



PARLIAMENT OF NEW SOUTH WALES

# **Legislation Review Committee**

## LEGISLATION REVIEW DIGEST

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No 1 of 2003

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## CHAIR'S FOREWORD

I am honoured to table the first *Legislation Review Digest*.

The *Digest* is the publication of the recently formed *Legislation Review Committee*.

The Legislation Review Committee, which replaces the Regulation Review Committee, commenced with the Fifty Third Parliament following amendments to *Legislation Review Act* in 2002.

Those amendments add a scrutiny of bills function to the existing regulatory review function of the previous Committee.

The Legislation Review Committee's bills scrutiny function commenced by proclamation on 15 August 2003.

Though its regular *Digests*, the Legislative Review Committee will report to both Houses on bills and regulations in accordance with its obligations under the *Legislation Review Act 1987*.

This Digest reports on the Committee's examination of the *Criminal Procedure Amendment (Sexual Offences Evidence) Bill 2003*. The Committee has produced this Digest on that Bill alone as the Bill is urgent. Normally the digest will report on all bills recently introduced and regulations recently considered by the Committee.

I trust Members of both Houses will find this and subsequent Legislation Review Digests of assistance in preparing their contribution to debate.

I thank all Members of the first Legislation Review Committee for their input. I also thank Committee Manager, Russell Keith, and his Staff for their work both in preparing this publication and their ongoing assistance to Committee Members.

Barry Collier, MP  
Chair

## THE LEGISLATION REVIEW COMMITTEE: STRUCTURE AND FUNCTIONS

The Legislation Review Committee is a Joint Standing Committee of the NSW Parliament.

The Committee comprises 5 Members of the Legislative Assembly and 3 Members of the Legislative Council.

The Legislative Review Committee was established by the *Legislation Review (Amendment) Act 2002* which was fully commenced on 15 August 2003. (A copy of the Act is provided at Appendix 1)

### Functions

The Legislation Review Committee has two primary functions under the *Act*:

- to scrutinise all bills introduced into the NSW Parliament;
- to scrutinise all regulations subject to disallowance by the Parliament.

### The Committee's Bills Scrutiny Function

The Committee's Scrutiny of Bills Function has its origins in the Legislative Council's Standing Committee on Law and Justice's Inquiry, *A NSW Bill of Rights*.

"The Committee recommends the establishment of a scrutiny of legislation committee following examples set by the Senate, Queensland, Victoria and the ACT Parliaments. A committee such as this has the potential to apply a systematic approach to the review of legislation at the time it is introduced, so as to alert the parliament to possible breaches of individual rights and liberties"  
(Legislative Council, Standing Committee on Law and Justice: *A NSW Bill of Rights*,

The Committee's functions with respect to Bills are set out in s 8A of *Legislation Review (Amendment) Act 2002*:

#### **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.

The Act clearly requires the Legislative Review Committee to report to both Houses of the Parliament as to whether any bill, wherever it is introduced, raises concerns under one or more of the five criteria set out in s 8A(1)(b).

Each of the criteria set out in s 8A(1)(b) are identical to those applied to bills by the Senate Scrutiny of Bills Committee and similar to those applied by equivalent committees in other legislatures such as Victoria, Queensland and the ACT.

## **The Scope of the Committee's Scrutiny Function**

The intended functioning of the Committee with respect to its bills scrutiny function is set out in the Second Reading Speech of Hon Paul Whelan on 18 June 2002 (see Appendix 2).

Briefly, it is important to point out that the Committee is *not* intended to be a third House of Parliament. So far as its scrutiny of bills function under the Act is concerned, the Committee will not:

- conduct enquiries or invite submissions;
- duplicate Parliamentary debate; or
- canvass general issues of government policy.

Rather, the primary function of the Committee is to identify and flag issues within its jurisdiction for the attention for all Members in a timely manner.

This is what the *Legislation Review Digest* is really all about: *A digest of advice to be tabled in both Houses and be available to all Members – ideally before the Second Reading debate.*

The Committee's function in this respect is to point Parliament to any issues of concern under s 8(1)(b). The manner in which these issues are dealt with is, of course, a matter for the Parliament itself.

## **Urgent Bills**

The intention is for the Committee to consider every bill as soon as it is introduced and report to Parliament before the resumption of the second reading debate.

Given that some bills will be urgent, this will not always be possible. Section 8A(2) of the Act recognises this by allowing the Committee to report on a bill after it has passed either House or has become an Act.

