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Legislation Review Committee

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MEMBERSHIP & STAFF

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

Panel of Legal Advisers

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

Professor Phillip Bates
Mr 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.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT AMENDMENT (X 18+) BILL 2005*

Date Introduced:	24 February 2005
House Introduced:	Legislative Council
Member Responsible:	The Hon Peter Breen MLC
Portfolio:	Private Member's Bill

Purpose and Description

1. The object of this Bill is to amend the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (the Act) to:
 - remove the current prohibition in relation to the sale and public exhibition of films that are classified X18+ under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth);
 - ensure that films classified X18+ are only sold from restricted publications areas; and
 - increase penalties for allowing minors to access adult material.

Background

2. It was stated in the second reading speech that:

Most of the erotic and pornographic material sold in New South Wales each year has not been approved by the censor, the stringent guidelines of the Commonwealth are being ignored, and reasonable material is being sold alongside hardcore, offensive, violent and illegal films that do not comply with any guidelines or legislation. If films classified X18+ by the censor were sold legally the policing of illegal pornography would be made much simpler...

[The Bill] will bring New South Wales into line with Commonwealth law and, by enabling more efficient policing of the industry, will reduce the amount of illegal and highly offensive material currently being sold throughout the State.¹

¹ Hon P J Breen MLC, Legislative Council *Hansard*, 3 March 2005.

The Bill

3. The Bill:

- removes the prohibition under s 6 of the Act on selling or publicly exhibiting a film classified X18+;
- increases the penalties for offences relating to allowing minors to access adult material;²
- creates certain offences in relation to the display, sale, delivery and publication of films classified X 18+ [proposed s 6A];
- creates an offence of selling or delivering to a minor a film classified X 18+, or an unclassified film that would, if classified, be classified X 18+ [proposed s 9(1A)];
- creates an offence of privately exhibiting in the presence of a minor a film classified X 18+ or an unclassified film that would, if classified, be classified X 18+ [proposed s 14(1A)];
- provides a defence to a prosecution for the offence of keeping a film classified X 18+ in certain places that the film was kept in a restricted publications area [proposed amended s 16(2)];
- provides that it is an offence for a person to leave in a public place or, without the occupier's permission, on private premises, a film classified RC, X 18+, R 18+ or MA 15+ or an unclassified film that would, if classified, be classified in one of those categories [proposed amended s 17(1)];
- amends the Act in relation to advertising films, publications and computer games classified X 18+; and
- provides that proceedings cannot be brought against any person for publishing an obscene libel or indecent article if the libel or article is, or is part of, a film, publication or computer game that is classified X 18+ [proposed amended s 63(b)].

4. The Bill also amends the *Crimes Act 1900* by omitting "or X 18+" from paragraph (e) of the definition of "article" in s 578C(1) of that Act.

² The current penalties are, in the case of a film classified RC or X or an unclassified film that is subsequently classified RC or X, 100 penalty units or imprisonment for 12 months for an individual, 250 penalty units for a corporation. The Bill provides for the following increased penalties:

- in the case of an unclassified film that is subsequently classified X 18+ - 75 penalty units for an individual, 150 penalty units for a corporation;
- in the case of a film classified RC or an unclassified film that is subsequently classified RC - 200 penalty units or imprisonment for 2 years for an individual, 400 penalty units for a corporation.

Issues Considered by the Committee

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

Strict liability offences

5. The Bill introduces certain offences for which there is no fault element, commonly referred to as strict liability offences. The Bill also increases the penalties for certain strict liability offences in the Act.
6. In its report on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, the Senate Scrutiny of Bills Committee set out a number of “basic principles”, including:
 - fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter;
 - strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; ...
 - strict liability should, wherever possible, be subject to program specific broad-based defences in circumstances where the contravention appears reasonable, in order to ameliorate any harsh effect; ...
 - strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units (\$6,600 for an individual and \$33,000 for a body corporate) appears a reasonable maximum.³
7. The following table sets out the relevant changes regarding strict liability offences under the Bill.

Offence (as amended)	Penalty for individuals	Defences provided ⁴	Changes from the Act
s 6. Sale or public exhibit of unclassified or RC films	200 penalty units (\$22,000) or imprisonment for 2 years	Nil	Current penalty 100 penalty units (\$11,000) or imprisonment for 12 months
s 6A Unlawful display, delivery or publication of X 18+ films	150 penalty units (\$16,500)	Nil	New offence. Currently X films included in s 6 above
s 9(1) Sale or delivery of RC or unclassified films to minor	200 penalty units (\$22,000) or imprisonment for 2 years	Nil	Current penalty 150 penalty units (\$16,500) or imprisonment for 2 years

³ 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.

⁴ Under the common law, there is a defence of honest and reasonable mistake of fact for strict liability offences. Whether or how this defence applies to an offence is a matter of statutory interpretation by the court.

Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+) Bill 2005*

s 9(1A) Sale or delivery of X 18+ films to minor	150 penalty units (\$16,500) or imprisonment for 12 months	Reasonable belief the minor was an adult	X films currently dealt with under s 9
s 9(4) Sale or delivery of MA 15+ films (other than by parent) to minor under 15	75 penalty units (\$8,250)	Reasonable belief the minor was an adult or parent consented	Current penalty 50 penalty units (\$5,500)
s 12 Public exhibition of R 18+ films before minors	100 penalty units (\$11,000)	Reasonable belief the minor was an adult	Current penalty 50 penalty units (\$5,500)
s. 13 Public exhibition of MA 15+ films before unaccompanied minor	40 penalty units (\$4,400)	Reasonable belief the minor was an adult or was accompanied by a parent or guardian	Current penalty 10 penalty units (\$1,100)
s 14 Private exhibition of RC X 18+ or R 18+ films to minors	For RC, 200 penalty units ((\$22,000); for X 18+ films 75 penalty units (\$8,250)	Reasonable belief the minor was an adult	Currently penalty for RC or X 18+ 100 penalty units (\$11,000)
s 17 Leaving RC, X 18+, R 18+ or MA 15+ films in certain places	For RC, 200 penalty units (\$22,000) or 2 years imprisonment; For X 18+, 100 penalty units (\$11,000); For R 18+, 50 penalty units (\$5,500); For MA 15+, 25 penalty units (\$2,750)	Reasonable excuse; or did not know, or could not reasonably be expected to have known, that the film is or would be classified RC or X 18+ ⁵	Offence currently only applies to RC or X 18+ films, with penalty of 100 penalty units (\$11,000)
s 18 Possession or copying of RC films for the purpose of sale or exhibition	200 penalty units (\$22,000) or imprisonment for 2 years	Nil	Offence currently applies to RC and X 18+ films, with penalty of 100 penalty units (\$11,000) or imprisonment for 12 months

8. The Committee notes that the Bill imposes severe penalties, with up to 2 years imprisonment and 200 penalty units (\$22,000), for strict liability offences for which there is no prescribed defence.
9. The Committee considers that strict liability may be appropriate for offences regarding restricted films to ensure their appropriate regulation and prevent carelessness in their handling.

