrutiny of provisions regarding the delegation and exercise of legislative power.

2.3 In the absence of a definition of “rights and liberties” in the Act, and in the absence of any other legislative statement as to the content of rights and liberties (eg, a Bill of Rights), the Committee takes into account;

- rights protected under the common law (eg, right to silence), as developed by the courts;
- rights protected under New South Wales and Commonwealth statute law (eg, *Anti Discrimination Act 1977* (NSW), *Racial Discrimination Act 1975* (Cth));
- rights protected under the Commonwealth *Constitution*;
- rights protected under international law, especially as set out in international human rights treaties ratified by Australia (eg, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CROC) and the Convention Against Torture (CAT));
- the decisions and comments of the principal international bodies monitoring these international human rights treaties (eg, UN Committees on Human Rights, Economic, Social and Cultural Rights, Women’s Rights, Children’s Rights and the Committee Against Torture);
- rights recognised in other comparable jurisdictions (eg, under the European Convention on Human Rights, South African and Canadian constitutions and the UK *Human Rights Act 1998*); and
- academic and public debate on the content of “rights”.

2.4 Some rights recognised under international law, such as the privilege against self-incrimination, have longstanding traditions, pre-dating even the English common law. Other rights are new to Australian law, and their scope and application are developing along with changes in society and technology, for example, the personal right to privacy.

Issues arising in Bills considered

2.5 Thirty-one of the 104 Bills reported on between 1 July 2006 and 30 June 2007 raised issues of the Committee’s consideration under one or more of the grounds set out in

s 8A of the Act. This represents almost 30% of the Bills commented on had raised issues under s 8A of the Act.²

2.6 The issues that arise most frequently in the Committee's reports are set out below.

Trespassing on personal rights and liberties (*Legislation Review Act 1987*, s 8A(1)(b)(i))

Fair trial

2.7 The Committee considered 10 Bills (compared to 10 Bills in the previous year of 2005-06) that raised fair trial issues, including the right to legal representation, prejudice and the media, equality before the law, self incrimination or the right to silence, and trial without delay.

2.8 Under the ICCPR and the regional human rights instruments, these rights are recognised as fundamental human rights, and are widely recognised as vital to the delivery of a fair trial.³ These and other fair trial rights are also recognised under the common law.

Retrospectivity

2.9 Retrospective application of legislation is the second of the most common issues identified by the Committee in this reporting period. Retrospectivity was the most common issue to be considered in the previous reporting period of 2005-06. Ten per cent of the total of 128 Bills had considered this issue during the previous period of 2005-05 as compared to about 6% of all 104 Bills considered during this reporting period of 2006-07⁴.

2.10 The Committee considers that any retrospective provision that adversely affects a person trespasses on that person's right to be able to rely on the law at any given time. This is most serious when a law seeks to create new criminal offences with retroactive effect. Such legislation is contrary to a fundamental human right recognised in the ICCPR and in the various regional human rights conventions.⁵ Article 15 of the ICCPR provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

2.11 Under the European Convention of Human Rights (ECHR), this right, which is in identical terms to Article 15, is considered so fundamental that it is one of the very few rights under that Convention that is non-derogable. This means that there are *no* circumstances in which governments are permitted to withdraw protection of this right under that Convention.

2.12 Retrospective legislation with which the Committee raised concerns included legislation that:

² In the 2005-06 reporting period, 51 of the 128 Bills had raised issues for the Committee's consideration. This represents almost 40% of the reported Bills had raised issues under s 8A of the Act in the previous reporting year of 2005-06.

³ In relation to equality before the law, see Articles 3, 16 and 26 of the ICCPR. In relation to undue delay in criminal proceedings see Articles 14(5) of the ICCPR; and in relation to right to appeal a criminal conviction see Article 14(3)(c) of the ICCPR.

⁴ This issue was considered in 6 of the 104 Bills considered from 1 July 2006 until 30 June 2007.