## **The Committee's Regulation Scrutiny Function**

The Legislation Review Committee's second major function is to scrutinise all regulations subject to disallowance by the Parliament.

Between 1988 and 2002, this function was carried out by the Regulatory Review Committee.

From 2003 onwards, this function will be performed by the Legislation Review Committee.

The Legislation Review Committee's functions with respect to Regulations are set out in s 9 of the *Legislation Review Act 1987* (as amended):

**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.

While the Act does not generally permit the examination of Government Policy, it clearly allows scope for the Committee to initiate enquiries and report to the Parliament.

Over the years, however, much of the former Committee's work with respect to scrutiny of regulations has been contained in the exchange of correspondence with the relevant Minister. This practice will continue with the new Legislation Review Committee and is not changed by the addition of the bills scrutiny function.

However, the Legislation Review Digest allows the Committee to improve its reporting on regulations which appear to attract the provisions of s9 of the Act. Accordingly, relevant Ministerial correspondence will be included with Legislation Review Digests.

This is similar to the practice of some equivalent committees in other Australian jurisdictions.



# Part 1 - Bills

## SECTION A: COMMENT ON BILLS

### 1. CRIMINAL PROCEDURE AMENDMENT (SEXUAL OFFENCE EVIDENCE) BILL 2003

Introduced: 2 September 2003

House: Legislative Assembly

Minister: The Hon Bob Debus MP

Portfolio: Attorney General

Trespasses unduly on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

#### Purpose and Description of Bill

The object of this Bill is to protect a complainant in sexual offence proceedings by providing that the accused cannot directly question the complainant and by providing instead for questions asked by an unrepresented accused to be put to the complainant by a person appointed by the court for that purpose. At present, that arrangement applies only to child witnesses under 16 years of age in any criminal proceedings and in certain civil proceedings.

#### Background

On 18 March 2003, the Premier announced that the Government would introduce a bill to bar defendants from representing themselves in sexual assault cases from cross-examining victims, and provide that such cross-examination be conducted by court appointed lawyers, or trial judges.

In March 2002, the Attorney General referred to the NSW Law Reform Commission ("the Commission") the issue of whether an unrepresented accused in a sexual offence trial should be permitted to cross-examine a complainant.

In June 2003, the Commission published its report, *Questioning of complainants by unrepresented accused in sexual offence trials*. The majority of the Commissioners recommended that there be an absolute prohibition on an unrepresented accused personally cross-examining a complainant in a sexual offence proceeding. They based their conclusion on the following considerations:

- Current measures for controlling cross-examination are inadequate;
- Prohibition would reduce unnecessary distress to the complainant;
- Prohibition would enable complainants to give evidence more accurately;
- Prohibition is consistent with other reforms to sexual assault law in New South Wales and elsewhere; and

- Prohibition would encourage reporting of sexual offences.

This approach was recommended in submissions to the Commission from a range of organisations, including the Legal Aid Commission, the NSW Director of Public Prosecutions, the Law and Justice Foundation of NSW, and the NSW Department for Women.

Two of the Commissioners dissented from this blanket prohibition, preferring to rely upon traditional procedure and increased judicial direction.

### **The Bill**

The Government has responded with the *Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003* (“the Bill”).

Schedule 1 of the Bill inserts a new s 294A into the *Criminal Procedure Act 1986*: “Arrangements for complainant in sexual offence proceedings giving evidence when accused person is unrepresented”. The crux of the Bill is the proposed s 294A(1) and (2):

(1) This section applies to sexual offence proceedings during which the accused person is not represented by counsel

(2) The complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court.

**Pursuant to a suspension of Standing Orders, the Bill passed all stages in the Legislative Assembly on 2 September 2003. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### **Issues arising under s 8A(1)(b)**

#### **Clause 2, Commencement**

The Committee notes that the Act commences on assent.

#### **Schedule 1, proposed clause 294A**

#### **Right to a Fair Trial**

The primary issue raised by this Bill is whether, in achieving its aim of reducing the potential distress and humiliation to complainants, the Bill impinges upon an accused's right to a fair trial.

Leading constitutional cases have established that “fairness” depends on the interests of justice in light of all the circumstances of a trial, and must accommodate the interests of both the accused and the Crown.<sup>1</sup>

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<sup>1</sup> See, e.g., *Dietrich v R* (1992) 177 CLR 292 at 300 (Mason CJ and McHugh J) and 353 (Toohey J).