⁵ The latter defence does not apply to R 18+ or MA 15+ films.

Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+) Bill
2005*

10. Given the importance of the protection of minors and public morals, the Committee does not consider the penalty levels for the offences to be inappropriate.
11. However, the Committee is concerned that such severe penalties could be imposed in circumstances where a person may not have intended to have committed the offence.

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| <ol style="list-style-type: none">12. As a general rule, the Committee considers that strict liability should be applied only where the penalty does not include imprisonment and there is a reasonable limit to any monetary penalty.13. The Committee refers to Parliament the question as to whether the severe penalties for strict liability offences proposed in the Bill trespass unduly on personal rights and liberties. |
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The Committee makes no further comment on this Bill.

2. CRIMES AMENDMENT (GRIEVOUS BODILY HARM) BILL 2005

Date Introduced:	2 March 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The object of the Bill is to amend the *Crimes Act 1900* ('Crimes Act') to ensure that offences under that Act relating to the infliction of grievous bodily harm extend to the destruction by a person of the foetus of a pregnant woman, other than in the course of a medical procedure.

Background

2. Currently, s 4 of the Crimes Act provides a non-exhaustive definition of grievous bodily harm to include any permanent or seriously disfiguring of a person.
3. In *R v King*⁶, the NSW Court of Criminal Appeal found that the loss of the unborn child may amount to grievous bodily harm to a pregnant woman, even where the woman suffers no other injury, because of the close physical connection between a pregnant woman and her unborn child.
4. The second reading speech to the Bill states:

[T]he amendment codifies the principles enunciated by the Court of Criminal Appeal in the King case, that the definition of grievous bodily harm in the Crimes Act includes the loss of an unborn child.

The amendment is the result of extensive consultations with all stakeholders and careful consideration of their opinions and suggestions. This amendment means that a range of Crimes Act offences, from the malicious infliction of grievous bodily harm with intent, which carries a maximum penalty of 25 years imprisonment, to causing grievous bodily harm by an unlawful or negligent act, which carries a maximum of two years imprisonment, will be covered. Criminal acts involving driving, such as that which claimed the life of Ms Shields' unborn child, will also be covered...

[T]he amendment recognises that not all cases will involve the same factual scenario or even the same level of criminality but that, nonetheless, all offenders will be held responsible...

It has never been and is not now the Government's intention that this amendment should affect the present law with respect to the lawful termination of pregnancy. And this bill does not affect that law. Nor is it the Government's intention that ... any medical personnel performing a medical

⁶ [2003] NSW CCA 399.

procedure that involves or results in foetal death ... should find themselves open to a criminal charge. For abundant caution, we have therefore exempted medical procedures from the amendment.⁷

The Bill

5. The Bill extends the existing definition of grievous bodily harm in s 4 of the Crimes Act to include the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

⁷ The Hon R J Debus MP, Attorney General, *Legislative Assembly Hansard*, 3 March 2005.

3. CRIMINAL APPEAL AMENDMENT (JURY VERDICTS) BILL 2004*

Date Introduced: 9 December 2004
House Introduced: Legislative Assembly
Member: Mr Andrew Tink MP
(Private Member's Bill)

Purpose and Description

1. The object of this Bill is to amend the *Criminal Appeal Act 1912* (the CAA) to introduce criteria which courts must apply when determining whether or not to grant an appeal against a jury verdict on the ground of miscarriage of justice arising from the publication or broadcast of prejudicial material.
2. The Bill seeks to limit the circumstances in which a court may grant an appeal on this ground, by requiring the court to be satisfied that a juror has read, seen or heard the prejudicial material relating to the case and was influenced by that material so as to cause a miscarriage of justice.⁸

Background

3. An accused's right of appeal is a fundamental part of the common law. As part of a general movement of reform of the criminal law, the CAA established a *statutory* jurisdiction of appeal in NSW.⁹

Allowing an appeal

4. Under the CAA, a court hearing an accused's appeal against conviction shall allow the appeal if it is of the opinion that:
 - the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence;
 - the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law¹⁰; or
 - that on any other ground whatsoever there was a miscarriage of justice [s 6(1)].

⁸ Mr A A Tink MP, *Legislative Assembly Hansard*, 10 December 2004.

⁹ This was based on the 1907 precedent of the English Court of Criminal Appeal. J Hickey, *An Overview of Sentence and Conviction Appeals in the NSW Court of Criminal Appeal*, Judicial Commission of New South Wales, www.judcom.nsw.gov.au/st/st16/#4.

¹⁰ Mere disagreement with the exercise of the discretion of a sentencing judge is *not* sufficient reason to intervene: *R v Allpass* (1993) 72 A Crim R 561 at 562 per the court. See also *R v Macdonell* (unreported, 8/12/95, NSW CCA) per Hunt CJ at CL.

5. However, s 6(1) includes a proviso that the court may, nonetheless, dismiss the appeal if it considers that no *substantial* miscarriage of justice has actually occurred.