⁵ See European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR), Article 7; African (Banjul) Charter On Human And Peoples' Rights 1981 (AfCHR), Article 7; and American Convention on Human Rights 1969 (AmCHR), Article 9.

- revoked a declaration duly made under the law (*Channel 7 Former Epping Site Protection Bill 2006*);⁶
- deemed the applications of amendments to the operation of the Act to persons who would not otherwise be subject to the Act's restrictions relating to damages (*Crimes and Courts Legislation Amendment Bill 2006*);⁷
- revoked a declaration duly made under the law (*Avalon Police Station (Public Ownership) Bill 2006*);⁸
- suspended or removed a pension entitlement that would have otherwise flowed to a person who ceased to be a member of Parliament at a time when criminal proceedings were pending (*Parliamentary Contributory Superannuation Amendment (Criminal Charges and Convictions) Bill 2006*);⁹
- removed the right to compensation of damages to the person who has been in custody if it has been found that there has been unlawful discrimination against that person on 29 May 2007 prior to the Bill receiving the Royal Assent (*Anti-Discrimination Amendment (Offender Compensation) Bill 2007*)¹⁰; and
- extended the powers of the Registrar to pending proceedings and exempted the Tribunal from providing formal written decisions in respect of certain decisions already made by the Court (*Guardianship Amendment Bill 2007*)¹¹.

Excessive Punishment

2.13 The Committee considered five Bills (as compared to three Bills in the previous year of 2005-06) that raised issues of excessive punishment. These included:

- presumption against bail for certain offences committed during the APEC period (*APEC Meeting (Police Powers) Bill 2007*);
- length of initial detention and review of dependency certificate (*Drug and Alcohol Treatment Bill 2007*);
- provisions with regard to community treatment orders (*Mental Health Bill 2007*);
- detaining persons who have not been charged and excluding their rights to communicate with or visits by officials with regard to the health, safety and well-being of detainees (*Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007*);
- doubling of penalty units (*War Memorial Legislation Amendment (Increased Penalties) Bill 2007*).

⁶ *Digest* No. 10 of 2006

⁷ *Digest* No. 16 of 2006

⁸ *Digest* No. 17 of 2006

⁹ *Digest* No. 17 of 2006

¹⁰ *Digest* No. 1 of 2007

¹¹ *Digest* No. 1 of 2007

Privacy

2.14 The Committee commented on the right to privacy in relation to four Bills during the reporting period.¹² During the last reporting period of 2005-06, the Committee also commented on four Bills with regard to the right to privacy.

Strict liability offences

2.15 The creation of strict liability offences still constitutes one of the most common issues identified by the Committee during the reporting period. Strict liability offences were the second most common issue to be commented by the Committee in the last reporting period of 2005-06. This issue was considered by the Committee in three Bills (as compared to seven Bills of the previous year).¹³

2.16 A “strict liability” offence does not require the prosecutor to prove a fault element. A person can commit such an offence without having meant to do so and whether or not they had any criminal intent.¹⁴ Such an offence is often imposed for regulatory offences where there is a need to ensure persons take all reasonable steps to avoid the offence, eg, speeding or pollution offences.

2.17 Under the common law, it is presumed that the prosecution must prove fault (eg, intention, recklessness or negligence) in relation to the physical elements of a crime. As statutes may displace this presumption, it is a matter of interpretation whether the prosecution must prove fault if it is not so explicitly provided.

2.18 In its reports, the Committee has repeatedly expressed the view that strict liability should:

- be imposed only after careful consideration of all other options;
- be subject to defences wherever possible where contravention appears reasonable; and
- have only limited monetary penalties.

2.19 To assist its consideration of Bills that raise this issue, the Committee released a discussion paper on strict liability for public comment and as a result, the Final Report was published in October 2006 in response to the submissions received.

