PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

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No 1 of 2009

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

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

9 Functions with respect to Regulations:

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

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

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

Appendix 1: Index of Bills Reported on in 2009

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 2009

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 2009

This table specifies the action the Committee has taken with respect to Bills that received comment in 2009 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 2009

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. Education Amendment (Educational Support For Children With Significant Learning Difficulties) Bill 2008*

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

2. Food Amendment (Meat Grading) Bill 2008*

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

3. Liquor Amendment (Special Licence) Conditions Bill 2008

Issue: Schedule 1 – Proposed section 11(1A) - Inappropriate delegation of legislative power

9.	The Committee always draws Parliament's attention to provisions that allow subordinate legislation to take precedence over primary legislation because those provisions involve a delegation of legislative power. Proposed section 11(1A) will allow the subject matter of Schedule 4 of the proposed Act to be amended, without limitation, by regulation. The strong public interest evident in relation to these legislative proposals, which are fundamental to the Act, indicates in the Committee's view that changes to them should more appropriately be considered by the Parliament rather than be enacted through a regulation. This is particularly so as the Minister is required, under the Bill, to review the operation of the provisions within 12 months of the date of assent to the proposed Act and to report to Parliament on the matter. The Committee therefore refers to Parliament the question of whether proposed section 11(1A) is an inappropriate delegation of legislative power.

4. Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008

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

5. Western Lands Amendment Bill 2008

Issue: Clause 2 – Commencement by Proclamation – Schedule 2[24]

12.	Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the proposed commencement of Schedule 2[24] by proclamation rather than on assent is an inappropriate delegation of power.

SECTION B: Ministerial Correspondence – Bills previously Considered

6. Contaminated Land Management Amendment Bill 2008

6.	The Committee thanks the Deputy Premier for her reply.

7. Crimes (Forensic Procedures) Amendment Bill 2008

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

Part One – Bills

SECTION A: COMMENT ON BILLS

1. EDUCATION AMENDMENT (EDUCATIONAL SUPPORT FOR CHILDREN WITH SIGNIFICANT LEARNING DIFFICULTIES) BILL 2008*

Date Introduced:	3 December 2008
House Introduced:	Legislative Council
Minister Responsible:	Reverend the Hon Fred Nile MLC
Portfolio:	Non Government – Christian Democratic Party

Purpose and Description

1. This Bill aims to ensure that children with significant learning difficulties are included in the NSW Government's Special Education Initiative for students with special needs.

Background

2. This Bill aims to conform with the United Nations' Convention on the Rights of the Child, Article 23, which states:

> … any child with a disability should have access to, and receive, an education in a manner conducive to achieving the fullest possible social integration and individual development.

3. According to the International Dyslexia Association, approximately 12 per cent of the population are hindered in social integration and individual development due to significant learning difficulties such as dyslexia.

4. According to the Second Reading speech:

> To date, New South Wales government schoolchildren suffering significant learning difficulties have not always received appropriate assistance within the Department of Education and Training's Learning Assistance program. In some cases, children suffering from learning difficulties require specialised care. Hence, I have introduced this legislative measure to ensure assistance is given to government schoolchildren with special needs, which includes dyslexia, autism and so on.

The Bill

5. The object of this Bill is to amend the *Education Act 1990* to ensure that the Minister

may provide or arrange special or additional assistance for an additional category of government school children with special needs, namely, children with significant learning difficulties in basic educational areas (whatever the cause).

6. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 is a formal provision that gives effect to the amendments to the *Education Act 1990* set out in Schedule 1.
Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.
Schedule 1 amends the *Education Act 1990* for the purposes described in the above Overview.

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.

2. FOOD AMENDMENT (MEAT GRADING) BILL 2008*

Date Introduced:	4 December 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Richard Torbay MP
Portfolio:	Independent

Purpose and Description

1. This Bill amends the *Food Act 2003* with respect to the advertising, packaging and labelling of meat.

2. Section 18 of the *Food Act 2003* makes it an offence to engage in misleading or deceptive conduct in relation to food intended for sale or the sale of food. Section 18 also makes it an offence to falsely describe such food. Section 22 of that Act sets out various circumstances in which food is taken to be falsely described. The maximum penalty for an offence under section 18 is 500 penalty units (for an individual) and 2,500 penalty units (for a corporation).

3. This Bill seeks to give effect to the recommendations of the industry-wide Red Meat Advisory Council Beef Grading/Labelling Forum. It aims to amend section 22 of the *Food Act 2003*.

4. Under this Bill, abattoirs and retailers who use the Aus-Meat labelling code will be audited and will face a penalty if their products do not conform to the code.

Background

5. Inconsistent eating quality has long been recognised as one of the main reasons undermining the marketability of beef in Australia.

6. The Agreement in Principle speech mentioned that over the last 10 years, beef consumption has fallen by 5 kilograms per person, from 41.3 kilograms in 1997 to 36.3 kilograms per person in 2006-07. The 2001 census figures show 7,800 abattoir jobs were lost in regional Australia between 1996 and 2001. A further 2,160 jobs were lost from abattoir closures by October 2003. Australia has no comprehensive consumer-based beef grading system that delivers customers a guaranteed quality product.

7. The New South Wales Government's SafeFood Truth-in-Labelling Cow Beef Working Group recommended, in February 2001, the introduction of a mandatory truth-in-labelling standard for beef cattle with eight or more teeth. In response to the working group's recommendations, the beef industry introduced a voluntary retail code for the labelling and sale of budget beef from cattle with eight or more teeth.

8. According to the Agreement in Principle speech:

> On the other hand, consumers in the United States get their table beef from animals with an average age of 22 months. In the United States, cows with eight permanent incisors are used almost entirely for processed beef, including hamburgers and sausages. Consumers in the European Union, South Korea and Japan also eat better quality meat, with import restrictions banning animals with more than four or six permanent incisors, depending on the country. It is clear that legislation on beef standards has had a positive impact on beef consumption in many countries. Over the period 1998 to 2003 the United Kingdom, United States of America, Canada and Japan—where national beef grading legislation or government restrictions on slaughter age exist—experienced increased beef consumption per head of population or, at worst, a very modest decline. During the period 1998 to 2003 consumption in the United Kingdom increased by 4.8 kilograms per person, in South Korea by 1.4 kilograms per person, in Japan by 600 grams per person, in the United States by 500 grams per person and in Canada there was a modest decline of 600 grams per person. In Australia and New Zealand, where there is no national beef grading legislation, beef consumption has declined dramatically—by 4.1 kilograms per person in Australia and by 2.6 kilograms per person in New Zealand.

9. In 2001, the Red Meat Advisory Council convened an industry-wide Beef Grading/Labelling Forum made up of independent and major supermarket retailers, cattle producers, the Australian Consumers Association, meat processors, regulators, meat industry organisations and other special interest groups to report back to the then Federal Minister for Agriculture with recommendations for the introduction of a national beef grading system. In 2004, the Red Meat Advisory Council industry-wide Beef Grading/Labelling Forum recommended the development of a voluntary standard language using Aus-Meat labelling language supported by research based extensions to Meat Standards Australia in the existing budget code. It also recommended that State and Territory Governments be requested to underpin any voluntary agreed language with regulation that would require those who adopt it to have compliance as a condition of their licence. As a result, the Australian Beef Industry organisations developed the Aus-Meat beef grading language for the domestic market published in the Aus-Meat "Users Guide to Australian Meat" which is the subject matter of this Bill.

10. This Bill seeks to be comparable to the system in the United States where its beef labelling code operates as a voluntary system backed up by legislation. A system of inspection from the abattoir through to the retailer or restaurant is provided to enforce the labelling program and penalise those who do not conform.

11. Retailers would only have to comply if they agree to adopt the labelling scheme but they would be in breach if using the Aus-Meat code when they do not comply. The major supermarkets and a significant number of butchers are already signatories to the current voluntary retail labelling agreement using the Aus-Meat code. The majority of beef sold within Australia comes from Aus-Meat accredited abattoirs and must conform with Aus-Meat accredited labelling.

12. Under the Australian system, no meat can be exported unless it has been processed at an accredited abattoir and is labelled accordingly. This is not the case with beef sold on the domestic market, irrespective of whether that beef is produced at a domestic abattoir or an export licensed abattoir. Meat and Livestock Australia attempted to address the problem by introducing a voluntary standards system. Under this arrangement, Meat and Livestock Australia operates a self-regulation labelling system through selected abattoirs and retailers. The difficulty with the

arrangement is that it is voluntary, and without sanctions for non-compliance.

13. The working party convened by the New South Wales Minister for Agriculture in 2000 was established to investigate the feasibility of introducing legislation for truth in labelling. This was in response to concerns by some producers that low-grade beef from cows and aged bullocks was substituted for high-quality table meat on the domestic market. Under this Bill, abattoirs and retailers who use the Aus-Meat labelling code will be audited and will face a significant penalty if their products do not conform to the code.

14. From the Agreement in Principle speech:

> Aus-Meat language is the basis of a national uniform description system based on objective carcass measurements that is used in the classification of Australian meat and livestock. The language covers all sections of the meat processor sector. The Australian Beef Industry Language and Standards Committee developed the Aus-Meat domestic beef grading descriptors that are set out in the Aus-Meat "Users Guide to Australian Meat" in direct response to the recommendations of the Red Meat Advisory Council beef grading-labelling forum. These descriptors are specifically designed for the sale of beef on the domestic market. A different language is used for export beef.

The Bill

15. The object of this Bill is to amend section 22 of the *Food Act 2003* as follows:

(a) to provide that meat is falsely described if it is described by words, letters or symbols that are used by the AUS-MEAT *Users' Guide to Australian Meat* to designate or indicate meat of a particular type or grade, but has not been assessed in accordance with the requirements of that publication or does not comply with the standards set out in that publication with respect to that type or grade of meat,
(b) to provide that a person is taken to have engaged in conduct that is misleading or deceptive in relation to the sale of meat if:
(i) the person advertises, packages, labels or sells meat described by means of AUS-MEAT language, and
(ii) other meat advertised, packaged, labelled or sold by that person is described by any other means.

16. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 is a formal provision that gives effect to the amendment to the *Food Act 2003* set out in Schedule 1.
Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.
Schedule 1 Amendment
Schedule 1 amends the *Food Act 2003* to give effect to the object referred to above.

Issues Considered by the Committee

17. 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.

3. LIQUOR AMENDMENT (SPECIAL LICENCE) CONDITIONS BILL 2008

Date Introduced:	2 December 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Minister for Gaming and Racing

Purpose and Description

1. The purpose of this Bill is to transfer, from the *Liquor Regulation 2008* to the *Liquor Act 2007*, special licence conditions that are designed to reduce alcohol-related violence in or about the declared premises to which the conditions relate and in so doing, enable Parliament to confirm the imposition of those conditions in relation to those licensed premises. The proposed Act commences on the date of assent to the Bill.

2. Clause 4 amends the *Liquor Regulation 2008* to remove the provisions relating to the special licence conditions that are being transferred to the Liquor Act 2007. Schedule 1[1] inserts a new section 11(1A) that states the special licence conditions for declared premises in Schedule 4 have effect.

3. New section 11(1A) states that the regulations may amend Schedule 4 including, without limitation, by adding or removing any relevant licence under that Schedule.

4. Schedule 1 amends the *Liquor Act of 2007* to impose special licence conditions in relation to the licensed premises that are specified in Schedule 4. A *restricted* service *period* in relation to declared premises means the period between midnight and such later time (if any) at which the premises are required to cease trading, or in the case of declared premises that are not required to cease trading at any time after midnight - the period between midnight and 5 a.m.

5. The licensee of declared premises must not permit patrons to enter the premises after 2am or before 5 a.m. This is the lockout period. During the restricted service period any drink sold for consumption on declared premises must not be served or supplied in a glass or breakable plastic container. Schedule 1 contains a list of specified drinks that must not be sold or supplied on declared premises during the restricted service period. During a restricted service period no more than four alcoholic drinks or the contents of one bottle of wine may be sold or supplied on declared premises to the same person at any one time. Under Clause 6 the sale or supply of liquor on declared premises must cease for a continuous period of 10 minutes during each hour of the restricted service period. Under Clause 8 the Director of Liquor and Gaming may by order in writing served on the licensee of declared premises, exempt the declared premises from any specified provision of Schedule 1. The Director can grant such an exemption if other conditions are imposed that will be more effective than the conditions contained in the regulation in reducing the risk of alcohol-related violence in or about the premises.

Background

6. The *Liquor Amendment (Special Licence Conditions) Regulation 2008* came into force on 1 December 2009. It amended the Liquor Regulation 2008 to apply a number of new liquor licence conditions to 48 specified venues. Nine of those 48 licensees subsequently brought proceedings in the Supreme Court to contest the validity of the regulation and of the decision to include those venues on the list. In his Agreement in Principle speech the Minister stated that the Government wished to put the matter beyond doubt so that the scheme was effective over the coming summer months. He said that the new licence conditions were designed to reduce alcohol-related violence in or around listed high-risk venues. He said that the 48 venues had been prepared on advice provided by the New South Wales Commissioner of Police and based on data provided by the Bureau of Crime Statistics and Research. That data, he said, identified assault incidents that were reported to or detected by police between July 2007 and June 2008 at licensed premises. The Minister said that the licence conditions are designed to address problems, such as assaults, glassing, intoxication and disturbance of nearby areas.

7. The Minister advises that a high-level implementation team is overseeing the new arrangements and that if new problems emerge the Government will consider them. The Minister says that measures in the Bill will ensure that a vital part of the Government strategy can be implemented bringing with it significant benefits for the community in terms of improved safety and lower rates of alcohol-related violence as well as antisocial behaviour.

The Bill

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 is a formal provision that gives effect to the amendments to the *Liquor Act 2007* set out in Schedule 1.
Clause 4 amends the *Liquor Regulation 2008* to remove the provisions relating to the special licence conditions that are being transferred to the *Liquor Act 2007*. **Clause 5** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Liquor Act 2007

Schedule 1 amends the *Liquor Act 2007* to impose special licence conditions in relation to licensed premises that are specified for that purpose. These special conditions and the licensed premises to which they apply are currently set out in the regulations under the Act. The conditions include such measures as preventing patrons from entering licensed premises between 2 am and 5 am (**the lock out period**), preventing the service of certain drinks (such as “shots”) after midnight, preventing the use of glasses to serve liquor after midnight and requiring 10 minute service “time-outs” during every hour after midnight. The regulations will be able to amend the conditions and add, or remove, licensed premises to or from the list of premises to which the conditions apply. The Minister is to review Schedule 1 to determine whether the policy objectives remain valid and whether the terms of the

Schedule remain appropriate for securing those objectives. The review is to be undertaken not later than at the end of the period of 12 months immediately following the date of assent to the *Liquor Amendment (Special Licence Conditions) Act 2008.* A report on the outcome of the review is to be tabled in each House of Parliament within three months after completion of the review.

Issues Considered by the Committee

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

Issue: Schedule 1 – Proposed section 11(1A) - Inappropriate delegation of legislative power

8. This provision constitutes a delegation of legislative power. The appropriateness of delegating to the regulations the power to amend or remake Schedule 4 (Special licence conditions for declared premises) of the proposed Act is questionable as the provisions of Schedule 4 are fundamental to the operation of the Act.

9. The Committee always draws Parliament's attention to provisions that allow subordinate legislation to take precedence over primary legislation because those provisions involve a delegation of legislative power. Proposed section 11(1A) will allow the subject matter of Schedule 4 of the proposed Act to be amended, without limitation, by regulation. The strong public interest evident in relation to these legislative proposals, which are fundamental to the Act, indicates in the Committee's view that changes to them should more appropriately be considered by the Parliament rather than be enacted through a regulation. This is particularly so as the Minister is required, under the Bill, to review the operation of the provisions within 12 months of the date of assent to the proposed Act and to report to Parliament on the matter. The Committee therefore refers to Parliament the question of whether proposed section 11(1A) is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

4. TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) (NEW SOUTH WALES) AMENDMENT BILL 2008

Date Introduced:	4 December 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Transport

Purpose and Description

1. This Bill amends the *Telecommunications (Interception and Access) (New South Wales) Act 1987* to harmonise its provisions with those of the *Telecommunications (Interception and Access) Act 1979* of the Commonwealth; and for other purposes.

2. Firstly, this Bill amends the definition of "certifying officer" and substitutes the definition of "permitted purpose" so that those definitions correspond with the definitions in the Commonwealth Act in their application to New South Wales. Currently, the definition of "certifying officer" in the New South Wales Act includes the members of the New South Wales Crime Commission, which includes the Commissioner and any Assistant Commissioners. However, the Crime Commission does not have Assistant Commissioners, Directors and Assistant Directors. The Commonwealth definition of "certifying officer" already includes such senior executive staff members. Similarly, the Commonwealth definition of "permitted purposes" for which intercepted material can be used has expanded beyond the definition in the New South Wales Act to include purposes pertaining to a number of New South Wales agencies such as the New South Wales Police Force, the Independent Commission Against Corruption and the Police Integrity Commission. The amendments seek to bring the New South Wales legislation in line with the Commonwealth provisions.

3. Secondly, the amendments will provide for the Inspector of the Police Integrity Commission and the Inspector for the Independent Commission Against Corruption to be eligible authorities for the purposes of the New South Wales Act. The Commonwealth Act already identifies these agencies as eligible authorities.

4. Thirdly, the Bill will provide for the record-keeping requirements for eligible authorities in New South Wales to be consistent with those for Commonwealth agencies. The record-keeping requirements of the Commonwealth Act have extended beyond what is currently captured by section 5 of the New South Wales Act. A possible consequence is that New South Wales authorities may not fulfil the preconditions to be declared eligible authorities under the Commonwealth Act. Therefore, the amendments will rectify that situation.

5. Fourthly, it will provide for the Ombudsman to have comparable powers to the Commonwealth Ombudsman in order to obtain information or ask questions when conducting an inspection of an eligible authority's records. The new section 3A will

outline when information or a question will be relevant to the Ombudsman's inspection. The amendments will make provision for the New South Wales Ombudsman to exchange information with the Commonwealth Ombudsman in relation to certain matters concerning the administration of the New South Wales Act and the Commonwealth Act. Section 92A of the Commonwealth Act provides for the exchange of information between the Commonwealth Ombudsman and a State Ombudsman regarding eligible authorities from that State, but there is no equivalent provision in the New South Wales Act. Therefore, the amendments will provide for the exchange of information.

6. Lastly, the Bill will remove the requirement for authorities to provide copies of warrants issued to them to the New South Wales Minister. Section 6 of the New South Wales Act currently requires authorities to provide copies of warrants to the State Minister, with the State Minister required by section 7 to pass them on to the Commonwealth Minister. Earlier this year, section 59A was inserted into the Commonwealth Act requiring State authorities to forward copies of warrants directly to the Commonwealth Minister.

Background

7. The *Commonwealth Telecommunications (Interception and Access) Act 1979* aims to protect the privacy of individuals who use the Australian telecommunications system by making it an offence to intercept communications other than in accordance with the Act. The Commonwealth Act specifies the circumstances in which it is lawful for an interception to take place. This includes interceptions in connection with the investigation by law enforcement agencies of serious offences.