6. This proviso is part of the wider right to a fair trial:

It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance, which was fairly open to him on being acquitted, there is, in the eyes of the law a miscarriage of justice.¹¹

Miscarriage of justice

7. It is for the courts to determine what constitutes a miscarriage of justice, and what satisfies the threshold of a substantial miscarriage of justice.¹² It has been held that an appeal ought to be upheld where the convicted person has “lost a real chance of acquittal”.¹³

8. In *Wilde v R*, the High Court stated the effect of the relevant authorities was that:

[u]nless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused, the conviction must be set aside...Unless that can be said, the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled, that is to say, a trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were strictly followed... The loss of such a chance of acquittal cannot be anything but a substantial miscarriage of justice. The question whether the jury would inevitably have convicted falls to be determined by the Court of Criminal Appeal. It is a question which the Court of Criminal Appeal must answer according to its assessment of the facts of the case.¹⁴

9. However, the majority of the High Court stressed in *Wilde v R* that there is no mechanical formula or rigid test to be applied to determine whether an irregularity is of this nature: each case depends on its own circumstances.¹⁵

¹¹ Street CJ in *R v De Cressac* 1985 1 NSWLR 381 at 390, citing the judgment of Fullagar J in *Mraz v The Queen* 93 CLR 493 at 514.

¹² See, eg, *R v Murphy* (1965) VR 187; *R v Chiron* (1980) 1 NSWLR 218; and *R v Khan* [2002] NSWCCA 521.

¹³ See Barwick CJ on the Victorian equivalent of s 6(1) in *R v Storey* (1978) 140 CLR 364 at 376: “...the question remains whether a jury of reasonable men (*sic*), properly instructed and on such of the material as should properly be before them, would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted”.

¹⁴ (1988) 164 CLR 365 per Brennan, Dawson and Toohey JJ at 371 – 372. See also, more recently, *R v Karki* [2002] NSWCCA 67, citing *Glennon v R* (1994) 68 ALJR 209 to the effect that a trial judge’s misdirection was not so fundamental that “the proceedings have so far miscarried as barely to be a trial at all”.

¹⁵ In determining the question, it will be appropriate to have regard to the strengths and weaknesses of the prosecution and defence cases in order to assess the gravity and significance of the error: *Wilde v R* (1988) 164 CLR 365 at 374.

Impetus for the Bill

10. The second reading speech states that the Bill arises from the NSW Court of Criminal Appeal decision of *R v Tayyab Sheikh*.¹⁶
11. In that case, Justices Mason and Wood held that appellate courts have a power to set aside a conviction in an extreme case if the trial has miscarried because of the atmosphere of external hostility in which it was conducted.¹⁷ Their Honours considered that this was such a case, and that conviction of the accused had not been inevitable.
12. Their Honours considered that a conviction following an unfair trial was a conviction obtained at too high a price.¹⁸
13. In dissent, Justice Sully cited Justice McHugh in *Gilbert v The Queen*:

Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.¹⁹
14. His Honour was unpersuaded that the accused had been deprived of a chance fairly open to him of acquittal.²⁰ Therefore he did not accept that there had been a substantial miscarriage of justice.

The Bill

15. The Bill inserts a new s 6AAA into the CAA as follows:
 - (1) Despite section 6, the court must not allow an appeal against the verdict of a jury on the ground that there was a miscarriage of justice due to prejudicial material published or broadcast relating to the case, unless it is satisfied that the material actually influenced an opinion or conclusion formed by the jury or a member of the jury causing a miscarriage of justice.
 - (2) For the purpose of making a decision under subsection (1), the court may examine a juror on oath to determine:
 - (a) whether the juror read, saw or heard alleged prejudicial material published or broadcast relating to the case, and
 - (b) whether the juror was influenced by the material.
16. Proposed s 6AAA(2) is to apply despite any provisions of the Jury Act.²¹

¹⁶ [2004] NSWCCA 38 (4 March 2004).

¹⁷ *R v Tayyab Sheikh* [2004] NSWCCA 38 at paragraphs 26-27. Mason P and Wood CJ at CL found that fairness and the appearance of fairness in Sheikh's trial was compromised primarily because feelings of anger, revulsion and general hostility to young Lebanese men that emanated from the media coverage of the first trial would have lingered heavily in the atmosphere of Sheikh's trial.

¹⁸ *R v Tayyab Sheikh* [2004] NSWCCA 38 at paragraph 41.

¹⁹ [2000] 201 CLR 414 at 425 (paragraph 31).

²⁰ *R v Tayyab Sheikh* [2004] NSWCCA 38 at paragraph 134

²¹ The *Jury Act 1977* provides that a judge or coroner may examine a juror on oath to determine whether a juror:

(a) has read, seen or heard alleged prejudicial material published or broadcast during the trial or inquest; and

Trespass to individual rights and liberties [s 8A(1)(b)(i) LRA]**Limit on Court of Criminal Appeal considering appeals: proposed s 6AAA**

17. Proposed s 6AAA prevents the court from allowing an appeal under s 6(1) on the ground that there was a miscarriage of justice due to prejudicial material published or broadcast relating to the case unless it is satisfied that the material actually influenced a juror.
18. Thus, the court would be unable to allow an appeal when it considers that it is *likely* that a juror was affected by such prejudicial material, but cannot be satisfied that the juror was in fact so affected.
19. It is a fundamental human right recognised by the common law²² and international law²³ that any person accused must be presumed innocent until proven guilty. The standard of proof required by the common law is beyond reasonable doubt.
20. To deny an appeal in circumstances where there was a likelihood that a trial was blemished, and thereby the accused was denied a fair chance of acquittal, arguably falls short of that standard.

21. **The Committee notes that proposed s 6AAA would prevent the Court from allowing an appeal where it is of the opinion that a miscarriage of justice resulted from an unacceptable risk that jurors had been prejudiced in their decision-making by published or broadcast material, but has not been able to satisfy itself that any juror had in fact been so prejudiced.**
22. **The Committee refers to Parliament the question as to whether proposed s 6AAA trespasses unduly on the right to a fair trial and the presumption of innocence until guilt is proven beyond reasonable doubt.**

The Committee makes no further comment on this Bill.

(b) has been influenced by the material: s 55D of the *Jury Act 1977*.

In 2004 further safeguards were added by the *Jury Amendment Act 2004* in the wake of the Court of Criminal Appeal decisions in *R v K* [2003] NSWCCA 406, and *R v Skaf* [2004] NSWCCA 37, in which jurors had undertaken research of their own in the course of a trial, and re-trials were ordered: Justice Virginia Bell, "How to Preserve the Integrity of Jury Trials in a Mass Media Age", Supreme and Federal Courts Judges' Conference, January 2005.

