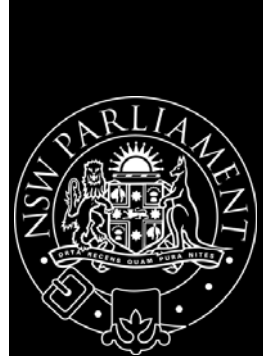


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 8 of 2005

20 June 2005

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

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

Legislation Review Digest, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2005, 66 p; 30cm

Chair: The Hon Peter Primrose MLC

20 June 2005

ISSN 1448-6954

1. Legislation Review Committee—New South Wales
2. Legislation Review Digest No 8 of 2005

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; no. 8 of 2005

TABLE OF CONTENTS

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	iii
Guide to the <i>Legislation Review Digest</i>	iv
Summary of Conclusions.....	vi
Part One – Bills.....	1
SECTION A: Comment on Bills.....	1
1. Drug Misuse And Trafficking Amendment Bill 2005.....	1
2. Gaming Machines Amendment Bill 2005.....	6
3. Legal Profession Amendment Bill 2005.....	9
4. Local Government Amendment Bill 2005.....	13
5. Passenger Transport Amendment (Maintenance Of Bus Service) Bill 2005.....	18
6. Pawnbrokers and Second-hand Dealers Amendment Bill 2005.....	25
7. State Revenue Legislation Amendment Bill 2005.....	27
8. Statute Law (Miscellaneous Provisions) Bill 2005.....	31
9. Terrorism Legislation Amendment (Warrants) Bill 2005.....	33
Part Two – Regulations.....	46
SECTION A: Regulations about which the Committee is Seeking Further Information.....	46
Appendix 1: Index of Bills Reported on in 2005.....	47
Appendix 2: Index of Ministerial Correspondence on Bills for 2005.....	50
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005.....	51
Appendix 4: Index of correspondence on regulations reported on in 2005.....	54

* Denotes Private Member's Bill

MEMBERSHIP & STAFF

Chairman

Peter Primrose MLC

Vice Chairman

Virginia Judge MP, Member for Strathfield

Members

Linda Burney MP, Member for Canterbury
Shelley Hancock MP, Member for South Coast
Don Harwin MLC
Noreen Hay MP, Member for Wollongong
Russell Turner MP, Member for Orange
Peter Wong MLC

Staff

Russell Keith, Committee Manager
Indira Rosenthal, Senior Committee Officer
Mel Keenan, Senior Committee Officer
Rachel White, Committee Officer
Melanie Carmeci, Assistant Committee Officer

Panel of Legal Advisers

The Committee retains a panel of legal advisers to provide advice on Bills as required.

Professor Phillip Bates
Professor Simon Bronitt
Dr Steven Churches
Dr Anne Cossins
Professor David Farrier
Mr John Garnsey QC
Associate Professor Luke McNamara
Ms Rachel Pepper
Mr Rohan Price
Ms Diane Skapinker
Ms Jennifer Stuckey-Clarke
Professor George Williams

Contact Details

Legislation Review Committee
Legislative Assembly
Parliament House
Macquarie Street
Sydney NSW 2000

Telephone

02 9230 3418

Facsimile

02 9230 3052

Email

legislation.review@parliament.nsw.gov.au

URL

www.parliament.nsw.gov.au/lrc/digests

FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations:

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

Appendix 1: Index of Bills Reported on in 2005

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Bill and correspondence appear.

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

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2005

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Regulation and correspondence appear.

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Drug Misuse And Trafficking Amendment Bill 2005

Henry VIII clause: proposed new s 44A

- | |
|---|
| <p>8. The Committee will always be concerned to identify when rules or regulations may amend Acts.</p> <p>9. However, having regard to the objects of the Act, the potential need for immediate Executive action, and the fact that any such amendments will be subject to disallowance by Parliament, the Committee considers that proposed s 44A does not inappropriately delegate legislative power.</p> |
|---|

2. Gaming Machines Amendment Bill 2005

Strict liability: Schedule 1, clauses 7, 8, 12,18 and 24 and Schedule 2, clause 1

- | |
|--|
| <p>10. The Committee considers that strict liability offences should only be imposed when clearly in the public interest, and that the severity of punishment should reflect the lack of criminal intent.</p> <p>11. The Committee notes that the offences created by the Bill are of a regulatory nature in that they are to ensure hoteliers, registered clubs, certain licensees, technicians and casinos comply with their obligations under the Principal Act and the <i>Casino Control Act</i>.</p> <p>12. The Committee notes that a number of the offences for which there are no statutory fault elements have a maximum penalty of 100 penalty units (\$11,000).</p> <p>13. The Committee has written to the Minister to seek his advice as to the need for penalties of 100 penalty units for offences that do not include a statutory fault element where those penalties may be applied to individuals.</p> |
|--|

3. Legal Profession Amendment Bill 2005

Strict liability: proposed s 722

- | |
|--|
| <p>9. Given the need for relevant persons to take care not to disclose personal information except if one or more of the circumstances specified in proposed s 722(2) applies, and the limit on any monetary penalty, the Committee does not consider that the lack of an explicit element of criminal intent in proposed s 722(1) trespasses unduly on personal rights and liberties.</p> |
|--|

Henry VIII clause: proposed s 300(f)

15. The Committee will always be concerned to identify when a provision in a Bill provides for regulations to make or give exemptions from an Act.
16. The Committee notes that proposed s 300(f) provides a broad power of exemption from the requirements of Part 3.1, which relate to trust money and trust accounts. It further notes that regulations under s 300(f) may provide for the giving of exemptions by others, thus envisaging a further delegation of legislative power.
17. The Committee refers to Parliament the question as to whether s 300(f) comprises an inappropriate delegation of legislative power.

4. Local Government Amendment Bill 2005**Freedom of information: Schedule 2, Clause 2.1**

21. The Committee is of the view that freedom of information is an important principle of democracy and the rule of law and that individuals have a general right to access information held by government.
22. The Committee is also of the view that the right to freedom of information is not absolute. However, legislation that restricts or removes access to information held by government needs to be justified on strong public interest grounds and such restriction should only be made to the extent necessary to achieve the desired result.
23. The Committee notes the importance of the Department's investigative and complaint handling functions in strengthening the democratic process by exposing corruption and other serious wrongdoing or maladministration by local government. The Committee also notes the importance of enabling the Department to carry out these functions without undue hindrance.
24. The Committee notes that the exemption proposed in this Bill are limited to the Department's investigative and complaint handling functions only.
25. The Committee has written to the Minister for further clarification as to the full scope of the exemption provided for in the Bill and whether the Bill's objects could be achieved by a more limited exemption.
26. The Committee refers to Parliament the question whether the proposed exemption from the *FOI Act* is an undue trespass on the individual right to access information held by government.

5. Passenger Transport Amendment (Maintenance Of Bus Service) Bill 2005**Denial of compensation rights: proposed cl 37(1)(e)**

22. The Committee notes that the Bill's amendments preclude any claims for compensation for the implementation of step-in arrangements, thereby trespassing on the personal rights of bus service operators.

Summary of Conclusions

23. The Committee further notes that the arrangements can include the termination of a contract and the taking of assets for up to 12 months.
24. The Committee notes that the arrangements can, at the discretion of the Director-General, include certain payments to the existing service providers or third parties.
25. The Committee also notes that, given that failure to comply with a requirement under step-in arrangements is an offence, the denial of compensation rights is particularly significant.
26. The Committee refers to Parliament the question as to whether the exclusion of claims for compensation constitutes an undue trespass on the rights of bus service operators.

Implementation of step-in arrangements: proposed cl 39A

33. The Committee notes that the Director-General is given extensive powers with respect to the implementation and operation of step-in arrangements under the amendments to the Act.
34. The Committee also notes that the Bill does not specify the criteria to which the Director-General is to have reference in exercising these powers.
35. The Committee notes the significant public interest in maintaining continuity of public transport services.
36. The Committee refers to Parliament the question of whether the Bill makes personal rights, liberties and obligations subject to unclear administrative powers.
42. The Committee notes that proposed cl 36(1)(c) excludes from judicial review any decisions of the Director-General in relation to step-in arrangements.
43. The Committee also notes that the rights of bus operators may be dependent upon such decisions concerning the implementation of step-in arrangements.
44. The Committee notes the significant public interest in maintaining continuity of public transport services.
45. The Committee refers to Parliament whether proposed cl 36(1)(c) operates to make personal rights unduly dependent upon non-reviewable decisions.

Notice and determinations in respect of step-in arrangements: proposed cl 39A

48. The Committee notes that the process of determining and implementing step-in arrangements is to be undertaken by the Director-General without any process of Parliamentary scrutiny.
49. The Committee refers to Parliament the question of whether this constitutes an inappropriate delegation of Parliamentary power.

6. Pawnbrokers and Second-hand Dealers Amendment Bill 2005

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

7. State Revenue Legislation Amendment Bill 2005

Privacy: *Fines Act 1996*, Schedule 2, clauses 2 & 3

9. The Committee is of the view that the right to privacy is an important right that should only be abrogated to the extent necessary to achieve the policy objectives of the legislation and only on strong competing public interest grounds.
10. The Committee notes that a principal purpose of the provision is to enable a garnishee order to be enforced. The Committee also notes that disclosure of personal information for this purpose is only authorised in limited and specified circumstances directly related to the object of enforcement of garnishee orders.
11. The Committee is of the view that these clauses do not *unduly* trespass on the individual right to privacy.

Strict liability: Schedule 2, clause 3 [proposed s 117B]

17. The Committee considers that strict liability offences should only be imposed when clearly in the public interest, and that the severity of punishment should reflect the lack of criminal intent.
18. The Committee has written to the Minister to seek his advice as to the need for penalties of 100 penalty units for an offence that does not include a statutory fault element where that penalty may be applied to individuals.
19. The Committee refers to Parliament the question whether the strict liability offence in proposed section 117B, with a maximum penalty of 100 penalty units, unduly trespasses on individual rights.

8. Statute Law (Miscellaneous Provisions) Bill 2005

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

9. Terrorism Legislation Amendment (Warrants) Bill 2005

Covert searches: proposed s 270

40. The Committee notes that the broad covert search powers significantly trespass on the personal right to privacy.
41. The Committee notes that the purpose of these powers is to prevent terrorist activity.

Summary of Conclusions

42. The Committee notes that the Bill provides for very significant trespasses on the rights and liberties of persons who are not suspected of being involved in the commission of a terrorist act.
43. The Committee also notes that occupants of premises who are subject to the full search and seizure powers of a warrant are not normally provided with an occupiers notice if they were not at the time believed to be knowingly concerned in the commission of the terrorist act.
44. The Committee also notes that the Bill provides no protection in relation to reasonable responses by occupiers discovering covert intruders who are executing a warrant.
45. The Committee refers to Parliament the question of whether the Bill trespasses unduly on the rights to privacy and property.

Extension of warrants authorising use of listening devices: Schedule 3

47. The Committee notes the Attorney General's comments regarding the longer term nature of investigations into terrorist activities and the strong public interest in the investigation of such activities.
48. The Committee further notes that the use of listening devices is a significant trespass on the right to privacy.
49. The Committee refers to Parliament the question as to whether the extension from 21 days to 90 days of the maximum period for a warrant authorising the use of a listening device trespasses unduly on the right to privacy.

Criminalising association with organisations proscribed by Commonwealth regulation: Schedule 4

61. The Committee notes that freedom of association is a fundamental right that should only be restricted to the extent necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.
62. The Committee notes that Schedule 4 of the Bill criminalises membership of organisations specified as terrorist organisations in regulations made by the Governor-General under s 102.1 of the Commonwealth Criminal Code.
63. The Committee further notes that the definition of "membership" of a terrorist organisation is extremely broad and includes acts extremely remote from any acts of violence.
64. The Committee notes that "membership of a terrorist organisation" under the Bill may be punished by 10 years' imprisonment and exposes a person to the highly intrusive covert search warrant regime in the Bill.
65. The Committee also notes that proposed section 310J(2) reverses the onus of proof.
66. The Committee refers to Parliament the question as to whether Schedule 4 unduly trespasses on the right to freedom of association and the presumption of innocence.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. DRUG MISUSE AND TRAFFICKING AMENDMENT BILL 2005

Date Introduced:	9 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill makes miscellaneous amendments to the *Drug Misuse and Trafficking Act 1985* (the DMTA) and other legislation relating to the operation of drug law in New South Wales as set out below.