Reversal of Onus of Proof

2.20 The Committee commented on these issues, in relation to three Bills during the reporting period.¹⁵

2.21 In its comments on these Bills, the Committee stated its view that the principle that the prosecutor bears the onus of proving beyond reasonable doubt all the elements of a criminal offence against an accused person, consistent with the presumption of innocence, is a key principle of the Australian criminal justice system and a fundamental human right.¹⁶

¹² *Crimes Legislation Amendment (Gangs) Bill 2006; Parliamentary Electorates and Elections Amendment Bill 2006; APEC Meeting (Police Powers) Bill 2007; Drug and Alcohol Treatment Bill 2007.*

¹³ *Crimes Legislation Amendment (Gangs) Bill 2006; Crimes Amendment (Apprehended Violence) Bill 2006; APEC Meeting (Police Powers) Bill 2007.*

¹⁴ Section 6.1 of the Commonwealth *Criminal Code* defines strict liability offences.

¹⁵ *Crimes and Courts Legislation Amendment Bill 2006; APEC Meeting (Police Powers) Bill 2007; Crimes Legislation Amendment (Mobile Phones in Places of Detention) Bill 2007.*

¹⁶ See for example, article 11(1), Universal Declaration of Human Rights and Article 14(2) of the ICCPR, to which Australia became a party in 1980. Also, see Article 6(2) of the ECHR.

Search or Seizure or Entry Without Warrant

2.22 The Committee commented on these issues, in relation to three Bills during the reporting period.¹⁷

2.23 In its comments on these Bills, the Committee stated its concern that these could have the effect of unduly trespassing on individual rights and liberties such as rights to privacy or to property.

Other issues regarding trespass of rights and liberties

2.24 Other rights issues on which the Committee commented during the reporting period included:

- denial of compensation [2 Bills];¹⁸
- procedural fairness [2 Bills];¹⁹
- the rule of law [2 Bills];²⁰
- self incrimination / right to silence [1 Bill];²¹
- oppressive official powers [1 Bill];²²
- double jeopardy rule [1 Bill];²³
- right to self determination [1 Bill];²⁴
- right to life [1 Bill];²⁵ and
- right to peaceful assembly [1 Bill].²⁶

Insufficiently defined administrative powers (Legislation Review Act 1987, s 8A(1)(b)(ii))

2.25 The Committee commented on four Bills regarding insufficiently defined administrative powers.²⁷ This is compared to two Bills that were commented on by the Committee in the previous reporting year of 2005-06.

Non-reviewable decisions (Legislation Review Act 1987, s 8A(1)(b)(iii))

2.26 The Committee commented on two Bills with regard to non-reviewable decisions.²⁸ This contrasted with the previous reporting period of 2005-06 where the Committee commented on a total of ten Bills either removing or modifying judicial review rights or which excluded merits review.

¹⁷ APEC Meeting (Police Powers) Bill 2007; Drug and Alcohol Treatment Bill 2007; Mental Health Bill 2007.

¹⁸ Crimes (Appeal And Review) Amendment (DNA Review Panel) Bill 2006; Anti-Discrimination Amendment (Offender Compensation) Bill 2007.

¹⁹ Community Protection (Closure of Illegal Brothels) Bill 2006; Companion Animals Amendment Bill 2006.

²⁰ Crimes Legislation Amendment (Gangs) Bill 2006; Mental Health Bill 2007.

²¹ Mental Health Bill 2007.

²² Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007.

²³ Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006.

²⁴ Guardianship Amendment Bill 2007.

²⁵ Human Cloning and Other Prohibited Practices Amendment Bill 2007.

²⁶ Crimes Legislation Amendment (Gangs) Bill 2006.

²⁷ Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006; and Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006 (Digest No. 13 of 2006); Quarantine Station Preservation Trust Bill 2006 (Digest No. 15 of 2006); Mental Health Bill 2006 (Digest No. 1 of 2007).

²⁸ APEC Meeting (Police Powers) Bill 2007; Mental Health Bill 2007 (Digest No. 1 of 2007).