²² See, eg, *Obeid v John Fairfax Publications Pty Ltd* [2003] NSWSC 967 (23 October 2003).

²³ Article 14(2) of the International Covenant on Civil and Political Rights, on equality before the courts and the right to a fair and public hearing by an independent court established by law, states:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

4. Criminal Procedure Amendment (Evidence) Bill 2005

Date Introduced:	2 March 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Criminal Procedure Act 1986* (the CPA) so as to permit the admission of a record of evidence given by a complainant in a sexual assault proceeding in any new trial that is ordered following an appeal.

Background

2. It was stated in the second reading speech that:

This bill is part of the on-going process of reform to improve the process surrounding sexual assault prosecutions for complainants. [It] amends the *Criminal Procedure Act 1986* to permit the record of evidence given by the complainant in a sexual assault trial to be admitted as the evidence in any new trial ordered following an appeal. Honourable members will be aware that on 3 February the Director of Public Prosecutions [DPP] announced that the retrial of two accused would not proceed because the complainant was unwilling to testify again and the case was not strong enough to proceed without her evidence.

...In certain circumstances under the current law the evidence of complainants from previous trials is now admissible on subsequent retrial. However, unless an exception to the hearsay rule applies, the record of the original proceedings is inadmissible. The rule against hearsay...currently prevents the admission of representations made by a complainant in a previous trial to prove the facts upon which the prosecution seeks to rely in a subsequent retrial.

[The bill] permits the admission of a record of evidence given by a complainant in a prescribed sexual offence proceeding in any new trial that is ordered following an appeal...

The bill does not require the record of the original evidence to be admitted in evidence on all retrials. Some complainants will choose to give all their evidence again in person. It is important that complainants can choose to give evidence on a retrial. It empowers complainants and allows them a decision-making role in the court process. The prosecutor will no doubt advise complainants that the case will be stronger if they can manage to give all their evidence again in front of a new jury. Where the complainant does choose to give all their evidence again on a retrial, no notice need be served by the prosecution. The complainant will have a choice about whether to give no further evidence, give limited further evidence, or give all their evidence afresh.²⁴

²⁴ The Hon R J Debus MP, Attorney General, *Legislative Assembly Hansard*, 2 March 2005.

The Bill

3. The Bill provides that, where a person is convicted of a sexual offence and, on appeal, a new trial is ordered, the prosecutor may tender as evidence in the new trial proceedings a record of the evidence of the complainant given in the proceedings that gave rise to the conviction [proposed s 306B(1)].

This will include the evidence given by the complainant on examination in chief, and any further evidence given on cross-examination or re-examination [proposed s 306B(2)].
4. The record will be admissible only if the prosecutor gives the court and the accused person notice of the prosecutor's intention to tender the record. The hearsay rule under the *Evidence Act 1995* will not prevent the admission or use of the record as evidence [proposed s 306B(3)].
5. If a record of the evidence of a complainant is admitted in the new trial proceedings, the complainant will not be compellable to provide any further evidence (proposed s 306C), but may elect to do so (with leave of the court hearing the new trial proceedings) [proposed s 306D].
6. The Bill also makes provision for the form in which a record of the original evidence given by a complainant is to be tendered in new trial proceedings [proposed s 306E].
7. The Bill also amends the *Criminal Procedure Regulation 2000* consequentially, to make provision for:
 - (a) the matters to be specified in the notice required to be given by the prosecutor before tendering a record of the original evidence of a complainant [proposed cl 14A]; and
 - (b) the arrangements that are to be made for giving an accused person access to that record if it is an audio visual recording or audio recording [proposed 14B].

Issues Considered by the Committee

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

Retrospectivity: Schedule 1

8. The Bill extends Division 3 to proceedings for a new trial ordered *before* the commencement of the Division, including new trials that have already been commenced or partly heard [proposed s 306B(9)].
9. The Committee is concerned to identify any retrospective legislation that may adversely affect any person.
10. The Queensland Scrutiny of Bills Committee has characterised the impact of proposed retrospectivity by considering whether an individual has *legitimate*

expectations under the existing law, and whether he or she could reasonably rely on those expectations.²⁵

Legitimate expectations

11. Currently, if a re-trial is ordered by an appeal court and the Director of Public Prosecutions decides to proceed, a defendant may be said to have a legitimate expectation that the re-trial will be conducted according to existing common law and statutory laws, in particular, the fair trial principle.²⁶
12. Part of this legitimate expectation is that the complainant will be called as a prosecution witness to give oral evidence, according to the adversarial tradition.
13. As a consequence, it would also be a legitimate expectation that the complainant would be available for cross-examination by the defendant's counsel, so that the defence may undertake a forensic examination of the prosecution's chief witness.
14. However, the retrospectivity of Division 3 means that such a legitimate expectation cannot be relied upon in relation to re-trials ordered *before* its commencement. Instead, a defendant will have to rely on the cross-examination conducted in the original trial as the basis for the defence, irrespective of any inadequacies in that original cross-examination.²⁷

Right to a fair trial

15. The legitimate expectations of a defendant under the fair trial principle must be balanced against the needs of complainants of sexual assault, and of the community generally.
16. The rights of a defendant under the fair trial principle are not absolute, and are subject to "the interests of the Crown acting on behalf of the community".²⁸ Indeed, the concept of fairness is not fixed and immutable, but "may vary with changing social standards and circumstances"²⁹, such that it is inextricably "bound up with prevailing social values"³⁰.
17. The concept of *fairness* can take into account the interests of the victim³¹ - including the desirable goal of encouraging victims to report sexual offences to the police - as well as minimising the re-traumatisation experienced by sexual assault complainants, as noted in the second reading speech.³²

²⁵ See, eg, *Alert Digest* No. 2 of 1998 on the *Statute Law (Miscellaneous Provisions) Bill 1998* (Qld).

²⁶ See *Dietrich v R* (1992) 177 CLR 292.

²⁷ This will be the case unless the complainant chooses to give further evidence: proposed s 306D of the *Criminal Procedure Act 1986*.

²⁸ *Dietrich v R* (1992) 177 CLR 292 at 335, per Deane J; quoting *Barton v R* (1980) 147 CLR 75 at 101, per Gibbs ACJ and Mason J.