Background

2. The Attorney General gave the following background in the second reading speech:

[The Bill] addresses the changing patterns of drug crime and is part of the Government's plan to respond to developments in drug crime as they emerge. In particular, the bill addresses the proliferation of chemical, or so-called designer, drugs and the methods used by those who distribute and manufacture them. The measures in the bill largely result from the work of the Drug Misuse and Trafficking Act Working Group convened by my department, which deliberated on various proposals for reform in the course of 2003 and 2004. The working group included representatives of a wide range of agencies with knowledge and expertise in drug crime, including police, pharmacological and scientific analysis, criminal prosecution and defence.¹

The Bill

3. The Bill amends the DMTA by:
 - extending the operation of s 11A (which relates to the prohibition of the sale, supply and display of waterpipes - also known as bongs) to ice pipes (also known as crack pipes);
 - creating an offence prohibiting a person who manufactures or produces, or who knowingly takes part in the manufacture or production of, a prohibited drug, from *exposing a child* to that manufacturing or production process, or to

¹ The Hon R J Debus MP, Legislative Assembly *Hansard*, 9 June 2005. The Bill provides that the *Drug Misuse and Trafficking Act 1985* does not apply to persons conducting clinical trials of prohibited drugs who are acting under an authority granted by the Director-General of the Department of Health.

Drug Misuse And Trafficking Amendment Bill 2005

- substances being stored for use in that process, with a penalty of 2,400 penalty units (currently \$264,000) or imprisonment for 18 years, or both [proposed s 24(1A)];²
- creating an *aggravated* form of the offence under proposed s 24(1A) where the amount of prohibited drug manufactured or produced is not less than the commercial quantity applicable to that drug, with a penalty of a fine of 4,200 penalty units (currently \$462,000) or imprisonment for 25 years, or both. [proposed s 24(2A)];
 - providing for:
 - alternative verdicts of lesser offences if certain elements of the proposed new offences are not made out during a trial; and
 - a defence to a prosecution for the proposed new offences where the defendant establishes that the exposure of the child to the prohibited drug manufacturing or production process, or to substances being stored for use in that manufacturing or production process, did not endanger the health or safety of the child [proposed s 24(3) – (3B)];
 - providing that Regulations under the DMTA may make provision for, or with respect to, prohibiting or regulating the sale and storage of certain drug precursors [proposed amended s 24A(2A)];³
 - making it an offence for a person of or above the age of 18 years to procure a person under the age of 16 years to supply, or take part in the supply of:
 - a prohibited drug (other than cannabis leaf) to another person, with a penalty of a fine of 2,400 penalty units (currently \$264,000) or imprisonment for 18 years, or both [proposed s 25(2C)]; or
 - an amount of a prohibited drug (other than cannabis leaf) which is not less than the applicable *commercial* quantity, with a fine of 4,200 penalty units (currently \$462,000) or imprisonment for 25 years, or both [proposed s 25(2D)];
 - providing that it is a defence to a prosecution for an offence under proposed s 25(2C) or (2D) if the defendant establishes that he or she had, at the relevant time, reasonable cause to believe, and did in fact believe, that the person so procured was of or above the age of 16 years [proposed s 25(2E)];
 - providing for the maximum penalties for the proposed new offences as set out above [proposed s 33AC];⁴
 - providing that it is not unlawful under the DMTA to manufacture, produce, possess or supply a substance listed in Schedule 2⁵ if the manufacture, etc., is

² In s 24 of the *Drug Misuse and Trafficking Act 1985*, *child* means a person who is under the age of 16 years: proposed s 24(5).

³ Currently s 24A refers to “cash sale”, rather than “sale and storage”. A “precursor” is a substance specified or described in the regulations as a precursor for the purposes of s 24A. See Schedule 2 to the *Drugs Misuse and Trafficking Regulation 2000*.

⁴ However, if the court concerned is satisfied that an offence under s 24(2A) or s 25(2D) involved not less than the large commercial quantity of the prohibited drug concerned, the penalty for the offence is a fine of 6,000 penalty units (currently \$660,000) or imprisonment for life, or both.

done for certain legitimate purposes by manufacturers, distributors and other users of those substances or products that contain those substances [proposed s 35A];

- providing that the Governor may, from time to time, by Regulation amend Schedule 2 to the DMTA by adding or amending substance names or descriptions [proposed s 44A];
- providing that the minimum amount of heroin seized that may be the subject of an order for destruction is the traffickable quantity in relation to heroin, being 3 grams, instead of 1 gram as is currently the case [proposed new s 39A];
- providing that a police officer of or above the rank of Superintendent may order that a prohibited drug, or a substance that the officer reasonably suspects is a prohibited drug, seized by a member of NSW Police be destroyed if:
 - the amount of the prohibited drug is less than the traffickable quantity of the drug; and
 - no person has been, or is likely to be, charged with an offence with respect to the prohibited drug or substance [proposed s 39PB];⁶
- providing that the functions of directing that any prohibited plant or drug that has been seized be retained for use in connection with a controlled operation under the *Law Enforcement (Controlled Operations) Act 1997*, or an integrity testing program under Part 10A of the *Police Act 1990*, may be delegated to a person holding a NSW Police Senior Executive Service position to whom the function under s 6(1) of the *Law Enforcement (Controlled Operations) Act 1997* has been delegated in accordance with that Act [proposed new s 39RA(5)];⁷
- providing that certain evidence relating to the analysis of plants and substances may be given by certificate by an analyst under a corresponding law of another State or Territory and who is, or belongs to a class, prescribed by the Regulations under the DMTA for the purposes of this provision [proposed amended s 43(6)];⁸
- providing that a Regulation may create an offence punishable by a penalty, including a distinct penalty in the case of a second or subsequent offence, not exceeding:
 - 150 penalty units in the case of a corporation (currently \$16,500); or

⁵ That is, two substances that are to be listed as prohibited drugs by Schedule 1 [28].

⁶ The second reading speech states that this amendment was requested by the NSW Police and “will reduce pressure on analytical resources as analysis will not be required in those cases to prove that the substance is a drug in order to obtain a destruction order from a court. That will reduce pressure on resources for exhibit storage, analysis and courts and ensure that drugs are destroyed at the earliest opportunity”: The Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 9 June 2005.

⁷ The senior executive service includes deputy commissioners, assistant commissioners and officers at commander and superintendent level.

⁸ Clause 3 of the *Drug Misuse and Trafficking Regulation 2000* provides that “analyst” has the same meaning as in s 43 of the DMTA, where it is defined as any person who is employed as an analyst by the NSW Government, or by an area health service, and any person who is an analyst within the meaning of the *Poisons and Therapeutic Goods Act 1966*.

Drug Misuse And Trafficking Amendment Bill 2005

- 50 penalty units in the case of an individual (currently \$5,500) [proposed new s 45(3)];⁹
- inserting *1,4-Butanediol*, *Gamma butyrolactone*, and Methadone in oral liquid form into Schedule 1 to the DMTA as prohibited drugs (along with their corresponding traffickable, small, indictable, commercial and large commercial amounts).

Amendment of *Young Offenders Act 1997*

4. The Bill amends s 8 of the *Young Offenders Act 1997* (YOA) to make it clear that the provisions of that Act (including the provisions relating to the cautioning of young offenders) apply to offences under Div 1 of Part 2 of the Act relating to cannabis leaf if:
- (a) the offence involves not more than half the small quantity applicable to cannabis leaf under the Act; or
 - (b) there are exceptional circumstances in that:
 - (i) the offence involves more than half, but not more than the total, small quantity of cannabis leaf within the meaning of the Act; and
 - (ii) it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under the YOA.

Issues Considered by the Committee

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

Henry VIII clause: proposed new s 44A

5. As noted above, the Bill provides that the Governor may, from time to time, by Regulation amend Schedule 2 to the DMTA by adding or amending substance names or descriptions [proposed s 44A].
6. A regulation-making power that authorises a regulation to amend primary legislation is known as a “Henry VIII clause”. It is generally undesirable that a subordinate law-making authority should have the power to amend a statute made by the superior authority of the Parliament.
7. The Legislation Review Committee has previously acknowledged that there are limited circumstances where the use of such provisions is appropriate.¹⁰ These situations include:
- facilitating the effective application of innovative legislation;
 - facilitating transitional arrangements;
 - facilitating the application of national schemes of legislation; and

⁹ Currently, s 45(3) provides that a Regulation may impose a penalty not exceeding 10 penalty units for any contravention of the Regulation.

¹⁰ See *Legislation Review Digest* No.3, 14 October 2003, p.23.

- when circumstances warrant immediate Executive action.

- | |
|---|
| <p>8. The Committee will always be concerned to identify when rules or regulations may amend Acts.</p> <p>9. However, having regard to the objects of the Act, the potential need for immediate Executive action, and the fact that any such amendments will be subject to disallowance by Parliament, the Committee considers that proposed s 44A does not inappropriately delegate legislative power.</p> |
|---|

The Committee makes no further comment on this Bill.

2. GAMING MACHINES AMENDMENT BILL 2005

Date Introduced:	9 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Grant McBride MP
Portfolio:	Gaming and Racing

Purpose and Description

1. The Bill amends the *Gaming Machines Act 2001* to make further provision with respect to the allocation and transfer of poker machine entitlements, the regulation of gaming machines in hotels and registered clubs and other administrative matters; to amend the *Casino Control Act 1992* to restructure the casino community benefit levy and fund; and for other purposes.

Background

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

The Gaming Machines Amendment Bill contains a range of miscellaneous amendments to the Gaming Machines Act and the Casino Control Act. These amendments have been identified as necessary to the proper functioning of the Act as experience is gained in the administrative and operational side of administering the legislation.¹¹

The Bill

3. Amendments made by the Bill to the *Gaming Machines Act 2001* (***the Principal Act***) include:
 - (a) providing for the allocation of poker machine entitlements to certain hotels and registered clubs that have not been allocated entitlements under the existing arrangements,
 - (b) making it an offence for a hotelier or registered club not to enter into arrangements for making problem gambling counselling services available to patrons (max. 100 penalty units),
 - (c) making it an offence for a hotelier or registered club not to enter into arrangements for establishing self-exclusion schemes for patrons or to publicise the availability of such schemes (max. 100 penalty units),
 - (d) making it an offence to supply or install unapproved gaming machine software and to create other offences in relation to the regulation of gaming machines (max. 100 penalty units),
 - (e) requiring gaming machine technicians to ensure that hotel or club gaming machines are connected to an authorised centralised monitoring system (CMS) (max. 100 penalty units),
 - (f) making it clear that the Liquor Administration Board may cancel a hotelier's or registered club's authorisation to keep gaming machines if the hotel or club fails to pay gaming machine tax or the CMS monitoring fee,

¹¹ The Hon Grant Mc Bride MP, Minister for Gaming and Racing, Legislative Assembly *Hansard*, 9 June 2005.

- (g) enabling special inspectors to require hoteliers, registered clubs and holders of gaming-related licences, by notice in writing, to provide information and documents in relation to their businesses,¹²
 - (h) extending the authority to publish information in relation to gaming machines in the public interest,
 - (i) validating anything done by the Board before 14 February 2003 in relation to the allocation of poker machine entitlements under section 15.¹³
4. This Bill also amends the *Casino Control Act 1992*:
- (a) to make it an offence for the casino operator not to enter into arrangements for making problem gambling counselling services available to casino patrons (max. 100 penalty units),
 - (b) to require the casino operator to pay a responsible gambling levy to the Casino Control Authority (which will replace the existing Casino Community Benefit levy) and to provide for the payment of the levy into a Responsible Gambling Fund¹⁴, and
 - (c) to enable the Minister to pay money out of the Responsible Gambling Fund for any purpose that is consistent with the provisions of the trust deed set up to administer the expenditure of the money in the Fund.

Issues Considered by the Committee

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

Strict liability: Schedule 1, clauses 7, 8, 12, 18 and 24 and Schedule 2, clause 1

5. The Bill inserts a number of new offences into the Principal Act and the *Casino Control Act*. For example, failure by an operator to meet the existing requirement to enter arrangements for making problem gambling counselling services available to patrons will now be an offence attracting a maximum penalty of 100 penalty units (\$11,000) [eg, cl 7].¹⁵ Also, a technician who carries out any work on an approved gaming machine in a hotel or registered club must ensure that the gaming machine is connected to an authorised centralised monitoring system (CMS) before the gaming is operated unless the technician certifies that it was not practicable to do so (maximum penalty of 100 penalty units) [cl 18].
6. As these clauses do not explicitly require any criminal intent, they may be held to be offences of *strict liability*.¹⁶

¹² Failure to comply with such a request attracts a maximum penalty of 100 penalty units: proposed subsection 182A(2)).

¹³ This amendment is made in response to a decision of the NSW Supreme Court in *Mellor v Liquor Administration Board*, [2003] NSWSC 38. In his second reading speech, the Minister said that this case held that certain assumptions made by the Board, on the basis of Crown law advice, as to the administration of certain provisions of the Principal Act “did not fully reflect the legislation as written”: The Hon Grant McBride MP, Minister for Gaming and Racing, Legislative Assembly *Hansard*, 9 June 2005.

¹⁴ The “Responsible Gaming Fund” is the new name for the existing “Casino Community Benefit Fund”.

¹⁵ See Schedule 1[7] in relation to registered clubs and Schedule 2[1] in relation to casinos.