Delegation & Parliamentary scrutiny of legislative power (*Legislation Review Act 1987*, s 8A(1)(b)(iv & v))

2.27 The Committee commented on the following delegations of legislative power:

- so-called “Henry VIII” clauses (which allow an Act to be amended by Regulation) [1 Bill ²⁹ – the previous year of 2005-06 also only commented on 1 Bill];
- process of review and appeal to be established by regulation rather than in the primary legislation [1 Bill]; ³⁰
- allowing the Governor to terminate the operation of a part of legislation under proclamation [1 Bill]; ³¹
- providing for matters set out in an Act to be dealt with by ministerial guidelines rather than in the Act [1 Bill]; ³²
- Minister to make the rules which are central to the operation of the scheme [1 Bill]; ³³
- other matters which should be regulated by Parliament, such as class of persons to which an Act is to apply or not apply [3 Bills ³⁴ - the previous year of 2005-06 commented on 2 Bills]; and
- commencement on proclamation rather than on assent [3 Bills]. ³⁵

²⁹ *Terrorism (Police Powers) Amendment (Preventative Detention Orders) Bill 2007 (Digest No. 1 of 2007).*

³⁰ *Police Amendment (Police Promotions) Bill 2006 (Digest No. 10 of 2006).*

³¹ *Electricity Supply Amendment (Greenhouse Gas Abatement Scheme) Bill 2006 (Digest No. 15 of 2006).*

³² *Education Legislation Amendment Bill 2006 (Digest No. 16 of 2006).*

³³ *Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006 (Digest No. 9 of 2006).*

³⁴ *Transport Administration Amendment (Travel Concession) Bill 2006 (Digest No. 9 of 2006); Drug and Alcohol Treatment Bill 2007; Mental Health Bill 2007 (Digest No. 1 of 2007).*

³⁵ *Criminal Procedure Amendment (Vulnerable Persons) Bill 2007; Guardianship Amendment Bill 2007; Statute Law (Miscellaneous Provisions) Bill 2007 (Digest No. 1 of 2007).*

Chapter Three - Scrutiny of Regulations

Regulations considered

- 3.1 During this reporting period (including the conclusion of the 53rd Parliament and the commencement of the 54th Parliament on 8 May 2007), the Committee considered 195 Regulations.³⁶ Of these, the Committee took follow-up action on 19 Regulations (including 10 proposed postponements of the repeal of Regulations). During the period, such action included writing to the responsible Minister seeking clarification or explanation of the issues of concern. All correspondence was subsequently published in the *Digest*.
- 3.2 The Committee did not recommend the disallowance of any Regulation. However, the Committee did draw the special attention of Parliament to one Regulation during the reporting period.³⁷

Issues arising in Regulations considered

3.3 Issues which the Committee raised in relation to Regulations included:

- not within the general objects of the legislation or contrary to the intent and spirit of the legislation under which the regulation was made (2 Regulations)³⁸,
- Undue trespass on personal rights and liberties – including penalty in excess of the gravity of the offence (1 Regulation)³⁹; access to justice or discrimination (1 Regulation)⁴⁰; compensation rights (2 Regulations)⁴¹; privacy issues (2 Regulations)⁴²;
- costings of regulation or cost benefit analysis (5 Regulations);⁴³
- appeal rights (1 Regulation);⁴⁴

³⁶ This is compared with the previous reporting period where the Committee considered 397 Regulations.

³⁷ *Environmental Planning and Assessment Amendment (Designated Development) Regulation 2007* (*Digest* No. 1 of 2007, pp. 95 – 99).

³⁸ *Gaming Machine Amendment (Payment of Prize Money) Regulation 2006* - see correspondence about this Regulation and the Minister's reply in *Digest* No. 14 of 2006, pp 14 – 16; *Environmental Planning and Assessment Amendment (Designated Development) Regulation 2007* in *Digest* No. 1 of 2007, pp 95 – 99.

³⁹ *Photo Card Regulation 2005* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp 44 – 46.