²⁹ *Dietrich v R* (1992) 177 CLR 292 at 328, per Deane J.

³⁰ *Dietrich v R* (1992) 177 CLR 292 at 364, per Gaudron J.

³¹ *Dietrich v R* (1992) 177 CLR 292 at 357, per Toohey J.

³² The Hon R J Debus MP, Attorney General, *Legislative Assembly Hansard*, 2 March 2005.

18. In 2003, the NSW Law Reform Commission published its Report on the cross examination of complainants by accused in sexual assault trials. The Commission noted the following on the balancing of competing interests:

The Commission accepts that the first and overwhelming element of the public interest in the administration of justice is that the accused is fairly tried. This does not mean, however, that the *interests* of the accused take priority over all other interests that may be affected by the proceedings. There is a public interest in the protection of these other interests — for example, in preventing certain kinds of confidential information from being exposed (such as the identities of informers or matters covered by legal professional privilege)...The crucial question therefore is not whether the *interests* of the accused might be prejudiced but whether the fairness of the trial might be called into question...³³

19. Any record of the original evidence given by the complainant that the prosecution tenders at retrial would include any further evidence given on cross-examination or re-examination in the original trial [proposed s 306B(2)]. Thus the defendant's original right to cross-examine the evidence of the complainant is preserved.
20. Undoubtedly, the Bill's retrospectivity benefits those complainants who have decided they cannot deal with giving evidence in re-trials ordered before the commencement of Division 3.
21. At the same time, the community benefits, due to the public interest in ensuring that persons accused of sexual offences are dealt with by the criminal justice system. It is likely to offend community notions of justice if a person accused of sexual offences avoids a re-trial simply because the complainant is unable or unwilling to give evidence again. In these ways, both complainants and the community generally will benefit from the enactment of the Bill.
22. It should also be borne in mind that the prosecution's burden of proof and the presumption of innocence ensure that fundamental fair trial processes will be followed in any re-trial ordered before, or after, the commencement of Division 3. This, in turn, will ensure that the jury determines the weight to be given to the complainant's original evidence in a context that is weighted in favour of fairness to the defendant.

- 23. The Committee will always be concerned to identify where legislation has a retrospective effect that may impact adversely upon any person.**
- 24. The Bill's application to re-trials ordered before its commencement impinges upon a defendant's legitimate expectation that the retrial will be conducted in accordance with current law and that they will therefore be able to re-examine the complainant at the new trial.**

³³ NSW Law Reform Commission, Report 101 (2003) *Questioning of complainants by unrepresented accused in sexual offence trials*, at paragraph 3.66.

- 25. Having regard to the benefit to the complainant of not being compelled to testify a second time, the benefit to the community of ensuring that persons accused of sexual offences are effectively dealt with by the criminal justice system, and the continuing common law requirement of a fair trial, including the presumption of innocence and the requirement that guilt be proved beyond reasonable doubt, the Committee does not consider that the bill trespasses unduly on personal rights and liberties.**

The Committee makes no further comment on this Bill.

5. National Parks and Wildlife (Adjustment of Areas) Bill 2005

Date Introduced:	2 March 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Environment

Purpose and Description

1. This Bill revokes the reservation under the *National Parks and Wildlife Act 1974* of certain areas of land as national park or nature reserve and amends the *National Park Estate (Southern Region Reservations) Act 2000* to extend deadlines in certain provisions relating to roads within or in the vicinity of land transferred to the national park estate by that Act.

Background

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

This Bill proposes the revocation of small areas of land in three national parks and one nature reserve. The need for such revocations arises from time to time, for example to correct reserve boundary errors or boundary encroachments. To achieve this, and to ensure that conservation outcomes remain a priority, lands reserved under the *National Parks and Wildlife Act 1974* may not be revoked, except by an Act of Parliament.

Also included in this Bill is an amendment to the *National Park Estate (Southern Region Reservations Act) 2000* to extend the deadlines for the road provisions in the Act for a period of two years.

The Department of Environment and Conservation carefully considers all alternatives to the revocation of land and their merits before revocation of land from a reserve may be considered...³⁴

The Bill

3. The Bill:
 - revokes the reservation under the *National Parks and Wildlife Act 1974* of areas of land within:
 - Botany Bay National Park (to enable NSW Golf Club to construct a footbridge and to correct a small boundary error³⁵);
 - Kosciuszko National Park (to remove a number of developments associated with Talbingo Dam from the Park³⁶);

³⁴ The Hon R J Debus MP, Minister for the Environment, *Legislative Assembly Hansard*, 2 March 2005 (Second reading speech).

³⁵ Second reading speech.

National Parks and Wildlife (Adjustment of Areas) Bill 2005

- Lake Innes Nature Reserve (to allow Hastings Council to construct an extension of the Port Macquarie ring road³⁷); and
- South East Forest National Park (to correct errors that were made during the gazettal of this national park³⁸); and
- vests those areas in the Crown as Crown land (in the case of the areas within Botany Bay National Park) or in the Minister administering Part 11 of the *National Parks and Wildlife Act 1974* (in all other cases); and
- amends the *National Park Estate (Southern Region Reservations) Act 2000* to extend deadlines in certain provisions relating to roads within or in the vicinity of land transferred to the national park estate by that Act.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

4. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.
5. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.
6. The revoked lands will not be transferred until compensatory lands are first transferred to the Department of Environment and Conservation.³⁹ The office of the Minister for the Environment has advised that this requires that there be some flexibility as regards the commencement date or dates of the Bill.

The Committee makes no further comment on this Bill.

³⁶ Second reading speech.

³⁷ Second reading speech.

³⁸ Second reading speech.

³⁹ Second reading speech.

6. Water Efficiency Labelling And Standards (New South Wales) Bill 2005

Date Introduced:	2 March 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Frank Sartor MP
Portfolio:	Energy and Utilities

Purpose and Description

1. The object of this Bill is to give effect in this State to a nationally consistent Water Efficiency Labelling and Standards scheme by applying the Commonwealth *Water Efficiency Labelling and Standards Act 2005* to NSW.