¹⁶ In other words, it does not require the prosecutor to prove that the accused person meant to commit the offence, or had the necessary “*mens rea*” to commit the offence.

Gaming Machines Amendment Bill 2005

7. Strict liability is often imposed for regulatory offences where there is a need to ensure persons take all reasonable steps to avoid the offence. In this case, the Committee notes that the Principal Act and the *Casino Control Act* currently require registered clubs and casinos to comply with certain obligations and this Bill will make failure to comply with those obligations an offence.
8. The Committee has previously expressed the view that providing for strict liability is a very serious matter, and should be:
 - imposed only after careful consideration of all available options;
 - subject to defences wherever possible where contravention appears reasonable; and
 - have only limited monetary penalties.¹⁷
9. In regard to penalties, the Committee notes the Commonwealth Attorney General's Department's guideline that if strict liability is applied the maximum penalty should in general be no more than 60 penalty units (which under Commonwealth law means \$6,600 for an individual and \$33,000 for a body corporate).¹⁸

10. **The Committee considers that strict liability offences should only be imposed when clearly in the public interest, and that the severity of punishment should reflect the lack of criminal intent.**
11. **The Committee notes that the offences created by the Bill are of a regulatory nature in that they are to ensure hoteliers, registered clubs, certain licensees, technicians and casinos comply with their obligations under the Principal Act and the *Casino Control Act*.**
12. **The Committee notes that a number of the offences for which there are no statutory fault elements have a maximum penalty of 100 penalty units (\$11,000).**
13. **The Committee has written to the Minister to seek his advice as to the need for penalties of 100 penalty units for offences that do not include a statutory fault element where those penalties may be applied to individuals.**

The Committee makes no further comment on this Bill.

¹⁷ See, eg, *Legislation Review Digest* No 3 of 2005 in the context of the *Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+) Bill 2005*.

¹⁸ Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002.

3. LEGAL PROFESSION AMENDMENT BILL 2005

Date Introduced:	9 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. This Bill makes amendments to the *Legal Profession Act 2004* (the Act) and consequential amendments to the *Public Notaries Act 1997* and other Acts.

Background

2. The Act regulates legal practice in New South Wales consistent with the law in other Australian jurisdictions. The Act, which is proposed to commence no later than 1 October 2005, is designed to remove many of the barriers to legal practitioners practising across State and Territory borders and to harmonise clients' rights across jurisdictions.¹⁹

3. The second reading speech states that the Bill:

proposes to amend the Legal Profession Act 2004 before it commences. Many of the amendments in this bill arise from proposals approved by the Standing Committee of Attorneys-General under that national profession process at its November 2004 and March 2005 meetings.

Since Parliament enacted the Legal Profession Act 2004 in December last year a number of stakeholders have proposed amendments to clarify and streamline the operation of the Act and many of these proposals have been dealt with in this amending bill.²⁰

The Bill

4. Schedules 1-9 of the Bill amend provisions in Chapters 1-8 and Schedule 9 of the Act to, among other things:
 - (a) empower the Legal Practitioners Admission Board (Board) to exempt a person from the standard academic or practical legal training requirements for admission to the legal profession, where the Board is satisfied that the person has sufficient experience and/or qualifications [amended s 24(4) and new s 24(4A)];
 - (b) clarify that a legal practitioner can only hold one practising certificate in one jurisdiction in any given year [amended ss 41 and 45];

¹⁹ The Hon Bob Debus MP, Attorney General, Legislative Assembly *Hansard*, 9 June 2005. See, also, the Attorney General's second reading speech on the Legal Profession Bill 2004: Legislative Assembly *Hansard*, 8 December 2004.

²⁰ The Hon Bob Debus MP, Attorney General, Legislative Assembly *Hansard*, 9 June 2005.

Legal Profession Amendment Bill 2005

- (c) provide that transit money received in the form of cash must always go through a trust account, so its receipt can be recorded [proposed new s 258A];
 - (d) expand the matters on which regulations may be made under the Act [proposed new s 300];
 - (e) narrow the circumstances in which a costs assessor may refer a matter concerning the costs charged by a legal practice to the Legal Services Commissioner (Commissioner) for disciplinary action [amended s 393];²¹
 - (f) remove specific references to contraventions of the Act's requirements constituting unsatisfactory professional conduct or professional misconduct, on the basis that s 498(a) of the Act generally provides for such contraventions to be capable of being unsatisfactory professional conduct or professional misconduct;²²
 - (g) confer a uniform pathway for review of decisions made under the Act, including merits review by the Administrative Decisions Tribunal (Tribunal) and judicial review by the Supreme Court, but without the intermediate step of review by the Tribunal's Appeal Panel [proposed new s 729A, replacing s 606 of the Act]; and
 - (h) oblige the Commissioner, the Bar Council or the Law Society Council to report suspected offences to law enforcement or prosecution authorities generally, not only in cases where complaints are involved [proposed new s 730A, replacing s 599 of the Act].
5. Schedule 10 amends the *Public Notaries Act 1997* to empower:
- (a) the Supreme Court to order the removal of the name of a person from the roll of public notaries for misconduct, incompetence or any other reason the Court considers warrants removal or who have not complied with the Public Notaries Appointment Rules;
 - (b) the Board to publish information contained in the roll of public notaries; and
 - (c) the registrar of public notaries, rather than the Supreme Court, to remove a person's name from the roll of public notaries at the person's request.²³
6. Schedule 11 of the Bill makes consequential amendments to the *Administrative Decisions Tribunal Act 1997* to clarify how the Tribunal is to operate in relation to matters arising under the Act. The *Commercial Arbitration Act 1984*, the *Conveyancers Licensing Act 2003*, the *Interpretation Act 1987* and the *Ombudsman*

²¹ Under the *Legal Profession Act 2004*, a cost assessor can make a referral to the Commissioner when he or she considers the legal costs charged by a legal practice have been "excessive": s 393(1). The proposed amendment to s. 393(1) require a higher threshold, namely that the costs be considered "grossly excessive". Excessive charging may still be capable of being unsatisfactory professional conduct or professional misconduct under the Act: s 498(b).

²² 'However, provisions that clarify which conduct by which person will be considered a breach, or which set a higher standard than the general provision, are retained. In addition, some breaches which involve a practitioner ignoring or defying the requirements of the Act or the regulatory authorities are amended to bring them into line with the higher standard imposed on these sorts of breaches generally in the Act': The Hon Bob Debus MP, Attorney General, second reading speech, Legislative Assembly *Hansard*, 9 June 2005.

²³ These amendments were recommended in the report on the Review of the *Public Notaries Act 1997* tabled in the Legislative Assembly on 9 December 2004: The Hon Bob Debus MP, Attorney General, second reading speech, Legislative Assembly *Hansard*, 9 June 2005.

Act 1974 are amended to update definitions and references to be consistent with the Act.

Issues Considered by the Committee

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

Strict liability: proposed s 722

7. Proposed s 722(1) of the Bill makes it an offence for a ***relevant person***²⁴ to disclose to any other person, whether directly or indirectly, any personal information obtained by reason of that capacity, unless one or more of the circumstances specified in proposed s 722(2) applies. The maximum penalty for this offence is 50 penalty units (\$5,500). Proposed s 722(1) and (2) of the Bill would supersede existing s 722(1) and (2) of the Act.
8. This disclosure provision does not explicitly require any criminal intent. It may thus be held to be an offence of strict liability.²⁵ Strict liability is often imposed for regulatory offences where there is a need to ensure persons take all reasonable steps to avoid the offence.

9. Given the need for relevant persons to take care not to disclose personal information except if one or more of the circumstances specified in proposed s 722(2) applies, and the limit on any monetary penalty, the Committee does not consider that the lack of an explicit element of criminal intent in proposed s 722(1) trespasses unduly on personal rights and liberties.

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

Henry VIII clause: proposed s 300(f)

10. The Bill allows regulations to be made:
 - providing exemptions, or providing for the giving of exemptions, from all or any specified requirements of [Part 3.1] [proposed new s 300(f)].
11. Regulations under proposed s 300(f) may make exemptions from all or any of the specified requirements in Part 3.1. Regulations under proposed s 300(f) may also provide for the “giving of exemptions” by other bodies, such as a local regulatory

²⁴ Under s 722(4) of the *Legal Profession Act 2004*, a ***relevant person*** means:

- (a) a ***local regulatory authority***; or
- (b) a member or former member of a local regulatory authority; or
- (c) a person currently or previously employed by or acting at the direction of a local regulatory authority.

This sub-section also defines a ***local regulatory authority*** to mean ‘(a) an authority having powers or functions under this Act, or (b) a person or body prescribed, or of a class prescribed, by the regulations’. Local regulatory authorities include the Law Society, the Bar Council, the Legal Services Commissioner and the Legal Profession Admission Board.

²⁵ The same question of strict liability arises with respect to s 723 of the *Legal Profession Act 2004*. It makes it an offence for a person to disclose any information obtained in the administration of the Act, unless any of the circumstances specified in paragraph (a)-(e) apply. The penalty for this offence is also 50 penalty units (\$5,500).

authority. Part 3.1 concerns trust money and trust accounts.²⁶ It includes requirements relating to how a law practice must hold, disburse and account for trust money it receives (Division 2) and places restrictions on the receipt of trust money (Division 8).

12. The Attorney General stated in his second reading speech that:

My department is preparing regulations for the 2004 Act. In drafting these regulations it is evident that some of the regulation-making powers previously found in the 1987 Act have not been carried over. To overcome this the Bill also makes miscellaneous amendments to ensure that current procedures contained in the regulations can be continued under the 2004 Act.²⁷

13. The Committee has been advised by the Attorney General's Department that the purpose of proposed s 300(f) is to preserve the continuity of some regulations made under the *Legal Profession Act 1987* relating to trust money and trust accounts.

14. The Committee notes that s 246(3) of the Act already provides for a complete exclusion of prescribed law practices, or classes of practice, and prescribed kinds of trust money from Part 3.1.

15. The Committee will always be concerned to identify when a provision in a Bill provides for regulations to make or give exemptions from an Act.

16. The Committee notes that proposed s 300(f) provides a broad power of exemption from the requirements of Part 3.1, which relate to trust money and trust accounts. It further notes that regulations under s 300(f) may provide for the giving of exemptions by others, thus envisaging a further delegation of legislative power.

17. The Committee refers to Parliament the question as to whether s 300(f) comprises an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

²⁶The purposes of Part 3.1 of the *Legal Profession Act 2004* are:

- (a) to ensure trust money is held by law practices in a way that protects the interests of persons for or on whose behalf money is held, both inside and outside this jurisdiction;
- (b) to minimise compliance requirements for law practices that provide legal services within and outside this jurisdiction; and
- (c) to ensure the Law Society Council can work effectively with corresponding authorities in other jurisdictions in relation to the regulation of trust money and trust accounts.

²⁷ The Hon Bob Debus MP, Attorney General, Legislative Assembly *Hansard*, 9 June 2005.

4. LOCAL GOVERNMENT AMENDMENT BILL 2005

Date Introduced:	10 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Tony Kelly MLC
Portfolio:	Local Government

Purpose and Description

1. The Bill amends the *Local Government Act 1993*, among other things, to allow for a reduction in the required number of councillors, to clarify the meaning of pecuniary interest, and to exempt certain matters from the *Freedom of Information Act 1989* (*FOI Act*).

The Bill

2. The Bill amends the *Local Government Act 1993* to enable a council to make an application to the Minister for approval to reduce the number of its councillors (within certain limits). It also requires councils to adopt an annual policy on expenses and facilities, provides for standard forms of employment contracts for general managers and other senior staff of councils and enables a contempt in the face of the Pecuniary Interest and Disciplinary Tribunal to be referred to the Supreme Court.
3. The Bill also amends the *Freedom of Information Act 1989* to exempt from the operation of that Act the Department of Local Government in relation to its complaint handling and investigative functions and amends the definition of a “**public-private partnership**” in the *Local Government Amendment (Public-Private Partnerships) Act 2004*.

Issues Considered by the Committee

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

Freedom of information: Schedule 2, Clause 2.1

4. Schedule 2 to the *FOI Act* lists bodies and offices that are exempt from the operation of that Act. Schedule 2 [2.1] amends Schedule 2 of the *FOI Act* by adding a further exemption from the operation of that Act in relation to complaint handling and investigative functions conferred by or under any Act on the Department of Local Government.

