PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 2 of 2009

10 March 2009

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

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

Legislation Review Digest, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2009, x, 84 p; 30cm

Chair: Mr Allan Shearan MP

10 March 2009

ISSN 1448-6954

1. Legislation Review Committee—New South Wales

2. Legislation Review Digest No. 2 of 2009

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; No. 2 of 2009

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:
   (a) to consider any Bill introduced into Parliament, and
   (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
      (i) trespasses unduly on personal rights and liberties, or
      (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
      (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
      (iv) inappropriately delegates legislative powers, or
      (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

(2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

(1) The functions of the Committee with respect to regulations are:
   (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
   (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
      (i) that the regulation trespasses unduly on personal rights and liberties,
      (ii) that the regulation may have an adverse impact on the business community,
      (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
      (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
      (v) that the objective of the regulation could have been achieved by alternative and more effective means,
      (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
      (vii) that the form or intention of the regulation calls for elucidation, or
      (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
   (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(2) Further functions of the Committee are:
   (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
   (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

(3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page 3).

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 3).

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 2008

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 2008

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 2008

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 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 2008

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. Associations Incorporation Bill 2009

Issue: Strict Liability

9. The Committee notes that most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, and does not carry an imprisonment term where it is a strict liability offence. Therefore, the Committee considers that they do not trespass unduly on individual rights or liberties.

11. The Committee is concerned that there is an ill-defined and wide discretion by the Director-General to refuse the registration of an association for any other reason that appears sufficient to the Director-General under Clause 7 (2) (c) (iv) of Part 2, Division 1. This may constitute a wide power unduly dependent on insufficiently defined administrative powers, and therefore, the Committee refers this to Parliament.

Issue: Clause 73 (2) (d) of Part 7, Division 1 – Director-General may direct association to apply for cancellation – Ill-Defined and Wide Powers:

13. The Committee considers that there is an ill-defined and wide discretion by the Director-General to direct an association to apply for cancellation for any other reason that appears sufficient to the Director-General under Clause 73 (2) (d) of Part 7, Division 1. This may constitute a wide power unduly dependent on insufficiently defined administrative powers, and accordingly, the Committee refers this to Parliament.

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

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

Issue: Clause 97 (2) of Part 9 – Modifications to applied provisions – enabling the issuing of directions influencing the exercise of powers without any obligation for them to be tabled in Parliament or subject to disallowance:

17. The Committee is concerned that the Director-General may give directions as to the modifications to applied provisions by publication in the Gazette, which would not be disallowable by the Parliament. The Committee holds the view that this delegation of legislative power is insufficiently subject to parliamentary scrutiny, and refers clause 97 (2) to Parliament.

2. Barangaroo Delivery Authority Bill 2009

Issue: Clause 16 (Part 3, Division 2) - Acquisition of land:

17. The Committee notes that the acquisition of property be on just terms is an important safeguard of the right to property. The Committee considers that clause 16 (1) of Part 3, Division 2, provides this safeguard by ensuring that any acquisition of land, by agreement or compulsory process, has to be in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* so as not to trespass unduly on personal rights and liberties.

3. Children and Young Persons (Care and protection) Amendment (Children's Employment) Bill 2009

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

4. Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009

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

5. Crimes (Administration of Sentences) Amendment (Private Contractors) Bill 2009*

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

6. Crimes (Appeal and Review) Amendment Bill 2009

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

7. Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009

9. The Committee considers that the broad covert search warrant powers significantly trespass on personal rights and liberties, particularly in regard to persons not suspected of serious criminal activity. The Committee also believes that the Act contains insufficient safeguards to address these. The Committee therefore refers the matter to Parliament. The Committee has also resolved to write to the NSW Attorney General inquiring whether any public consultation was conducted in relation to the Bill and if not, the reasons behind this decision.

12. The Committee has resolved to write to the NSW Attorney General inquiring as to how regularly it is envisaged that reports regarding the exercise of the covert search powers will be tabled in both Houses of Parliament.

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

8. Nation Building And Jobs Plan (State Infrastructure Delivery) Bill 2009

Issue: Clause 18 (Part 4) - Acquisition of land on just terms:

17. The Committee notes that the acquisition of property be on just terms is an important safeguard of the right to property. The Committee considers that clause 18 (1) of Part 4 provides this safeguard by ensuring that any project authorisation order to acquire land by agreement or compulsory process has to be in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* so as not to trespass unduly on personal rights and liberties.

19. The Committee has resolved to write to the Minister for Planning to inquire as to how the introduction of Clause 23 will affect the rights of third parties to be notified and allowed to comment upon developments where they may be impacted by them, particularly in situations where these rights are currently provided under other planning legislation and instruments.

Issue: Clause 25 (6) of Part 5 – Application of *Environmental Planning and Assessment 1979* – Retrospectivity:

21. The Committee will always be concerned where the law is changed retrospectively in a manner that may adversely affect any person and considers clause 25 (6) may trespass unduly on personal rights and refers this to Parliament.

Issue: Clause 27 (Part 6) – Protection of exercise of certain functions – excludes merits and judicial review:

26. The Committee notes the importance of reviewable decisions for protecting individual rights and in upholding the rule of law. The Committee will always express concerns if a Bill purports to oust the jurisdiction of the courts including proceedings in the exercise of the inherent jurisdiction of the Supreme Court as contained in clause 27 (6) (b).

27. The Committee is also of the view that clause 27 is very broad, including whether or not the proceedings relate to any question involving compliance or non-compliance by a Minister (protected person) or the rules of natural justice (procedural fairness) as proposed in clauses 27 (3) and (4). The Committee, therefore, draws Parliament's attention to the fact that individual rights and liberties may appear to be unduly dependent on non-reviewable decisions as proposed in clause 27 (Part 6).

Issue: Clause 29 (2) (Part 6) – Regulations – Henry VIII clauses which allow amendment of Acts by a regulation:

29. The Committee notes that clause 29 (2) allows regulations to amend the *Environmental Planning and Assessment Act 1979* by inserting provisions into that Act's Schedule 6 (Savings, transitional and other provisions) and allows regulations to make provisions with respect to restoring the operation of that Act.

30. This could enable regulations to be made to undermine the operation of that Act, and in effect, allow amendments of the Act by regulations. Therefore, the Committee considers this as constituting an inappropriate delegation of legislative power and refers it to Parliament.

Issue: Clause 23 (1) (Part 5) – Approval requirements under other Acts – enabling declaration in writing to influence the exercise of powers without any obligation for them to be tabled in Parliament or subject to disallowance:

32. The Committee is concerned that the Co-ordinator General (or its delegate) may make a declaration to exempt a specified infrastructure project (or an infrastructure project of a specified class) from all or any specified development control legislation, which could in effect be an exercise of legislative powers that is not subject to disallowance or scrutiny by the Parliament. Therefore, the Committee refers clause 23 of Part 5 to the attention of Parliament.

SECTION B: Ministerial Correspondence — Bills Previously Considered

9. Criminal Procedure Amendment (Vulnerable Persons) Bill 2007

5. The Committee thanks the Attorney General for his reply.

10. Liquor Legislation Amendment Bill 2008

6. The Committee thanks the Minister for his reply.

11. Mental Health Bill 2007

7. The Committee thanks the Minister for his reply and his detailed response as attached to this report.

12. Water Management Amendment Bill 2008

5. The Committee thanks the Minister for his reply.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. ASSOCIATIONS INCORPORATION BILL 2009

Date Introduced:	4 March 2009
House Introduced:	Legislative Assembly
Introduced By:	Hon Virginia Judge MP
Portfolio (Minister Responsible):	Fair Trading

Purpose and Description

1. This Bill provides for the registration of clubs, societies and other non-profit associations; to provide for the regulation of those associations after registration; and for other purposes.

2. The objects of this Bill are:

(a) to establish a scheme for the registration of associations that are constituted for the purpose of engaging in small-scale, non-profit and non-commercial activities, including:

(i) associations that are currently unincorporated (which become bodies corporate when they are registered), and
(ii) associations that are currently incorporated under other legislation (which retain their corporate status following registration), and

(b) to make provision with respect to the corporate governance and financial accountability of associations registered under that scheme.

3. A fundamental reform is the insertion of the objectives of the Act into the statute itself. The Bill provides that the objects of the legislation are to establish a scheme for the registration of associations engaging in small-scale, non-profit and non-commercial activities and to provide for the corporate governance and financial accountability of associations. This aims to address stakeholders' concerns about the legislative intention in regulating associations.

Background

4. The Bill, unlike the current Act:

(a) distinguishes between large (Tier 1) and small (Tier 2) associations for the purposes of financial reporting, so enabling tighter reporting and auditing requirements to be imposed on the former, and
(b) requires an association's public officer, and at least 3 of its committee members, to be resident in Australia, and
(c) requires an association's committee members to disclose their pecuniary interests in any matters to be discussed at a committee meeting, and

(d) creates a number of offences with respect to fraudulent behaviour and misuse of confidential information by an association's committee members, and
(e) enables an association to be ordered to change its name if the name under which it is registered is unacceptable for any of a number of specified reasons, and
(f) enables an association to allow postal voting by its members, and
(g) enables an association's registration to be reinstated if its registration is mistakenly cancelled.

5. There are more than 35,000 associations registered under the New South Wales legislation. This Bill aims to streamline and simplify administrative procedures. It will also strengthen the financial accountability of larger associations but ensuring that smaller associations have less onerous financial reporting requirements.

6. The Agreement in Principle speech explained the following:

> The review of the Act found that it is not appropriate to impose the same level of administrative obligation on small associations as on associations that have significant turnover and, indeed, assets. In response, the bill introduces a two-tiered financial reporting system, which will distinguish small and large associations on the basis of a financial threshold. This threshold will be based on the association's gross receipts for the financial year last ended or the association's current assets. The threshold will be calculated in accordance with the regulations to allow refinements and adjustments to be made as required. This will provide a comprehensive yet flexible method for determining the appropriate threshold through a comprehensive public consultation process.
>
> Large, tier 1 associations will be required to have their accounts audited annually by an appropriately qualified auditor. Small, tier 2 associations will be exempt from this requirement. The purpose of introducing this two-tiered system is to ensure that larger associations are properly accountable for financial and asset management while recognising that smaller associations should not be unduly burdened by the same financial reporting requirements. On occasions the auditing of large associations' financial records may put individual associations in financial distress, or there may be some other reason why an association is unable to comply with auditing requirements.
>
> Recognising that this legislation is dealing with not-for-profit, usually volunteer-run community groups, the bill includes power for the Commissioner for Fair Trading to make an order exempting an association or a class of associations from the requirements where appropriate. The exemption can be subject to appropriate conditions or a time limit and can be varied, suspended or revoked by the commissioner if necessary. Alternatively, a situation may occur where the commissioner finds it necessary to direct a small association to have its financial records audited either to ensure the association's assets are protected or for some other reason. The bill provides the commissioner with the power to make this directive.
>
> Incorporation under the Act is only suitable for non-profit groups. The current Act provides a list of circumstances in which an association is deemed not to be trading or securing pecuniary gain for its members. During consultation it became apparent that the current definition is difficult to interpret and does not give adequate direction to associations on what constitutes securing pecuniary gain. The bill adds a new clearer definition of the term "pecuniary gain", which includes circumstances where association members will obtain financial benefits. In addition, the bill retains

a list of circumstances in which an association is not considered to be securing pecuniary gain—for example, where an association carries out fundraising activities but no part of the gain is divided among or received by members. The new definition is more comprehensive and provides clearer direction on these matters and greater certainty for associations.

The Bill

7. The object of this Bill is to repeal and re-enact the *Associations Incorporation Act 1984*. Like the current Act, it provides for the incorporation of certain kinds of associations and regulates the conduct of their affairs. The Bill:

(a) restricts to particulars of internal management and administration the matters for which an association's constitution must provide, and
(b) removes the requirement for an association's documents to be executed under seal, and
(c) enables offences under the proposed Act to be dealt with by way of penalty notice, and
(d) enables fees under the proposed Act to be waived, remitted or postponed in appropriate circumstances, and
(e) clarifies the obligations of an association's outgoing committee members and public officer to hand over documents in their possession that relate to the association's affairs, and
(f) clarifies the procedures to be followed for the purpose of reserving a name for use by an association, and
(g) clarifies the circumstances in which an administrator may be appointed to manage an association's affairs.

Issues Considered by the Committee

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

Issue: Strict Liability

8. Numerous clauses[1] throughout the Bill impose strict liability in relation to various offences. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the authority prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

9. The Committee notes that most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, and does not carry an imprisonment term where it is a strict liability offence. Therefore, the Committee considers that they do not trespass unduly on individual rights or liberties.

[1] For example, clause 13 (Notification of change of official address) of Part 2, Division 2; clause 29 (Register of committee members) of Part 4, Division 1; clause 34 (Public officer) of Part 4, Division 2; clause 35 (Vacation of office of public officer) of Part 4, Division 2.

Insufficiently defined administrative powers [s 8A(1)(b)(ii) *LRA*]

Issue: Clause 7 (2) (c) (iv) of Part 2, Division 1 – Decision on application – Ill-Defined and Wide Powers:

10. Clause 7 (2) proposes that an application for registration may be refused if: (c) the Director-General is satisfied that, having regard to the objects of this Act, the association should not be registered: (iv) ***for any other reason*** that appears sufficient to the Director-General. The other reasons contained in Clause 7 (2) (c) where the Director-General is satisfied that, having regard to the objects of this Act, the association should not be registered: (i) because some provision of the association's constitution is contrary to law, or (ii) because of the association's objects or the Director-General's assessment of the likely nature or extent of the association's proposed activities, or (iii) because of the likely nature or extent of the association's dealings with the public.

11. The Committee is concerned that there is an ill-defined and wide discretion by the Director-General to refuse the registration of an association for any other reason that appears sufficient to the Director-General under Clause 7 (2) (c) (iv) of Part 2, Division 1. This may constitute a wide power unduly dependent on insufficiently defined administrative powers, and therefore, the Committee refers this to Parliament.

Issue: Clause 73 (2) (d) of Part 7, Division 1 – Director-General may direct association to apply for cancellation – Ill-Defined and Wide Powers:

12. Clause 73 (2) proposes the Director-General may not direct an association to apply for cancellation unless the Director-General is satisfied that, having regard to the objects of the Act, the association should no longer be registered: (d) ***for any other reason*** that appears sufficient to the Director-General. The other reasons contained in Clause 73 (2) includes: (a) because some provision of the association's constitution is contrary to law, or (b) because of the Director-General's assessment of the nature of extent of the association's activities, or (c) because of the Director-General's assessment of the nature or extent of the association's dealings with the public.

13. The Committee considers that there is an ill-defined and wide discretion by the Director-General to direct an association to apply for cancellation for any other reason that appears sufficient to the Director-General under Clause 73 (2) (d) of Part 7, Division 1. This may constitute a wide power unduly dependent on insufficiently defined administrative powers, and accordingly, the Committee refers this to Parliament.

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

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

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

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

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

Issue: Clause 97 (2) of Part 9 – Modifications to applied provisions – enabling the issuing of directions influencing the exercise of powers without any obligation for them to be tabled in Parliament or subject to disallowance:

16. Clause 97 (2) reads: The Director-General may, by order published in the Gazette, give directions as to the modifications that are necessary or desirable for the effectual operation of applied provisions.

17. The Committee is concerned that the Director-General may give directions as to the modifications to applied provisions by publication in the Gazette, which would not be disallowable by the Parliament. The Committee holds the view that this delegation of legislative power is insufficiently subject to parliamentary scrutiny, and refers clause 97 (2) to Parliament.

The Committee makes no further comment on this Bill.