8. The Commonwealth legislation allows authorised State law enforcement agencies to apply for warrants to intercept telecommunications to assist in the investigation of prescribed offences. The New South Wales *Telecommunications (Interception and Access) Act 1987* sets out the administrative procedures that are to be followed by authorised New South Wales agencies, including the keeping and destruction of records. The Commonwealth Act has been amended a number of times in recent years, and this has given rise to concerns that the New South Wales Act is no longer consistent with that Act. This Bill seeks to harmonise the provisions of the New South Wales Act with those of the Commonwealth Act.

The Bill

9. The object of this Bill is to amend the Telecommunications (Interception and Access) (New South Wales) Act 1987 (**the Principal Act**):

(a) to harmonise the provisions of the Principal Act with those of the *Telecommunications (Interception and Access) Act 1979* of the Commonwealth (***the Commonwealth Act***) by:

(i) amending the definition of ***certifying officer*** and substituting the definition of ***permitted purpose*** so that those definitions correspond with the definitions in the Commonwealth Act in their application to New South Wales, and

(ii) providing for the Inspector of the Independent Commission Against Corruption and the Inspector of the Police Integrity Commission to be eligible authorities for the purposes of the Principal Act, and

(iii) providing for the Ombudsman to have comparable powers to the Commonwealth Ombudsman to obtain information or ask questions when

conducting an inspection of an eligible authority's records, and

(iv) providing for the record-keeping requirements for an eligible authority to be consistent with the record-keeping requirements for Commonwealth agencies under the Commonwealth Act, and

(v) removing the requirement for eligible authorities to provide copies of warrants issued to them (and copies of instruments revoking such warrants) to the Minister, and

(vi) enabling the Ombudsman to exchange information with the Commonwealth Ombudsman in relation to certain matters concerning the administration of the Principal Act and the Commonwealth Act, and

(b) to make other amendments to the Principal Act in the nature of statute law revision and of a savings and transitional nature.

10. Outline of provisions

Schedule 1 Amendments

Schedule 1 [1] amends the definition of ***certifying officer*** in section 3 (1) of the Principal Act so that a certifying officer in relation to the New South Wales Crime Commission includes a member of the staff of the Commission who is authorised to be a certifying officer of the Commission under section 5AC (5) of the Commonwealth Act. Section 5AC (5) of the Commonwealth Act enables the Commissioner for the New South Wales Crime Commission to authorise, in writing, a member of the staff of the Commission who occupies an office or position at an equivalent level to that of a senior executive officer within the meaning of the *Public Sector Employment and Management Act 2002* to be a certifying officer of the Commission.

Schedule 1 [2] amends the definition of ***eligible authority*** in section 3 (1) of the Principal Act to include the Inspector of the Independent Commission Against Corruption and the Inspector of the Police Integrity Commission.

Schedule 1 [3] amends the definition of ***officer*** in section 3 (1) of the Principal Act to replace an outdated reference to the *Police Service Act 1990* with a reference to the *Police Integrity Commission Act 1996*.

Schedule 1 [4] replaces the definition of ***Part VI warrant*** in section 3 (1) of the Principal Act with a definition of ***Part 2-5 warrant***. Warrants that were previously issued under Part VI of the Commonwealth Act are now issued under Part 2-5 of that Act. **Schedule 1 [9]** makes consequential amendments to section 5 of the Principal Act.

Schedule 1 [5] substitutes the definition of ***permitted purpose*** in section 3 (1) of the Principal Act. The new definition mirrors the definition of ***permitted purpose*** in the Commonwealth Act in its application to New South Wales agencies. In particular, the new definition includes references to certain activities carried out by the Independent Commission Against Corruption, the Inspector of the Independent Commission Against Corruption, the Inspector of the Police Integrity Commission and the Police Integrity Commission. The new definition also includes:

(a) new kinds of activities in connection with appointment, re-appointment, term of appointment, retirement and termination of appointment of officers or members of staff of the Police Force, and

(b) the keeping of records by an eligible authority under sections 4 and 5 of the Principal Act.

Schedule 1 [6] inserts section 3A in the Principal Act. The new section seeks to clarify, in a non-exhaustive manner, the kinds of information or questions that can be treated as being information or a question that is relevant to an inspection of an eligible authority's records in connection with the exercise of the Ombudsman's powers to inspect and report on such records. The new section mirrors the provisions of section 5C of the Commonwealth Act in

connection with the Commonwealth Ombudsman's inspection powers. In particular, the new section makes it clear that information or a question will be relevant if it is about a matter relating to a contravention of the Principal Act or the Commonwealth Act that the Ombudsman suspects on reasonable grounds to have occurred.

Schedule 1 [7] amends section 4 of the Principal Act to enable an eligible authority to keep either the original of a warrant that has been issued to it or a certified copy of such a warrant. Currently, section 4 requires an eligible authority to keep only a certified copy of the warrant.

Schedule 1 [8] amends section 4 of the Principal Act to update an outdated reference to a provision of the Commonwealth Act.

Schedule 1 [10] and [12] amend section 5 of the Principal Act to require a record of certain additional particulars to be kept by an eligible authority in relation to its exercise of an authority given by a Part 2-5 warrant. These additional particulars are consistent with the particulars that Commonwealth agencies are required to keep under section 81 of the Commonwealth Act.

Schedule 1 [11] amends section 5 of the Principal Act to enable records kept under that section to be by means of a computer instead of in written form. The amendment makes the obligation imposed on eligible authorities consistent with the obligation imposed on Commonwealth agencies by section 81 of the Commonwealth Act.

Schedule 1 [13] amends section 6 of the Principal Act to remove the requirement currently imposed on an eligible authority to provide the Minister with a copy of any warrant issued to the authority and each instrument revoking such a warrant. Section 59A of the Commonwealth Act requires copies of such warrants to be given to the Secretary of the Commonwealth Attorney-General's Department. **Schedule 1 [15]** re-enacts section 7 of the Principal Act to remove references to the instruments referred to in the provisions removed from section 6.

Schedule 1 [14] amends section 6 of the Principal Act to update an outdated reference to a provision of the Commonwealth Act.

Schedule 1 [16] inserts section 19A in the Principal Act to enable the State Ombudsman to exchange information with the Commonwealth Ombudsman in relation to certain matters concerning the administration of the Principal Act and the Commonwealth Act. Section 92A of the Commonwealth Act authorises the Commonwealth Ombudsman to exchange information with a State Ombudsman about State agencies that the Commonwealth Ombudsman has obtained under the Commonwealth Act.

Schedule 1 [17] inserts provisions of a savings or transitional nature in the Principal Act.

Issues Considered by the Committee

11. 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.

5. WESTERN LANDS AMENDMENT BILL 2008

Date Introduced:	4 December 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kristina Keneally MP
Portfolio:	Minister for Planning

Purpose and Description

1. The purpose of this Bill is to give effect to the recommendations of a statutory review of the Western Lands Act 1901.

2. The Bill provides for the creation of easements, in favour of the Wild Dog Destruction Board, to maintain the dog-proof fences that are erected, pursuant to the Wild Dog Destruction Act 1921, along parts of the New South Wales /Queensland and New South Wales/ South Australian borders. The dog- proof fence is approximately 600 km in length. This fence was originally constructed as a rabbit-proof fence, but now serves to prevent wild dogs from entering New South Wales and killing stock and wildlife. Over $1.5 million of landholder and public money is spent annually in maintaining the fence. The Wild Dog Destruction Board coordinates this work. The Parliamentary Secretary in his Agreement in Principle speech reports that the Wild Dog Destruction Act generally covers the Board's work but that the Bill will give the Minister specific power to create easements in respect of the whole of the fenced area across all tenures. This will guarantee access to the fence by the Board for upkeep and maintenance purposes into the future.

3. A person who has an estate or interest in any freehold land over which a fencing easement is created is entitled to receive compensation from the Crown in respect of the creation of the easement. The *Land Acquisition (Just Terms Compensation) Act 1991* applies to the payment of such compensation. If there is any disagreement between the Crown and a person claiming compensation as to the amount of compensation the claim may be heard and disposed of in accordance with section 20 of the *Land and Environment Court Act 1979*. Proposed section 35UE requires notice of the creation or extinguishment of a fencing easement to be given to affected landholders.

4. Proposed new section 153E of the *National Parks and Wildlife Act 1974* authorises the Minister administering that Act, after consultation with the Minister administering the *Western lands Act 1901, to* grant an easement over any reserved land in favour of the Wild Dog Destruction Board for the purpose of facilitating the repair and maintenance of the dog- proof fence.

5. Proposed section 18A makes it clear that the power of the Western Lands Commissioner to set conditions by order as to fencing in relation to a Western Lands Lease can be exercised from time to time and not just when the lease is granted and allows the Commissioner to apportion the costs of complying with the fencing order between adjoining landowners. An appeal lies to the Local Land Board against any order under this section.

6. Proposed section 35QA authorises the Minister to create public roads over freehold land by acquiring the land under Part 12 of the *Roads Act 1993* and dedicating the land so acquired as a public road under Part 2 of that Act. Section 35Q already provides for the creation of public roads over leasehold land.

7. The Bill amends section 8B of the Principal Act to increase the number of members on the Western Lands Advisory Council from 14 to 15. The new Member will represent the interests of the Minister for Mineral Resources. Members of the Council will now hold office for up to three years instead of the statutory three-year term as at present. This provision is intended to give greater flexibility.

8. Schedule 1 [1] and [2] amend section 2 relating to the objects of the Act so as to reflect the new uses contemplated by the special purpose lease provisions of the Principal Act included in the Act by the Western and *Crown Lands Amendment (Special Purpose Leases) Act 2008* and the ongoing obligation to respect the indigenous and non-indigenous cultural heritage of the Western Division.