5. The Committee is of the view that freedom of information is an important principle of democracy and the rule of law, and that individuals have a general right to access information held by government.²⁸ The Committee is also of the view that expanding the list of agencies or activities of agencies that are exempt from the operation of the *FOI Act* may trespass on individual rights by reducing access to information held by government, and may also diminish the accountability of agencies, which hold such information.
6. While the Committee recognises that the right to freedom of information is not absolute, legislation that restricts or removes access to information held by government needs to be justified on strong public interest grounds. Further, the extent of any restriction should be limited to that necessary to achieve the objectives sought.
7. The Committee notes that in the second reading speech, the Parliamentary Secretary explained that, among other things, the Department of Local Government examines complaints relating to breaches of pecuniary interest provisions of the Act, investigates councillors for alleged misbehaviour and monitors and investigates complaints made to the Minister and the Director-General which allege maladministration by local councils. The Department also receives referrals from the Independent Commission Against Corruption and the Ombudsman in relation to matters those agencies consider more properly dealt with by the Department.²⁹
8. The Committee is of the view that the subject of, and the manner in which the Department of Local Government handles, complaints about local councils is a matter of genuine interest to the public. Furthermore, allowing the public access to information about such investigations may strengthen the public's confidence in government by showing that the process is fair and not open to corruption. In this way it strengthens democratic principles and the rule of law.
9. The Committee notes the importance of enhancing corruption resistance in public affairs and considers that enabling the Department to carry out its complaint handling and investigative functions without undue hindrance is important to ensuring that serious complaints about local government are dealt with fully and properly. The Department's complaint and investigation powers are also important in ensuring that local councils and individual councillors properly, lawfully and responsibly carry out their functions.
10. In the context of investigating and handling complaints about local councils or individual councillors, the Committee is of the view that a balance must be achieved

²⁸ See for example, *Australian Capital Television P/L v Commonwealth (No 2)* (1992) 177 CLR 106, at page 139, per Mason CJ: "... the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters." See also *Declaration on the freedom of expression and information*, adopted by the Committee of Ministers, Council of Europe in 1982, which states that "freedom of expression and information are a 'fundamental element ...[of the] principles of genuine democracy, the rule of law and respect for human rights' ... Further, access to government information is important 'to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters'".

²⁹ Ms Alison Megarrity MP, Parliamentary Secretary, second reading speech, Legislative Assembly *Hansard*, 10 June 2005.

between the promotion of freedom of information and enabling individuals to make disclosures about misbehaviour, maladministration and serious misconduct without fear of any reprisal that may follow if they are identifiable.

11. The Minister's Office has advised the Committee that recent amendments to the Act have increased the scope of the Department's power to investigate allegations of misbehaviour and serious misconduct by councils and councillors. They have further advised the Committee that in a number of complaints of serious misconduct against local government, people with pertinent information declined to give that information on the basis that it would be subject to disclosure under the FOI regime. In this regard, the Committee notes that in the second reading speech, the Parliamentary Secretary stated that the complaints and investigations handled by the Department "will often involve sensitive issues and personal or private matters that are properly exempted from public disclosure under the [FOI Act]. That they are not currently exempt may serve to frustrate or hamper current or future investigations."³⁰
12. The Committee notes that the *FOI Act* contains a number of provisions that would likely exempt such information from disclosure.
13. For example, clause 4(1)(a) of Schedule 1 of the *FOI Act* provides that "a document is an exempt document if it contains matter the disclosure of which could reasonably be expected to prejudice the investigation of any contravention or possible contravention of the law... whether generally or in a particular case".
14. Another example can be found in clause 6 of Schedule 1, which states that:
 - (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (whether living or deceased).³¹
15. As a further protection against unreasonable disclosure of such information, section 31 of the Act provides that an agency shall not give access to a document that contains information concerning the personal affairs of any person (whether living or deceased), unless the agency has taken such steps as are reasonably practicable to obtain the views of the person concerned as to whether or not the document is an exempt document by virtue of clause 6 of Schedule 1.
16. In relation to the scope of the exemption provided by the Bill, the Committee notes that the second reading speech stated that the Bill exempts:

...the Department in relation to its complaint-handling and investigation functions where the Department is carrying out examinations of complaints or investigations. This does not mean that all complaints received by the Department are exempt, only those that relate to particular types of complaints or investigations. These include complaints and investigations relating to pecuniary interest matters or complaints and investigations in relation to acts of misbehaviour or maladministration...³²

³⁰ Ms Alison Megarrity MP, Parliamentary Secretary, second reading speech, Legislative Assembly *Hansard*, 10 June 2005.

³¹ Note that under subsection 31(5) a reference in this section to "the person concerned" is, in the case of a deceased person, a reference to that person's closest relative who is of or above the age of 18 years.

³² Ms Alison Megarrity MP, Parliamentary Secretary, second reading speech, Legislative Assembly *Hansard*, 10 June 2005.

17. On this point, the Department has advised the Committee that it views its complaint handling and investigative powers as applying only to these types of complaints as well as referrals from ICAC and the Ombudsman. It explained that it receives a number of “complaints” that do not raise serious allegations of misconduct and do not involve sensitive information.³³ The exemption from the FOI Act is not intended to cover investigations and other action taken by the Department in relation to this sort of complaint. Rather, it is intended to apply to complaints involving sensitive information about pecuniary interest matters, misbehaviour and maladministration by councils or individual councillors, in other words, allegations of serious misconduct or unlawfulness.
18. On the face of the legislation it appears that the exemption from the *FOI Act* is broader, covering all of the Department’s “complaint handling and investigative functions conferred by or under any Act” and not just those relating to pecuniary interest matters, misbehaviour and maladministration. The Minister’s Office has advised the Committee that the drafting of the exemption is consistent with the terms used to exempt functions of other agencies under the FOI Act. The Minister’s office has indicated that the Minister will clarify this matter during debate on the Bill in Parliament, and that the Department will circulate this information to Councils.
19. The Committee also notes that should an FOI applicant dispute a determination by the Department that the requested information falls within the exempt category, then the matter is subject to the usual review and appeal mechanisms including internal review, review by the Ombudsman and appeal to the Administrative Decisions Tribunal. The involvement of independent arbiters in such disputes will help ensure that the legislation is applied in the appropriate manner.
20. Finally, the Committee notes that the second reading speech stated that:

...the *FOI Act* already exempts other agencies who have investigation and complaint-handling functions similar to those of the Department of Local Government and the fact that the *FOI Act* applies to all aspects of the Department's functions...is somewhat unusual and anomalous for an agency that has such significant complaint-handling and investigative functions.³⁴

21. **The Committee is of the view that freedom of information is an important principle of democracy and the rule of law and that individuals have a general right to access information held by government.**
22. **The Committee is also of the view that the right to freedom of information is not absolute. However, legislation that restricts or removes access to information held by government needs to be justified on strong public interest grounds and such restriction should only be made to the extent necessary to achieve the desired result.**

³³ For example, such a “complaint” may refer to a decision of a local council not to grant permission for the removal of a tree.

³⁴ Ms Alison Megarrity MP, Parliamentary Secretary, second reading speech, Legislative Assembly *Hansard*, 10 June 2005.

23. **The Committee notes the importance of the Department's investigative and complaint handling functions in strengthening the democratic process by exposing corruption and other serious wrongdoing or maladministration by local government. The Committee also notes the importance of enabling the Department to carry out these functions without undue hindrance.**
24. **The Committee notes that the exemption proposed in this Bill are limited to the Department's investigative and complaint handling functions only.**
25. **The Committee has written to the Minister for further clarification as to the full scope of the exemption provided for in the Bill and whether the Bill's objects could be achieved by a more limited exemption.**
26. **The Committee refers to Parliament the question whether the proposed exemption from the *FOI Act* is an undue trespass on the individual right to access information held by government.**

The Committee makes no further comment on this Bill.

5. PASSENGER TRANSPORT AMENDMENT (MAINTENANCE OF BUS SERVICE) BILL 2005

Date Introduced:	8 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Transport

Purpose and Description

1. The Bill amends the *Passenger Transport Act 1990* (the Act) to enable the implementation of “step-in arrangements” (arrangements) to maintain regular bus services before or after termination, or on or before the expiry of:
 - commercial bus service contracts, ie, those in force before the reform of bus contracts in 2004; and
 - temporary contracts replacing those contracts, (existing bus service contracts).

Background

2. The *Passenger Transport Amendment (Bus Reform) Act 2004* (2004 Act) established a new system for the regulation of regular bus services, including the introduction of performance-based contracts and opportunities for contestability.³⁵
3. Under transitional provisions inserted by the 2004 Act, existing contracts were kept on foot but could be terminated by the Director-General of the Department of Transport (the Director-General) before the contract term expires. Subsequent contracts are governed by the new contract arrangements.
4. The proposed Act enables the Director-General to implement arrangements to maintain the provision of bus services where an existing bus service contract expires, or is terminated before a new contract is operative.
5. The Minister noted in the second reading speech that:

the bill does not apply to operators who have entered into the new contracts as part of the bus reform process. Nor does it apply to services delivered under the State's 1,800 non-commercial contracts, which are typically held by smaller bus operators. As a further safeguard, the step-in cannot be continued for a period longer than 12 months. The key change introduced by the bill is the creation of a provision authorising the Director-General or the Director-General's nominee to step in and operate the bus services. This provision is modelled on the “step-in” clause in the new metropolitan bus contract, which has already been signed by a range of operators in Sydney.³⁶

³⁵ The Committee reported on this Bill in its *Legislation Review Digest* No 8 of 2004.

³⁶ The Hon J A Watkins MP, Minister for Transport, Legislative Assembly *Hansard*, 8 June 2005.

6. The Minister also noted that:

The Ministry of Transport now has a track record of using responsibly the powers that Parliament gave it last year and engaging operators in bus reform through the negotiation process. The proposed step-in powers would also be used responsibly - they would be exercised only as a last resort in order to maintain passenger services.³⁷

The Bill

7. The Director-General may gazette arrangements to authorise the Director-General, or a person nominated by the Director-General, to provide bus services formerly provided under an existing bus service contract [proposed cl 39A(1)].³⁸

8. Such arrangements enable the person to act in the place of the bus service provider for up to 12 months, as if the contract were in force, and to take possession of and use the assets necessary to provide the bus services [proposed cl 39A(4)].³⁹

9. It is an offence to:

- fail (without reasonable excuse) to comply with a requirement imposed on the person under arrangements in force under cl 39A; or
- enter into an agreement, arrangement or other transaction or take action with the intention of, or with intentions that include, preventing the use of staff or a bus, premises or other assets in accordance with arrangements in force under cl 39A.

The maximum penalty is 100 penalty units (currently \$11,000) [proposed cl 39B].

10. Legal protections are provided to parties in relation to the operation of proposed cl 39A and arrangements, in that they are not to be regarded as:

- a breach of contract or confidence or otherwise as a civil wrong;
- a breach of any contractual provision prohibiting, restricting or regulating the provision of bus services;
- giving rise to any remedy by a party to an instrument, or as causing or permitting the termination of any instrument; or
- an event of default under any contract or other instrument [proposed cl 39C].

³⁷ The Minister stated that the Bill's provisions are "temporary and are clearly aimed at ensuring service continuity during the transition to new arrangements": The Hon J A Watkins MP, Minister for Transport, Legislative Assembly *Hansard*, 8 June 2005.

³⁸ These arrangements may implemented:

- on or before the expiry of an existing bus service contract;
- on or before termination of an existing bus service contract by the Director-General; or
- not later than 60 days after notice of termination, or termination without notice, of an existing bus service contract by an existing service provider [proposed cl 39A(2)].

They take effect on the day the notice is published in the Gazette, or on such later day as may be specified in the notice: proposed cl 39A(3).

³⁹ The proposed clause sets out the matters that may be covered by arrangements (including the use of staff) and provides for the variation or revocation of arrangements by further notice published in the Gazette.

Extension of the 2004 Act protections

11. The Bill extends the ambit of cl 33, so that the holder of any interim commercial bus service contract has no right or expectation of renewal of the contract on its expiry [proposed new cl 33(3)].
12. Clause 34 excluded from review decisions of the Director-General made in respect of an existing commercial bus service contract or existing non-commercial bus service contract.⁴⁰ The Bill provides that the review provisions of the Act also do not apply to a decision to implement arrangements under proposed cl 39A [proposed amended cl 34].
13. The Bill extends the existing protections from legal challenge given by cl 36 to the exercise of functions of the Director-General relating to the implementation of arrangements pursuant to the Bill [proposed new cl 36(1)(c)].
14. The existing prohibition on compensation by the Crown under cl 37 to the Act is extended to loss or damage arising from arrangements or things done or omitted to be done under or in connection with arrangements [proposed new cl 37(1)(e)].

Issues Considered by the Committee

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

Denial of compensation rights: proposed cl 37(1)(e)

15. The Bill provides that no compensation is payable to any person by the Crown for loss or damage arising directly or indirectly from the implementation of arrangements, and any thing done or omitted to be done under or in connection with arrangements [proposed cl 37(1)(e)].
16. Proposed cl 39B provides that it is a criminal offence to fail to comply with obligations imposed under the arrangements without reasonable excuse.
17. The Bill does provide that arrangements may include payments to the existing service provider under the contract and to third parties [proposed cl 39A]. However, this is at the non-reviewable discretion of the Director-General.

