



## NSW Legislative Council Hansard Constitution Amendment (Governor) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 24 May 2006.

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### Second Reading

**The Hon. TONY KELLY** (Minister for Justice, Minister for Juvenile Justice, Minister for Emergency Services, Minister for Lands, and Minister for Rural Affairs) [11.57 a.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

The Government has been developing government continuity arrangements in the event of a serious terrorist incident or natural disaster.

As part of this work, consideration has been given to the constitutional and other legal limits that would apply to Executive Government decision-making in the event of a serious incident.

It has become clear that some of the provisions of the *Constitution Act* may not be effective in certain circumstances. For example, following a significant terrorist incident, the Governor may be prevented from reaching any place where the Executive Council needs to meet to respond to the crisis.

In some circumstances, the Governor may not be able to be found or contacted.

It might, however, be necessary for the Government to take steps to deal with the emergency, such as declaring a State of Emergency or making emergency regulations or orders. It might even be necessary to swear in new members of a Ministry.

The provisions of the *Constitution Act* only allow the Lieutenant-Governor, who is the Chief Justice of the Supreme Court, or the Administrator, who is the next most senior judge of the Supreme Court, to assume administration if the Governor is outside New South Wales or is "incapacitated".

The Crown Solicitor was asked to advise whether the term "incapacitated" would extend to situations in which the Governor was not physically or mentally incapacitated but was unavailable.

The Crown Solicitor advised that the term "incapacity" may not extend to situations beyond physical or mental incapacity.

It is possible, therefore, that a situation might arise where no person would be available to administer the Executive Government of New South Wales during a critical emergency period.

Such a situation could arise if the Governor was still in New South Wales but unable to exercise her functions due to reasons other than her physical or mental incapacity, for example, if she is uncontactable, missing or physically prevented from attending an urgent Executive Council meeting because of the cessation of elements of the communication or transport systems.

This is to be contrasted with the position in other jurisdictions.

In Victoria, the Administrator is entitled to assume administration merely if the Governor is "unable or unwilling" to perform his or her duties.

The Queensland Constitution is also probably more flexible than the present situation in New South Wales. In Queensland, the Administrator may take over when the Governor is "incapable of performing the duties of office."

To ensure the continuity of Executive Government in New South Wales in a crisis, the Government has decided to introduce amendments to the *Constitution Act*.

The Bill will amend the *Constitution Act* to allow the Lieutenant Governor or Administrator to assume administration whenever the Governor is "unavailable".

The amendments also provide consequentially that if the President of the Court of Appeal is unavailable to act

as Administrator, the next most senior available judge of the Supreme Court is entitled to assume administration.

The amendments are only intended to be used in emergency or crisis situations, such as following a terrorist event where there may be significant transport and communication difficulties or casualties among the Executive Government.

The Bill is not intended to be used routinely in non-emergency situations, for example, where the Governor is temporarily away from the central business district of Sydney on official business and her future availability to attend routine Executive Council meetings can be presumed. In such cases, it is appropriate for the governance arrangements to remain unaltered despite any administrative inconvenience to the Government.

The Bill therefore includes checks on the exercise of the broader power to assume administration.

The first check is that it will remain a matter for any judicial officer approached by the Government to assume administration to be personally satisfied that the Governor is actually unavailable.

It is highly unlikely that any judicial officer would agree to assume administration if, for example, the only explanation given for the Governor's unavailability is that she is otherwise engaged in performing her official duties or it is after normal business hours.

Second, the Lieutenant-Governor or an Administrator will not be entitled to assume administration on "unavailability" grounds without the concurrence of the Premier or, if the Premier cannot be contacted, the next most senior Minister.

The third check is that the Premier or Minister concurring with the assumption of administration should only do so if he or she is satisfied that there are "*special circumstances*".

The Premier or Minister must also be satisfied that **either** it is not possible to determine if or when the Governor will become available again **or** it is necessary for the administration of the State that certain functions be exercised prior to the Governor's return.

This assessment about the needs of Executive Government is, ordinarily, best left to Ministers. The exception to this is in circumstances where neither the Premier nor any other Minister is contactable. In such cases, the judicial officer who is approached will be required to satisfy themselves as to the criteria which would otherwise be considered by the Premier or other Minister. This will ensure that the administration of the State does not pass to another person too readily.

The Bill will also amend the Act to ensure that the Lieutenant-Governor's or an Administrator's administration ends as soon as the Governor's unavailability ceases and she notifies the Administrator accordingly. A similar provision already exists in the Act in the case of the Governor's incapacity.

This will ensure that the Governor resumes administration of the State as soon as she is available to perform her duties again.

This Bill will ensure that the Executive Government of the State is able to continue to function in the exceptional circumstances which might arise following a natural disaster or terrorist event. It highlights this Government's preparedness to respond to such major incidents. Importantly, the Bill includes significant safeguards to ensure that it is only used in appropriate cases.

I commend the Bill to the House.