2. BARANGAROO DELIVERY AUTHORITY BILL 2009

Date Introduced:	4 March 2009
House Introduced:	Legislative Assembly
Introduced By:	Hon Kristina Keneally MP
Portfolio (Minister Responsible):	Planning

Purpose and Description

1. This Bill constitutes the Barangaroo Delivery Authority; to specify its functions; and to provide for other matters related to the development, use and management of Barangaroo.

2. It provides for the establishment of a delivery agency for the Government's major foreshore urban renewal program at Barangaroo.

3. The creation of the Headland Park is a key feature of the Barangaroo project.

4. The objects of the Bill are to:

- encourage the development of Barangaroo as an active, vibrant and sustainable community and as a location for national and global business;
- create a high-quality commercial and mixed use precinct connected to and supporting the economic development of Sydney;
- facilitate the establishment of Barangaroo Headland Park and public domain;
- promote the orderly and sustainable development of Barangaroo, balancing social economic and environmental outcomes; and
- encourage design excellence outcomes in architecture and public domain design in Barangaroo.

Background

5. The Barangaroo Delivery Authority will have the task of renewing a vacant 22-hectare slab into a new quarter of city, with new foreshore access for people and a new headland park on Sydney harbour.

6. According to the Agreement in Principle, the NSW Government’s vision for the renewal of Barangaroo is:

> to unlock a large section of city foreshore that has been isolated from public use for over a century and transform it into a new working CBD precinct, set in a generous and dignified public domain; to secure Sydney's growing financial role in the highly-competitive Asia-Pacific region, attracting new global players, investment, knowledge and jobs growth; to create a new western face of the city, transforming an isolated part of town into a precinct of buildings and parkland which mirrors the city's much-celebrated eastern face; to build 11

> hectares of new park, community and cultural facilities and complete the State Government's 14-kilometre Sydney Foreshore Walk—a public walkway unprecedented in harbour cities worldwide; and to leverage development of transport infrastructure at this underserved part of the city. Barangaroo will tap into the Sydney Metro—with pedestrian links to Wynyard and a new station to service the site—and a new ferry terminal is being explored to open new access from the harbour.
>
> For the first time in over a century the public will have access to 1.4 kilometres of foreshore at Barangaroo that has been locked away, physically and psychologically, from our city...Supporting the recreational side of this equation will be 11 hectares of foreshore promenade, public domain and park, not least of which will be the Headland Park at the northern end of the site. This aspect of the renewal is nothing less than restoring to Sydney Harbour an entire headland previously razed for industrial use. In so doing, Barangaroo will reinstate—with Balls Head, Blues Point, and Ballast Point—the archipelago of green headlands that once defined the western harbour, centred on Goat Island and reflected in its indigenous name "Mel-Mel", or "The Eye"… The historic suburb of Millers Point will see its historic headland returned and its streets and residents reconnected to the waterline.

7. The Barangaroo project aims to build investment and jobs for New South Wales, such as during the construction phase, where an estimated $3 billion injection will flow into the economy, creating around 4,000 jobs over the project cycle.

The Bill

8. The objects of this Bill are to establish the Barangaroo Delivery Authority (the ***Authority***) and to provide for its functions and other matters relating to the development of Barangaroo.

9. The authority's board will include the chief executive officer of the authority, the Secretary of the Treasury, a nominee of the City of Sydney Council, and up to four other appointed members. The authority will be subject to accountability mechanisms, with board members and staff subject to the Independent Commission Against Corruption and the Ombudsman. The authority will have annual reporting requirements and will be subject to annual audit by the New South Wales Auditor General.

10. The Bill includes requirements relating to disclosure and misuse of information and management of pecuniary and other interests. Board members will be required to comply with a code of conduct.

11. The functions of the authority will be: to manage the orderly and economic development and use of Barangaroo including the provision and management of infrastructure; to promote, provide and manage cultural, educational, commercial, residential, tourist and recreational activities and facilities at Barangaroo; to develop and manage the Headland Park and other public domain areas and to encourage the public's use of those areas; to facilitate appropriate commercial activities within the Headland Park and public domain areas consistent with their use and enjoyment by the public; to promote development in Barangaroo that accords with best practice environmental planning standards and which applies innovative environmental building and public domain design; and to liaise with government agencies with respect to the coordination and provision of infrastructure, including transport infrastructure, associated with Barangaroo.

12. The authority will have necessary ancillary and consequential powers to ensure the delivery of its core functions. The authority will have powers to acquire and dispose of land.

13. The Bill includes special protections for the Headland Park to ensure the park remains available for use by the public. It prohibits the authority from disposing of fee simple estate of the land identified for the Headland Park. It also provides for the ongoing management of the Barangaroo Headland Park.

14. The Bill allows for the Headland Park and public domain areas, to be managed on behalf of the authority by the Sydney Harbour Foreshore Authority.

15. It also provides a 1 per cent levy to be imposed on development in Barangaroo. This will apply in lieu of the developer contributions that would otherwise have applied to development under the Environmental Planning and Assessment Act and the City of Sydney Act. The authority will be required to prepare a contributions plan detailing the infrastructure to be provided from the contributions and the timing for delivery of the infrastructure. This will include provision of the new pedestrian link to Wynyard.

Issues Considered by the Committee

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

Issue: Clause 16 (Part 3, Division 2) - Acquisition of land:

16. Clause 16 (1) proposes that: The Authority may acquire land, for the purposes of this Act, by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*.

17. The Committee notes that the acquisition of property be on just terms is an important safeguard of the right to property. The Committee considers that clause 16 (1) of Part 3, Division 2, provides this safeguard by ensuring that any acquisition of land, by agreement or compulsory process, has to be in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* so as not to trespass unduly on personal rights and liberties.

The Committee makes no further comment on this Bill.

3. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT (CHILDREN'S EMPLOYMENT) BILL 2009

Date Introduced:	4 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Linda Burney MP
Portfolio:	Community Services

Purpose and Description

1. The purpose of the Bill is to amend the Children and Young Persons (Care and Protection) Act 1998:

(a) to extend the existing safeguards relating to the employment of children aged under 15 years to children aged 15 years and over (but under 16 years) who are employed as models, and

(b) to increase the maximum penalty for certain offences in relation to the employment of children from 10 penalty units to 100 penalty units (currently $11,000).

Background

2. According to the Minister's Agreement in Principle Speech the major effect of this bill will be to give models between the ages of 15 and 16 years the benefit of the safeguards that the legislation already provides for models below the age of 15. This follows community concern about the dangers for young people who are drawn into an adult world at an age when they are more mature physically than emotionally.

3. The other significant effect of this bill will be to increase the maximum penalty that a court may impose on an employer for failure to comply with this legislation in relation to any child it is intended to protect. Failure to comply with the legislation is already an offence for which the maximum penalty prescribed in the Children and Young Persons (Care and Protection) Act 1998 is currently 10 penalty units. Non-compliance could occur in a range of ways, including failure to obtain an employer's authority from the Children's Guardian or to notify the Children's Guardian about a proposed instance of employment. The most extreme form of an offence under this provision would be for an employer to proceed with an employment proposal in defiance of a notification from the Children's Guardian that it would contravene the code of practice.

4. The maximum penalty prescribed for a comparable offence under the Industrial Relations (Child Employment) Act 2006 is 100 penalty units. That provision applies where an employer fails to comply with requirements contained in a compliance notice. This bill will increase the existing maximum penalty under the Children and Young Persons (Care and Protection) Act 1998 to match the corresponding provision in the Industrial Relations (Child Employment) Act 2006. That would enable the courts to impose similar fines on employers who deliberately break either of these laws.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
Schedule 1 Section 223 of the *Children and Young Persons (Care and Protection) Act 1998* requires a person who employs a child under the age of 15 years in an area related to entertainment and exhibition to hold an employer's authority issued by the Minister for Community Services. The proposed Schedule amends this section to include children up to the age of 16 years who are employed as models.
Section 223 also includes penalties for contravention of this authority. Proposed **Schedule 1 [2]** increases the penalty from 10 penalty units to 100 penalty units (currently $11,000).
Schedule 2 extends the associated employer's Code of Practice to children up to the age of 16 years who are employed as models.

Issues Considered by the Committee

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

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

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

The Committee makes no further comment on this Bill.

4. CHILDREN LEGISLATION AMENDMENT (WOOD INQUIRY RECOMMENDATIONS) BILL 2009

Date Introduced:	5 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Linda Burney MP
Portfolio:	Community Services

Purpose and Description

1. The object of this Bill is to amend various Acts and other legislation to give effect to certain recommendations in the *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (the ***Wood Report***). In particular, the Bill:

(a) amends the *Children and Young Persons (Care and Protection) Act 1998* (the***Care Act***):

(i) to raise the "risk of harm" reporting threshold so that a child or young person will not be reported to the Director-General of the Department of Community Services (***DoCS***) unless the circumstances that are causing concern for the safety, welfare or well-being of the child or young person are present to a significant extent, and

(ii) to extend the circumstances when a child or young person is at risk of significant harm to include the situation when the child or young person is not receiving an education as required by the *Education Act 1990*, and

(iii) to provide for alternative mandatory reporting arrangements under which matters relating to children being at risk of significant harm may initially be assessed within the reporter's agency instead of being reported directly to DoCS, and

(iv) to modify the legislative framework for the provision of out-of-home care, and

(v) to authorise certain agencies to exchange information concerning the safety, welfare and well-being of children and young persons and to co-ordinate the services those agencies provide, and

(vi) to make a number of changes in relation to care proceedings in or before the Children's Court and the making of care orders by the Court, and

(b) amends the *Children's Court Act 1987* to provide for the appointment of a District Court Judge as the senior judicial officer of the Children's Court (to be known as the President of the Children's Court), and

(c) amends the *Commission for Children and Young People Act 1998* to extend the child-related employment provisions under that Act (including the requirement for background checking) to a wider class of people, and

(d) makes a number of other amendments in response to the recommendations of the Wood Report.

Background

2. According to the Minister's Agreement in Principle Speech this legislation gives effect to recommendations of the Special Commission of Inquiry into Child Protection

Services in New South Wales. This was a comprehensive investigation of the State's child protection system and resulted in a substantial report containing 111 recommendations.

3. The Inquiry's report provided the Government with a blueprint for the next stage of child protection reform in this State. In response, the Government has developed its action plan—Keep Them Safe: a shared approach to child wellbeing. The action plan radically changes the way the Government and community address child safety and wellbeing, to build a stronger, more effective child protection system. The bill implements the actions that require changes to the Children and Young Persons (Care and Protection) Act 1998 and other relevant legislation.

4. The three key objectives of the bill are: first, to improve the statutory child protection system by focusing on children and young people at greatest risk, making court processes more user friendly for children and families, concentrating the efforts of the specialist Children's Court to where it is imperative to have a judicial decision, and clarifying regulation of out-of-home care to focus the Department of Community Services on working with children and young people in need of care and protection; second, to share the responsibility for child protection by creating a new system for accessing information, facilitating better interagency cooperation, and obliging agencies to take steps to coordinate with other agencies; and, third, to streamline and improve oversight arrangements of the child protection system by making some minor miscellaneous amendments to the Children and Young Persons (Care and Protection) Act 1998 and related Acts.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
Clause 3 repeals the *Children (Care and Protection) Act 1987*.
Schedule 1 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157
Schedule 1.1 Amendments relating to recommendations 6.2 and 10.1
At present under section 23 of the Care Act, a child or young person is ***at risk of harm*** (which in turn leads to the making of a report to DoCS) if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence of any of the circumstances currently listed in that section (eg neglect or abuse).
Schedule 1.1 [2] amends the definition by requiring the circumstances concerned to be present to a significant extent. As a consequence, **Schedule 1.1 [1] and [5]** change references to the term "at risk of harm" (including the defined term itself) to "at risk of significant harm".
Schedule 1.1 [3] extends the circumstances in which a child or young person is at risk of significant harm to include, in the case of a child or young person who is subject to the compulsory education requirements under the *Education Act 1990*, the fact that the parents or caregivers have not arranged (or are unable or unwilling to arrange) for the child or young person to receive an education as required by that Act.
Schedule 1.1 [4] makes it clear that the circumstances that constitute a child or young person being at risk of significant harm may relate to a single act or omission or to a series of acts or omissions.
Section 27 of the Care Act currently makes it an offence for certain persons whose work involves (or relates to) the delivery of services to children (eg school teachers)

not to make a report to DoCS if the person has grounds to suspect the child is at risk of harm.

Schedule 1.1 [6] and [7] provide that it will no longer be an offence if the person does not report the matter to DoCS, but it will still be a duty to make the report.

Schedule 1.1 [8] provides for alternative reporting arrangements that will apply in relation to certain mandatory reporters who are required to report to DoCS their suspicion that a child is at risk of significant harm. Under such an arrangement, the mandatory reporter may, instead of reporting to DoCS, refer the matter to an assessment officer in the reporter's agency. The assessment of the matter in accordance with the guidelines of DoCS may result in a report being made to DoCS or other appropriate action being taken in respect of the child. Making such a referral discharges the mandatory reporter's obligation to report the matter to DoCS under section 27 and also attracts the same protections and safeguards as if the reporter had made a report to DoCS.

Schedule 1.2 Amendments relating to recommendations 11.1 and 11.3

Schedule 1.2 [2] and [3] modify the objects of the Care Act and the principles to be applied in the administration of the Act, in particular so as to separate the overriding principle of the Care Act (namely, that the safety, welfare and well-being of a child or young person is paramount in all decisions) from the other principles.

Schedule 1.2 [6] provides that a non-government agency in receipt of government funding may make a request for assistance from DoCS on behalf of the child or young person in respect of whom the agency is providing services.

Schedule 1.2 [7] makes it clear that the Director-General of DoCS must assess a request for assistance but is not required to take any further action in response to the request.

Schedule 1.2 [8] modifies the requirement for the Director-General to keep records in relation to reports made to DoCS and the action taken as a consequence of a report.

Schedule 1.2 [9] will permit the disclosure of the identity of a person who has made a report to DoCS if the disclosure is made for the purposes of the investigation of a serious offence against a child or young person and is necessary for the protection of a child or young person (whether or not the victim of the alleged offence). However, it will be necessary for a senior officer of a law enforcement agency, or for the person or body making the disclosure, to certify that it was not practical to obtain the consent of the reporter to having his or her identity disclosed or to certify that obtaining that consent would prejudice the investigation of the offence. The person or body disclosing the identity of the reporter will also be required to notify the reporter about the disclosure.

Schedule 1.2 [11] provides that the Children's Court Clinic will not have the option of informing the Children's Court that it is unwilling to prepare an assessment report for the Children's Court.

Schedule 1.2 [12] will enable the Children's Court to order the Children's Court Clinic or other person appointed to prepare an assessment report to provide to the Court such other information as may be within the expertise of the clinic or other person to provide.

Schedule 1.2 [15], [17] and [21] provide that permanency planning for children or young persons is not required to provide detail about the exact long-term placement of the child or young person concerned.

Schedule 1.2 [19] restricts the Children's Court's capacity to allocate parental responsibility for a child or young person to a designated agency.

Schedule 1.2 [20] provides that the Children's Court may order a party to proceedings in which it allocates parental responsibility of a child or young person to report to the Court at a later time on the suitability of the care and protection arrangements. The Court may invite the parties to apply to vary or rescind the

arrangements, but it no longer has an on-going monitoring role in relation to orders allocating parental responsibility.

Schedule 1.2 [22] limits the circumstances in which the Children's Court may make a contact order in care proceedings.

Schedule 1.2 [23] enables regulations to be made in relation to the referral, to alternative dispute resolution services, of disputes involving contact between children and their parents or other family members, but only in relation to matters in respect of which the Children's Court does not have power to make a contact order.