Background

9. The Parliamentary Secretary, in his Agreement in Principle speech, said that the *Western Lands Amendment Bill 2008* is the culmination of a thorough review of the operation the *Western Lands Act 1901* carried out in consultation with all relevant stakeholders and interested parties. That review was conducted under section 3B of the *Western Lands Act 1901*. This provision was inserted in the Act by the Western Lands Amendment Act 2002 That section requires the Minister administering the Act to conduct a formal review after five years to determine whether the policy objectives of the Act remain relevant and whether the provisions remain appropriate for securing those objectives. The statutory review of the Act has been undertaken in consultation with the West Lands Advisory Council. The Council is representative of the diverse interests in the Western Division. The Minister reports that as part of the review process, members of the Western Lands Advisory Council were encouraged to consult with the individuals and organisations they represent to identify issues those parties wished to have included in the review. Members of the general public were also invited to comment through advertisements in national and local newspapers.

10. The statutory review found that the policy objectives of the *Western Lands Act 1901* remain generally valid. The review found, however, that there is a need to amend the Act in a number of ways, including to enable the creation of easements along the length of the dog-proof fence; to strengthen the boundary fencing provisions; to provide greater flexibility in the term of appointment of members to the Western Lands Advisory Council; to provide greater clarity as to the objects of the Act and to make further provision to effect the creation of a legal road and access network for the Western Division across all land parcels.

The Bill

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act (other than Schedule 2 [24]) on the date of assent to the proposed Act. Schedule 2 [24] is to commence on a day to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Western Lands Act 1901* set out in Schedules 1 and 2.
Clause 4 is a formal provision that gives effect to the amendments to other Acts and instruments set out in Schedule 3.
Clause 5 repeals the *Western Lands Amendment Act 2002*.
Clause 6 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent. Section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Principal amendments
Easements to maintain the Border Fences

Schedule 1 [13] inserts proposed Division 3 into Part 9C of the Principal Act. The new Division contains the following provisions.
Proposed section 35UA defines *Border Fence, fenced portion of the State boundary, fencing easement* and *Wild Dog Destruction Board* for the purposes of the proposed Division.
Proposed section 35UB enables easements to be created in favour of the Wild Dog Destruction Board along the fenced portion of the NSW/Queensland and NSW/South Australia State boundaries (fencing easements).
Proposed section 35UC provides for the payment of compensation, to be determined in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*, in respect of freehold land affected by the creation of a fencing easement. No such compensation is to be payable if the land affected is leased under the Principal Act.
Proposed section 35UD provides for the extinguishment of fencing easements.
Proposed section 35UE requires notice of the creation or extinguishment of a fencing easement to be given to affected landholders.
Proposed section 35UF provides that no duty is payable under the *Duties Act 1997* in respect of the creation or extinguishment of a fencing easement.
Proposed section 35UG provides that the proposed Division does not apply to or in respect of land reserved under the *National Parks and Wildlife Act 1974*. However, proposed amendments to that Act in Schedule 3.8 make it clear that the Minister administering that Act may grant a fencing easement over any such reserved land in favour of the Wild Dog Destruction Board after consultation with the Minister administering the *Western Lands Act 1901*.
Schedule 1 [11] makes a consequential amendment to the heading to Part 9C of the Principal Act.
Western Lands Advisory Council

Schedule 1 [4] amends section 8B of the Principal Act so as to increase the number of members on the Council from 14 to 15.
Schedule 1 [6] amends section 8B of the Principal Act so as to provide for the new member to be appointed to represent the interests of the Minister for Mineral Resources. The same amendment replaces an obsolete reference to the Minister for Agriculture with a reference to the Minister for Primary Industries, while **Schedule 1 [5]** replaces an obsolete reference to the Minister for the Environment with a reference to the Minister for Climate Change and the Environment.
Schedule 1 [17] amends clause 2 of Schedule 5 to the Principal Act so as to replace the existing 3 year terms of office for members of the Council with flexible terms of up to 3 years.
Schedule 1 [16] inserts a saving provision into Schedule 3 to the Principal Act so as to

preserve the existing terms of office of existing members of the Council.

Fencing conditions

Schedule 1 [9] substitutes sections 18A and 18B of the Principal Act.

Proposed section 18A makes it clear that the power of the Western Lands Commissioner to set conditions as to fencing in relation to a Western Lands lease can be exercised from time to time, and not just when the lease is granted, and allows the Commissioner to apportion the costs of complying with a fencing order between adjoining landowners.

Proposed section 18B ensures that a landowner may recover from adjoining landowners any excess beyond the contributions for which they are liable in relation to compliance with a fencing order under proposed section 18A.

Schedule 1 [16] inserts a saving provision into Schedule 3 to the Principal Act so as to apply the proposed section 18A to existing Western Lands leases as well as to new Western Lands leases.

Local land boards

There are currently two separate schemes for local land boards: one under the *Crown Lands Act 1989* and the other under the Principal Act. In practice, the two schemes are administered as one. The intention is that there should in future be a single scheme applying throughout the State, that scheme being the scheme established under the *Crown Lands Act 1989*.

Schedule 1 [3] substitutes the definition of Local Land Board in section 3 (1) of the Principal Act. The new definition refers to local land boards constituted under the Crown Lands Act 1989.

Schedule 1 [7], [8] and [10] omit section 9 (2)–(7) and sections 9A, 10, 10A and 18C of the Principal Act (dealing with the constitution and functions of local land boards).

Schedule 1 [14] amends Schedule 2 to the Principal Act so as to extend to the Western Division the provisions of the *Crown Lands Act 1989* with respect to local land boards.

Schedule 1 [16] inserts a saving provision into Schedule 3 to the Principal Act so as to deem existing local land boards under that Act to be local land boards under the Crown Lands Act 1989.

Public roads

Schedule 1 [12] inserts proposed section 35QA into the Principal Act. The new section makes it clear that the Minister may create public roads over freehold land by acquiring the land under Part 12 of the *Roads Act 1993* and dedicating the land so acquired as a public road under Part 2 of that Act. Section 35Q already provides for the creation of public roads over leasehold land.

Objects

Schedule 1 [1] and [2] amend section 2 so as to reflect the new uses contemplated by the "special purpose lease" provisions of the Principal Act (included in the Act by the *Western and Crown Lands Amendment (Special Purpose Leases) Act 2008* and the ongoing obligation to respect the indigenous and non-indigenous cultural heritage of the Western Division.

Additional savings and transitional provisions

Schedule 1 [15] amends clause 1AAA of Schedule 3 to the Principal Act so as to enable savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 2 Miscellaneous amendments

Except for the following, the amendments made by this Schedule are either consequential on the amendments to the Principal Act that are to be made by Schedule 1 or of a minor law revision nature only.

Schedule 2 [4] substitutes the definition of Western Division in section 3 (1) of the Principal Act as a consequence of proposed Schedule 3.3 [4], which includes such a definition in section 4 of the *Crown Lands Act 1989*.

Schedule 2 [7] updates section 18CC of the Principal Act. Much of the existing section has been rendered obsolete by the *Crown Proceedings Act 1988*. **Schedule 2 [12]** amends section 18DB of the Principal Act as a consequence of the enactment of the *Native Vegetation Act 2003*.

Schedule 2 [14] repeals section 18I of the Principal Act (which deals with survey fees). No such fees are currently imposed.

Schedule 2 [18] repeals section 35L of the Principal Act (which provides for the amendment of various instruments). The section deals with matters that are more properly dealt with administratively.

Schedule 2 [19] substitutes section 36B of the Principal Act (which imposes interest on late payments of rent under a Western Lands lease issued before 1 July 1969) and repeals section 36C of that Act (which imposes interest on late payments of rent under a Western Lands lease issued after 1 July 1969) so as to provide that the rate of interest payable on late payments of any Western Lands lease is to be prescribed by the regulations. This reflects the current position.

Schedule 2 [20] substitutes section 46 (1) of the Principal Act so as to clarify the meaning of *condition* in Part 11 of that Act (which deals with the enforcement of the conditions of a Western Lands lease) so as to ensure that the expression extends to all conditions that the Principal Act imposes on such a lease.

Schedule 2 [24] replicates an uncommenced amendment that is currently contained in the **Western Lands Amendment Act 2002**, and so enables that Act to be repealed, as is proposed in clause 5 of the proposed Act.

Schedule 3 Amendment of other Acts and instruments

The amendments made by this Schedule are consequential on, or complementary with, the amendments to the Principal Act to be made by Schedule 1. The following amendments are of particular significance.

Amendment of the Conveyancing Act 1919

Schedule 3.2 [1] amends section 7A of the Act so as to provide that a plan of land the subject of a special purpose lease under Division 3A of Part 4 of the *Crown Lands Act 1989*, or Part 9E of the Principal Act, is not a current plan for the purposes of the Act. Schedule 3.2 [2] amends section 23G of the Act so as to exclude the granting of a special purpose lease, and any subsequent transaction with respect to a special purpose lease, from the operation of section 23F of the Act. Section 23F allows the Registrar-General to refuse to register a land transaction unless it relates to an existing lot in a current plan.

Amendment of the Crown Lands Act 1989

Schedule 3.3 [2] substitutes the definition of **land district** in section 3 (1) of the Act. The new definition extends to land districts established under section 9 of the Principal Act. The effect of this extension is that section 8 of the Act (which provides for the establishment of local land boards for each land district) will therefore apply to land districts in the Western

Division. See also Schedule 1 [14] referred to above.
Schedule 3.3 [3] and [5] amend sections 4 and 5 of the Act so as to make it clear that the Act does not, of its own force, apply to land in the Western Division or Lord Howe Island. Section 2A of, and Schedule 2 to, the Principal Act apply certain provisions of the Act to land in the Western Division.
Schedule 3.3 [4] inserts proposed subsection (2A) into section 4 of the Act. The new subsection defines the Western Division by reference to a deposited plan recorded in the office of the Registrar-General.