⁴⁰ *Photo Card Regulation 2005* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp 44 – 46.

⁴¹ *Electricity (Consumer Safety) Regulation 2006* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp.29 - 31; *Motor Accidents Compensation Regulation 2005* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp. 35 – 43.

⁴² *Health Records and Information Privacy Regulation 2006* - see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp. 32 - 34; *Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003* - see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp.49 - 50.

⁴³ *Motor Accidents Compensation Regulation 2005* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp.35 - 43; *Photo Card Regulation 2005* and *Photo Card Amendment (Fee and Penalty Notice Offences) Regulation 2006* – see correspondence about these Regulations and the Minister's replies in *Digest* No. 9 of 2006, pp.44 – 48; *Gaming Machine Amendment (Payment of Prize Money) Regulation 2006* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 14 of 2006, pp.14 – 16; *Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 16 of 2006, pp.45 – 48.

- objective of the Regulation could have been achieved by alternative and more effective means (3 Regulations).⁴⁵

3.4 Some of the comments made by the Committee in relation to these issues echoed comments made on the same issues in the Committee's consideration of Bills, for example in relation to the penalty in excess of the gravity of the offence; rights to compensation; privacy rights and appeal rights.

⁴⁴ *Electricity (Consumer Safety) Regulation 2006* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 9 of 2006, pp.29 – 31.

⁴⁵ *Conveyancing (Sale of Land) Amendment (Smoke Alarms) Regulation 2006* – see correspondence about this Regulation and the Minister's reply in *Digest* No. 16 of 2006, pp 45 – 48; *Environmental Planning and Assessment Amendment (Designated Development) Regulation 2007* in *Digest* No. 1 of 2007, pp 95 – 99.

Chapter Four - Operational issues

Membership of Committee

- 4.1 During this reporting year, the composition of the Committee changed as follows.
- 4.2 During the 53rd Parliament and up to March 2007 when the General Election was held on 24 March 2007, Mr Allan Shearan MP was Chair. Ms Virginia Judge MP was Deputy Chair. The other members included Ms Shelley Hancock MP; the Hon Robyn Parker MLC; Mr Paul Pearce MP; the Hon Penny Sharpe MLC; Mr Russell Turner MP; and the Hon Peter Wong MLC.
- 4.3 During the 54th Parliament, which commenced on 8 May 2007, the following members were appointed to the Committee on 21 June 2007. Mr Allan Shearan MP was elected Chair and Mr Paul Pearce MP was elected Deputy Chair on 26 June 2007. The other members included the Hon Amanda Fazio MLC; Ms Judy Hopwood MP; Ms Lylea McMahon MP; the Hon Roy Smith MLC; and Mr Russell Turner MP.

Operational Issues

Time allowed for consideration of Bills

- 4.4 One of the continuing significant challenges the Committee remains faced with is the timeframe within which it can consider Bills.⁴⁶
- 4.5 The Legislative Assembly's *Standing Order 198(11)* and the Legislative Council's *Standing Order 137(3)* require only a 5 clear day adjournment of the debate after the mover's second reading speech or agreement in principle speech. The five-day period includes weekends.
- 4.6 The Committee tables its *Digests* at or before the commencement of the Tuesday sitting in order to allow its reports on Bills to be available to Members in time for the second reading debate. To meet the deadline, briefing papers on Bills for meetings need to be completed by Monday. This leaves the Committee with little time for full consideration of Bills, especially in consecutive sitting weeks.
- 4.7 Other Australian Parliaments follow a different procedure. As previously reported, the Queensland Parliament extended its second reading adjournment period from 6 to 11 sitting days after a 1998 report from its Bills scrutiny committee indicating that the six day period was not workable.⁴⁷ In Victoria, debate on Bills introduced into the Legislative Assembly is usually adjourned for two weeks. This is also the general practice in the Victorian Legislative Council.⁴⁸ The practice of the Federal Parliament is to adjourn Bills to the next period of sittings, which is usually one or two months later.
- 4.8 In the United Kingdom, the practice is to have at least two weekends between printing and second reading. In New Zealand, the practice is to adjourn Bills for 6