Schedule 1.2 [24] provides that an application to the Children's Court for the rescission or variation of a care order may be made by the child or young person concerned.

Schedule 1.2 [25] repeals provisions relating to the making of compulsory assistance orders by the Children's Court. **Schedule 1.2 [1] and [30]** are consequential amendments.

Schedule 1.2 [29] enables the regulations to make provision with respect to the collection of information by the Director-General of DoCS and the Children's Court and requiring the Director-General and the Court to make certain information publicly available.

Schedule 1.3 Amendments relating to recommendations 11.1 (xvii) and 16.16 (i) and (viii)

Schedule 1.3 [4] modifies the definition of ***out-of-home care*** by providing for 3 types of out-of-home care under the Care Act. ***Statutory out-of-home care*** is essentially foster care provided pursuant to an order of the Children's Court. ***Supported out-of-home care*** comprises temporary care arrangements made by the Director-General of DoCS and foster care that is supported by the Director-General. ***Voluntary out-of-home care*** comprises voluntary arrangements made by parents with organisations that provide out-of-home care. As a result of the reclassification of out-of-home care, various provisions of the Care Act are modified so that they only apply to a particular type of out-of-home care (see **Schedule 1.3 [1], [2], [7] and[9]–[14]**).

Schedule 1.3 [5] provides that statutory out-of-home care may, as is the case at present, only be provided by a carer who is authorised by a designated agency that is accredited by the Children's Guardian in accordance with the regulations. However, the prohibition on providing unauthorised statutory out-of-home care does not prevent the child or young person from returning to live with his or her parents during the last 6 months of the placement in out-of-home care if the arrangements concerned are in accordance with a care plan approved by the Children's Court.

Schedule 1.3 [6] prevents the parents of a child or young person from being given care responsibility of, or being authorised by a designated agency as the authorised carer of, the child or young person if the Children's Court has, in making a care order for the child or young person, accepted that there is no realistic possibility of the child or young person being restored to his or her parents.

Schedule 1.3 [15] prohibits a parent from placing a child or young person in out-of-home care that is provided by an organisation unless the organisation is a designated agency or is registered by the Children's Guardian.

Schedule 1.4 Amendments relating to recommendation 16.16 (ii)–(vii)

Schedule 1.4 [3] provides that the Director-General of DoCS, rather than the Children's Guardian, will be able to consent to the publication of the name of a child or young person who is under the parental responsibility of the Minister if the publication is of benefit to the child or young person.

Schedule 1.4 [4] provides that the Children's Guardian will no longer have the function of exercising the Minister's parental responsibilities for a child or young person nor the function of examining care plans for children or young persons in out-of-home care.

Schedule 1.5 Amendment relating to recommendations 24.1 and 24.6

Schedule 1.5 establishes a scheme for the sharing of information between certain agencies (primarily human services and justice or law enforcement agencies) relating to the safety, welfare or well-being of children and young persons. The scheme also requires these agencies to take reasonable steps to co-ordinate decision-making and delivery of services regarding children and young persons. Under the proposed scheme, agencies will be authorised to provide and receive information that would assist decision-making in relation to children's services or that would assist in the management of risks to children and young persons. The provision of information may also be requested by an agency and the agency that receives the request will be required to comply with it. Provision is made under the proposed scheme for the safeguarding of information that is shared and for the protection of persons from liability for providing information under the scheme.

Schedule 2 Amendments relating to recommendations 11.2, 13.1, 13.3, 13.4, 13.9 and 13.12

Schedule 2.1 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Schedule 2.1 [1] provides that the Director-General of DoCS is required to apply to the Children's Court for a care order no later than 72 hours after the child or young person concerned is removed under the Care Act or after care responsibility for the child or young person is assumed. At present, such an application is required no later than the next sitting day of the Court.

Schedule 2.1 [2] requires care applications to the Children's Court to be accompanied by a written report in accordance with the rules under the *Children's Court Act 1987*.

Schedule 2.2 Amendment of Children's Court Act 1987 No 53

Schedule 2.2 [1] and [2] make provision for a new office of President of the Children's Court. The person appointed as the President must be a Judge of the District Court, and will remain a Judge for certain purposes, but will only perform duties as the President of the Children's Court while holding that office. Schedule 2.2 [2] also provides for the appointment of a Children's Magistrate to act as the President in certain circumstances.

Schedule 2.2 [3]–[5] and [14] confer on the President a role in relation to the appointment of Children's Magistrates, the courses of training required to be undertaken by Children's Magistrates and the manner in which a Children's Magistrate resigns office.

Schedule 2.2 [10] provides for the Children's Court Clinic (which primarily has functions under the Care Act in relation to the preparation of assessment reports) to be established and maintained by the Minister for Health rather than the Attorney General.

Schedule 2.2 [12] enables the regulations to provide that an appeal under any Act or law in relation to a decision of the Children's Court when constituted by the President is taken to be an appeal to the Supreme Court instead of the District Court.

Schedule 3 Amendments relating to recommendations 23.3, 23.4 and 23.8

Schedule 3.1 Amendment of Commission for Children and Young People Act 1998 No 146

Schedule 3.1 [3] and [5] extend the definition of ***child-related employment*** in Part 7 of the *Commission for Children and Young People Act 1998* (that Part prohibits certain persons from being employed in child-related employment and requires background checking for certain kinds of child-related employment).

Schedule 3.1 [8] extends the background checking provisions so that they will also apply in relation to an adult person who resides in the home of an authorised carer or children's service provider (ie the provider of a family day care or home based children's service under the Care Act). In the case of an adult person residing in the

home of an authorised carer the "employer" will be the designated agency that authorises the carer. In the case of an adult person residing at the home of a children's service provider, the licensee of the service will be the "employer". It will be the duty of the employer to carry out background checking of the adult person to determine whether it is appropriate for that person to reside at the home of the authorised carer or children's service provider.

Schedule 3.2 Amendment of Community Services (Complaints, Reviews and Monitoring) Act 1993 No 2

Schedule 3.2 [1] requires Official Community Visitors to provide the Children's Guardian with information obtained by the Visitor that the Children's Guardian specifies as being relevant to the Children's Guardian's functions in accrediting organisations as designated agencies under the Care Act.

Schedule 3.2 [2] provides that the death of a child (or a child who is a sibling of a child) who was the subject of a risk of harm report under the Care Act within the period of 3 years before the child's death will not be a death that is subject to review by the Ombudsman under Part 6 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

Schedule 3.2 [3]–[5] provide that the Ombudsman is to report to Parliament every 2 years, instead of annually, on the Ombudsman's work and activities in relation to reviewable deaths of children and other persons in care.

Schedule 3.3 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Schedule 3.3 provides that, in order to facilitate the background checking under the *Commission for Children and Young People Act 1998* of adult persons residing in the home of an authorised carer or licensed provider of a family day care or home based children's service, it will be a condition of the carer's authorisation or the service provider's licence under the Care Act to notify the Director-General of DoCS if an adult person has been residing in the carer's or licensee's home on a regular basis for a period of at least 3 months.

Issues Considered by the Committee

5. The Bill covers a number of issues which fall under the Committee's functions as prescribed by s8A of the LRA. However, these arise as a direct result of the recommendations made in the *Report of the Special Commission of Inquiry into Child Protection Services in NSW* which conducted a thorough examination of the current child protection system and seem reasonable when balanced with the need to effect better outcomes for child protection.

6. *Rights of Children* – Schedule 1.1[2] amends the current section 23 of the Care Act to require reporting to DoCS if concerns exist that a child is at "at risk of significant harm" rather than "at risk of harm". This change is a result of the Inquiry's findings that too many reports were being made to DoCs which did not warrant the exercise of its statutory powers and important competing demands were suffering as a result. Further, other changes within the child protection system such as early intervention programs and new referral systems aim to still address the needs of children at risk of harm which are not of a "significant" nature.

7. *Right to Privacy* - Schedule 1.2 [9] permits the disclosure of the identity of a person who has made a report to DoCS if the disclosure is made for the purposes of the investigation. However, this is only in circumstances where it is necessary for the protection of a child or young person and certification is required that it was not

practical to obtain the consent of the reporter or gaining consent would prejudice the investigation of the offence.

8. *Access to Justice* – Schedule 2.2 [12] provides that decisions of the Children's Court will now be appealed to the Supreme Court rather than the District Court. This is arguably a more complicated, expensive and lengthy process. However, this is a direct consequence of replacing the Senior Children's Magistrate with a District Court judge as President of the Children's Court to enhance the standing of the Children's Court and ensure a pool of expertise in children's appeal matters within the District Court.

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

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

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

The Committee makes no further comment on this Bill.

5. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (PRIVATE CONTRACTORS) BILL 2009*

Date Introduced:	5 March 2009
House Introduced:	Legislative Council
Introduced By:	Sylvia Hale MLC
Portfolio (Minister Responsible):	The Greens

Purpose and Description

1. This Bill amends the *Crimes (Administration of Sentences) Act 1999* to ensure that contractors are not used for inter-prison transport and to require Parliamentary approval prior to any correctional centre privatisation; and for other purposes.

Background

2. In August 2008, the NSW Government indicated reforms to the prison system. This included a proposal announced in the November 2008 Mini-Budget to privatise Cessnock and Parklea prisons.

3. Currently, the only privately operated prison in NSW is the Junee Correctional Centre.

4. On 17 December 2008, the Legislative Council's General Purpose Standing Committee No 3 established an inquiry into the privatisation of prisons and prison-related services. This inquiry is currently holding public hearings. The inquiry will examine the impact of prison privatisation on: public safety and rates of escape; incidence of assault on inmates and staff; disciplinary breaches; overcrowding; prisoner classification levels; rehabilitation programmes, mental health support services and recidivism rates; and staffing levels and employee conditions.

5. The inquiry is also examining the comparative economic costs of operating public and private facilities and the impact of privatisation on publicly managed prisons; accountability mechanisms; future plans to privatise prisons or prison services in NSW including the Court Escort Security Unit; use and effectiveness of private security guards in perimeter security of prisons and the experience of privatisation of prisons and prison services in other Australian and overseas jurisdictions.

The Bill

6. The object of this Bill is to amend the *Crimes (Administration of Sentences) Act 1999*:

   (a) to prevent the use of contractors for the transport of prisoners, and

   (b) to prevent a management agreement for a private operator to manage a correctional centre from being entered into unless it is approved by both Houses of Parliament.

Issues Considered by the Committee

7. 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.

6. CRIMES (APPEAL AND REVIEW) AMENDMENT BILL 2009

Date Introduced:	4 March 2009
House Introduced:	Legislative Assembly
Introduced by:	The Hon David Campbell MP
Portfolio:	Attorney General

Purpose and Description

1. The objects of the Bill are:

(a) to amend the *Crimes (Appeal and Review) Act 2001* (the ***principal Act***) so as:
(i) to allow an appeal court to set aside a conviction for the purpose of making an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, and
(ii) to make it clear that a person may appeal against both a conviction and sentence, and
(iii) to provide that an appeal against conviction is to be by way of rehearing on the evidence given in the original Local Court proceedings rather than on the basis of certified transcripts, and
(iv) to enable an appeal court to remit certain matters to the original Local Court on an appeal, and
(v) to provide that an appeal against certain suspensions and disqualifications of driver licences does not automatically result in the stay of the suspensions or disqualifications, and
(vi) to remove the current requirement that an appeal court direct that costs be paid to the registrar of a Local Court, and
(vii) to require appeals made to the Land and Environment Court to be lodged with the Registrar of that Court rather than with the registrar of a Local Court,

(b) to amend the *Crimes (Domestic and Personal Violence) Act 2007* so as:
(i) to require the District Court on certain appeals against orders made under that Act to make interim apprehended domestic violence orders or interim apprehended personal violence orders (as the case requires), and
(ii) to allow a person who has had an application for an apprehended violence order dismissed in their absence to apply for the annulment of that dismissal,

(c) to amend the *Criminal Procedure Act 1986* to enable certain accused persons to rely on written pleas instead of attending personally at certain Local Court hearings,

(d) to amend the *Crimes (Domestic and Personal Violence) Act 2007*, the *Local Courts Act 1982* and the *Local Court Act 2007* to make it clear that the provisions of the principal Act relating to appeals against conviction apply to certain appeals under those Acts.

The amendments described above give effect to recommendations that were made in the report tabled in Parliament in September 2008 as a result of a review of the principal Act carried out under section 120 of that Act.

Background

2. According to the Agreement in Principle Speech, the reforms in this bill have the objective of clarifying and improving the appeal and review processes from the Local Court and Children's Court to the District Court, the Land and Environment Court and the Supreme Court.

3. The first two items in schedule 1 amend the definition of the terms "conviction" and "sentence" in the Act to make it clear that a court is authorised to quash the recording of a conviction when dealing with an appeal against the severity of a sentence. The amendment overcomes the problem raised in a line of authority in the Land and Environment Court, most recently expounded in *Advanced Abor Service Pty Ltd v Strathfield Municipal Council* [2006] New South Wales LEC 485, in which the court held that in relation to appeals against sentence it was precluded from quashing the conviction and imposing a sentencing order that did not include a conviction. The bill amends section 3 to make it clear that a court when dealing with a severity appeal may set aside the conviction imposed to make a non-conviction sentencing order.

4. Item 4 rectifies a technical issue referred to in recommendation 14 of the report. Section 11 of the Crimes (Appeal and Review) Act 2001 allows a defendant to lodge an appeal against either the conviction or the sentence. Section 11 does not make specific provision for a single appeal to be lodged against both the conviction and the sentence. Where an appeal against the conviction is unsuccessful then technically a defendant may be precluded from challenging the sentence. This amendment makes it clear that an appeal may be made against both the conviction and sentence. Items 5, 6, 7 and 10 of schedule 1 of the bill give effect to recommendation 2 of the report.

5. This recommendation achieves two objectives. Firstly, it ensures that the District Court is not placed in the position of conducting an original summary defended hearing in circumstances where there has been no defended hearing in the Local Court. It does this by creating a right for the District Court to set aside a conviction that has been recorded in the absence of the defendant or where the defendant initially entered a guilty plea and remit the matter to the Local Court for a defended hearing. Secondly, recommendation 2 streamlines the appeal process by providing that if a sentence is imposed in the absence of the defendant then, if a magistrate declines to annul the sentence, the defendant cannot appeal that refusal but may lodge a severity appeal against the sentence in the normal manner. This allows the District Court to bring the matter to finality on appeal without requiring the District Court to remit the case to the Local Court to further exercise its sentencing discretion.

6. Item 17 of schedule 1 gives effect to recommendation 11 of the report by reinstating during the appeal period any suspension of licence that was in place immediately prior to the determination of proceedings. When a person is charged with a serious driving offence such as driving with the mid or high range prescribed concentration of alcohol or street racing a police officer may suspend the person's licence immediately upon laying charges against the person. The suspension then remains in force until the court determines the charge. If the court finds the offence proven then periods of licence disqualification apply. The underlying purpose of these provisions is to ensure that a person who is charged with a serious traffic offence is immediately taken off the road for the protection of the community.

7. Section 63 of the Crimes (Appeal and Review) Act stays the execution of certain sentences during an appeal period. The stay ensures that a party is able to seek the reconsideration of the sentence before the District Court before it takes effect. In relation to serious traffic offences, the operation of this provision means that a defendant who has had his licence suspended leading up to the determination of the case in the Local Court is able to drive during the stay of execution during the appeal period. This acts contrary to the intention of removing serious traffic offenders immediately from the road and protecting the community. Item 17 creates an exception to the stay provision so that the licence sanction remains in force during the appeal period subject to any order of the appeal court. This provision will commence once the Roads and Traffic Authority has made adjustments to its systems to record these outcomes.