Amendment of the Dividing Fences Act 1991

Schedule 3.4 [2] inserts proposed paragraph (g) into section 4 of the Act. The new paragraph requires a local land board to have regard to certain orders under the Principal Act when dealing with fencing disputes affecting land the subject of a Western Lands lease.
Schedule 3.4 [3] amends section 13 of the Act so as to preclude a Local Court (which has a general jurisdiction to deal with matters arising under the Act) from dealing with matters that affect land the subject of a Western Lands lease.

Amendment of the National Parks and Wildlife Act 1974

Schedule 3.8 inserts proposed section 153E into the Act to make it clear that the Minister administering the Act may, after consultation with the Minister administering the *Western Lands Act 1901*, grant an easement over any reserved land in favour of the Wild Dog Destruction Board for the purpose of facilitating the repair and maintenance of the dog-proof fence located along the NSW/Queensland and NSW/South Australia State boundaries.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by Proclamation – Schedule 2[24]

11. Clause 2 provides for the commencement of the proposed Act (other than Schedule 2 [24] on the date of assent to the proposed Act. Schedule 2[24] is to commence on a day to be appointed by proclamation.

12. Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the proposed commencement of Schedule 2[24] by proclamation rather than on assent is an inappropriate delegation of power.

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE – BILLS PREVIOUSLY CONSIDERED

6. CONTAMINATED LAND MANAGEMENT AMENDMENT BILL 2008

Date Introduced:	26 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Verity Firth MP
Portfolio:	Climate Change and the Environment

Background

1. The Committee reported on this Bill in its Legislation Review *Digest* 10 of 2008.

2. At its meeting of 22 September 2008, the Committee also resolved to write to the Minister in a letter of 21 October 2008, to seek further clarification as to whether a landowner could be held responsible for the clean-up costs of contaminated land in circumstances where the landowner did not cause or contribute to the contamination either directly or through inaction and the contaminating party could not be held to account.

Minister's Reply

3. The Deputy Premier (the current Minister for Climate Change and the Environment) wrote two separate letters in response to the above Bill.

4. The first letter dated 26 November 2008 was received on 3 December 2008. It was in response to the comments or concerns raised in the *Digest* 10 of 2008. The Deputy Premier clarified the following three issues raised in the *Digest*:

> **Schedule 1 [9] – *proposed Section 40 (3) charge on land subject to cost notice.***
>
> I am advised that this section is retained from the original Contaminated Land Management Act 1997. While it has only been implemented once, it is important to ensure fiscal responsibility where public funds are used to improve a private asset.
>
> Where land has been substantially improved by the removal of contamination through public expenditure, and the owner wishes to benefit from the improvements, it is appropriate that the opportunity to be available to recover public funds. Where a responsible party is innocent, funding opportunities are available through the Environment Trust's Innocent Owners program.
>
> **Reverse Onus of Proof – Schedule 1 [40] – *proposed sections 98(1)(a) and (b) Offences by corporations.***
>
> I note the Committee's comments that reversing the onus of proof may be justified where knowledge of the facts is in the possession of one party only. I support the Committee's view that the reversal of the onus of proof in these circumstances would be appropriate.
>
> **Clause 2 – Commencement by proclamation – *Provide the executive with unfettered control over the commencement of an Act.***

> I am advised that a period of lead in time will be necessary to ensure that any required changes can be made to relevant guidelines, environmental planning instruments and the Contaminated Land Management Regulation 2008.

5. The second letter dated 4 February 2009 was received 9 February 2009. The Deputy Premier (as the current Minister for Climate Change and the Environment), replied to the Committee's concerns raised in the letter of 21 October 2008 to the former Minister for Climate Change and the Environment:

> The Bill was passed by Parliament on 2 December 2008. However, I acknowledge the Committee's concern regarding landowners' responsibility for clean up costs for contaminated land where the landowner did not cause or contribute to the contamination.
>
> The Department of Environment and Climate Change only requires clean up where contamination is causing a significant risk of harm, either to the community or the environment.
>
> Under the amended Act, the Department can issue an order to manage contamination, in the following hierarchy:
>
> - The person who is responsible for significant contamination of the land (whether or not there may be other persons who are also responsible for the contamination) or, if this is not practicable,
> - The owner of the land (whether or not the person is responsible for the contamination), or if this is not practicable,
> - A notional owner of the land, for example, a mortgagee in possession (whether or not the person is responsible for the contamination).
>
> This hierarchy is similar to that under the previous Act, however the amendments broaden the first tier, so that the Department can now only issue a management order to a landowner where it is not possible to issue an order to those responsible for the contamination.
>
> Under both the previous and amended Acts, a landowner could also become responsible for clean up costs if the Department orders a public authority to clean up contamination. This could occur where a landowner has bought land cheaply because of contamination, which is subsequently cleaned up by a public authority on behalf of the community. In this case, it may be appropriate for the authority to seek to recover its costs if the land was later resold for a higher price, after having been cleaned up using community funds.
>
> I can assure you that issuing an order to an innocent landowner is, and will continue to be, approached cautiously. Further, I am advised by the Department that no innocent landowners have been ordered to investigate or remediate any significant contamination in the past ten years.
>
> Additionally, the NSW Government has established an Innocent Owners Scheme under the NSW Environmental Trust, to assist in reducing the legal and financial burden on innocent owners by providing a grant for the clean up of contamination.

Committee's Response

6. The Committee thanks the Deputy Premier for her reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

23 September 2008

The Hon Verity Firth MP
Minister Assisting the Minister for Climate Change, Environment and Water
Level 33, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Contaminated Land Management Amendment Bill 2008

At its meeting of 22 September 2008 the above Bill was considered by the Legislation Review Committee. The Committee resolved to seek further clarification as to whether a landowner could be held responsible for the clean-up costs of contaminated land in circumstances where the landowner did not cause or contribute to the contamination either directly or through inaction and the contaminating party could not be held to account.

I would be grateful for the views of your department on this matter as soon as practicable.

Should there be any further queries please contact Catherine Watson, on 9230 2036 or Catherine.Watson@parliament.nsw.gov.au

Yours sincerely

Allan Shearan

Allan Shearan MP
Chair

Carmel Tebbutt MP

Deputy Premier

Minister for Climate Change and the Environment | Minister for Commerce

In reply please quote: DOC08/48054

RECEIVED
3 DEC 2008
LEGISLATION REVIEW COMMITTEE

Mr Allan Shearan MP
Chair, Legislative Review Committee
NSW Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

I refer to the Legislative Review Committee's report on the *Contaminated Land Management Amendment Bill* 2008 in the Legislative Review Digest No 10 of 2008. I would like to clarify three issues raised in the report.

Schedule 1 [9] – *proposed Section 40(3) charge on land subject to cost notice.*
I am advised that this section is retained from the original *Contaminated Land Management Act 1997.* While it has only been implemented once, it is important to ensure fiscal responsibility where public funds are used to improve a private asset.

Where land has been substantially improved by the removal of contamination through public expenditure, and the owner wishes to benefit from the improvements, it is appropriate that the opportunity be available to recover public funds. Where a responsible party is innocent, funding opportunities are available through the Environment Trust's Innocent Owners program.

Reverse Onus of Proof – Schedule 1 [40] - *proposed sections 98(1)(a) and (b) Offences by corporations*
I note the Committee's comments that reversing the onus of proof may be justified where knowledge of the facts is in the possession of one party only. I support the Committee's view that the reversal of the onus of proof in these circumstances would be appropriate.

Clause 2 - Commencement by proclamation - *Provide the executive with unfettered control over the commencement of an Act*
I am advised that a period of lead in time will be necessary to ensure that any required changes can be made to relevant guidelines, environmental planning instruments and the *Contaminated Land Management Regulation 2008.*

I understand that Mr Craig Lamberton, Director Specialised Regulation Branch, Department of Environment and Climate Change, has discussed the Committee's report with Mr Jim Jefferis. If further information is required, Mr Lamberton can be contacted on 9995 5593.

Yours sincerely

26 NOV 2008

Carmel Tebbutt MP
Deputy Premier
Minister for Climate Change and the Environment

Level 30, Governor Macquarie Tower | 1 Farrer Place Sydney NSW 2000 | p 9228 4866 | f 9228 4855

7. CRIMES (FORENSIC PROCEDURES) AMENDMENT BILL 2008

Date Introduced:	18 June 2008
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* 9 of 2008.

2. The Committee resolved to write to the Minister seeking advice on the following matters of concern regarding the right to personal physical integrity arising under Schedule 1 [1] to insert section 93 on permissible matching of DNA profiles:

   (a) Whether the change to permit a DNA profile that is on the volunteers unlimited purposes index to be matched with a DNA profile on the offenders index could trespass unduly on the right to personal physical integrity?

   (b) Whether the change to permit a DNA profile that is on the volunteers limited purpose index to be matched with a DNA profile on the crime scene index could trespass unduly on the right to personal physical integrity?

   (c) Whether the change to permit a DNA profile that is on the volunteers limited purpose index to be matched with a DNA profile on the offenders index could trespass unduly on the right to personal physical integrity?

   (d) Whether the person will be informed when providing their DNA to be stored on the DNA database that the above matching of profiles and indexes will be permitted?

   (e) Whether the person's consent will be required for the above matching of profiles and indexes?

   (f) Will consent be obtained, if possible, regarding existing DNA already stored on the database to be permitted to be matched with the respective indexes referred to above?

   (g) What benefits will come from the above changes?

   (h) How will any of the benefits balance and/or address any concerns regarding the right to personal physical integrity and consent?