The relevant features of a “fair trial” which relate to the Bill are:

1. The right to self representation; and
2. The presumption of innocence.

### 1. Self-Representation

Currently in New South Wales, there is nothing either at common law or in statute prohibiting an accused from dismissing legal representatives and conducting his or her own defence. The right is also recognised in international instruments, namely:

- Article 14 of the *International Covenant on Civil and Political Rights* and
- Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

However, it is also recognised under these instruments that there is *no absolute right* to self-representation, and the denial of self-representation will not necessarily form the basis of an unfair trial. The Bill does not prevent accused persons from representing themselves generally, but merely prohibits accused persons personally questioning a complainant in sexual offence proceedings. Accordingly, controls or limitations on the way accused persons represent themselves do not necessarily undermine the fairness of the trial procedure.

### 2. Presumption of Innocence

#### Cross-examination

Cross-examination is also a basic right of an accused. It is linked to the presumption of innocence, in that an accused has a right to test the evidence upon which the Crown relies to prove the accused’s guilt. It is particularly important in the case of sexual assault, where the only evidence may be that of the complainant. It is also recognised in international instruments in both common law and civil law jurisdictions:

- Article 14(3)(e) of the *International Covenant on Civil and Political Rights*; and
- Article 6(3)(d) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*

As with self-representation, the right to cross-examine is not an absolute right, and is subject to the court’s ability to regulate its own proceedings.<sup>2</sup>

In addition, s 294A(2) does not generally prohibit cross-examination of a complainant, but provides only that it may not be conducted by the accused personally.

Section 294A(2) refers to “a person appointed by the court”, which reflects the existing practice for children complainants under s 28 of the *Evidence (Children) Act 1997*.

Under s 294A(3), the court-appointed person acts solely as the conduit for the accused’s questions to the complainant:

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<sup>2</sup> *Kant v DPP* (1994) 73 A Crim R 481 at 488 (Gleeson CJ)

The person appointed by the court is to ask the complainant only the questions that the accused person requests that person to put to the complainant.

Questions posed to the complainant remain subject to the provisions of the *Evidence Act 1995*. Accordingly, s 294A(3) does not give a self-represented accused *carte blanche* to ask a complainant any question by way of a court-appointed person. Under Part 3.1 of the *Evidence Act*, questions must be relevant. Under s 41 of that Act, a court may disallow a question put to the complainant in cross-examination, or inform the complainant that a question need not be answered, if the question is:

- (a) misleading, or
- (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

Under the present Bill, the court retains these powers.

The Bill further regulates the role of the court-appointed person, by strictly confining that person to the role of cross-examiner for the purposes of s 294A, and ensuring that there is no suggestion that the court-appointed person is “acting” for the self-represented accused. Section 294A(4) states:

Any such person, when acting in the course of an appointment under this section, must not independently give the accused person legal or other advice.

By requiring an accused person representing themselves to cross-examine a complainant through a third party, the dynamics of personal cross-examination are altered. However, the content of questions which may be asked is not affected. The situation would be somewhat analogous to examining a witness through an interpreter.

### **Adverse inferences**

Section 294A(5) states:

The court does not have a discretion to decline to appoint a person under this section, despite anything to the contrary in section 28 of the *Evidence (Children) Act 1997* or any other Act or law.

The effect of s 294A(5) is that, as a court must appoint a person under s 294A, whenever the complainant is to be questioned, the court-appointed person stands between accused and complainant. Where the trial is being held before a jury, the involvement of an outside party at this point of the proceedings could, without safeguards, result in adverse inferences being drawn by jurors.

To overcome this possibility, s 294A(7) provides that in jury trials, the judge must:

- (a) inform the jury that it is standard procedure in such cases to appoint the person to put the questions to the complainant, and
- (b) warn the jury not to draw any inference adverse to the accused person or to give the evidence any greater or lesser weight because of the use of that arrangement.

**The Committee considers that the combination of the limits placed upon court-appointed questioners under s 294A(3) and (4), together with the use of judicial warning under s 294A(7), is sufficient to ensure the fairness of the trial procedure in respect of a self-represented accused.**

**Given the purpose of the bill and its safeguards, the Committee considers that the limitation on an accused person directly questioning a complainant does not unduly trespass on personal rights.**

#### **Schedule 1, proposed paragraph 294A(8)**

##### **Retrospectivity**

Proposed paragraph 294A(8) states:

This section extends to proceedings instituted before the commencement of this section including proceedings that have been partly heard.