8. Schedule 2.1 of the bill makes amendments to give effect to recommendations 4 and 6 of the report. The purpose of these amendments is to improve the protection afforded to victims of domestic violence when either an appeal or review is made against an apprehended violence order under the Crimes (Domestic and Personal Violence) Act 2007. If an appeal under section 11A is granted by the District Court then the apprehended violence order that is in place is annulled and the proceedings are remitted to the Local Court for a further hearing. During the period between the annulment and the further hearing in the Local Court the victim is not protected by an interim apprehended violence order. This potential gap in protection of victims is addressed by placing an obligation upon the District Court to make an interim order in favour of the victim unless it is satisfied that it is not necessary to do so. The second amendment will create a right for a person who is seeking an apprehended violence order to apply for an annulment of an order dismissing the application if that dismissal was made in their absence. The change is intended to ensure that a person in need of protection is not prevented from seeking an apprehended violence order if the case is dismissed in their absence and their failure to attend was due to illness or misadventure.

9. The remaining provisions in the bill address a number of other minor technical and procedural issues identified in the report. They improve the operation of the Crimes (Appeal and Review) Act by clarifying provisions that were uncertain and modernising and streamlining provisions that are historic vestiges of the former appeals regime under the Justices Act 1902. The Crimes (Appeal and Review) Act provides an effective and efficient framework for parties aggrieved by decisions of magistrates to seek redress. The District Court finalises more than 90 per cent of all grounds appeals within 12 months of lodgement and 90 per cent of sentencing appeal within six months of lodgement. The provisions in this bill will finetune the operation of the Act to ensure that it continues to provide an effective system for appeals.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act.
Schedule 1 Amendment of Crimes (Appeal and Review) Act 2001 No 120
Schedule 1 [1] amends section 3 of the principal Act to provide that, when varying a sentence, an appeal court may set aside a conviction for the purpose of making an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. The setting aside of any such conviction for that purpose does not set aside the finding of guilt that gave rise to that conviction.
Schedule 1 [2] amends section 11 of the principal Act to make it clear that a person

may appeal against both a conviction and the sentence imposed in relation to that conviction. Currently, section 11A of the principal Act allows a person who is sentenced while not present at the Court to apply for the annulment of the sentence and, if the annulment is not granted, the person may appeal to the District Court against the refusal to grant the annulment of the sentence.

Schedule 1 [3] amends section 11 of the principal Act to provide that a person who has an application for the annulment of a sentence dismissed by the Local Court may appeal to the District Court against the sentence rather than appealing against the refusal to grant the annulment.

Schedule 1 [4] amends section 11A of the principal Act to remove the right to appeal against the Local Court's refusal to grant the annulment of a sentence. **Schedule 1 [5]** makes a consequential amendment.

Schedule 1 [6] amends section 18 of the principal Act to make it clear that an appeal to the District Court against a conviction is to be by way of rehearing on the evidence that was before the original court rather than on the basis of certified transcripts of the original proceedings.

Schedule 1 [10] makes a similar amendment to section 37 of the principal Act in relation to an appeal to the Land and Environment Court against a conviction. **Schedule 1 [7] and [11]** make consequential amendments.

Currently, section 20 of the principal Act provides that the District Court may determine an appeal against conviction by setting aside the conviction or by dismissing the appeal.

Schedule 1 [8] amends that section to allow the District Court to determine such an appeal by remitting the matter back to the original Local Court for redetermination where the conviction was made in the accused person's absence. The amendment also provides that the District Court may issue directions in relation to the redetermination of the matter by the Local Court.

Schedule 1 [12] makes a similar amendment to section 39 of the principal Act in relation to the Land and Environment Court's determination of an appeal against conviction.

Schedule 1 [9] and [13] amend sections 34 and 44 of the principal Act, respectively, to provide that an appeal to the Land and Environment Court is to be lodged with the Registrar of the Land and Environment Court rather than the registrar of a Local Court.

Schedule 1 [14] amends section 48 of the principal Act to provide that the Land and Environment Court may determine an appeal against an order referred to in section 42 (2B) of the principal Act by setting aside the order and making some other order, by setting aside the order and remitting the matter to the Local Court or by dismissing the appeal.

Section 63 of the principal Act provides that, on the lodgment of an appeal, certain sentences and penalties are automatically stayed until the appeal is finally determined.

Schedule 1 [15] amends that section to provide that the automatic stay does not apply in respect of the suspension or disqualification of a driver licence if the licence was, immediately before the suspension or disqualification, suspended under Division 4 of Part 5.4 of the *Road Transport (General) Act 2005* for the offence to which the appeal relates. The proposed amendment to section 63 of the principal Act also provides that the appeal court may order that any such suspension or disqualification be stayed if the court considers it appropriate in the circumstances.

Schedule 1 [16] amends section 72 of the principal Act to remove the requirement that, on making an order for costs, an appeal court must direct that the costs be paid to the registrar of the original Local Court to allow the Court to direct that costs are to be paid directly to the other party to the proceedings.

Schedule 1 [17] amends clause 1 of Schedule 1 to the principal Act to enable the

Governor to make regulations of a savings and transitional nature consequent on the enactment of the proposed Act.
Schedule 1 [18] inserts a new Part in Schedule 1 to the principal Act containing a provision of a transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts
Schedule 2.1 Crimes (Domestic and Personal Violence) Act 2007 No 80
Currently, section 84 of the *Crimes (Domestic and Personal Violence) Act 2007* provides that an application for the annulment of an apprehended violence order made by the Local Court or Children's Court, or an appeal against a conviction or sentence, is to be made in the same way as an application for the annulment of a conviction or sentence, or appeal against a conviction or sentence, is made under the *Crimes (Appeal and Review) Act 2001*.
Schedule 2.1 [1] amends section 84 of the *Crimes (Domestic and Personal Violence) Act 2007* to make it clear that such an application or appeal is to be made in the same way as an application for the annulment of a conviction, or appeal against a conviction, is made under the *Crimes (Appeal and Review) Act 2001*, rather than in the same way as an application for the annulment of a sentence, or appeal against a sentence, under that Act.
Schedule 2.1 [2] amends section 84 of the *Crimes (Domestic and Personal Violence) Act 2007* to allow a person who has had an application for an apprehended violence order dismissed to apply for the annulment of the dismissal, but only if the person was not in attendance when the application was dismissed.
Schedule 2.1 [3] amends section 84 of the *Crimes (Domestic and Personal Violence) Act 2007* to provide that, if the District Court allows an appeal against the refusal to annul an apprehended violence order and remits the matter to the Local Court, the District Court is to make an interim apprehended domestic violence order or interim apprehended personal violence order unless the Court is satisfied that it is not necessary to do so.
Schedule 2.2 Criminal Procedure Act 1986 No 209
Schedule 2.2 amends section 182 of the *Criminal Procedure Act 1986* to provide that a person who submits a written plea under that section not later than 7 days before the date that the person is required to attend a Local Court is not required to attend the Court on that date and is taken to have attended the Court on that date.
Schedule 2.3 Local Court Act 2007 No 93
Schedule 2.3 amends section 70 of the *Local Court Act 2007* to provide that an application for an annulment in relation to an order, or an appeal against an order, is to be made in the same way as an application for the annulment of a conviction, or appeal against a conviction, is made under the *Crimes (Appeal and Review) Act 2001*. Currently, such an application or appeal is to be made in the same way as an application for the annulment of a sentence, or an appeal against a sentence.
Schedule 2.4 Local Courts Act 1982 No 164
Schedule 2.4 amends section 64 of the *Local Courts Act 1982* to provide that an application for an annulment in relation to an order, or an appeal against an order, is to be made in the same way as an application for the annulment of a conviction, or appeal against a conviction, is made under the *Crimes (Appeal and Review) Act 2001*. Currently, such an application or appeal is to be made in the same way as an application for the annulment of a sentence, or an appeal against a sentence.

Issues Considered by the Committee

Issue: Schedule 1 [15] – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

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

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

The Committee makes no further comment on this Bill.

7. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (SEARCH POWERS) BILL 2009

Date Introduced:	4 March 2009
House Introduced:	Legislative Assembly
Introduced by:	The Hon David Campbell MP
Portfolio:	Attorney General

Purpose and Description

1. Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (the ***principal Act***) sets out powers of police and other persons to enter and search premises under the authority of a search warrant (in this explanatory note described as a ***standard search warrant***). Part 5 requires an occupier's notice to be served on entry to the premises concerned or as soon as practicable after, unless service is postponed by the authorised officer who issued the warrant.

2. The object of this Bill is to amend the principal Act to enable Supreme Court judges to issue search warrants (called ***covert search warrants***) that, in addition to authorising the exercise of powers currently able to be exercised under standard search warrants, also enable specially authorised police officers and staff of the New South Wales Crime Commission and the Police Integrity Commission to enter and search premises covertly for the purposes of investigating serious criminal offences.

3. Service of occupier's notices in relation to covert search warrants may be deferred for up to 6 months (with possible extensions up to 3 years) after entry to the premises.

4. This Bill also amends the principal Act to create new powers to remove computers and similar devices from premises the subject of any search warrant for up to 7 working days (or longer on application) for examination and to search computers that are "networked" to a computer at the premises. The Bill amends the *Terrorism (Police Powers) Act 2002* to enable eligible persons executing covert search warrants under that Act to exercise similar powers under that Act.

5. This Bill also makes consequential amendments to other Acts and the *Law Enforcement (Powers and Responsibilities) Regulation 2005*.

Background

In the Agreement in Principle Speech the Minister explained the necessity for covert search warrant powers:

6. The Bill is part of the New South Wales Government's ongoing commitment to providing law enforcement agencies with the necessary armoury to respond effectively to major crime and keep the community safe.

7. The new scheme recognises that there may be cases in which law enforcement agencies would benefit from obtaining covert access to premises to obtain intelligence

or evidence in relation to a serious criminal offence. By conducting a covert search, the police could monitor the organisation and development of criminal activity without notifying the suspects that they are under surveillance.

8. Premature notification to a suspect of the existence of an investigation may lead to an investigation failing, notwithstanding the commission of serious offences. Searches of clandestine drug laboratories are but one example of where there may be the need to covertly examine the premises to determine whether the manufacturing process is sufficiently advanced for the seizure of evidence to occur.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act.
Schedule 1
Proposed Section 46A defines a *searchable offence* which will generally be an indictable offence punishable by imprisonment for a period of 7 years or more that will involve various drug, sexual and other serious offences.
Proposed Section 46B defines an *eligible judge* as a judge of the Supreme Court who consents to issue such warrants.
Proposed Section 46C specifies the persons (called ***eligible applicants***) who are authorised to apply for a covert search warrant. They are police officers authorised to make applications by a police officer holding the rank of Superintendent or above, Commissioners or Assistant Commissioners for the New South Wales Crime Commission and the Police Integrity Commission and members of staff of the New South Wales Crime Commission and Police Integrity Commission authorised by the Commissioner for the New South Wales Crime Commission or the Commissioner for the Police Integrity Commission, respectively. An authorisation may only be given if the person giving it considers that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises.
Proposed Section 47A describes the features of, and difference in the authority conferred by, standard search warrants and covert search warrants. A standard search warrant authorises an executing officer to enter the subject premises and to search for things connected with a particular searchable offence. Under the authority of a covert search warrant, police officers and certain members of the staff of the New South Wales Crime Commission and Police Integrity Commission may enter the subject premises without the occupier's knowledge, impersonate another person for the purpose of executing the warrant and may do anything else that is reasonable to conceal anything done in the execution of the warrant from the occupier. They may also gain access to the subject premises by entering adjoining and adjacent premises without the knowledge of the occupier of those premises. Provision is made elsewhere in this Bill for the occupier of the subject and adjoining premises to subsequently be notified of the entry.
Proposed Section 48 sets out the grounds on which the two kinds of search warrants may be issued and enables a standard search warrant to be issued instead of a covert search warrant in specified circumstances. These are where there are reasonable grounds for doing so.
Proposed Section 49 specifies that things may be seized and detained in the execution of a search warrant. It also enables a covert search warrant to authorise placement of things in substitution for seized things.
Proposed Section 49A authorises the return or retrieval of certain things seized or placed under a covert search warrant.

Proposed Section 50 empowers a person executing a search warrant to search a person found in or on premises entered under a search warrant if the person executing the warrant reasonably suspects the person of having any thing mentioned in the warrant.
Schedule 1 [14] replaces section 62 of the principal Act with new section 62, which sets out the information to be contained in an application for a search warrant.
Schedule 1 [16] amends section 63 of the principal Act to make it an offence to give false or misleading information in a report or occupier's notice in relation to a search warrant, knowing it to be false or misleading.
Schedule 1 [20] amends section 65 of the principal Act to require an eligible issuing officer who refuses to issue a warrant to record the grounds relied on by the officer to justify the refusal.
Schedule 1 [21] amends section 66 of the principal Act to require a covert search warrant to specify certain matters.
Schedule 1 [23] amends section 67 of the principal Act so as to alter the current requirements for service of occupier's notices in relation to the execution of standard search warrants and provide for service of occupier's notices in relation to the execution of covert search warrants. At present an occupier's notice is required to be personally served on an occupier on entry to premises or as soon as practicable after, unless service is postponed. Service may be postponed on more than one occasion (for up to 6 months at a time). New section 67 (4)–(7) instead require personal service on entry or within 48 hours after entry. If this proves impossible, an eligible issuing officer may make orders to bring the entry to the notice of the occupier otherwise than by personal service. New section 67 (8) requires service of an occupier's notice in relation to a covert search warrant as soon as practicable after the warrant is executed unless it is postponed under new section 67A
Schedule 1 [24] inserts new sections 67A and 67B into the principal Act.
Proposed Section 67A enables an eligible issuing officer to postpone service of an occupier's notice in relation to a covert search warrant for an initial period of up to 6 months and on further occasions for up to 3 years in total. An eligible issuing officer may not postpone service for periods exceeding 18 months in total unless satisfied that there are exceptional grounds to justify the postponement.
Proposed Section 67B requires an adjoining occupier's notice to be served on an adjoining occupier whose property is entered under a covert search warrant within specified periods, unless service is postponed or dispensed with by the eligible issuing officer.
Schedule 1 [28] amends section 70 of the principal Act to specifically authorise a person executing a search warrant to do anything reasonably necessary to render safe any dangerous article found in or on the premises.
Schedule 1 [29] amends section 72 of the principal Act to authorise the execution of a covert search warrant by day or by night.
Schedule 1 [33] amends section 73 of the principal Act to provide for the expiry of a covert search warrant 10 days after the date on which it is issued.
Schedule 1 [40] inserts new section 74A into the principal Act.
Proposed Section 74A requires a person executing a covert search warrant to report certain matters to the eligible issuing officer who issued the warrant within 10 days after the execution of the warrant or, if the warrant was not executed, within 10 days after the expiry of the warrant. A report is also to be provided if premises are entered for the purposes of returning or retrieving a thing under new section 49A. Copies of reports provided under the new section are to be given to the Attorney General.
Schedule 1 [42] inserts new sections 75A and 75B into the principal Act.
Proposed Section 75A authorises a person executing or assisting in the execution of a warrant to bring to and operate electronic and other equipment at the premises for the purpose of examining things at the premises to determine whether they may be seized and to remove things from the premises for examination in specified circumstances.