⁴⁰ Section 48 of the Act provides that the holder of a service contract who is aggrieved by any decision of the Director-General:

- (a) with respect to the variation, suspension, cancellation, renewal or transfer of the contract, or
 - (b) that affects the holder's exclusive rights under the contract,
- may request the Director-General to cause the decision to be reviewed under Division 2 of the Act.

The section does not apply to a decision of the Director-General with respect to a service contract for a regular bus service: s 48(2).

Right to Compensation

18. The High Court has treated the denial of compensation rights as akin to the acquisition of property, holding that “acquisition” in s 51(xxxi)⁴¹ of the Commonwealth Constitution extends to the:
- extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes liability being brought to an end without payment or other satisfaction).⁴²
19. It has been argued that Parliament’s power to legislate to deprive a contracting party of rights under a contract entered into with the Executive should be used sparingly and set out unambiguously, given that it is a “harsh and extraordinary use of governmental authority”.⁴³
20. Whether the extinguishment of compensation rights comprises an *undue* trespass to personal rights depends on striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.⁴⁴
21. In striking such a balance, two issues for consideration include any need to extinguish compensation rights in order to promote the general interests of the community, and the appropriateness of any right to compensation in the circumstances.

- 22. The Committee notes that the Bill’s amendments preclude any claims for compensation for the implementation of step-in arrangements, thereby trespassing on the personal rights of bus service operators.**
- 23. The Committee further notes that the arrangements can include the termination of a contract and the taking of assets for up to 12 months.**
- 24. The Committee notes that the arrangements can, at the discretion of the Director-General, include certain payments to the existing service providers or third parties.**
- 25. The Committee also notes that, given that failure to comply with a requirement under step-in arrangements is an offence, the denial of compensation rights is particularly significant.**
- 26. The Committee refers to Parliament the question as to whether the exclusion of claims for compensation constitutes an undue trespass on the rights of bus service operators.**

⁴¹ Section 51(xxxi) provides that the Commonwealth may make laws for “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”.

⁴² *Georgiadis v Australian and Overseas Telecommunications Corporation*, per Mason CJ, Deane & Gaudron JJ (1994) 179 CLR 297 at 205.

⁴³ Professor P W Hogg, cited in *Politics and the Rule of Law: Where Does the Forest Service’s Duty Lie?* www.for.gov.bc.ca/hen/publications/rule_of_law/rule_of_law_chapter05.html

⁴⁴ This is the test used by the European Court of Human Rights when applying Article 1 of Protocol 1 to the *European Convention on Human Rights*, which permits a State to deprive a person of possessions, as long as it is done “in the public interest and subject to the conditions provided for by law and by the general principles of international law”: *Sporrong and Lönnroth v Sweden* (1982) EHRR 35 at paragraph 69.

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

Implementation of step-in arrangements: proposed cl 39A

27. Under proposed cl 39A(1), the Director-General may implement the arrangements where he or she is of the opinion that it is necessary to do so to maintain regular bus services provided under an existing bus service contract.
28. The Director-General may, for example, authorise the step-in party to take possession of, and use, buses or premises or other assets used or required by the existing service provider to provide the regular bus services concerned [proposed cl 39A(4)(b)].
29. In determining the arrangements and their implementation, the Director-General is to consider the terms and conditions of the existing bus service contract, and any relevant commercial arrangements of the existing service provider in connection with the provision of its service [proposed cl 39A(5)].
30. Nonetheless, the Director-General may specify the terms and conditions on which the step-in arrangements are to be implemented [proposed cl 39A(4)(e)].
31. The Bill makes the rights and obligations of the existing bus service provider, and any relevant or affected third party, dependent on unclear administrative powers in that the Bill does not specify the criteria which the Director-General is to apply in making his determination as to the implementation and operation of the particular step-in arrangement under cl 39A.
32. Moreover, the Committee notes that pursuant to proposed cl 36(1)(c) (*see below*) there is no means of having a decision of the Director-General with respect to the arrangements made subject to judicial review.

33. **The Committee notes that the Director-General is given extensive powers with respect to the implementation and operation of step-in arrangements under the amendments to the Act.**
34. **The Committee also notes that the Bill does not specify the criteria to which the Director-General is to have reference in exercising these powers.**
35. **The Committee notes the significant public interest in maintaining continuity of public transport services.**
36. **The Committee refers to Parliament the question of whether the Bill makes personal rights, liberties and obligations subject to unclear administrative powers.**

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

Protection for exercise of functions by Director-General: proposed cl 36(1)(c)

37. The 2004 Act provided that certain functions of the Director-General could not be:
 - (a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings; or

Passenger Transport Amendment (Maintenance Of Bus Service) Bill 2005

- (b) restrained, removed or otherwise affected by any proceedings [cl 36(2)].⁴⁵
38. Moreover, the rules of natural justice, so far as they applied to the exercise of such functions, did not place on the Director-General *any obligation enforceable in a court of law or administrative review body* [cl 36(3)].⁴⁶
39. The Bill extends this exhaustive privative, or “ouster”, clause to apply to the Director-General’s operation of any arrangements [proposed cl 36(1)(c)].
40. In addition, the Bill provides that the operation of cl 39A or any arrangements is not to be regarded as giving rise to any remedy by a party to an instrument, or as causing or permitting the termination of any instrument [proposed cl 39C(1)(c)].
41. The Committee has previously noted that the availability of judicial review is of such fundamental importance to the functioning of a democratic system, as to be part of the rule of law.⁴⁷

- 42. The Committee notes that proposed cl 36(1)(c) excludes from judicial review any decisions of the Director-General in relation to step-in arrangements.**
- 43. The Committee also notes that the rights of bus operators may be dependent upon such decisions concerning the implementation of step-in arrangements.**
- 44. The Committee notes the significant public interest in maintaining continuity of public transport services.**
- 45. The Committee refers to Parliament whether proposed cl 36(1)(c) operates to make personal rights unduly dependent upon non-reviewable decisions.**

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**Notice and determinations in respect of step-in arrangements: proposed cl 39A**

46. The Bill provides the Director-General with unlimited and undefined power to give notice and make determinations in respect of step-in arrangements. The Bill does not specify any appropriate criteria governing the Director-General’s exercise of his powers in respect of arrangements [proposed cl 39A(1)- (8)].
47. The Committee notes that the operation and nature of arrangements are matters central to the effective operation of the reform process contemplated by the Act. As such, the provisions of proposed cl 39A may be viewed as an impermissible delegation of legislative power.

⁴⁵ These concerned the termination of an existing commercial bus service contract, or the declaration or variation of a bus service contract region or strategic transport corridor before the transitional period expiry day under new s 28EA, s 28EB, or Part 7.

⁴⁶ This is despite the fact that in *Annetts v McCann*, Brennan J stated that “the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice”: (1990) 170 CLR 596.

⁴⁷ See, eg, the Committee’s report on the 2004 Act in its *Legislation Review Digest* No 8 of 2004.

- | |
|---|
| <p>48. The Committee notes that the process of determining and implementing step-in arrangements is to be undertaken by the Director-General without any process of Parliamentary scrutiny.</p> <p>49. The Committee refers to Parliament the question of whether this is constitutes an inappropriate delegation of Parliamentary power.</p> |
|---|

The Committee makes no further comment on this Bill.

6. PAWNBROKERS AND SECOND-HAND DEALERS AMENDMENT BILL 2005

Date Introduced:	10 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Fair Trading

Purpose and Description

1. The Bill amends the *Pawnbrokers and Second-hand Dealers Act 1996* (the Act) to reverse the effect of the decision of the High Court in *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28.

Background

2. In *Palgo Holdings*, a majority of the High Court decided that certain loans of money that gave rise to chattel mortgages were not loans on the security of pawned goods even though the goods were taken into the possession of the lender and the borrowers thought that they were pawning their goods. The result of this was that the lender was not required to hold a licence under the Act.
3. The loans concerned were structured as chattel mortgages and the lender's taking possession of the goods was made to appear to be at the request of borrowers. In practice no such requests were ever made and the borrowers had no option but to hand over possession of the goods as security for their loans. This type of transaction should be regarded as a pawning of goods.
4. The Bill makes it clear that goods are pawned when possession of the goods is taken by a lender of money for the purpose of the lender relying on possession of the goods as security for the repayment of the loan.
5. The second reading speech stated that, in light of the decision in *Palgo*:

This Bill seeks to avoid any further anomalies arising from a literalistic interpretation of the Act, making clear that the Act applies to all agreements which, in substance, amount to a pledge and loan agreement.⁴⁸

The Bill

6. The principal amendment made by the Bill is a new definition of "***pawnbroker***". Currently, section 3 defines pawnbroker as "a person who carries on a business of lending money on the security of pawned goods". The new definition provides that "***pawnbroker***" means a person who carries on a business of lending money on the security of pawned goods. The Bill also defines the meaning of when goods are pawned:

⁴⁸ Ms Alison Megarrity MP, Parliamentary Secretary, second reading speech, Legislative Assembly *Hansard*, 10 June 2005.

Pawnbrokers and Second-hand Dealers Amendment Bill 2005

...goods are ***pawned*** if the goods are taken into the possession of a lender of money for the purpose of the lender relying on possession of the goods as security for the repayment of the loan.

7. The Bill sets out four principles that are to be applied in determining whether goods are pawned and whether money is lent on the security of pawned goods.
8. In addition, the regulations may specify cases or circumstances in which goods are or are not pawned.

Issues Considered by the Committee

- | |
|--|
| <p>9. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
|--|

The Committee makes no further comment on this Bill.

7. STATE REVENUE LEGISLATION AMENDMENT BILL 2005

Date Introduced:	10 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Andrew Refshauge MP
Portfolio:	Treasurer

Purpose and Description

1. The Bill makes miscellaneous amendments to certain State revenue legislation.

Background

2. The second reading speech states:

The purpose of this Bill is to make amendments to the *Duties Act 1997*, *Fines Act 1996*, *Health Insurance Levies Act 1982*, *Pay-roll Tax Act 1971*, *Public Finance and Audit Act 1983*, *State Owned Corporations Act 1989* and the *Taxation Administration Act 1996*. The Bill makes a number of amendments to these revenue Acts to ensure that the legislation remains consistent with current commercial practices, and is more equitable and certain in its application. The proposed amendments are the result of monitoring of business practices by the Office of State Revenue, ongoing liaison with industry and professional bodies, and consultation with revenue offices in other States.⁴⁹

The Bill

3. Among other things, the Bill:
 - (a) amends the *Duties Act 1997*, including in relation to duty on the assignment or transfer of a right under a call option to purchase dutiable property, duty exemptions and concessions, vendor duty concessions, mortgage duty and the powers of the Chief Commissioner of State Revenue in relation to property valuations;
 - (b) amends the *Fines Act 1996*, including to prohibit the disclosure of personal information, to give the State Debt Recovery Office power to access information about employers or past employers of fine defaulters, and to provide for an alternative manner of making statutory declarations under the Act;
 - (c) amends the *Health Insurance Levies Act 1982* to transfer a provision from the regulations to the Act and to make an amendment by way of statute law revision; and
 - (d) amends the *Pay-roll Tax Act 1971*, including in relation to the scheme for taxation of benefits paid to employees in the form of shares and share options, exempting financial planners, amounts paid indirectly to employees or

⁴⁹ Mr Bryce Gaudry MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 10 June 2005.

State Revenue Legislation Amendment Bill 2005

- directors, amounts distributed under a trust in lieu of wages and exemptions for motor vehicle allowances and accommodation allowances;
- (e) amends the *Public Finance and Audit Act 1983*, the *State Owned Corporations Act 1989* and the *Taxation Administration Act 1996* in relation to the charging and collection of tax-equivalents from State owned corporations and government trading enterprises; and
 - (f) amends the *Taxation Administration Act 1996*, in relation to the grouping of corporations and the reasons for the disclosure taxation information;
 - (g) repeals the *Health Insurance Levies Regulation 2003* and the *Pay-roll Tax Regulation 1998*.

Issues Considered by the Committee

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

Privacy: *Fines Act 1996*, Schedule 2, clauses 2 & 3

4. Schedule 2[2] authorises the State Debt Recovery Office to obtain information about the address and employment details of a fine defaulter from an employer or past employer of the fine defaulter for the purposes of the enforcement of a garnishee order.
5. Schedule 2[3] extends the list of permitted disclosures of personal information. It provides that the State Debt Recovery Office, the Director of the Office, a member of staff of the Office or any other person engaged in the administration of the Act, may disclose personal information obtained in relation to a person in the administration of the Act:
 - (a) in connection with the administration or execution of the Act;
 - (b) with the consent of the person to whom the information relates; or
 - (c) in the case of information obtained in relation to a fine defaulter:
 - (i) to a government agency that is a prosecuting authority in relation to the offence concerned or on whose behalf the offence was prosecuted;
 - (ii) to a government agency on whose behalf the penalty notice for the offence concerned was issued; or
 - (iii) to the Hardship Review Board.
6. Also, the Bill expressly provides that personal information may be disclosed to an employer or past employer of a fine defaulter for the purposes of the administration, enforcement or execution of a garnishee order.
7. The Bill provides some protection for misuse of this personal information by providing that it may be disclosed to a government agency under subsection (1)(c)(i) or (ii) **only** if the disclosure is reasonably necessary to monitor the status of outstanding fines.
8. The Committee will always be concerned with legislation that infringes a person's right to privacy. If infringement of this important right is not proportionate to the policy objectives sought or justifiable on strong competing public interest grounds, the infringement may be an undue trespass on individual rights.