⁴⁶ This issue has also been raised by the Committee in Legislation Review Committee, *Operation, Issue and Future Directions September 2003 - June 2004*, Report No. 1, 24 June 2004, p 8; Legislation Review Committee *Annual Review July 2004 - June 2005*, Report No. 3, 13 September 2005, p 15; and Legislation Review Committee *Annual Review July 2005 - June 2006*, Report No. 5, 29 August 2006.

⁴⁷ Queensland Scrutiny of Bills Committee, *The scrutiny of Bills within a restrictive timetable*, Report No. 7, tabled 18 March 1998, www.parliament.qld.gov.au/view/committees/documents/SLC/reports/slcr07.pdf.

⁴⁸ See Victorian Scrutiny of Acts and Regulations Committee, www.parliament.vic.gov.au/sarc/role.htm.

months. These jurisdictions also provide for expedited procedures when a Bill needs to be passed urgently.

- 4.9 The Committee remains of the view that amending Legislative Assembly *Standing Order 198* and Legislative Council *Standing Order 137*, or sessional orders, to provide for a longer adjournment period for the second reading or agreement in principle debate would greatly assist the Committee in fulfilling its scrutiny function under the Act. It would also assist Members, who would benefit from the longer period in which to consider Bills, and the more detailed consideration the Committee would be able to give to Bills in its reports to Parliament.

Protective disallowance

- 4.10 Under s 9 of the Act, the Committee considers Regulations while they are subject to disallowance. Regulations are subject to disallowance in each House for 15 sitting days after the Regulation is tabled in that House. If a Notice of Motion to Disallow a Regulation is given during that time, the 15-day period is extended until the notice of motion is dealt with by the House or withdrawn. As a result, a Notice of Motion to Disallow a Regulation can be used as a device to extend the disallowance period. This is referred to as a protective notice of motion as it protects the House's power to disallow a Regulation beyond the initial 15-day period.
- 4.11 When considering Regulations, the 15-day period can be quite arbitrary. As previously reported, it means that the Committee has the least time for considering Regulations when the Parliament is sitting frequently as this is also the time when the Committee is most occupied with the consideration of Bills.
- 4.12 Section 9 of the Act was amended by the *Statute Law Miscellaneous Provisions Act 2005*, which received the Royal Assent on 1 July 2005. This amendment clarifies that the Committee may consider and make reports to Parliament on a Regulation that has ceased to be subject to disallowance if the Committee has, during the disallowance period, resolved to review and report on the Regulation.⁴⁹ This clarification removes the need for a protective Notice of Motion to Disallow a Regulation merely to extend the time for which the Committee may collect evidence on the Regulation. The Committee did not request any Member to give a Notice of Motion to Disallow a Regulation during the reporting period.⁵⁰

⁴⁹ The Committee had recommended an amendment to this effect in its report *Operation, Issues and Future Directions September 2003 - June 2004*, Report No. 1, 24 June 2004, pp 9-10. The Committee's correspondence with the then-Premier in relation to the review of Regulations was published in *Digest* No. 11 of 2004, pp 41- 48.

⁵⁰ The Committee also did not request any Member to give a Notice of Motion to Disallow a regulation during the previous reporting period of 2005-06.