Proposed Section 75B authorises a person executing or assisting in the execution of a warrant to operate computers and other equipment at the premises the subject of the warrant to access data that the person believes on reasonable grounds may be seized under the warrant and, in certain circumstances, to copy that data or take the data storage device from the premises.
Schedule 1 [43] inserts new sections 76A and 76B into the principal Act.
Proposed Section 76A provides for applications under Part 5 in respect of covert search warrants to be dealt with in the absence of the public.
Proposed Section 76B makes it an offence to publish certain applications, reports and notices concerning search warrants.
Schedule 1 [45] amends section 201 of the principal Act so that it will not require warnings to be given or evidence to be given of the identity of a police officer in exercising powers under a covert search warrant.
Schedule 1 [46] and [47] amend section 242 of the principal Act to provide for the Ombudsman to monitor the operation of provisions of the Act relating to covert search warrants and to make a yearly report to the Attorney General and the Minister for Police.
Schedule 1 [48] inserts new section 242A into the principal Act to require the Commissioner of Police, the Commissioner for the New South Wales Crime Commission and the Commissioner for the Police Integrity Commission to report annually on the exercise of powers under covert search warrants by police officers and members of staff of the New South Wales Crime Commission and the Police Integrity Commission, respectively.

Issues Considered by the Committee

Trespasses on Personal Rights and Liberties [s 8A(1)(b)(i) LRA]

The Committee has previously commented upon covert search warrants in relation to the *Terrorism Legislation Amendment (Warrants) Bill 2005.*

Authorising an eligible person to covertly enter and search premises using such force as is necessary and to seize, substitute, copy, photograph and record things, and to covertly enter adjoining premises, as provided under Proposed section 47A,is clearly a significant trespass on the relevant persons' privacy and property.

While the argument is made that the public interest must be balanced against personal rights and liberties, this is the only legislation of its type in Australia. The issuing of covert search warrants has so far only been allowed under terrorism legislation.

There are some restrictions placed upon the impact of powers under the Bill:

- Covert search warrants are limited to indictable offences punishable by imprisonment for a period of seven years or more that involve various drug, sexual and other offences [Section 46A];
- The warrant must be issued by an eligible judge of the NSW Supreme Court [Section 46B];
- Only authorised officers of NSW Police, the NSW Crimes Commission or the NSW Police Integrity Commission can apply for covert warrants [Section 46C];
- The application can only be made f the applicant suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing of a kind connected

with a searchable offence and considers that it is necessary for the entry and search to be conducted without the knowledge of the occupier of the premises [Section 47A];

- It is an offence to knowingly give false or misleading information in a report or occupier's notice in relation to a search warrant [Section 63];

- The Commissioner of Police, the Commissioner for the NSW Crime Commission and the Commissioner for the Police Integrity Commission will be required to report annually on the use of covert search warrants [Section 242A];

- The NSW Ombudsman will have the power to monitor the operations of the Act and make an annual report to the Attorney General and Minister for Police [Section 242].

However the Bill raises significant concerns about trespasses on personal rights and liberties for the following reasons:

- The threshold for invoking the powers is suspicion *on reasonable grounds* which is not high enough to ensure that there will not be covert entry and search of premises of innocent people;

- If a search warrant is not served upon the person at the time of entry there is no opportunity to check whether the occupier and address are correct;

- It is not necessary that all or any occupiers of the premises be suspected of any criminal acts therefore potentially infringing on the rights;

- The bill specifically provides for the covert entry of adjoining premises occupied by people with no suspected criminal activity therefore infringing upon the rights of innocent persons;

- While it is an offence to knowingly give false and misleading information when making an application, this is a fairly high evidencial threshold to meet. Further, there is no penalty for being reckless or negligent regarding the truthfulness or accuracy of the information given;

- An applicant is not required to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of the person [Section 62(6)]. This section seems overly cautious as the identity of the person will presumably only be disclosed to a judge of the Supreme Court and its non-disclosure may make it difficult for the judge to decide how compelling the evidence is in regard to the need for a covert warrant.

The Committee is concerned that there appears to have been no robust consultation on the Bill. The initial covert search warrant powers that were introduced under the *Terrorism Legislation Amendment (Warrants) Bill 2005* were done so in relation to the context of the potentially catastrophic consequences of terrorist activities and a public interest test was argued. However, these powers cover a large range of indictable offences which need only attract seven years imprisonment.

9. The Committee considers that the broad covert search warrant powers significantly trespass on personal rights and liberties, particularly in regard to persons not suspected of serious criminal activity. The Committee also believes that the Act contains insufficient safeguards to address these. The Committee therefore refers the matter to Parliament. The Committee has also resolved to write to the NSW Attorney General inquiring whether any public consultation was conducted in relation to the Bill and if not, the reasons behind this decision.

10. The Committee notes that new section 242A requires that annual reports regarding the use of the warrants be given to the Attorney General and the Police Minister. Section 242A allows that these reports can be combined into the annual reports of the NSW Police Force, the NSW Crime Commission or the Police Integrity Commission. However, the legislation does not specify that this must be done and thus does not give any assurance that they will therefore be made publicly available on an annual basis. Section 242A(5) requires only that reports are to be tabled in each House of Parliament as soon as practicable after they are received by the Attorney General.

11. The Committee believes that given the strength of these new search powers, the additional oversight afforded by public availability of these reports on a timely basis is important.

12. The Committee has resolved to write to the NSW Attorney General inquiring as to how regularly it is envisaged that reports regarding the exercise of the covert search powers will be tabled in both Houses of Parliament.

Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act

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

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

The Committee makes no further comment on this Bill.

[2] Except as provided by subsection (2): Schedule 1 [18], and Schedule 1 [116] to the extent that it inserts clause 44 into Schedule 1 to the *Gaming Machines Act 2001*, commence (or are taken to have commenced) on 1 December 2008.

8. NATION BUILDING AND JOBS PLAN (STATE INFRASTRUCTURE DELIVERY) BILL 2009

Date Introduced:	4 March 2009
House Introduced:	Legislative Assembly
Introduced By:	Hon Kristina Keneally MP
Portfolio (Minister Responsible):	Planning

Purpose and Description7

1. This Bill enables New South Wales to deliver the infrastructure projects funded under the Nation Building and Jobs Plan of the Commonwealth in accordance with its obligations under the February 2009 COAG partnership agreement.

2. Clause 5 states that the Bill applies only to projects funded by the Commonwealth under the Nation Building and Jobs Plan.

3. Part 2 establishes the New South Wales Infrastructure Co-ordinator General, who will be responsible for planning and implementing the timely delivery of the infrastructure projects. The Bill provides for the establishment of a taskforce consisting of government and private sector representatives to provide advice on the exercise of functions by the Co-ordinator General.

4. Part 3 requires State Government agencies to co-operate with the Co-ordinator General in relation to infrastructure projects to ensure that the projects are delivered on time.

5. Part 4 provides for the Co-ordinator General to take over the delivery of infrastructure projects on behalf of State government agencies.

Background

6. This Bill aims to ensure the rapid delivery of infrastructure projects funded by the Commonwealth to implement the 5 February Council of Australian Governments [COAG] agreement on the Nation Building and Jobs Plan to help address the impact of the global economic crisis.

7. The COAG agreement implements the Rudd Government's $42 billion package to stimulate the economy and construction.

8. The Bill will not apply to other infrastructure projects, whether funded by the Commonwealth or not.

9. Once the infrastructure projects are completed, the legislation will be repealed. The Bill establishes a mechanism under which the Act has to be reviewed. Once the Co-ordinator General is satisfied that the Act is no longer required, he or she will provide a certificate to that effect and the Governor can then repeal the Act.

The Bill

10. The object of this Bill is to ensure the timely delivery in NSW of the infrastructure projects funded by the Commonwealth under the Nation Building and Jobs Plan to implement the COAG partnership agreement of 5 February 2009 to reduce the impact on Australia of the global economic recession.

11. The Bill:

    (a) establishes a NSW Infrastructure Co-ordinator General who will be responsible for planning and implementing the timely delivery of the infrastructure projects, and
    (b) establishes an advisory Taskforce consisting of government and private sector representatives, and
    (c) requires State government agencies to co-operate with the Co-ordinator General in relation to infrastructure projects, and
    (d) provides for the Co-ordinator General to take over the delivery of infrastructure projects on behalf of State government agencies, and
    (e) enables the Co-ordinator General to streamline the planning and other approval processes for infrastructure projects.

12. Project authorisation orders will be able to be made by either the Premier or the portfolio Minister for the works. Such orders will be made where project delivery timeframes would not be met by the relevant agency and it is necessary for the Co-ordinator General to take over the delivery of the project to make sure that it is delivered on time. If such an order is made, the Co-ordinator General will be able to exercise all of the functions of the agency in relation to the project. The Co-ordinator General will also be able to issue directions to the agency, with the concurrence of the Minister who made the order and after consulting with the agency, and the agency must then comply with those directions.

13. This Bill provides that the Co-ordinator General can establish alternative procurement and tendering frameworks for the infrastructure projects.

14. Part 5 allows the Co-ordinator General to vary the planning and environmental approval processes in relation to infrastructure projects to ensure that the projects can be delivered within the timeframes required by the Commonwealth.

15. Under clause 23, the Co-ordinator General will be able to exempt a project from the development control legislation or require an alternative authorisation under clause 24. The definition of development control legislation is wide to cover any Act, regulation or instrument that prohibits the carrying out of development or that requires the approval of any person or body before development is carried out. Where the Co-ordinator General makes an order that an authorisation is required under part 5, clause 24 sets out the application and authorisation process. The Co-ordinator General can impose those conditions on an authorisation deemed appropriate, including requirements to provide for public notification, environmental protection, heritage conservation, threatened species protection and bushfire protection. This aims to ensure that appropriate conditions are imposed on development authorised under part 5.

Issues Considered by the Committee

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

Issue: Clause 18 (Part 4) - Acquisition of land on just terms:

16. Clause 18 (1) proposes that: The State of NSW may, for the purposes of the exercise of the functions of the Co-ordinator General in relation to an infrastructure project as authorised by a project authorisation order, acquire land by agreement or compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*.

17. The Committee notes that the acquisition of property be on just terms is an important safeguard of the right to property. The Committee considers that clause 18 (1) of Part 4 provides this safeguard by ensuring that any project authorisation order to acquire land by agreement or compulsory process has to be in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* so as not to trespass unduly on personal rights and liberties.

Issue: Clause 23 – Property

18. Under this Clause the Co-ordinator General may declare a specified infrastructure project exempt from any specified development control legislation. The Committee is concerned that this may extinguish existing obligations given under other legislation to notify third parties who may potentially be affected by the proposed development.

19. The Committee has resolved to write to the Minister for Planning to inquire as to how the introduction of Clause 23 will affect the rights of third parties to be notified and allowed to comment upon developments where they may be impacted by them, particularly in situations where these rights are currently provided under other planning legislation and instruments.

Issue: Clause 25 (6) of Part 5 – Application of *Environmental Planning and Assessment 1979* – Retrospectivity:

20. Clause 25 (6) reads that: Subsection (2) applies to an environmental planning instrument made before or after the commencement of this section. Subsection (2) proposes: An environmental planning instrument under that Act cannot prohibit, require development consent for or otherwise restrict the carrying out of the infrastructure project.

21. The Committee will always be concerned where the law is changed retrospectively in a manner that may adversely affect any person and considers clause 25 (6) may trespass unduly on personal rights and refers this to Parliament.

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

Issue: Clause 27 (Part 6) – Protection of exercise of certain functions – excludes merits and judicial review:

22. Clause 27 (1) proposes that: This section applies to any of the following functions (a protected function) conferred or imposed on the Co-ordinator General (or his or her delegate) or a Minister (a protected person):

(a) a certification under section 5 that any development is an infrastructure project to which this Act applies,

(b) the giving of a direction to a government agency under section 11,

(c) the making of a project authorisation order or project divesting order under Part 4,

(d) the declaring of an exemption or giving of an authorisation under Part 5.

23. Clause 27 (2) proposes that: The exercise by any protected person of any protected function may not be:

(a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings, or

(b) restrained, removed or otherwise affected by any proceedings.

24. Clause 27 (3) reads: Without limiting subsection (2), that subsection applies whether or not the proceedings relate to any question involving compliance or non-compliance, by the protected person, with those provisions or with those rules so far as they apply to the exercise of any protected function.

25. Clause 27 (6) reads: In this section:

Exercise of functions include:

(a) the purported exercise of functions, and

(b) the non-exercise or improper exercise of functions, and

(c) the proposed, apprehended or threatened exercise of functions.

Proceedings includes:

(a) proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, and

(b) without limiting paragraph (a), proceedings in the exercise of the inherent jurisdiction of the Supreme Court or the jurisdiction conferred by section 23 of the *Supreme Court Act 1970*,

but does not include any investigation or proceedings under the *Independent Commission Against Corruption Act 1988*.

26. The Committee notes the importance of reviewable decisions for protecting individual rights and in upholding the rule of law. The Committee will always express concerns if a Bill purports to oust the jurisdiction of the courts including proceedings in the exercise of the inherent jurisdiction of the Supreme Court as contained in clause 27 (6) (b).

27. The Committee is also of the view that clause 27 is very broad, including whether or not the proceedings relate to any question involving compliance or non-compliance by a Minister (protected person) or the rules of natural justice (procedural fairness) as proposed in clauses 27 (3) and (4). The Committee, therefore, draws Parliament's attention to the fact that individual rights and liberties may appear to be unduly dependent on non-reviewable decisions as proposed in clause 27 (Part 6).

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

Issue: Clause 29 (2) (Part 6) – Regulations – Henry VIII clauses which allow amendment of Acts by a regulation:

28. Clause 29 (2) proposes that: **The regulations may make provision for or with respect to restoring the operation of the *Environmental Planning and Assessment Act 1979*** in relation to an infrastructure project that would otherwise be exempted from that Act by this Act and, in particular, for or with respect to:

(a) declaring an authorisation of an infrastructure project by the Co-ordinator General to be a development consent or other approval under that Act and applying the provisions of that Act (with any specified modifications) to any such consent or approval, and

(b) the operation of provisions relating to existing uses and the continuance of lawful uses in relation to an infrastructure project.

For that purpose, ***the regulations may also amend that Act*** to insert provisions into Schedule 6 to that Act in relation to the application of that Act (before or after the repeal of this Act) to infrastructure projects carried out under this Act.

29. The Committee notes that clause 29 (2) allows regulations to amend the *Environmental Planning and Assessment Act 1979* by inserting provisions into that Act's Schedule 6 (Savings, transitional and other provisions) and allows regulations to make provisions with respect to restoring the operation of that Act.

30. **This could enable regulations to be made to undermine the operation of that Act, and in effect, allow amendments of the Act by regulations. Therefore, the Committee considers this as constituting an inappropriate delegation of legislative power and refers it to Parliament.**

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

Issue: Clause 23 (1) (Part 5) – Approval requirements under other Acts – enabling declaration in writing to influence the exercise of powers without any obligation for them to be tabled in Parliament or subject to disallowance:

31. Clause 23 (1) reads: The Co-ordinator General may, by order in writing, declare that a specified infrastructure project (or an infrastructure project of a specified class): (a) is exempt from all or any specified development control legislation, or (b) is exempt from all or any specified development control legislation if the carrying out of the project is the subject of an authorisation of the Co-ordinator General under section 24.

32. The Committee is concerned that the Co-ordinator General (or its delegate) may make a declaration to exempt a specified infrastructure project (or an infrastructure project of a specified class) from all or any specified development control legislation, which could in effect be an exercise of legislative powers that is not subject to disallowance or scrutiny by the Parliament. Therefore, the Committee refers clause 23 of Part 5 to the attention of Parliament.

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

9. CRIMINAL PROCEDURE AMENDMENT (VULNERABLE PERSONS) BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Police

Background

1. The Committee reported on this Bill in its Legislation Review *Digest* 1 of 27 June 2007. This Bill received assent on 15 June 2007.

2. The Committee also resolved to write to the Minister for Police in a letter of 29 June 2007 and a follow up letter of 24 November 2008, to seek advice on the reason for and status of the commencement by proclamation.