9. **The Committee is of the view that the right to privacy is an important right that should only be abrogated to the extent necessary to achieve the policy objectives of the legislation and only on strong competing public interest grounds.**
10. **The Committee notes that a principal purpose of the provision is to enable a garnishee order to be enforced. The Committee also notes that disclosure of personal information for this purpose is only authorised in limited and specified circumstances directly related to the object of enforcement of garnishee orders.**
11. **The Committee is of the view that these clauses do not *unduly* trespass on the individual right to privacy.**

Strict liability: Schedule 2, clause 3 [proposed s 117B]

12. Proposed section 117B Bill provides that:
- (1) A person engaged in the administration of this Act must not disclose any personal information obtained in relation to any person in the administration or execution of this Act except as authorised or required by this Act or any other Act or law. Maximum penalty: 100 penalty units.
13. As this clause does not explicitly require any criminal intent,⁵⁰ it may be held to be an offence of *strict liability*. Strict liability is often imposed for regulatory offences where there is a need to ensure persons take all reasonable steps to avoid the offence.
14. The Committee has previously expressed the view that providing for strict liability is a very serious matter, and should be:
- imposed only after careful consideration of all available options;
 - subject to defences wherever possible where contravention appears reasonable; and
 - have only limited monetary penalties.⁵¹
15. In regard to penalties, the Committee notes the Commonwealth Attorney General's Department's guideline that if strict liability is applied the maximum penalty should in general be no more than 60 penalty units (which under Commonwealth law means \$6,600 for an individual and \$33,000 for a body corporate).⁵²
16. The Committee notes that the purpose of the offence is to penalise a person who, unlawfully or without authorisation, discloses personal information obtained in the course of their administration of the Act.

⁵⁰ In other words, it does not require the prosecutor to prove that the accused person meant to commit the offence, or had the necessary "*mens rea*" to commit the offence.

⁵¹ See, eg, *Legislation Review Digest* No 3 of 2005 in the context of the *Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+) Bill 2005*. Note that the Commonwealth Attorney General's Department follows a guideline providing that if strict liability is applied the maximum penalty should in general be no more than 60 penalty units (\$6,600 for an individual) see Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002.

⁵² Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002.

- 17. The Committee considers that strict liability offences should only be imposed when clearly in the public interest, and that the severity of punishment should reflect the lack of criminal intent.**
- 18. The Committee has written to the Minister to seek his advice as to the need for penalties of 100 penalty units for an offence that does not include a statutory fault element where that penalty may be applied to individuals.**
- 19. The Committee refers to Parliament the question whether the strict liability offence in proposed section 117B, with a maximum penalty of 100 penalty units, unduly trespasses on individual rights.**

The Committee makes no further comment on this Bill.

8. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2005

Date Introduced:	8 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Carr MP
Portfolio:	Premier

Purpose and Description

1. The objects of this Bill are to amend certain Acts and regulations, including for the purpose of effecting statute law revision, to repeal certain Acts, regulations and provisions thereof, and to make other provisions of a consequential or ancillary nature.

Background

2. The second reading speech states:

The form of the bill is similar to that of previous bills in the statute law revision program. Schedule 1 contains policy changes of a minor and non-controversial nature... Schedule 2 deals with matters of pure statute law revision... Schedule 3 repeals a number of Acts, regulations and provisions of Acts... Schedule 4 contains general savings, transitional and other provisions.⁵³

The Bill

3. Schedule 1 makes amendments to 49 Acts and four regulations.
4. A proposed amendment to the *Legislation Review Act 1987* would enable the Legislation Review Committee to consider and make reports to Parliament on a regulation that has ceased to be subject to disallowance if the Committee has, during the disallowance period, resolved to review and report on the regulation [Schedule 1.15, proposed s 9(1A)].
5. Schedule 2 amends 41 Acts, 4 regulations and 34 environmental plans for the purpose of effecting statute law revision. Amendments proposed in Schedule 2 arise from the repeal of other legislation, the need to correct typographical errors and update terminology.
6. Schedule 3 repeals various Acts (in whole or in part) and regulations. Many of the Acts repealed are amending Acts that have already effected changes to other legislation.
7. Schedule 4 contains savings and transitional provisions that are standard in statute law reform bills.

⁵³ The Hon Grant McBride MP, Minister for Gaming and Racing and Minister for the Central Coast, *Legislative Assembly Hansard*, 8 June 2005.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

9. TERRORISM LEGISLATION AMENDMENT (WARRANTS) BILL 2005

Date Introduced:	9 June 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill's objects are to:

- amend the *Terrorism (Police Powers) Act 2002* (Terrorism Act) to enable the covert entry and search of premises, under the authority of a special covert search warrant, by specially authorised police officers or staff of the New South Wales Crime Commission (the Crime Commission) for the purposes of responding to or preventing terrorist acts, including obtaining evidence of the proposed State offence of membership of a terrorist organisation;
- amend the *Listening Devices Act 1984* to extend from 21 days to 90 days the maximum period during which a warrant issued under that Act for the use of a listening device remains in force if the warrant is issued in connection with certain Commonwealth terrorism offences, and the proposed State offence; and
- amend the *Crimes Act 1900* (Crimes Act) to create a State offence that is equivalent to the Commonwealth offence of membership of a terrorist organisation.⁵⁴

Background

2. The Attorney General noted in the second reading speech:

The citizens of this State have a right to expect that their privacy will be protected from unjustified searches and interference from the State. Society recognises, however, that there are certain circumstances when an individual's right to privacy must be weighed against the greater public interest in order to allow law enforcement agencies to uphold the law and prevent criminal activity, especially when many lives are potentially at stake...

General criminal activity has never aimed to perpetrate the mass taking of life, the widespread destruction of property or the wholesale disruption of society in the way that terrorism does. The powers set out in this bill are not designed or intended to be used for general policing. Their use is restricted to the NSW Police Counter-Terrorism Co-ordination Command and to the units of the NSW Crime Commission assigned the task of investigating and responding to terrorism...

These powers are extraordinary and have been permitted only with the strictest of safeguards...⁵⁵

⁵⁴ The relevant Part of the *Crimes Act 1900* is to be repealed on the second anniversary of its commencement.

⁵⁵ The Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 9 June 2005.

The Bill

3. The Bill inserts a new Part 3 (s 27A - s 27ZC) into the Terrorism Act, establishing the scheme for ***covert search warrants***.
4. Proposed s 27A contains definitions for the purposes of the proposed Part. In particular, ***terrorist act*** is defined to include the proposed State offence of membership of a terrorist organisation (see Sch 4).
5. Schedule 2 [18] to the Bill makes it clear that the scheme for covert search warrants contained in proposed Part 3 applies in relation to terrorist acts committed *before*, as well as those committed after, the commencement of that Part.

Covert search warrants

6. Certain police officers and certain staff members of the Crime Commission may be authorised to apply for a covert search warrant by the Commissioner of Police (the Police Commissioner) and the Commissioner for the Crime Commission (Crime Commissioner) respectively [proposed s 27D].⁵⁶
7. Such eligible police officers or eligible staff members of the Crime Commission may apply to eligible Judges of the Supreme Court for a covert search warrant [proposed s 27G].⁵⁷
8. An authorisation to apply for a covert search warrant may be given, or applied for, if the person giving the authorisation or making the application (as the case may be) suspects or believes on reasonable grounds that:
 - a terrorist act has been, is being, or is likely to be, committed;
 - the entry to and search of premises will substantially assist in responding to or preventing the terrorist act; and
 - it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises [proposed s 27C and s 27G respectively].⁵⁸
9. An eligible Judge may issue a covert search warrant if satisfied that there are reasonable grounds for doing so. When determining whether there are such reasonable grounds, the Judge is to consider (amongst other things):
 - the reliability of the information on which the application is based;

⁵⁶ Proposed s 27E and s 27F restrict the persons to whom the Commissioner of Police and the Commissioner for the New South Wales Crime Commission, respectively, may delegate their function of authorising persons to apply for covert search warrants.

⁵⁷ In order to deal with issues raised by *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, applications may be made only to Judges who consent, under proposed section 27B, to being involved in issuing covert search warrants. Matters required to be dealt with by an eligible Judge under proposed Part 3 are to be dealt with in the absence of the public: proposed s 27Y.

⁵⁸ Proposed s 27H and s 27I provide for the making of applications for covert search warrants in person and by telephone. Proposed s 27J sets out the matters that must be included in an application for a covert search warrant.

- whether there is a connection between the terrorist act concerned and the kinds of things that are proposed to be searched for, seized, placed in substitution for a seized thing, copied, photographed, recorded, operated, printed or tested;
 - the nature and gravity of the terrorist act;
 - the extent to which the exercise of powers under the warrant would assist in the prevention of, or response to, the terrorist act;
 - alternative means of obtaining the information sought;
 - the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the terrorist act is likely to be affected if the warrant is issued [proposed s 27K].⁵⁹
10. If an application for a covert search warrant has been refused, a further application may *not* be made for the same warrant, unless the further application provides additional information that justifies the making of the further application [proposed s 27M].
11. Proposed s 270 sets out the following powers conferred by a covert search warrant:
- to enter, without any occupier's knowledge, the premises the subject of the warrant;
 - to impersonate another person for the purposes of executing the warrant;
 - to use such force as is reasonably necessary for the purpose of entering the subject premises;
 - if the warrant authorises entry to premises adjoining the premises the subject of the warrant - to enter the adjoining premises, using such force as is reasonably necessary, for the purpose of entering the subject premises;
 - to search the subject premises for any kind of thing described in the warrant;
 - to break open any receptacle in or on the subject premises for the purposes of that search if it is reasonably necessary to do so;
 - if the warrant authorises the seizure of a kind of thing - to seize and detain a thing of that kind and any relevant thing that the person finds in the course of executing the warrant;
 - to seize and detain any other thing that the person finds in the course of executing the warrant and that is connected with a serious indictable offence;⁶⁰

⁵⁹ An eligible Judge who determines an application for a covert search warrant must record all relevant particulars of the grounds that the Judge has relied on to justify the issue of the warrant or the refusal to issue the warrant, as the case may be [proposed s 27L]. Any matter that might disclose the name or residential address of a person must not be recorded if the Judge is satisfied that to do so might jeopardise the safety of any person.

⁶⁰ A covert search warrant can authorise the return of a seized thing or the retrieval of a thing that has been placed in substitution for something that has been seized [proposed s 27R]. Generally, the thing concerned must be returned or retrieved within 7 days of the execution of the warrant.

Terrorism Legislation Amendment (Warrants) Bill 2005

- if the warrant authorises the placing of a kind of thing in substitution for a seized thing - to place a thing of that kind on the subject premises in substitution for a thing seized;
 - if the warrant authorises the copying, photographing or recording of a kind of thing - to copy, photograph or otherwise record a thing of that kind and any relevant thing that the person finds in the course of executing the warrant,
 - if the warrant authorises the operation of a kind of electronic equipment - to operate any electronic equipment of that kind, and any relevant electronic equipment that the person finds in the course of executing the warrant, and print, copy or otherwise record information from that equipment;
 - if the warrant authorises the testing of a kind of thing - to test a thing of that kind and any relevant thing that the person finds in the course of executing the warrant.⁶¹
12. A person to whom a covert search warrant has been issued must report back to the eligible Judge who issued the warrant about the execution of the warrant [proposed s 27S].⁶²
13. The Attorney General may enter into arrangements with a Minister of the Commonwealth in relation to the transmission to or from the Commonwealth of things seized under the Terrorism Act or Commonwealth law, where the things seized are relevant to the investigation of an offence [proposed new s 29A].
14. The Bill provides for the destruction of any records obtained in the execution of a covert search warrant if the Police Commissioner or the Crime Commissioner respectively is satisfied that their retention is no longer required [proposed s 27W].

Occupier's notices

15. A person who executes a covert search warrant is to produce an *occupier's notice* setting out certain details regarding the execution of the warrant.
16. An occupier's notice must be provided for the approval of an eligible Judge within 6 months of the execution of a covert search warrant. Following approval by the Judge, the notice is to be given to:
- any person suspected of being knowingly concerned in the commission of the terrorist act concerned; and
 - if no such person was an occupier when the warrant was executed, an occupier of the premises concerned [proposed s 27U].

⁶¹ A covert search warrant is not invalidated by any defect other than a defect that *affects the substance of the warrant in a material particular* [proposed s 27T].