Background

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

The Bill will ... give effect in this State to a nationally consistent Water Efficiency Labelling and Standards [WELS] scheme. The purpose of the WELS scheme is to conserve water supplies by reducing water consumption through the adoption of water efficient appliances; to provide appliance efficiency and performance information to purchasers of water appliances to allow them to make a well-informed purchasing decision; and to promote the adoption of efficient and effective water-use technology...

The proposed legislative approach is a Commonwealth-led legal framework, supported by mirror State and Territory legislation. Under this approach, the Commonwealth legislation would apply to corporations and importers. The State and Territory legislation would apply to businesses that are beyond the limit of Commonwealth constitutional power, such as unincorporated businesses.

The Commonwealth's *Water Efficiency Labelling and Standards Bill 2004* was passed by the Senate on 8 February 2005 and is awaiting assent. The legislation adopted by States and Territories will provide for the conferral of relevant powers and functions on a Commonwealth-based WELS regulator. The regulator will oversee the registration of WELS products to which the mandatory labelling and standards provisions apply, and will monitor and enforce compliance with the scheme.⁴⁰

The Bill

3. The Bill applies the Commonwealth water efficiency laws (which are defined in clause 4 as the *Water Efficiency Labelling and Standards Act 2005* ('Commonwealth Act') and all regulations, guidelines, principles, standards and codes of practice in force under that Act) as a law of NSW (cl 5).
4. It also provides that the following Commonwealth laws apply in NSW in relation to the applied provisions:

⁴⁰ The Hon Frank Sartor MP, Minister for Energy and Utilities, *Legislative Assembly Hansard*, 2 March 2005.

Water Efficiency Labelling And Standards (New South Wales) Bill 2005

- *Acts Interpretation Act 1901* (cl 7); and
- administrative laws (which are defined in clause 4), except as provided by the regulations under the proposed Act (cl 14).

5. Other provisions of the Bill provide that:

- regulations under the proposed Act may modify the Commonwealth water efficiency laws for the purposes of the proposed Act (cl 6);
- the Scheme Regulator (the *Commonwealth Regulator*) appointed under the Commonwealth Act and other authorities and officers have the same functions and powers under the applied provisions as they have under the Commonwealth water efficiency laws (cl 8);
- an offence against the applied provisions is to be treated as if it were an offence against a law of the Commonwealth (cl 10);
- a person is not liable to be punished for an offence under the applied provisions if the person has been punished for the same offence under the Commonwealth water efficiency laws (cl 13);
- a matter arising in relation to the applied provisions is taken to be a matter arising in relation to the laws of the Commonwealth and not NSW (cl 14);
- any provision of a Commonwealth administrative law applying because of clause 14 that purports to confer jurisdiction on a federal court is taken not to have that effect (cl 14(4));⁴¹
- the validity of a licence, certificate or other thing issued, given or done for the purposes of the applied provisions is not affected only because it was issued, given or done also for the purposes of the Commonwealth water efficiency laws (cl 17);
- all money payable under the proposed Act and the applied provisions is to be paid to the Commonwealth (cl 19);
- the definition of *relevant State Act* in section 4 of the *NSW Co-operative Schemes (Administrative Actions) Act 2001* extends to include the proposed Act (Sched 1[1]). In particular, the amendment will enable that Act to be read down to exclude any provisions relating to the conferral of duties on Commonwealth authorities and officers that may be found to exceed the legislative authority of the State; and
- the definition of *relevant State Act* in section 3 of the *Federal Courts (State Jurisdiction) Act 1999* of New South Wales is extended to include the proposed Act. In particular, the amendment will enable regulations to be made under section 16 (2) of that Act to make modifications to the administration and enforcement of the applied Commonwealth laws as a consequence of any future decisions of the High Court with respect to the conferral of functions on Commonwealth officials in connection with co-operative Commonwealth/State legislative arrangements.

⁴¹ The Explanatory Note to the Bill states that this is consistent with the High Court decision in Wakim's case (*Re Wakim; Ex parte McNally* (1999) 198 CLR 511) that a State law cannot confer jurisdiction on the Federal Court.

Issues Considered by the Committee

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

Strict liability offences, Commonwealth Act, sections 33-38

6. Sections 33-38 of the Commonwealth Act, which the Bill applies to NSW, create strict liability offences. The penalty for these offences, which relate to the supply of WELS products, is 60 penalty units (\$6,600).
7. Under s 6.1 of the Commonwealth *Criminal Code*, a strict liability offence is an offence where:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact under section 9.2 is available.
8. The Committee has commented previously that such offences, unless properly justified, trespass on personal rights and liberties.
9. This issue received the attention of the Senate Scrutiny of Bills Committee when the Commonwealth Bill was introduced. After comment from that Committee, the relevant Explanatory Memorandum was amended to offer the following justification for these strict liability provisions:

Strict liability offences of the bill do not unduly trespass upon personal rights and liberties. It is important to note that the intent of imposing strict liability is not to criminalise innocent contraventions of the scheme but to strongly discourage actions that lead to excess urban water consumption that would further jeopardise the supply of this diminishing resource. The strict liability provisions contained in the bill therefore remove the uncertainty that would otherwise be inherent in the labelling and standards regime and create a simpler – as well as more stringent – standard.
10. The Senate Scrutiny of Bills Committee commented:

This explanation would appear to place the scheme within the principles proposed by the Committee in its report on strict liability offences and, in particular, the recognition that ‘strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment or financial or corporate regulation’ (*Sixth Report of 2002*, p 284).⁴²
11. The Senate Committee has published a fuller explanation from the relevant Minister on the need for these strict liability provisions.⁴³
12. The Committee shares the view of the Senate Committee that strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as the one provided for in the Commonwealth Act, which this Bill applies to NSW.

13. The Committee does not consider that the application of strict liability to certain offences to be applied in NSW by the Bill unduly trespasses on personal rights and liberties.

⁴² Extracts from *Senate Alert Digest No 12 of 2004*.

⁴³ Senate Standing Committee for the Scrutiny of Bills, *First Report of 2005*, 9 February 2005.

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

Commencement by proclamation: Clause 2

14. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.
15. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.
16. The Minister's Office has advised the Committee that commencement by proclamation is necessary as the Commonwealth legislation, on which the uniform State and Territory legislation is based, is still waiting assent. The delay in commencement will ensure that the Bill does not come into force before the Commonwealth Bill.
17. The Minister's Office also advised that the overall target for the national uniform legislation to be in force is 1 July 2005. However, the Office indicated that most States and Territories are progressing well in the parliamentary passage of their mirror legislation and that deadline may be brought forward.