Minister's Reply

3. By letter received 6 February 2009, the Attorney General (as the Minister charged with the administration of the *Crimes (Forensic Procedures) Act 2000*), replied to the Committee's above concerns:

> In relation to the questions labelled 'a', 'b', 'c', 'f' and 'h' in your letter dated 24 June 2008, I note that matching between the indices mentioned was already permitted by the Act. The amendments in the 2008 Bill clarified the operation of the matching table in relation to these DNA profiles; they did not increase the ambit of permissible

matches. There will therefore be no impact, undue or otherwise, on the right to personal physical integrity as a result of these changes. Nor is there any need to seek additional consent from people who had volunteered their DNA in the past.

In relation to question 'd', I refer the Committee to s77 of the Act which provides a comprehensive list of the information which must be provided to people who volunteer their DNA.

In relation to question 'e', I note that Part 8 of the Act sets out consent procedures for persons who volunteer their DNA. The Act requires the informed consent of volunteers.

In relation to question 'g', I note that the amendments to the legislation were designed to provide clarity as to the operation of the table and remove any ambiguity and misunderstanding that might have led to the view that such matching was not previously allowed.

Committee's Response

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

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 June 2008

Our Ref:LRC

The Hon David Campbell MP
Minister for Police,
Minister for the Illawarra,
Level 35 Governor MacquarieTower
1 Farrer Place
Sydney NSW 2000

Dear Minister

CRIMES (FORENSIC PROCEDURES) 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 9 of 2008*.

The Committee resolved to write to you for advice on the following matter of concern, regarding the right to personal physical integrity arising under Schedule 1 [1] to insert the proposed section 93 – permissible matching of DNA profiles.

The Committee seeks your advice as to:

(a) Whether the change to permit a DNA profile that is on the volunteers unlimited purposes index to be matched with a DNA profile on the offenders index could trespass unduly on the right to personal physical integrity?

(b) Whether the change to permit a DNA profile that is on the volunteers limited purpose index to be matched with a DNA profile on the crime scene index could trespass unduly on the right to personal physical integrity?

(c) Whether the change to permit a DNA profile that is on the volunteers limited purpose index to be matched with a DNA profile on the offenders index could trespass unduly on the right to personal physical integrity?

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(d) Whether the person will be informed when providing their DNA to be stored on the DNA database that the above matching of profiles and indexes will be permitted?

(e) Whether the person's consent will be required for the above matching of profiles and indexes?

(f) Will consent be obtained, if possible, regarding existing DNA already stored on the database to be permitted to be matched with the respective indexes referred to above?

(g) What benefits will come from the above changes?

(h) How will any of the benefits balance and/or address any concerns regarding the right to personal physical integrity and consent?

The Committee appreciates any information or advice that you could provide with respect to the above questions.

Yours sincerely

Allan Shearan

Allan Shearan MP
Chair

NEW SOUTH WALES

ATTORNEY GENERAL

RECEIVED
6 FEB 2009
LEGISLATION REVIEW COMMITTEE

Mr Allan Shearan MP
Chair
Legislation Review Committee
Parliament House of NSW
Macquarie Street,
Sydney, NSW 2000

Your Ref: LRC
Our Ref:09/00038

Dear Mr Shearan

I write in relation to your letters dated 24 June 2008 and 24 November 2008 which were addressed to the Hon David Campbell MP. These letters concerned the *Crimes (Forensic Procedures) Amendment Bill 2008*. The letters have been bought to my attention as I am the Minister charged with the administration of the *Crimes (Forensic Procedures) Act 2000* (the Act). The letters seek advice on 8 specific issues.

In relation to the questions labelled 'a', 'b', 'c', 'f', and 'h' in your letter dated 24 June 2008, I note that matching between the indices mentioned was already permitted by the Act. The amendments in the 2008 Bill clarified the operation of the matching table in relation to these DNA profiles; they did not increase the ambit of permissible matches. There will therefore be no impact, undue or otherwise, on the right to personal physical integrity as a result of these changes. Nor is there any need to seek additional consent from people who had volunteered their DNA in the past.

In relation to question 'd', I refer the Committee to s77 of the Act which provides a comprehensive list of the information which must be provided to people who volunteer their DNA.

In relation to question 'e', I note that Part 8 of the Act sets out consent procedures for persons who volunteer their DNA. The Act requires the informed consent of volunteers.

In relation to question 'g', I note that the amendments to the legislation were designed to provide clarity as to the operation of the table and remove any ambiguity and misunderstanding that might have led to the view that such matching was not previously allowed.

I trust this is of assistance.

Yours faithfully

(John Hatzistergos)

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

Part Two – Regulations

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

Outline of the Regulation/Issues

Crimes (Administration of Sentences) Amendment Regulation 2009

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to report to Parliament on the Regulation.

Grounds for comment

Personal rights/liberties	**Confidential Communications and Legal Professional Privilege:** The Committee is concerned that the new clauses 95A (2) and (3) may in practice, restrict open (full and frank) communications with a legal practitioner as the subclauses enable a correctional officer (or an interpreter approved by the Commissioner) to hear otherwise confidential communications. The Committee is also concerned with the new clause 108A (2) on allowing the general manager or nominated officer to arrange for a translation of the correspondence if it is written in a language other than English from an extreme high risk restricted inmate when addressed to any person (other than an exempt body where an exempt body does not mean a legal practitioner). Another concern is that these restrictions of confidential communications are authorised by this Regulation (and not by an amending Act), which may be inconsistent with the legal protection conventionally conferred on lawyer-client relationships. Legal professional privilege is a common law right in Australia and is acknowledged by the High Court to be a fundamental human right or civil right.

	The Committee acknowledges the rationale for the protection under the common law is not merely for privacy reasons but because legal professional privilege relates fundamentally to the proper administration of justice as observed in the High Court. The Committee further notes that the practical effect of the restrictions on confidential communications is the likely effect on the candour of the parties. This would impair the exercise of the right to legal professional privilege. Therefore, the Committee is of the view that clauses 95A (2) and (3) and clause 108A (2) may form undue trespasses on individual rights and liberties to legal professional privilege and refers this to Parliament. **Oppressive Official Powers – Denial of Access to Official Visitors:** As already raised in the *Legislation Review Digest 10 of 2008*, the Committee remains of the view that clauses 155 (5), 156 (5) and 159 (5) unduly trespass on personal rights and liberties to access and be heard by Official Visitors, who have a legislated responsibility to ensure the health, safety and welfare of inmates. The Committee remains concerned that these clauses, which exclude the right to Official Visitors, may weaken the individual right to humane treatment. Accordingly, the Committee refers these matters to the attention of Parliament. **Insufficiently Defined Administrative Powers – Ill-Defined and Wide Powers** The Committee considers that clause 89A (3) where the power of the Commissioner of Corrective Services may refuse to approve a person as a visitor to an extreme high risk restricted inmate ***for any other reason*** (other than on the basis of a criminal record check) is ill-defined and wide. The Committee also considers that clause 89A (4) where the power of the Commissioner may revoke an approval of a person as a visitor to an extreme high risk restricted inmate ***at any time*** is broad and ill-defined, without defining the set of circumstances or conditions to

	guide the exercise of the Commissioner's discretion. The Committee is concerned that the Commissioner's discretion under clauses 89A (3) and (4) may make the rights of a visitor and that of an extreme high risk restricted inmate unduly dependent on insufficiently defined administrative powers, and accordingly, refers this to Parliament. The Committee is concerned that there is an ill-defined and wide discretion by the Commissioner to approve 'another language' with regard to visits to extreme high risk restricted inmates if communications are not conducted in English under clause 95A (1) and with regard to telephone calls made by an extreme high risk restricted inmate under clause 110 (6). This may make the rights of a visitor and that of an extreme high risk restricted inmate unduly dependent on insufficiently defined administrative powers.
Business impact	
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	

Explanatory Note

The object of this Regulation is to establish a new designation for inmates who are believed to constitute an extreme danger to other people or to good order and security and who may engage in, or incite others to engage in, activities that constitute a serious threat to the peace, order or good government of the State or any other place. These inmates will be known as ***extreme high risk restricted inmates*** and will be subject to a stricter security and management regime than other inmates.

The Regulation provides as follows:

> (a) extreme high risk restricted inmates will generally be allowed one visit only each week, and visitors may be required to undergo a criminal record check and be pre-approved by the Commissioner of Corrective Services (***the Commissioner***),
> (b) visits to extreme high risk restricted inmates will be non-contact visits and must be conducted in English or another approved language with an interpreter present,
> (c) all letters and parcels to and from extreme high risk restricted inmates will be opened and read, other than correspondence with exempt bodies (such as the Ombudsman) and Australian legal practitioners in certain circumstances,

(d) all correspondence from extreme high risk restricted inmates must be written in English or another approved language and may be translated,
(e) all telephone calls by extreme high risk restricted inmates must be conducted in English or another approved language,
(f) extreme high risk restricted inmates will not be allowed to receive any money directly or into their accounts (other than money paid to inmates by the Commissioner), and any such money will be returned to the sender or confiscated,
(g) extreme high risk restricted inmates will not have access to the Official Visitor at the correctional centre in which they are held (as is currently the case for Category AA male inmates and Category 5 female inmates),
(h) reviews of directions under which extreme high risk restricted inmates are held in segregated or protective custody are to be heard by the Chairperson of the Serious Offenders Review Council alone (rather than the full Council, as is the case for other inmates),
(i) extreme high risk restricted inmates will be deemed as serious offenders for the purposes of the *Crimes (Administration of Sentences) Act 1999* and the regulations made under that Act.

The Regulation also:

(a) provides that the Serious Offenders Review Council will not be required to disclose in the records of the Council's proceedings any information the disclosure of which may prejudice national security, and
(b) further provides for the circumstances in which a correctional officer may terminate an inmate's telephone call, and
(c) makes further provision with respect to letters and parcels sent to or by certain categories of inmates, and
(d) makes other consequential and minor amendments.

This Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 3 (1) (the definition of ***serious offender***), 79, 197A and 271 (the general regulation-making power).

This Regulation has commenced on 13 February 2009.

Comment

Insufficiently Defined Administrative Powers – Ill-Defined and Wide Powers

1. The new Clause 89A provides conditions and restrictions with regard to approval of visitors to extreme high risk restricted inmates.

2. Clause 89A (3) reads: The Commissioner may refuse to approve a person as a visitor to an extreme high risk restricted inmate (on the basis of a criminal record check or ***for any other reason***).

3. Clause 89A (4) reads: The Commissioner may revoke an approval of a person as a visitor to an extreme high risk restricted inmate ***at any time***.

4. The Committee considers that subclause (3) where the power of the Commissioner of Corrective Services may refuse to approve a person as a visitor to an extreme high risk restricted inmate for any other reason (other than on the basis of a criminal

record check) is ill-defined and wide. The Committee also considers that subclause (4) where the power of the Commissioner may revoke an approval of a person as a visitor to an extreme high risk restricted inmate at any time is broad and ill-defined, without defining the set of circumstances or conditions to guide the exercise of the Commissioner's discretion.

5. The Committee is concerned that the Commissioner's discretion under clauses 89A (3) and (4) may make the rights of a visitor and that of an extreme high risk restricted inmate unduly dependent on insufficiently defined administrative powers, and accordingly, refers this to Parliament.

Insufficiently Defined Administrative Powers – Ill-Defined and Wide Powers

6. The new clause 95A sets out the requirements for visits to extreme high risk restricted inmates to be conducted in English or another approved language by the Commissioner of Corrective Services. Clause 95A (1) reads: During a visit to an extreme high risk restricted inmate, all communications must be conducted in English ***or another language approved by the Commissioner***.

7. Another new clause 110 (6) reads that: All telephone calls made by an extreme high risk restricted inmate must be conducted in English or ***another language approved by the Commissioner***, unless the telephone call is made to an exempt body or unless the Commissioner otherwise authorises.

8. The Committee is concerned that there is an ill-defined and wide discretion by the Commissioner to approve 'another language' with regard to visits to extreme high risk restricted inmates if communications are not conducted in English under clause 95A (1) and with regard to telephone calls made by an extreme high risk restricted inmate under clause 110 (6). This may make the rights of a visitor and that of an extreme high risk restricted inmate unduly dependent on insufficiently defined administrative powers, and therefore, the Committee refers this to Parliament.

Confidential Communications and Legal Professional Privilege

9. The new clause 95A (2) reads: If communications are conducted in a language other than English, the visit must take place within the hearing of an interpreter approved by the Commissioner. Subclause (3) reads: In any case, a visit to an extreme high risk restricted inmate must take place within the hearing of a correctional officer.

10. The new clause 108A sets out additional requirements for correspondence from extreme high risk restricted inmates. The new clause 108A (2) reads: If a letter or parcel received from an extreme high risk restricted inmate and addressed to any person (***other than an exempt body***) contains any correspondence that is written in a language other than English, the general manager or nominated officer may arrange for a translation of the correspondence.

11. A legal practitioner does not fall within the meaning of an exempt body, rather a legal practitioner means an exempt person only. Therefore, the meaning of an exempt body does not include a legal practitioner. An exempt body includes: the Ombudsman, the Judicial Commission, the NSW Crime Commission, the Police Integrity Commission, the Anti Discrimination Board, the Administrative Decisions Tribunal, the Independent Commission Against Corruption, the Privacy

Commissioner, the Legal Aid Commission, the Legal Services Commissioner or the Legal Services Tribunal or the Commonwealth Ombudsman, the Commonwealth Human Rights and Equal Opportunity Commission or the Australian Crime Commission.

12. The Committee is concerned that the new clauses 95A (2) and (3) may in practice, restrict open (full and frank) communications with a legal practitioner as the subclauses enable a correctional officer (or an interpreter approved by the Commissioner) to hear otherwise confidential communications.

13. The Committee is also concerned with the new clause 108A (2) on allowing the general manager or nominated officer to arrange for a translation of the correspondence if it is written in a language other than English from an extreme high risk restricted inmate and addressed to any person (other than an exempt body where an exempt body does not mean a legal practitioner).

14. Another concern is that these restrictions of confidential communications are authorised by this Regulation (and not by an amending Act), which may be inconsistent with the legal protection conventionally conferred on lawyer-client relationships. Legal professional privilege is a common law right in Australia and is acknowledged by the High Court to be a fundamental human right or civil right[1].

15. The Committee acknowledges the rationale for the protection under the common law is not merely for privacy reasons but because legal professional privilege relates fundamentally to the proper administration of justice as observed in the High Court[2], where it was held that the privilege is not a "mere rule of evidence, it is a substantive and fundamental common law principle"[3].

16. The Committee further notes that the practical effect of the restrictions on confidential communications is the likely effect on the candour of the parties. This would impair the exercise of the right to legal professional privilege. In *Grant v Downs* (1976) 135 CLR 674, the High Court identified a public interest of promoting frank exchanges, where Stephen, Mason and Murphy JJ, at 685, stated: "keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor".

17. Therefore, the Committee is of the view that clauses 95A (2) and (3) and clause 108A (2) may form undue trespasses on individual rights and liberties to legal professional privilege and refers this to Parliament.

Oppressive Official Powers – Denial of Access To Official Visitors:

18. The Committee has already commented and referred to Parliament similar concerns

[1] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543: "Australian courts have classified legal professional privilege as a fundamental right or immunity" at 563 per McHugh J; and also Kirby J at 575: "Legal professional privilege is also an important human right deserving of special protection".

[2] *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 133, per Deane J: [Legal professional privilege] "plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen – particularly the weak, the unintelligent and the ill-informed citizen – under the law".

[3] *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 132, per Deane J.

in the *Legislation Review Digest 10* of 2008 with regard to the *Crimes (Administration of Sentences) Regulation 2008*.

19. At the time, the Committee raised concerns about clauses 155 (3); 156 (5); and 159 (5) with regard to access to Official Visitors by Category AA male inmate and Category 5 female inmate. Category AA is the category of male inmates who, in the opinion of the Commissioner, represent a special risk to national security and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment. Category 5 is the category of female inmates who, in the opinion of the Commissioner, represent a special risk to national security and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

20. In the *Legislation Review Digest 10* of 2008, the Committee formed the view that clauses 156 (5) and 159 (5) unduly trespass on personal rights and liberties including the right to access and be heard by Official Visitors, who have a legislated responsibility to ensure the health, safety and welfare of inmates, since the clauses exclude the right to Official Visitors.

21. The new clause 155 (5) will expand to cover extreme high risk restricted inmates, in order to exclude such inmates from the notice of the availability of Official Visitors. Similarly, the new clause 156 (5) will not permit an Official Visitor to deal with a complaint or inquiry received from an extreme high risk restricted inmate, and the new clause 159 (5) will exclude an extreme high risk restricted inmate from speaking with an Official Visitor.

22. As already raised in the *Legislation Review Digest 10 of 2008*, the Committee remains of the view that clauses 155 (5), 156 (5) and 159 (5) unduly trespass on personal rights and liberties to access and be heard by Official Visitors, who have a legislated responsibility to ensure the health, safety and welfare of inmates. The Committee remains concerned that these clauses, which exclude the right to Official Visitors, may weaken the individual right to humane treatment. Accordingly, the Committee refers these matters to the attention of Parliament.

23. The Committee has resolved to refer this report to Parliament on the Regulation.

Outline of the Regulation/Issues

Liquor Amendment (Special Licence Conditions) Regulation 2008

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolves to refer to Parliament on the Regulation; and
2) asks Parliament to consider whether that it may be an undue trespass on the right to procedural fairness in the absence of an opportunity for the affected licensees to make representations or submissions to challenge their inclusion in Schedule 3; and
3) asks Parliament to consider whether the special conditions that impose a strict liability may have the potential to adversely impact the business of the affected premises if other competing licensed premises in the area or vicinity are not subjected to the same special conditions and have not been included in Schedule 3.

Grounds for comment

Personal rights/liberties	The Committee further notes that strict liability is imposed on the compliance with the special conditions, and in the absence of an opportunity for the affected licensees to make representations or submissions to challenge their inclusion in Schedule 3, the Committee asks Parliament to consider whether that it may be an undue trespass on the right to procedural fairness.
Business impact	The Committee notes that these special conditions, such as lock out or reduction in trading hours, may also have the potential to adversely impact the business of the affected premises, particularly, if other competing licensed premises in the area or vicinity are not subjected to the same special conditions and have not been included in Schedule 3.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	

Explanatory Note

The object of this Regulation is to prescribe additional licence conditions in respect of certain licensed premises. The conditions are designed to reduce alcohol-related violence in or about the premises concerned. Schedule 3 lists the forty-eight licensed premises that are subject to the special conditions.
This Regulation is made under the *Liquor Act 2007*, including sections 11 (1) (b) and 159 (the general regulation-making power). The Regulation commenced on 1 December 2008. It amended the Liquor Regulation 2008 to apply new liquor licence conditions onto the 48 licensed premises.

The new special conditions include:

- mandatory 2 am lock-outs for declared premises where patrons must not be permitted to enter the premises after 2 am or before 5 am (clause 53C);
- glasses and breakable plastic containers are prohibited during restricted service period after midnight (clause 53D);
- certain drinks are prohibited during restricted service period after midnight such as shots as well as drink purchase limits (clause 53E);
- 10 minute alcohol sale 'time-outs' every hour during restricted service period after midnight (clause 53F);
- cessation of alcohol service 30 minutes before closing time (clause 53G).