3. The above letters were forwarded on 3 December 2008 to the Attorney General for his reply as the legislation fell under the Attorney General's administration.

Attorney General's Reply

4. The Attorney General wrote the following reply in a letter received on 13 February 2009:

> In relation to your inquiry as to why this legislation commenced on proclamation rather than assent, I advise that this legislation contained important protections for intellectually impaired people when giving evidence in court, such as having a support person present, and the use of alternative arrangements for giving evidence (such as CCTV). It was important that the appropriate support agencies were given adequate notice of the commencement of these provisions to enable them to provide accurate advice to their clients. In addition, it was considered important to provide the Police Force, Courts Services and the DPP with adequate time to update their procedures and policies to ensure the smooth transition of the amendments.
>
> In regard to your second inquiry, I advise that the legislation was assented to on 15 June 2007 and commenced by proclamation on 12 October 2007.

Committee's Response

5. The Committee thanks the Attorney General for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

29 June 2007

The Hon David Campbell MP
Minister for Police
Ground Floor
84 Crown Street
Wollongong NSW 2500

Dear Minister

CRIMINAL PROCEDURE AMENDMENT (VULNERABLE PERSONS) BILL 2007

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee reported on its consideration of the Bill in its *Legislation Review Digest No 1 of 2007*.

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

Commencement by proclamation

The Committee notes that the *Criminal Procedure Amendment (Vulnerable Persons) Bill 2007* is to commence on proclamation rather than on assent. It acknowledges that there may be good reasons for commencing on proclamation rather than assent.

The Committee accordingly seeks your advice as to:

1. *Why is the Criminal Procedure Amendment (Vulnerable Persons) Bill 2007 to commence on proclamation rather than on assent?*
2. *When is commencement likely to be proclaimed?*

Thank you for your attention to these matters. Should you have any further queries, please contact Talina Drabsch, Senior Committee Officer, on 9230 2128 or talina.drabsch@parliament.nsw.gov.au.

Yours sincerely

Allan Shearan MP
Chair

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NEW SOUTH WALES

ATTORNEY GENERAL

RECEIVED
13 FEB 2009
LEGISLATION REVIEW COMMITTEE

Mr Allan Shearan MP
Chair, Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan.

I refer to correspondence dated 29 June 2007 and 24 November 2008 that you forwarded to the Minister for Police in relation to the *Criminal Procedure Amendment (Vulnerable Persons) Bill* 2007.

As this legislation comes under my administration, the Minister for Police forwarded copies of your correspondence to my office on 3 December 2008.

In relation to your inquiry as to why this legislation commenced on proclamation rather than assent, I advise that this legislation contained important protections for intellectually impaired people when giving evidence in court, such as having a support person present, and the use of alternative arrangements for giving evidence (such as CCTV). It was important that the appropriate support agencies were given adequate notice of the commencement of these provisions to enable them to provide accurate advice to their clients. In addition, it was considered important to provide the Police Force, Courts Services and the DPP with adequate time to update their procedures and policies to ensure the smooth transition of the amendments.

In regard to your second inquiry, I advise that the legislation was assented to on 15 June 2007 and commenced by proclamation on 12 October 2007.

Yours faithfully

John Hatzistergos

Postal: GPO Box 5341 Sydney NSW 2001 Telephone (02) 9228 4977 Facsimile (02) 9228 3600

10. LIQUOR LEGISLATION AMENDMENT BILL 2008

Date Introduced:	13 November 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Gaming and Racing

Background

1. The Committee reported on this Bill in its Legislation Review *Digest* 14 of 2008. This Bill was passed by the Parliament on 26 November 2008 and commenced on 3 December 2008.

2. At its meeting of 24 November 2008, the Committee also resolved to write to the Minister in a letter of 24 November 2008, to seek advice on the matters of concern arising from Schedule 2 [1] – amendment of *Local Government Act 1993* in relation to section 642 on the confiscation of alcohol in alcohol-free zones and matters of concern arising from Schedule 2 [2] and Schedule 2 [4] – amendment of *Local Government Act 1993* with regard to the removal of an offence by a penalty notice in relation to individuals from disadvantaged or marginalised groups.

Minister's Reply

3. The Minister wrote his reply in a letter received on 5 January 2009. The Minister informed that advice has been sought from the Local Government portfolio in relation to the amendments.

4. The Minister advised the following in relation to section 642 Confiscation of alcohol in alcohol-free zones:

> …that the previous mandatory warning requirement for alcohol free zones was often an impediment to police acting quickly to diffuse a potentially volatile situation. Through the recent amendments, police now have the power to act immediately to confiscate and dispose of alcohol…The Government's view is that the requirement to warn a person who is clearly intoxicated and is either behaving in an anti-social manner or is likely to was inhibiting the good work that police officers do on a daily basis to keep our communities safe.
>
> Police and authorised council enforcement officers can still use discretion and give a warning to a person, who, for example, appears to be unaware of the existence of an alcohol free zone, or can use other options when dealing with persons from marginalised groups. The Local Government portfolio has advised that this and other implementation issues are addressed in police operational procedures that have been developed. Advice will also be provided to councils in an updated version of the *Ministerial Guidelines on Alcohol Free Zones* and other advice issued by the Department of Local Government.

5. With regard to the omission of sections 647 and 649 and '642' from section 679 of the amended Local Government Act 1993, the Minister advised that:

> The Government's view is that the confiscation and disposal of alcohol is an immediate and greater deterrent than the issue of a $22 fine, which I am advised was a course of action rarely used by police officers…The Government chose not to increase the penalty because of the potential for that to impact disproportionately on individuals from disadvantaged or marginalised groups. Given that penalty notices were rarely issued and that the emphasis has been on confiscation, the removal of the penalty notice option should not change the potential for escalation of incidents that are currently dealt with by police officers.

Committee's Response

6.	The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 November 2008

Our Ref: LRC 2970

The Hon Kevin Greene MP
Minister for Gaming and Racing
Level 36 Governor Macquarie Tower,
1 Farrer Place,
SYDNEY NSW 2000

Dear Minister

Liquor Legislation Amendment Bill 2008

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 14 of 2008*.

The Committee resolved to write to you for advice on the following matters of concern.

Schedule 2 [1] – amendment of *Local Government Act 1993* – proposed section 642 Confiscation of alcohol in alcohol-free zones:

The Committee is concerned that in the absence of an offence attracting a penalty notice, that the alcohol confiscation and tipping powers proposed for the police or enforcement officers in alcohol-free zones under the new section 642, may constitute as oppressive official powers which could trespass unduly on personal rights and liberties.

The Committee also holds concerns that there will be no requirement to warn the person that they are in an alcohol-free zone and that their alcohol may be seized or may be immediately disposed if the person is drinking in the alcohol-free zone, or if the officer has reasonable cause to believe that the person is about to drink, or has been recently drinking alcohol in the alcohol-free zone.

The Committee would, therefore, appreciate more information on why such a warning is no longer required in the proposed section 642.

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PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 November 2008

Our Ref: LRC 2970

The Hon Kevin Greene MP
Minister for Gaming and Racing
Level 36 Governor Macquarie Tower,
1 Farrer Place,
SYDNEY NSW 2000

Dear Minister

Liquor Legislation Amendment Bill 2008

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 14 of 2008*.

The Committee resolved to write to you for advice on the following matters of concern.

Schedule 2 [1] – amendment of *Local Government Act 1993* – proposed section 642 Confiscation of alcohol in alcohol-free zones:

The Committee is concerned that in the absence of an offence attracting a penalty notice, that the alcohol confiscation and tipping powers proposed for the police or enforcement officers in alcohol-free zones under the new section 642, may constitute as oppressive official powers which could trespass unduly on personal rights and liberties.

The Committee also holds concerns that there will be no requirement to warn the person that they are in an alcohol-free zone and that their alcohol may be seized or may be immediately disposed if the person is drinking in the alcohol-free zone, or if the officer has reasonable cause to believe that the person is about to drink, or has been recently drinking alcohol in the alcohol-free zone.

The Committee would, therefore, appreciate more information on why such a warning is no longer required in the proposed section 642.

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Schedule 2 [2] – amendment of *Local Government Act 1993* – omit sections 647 and 649; and Schedule 2 [4] – omit "642" from section 679 (1) Penalty notices for certain offences:

The Committee notes that the current Local Government Act under section 656 (guidelines for alcohol-free zones), provides for the inclusion of a list of names of the councils that are required to advise the Anti-Discrimination Board under section 644A (3), where the Board may make any representations or objections within 40 days. This reflects the recognition that the operation of alcohol-free zones may sometimes have the potential to impact differentially or disproportionately on members from marginalised groups.

Therefore, the Committee is concerned that the proposed removal of an offence by a penalty notice may lead to escalated incidents or confrontational circumstances arising from the enforcement of the new section 842, which will no longer require a warning to the concerned individual in the alcohol-free zone. This may lead to the unintended consequence of increasing arrests in the absence of an alternative option to serve a penalty notice, which may impact disproportionately on individuals from disadvantaged groups such as those already documented in published research by the NSW Bureau of Crime Statistics and Research as well as by others. The Committee would like any information which you may have received from the Minister for Police on the likely effects of the above amendments in respect of the potential to increase police arrests for incidents escalating or arising from the enforcement of the new section 642 (rather than the alternative option of a penalty notice which would no longer be available under the Bill).

The Committee would like to know how the above concerns could be addressed especially with individuals from disadvantaged or marginalised groups such as Indigenous people, young people, people who are homeless, and those with mental health, drug and/or alcohol related problems that may be highly visible and tend to use public space (including alcohol-free zones) in the absence of the alternative option of a penalty notice.

Thank you for your assistance in providing your advice and the requested information. If you should have any question, please contact Catherine Watson, the Committee Manager on 9230 2036 or by email: Catherine.Watson@parliament.nsw.gov.au

Yours sincerely

Allan Shearan

Allan Shearan MP
Chair

MINISTER FOR GAMING AND RACING
MINISTER FOR SPORT AND RECREATION

Mr Allan Shearan MP
Chair
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan MP

I refer to your recent letter seeking information in regard to the *Liquor Legislation Amendment Bill 2008*.

As you would be aware, the Bill was passed by the Parliament on 28 November 2008, and commenced on 3 December 2008. I note the Legislation Review Committee seeks advice in regard to certain amendments contained in the Bill. Those amendments relate to the operation of alcohol free zone provisions in the *Local Government Act 1993*.

Advice has been sought from the Local Government portfolio in relation to these matters given that the *Local Government Act 1993* is administered by that portfolio.

Amendment of *Local Government Act 1993* – Section 642 Confiscation of alcohol in alcohol-free zones

The *Local Government Act 1993* provides the legislative powers for local councils in NSW to establish alcohol free zones to promote the safe use of roads, footpaths and public car parks without interference from anti-social behaviour caused by public drinkers. Alcohol free zones are an early intervention measure to prevent the escalation of irresponsible street drinking into incidents involving serious crime.

The Government has acted to strengthen the laws to improve the enforcement of alcohol free zones in response to an increase in alcohol related crime and the findings from the Evaluation of Alcohol Free Zones in NSW conducted by the Department of Local Government.

I am advised that the previous mandatory warning requirement for alcohol free zones was often an impediment to police acting quickly to diffuse a potentially volatile situation. Through the recent amendments, police now have the power to act immediately to confiscate and dispose of alcohol.

The community has had in excess of 16 years to become aware of alcohol free zones. These zones have been in place in many communities for many years. The Government's view is that the requirement to warn a person who is clearly intoxicated and is either behaving in an anti-social manner or is highly likely to was inhibiting the good work that police officers do on a daily basis to keep our communities safe.

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Police and authorised council enforcement officers can still use discretion and give a warning to a person who, for example, appears to be unaware of the existence of an alcohol free zone, or can use other options when dealing with persons from marginalised groups. The Local Government portfolio has advised that this and other implementation issues are addressed in police operational procedures that have been developed. Advice will also be provided to councils in an updated version of the *Ministerial Guidelines on Alcohol Free Zones* and other advice issued by the Department of Local Government.

Police and council enforcement officers use discretion when enforcing the law on a daily basis and the Government is confident that these amendments provide the necessary balance of powers to reduce alcohol related misbehaviour on our streets while not unduly trespassing on personal rights and liberties.

Amendment of *Local Government Act 1993* – Omit sections 647 and 649, Omit "642" from section 679

The Government's view is that the confiscation and disposal of alcohol is an immediate and greater deterrent than the issue of a $22 fine, which I am advised was a course of action rarely used by police officers.

The amendments in the *Liquor Legislation Amendment Act 2008* support the Government's position that alcohol free zones continue to be an important preventative enforcement power for police and council enforcement officers. The primary deterrent in the legislation has always been the permanent confiscation of the alcohol.

Councils and members of the community have been requesting that the fine be substantially increased. The Government considered this, but decided that a better alternative is to remove the fine and strengthen the confiscation and disposal powers.

The Government chose not to increase the penalty because of the potential for that to impact disproportionately on individuals from disadvantaged or marginalised groups. Given that penalty notices were rarely issued and that the emphasis has been on confiscation, the removal of the penalty notice option should not change the potential for escalation of incidents that are currently dealt with by police officers.

The alcohol free zone powers aim to pre-empt more serious crime and avoid the need for arrests. However, as was previously the case, where a volatile situation arises and more serious action is required, I am advised that police have other powers available to them under the *Law Enforcement (Powers and Responsibilities) Act 2002* and other legislation.

The Government wants the enforcement of alcohol free zones to be focussed on stopping the escalation of alcohol fuelled anti-social behaviour into more serious crime. Issuing fines and dealing with people through penalty notices that often end up being dealt with by the court system is not viewed as the most efficient and effective way of enforcing the alcohol free zone legislation.

Yours sincerely

Kevin Greene MP
Minister for Gaming and Racing
Minister for Sport and Recreation

[redacted]

11. MENTAL HEALTH BILL 2007

Date Introduced:	9 May 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Paul Lynch MP
Portfolio:	Mental Health

Background

1. The Committee reported on this Bill in its Legislation Review *Digest* 1 of 27 June 2007. This Bill received assent on 15 June 2007.

2. The Committee also resolved to write to the then Minister Assisting the Minister for Health (Mental Health) in a letter of 3 July 2007 and a follow up letter to seek advice on a range of matters of concern arising out of *Digest* 1 of 27 June 2007.

3. The Minister for Health replied in a letter received on 22 January 2009.

Minister's Reply

4. The Minister wrote the following reply:

> I have been advised that a letter, together with a short document addressing each of the questions raised by the Committee was forwarded to the former Minister Assisting the Minister for Health (Mental Health) for signature. It would appear, however, that the correspondence was not forwarded to you at the time. The delay in forwarding the attached comments is regretted.

5. The Committee notes and refers to the detailed response attached to this report and enclosed with the Minister's letter, addressing the issues arising from the 13 questions raised by the Committee.

6. The attached response addressed the following concerns:

- Entry without warrant and search and seizure without a warrant and the meaning of 'any such person' in clause 21 (2);

- Excessive punishment and the scope of provisions and test for a community treatment order;

- Excessive punishment and detention of a person as an involuntary patient beyond the term of a sentence when a person ceases to be a forensic patient and sanction for failure to comply with a detention or compulsory treatment order relative to the imposition of the original sentence;

- Fair trial and a person's right to be heard in any application for compulsory community treatment order including medication; the interests and needs of such a person if they were a child, young person or elderly; and the need for representation by an advocate, legal representative, nominated friend or guardian for a member from a vulnerable group at such applications;

- Vulnerable groups and safeguards to protect their interests around the issue of informed consent; and in relation to their need for guardians, advocates or nominated friends with regard to provisions on mental health treatment, psychosurgery and electro convulsive therapy;

- Insufficiently defined administrative powers such as ill defined and wide powers in relation to section 150 which enables the Mental Health Review Tribunal to be constituted by a single member;

- Non-reviewable decisions by excluding judicial review concerning Schedule 7, section 72 (5); and a reasonable time limit to the judicial review period.