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

Amending Act by Regulation, Henry VIII Clause: Clause 6

18. Clause 6 of the Bill provides that regulations made under the proposed Act may:
 - (a) modify the Commonwealth water efficiency laws for the purposes of the proposed Act; and
 - (b) provide that the Commonwealth water efficiency laws apply as if an amendment made to those laws made by the Commonwealth had not taken effect (cl 6).
19. The Commonwealth water efficiency laws are defined in the Bill as the *Water Efficiency Labelling and Standards Act 2005 (Cth)* and all regulations, guidelines, principles, standards and codes of practice in force under that Act (cl 4).
20. Clause 6 has the effect of allowing these laws to be modified in their application in NSW by regulation.
21. While the Committee is concerned to identify where a bill allows regulations to amend primary legislation, there are circumstances in which this may be appropriate. In this regard, the Committee refers to a report of the Queensland Scrutiny of Legislation Committee examining this type of clause, known as a "Henry VIII" clause. The Queensland Committee considered that enabling an Act to be amended by subordinate legislation may be appropriate when:
 - facilitating the effective application of innovative legislation;
 - facilitating transitional arrangements;
 - facilitating the application of national schemes of legislation; and

- circumstances warrant immediate Executive action.⁴⁴
22. In this case, the Committee is of the view that the Bill falls within the third category referred to by the Queensland Committee and agrees with that Committee that in such a case, enabling the Bill to be amended by subordinate legislation may be appropriate. The Committee also notes that regulations are disallowable instruments and, as such, are subject to the Parliament's scrutiny.

23. The Committee considers that allowing regulations to modify the application of the Commonwealth Act to New South Wales as provided in the Bill does not comprise an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

⁴⁴ Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *The use of "Henry VIII clauses" in Queensland legislation*, Brisbane, January 1997 at 38-55.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

7. Civil Liability Amendment (Offender Damages) Bill 2005

Date Introduced:	23 February 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Justice

Background

1. The Committee reported on the *Civil Liability Amendment (Offender Damages) Bill 2005* in *Legislation Review Digest No 2* of 1 March 2005.
2. This Bill amends the *Civil Liability Act 2002* to make further provision with respect to claims for damages for negligence for death or injury suffered by offenders in custody. In particular, the Bill seeks to clarify Part 2A of the Act, which had been inserted into the Act by the *Civil Liability Amendment (Offender Damages) Act 2004* (“2004 Act”). The Bill provides that Part 2A applies, with certain exceptions, to any civil liability whether arising before, on or after the commencement of the Bill, and to proceedings instituted before such commencement.
3. The Committee was of the view that the proposed amendments, although of an administrative nature, may nonetheless directly and adversely affect the compensation rights of individuals under the *Civil Liability Act*. The Committee resolved to write to the Minister to seek his advice as to the need for amendments to Part 2A of the *Civil Liability Act 2002* to apply retrospectively.

The Minister’s Response

4. In his reply of 8 March 2005, the Minister advised the Committee that the retrospective provisions highlighted by the Committee do not apply to litigants who are not already subject to the provisions of the 2004 Act, namely litigants who commenced proceedings *before* the 2004 Act commenced.

Committee’s Conclusion

5. The Committee thanks the Minister for his response.
6. The Committee notes that it was not seeking to clarify the scope of the retrospective provisions. The Committee discussed limitations on the Bill’s retrospective application in paragraphs 9 and 10 of its report. Rather, the Committee is seeking to obtain a

justification for the need for any retrospective provisions in the Bill that may adversely affect any person.

7. The Committee remains of the view that legislation that adversely affects individuals should not be applied retrospectively without a clear justification in the public interest. The Committee therefore seeks an explanation as to why it is necessary for the Bill to apply retrospectively in certain situations so the Parliament can better determine whether this trespass on personal rights is undue.
8. In its report on the Bill, the Committee noted that while it had previously been explained that the retrospective application of the 2004 Act was “necessary to prevent a flood of speculative claims”, that rationale may not be applicable to the current Bill and no other rationale had been given.
9. The Committee therefore continues to seek an explanation as to why the Bill, which may have an adverse impact on the compensation rights of some persons, retrospectively applies to current proceedings where:
 - if the relevant person is an adult, proceedings commenced on or after 15 January 2004; and
 - if the relevant person is a child, proceedings commenced on or after 16 March 2004.

The Committee makes no further comment on this Bill.



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

1 March 2005

Our Ref:LRC1161

Hon John Hatzistergos MLC
Minister for Justice
Level 25
59-61 Goulburn St
Sydney NSW 2000

Dear Minister

Civil Liability Amendment (Offender Damages) Bill 2005

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 5 of 2004*.

The Committee notes that the Bill adds a new Part 6 to Sch 5 to the *Civil Liability Act 2002*. This provides that Part 2A applies to any civil liability whether arising before, on or after the commencement of the Bill, and to proceedings instituted before such commencement.

The Committee notes that, although the proposed amendments are of the nature of administrative changes to the operation of Part 2A of the *Civil Liability Act 2002*, these changes may nonetheless directly and adversely affect the compensation rights of individuals under that Act.

The Committee seeks your advice as to the need for the retrospective application of the proposed amendments to Part 2A of the *Civil Liability Act 2002*.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Peter Primrose'.

Peter Primrose MLC
Chairman



New South Wales
Minister for Justice

The Hon. Peter Primrose MLC
Chairman, Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY 2000

Dear Mr Primrose

- 8 MAR 2005

Re: *Civil Liability Amendment (Offender Damages) Bill 2005*

I refer to your letter of 1 March 2005.

The retrospective provisions highlighted by the Committee apply the provisions of this Bill to persons who have already lodged a claim for damages under Part 2A of the *Civil Liability Act 2002*. They do not apply to litigants who are not already subject to the provisions of this Act – ie, litigants who commenced proceedings before the *Civil Liability Amendment (Offender Damages) Act 2004* applied.

The Committee's comments refer to changes introduced by proposed new clause 18 to Schedule 1 of the *Civil Liability Act 2002*.