However, clause 53H allows for exemptions. The Director may, by order in writing served on the licensee of the declared premises, exempt the declared premises from any specified provision of the special licence conditions under Division 3 of the Regulation. The Director may only exempt declared premises if the Director is satisfied that conditions other than the specified provision will be more effective in reducing the risk of alcohol-related violence in or about the declared premises, and has imposed those other conditions on the licence for the premises.

Comment

1. It is an offence under section 11 (2) of the *Liquor Act 2007* if a licensee fails to comply with any conditions to which the licence is subject. The special conditions in the Regulation appear to impose strict liability.

2. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the authority or prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty, and the availability of any defences or safeguards.

3. At the time, 9 of the 48 licensees had initially brought proceedings in the Supreme Court to contest the validity of the regulation and the decision to include the specified premises on the list of declared premises subject to the special conditions in Schedule 3. They claimed that they had been denied natural justice as they had not been informed that they were to be included on the Schedule list and were not given an opportunity to challenge their inclusion on the list, including the validity of the data used to establish the list.

4. Subsequently, during that period, seven of the nine licensees dropped out of the proceedings, with only two licensees continuing with the proceedings in the Supreme Court back in December 2008.

5. The Committee will be concerned about regulation that authorises administrative decision-making without providing for the right of those affected to have their views heard, especially in the context that the list of licenses subject to the special conditions may be based on data which could be disputed.

6. The Committee further notes that strict liability is imposed on the compliance with the special conditions, and in the absence of an opportunity for the affected licensees to make representations or submissions to challenge their inclusion in Schedule 3, the Committee asks Parliament to consider whether that it may be an undue trespass on the right to procedural fairness.

7. The Minister for Gaming and Racing said the special conditions were designed to reduce alcohol-related violence in or around listed high-risk venues. He said the 48 licensed premises had been prepared on the advice provided by the NSW Commissioner of Police and based on data provided by the NSW Bureau of Crime Statistics and Research. The data identified assault incidents that were reported to or detected by police between July 2007 and June 2008 at licensed premises.

8. The Committee notes that these special conditions, such as lock out or reduction in trading hours, may also have the potential to adversely impact the business of the affected premises, particularly, if other competing licensed premises in the area or vicinity are not subjected to the same special conditions and have not been included in Schedule 3.

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

Notification of the Proposed Postponement of the Repeal of the Children and Young Persons (Care and Protection) Regulation 2000 (4)

...

File Ref: LRC 2565
CO9/

Minister for Community Services

Issues

1. By letter received 4 February 2009, the Minister for Community Services advised the Committee that she is proposing to postpone the automatic repeal due on 1 September 2009 of the above Regulation.

Recommendation

2. That the Committee write to the Minister to advise that it has considered the reasons advanced for the postponement of the repeal of the Regulation and does not have any concerns with this proposal.

Comment

Children and Young Persons (Care and Protection) Regulation 2000

3. The Minister is proposing the postponement of the automatic repeal of this regulation for the fourth time.

4. The Minister advised that:

> *The reason for seeking a further postponement is that legislative reforms proposed by the Special Commission of Inquiry into Child Protection are expected to be progressed in the Budget Session 2009. It is anticipated that the Regulation will be reviewed in late 2009, to enable the remaking of the Regulation with necessary changes, to take effect in 2010.*

Notification of the Proposed Postponement of the Repeal of the Fisheries Management (Aquatic Reserves) Regulation 2002 (3); Protection Of The Environment Operations (Clean Air) Regulation 2002 (3); Coastal Protection Regulation 2004 (1); Hunter Water (Special Areas) Regulation 2003 (2); Lord Howe Island Regulation 2004 (1); Radiation Control Regulation (2); Threatened Species Conservation Regulation 2002 (2)

...

File Ref: LRC CO9/

Deputy Premier and Minister for Climate Change and the Environment

Issues

1. By letters received 9 February 2009, the Deputy Premier (Minister for Climate Change and the Environment) advised the Committee that she is proposing to postpone the automatic repeal due on 1 September 2009 of the above seven Regulations.

Recommendation

2. That the Committee writes to the Deputy Premier to advise that it has considered the reasons advanced for the postponements of the repeal of the above Regulations and does not have any concerns with the proposals.

Comment

Fisheries Management (Aquatic Reserves) Regulation 2002

3. The Deputy Premier is proposing the postponement of the automatic repeal of this regulation for the third time. The Deputy Minister advises that:

> *DECC [Department of Environment and Climate Change] is currently undertaking a review of the Marine Parks Regulation 1999. This review will inform the review and remaking of the Fisheries Management (Aquatic Reserves) Regulation 2002. Amendments may be made to the Regulation in 2009 to introduce management plan provisions for the Cabbage Tree Bay Aquatic Reserve. These management plan provisions would increase environmental protection, assist management and protect infrastructure provided by DECC within this Reserve. The implementation of these provisions would further inform the review process associated with the remaking of the Regulation. A postponement is sought to enable DECC to undertake a thorough and detailed review of the Regulation, including the proposed amendments to the Regulation. It is expected that the Regulation will be remade by August 2010.*

Protection of the Environment Operations (Clean Air) Regulation 2002

4. The Deputy Premier is proposing the postponement of the automatic repeal of this regulation for the third time. She advises that:

> *Part 4 of the Regulation covers industrial air emissions. It is a very complex section of the regulation as there are a number of different mechanisms which act to control emissions from industry. A further postponement of the repeal of this Regulation is*

considered necessary to ensure a robust assessment of the impacts of the Regulation and comprehensive economic analysis. National approaches for the regulation of woodheaters and small engines (eg outboard marine engines and garden equipment) are currently being developed as air emissions from these sectors have significant environmental and health impacts in all or several jurisdictions. The Commonwealth has undertaken a detailed analysis of options and prepared papers for the November 2008 Environment Protection and Heritage Council (EPHC) meeting recommending the preparation of a Regulatory Impact Statement for the options. Postponing the repeal of the Regulation will allow consideration of the outcomes of the woodheater and small engines national process. A postponement of the staged repeal of the Regulation has been sought as a result of the complexity of the regulation and the development of national approaches to woodheaters and small engines. It is expected that the regulation will be remade by March 2010.

Coastal Protection Regulation 2004

5. The Deputy Premier is proposing the postponement of the automatic repeal of this regulation for the first time. This is sought because:

…a major review of Part 3 of the Coastal Protection Act 1979 is currently underway and this review is likely to recommend changes to the Act that will result in the regulation not being required. The review is being carried out in response to a Cabinet decision made in May 2008…The review is expected to be completed by early 2009. Given that the review and reform of several key aspects of the Act will probably result in the Regulation being repealed, there does not appear to be merit in remaking the Regulation in its current form in 2009.

Hunter Water (Special Areas) Regulation 2003

6. The postponement of the automatic repeal of this regulation is sought for the second time. This is sought because as advised by the Deputy Premier:

…this Regulation is likely to be reallocated to the Minister for Water…The remake process has been delayed for several months awaiting notification of the allocation of the Regulation. Given that this Regulation is very important for protecting water supply catchments, a second postponement is necessary to allow the reallocation of Part 5 Division 8 of the Act and the Regulation back to the Minister for Water. A postponement is also necessary to enable the Hunter Water Corporation to assist the Department of Water and Energy in developing alternative mechanisms for the regulation and protection of the water catchment Special Areas. Hunter Water Corporation is currently working with local councils to consider further provisions in their environmental planning instruments and is in discussions with the Department of Planning regarding protection of drinking water catchments under a SEPP.

7. It is anticipated that the Regulation will be remade by August 2010.

Lord Howe Island Regulation 2004

8. This is the first postponement sought for this Regulation. The postponement is sought because:

…a major review of the Lord Howe Island Act 1953 is currently underway, as required by s 40 of the Act, and this review may result in changes being made to the Act. This would have implications for the Lord Howe Island Regulation 2004. The review of the Act is to be completed by March 2010. Given that the Regulation might need to be significantly amended as a result of the review and reform of the Act, there does not appear to be merit in remaking the regulation in its current form in 2009.

9. It is expected that the Regulation will be finalised by April 2011.

Radiation Control Regulation 2003

10. This is the second postponement sought for this Regulation. The Deputy Premier advises that:

> *The first postponement was sought because a major review of the Radiation Control Act 1990 was taking place. That review is still underway and may result in significant changes being made to the existing form of the Regulation Control Regulation 2003. The review is expected to be completed by February 2009. Given that the Regulation may be subject to significant amendments arising from the review and reform of several key aspects of the Act, there does not appear to be merit in remaking the Regulation in its current form in 2009.*

11. It is expected that the Regulation will be finalised by November 2010.

Threatened Species Conservation Regulation 2002

12. This is the second postponement sought for this Regulation. The Deputy Premier advises that:

> *The in-principle approval of the remake of the Regulation has been awaiting the outcome of preliminary consultation. DECC has recently completed internal consultation and consultation with the Scientific Committee concerning possible amendments to the Little Penguin Critical Habitat and possible amendments to the listing criteria in the Regulation. As a result of this consultation, DECC has determined that it is not appropriate to amend the area of the Little Penguin Critical Habitat or to amend the listing criteria. This Regulation, particularly the criteria for the listing of new threatened species, is closely scrutinised and it is anticipated that the public exhibition of the proposed Regulation will generate substantial interest from developers, the rural sector, scientists and environmental and community groups. Due to the controversial nature of the Regulation and the need for thorough consultation, DECC anticipates that the remake process will extend beyond September 2009.*

Appendix 1: Index of Bills Reported on in 2009

	Digest Number
Education Amendment (Educational Support For Children With Significant Learning Difficulties) Bill 2008*	1
Food Amendment (Meat Grading) Bill 2008*	1
Liquor Amendment (Special License) Conditions Bill 2008	1
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		1		
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			14	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1		
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			12	

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
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
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
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		10
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10