Chapter Five - Statistics And Outcomes

- 5.1 The following statistics relate to the Committee during the 2006-07 reporting period.
- 5.2 During the reporting period, the Committee:
- met 11 times; ⁵¹
 - reported on 104 Bills in 10 tabled *Legislation Review Digests*; ⁵²
 - commented on 31 Bills under the criteria in s 8A of the *Legislation Review Act 1987*; ⁵³
 - written to Ministers or Members for clarification or justification of issues that relate to the s 8A criteria in relation to 14 Bills; ⁵⁴
 - referred 55 issues in 31 Bills that relate to s 8A criteria to Parliament for its consideration; ⁵⁵ and
 - had its *Digest* reports referred to 33 times by Members in the course of Parliamentary debate in relation to 22 Bills out of 31 Bills which have been commented on by the Committee that had raised issues relating to s 8A criteria. ⁵⁶
- 5.3 The Committee:
- considered 195 Regulations subject to disallowance, including 9 Regulations that were the subject of detailed analysis; ⁵⁷
 - considered 10 proposed postponements of the automatic repeal of a Regulation; ⁵⁸ and
 - published correspondence relating to 8 Regulations raising issues under s 9 of the Act. ⁵⁹
- 5.4 The function of the Committee is to assist the Parliament's consideration of Bills and Regulations in the terms set out in s 8A and s 9 of the Act. Indicators of the Committee's effectiveness include the influence the Committee has on debate and the changes to Bills, Regulations or administrative practices that result from the

⁵¹ This is compared to the Committee having met 17 times in the previous reporting period of 2005-06. It is to be noted that during this reporting period, the 53rd Parliament concluded and the General Election was held on 24 March 2007, and the 54th Parliament commenced on 8 May 2007. The members of the Committee were not appointed until 21 June 2007 with the first meeting held on 26 June 2007.

⁵² The Committee reported on 128 Bills in 16 tabled *Digests* during the previous reporting year of 2005-06.

⁵³ The Committee commented on 51 Bills under the criteria in s 8A of the Act during the previous reporting year.

⁵⁴ The previous reporting year of 2005-06 showed that the Committee had written to Ministers or Members for clarification of issues that relate to the s 8A criteria in relation to 20 Bills.

⁵⁵ The Committee had referred 77 issues in 39 Bills to Parliament for its consideration in the previous reporting year.

⁵⁶ This is compared to the last reporting year of 2005-06 when the *Digest* reports had been referred to 71 times by Members in the course of Parliamentary debate in relation to 33 Bills.

⁵⁷ The previous reporting year showed that the Committee considered 397 Regulations subject to disallowance including 73 Regulations that were the subject of detailed analysis.

⁵⁸ The Committee considered 14 proposed postponements of the automatic repeal of a Regulation in the previous reporting period.

⁵⁹ The Committee had published 14 Regulations raising issues under s 9 of the Act in the previous reporting period of 2005-06.

Committee's reports and correspondence. However, the effectiveness of the Committee rests primarily on the extent to which it encourages the detailed consideration of the issues under its terms of reference in the preparation of Bills and Regulations.

- 5.5 In the reporting period, Members used the Committee's *Digests* in a variety of ways. With respect to some Bills, Members referred to issues of concern as reported in the *Digest* and requested the sponsoring Minister or Member to answer those concerns in debate.⁶⁰
- 5.6 One Bill was amended in the Legislative Assembly partly in response to the Committee's report and was passed, as amended.⁶¹

⁶⁰ See, for example, comments made by Mr Malcolm Kerr MP on the *Crimes Legislation Amendment (Gangs) Bill 2006*, Legislative Assembly *Hansard*, 6 September 2006. See also response made by Mr Bryce Gaudry MP, on the *Crimes and Courts Legislation Amendment Bill 2006*, Legislative Assembly *Hansard*, 15 November 2006. See response made by the Hon John Della Bosca MLC, on the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006* and the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006*, Legislative Council *Hansard*, 17 October 2006.

⁶¹ See the Hon Carmel Tebbutt MP, the then Minister for Education and Training, moved Government amendments in Committee, in relation to the *Education Legislation Amendment Bill 2006*, Legislative Assembly *Hansard*, 15 November 2006.