Committee's Response

7.	The Committee thanks the Minister for his reply and his detailed response as attached to this report.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

3 July 2007

Our Ref:LRC

The Hon Paul Lynch MP
Minister Assisting the Minister for Health (Mental Health)
Level 32, Governor Macquarie Tower
1 Farrer Place,
SYDNEY NSW 2000

Dear Minister Paul

MENTAL HEALTH BILL 2007

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee has reported its consideration of the Bill in its *Legislation Review Digest No 1 of 27 June 2007*.

The Committee resolved to write to you for responses on the following matters of concern.

Entry without warrant and Search and seizure without warrant: Clause 21(2) Police assistance. For details, please refer to page 60 of the *Legislation Review Digest No 1 of 27 June 2007.*

The Committee notes the wide scope of powers of entry to apprehend the person but also 'may apprehend any such person, without a warrant', and is cautious of personal rights to liberty and privacy as well as the privacy of other owners or occupiers in the absence of offending on the part of the person.

The Committee seeks your response regarding:

1. *The meaning or wording of 'any such person' in the clause.*

Excessive Punishment: Clauses 50, 51, 53, 54, 55, 56, 57, 58 and 59 on community treatment order. For details, please refer to pages 61 to 63 of the *Legislation Review Digest No 1 of 27 June 2007.*

The application of the same test or criteria, requirements, form, duration, operation of and conditions (including medication) for community treatment

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orders can be made about a person who is detained in a mental health facility and a person who is not.

The Committee seeks your response regarding:

2. *The need to clarify the scope of these provisions; and*
3. *why the same test or criteria, requirements, form, duration and operation of and conditions for community treatment orders (including medication) can be made about a person who is not detained in a mental health facility as a person who is detained?*

Excessive Punishment: Schedule 7, Clause 76 Person who ceases to be a forensic patient may be detained as an involuntary patient. For details, please refer to page 63 of the *Legislation Review Digest No 1 of 27 June 2007*.

Compelling a person to be detained as an involuntary patient is a significant trespass to that person's rights and liberties.

The Committee seeks your response regarding:

4. *Whether there is a need to clarify that if a person ceases to be a forensic patient, then a detention of that person as an involuntary patient should not extend unnecessarily beyond the term of a sentence; and*
5. *whether there is a need to clarify that any sanction for failing to comply with detention or compulsory community treatment orders should not be more severe than the imposition of the original sentence.*

Fair trial: Clause 55 Community treatment order may be made in absence of affected person. For details, please refer to pages 63 to 64 of the *Legislation Review Digest No 1 of 27 June 2007*.

A community treatment order may be made in the absence of the affected person if the person has been given notice of the *application.*

The Committee seeks your response as to:

6. *Whether there is a need to clarify the importance of the person's right to be heard in any application for compulsory community treatment order (including medication) affecting the person, and*
7. *how the interests and needs of the affected person if the person were a child, young person or an elderly would be protected; and*
8. *whether there is a need to amend the Act to legislate for representation by an advocate, legal representative, nominated friend or guardian for a member from a vulnerable group at such applications.*

Vulnerable Groups:

The Bill did not make much reference or specific provisions to safeguard the interests or needs of children, young people and the elderly, including the need for guardians, advocates or nominated friends and around the issue of their informed consent.

The Committee seeks your response as to:

9. *Whether there is a need for clarification on safeguards to protect the interests and needs of children, young people and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends.*

Vulnerable Groups: Clauses 82 to 86 on mental health treatment, psychosurgery; and Clauses 87 to 97 on Electro convulsive therapy. For details, please refer to pages 65 to 66 of the *Legislation Review Digest No 1 of 27 June 2007.*

The above clauses did not make reference or provide specific provisions to safeguard the interests or needs of children, young people (including those aged 14 years or over) and the elderly, including the need for guardians, advocates or nominated friends and around the issue of their informed consent with the exception of Clause 104 which did make a specific reference to a child under the age of 14 years or a person under guardianship.

The Committee seeks your response regarding:

10. *Whether there is a need for safeguards to protect the interests and needs of children, young people (including those aged 14 years or over), and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends with regard to the provisions on mental health treatment, psychosurgery and electro convulsive therapy.*

Insufficiently defined administrative powers - Ill-defined and wide powers: Clause 150 (2) and (5) Composition of the Tribunal. For details, please refer to page 67 of the *Legislation Review Digest No 1 of 27 June 2007.*

These clauses may create uncertainty. The Committee is concerned that the scope for one-person Tribunal panels is too wide and that the intention may not be sufficiently clear to ensure that a full three-person panel sits where substantial or contested matters are heard and that one-person panels are limited to only minor, procedural matters.

11. *The Committee seeks your response regarding this matter.*

Non-reviewable decisions - Exclude judicial review: Schedule 7, Clause 72 (5) Appeals against decisions of Director-General. For details, please refer to page 68 of the *Legislation Review Digest No 1 of 27 June 2007.*

The Tribunal may determine that no further right of appeal may be exercised before the date on which the person is next reviewed by the Tribunal, and this excludes from judicial review or merits review by way of a new hearing of any failure or refusal by the Director-General to grant a forensic patient leave of absence.

The Committee seeks your response as to:

12. *Whether Schedule 7, Clause 72(5) might operate to make personal rights dependent on non-reviewable decisions by excluding judicial review; and*
13. *whether this might be amended by proposing a reasonable time limit to the judicial review period as an appropriate balance between a person's right to challenge the legality or merits by way of a new hearing of such determinations.*

Thank you for your attention to these matters. The Committee looks forward to receiving your response. If you should have any further queries, please contact Carrie Chan, Senior Committee Officer, on 9230 2108 or email: Carrie.Chan@parliament.nsw.gov.au

Yours sincerely

Allan Shearan MP
Chair

The Hon. John Della Bosca, MLC
Minister for Health
Minister for the Central Coast
Leader of the Government in the Legislative Council

A70142
M08/8849
20 JAN 2009

Mr A Shearan MP
Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

Thank you for your correspondence advising that the Legislation Review Committee had to date not received a reply to a previous correspondence dated 3 July 2007 in relation to the Mental Health Act 2007.

In your earlier correspondence you raised a series of questions in respect of the Mental Health Act 2007, arising out of the Committee's Report, dated 27 June 2007.

I have been advised that a letter, together with a short document addressing each of the questions raised by the Committee was forwarded to the former Minister Assisting the Minister for Health (Mental Health) for signature.

It would appear, however, that the correspondence was not forwarded to you at the time.

The delay in forwarding the attached comments is regretted.

Yours sincerely

John Della Bosca MLC

Level 30 Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000, Australia
Tel: (02) 9228-4777 Fax: (02) 9228-4392 E-Mail: office@smos.nsw.gov.au

MENTAL HEALTH ACT 2007

ISSUES RAISED BY THE LEGISLATION REVIEW COMMITTEE

Issue: Entry without warrant and search and seizure without a warrant

The Legislation Review Committee has raised a concern with the terms of section 21 of the Act, which allows for police assistance where a person has been assessed by a medical practitioner, ambulance officer or accredited person as being a "mentally ill person", and in need of involuntary care. They have raised the following question:

1. The meaning or wording of 'any such person' in clause 21(2).

The reference to "any such person" is a reference to the person referred to in clause 21(1)(a), that is, a person who has been assessed by a medical practitioner/accredited person/ ambulance officer to be a person in need of detention, control and treatment due to the fact they are a "mentally ill person" (As defined by section 14 of the Act). Under section 14, a person is a mentally ill person if they suggest a mental illness and are at risk of serious harm to themselves or others due to that mental illness. The provision reflects existing provisions in the 1990 Act and ensures person's who fall within this definition can be apprehended and taken for necessary assessment, care, and treatment.

Issue: Excessive Punishment

The Committee is concerned that the test for a community treatment order is the same irrespective of whether the person is, at the time the order is sought, detained in a facility or living in the community. They have raised the following questions:

2. The need to clarify the scope of these provisions

There is no need for clarification. The main test for involuntary care under the Act is whether the person satisfies the definition of "mentally ill person", along with an assessment of whether other appropriate less restrictive care is available (see section 19 in relation to detention, section 53 in relation to a community order). This test allows the specific situation of a patient to be factored into any decision for involuntary treatment – whether in the community or via detention in a facility.

It is also important to note that the purpose of the provisions for community orders is not to "punish", but to allow care to be provided in the less restrictive environment of the community, in circumstances where the person may otherwise be forced to be detained in a hospital.

3. Why the same test or criteria, requirements, form, duration and operation of and conditions for community treatment orders (including medication) can be made about a person who is not detained in a mental health facility as a person who is detained?

See response to question 2. In addition, the duration and conditions etc will not be the same in all cases, and will be determined by a treatment plan designed to address the patients' particular circumstances on a case by case basis.

Issue: Excessive Punishment

The Committee is concerned that a provision that makes it clear that discharge from forensic status does not prevent a person being detained under the civil provisions of the mental health legislation may involve an option to allow improper extension of their original sentence. They have raised the following questions:

4. Whether there is a need to clarify that if a person ceases to be a forensic patient, then a detention of that person as an involuntary patient should not extend unnecessarily beyond the term of a sentence;

The only purpose of clause 76 of Schedule 7 is to ensure that nothing in the forensic provisions of the legislation would *prevent* a person being dealt with under the civil provisions of the legislation, if they were in need of ongoing care for their mental illness. It is designed to ensure that a former forensic patient is not treated any differently from a non-forensic patient who may be in need of involuntary care and detention.

The civil provisions in Chapter 3 provide for involuntary care where a person is a mentally ill person - that is suffering from a mental illness and requiring care, treatment or control in order to protect themselves or another person from serious harm. The length of any sentence a former forensic patient may have been subject to is not relevant to the assessment of whether a person meets the criteria set out in this definition. These civil provisions are not penal, but designed simply to allow for detention in order to care and treat a mentally ill person.

5. whether there is a need to clarify that any sanction for failing to comply with detention or compulsory community treatment orders should not be more severe than the imposition of the original sentence.

The issues raised by the Committee at pages 63-64 have been reviewed, however there is no "sanction" inherent in this provision – as noted above it is simply a clarification to make it clear that if a person no longer has forensic status, the general civil rules will continue to apply as they would apply to any person in the community. The rules in Chapter 3 only allow detention if a person meets clinical/safety criteria. As such, they are protective and do not incorporate punitive concepts of punishment or sanction.

Issue: Fair trial

The Committee is concerned that Community Treatment Orders may be given in the absence of the person affected by them. They have raised the following questions

6. Whether there is a need to clarify the importance of the person's right to be heard in any application for compulsory community treatment order (including medication), affecting the person, and

While the Committees concerns are noted, the main rationale for the change was that the previous community counselling orders, which did require a person to attend the hearing before they could be made or renewed, were rarely used due to the fact that the person could avoid the order by simply not attending.

The current provisions are designed as a means of addressing this issue, with the balance being that the Act requires the individual to be provided with a copy of the application and the proposed treatment plan in an appropriate timeframe prior to the hearing.

7. how the interests and needs of the affected person if the person were a child, young person or an elderly would be protected; and

See response to question 8 below

8. Whether there is a need to amend the Act to legislate for representation by an advocate, legal representative, nominated friend or guardian for a member from a vulnerable group at such applications. .

Clause 3 of Schedule 2 of the Act reflects existing terms of the 1990 Act which provide for a right to legal representation for a patient or a person detained in a hospital who has a matter before the Tribunal. The provision under the 1990 Act ensured legal representation where a CTO was initiated. It is recognized that the provision in the 2007 Act should have been revised to include those persons who will now be subject to community orders from the community. The Department of Health will be considering action to address this. In the meantime, The Department of Health will be consulting with the Legal Aid Commission with a view to putting in place mechanisms for such representation by administrative means.

This will ensure that the interests of *any* person coming before the tribunal for a CTO will be adequately and independently represented.

Issue: Vulnerable Groups

The Committee is concerned that there is no special protections in the Act for vulnerable groups such as children, young people and the elderly (such as the need for guardians, nominated friends or around the issue of informed consent). They have raised the following question.

9. Whether there is a need for clarification on safeguards to protect the interests and needs of children, young people and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends.

The terms of the Act recognize that people who are likely to be affected by it – that is people who are mentally ill or mentally disordered are all inherently vulnerable. The protections available under the Act therefore cover the entire body of people who may be affected by its provisions, not just particular subgroups. Some of these protections include:

- Provision for independent legal representation in detention and CTO matters;
- Recognition of family members and friends through the new provisions for "primary carers", where a person may nominate a particular friend or relative as a contact directly involved in their care;
- Retention of the Official Visitors program, whereby an independent panel of persons appointed by the Minister visit facilities and can advocate to the Minster on behalf of patients;
- Special processes providing for oversight by the Mental Health Review Tribunal in relation to decisions to give certain types of treatments (such as ECT) to persons who come within the jurisdiction.

Issue: Vulnerable Groups

The Committee is concerned the Act does not make "sufficient reference or specific provisions to safeguard" certain vulnerable groups. They have raised the following questions

19. Whether there is a need for safeguards to protect the interests and needs of children, young people (including those aged 14 years or over), and the elderly, including the issue of informed consent and the need for guardians, advocates or nominated friends with regard to the provisions on mental health treatment, psychosurgery and electro convulsive therapy.

See response to question 9 above. As noted there the view is that all persons coming under the ambit of the Act require support and protection due to their vulnerable status.

It is noted the Committee has included in its concerns reference to issues about informed consent in relation to specific forms of treatment.

> In relation to electro convulsive therapy (or ECT): Division 3 of Part 2 of Chapter 4 contains extensive oversight of and review processes for determining consent and capacity to consent. These apply to all patients, for the reasons noted in the reponse to question 9 above.
>
> In relation to psychosurgery: This procedure is a "prohibited treatment" under section 83 of the 2007 Act. As performance of psychosurgery will be an offence, no specific provisions have been included vis a vis consent issues.

Issue: Insufficiently defined administrative powers – ill defined wide powers

The Committee is concerned as to the terms of section 150, which enable the Mental Health Review Tribunal to be constituted by a single member. They have raised the following questions.

11. The Committee seeks your response regarding this matter.

This issue was canvassed extensively in the Parliament. In the course of the Agreement in Principle stage of the Bill on 9 May 2007, the Minister Assisting the Minister for Health (Mental Health) stated:

> *Under the 1990 Act the tribunal is required to be constituted by three members, irrespective of the nature of the matter before it. This means that a full panel must be constituted for what are very often simple interlocutory matters, such as listing arrangements, arranging or changing venues, noting representation and simple adjournments. Clause 150 of the bill creates flexibility to allow simple matters such as these to be dealt with by a legal member of the panel that is, the president, a deputy-president or another appointed lawyer—sitting alone.*
>
> *The Government recognises that one-person panels should be limited to those minor and administrative matters and that it is important to ensure transparency in how decisions on constituting the panel are reached. The Government therefore proposes, in consultation with the tribunal, to develop regulations using the powers in clause 150 (5) to ensure that a full three-person panel sits where substantial or contested matters come before it. That is, the Government intends that the single member will be used only in procedural matters. There is the possibility that it might be extended to a very restricted class of emergency situations. That will be the subject of further discussion. It is also important to emphasise that these changes do not affect the constitution of the tribunal in forensic matters. The provisions in relation to forensic patients have been retained and will continue to require the panel to be fully constituted by the president or a deputy-president, a psychiatrist and another suitably qualified member in forensic reviews.*

The new regulations under the Mental Health Act 2007 will use section 150(5) of the Act to prescribe the circumstances when a three person panel must be formed. The Regulation will identify certain basic hearings where the skills and qualifications of all three panel members are considered essential. The matters covered by the regulation will focus on hearings involving review of detention, applications for ECT, decisions in relation to CTOs and other medical treatment.