⁶² The report must be made within 10 days of the execution, expiry or withdrawal of the warrant. If an eligible Judge who has issued a covert search warrant has died, has ceased to be an eligible Judge or is absent, the report required to be provided to the Judge under proposed s 27S on the execution of the warrant, and the power to postpone the giving of an occupier's notice under s 27U, may be provided to, or exercised by, any other eligible Judge: proposed s 27X.

17. An eligible Judge may postpone, for a period of up to 6 months at a time, the giving of the occupier's notice if satisfied that there are reasonable grounds for doing so. The giving of an occupier's notice must *not* be postponed for a total period of more than 18 months, unless the eligible Judge is satisfied that there are exceptional circumstances justifying the postponement.⁶³

Offences

18. It is an offence for a person to give false or misleading information to an eligible Judge in an application for a covert search warrant, punishable by a maximum penalty of 100 penalty units (currently \$11,000) or 2 years imprisonment, or both [proposed s 27Z].
19. It is an offence, with certain exceptions, for a person to intentionally or recklessly publish an application for a covert search warrant, a report prepared under proposed s 27S, an occupier's notice or any information derived from such an application, report or notice:
- (a) before the related occupier's notice is served; or
 - (b) if the identity or whereabouts of any person believed to be knowingly concerned in the commission of the terrorist act concerned, or the identity or whereabouts of the relevant occupier, is unknown - before directions are sought from an eligible Judge in relation to the giving of the occupier's notice in these circumstances [proposed s 27ZA].
20. The proposed offence is punishable by a maximum penalty of 50 penalty units (currently \$5,500) or 12 months imprisonment, or both.⁶⁴

Reporting

21. The Police Commissioner and the Crime Commissioner must each report to the Attorney General and the Minister for Police on an annual basis in relation to the exercise of powers relating to covert search warrants [proposed s 27ZB].
22. The Ombudsman must monitor the exercise of such powers by members of NSW Police, the Crime Commissioner and staff of the Crime Commission for 2 years from the commencement of the proposed Part 3 [proposed s 27ZC].
23. The Attorney General may require the Police Commissioner or the Crime Commissioner to provide information, for the purposes of the annual review of the Terrorism Act, about the exercise of functions by members of NSW Police, members of the Crime Commission or members of staff of the Crime Commission [proposed amended s 36].

⁶³ Similar notices may be prepared and given to occupiers of premises adjoining premises that are the subject of a covert search warrant, if the execution of the warrant involved entry to those adjoining premises: proposed s 27V.

⁶⁴ Proposed s 27ZA does *not* make it an offence to publish any application, report, notice or information if the publication is for the purposes of:

- (a) exercising any functions under proposed Part 3; or
- (b) the internal management of NSW Police, the Crime Commission, the Supreme Court or the Attorney General's Department: proposed s 27ZA(3).

Amendment of *Listening Devices Act 1984*

24. As noted above, the Bill amends the *Listening Devices Act 1984* to extend from 21 days to 90 days the maximum period during which a warrant authorising the use of a listening device is in force, if the offence to which the warrant relates is a terrorism offence [propose amended s 16].⁶⁵
25. The Bill inserts into s 16 a definition of *terrorism offence*, which is defined to mean the proposed State offence of membership of a terrorist organisation, or an offence under any of the following provisions of the Commonwealth *Criminal Code 1995*:
- s 101.1 (Terrorist acts);
 - s 101.2 (Providing or receiving training connected with terrorist acts);
 - s 101.4 (Possessing things connected with terrorist acts);
 - s 101.5 (Collecting or making documents likely to facilitate terrorist acts);
 - s 101.6 (Other acts done in preparation for, or planning, terrorist acts);
 - s 102.2 (Directing the activities of a terrorist organisation);
 - s 102.3 (Membership of a terrorist organisation);
 - s 102.4 (Recruiting for a terrorist organisation);
 - s 102.5 (Training a terrorist organisation or receiving training from a terrorist organisation);
 - s 102.6 (Getting funds to or from a terrorist organisation);
 - s 102.7 (Providing support to a terrorist organisation); and
 - s 103.1 (Financing terrorism).

Issues Considered by the Committee

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

Covert searches: proposed s 270

26. Authorising an eligible person to covertly enter and search premises using such force as is necessary and to seize, substitute, copy, photograph and record things, and to covertly enter adjoining premises, as provided in proposed s 270, is clearly a very significant trespass to the relevant persons' privacy and property.
27. The Attorney General stated that this trespass must be:
- weighed against the greater public interest in order to allow law enforcement agencies to uphold the law and prevent criminal activity, especially when many lives are potentially at stake.⁶⁶

⁶⁵ Under that Act, there is no limit on providing further warrants in relation to the same prescribed offence: s 16(6).

⁶⁶ The Hon R J Debus MP, Attorney General, second reading speech, Legislative Assembly *Hansard*, 9 June 2005.

28. In setting out the need for these powers, he stated:

This scheme provides police with another tool that answers some of the more difficult characteristics of terrorist activity. For example, while both terrorists and organised crime gangs operate secretly and are aware of the possibility of official surveillance, terrorists operate over a much longer time frame. A terrorist operative may arrive in Australia years before any attack is planned, with no orders other than to lie low. So the first requirement of counter-terrorism covert investigative powers is that they be able to operate over a long period, enabling investigators to target terrorists from the early stages of their activities. Covertiness is the second requirement. In the preparatory stages of a terrorist plot any hint to the terrorist operatives that their plans or activities have been discovered or that they are under surveillance could mean that they simply abort the entire terrorist operation, allowing the organisation the opportunity to regroup and change the object of its plans. What this scheme will allow police to do is enter private premises without the knowledge of the occupiers for the purpose of preventing or responding to these terrorist threats.⁶⁷

29. The Committee agrees with the Attorney General that the right to privacy needs to be weighed against the important public interest of preventing terrorism.

30. The Committee also considers that any breaches of the right to privacy should be the minimum necessary to achieve that important goal, that everything reasonably practicable be done to ameliorate the consequences of that breach, and that any breach be in proportion to the object to be achieved.

31. Article 17 of the International Covenant on Civil and Political Rights states that:

- no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and
- everyone has the right to the protection of the law against such interference or attacks.

32. At common law, the general position is that, in the absence of consent, police powers of entry are restricted to making an arrest, preventing a serious indictable offence, arresting an offender running from an affray or preventing a murder.⁶⁸

33. Under s 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, the power of entry has been extended to include a general power to enter premises (including a dwelling house and its surrounds) where the police believe, on reasonable grounds, that a breach of the peace is being committed or is likely to be committed, in order to end or prevent it.⁶⁹

⁶⁷ The Hon R J Debus MP, Attorney General, second reading speech, Legislative Assembly *Hansard*, 9 June 2005.

⁶⁸ *Plenty v Dillon* (1991) 171 CLR 635.

⁶⁹ A police officer may enter premises if the police officer believes on reasonable grounds that:

- (a) a breach of the peace is being or is likely to be committed and it is necessary to enter the premises immediately to end or prevent the breach of peace; or
- (b) a person has suffered significant physical injury or there is imminent danger of significant physical injury to a person and it is necessary to enter the premises immediately to prevent further significant physical injury or significant physical injury to a person.

Limits on the impact of the powers under the Bill

34. The Bill includes some measures aimed at ensuring its covert search powers can only be used in connection with terrorist acts and at limiting the degree of infringement of personal rights:

- the powers can only be exercised on warrant issued by an eligible Judge of the Supreme Court;
- only police officers from the terrorism investigation group authorised by the Commissioner of Police or staff from the terrorism investigation group of the Crime Commission authorised by the Crime Commissioner may apply for a covert search warrant [proposed s 27G];
- the relevant Commissioner can only give an authorisation to apply for,⁷⁰ and the authorised officer or staff member can only apply for, covert search warrants if they suspect or believe on reasonable grounds that:
 - a terrorist act has been, is being, or is likely to be, committed; and
 - the entry to and search of the premises will substantially assist in responding to or preventing the terrorist act; and
 - it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises [proposed s 27G];
- if an application is refused, further application cannot be made without additional justifying information [proposed s 27M];
- reports on the execution or otherwise of a warrant must be made to the Judge and the Attorney General [proposed s 27S];
- certain occupiers must be notified once there is no reasonable, or after 18 months exceptional, reason not to do so [proposed s 27U & 27V];
- within 12 months of the execution of a warrant, and within each subsequent 12 month period thereafter, the relevant Commissioner is to destroy any record held that was made in the execution of a warrant if it is not reasonably required for an investigation or proceedings [proposed s 27W];
- it is an offence punishable by 100 penalty units (\$11,000) and 2 years' imprisonment to give false or misleading information in connection with an application for a warrant [proposed 27Z]; and
- annual reports including a range of statistics in respect of warrants are to be tabled in Parliament; for the first two years of its operation, the Ombudsman is to monitor and report on the operation of the regime [proposed 27ZC].

A police officer who enters premises under this section is to remain on the premises only as long as is reasonably necessary in the circumstances.

⁷⁰ The relevant Commissioner's power to authorise may be delegated but only to a limited number of persons holding prescribed offices: proposed s 27E & s 27F.

Exposure of person not connected to terrorist acts

35. The Bill nevertheless authorises the use of very significant powers against those who may not be involved in terrorist acts. In particular, it should be noted that:
- the threshold for invoking the powers is suspicion on reasonable grounds (which will inevitably lead to the covert entry and search of premises of innocent people);
 - it is not necessary that all or any occupiers of the premises be suspected of any criminal acts, although the Judge is to consider the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the terrorist act is likely to be affected;
 - the Bill specifically provides for the covert entry of premises of occupiers not suspected of any criminal activity in order to access adjoining premises;
 - the Bill allows use of covert search powers on the basis of actions which may have very little connection with any act which might harm a person, such as taking steps to join an organisation that has been proscribed by Commonwealth regulation, although the Judge must consider the nature and gravity of the “terrorist act”;
 - there is no requirement of imminent threat before a warrant may be issued;
 - once a warrant has been issued, the Bill allows the covert search powers to be used to seize “any other thing... that is connected with a *serious indictable offence*”, without the need for any evidence of connection between that thing and a terrorist act;
 - while it is an offence to knowingly give false or misleading information to a Judge when making an application, there is no prohibition on being reckless or negligent regarding the truthfulness or accuracy of such information; and
 - there is no general requirement that an occupier of searched premises who was not at the time believed to be knowingly concerned in the commission of the terrorist act be provided with an occupiers notice, even though such a person would have been subject to the full covert search and seizure powers under the warrant.
36. As a consequence, the Bill opens the possibility for certain highly undesirable consequences which should not be allowed unless truly necessary and should be prevented as far as is practicable. In particular, the Bill appears to enable:
- persons not concerned with a terrorist act who occupy the same premises as a person suspected of committing a terrorist act, or are visited by a such a person, to be subject to the full force of a covert search warrant;
 - a covert search warrant to be used to gather evidence for a serious indictable offence unconnected with a terrorist act using powers that could not otherwise be used for an investigation of that offence;⁷¹ and

⁷¹ This would be of particular concern if evidence of suspicion of a more marginal terrorist act, such as taking steps to join an organisation proscribed by Commonwealth regulation but which did not have explicit terrorist objectives, was used as a device to investigate an unrelated terrorist offence, or if a covert search warrant was

Terrorism Legislation Amendment (Warrants) Bill 2005

- applications for a covert search warrant to be made without sufficient care being taken, given the gravity of the powers sought, to test the grounds of suspicion of the terrorist act.

Risks associated with power to enter premises when occupants present

37. The Bill provides that a covert search warrant authorises eligible police officers and members of the Crime Commission to impersonate another person for the purpose of executing the warrant [proposed s 27O(1)(b)].
38. This right flows automatically from the warrant and there is no required prior exploration of whether impersonation is appropriate, either in the application for the warrant [proposed s 27J], or in the determination of whether it should be granted [proposed s 27K].
39. There are clearly risks in this situation that an innocent occupier will react violently to an ineffective impersonation in purported exercise of a power of self-defence. While it would appear that in these circumstances the occupier would have available to them a complete defence of self defence under s 418 of the *Crimes Act*, the exposure to the risk of prosecution in these circumstances can be viewed as trespassing on personal liberties, particularly where the possible provocation and resultant risk is created by law enforcement agencies.

- | |
|---|
| <p>40. The Committee notes that the broad covert search powers significantly trespass on the personal right to privacy.</p> <p>41. The Committee notes that the purpose of these powers is to prevent terrorist activity.</p> <p>42. The Committee notes that the Bill provides for very significant trespasses on the rights and liberties of persons who are not suspected of being involved in the commission of a terrorist act.</p> <p>43. The Committee also notes that occupants of premises who are subject to the full search and seizure powers of a warrant are not normally provided with an occupiers notice if they were not at the time believed to be knowingly concerned in the commission of the terrorist act.</p> <p>44. The Committee also notes that the Bill provides no protection in relation to reasonable responses by occupiers discovering covert intruders who are executing a warrant.</p> <p>45. The Committee refers to Parliament the question of whether the Bill trespasses unduly on the rights to privacy and property.</p> |
|---|

used to investigate a person occupying the relevant premises who was not concerned with the suspected terrorist act.