I am advised that proposed new clause 18 is consistent in its terms with clause 15 to Schedule 1 of the Act, that relates to amendments introduced by the *Civil Liability Amendment Act 2003*.

Clause 18(1) and (2) must be read by reference to the qualifications in clause 18(3): the proposed amendments will only apply to matters that Part 2A of the Act already applies to immediately before this amending Act commences.

In particular, the amendments will not apply to any of the circumstances described in paragraph 10 of the draft Legislation Review Digest, since those circumstances are already excluded from the operation of the Act.

Yours faithfully


(John Hatzistergos)

GPO BOX 5341 SYDNEY NSW 2001

8. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT BILL 2005

Date Introduced: 24 February 2005
House Introduced: Legislative Assembly
Minister Responsible: The Hon R J Carr MP
Portfolio: Premier

Background

1. The Committee reported on the *Independent Commission Against Corruption Amendment Bill 2005* in Legislation Review Digest No 2 of 2005.
2. The Committee noted that the Bill provided for the ensuing Act to commence on a day or days to be appointed by proclamation and wrote to the Premier to seek his advice as to the reasons for commencing the Act by proclamation, and a likely commencement date of the Act.

Minister's Reply

3. The Premier advised the Committee by letter dated 2 March 2005 (attached) that:

This Bill provides for the establishment of an Inspector of ICAC. It will be necessary to undertake administrative arrangements relating to the establishment of the Inspector before the legislation can be commenced. For example, steps will need to be taken to arrange for the appointment of an Inspector and the provision of suitable premises and administrative staff. As you would appreciate, the Government cannot take steps to implement these arrangements prior to the Bill passing through Parliament.

The Bill also changes the nomenclature and some of the procedures appertaining to hearings conducted by ICAC. ICAC will need to be notified in advance of the proposed commencement date of the legislation in order to ensure that it modifies its procedures to meet the new requirements.

4. The Premier also advised that he anticipated these arrangements would take several months to complete after the Bill has passed both Houses of Parliament and that commencement of the Act would take place shortly after.

Committee's Response

5. **The Committee thanks the Premier for his reply.**

The Committee makes no further comment on this Bill.



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

1 March 2005

Our Ref: LRC1166

The Hon R J Carr MP
Premier
Level 40 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Premier

Independent Commission Against Corruption Amendment Bill 2005

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 2 of 2005*.

The Committee notes that this Bill provides that the ensuing Act is to commence on a day or days to be appointed by proclamation.

The Committee seeks your advice as to the reasons for commencing this Bill by proclamation, and the time within which you expect the Act to commence.

Yours sincerely

A handwritten signature in cursive script that reads 'Peter Primrose'.

Peter Primrose MLC
Chairman



Premier of New South Wales
Australia



2/3/05

The Hon Peter Primrose, MLC
Chair, Legislation Review Committee
Parliament of NSW
Macquarie St
SYDNEY NSW 2000

Dear Mr Primrose

I refer to your Committee's request for advice as to the reasons for commencing the *Independent Commission Against Corruption (ICAC) Amendment Bill 2005* on proclamation.

The nature of the changes proposed by the Bill make commencement other than on proclamation impracticable.

This Bill provides for the establishment of an Inspector of ICAC. It will be necessary to undertake administrative arrangements relating to the establishment of the Inspector before the legislation can be commenced. For example, steps will need to be taken to arrange for the appointment of an Inspector and the provision of suitable premises and administrative staff. As you would appreciate, the Government cannot take steps to implement these arrangements prior to the Bill passing through Parliament.

The Bill also changes the nomenclature and some of the procedures appertaining to hearings conducted by ICAC. ICAC will need to be notified in advance of the proposed commencement date of the legislation in order to ensure that it modifies its procedures to meet the new requirements.

At this stage, it is anticipated that the necessary arrangements will take several months to complete once the Bill has passed through both Houses of Parliament. Commencement of the legislation will take place thereafter.

Yours sincerely

Bob Carr
Premier

LEVEL 39, GOVERNOR MACQUARIE TOWER, 1 FARRER PLACE, SYDNEY 2000, AUSTRALIA. TEL: (02) 9228 5239 FAX: (02) 9241 3616
G.P.O. BOX 5341, SYDNEY 2001

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	27/08/04	6699	05/11/04	
Wild Dog Destruction Regulation 2004	27/08/04	7133	26/10/04	

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Court Security Bill 2005	2
Crimes Amendment (Grievous Bodily Harm) Bill 2005	3
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	3
Criminal Procedure Amendment (Evidence) Bill 2005	3
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Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004	1
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Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	1
Legal Profession Bill 2004	1
Marine Safety Amendment (Random Breath Testing) Bill 2004	1
National Parks and Wildlife (Adjustment of Areas) Bill 2005	3
Photo Card Bill 2004	1
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	2
Road Transport (General) Bill 2004	1
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	1
Sheriff Bill 2005	2
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Standard Time Amendment (Co-ordinated Universal Time) Bill 2005	2
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Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill 2005*	2
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	3

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
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Electricity Supply Amendment Bill 2005	Minister for Energy and Utilities	01/03/05			2
Independent Commission Against Corruption Amendment Bill 2005	Premier	01/03/05	02/03/05		2, 3
Legal Profession Bill 2004	Attorney General	17/02/05			1
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
Road Transport (General) Bill 2004	Minister for Roads	17/02/05			1
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04	01/12/04	9	1
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	Minister for Roads	17/02/05			1
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
Civil Liability Amendment (Food Donations) Bill 2004	N			N	
Civil Liability Amendment (Offender Damages) Bill 2005	N,C				
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	R				
Court Security Bill 2005				N	
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	R				
Criminal Procedure Amendment (Evidence) Bill 2005	N				
Electricity Supply Amendment Bill 2005				C	
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004			N	N	N
Independent Commission Against Corruption Amendment Bill 2005				C	
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	R			N	
Legal Profession Bill 2004	N,C			N	
Marine Safety Amendment (Random Breath Testing) Bill 2004				C	
National Parks and Wildlife (Adjustment of Areas) Bill 2005				N	
Photo Card Bill 2004				C	
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	N				
Road Transport (General) Bill 2004	N	C		C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	N			C	
Sheriff Bill 2005				N	
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	N,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
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
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