Chapter Six - Other activities of the Committee

Strict and Absolute Liability Offences: Responses to the Discussion Paper

- 6.1 Submissions to the Discussion Paper on Strict and Absolute Liability Offences closed on 14 August 2006. This Discussion Paper was tabled back in June 2006 to seek comment on the principles it should adopt when considering if Bills or Regulations that create offences of strict or absolute liability trespass unduly on personal rights and liberties.
- 6.2 On 17 October 2006, the Committee tabled a report on response it received to this Discussion Paper.
- 6.3 The Committee received submissions from the following:
- 1) Australian Lawyers Alliance
 - 2) Australian Manufacturing Workers' Union
 - 3) The Hon Peter Breen MLC
 - 4) Director of Public Prosecutions
 - 5) Environmental Defenders Office
 - 6) Legal Aid Commission NSW
 - 7) Minister of Community Services and Minister for Youth
 - 8) Minister for Local Government
 - 9) Minister for Police
 - 10) Minister for Natural Resources, Primary Industries & Mineral Resources
 - 11) Minister for Tourism, Women & Minister Assisting Minister for State Development
 - 12) Minister for Water Utilities, Small Business, Regional Development & the Illawarra
 - 13) NSW Bar Association
 - 14) NSW Council for Civil Liberties
 - 15) NSW Department of the Environment & Conservation
 - 16) NSW Health
 - 17) NSW Law Society
 - 18) NSW Teachers Federation
 - 19) Public Defenders Office
 - 20) Roads and Traffic Authority
 - 21) Treasurer
 - 22) WA Joint Standing Committee on Delegated Legislation
- 6.4 All the submissions received recognised that the presumption of fault is an important element in our criminal justice system for the protection of individual rights. Most submissions expressed the view that there are circumstances in which it may be appropriate for this presumption to be displaced and strict or absolute liability offences to be created. These areas include environmental crimes or those situations in which it is difficult or impossible to prove intent or knowledge of the wrongful conduct and where there are strong public policy reasons.
- 6.5 Most submissions gave support in general terms to the principles in the Discussion Paper. However, there were diverging views on whether or not legislation creating strict or absolute liability offences should expressly provide for defences and whether the defences should be other than the defence of mistake of fact. There were also diverging views on whether or not there should be a cap on monetary penalties and whether that cap should be set at a high or a low level.

- 6.6 Based on the responses to the Discussion Paper, the Final Report contains a list of principles adopted by the Committee when considering Bills with regard to general principles to govern the use of strict or absolute liability; the applicability of defences to strict and absolute liability offences; penalties for strict and absolute liability offences; as well as additional principles in relation to absolute liability.

Chapter Seven - Conclusion

- 7.1 Since the commencement of its review of Bills function in September 2003, the Legislation Review Committee has achieved a significant output in terms of the number of Bills considered, *Digests* produced, and the number of meetings held. It has developed a highly effective and timely process by which it considers the large volume of legislation introduced and reports its findings to the Parliament in time for the second reading debate.
- 7.2 There are encouraging signs that the Committee's work is having an impact on debate on Bills with Members frequently referring to, or quoting from the *Digests* reports on Bills. This indicates that the *Digest* is being used by Members to help inform the debate in both Houses.
- 7.3 An important development over the past year has been the public dissemination of the discussion paper on strict and absolute liability in order to develop more defined principles by which to test legislative proposals. The Committee received a number of public submissions to its discussion paper, resulting in a report outlining the principles the Committee will adopt when considering this issue.
- 7.4 In the coming year, the Committee aims to continue advancing its understanding of the issues on which it comments in order to better enable the Parliament to determine when a Bill might trespass unduly on personal rights and liberties.
- 7.5 The Committee welcomes the Government's continual focus on regulatory reform and looks forward to assist by raising concerns with respect to any impact of Regulations on business, whether a Regulation's benefits outweigh the costs and whether appropriate consultation has been done prior to the Regulation being made.
- 7.6 In fulfilling its scrutiny function under the Act, the Committee aims to be of continued assistance to Members in their consideration of Bills and Regulations, raise the understanding of and respect for, personal rights and liberties.