12. Whether Schedule 7, Clause 72(5) might operate to make personal rights dependent on non-reviewable decisions by excluding judicial review; and

The provision does not exclude judicial review. Under the legislation, a forensic patient will be reviewed once every 6 months by the Mental Health Review Tribunal. This review involves a re-consideration of the patient's situation, including terms of detention, release and conditional release.

Section 72 provides an additional and separate appeal from an additional and separate provides for the Director General to approve certain forms of leave. The terms of 72(5) were included simply allow the MHRT to defer consideration of this appeal until the next general review by the Tribunal.

13. whether this might be amended by proposing a reasonable time limit to the judicial review period as an appropriate balance between a person's right to challenge the legality or merits by way of a new hearing of such determinations.

As noted in the response to question 12, section 72(5) is simply designed to recognize that these appeals can be considered as part of the regular 6 monthly reviews by the Tribunal.

12. WATER MANAGEMENT AMENDMENT BILL 2008

Date Introduced:	23 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Phillip Costa MP
Portfolio:	Water

Background

1. The Committee reported on this Bill in its Legislation Review *Digest* 11 of 2008. This Bill has now become the Amendment Act (*Water Management Amendment Act 2000*).

2. At its meeting of 22 October 2008, the Committee also resolved to write to the Minister in a letter of 28 October 2008, to seek clarification for the form of the proposed section 338D (3) which allows for arrest, without a warrant, of a person who fails to provide their full name and address to an authorised officer. The Committee was concerned that this provision may depart from the basic principle that no arrest should be made without a warrant from a competent court except where felony or breach of the peace is taking place or is reasonably apprehended.

Minister's Reply

3. The Minister wrote his reply in a letter received on 15 December 2008. The Minister advised the following:

> …it is appropriate for s. 338D (3) to be included in the Amendment Act as there may be situations unique to the enforcement of the provisions of the *Water Management Act 2000* (as with the enforcement of other environmental and local government legislation) that may require the immediate apprehension of a person. Without the ability to immediately apprehend those who in certain circumstances refuse to provide, or provide a false name or address, there is a possibility that someone caught in the act of committing an offence contrary to the *Water Management Act 2000* may not be brought to justice.

4. The Minister further advised that:

> Section 338D (3) of the Amendment Act is identical in terms of the provisions of the *Protection of the Environment Operations Act 1997* and the *Local Government Act 1993*. The relevant provisions of the *Protection of the Environment Operations Act 1997* are also adopted and operate in respect of the *National Parks and Wildlife Act 1974* and the *Pesticides Act 1999*. As such, s. 338D (3) of the Amendment Act does not depart from the laws of NSW.

Committee's Response

5. The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

The Hon Phillip Costa MP
Minister for Water
Level 34 Governor Macquarie Tower
1 Farrer Place
SYDNEY 2000

Dear Minister

Water Management Amendment Bill 2008

At it's meeting on 22 October 2008 my Committee examined this Bill and resolved to write to you concerning proposed section 338D(3). The Committee notes that this proposed section allows for the arrest, without a warrant, of a person who fails to provide their full name and address to an authorised officer.

This clause represents a departure from the basic principle that no arrest should be made without a warrant from a competent court except where felony or breach of the peace is taking place or is reasonably apprehended. Adherence to such a principle is important so as to protect against the possibility of arbitrary arrest as a result of the vesting of the power of arrest in a public official.

The Committee considers that the wide scope of this power has the potential to trespass on the personal rights and liberties of the person involved. My Committee would be grateful for your views on the reasons for the form of this provision.

Yours sincerely

Allan Shearan

Allan Shearan MP
Chair

Parliament of New South Wales · Macquarie Street · Sydney NSW 2000 · Australia
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New South Wales

Minister Phillip Costa MP

Minister for Water
Minister for Rural Affairs
Minister for Regional Development

MSO08/0175
08/2717

Mr Allan Shearan MP
Chair
Legislative Assembly Public Accounts Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

#50736

recieved 15/12/09.

Dear Mr Shearan

Thank you for your letter of 28 October 2008 concerning the provisions of the *Water Management Amendment Act 2000* ("the Amendment Act").

Section 338D(3) of the Amendment Act is identical in terms of the provisions of the *Protection of the Environment Operations Act 1997* and the *Local Government Act 1993*. The relevant provisions of the *Protection of the Environment Operations Act 1997* are also adopted and operate in respect of the *National Parks and Wildlife Act 1974* and the *Pesticides Act 1999*. As such, s.338D(3) of the Amendment Act does not depart from the laws of NSW.

In my view it is appropriate for s.338D(3) to be included in the Amendment Act as there may be situations unique to the enforcement of the provisions of the *Water Management Act 2000* (as with the enforcement of other environmental and local government legislation) that may require the immediate apprehension of a person. Without the ability to immediately apprehend those who in certain circumstances refuse to provide, or provide a false name or address, there is a possibility that someone caught in the act of committing an offence contrary to the *Water Management Act 2000* may not be brought to justice.

If you require further information on this matter, please contact Ms Louise Whiting, Departmental Liaison Officer, in my office on (02) 9228 5055.

Yours sincerely

The Hon. Phillip Costa MP
Minister for Water
Minister for Rural Affairs
Minister for Regional Development

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Part Two – Regulations

SECTION A: NOTIFICATION OF POSTPONEMENT OF REPEAL OF REGULATIONS UNDER S 11 OF THE *SUBORDINATE LEGISLATION ACT 1989*

Notification of the proposed postponements of the repeal of the: Public Health (Disposal Of Bodies) Regulation 2002; Public Health (General) Regulation 2002; Public Health (Microbial Control) Regulation 2000; Public Health (Skin Penetration) Regulation 2000; Public health (Swimming Pools And SPA Pools) Regulation 2000

File Ref: LRC 3022

Minister for Health

Issues

1. By correspondence received 8 December 2008, the Minister advised the Committee that he is seeking the postponements of the repeal of the above regulations.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponements of the repeal of the above regulations.

Comment

Public Health (Disposal of Bodies) Regulation 2002

3. The Minister has proposed the third postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009, for the third time.

4. This Regulation deals with the handling of bodies for burial and cremation, the exhumation of bodies and the keeping of the register of crematoria and mortuaries.

Public Health (General) Regulation 2002

5. The Minister has proposed the third postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009.

6. This Regulation deals with a range of matters including information provision to patients with regard to sexually transmissible medical conditions; the keeping of records about scheduled medical conditions and the notification of test results; and the control of vaccine preventable diseases.

Public Health (Microbial Control) Regulation 2000

7. The Minister has proposed the fifth (and last) postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009.

8. This regulates the installation and maintenance of air handling systems, water heating and cooling systems to prevent the spread of disease causing microbes.

Public Health (Skin Penetration) Regulation 2000

9. The Minister has proposed the fifth (and last) postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009.

10. This Regulation defines terms and regulates the hygiene standards and equipment of premises used for activities that involve penetrating the skin.

Public Health (Swimming Pools and Spa Pools) Regulation 2000

11. The Minister has proposed the fifth (and last) postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009.

12. This regulates the disinfection, cleanliness and inspection procedures for swimming pools and spas to which the public have access.

13. The Minister has advised that:

> These five regulations are made under the Public Health Act 1991 which is shortly to be replaced by a new Act. It is therefore considered unnecessarily resource intensive and duplicatory to consult upon, and remake the existing regulations when the process will need to be repeated in a short space of time as regulations are developed under the new Act.

14. The Minister further advised:

> Considerable resources would be required to prepare regulatory impact statements on these five regulations and on passage of a new Act this process will need to be repeated. This is considered to be an inefficient use of resources.

15. Accordingly, the staged repeal of each of these 5 regulations is proposed to be postponed.

Notification of the Proposed Postponement of the Repeal of the Road Transport (Safety and Traffic Management) Regulation 1999

File Ref: LRC

Minister for Roads

Issues

1. By correspondence received 15 January 2009, the Minister advised the Committee that he is seeking the postponement of the repeal of the above regulation.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponement of the repeal of the above regulation.

Comment

Road Transport (Safety and Traffic Management) Regulation 1999

3. This Regulation is due for repeal on 1 September 2009. The Minister has sought the postponement of its repeal until 1 September 2010.

4. The Minister has requested the postponement of the repeal of this Regulation since many of its provisions will be repealed in late 2009 as part of a broader project to consolidate NSW road transport legislation. He advised that under the project, several road transport acts will be amalgamated into a single statute, and several regulations under these acts, including this Regulation, will be consolidated.

Notification of the Proposed Postponements of the Repeal of the Associations Incorporation Regulation 1999; Consumer Credit Administration Regulation 2002 (3); Gas Supply (Gas Meters) Regulation 2002 (3); Motor Vehicle Repairs Regulation 1999; Retirement Villages Regulation 2000 (5)

File Ref: LRC

Minister for Fair Trading

Issues

1. By correspondence received 3 December 2008, the Minister advised the Committee that she is seeking the postponements of the repeal of the above regulations.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponements of the repeal of the above regulations.

Comment

Associations Incorporation Regulation 1999

3. As the repeal of this Regulation has already been postponed five times, this postponement will be effected through the *Statute Law (Miscellaneous Provisions) Bill 2009*.

4. The Minister advised that a Bill amending the *Associations Incorporation Act 1984* will be introduced into Parliament during the Budget Session in 2009. It would more appropriate and efficient use of resources to conduct the review of this Regulation after the passage of these amendments.

Consumer Credit Administration Regulation 2002

5. The Minister has proposed the third postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009.

6. The Minister advised that the regulation of consumer credit is to be transferred to the Commonwealth Government. The first stage of this transfer is to take place during 2009 and the second in 2010. NSW legislation will be amended to reflect the transition. Therefore, it would be more appropriate and efficient use of resources to conduct the review of the Regulation after the passage of these amendments rather than before.

Gas Supply (Gas Meters) Regulation 2002

7. The Minister has proposed the third postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009.

8. The Minister advised that the National Measurement Institute is working on the development of a new national standard for gas meters to allow pattern approval of gas meters on a national level. When the new regime is in place, the exemption for

domestic gas meters under the *National Measurement Act 1960 (Cth)* will be removed. This means that the above Regulation will no longer be necessary. The National Measurement Institute is unable to confirm a definite timeline for the removal of the exemption so it would be advisable to retain the NSW Regulation beyond 1 September 2009.

Motor Vehicle Repairs Regulation 1999

9. As the repeal of this Regulation has already been postponed five times, this postponement will be effected through the *Statute Law (Miscellaneous Provisions) Bill 2009*.

10. The Minister advised that the Better Regulation Office is currently conducting a review of the licensing system under the *Motor Vehicle Repairs Act 1980*. As the review is likely to lead to amendments or repeal of the Act, it is considered a more appropriate and efficient use of resources to conduct the review of this Regulation after the passage of those amendments rather than before.

Retirement Villages Regulation 2000

11. The Minister has proposed the fifth postponement of the repeal of the above Regulation due for staged repeal on 1 September 2009.

12. The Minister advised that legislation amending the *Retirement Villages Act 199*9 is anticipated to be passed by Parliament. Extensive changes will need to be made to the Regulations before the amendments to the Act can commence. A commitment has been given to the Retirement Villages Advisory Council to consult on the proposed terms of the regulations before drafting instructions, the timetable for remaking of the Regulation by 1 September 2009 may not be met. Therefore, postponement of the repeal is requested in case if the replacement Regulation will not be implemented by 1 September 2009.

SECTION B: CORRESPONDENCE ON REGULATIONS

Liquor Regulation 2008

Date of Gazette:	27 June 2008
Commencement:	1 July 2008
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Gaming and Racing

Background

1. The Committee reported on this Regulation in its Legislation Review *Digest* 10 of 2008. This Regulation commenced on 1 July 2008.

2. At its meeting of 22 September 2008, the Committee also resolved to write to the Minister and draw attention to the useful nature of a Regulatory Impact Statement (RIS) to identify costs arising from this Regulation.

Minister's Reply

3. The Minister wrote his reply in a letter received on 5 January 2009:

> I note the Committee believes it would be useful if some form of monitoring of costs arising from the new regulatory system could be considered so as to identify any procedures that might need to be modified to further improve the system's operation.
>
> The operation of the new liquor laws and the administrative licensing system is being closely monitored through processes which engage internal and external stakeholders, including the public, industry, police, local government and legal representatives. Costs associated with the new system are a key issue in that monitoring process.
>
> Fine tuning of the new administrative licensing arrangements is occurring as issues arise following the commencement of the new laws on 1 July 2008.

Committee's Response

4. The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

The Hon Kevin Greene MP
Minister for Gaming and Racing and Minister for Sport and Recreation
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Liquor Regulation 2008
Our Ref: LRC2792

The Legislation Review Committee at its meeting on the 22 September 2008 examined this Regulation and resolved to draw your attention to certain observations of the Committee in regard to the regulatory proposal.

The Regulatory Impact Statement (RIS) frequently identifies costs to the liquor industry and to licensees flowing from the particular provisions of the administratively based regulatory system established under the new Liquor Act. These include costs arising from meeting and processing procedural requirements such as the preparation of Community Impact Statements.

My Committee believes it would be useful if your Administration considered putting in place some form of monitoring of costs arising out of the new scheme so as to identify any procedures that might need to be modified to further improve its operation.

Yours sincerely

Allan Shearan

Allan Shearan MP
Chair

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MINISTER FOR GAMING AND RACING
MINISTER FOR SPORT AND RECREATION

Mr Allan Shearan MP
Chair
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan MP

I refer to your recent letter providing advice of certain observations of the Legislation Review Committee relating to the Regulatory Impact Statement for the *Liquor Regulation 2008*.

I note the Committee believes it would be useful if some form of monitoring of costs arising from the new regulatory system could be considered so as to identify any procedures that might need to be modified to further improve the system's operation.

The operation of the new liquor laws and the administrative licensing system is being closely monitored through processes which engage internal and external stakeholders, including the public, industry, police, local government and legal representatives. Costs associated with the new system are a key issue in that monitoring process.

Fine tuning of the new administrative licensing arrangements is occurring as issues arise following the commencement of the new laws on 1 July 2008.

Yours sincerely

Kevin Greene MP
Minister for Gaming and Racing
Minister for Sport and Recreation

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Appendix 1: Index of Bills Reported on in 2009

	Digest Number
Associations Incorporation Bill 2009	2
Barangaroo Delivery Authority Bill 2009	2
Children and Young Persons (Care and Protection) Amendment (Children's Employment) Bill 2009	2
Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009	2
Crimes (Administration of Sentences) Amendment (Private Contractors) Bill 2009	2
Crimes (Appeal and Review) Amendment Bill 2009	2
Education Amendment (Educational Support For Children With Significant Learning Difficulties) Bill 2008*	1
Food Amendment (Meat Grading) Bill 2008*	1
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	2
Liquor Amendment (Special License) Conditions Bill 2008	1
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	2
Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008	1
Western Lands Amendment Bill 2008	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1		
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12	
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	6/02/09		9	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07	13/2/09	1		2
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1	
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7		
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13	
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	5/01/09		14	2
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07	22/01/09	1		2
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1, 2		
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1		
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Associations Incorporation Bill 2009		N, R			N, R
Barangaroo Delivery Authority Bill 2009	N				
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	N, R, C	R			
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	N,		N	N	
Western Lands Amendment Bill 2008				R	

Key
R Issue referred to Parliament
C Correspondence with Minister/Member
N Issue Note

Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12	
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10	