Extension of warrants authorising use of listening devices: Schedule 3

46. Schedule 3 extends from 21 days to 90 days the maximum period during which a warrant authorising the use of a listening device is in force if the offence to which the warrant relates to a terrorism offence.⁷²

47. **The Committee notes the Attorney General's comments regarding the longer term nature of investigations into terrorist activities and the strong public interest in the investigation of such activities.**

48. **The Committee further notes that the use of listening devices is a significant trespass on the right to privacy.**

49. **The Committee refers to Parliament the question as to whether the extension from 21 days to 90 days of the maximum period for a warrant authorising the use of a listening device trespasses unduly on the right to privacy.**

Criminalising association with organisations proscribed by Commonwealth regulation: Schedule 4**"Terrorist organisation"**

50. The Bill creates an offence of being a member of a terrorist organisation [proposed s 310J]. The meaning of *member of a terrorist organisation* is taken from section 102.1 of the Commonwealth Criminal Code (the Code).

51. Under the Code, *terrorist organisation* includes an organisation specified in regulations made by the Governor-General.

52. Allowing the Governor-General to proscribe terrorist organisations *prima facie* has the potential to trespass on personal rights by criminalising association with that organisation on the basis of a political assessment of that organisation, rather than an impartial assessment of the actions or objectives of that organisation.

53. Article 22 of the International Covenant on Civil and Political Rights provides:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. ...

54. To help ensure the proscription of terrorist organisations is done on an objective basis, the Criminal Code provides that:

- before the making of the regulation, the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act;

⁷² Under the *Listening Device Act 1984*, further warrants can be applied for before the expiration of a warrant.

Terrorism Legislation Amendment (Warrants) Bill 2005

- before the making of the regulation, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed;
- regulations proscribing an organisation cease to have effect after two years;
- the Minister must revoke the proscription of an organisation if he or she ceases to be satisfied that the relevant conditions are met [s 102.1]; and
- the Federal Parliamentary Joint Committee on ASIO, ASIS and DSD may review the proscription of a terrorist organisation as soon as possible after the making of the regulation and such review extends the period during which the regulation may be disallowed under certain circumstances [s 102.1A].

“Member”

55. The definition “member of an organisation” in Section 102.1(1) of the Code, which the Bill adopts, includes:
- (a) a person who is an informal member of the organisation;
 - (b) a person who has taken steps to become a member of the organisation; and
 - (c) in the case of an organisation that is a body corporate - a director or an officer of the body corporate.
56. This extremely broad definition extends considerably beyond the usual criminal law limits of inchoate offences.
57. The crime of “attempt” traditionally distinguishes between *acts of preparation* – which are *not* criminal attempts – and *acts sufficiently proximate to the offence* to constitute an attempt.
58. The Committee notes that while many specific statutory offences erode this distinction, this is a particularly extreme example. Membership of an association is itself relatively remote from any offence of violence, but, in addition, *any* steps taken to become a member are sufficient under the Bill. The scope of “informal member” is also not defined and may be very remote from active participation in or support of any violent objectives of the organisation.
59. When this broad offence definition is coupled with the very extensive entry, search and seizure powers proposed in the Bill, it is evident that the Bill represents a very significant trespass on personal rights and liberties, both in terms of the right to privacy, and the traditional criminal law principle that offences should prohibit acts rather than mere status.
60. The Committee also notes that the Bill infringes on the presumption of innocence by placing the burden of proof on the accused to prove that he or she:
- took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation [proposed s 310J(2)].

- 61. The Committee notes that freedom of association is a fundamental right that should only be restricted to the extent necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.**
- 62. The Committee notes that Schedule 4 of the Bill criminalises membership of organisations specified as terrorist organisations in regulations made by the Governor-General under s 102.1 of the Commonwealth Criminal Code.**
- 63. The Committee further notes that the definition of “membership” of a terrorist organisation is extremely broad and includes acts extremely remote from any acts of violence.**
- 64. The Committee notes that “membership of a terrorist organisation” under the Bill may be punished by 10 years’ imprisonment and exposes a person to the highly intrusive covert search warrant regime in the Bill.**
- 65. The Committee also notes that proposed section 310J(2) reverses the onus of proof.**
- 66. The Committee refers to Parliament the question as to whether Schedule 4 unduly trespasses on the right to freedom of association and the presumption of innocence.**

The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Centennial Park and Moore Park Trust Regulation 2004	27/08/04	6699	05/11/04 29/04/05	21/04/05
Hunter-Central Rivers Catchment Management Authority Regulation 2005	13/05/05	1663	20/06/05	
Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005	08/04/05	1245	29/04/05	
Occupational Health and Safety Amendment (Transitional) Regulation 2004	17/12/04	9354	01/04/05 23/05/05	19/05/05
Protection of the Environment Operations (General) Amendment (Luna Park) Regulation 2005	11/03/05	698	29/04/05	
Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005	14/01/05	111	01/04/05	

Appendix 1: Index of Bills Reported on in 2005

	Digest Number
Appropriation Bill 2005	7
Appropriation (Budget Variations) Bill 2005	6
Appropriation (Parliament) Bill 2005	7
Appropriation (Special Offices) Bill 2005	7
Brigalow and Nandewar Community Conservation Area Bill 2005	7
Building Professionals Bill 2005	7
Civil Liability Amendment (Food Donations) Bill 2004	1
Civil Liability Amendment (Offender Damages) Bill 2005	2, 3
Civil Procedure Bill 2005	5
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	3
Coal Acquisition Amendment (Fair Compensation) Bill 2005	5
Courts Legislation Amendment Bill 2005	7
Court Security Bill 2005	2
Crimes Amendment (Grievous Bodily Harm) Bill 2005	3
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	6
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	3
Criminal Assets Recovery Amendment Bill 2005	7
Criminal Procedure Amendment (Evidence) Bill 2005	3
Criminal Procedure Further Amendment (Evidence) Bill 2005	4
Crown Lands Amendment (Access to Property) Bill 2005*	4
Crown Lands Legislation Amendment Bill 2005	7
Drug Misuse and Trafficking Amendment Bill 2005	8
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005	6
Electricity Supply Amendment Bill 2005	2, 5
Energy Administration Amendment (Water and Energy Savings) Bill 2005	5
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	7
Fair Trading Amendment (Responsible Credit) Bill 2005*	6
Fire Brigades Amendment (Community Fire Units) Bill 2005	7
Fiscal Responsibility Bill 2005	7
Fisheries Management Amendment (Catch History) Bill 2005*	6

	Digest Number
Gambling (Two-up) Amendment Bill 2005	7
Game and Feral Animal Control Amendment Bill 2005	5
Gaming Machines Amendment Bill 2005	8
Independent Commission Against Corruption Amendment Bill 2005	2, 3
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	1
Legal Profession Amendment Bill 2005	8
Legal Profession Bill 2004	1, 5
Local Government Amendment Bill 2005	8
Marine Safety Amendment (Random Breath Testing) Bill 2004	1
National Park Estate (Reservations) Bill 2005	7
National Parks and Wildlife (Adjustment of Areas) Bill 2005	3
Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005	7
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	8
Pawnbrokers and Second-hand Dealers Amendment Bill 2005	8
Petroleum (Submerged Lands) Amendment (Permits and Leases) Bill 2005	7
Photo Card Bill 2004	1
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	2
Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Bill 2005	7
Prisoners (Interstate Transfer) Amendment Bill 2005	4, 5
Protection of Agricultural Production (Right to Farm) Bill 2005*	4
Road Transport (General) Bill 2004	1, 4
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	1, 4, 7
Rural Workers Accommodation Amendment Bill 2005	7
Sheriff Bill 2005	2
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	1
Standard Time Amendment (Co-ordinated Universal Time) Bill 2005	2
State Revenue Legislation Amendment Bill 2005	8
State Revenue Legislation Amendment (Budget Measures) Bill 2005	7
Statute Law Miscellaneous Provisions Bill 2005	8
Surveying Amendment Bill 2005	7
Sydney 2009 World Masters Games Organising Committee Bill 2005	7
Sydney University Settlement Incorporation Amendment Bill 2005*	7
Terrorism Legislation Amendment (Warrants) Bill 2005	8

	Digest Number
Transport Administration Amendment (Transport Levy For Major Events) Bill 2005	2
Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill 2005*	2
Transport Legislation Amendment (Waterfall Rail Inquiry Recommendations) Bill 2005	7
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	3
Workplace Surveillance Bill 2005	6

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Building Professionals Bill 2005	Minister for Infrastructure and Planning (Planning Administration)	03/06/05			7
Child Protection (Offender Prohibition Orders) Bill 2004	Minister for Police	18/06/04		6	
Civil Liability Amendment (Offender Damages) Bill 2005	Minister for Justice	01/03/05	08/03/05		2, 3, 5
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05			6
Electricity Supply Amendment Bill 2005	Minister for Energy and Utilities	01/03/05	30/03/05		2, 5
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	Minister for Infrastructure and Planning	03/06/05			7
Independent Commission Against Corruption Amendment Bill 2005	Premier	01/03/05	02/03/05		2, 3
Legal Profession Amendment Bill 2005					8
Legal Profession Bill 2004	Attorney General	17/02/05	07/04/05		1, 5
Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004	Minister for Commerce	03/12/04	09/12/04	17	1
Marine Safety Amendment (Random Breath Testing) Bill 2004	Minister for Ports	17/02/05			1
Photo Card Bill 2004	Minister for Roads	17/02/05			1
Prisoners (Interstate Transfer) Amendment Bill 2005	Minister for Justice	01/04/05	18/04/05		4, 5
Road Transport (General) Bill 2004	Minister for Roads	17/02/05	14/03/05		1, 4
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04	01/12/04	9	1, 5
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	Minister for Roads	17/02/05 01/04/05	14/03/05 23/05/05		1, 4, 7
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/04		15	

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

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Building Professionals Bill 2005	N, C				
Civil Liability Amendment (Food Donations) Bill 2004	N			N	
Civil Liability Amendment (Offender Damages) Bill 2005	N,C				
Civil Procedure Bill 2005	N			N	
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	R				
Court Security Bill 2005				N	
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	R, C		R		
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	R				
Criminal Assets Recovery Amendment Bill 2005	R				
Criminal Procedure Amendment (Evidence) Bill 2005	N				
Criminal Procedure Further Amendment (Evidence) Bill 2005	C			N	
Drug Misuse and Trafficking Amendment Bill 2005				N	
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005				N	
Electricity Supply Amendment Bill 2005				C	
Energy Administration Amendment (Water and Energy Savings) Bill 2005				R, N	
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004			N	N	N
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	N, R	C	N, C		R, C
Gaming Machines Amendment Bill 2005	C				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Independent Commission Against Corruption Amendment Bill 2005				C	
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	R			N	
Legal Profession Amendment Bill 2005	N			R	
Legal Profession Bill 2004	N,C			N	
Local Government Amendment Bill 2005	C, R				
Marine Safety Amendment (Random Breath Testing) Bill 2004				C	
National Parks and Wildlife (Adjustment of Areas) Bill 2005				N	
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	R	R	R	R	
Photo Card Bill 2004				C	
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	N				
Prisoners (Interstate Transfer) Amendment Bill 2005				C	
Protection of Agricultural Production (Right to Farm) Bill 2005*	R				
Road Transport (General) Bill 2004	N	C		C	
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	N			C	
Rural Workers Accommodation Amendment Bill 2005	R				
Sheriff Bill 2005				N	
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	R, N				
State Revenue Legislation Amendment Bill 2005	N, C, R				
State Revenue Legislation Amendment (Budget Measures) Bill 2005	N				
Surveying Amendment Bill 2005	N				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Terrorism Legislation Amendment (Warrants) Bill 2005	R				
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	N			N	N

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2005

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2005
Architects Regulation 2004	Minister for Commerce	21/09/04	30/11/04	1
Centennial and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	05/11/04 29/04/05	21/04/05	5
Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004	Minister for Infrastructure and Planning	26/10/04 17/02/05	01/02/05	1
Forestry Regulation 2004	Minister for Primary Industries	26/10/04 17/02/05	18/01/05	1
Institute of Teachers Regulation	Minister for Education and Training	01/04/05 03/06/05	26/05/05	7
Occupational Health and Safety Amendment (Transitional) Regulation 2004	Minister for Commerce	01/04/05 23/05/05	17/05/05	6
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	Minister for Transport Services	30/04/04 01/03/05	17/02/05	2
Stock Diseases (General) Regulation 2004	Minister for Primary Industries	05/11/04	16/12/04	1
Sydney Olympic Park Amendment Regulation 2004	Minister for Sport and Recreation	05/11/04	03/12/04	1