In practice, this clause potentially has a retrospective effect in respect of trials that have already commenced. Given that the Bill allows the court appointed person to put questions requested by the accused to the complainant, the accused's existing right to cross-examine remains. All that changes is the method by which those questions are put.

**Given the conclusions of the Law Reform Commission, the purpose of the Bill, the safeguards inherent in the legislation and the interests of justice generally, the Committee is satisfied that the retrospectivity of the Bill does not, in this case, unduly trespass on personal rights.**

*The Committee makes **no further comment on the bill.***



# Appendices

## APPENDIX 1: LEGISLATION REVIEW ACT 1987

An Act to provide for a Legislation Review Committee of Parliament.

### Part 1 Preliminary

#### 1 Name of Act

This Act may be cited as the *Legislation Review Act 1987*.

#### 2 Commencement

This Act shall commence on the date of assent to this Act.

#### 3 Definitions

(1) In this Act:

**Bill** means a Bill for an Act of New South Wales.

**Chairman** means the Chairman of the Committee.

**Committee** means the Legislation Review Committee for the time being constituted under this Act.

**regulation** means a statutory rule, proclamation or order that is subject to disallowance by either or both Houses of Parliament.

**statutory rule** means:

(a) a regulation, by-law, rule or ordinance:

(i) that is made by the Governor, or

(ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or

(b) a rule of court.

**Vice-Chairman** means the Vice-Chairman of the Committee.

(2) In this Act:

(a) a reference to a function includes a reference to a power, authority and duty, and

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

### Part 2 Constitution and procedure of Committee

#### 4 Constitution of Legislation Review Committee

As soon as practicable after the commencement of the first session of each Parliament, a joint committee of members of Parliament, to be known as the Legislation Review Committee, shall be appointed.

#### 5 Membership

(1) The Committee shall consist of 8 members, of whom:

(a) 3 shall be members of, and appointed by, the Legislative Council, and

(b) 5 shall be members of, and appointed by, the Legislative Assembly.

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- (2) The appointment of members of the Committee shall, as far as practicable, be in accordance with the practice of Parliament with reference to the appointment of members to serve on joint committees of both Houses of Parliament.
- (3) A person is not eligible for appointment as a member of the Committee if the person is a Minister of the Crown or a Parliamentary Secretary.

## **6 Vacancies**

- (1) A member of the Committee ceases to hold office:
  - (a) when the Legislative Assembly is dissolved or expires by the effluxion of time,
  - (b) if the member becomes a Minister of the Crown or a Parliamentary Secretary,
  - (c) if the member ceases to be a member of the Legislative Council or Legislative Assembly,
  - (d) if, being a member of the Legislative Council, the member resigns the office by instrument in writing addressed to the President of the Legislative Council,
  - (e) if, being a member of the Legislative Assembly, the member resigns the office by instrument in writing addressed to the Speaker of the Legislative Assembly, or
  - (f) if the member is discharged from office by the House of Parliament to which the member belongs.
- (2) Either House of Parliament may appoint one of its members to fill a vacancy among the members of the Committee appointed by that House.

## **7 Chairman and Vice-Chairman**

- (1) There shall be a Chairman and a Vice-Chairman of the Committee who shall be elected by and from the members of the Committee.
- (2) A member of the Committee ceases to hold office as Chairman or Vice-Chairman of the Committee if:
  - (a) the member ceases to be a member of the Committee,
  - (b) the member resigns the office by instrument in writing presented to a meeting of the Committee, or
  - (c) the member is discharged from office by the Committee.
- (3) At any time when the Chairman is absent from New South Wales or is, for any reason, unable to perform the duties of Chairman or there is a vacancy in that office, the Vice-Chairman may exercise the functions of the Chairman under this Act or under the *Parliamentary Evidence Act 1901*.

## **8 Procedure**

- (1) The procedure for the calling of meetings of the Committee and for the conduct of business at those meetings shall, subject to this Act, be as determined by the Committee.
- (2) The Clerk of the Legislative Assembly shall call the first meeting of the Committee in each Parliament in such manner as the Clerk thinks fit.
- (3) At a meeting of the Committee, 4 members constitute a quorum, but the Committee shall meet as a joint committee at all times.
- (4) The Chairman or, in the absence of the Chairman, the Vice-Chairman or, in the absence of both the Chairman and the Vice-Chairman, a member of the Committee elected to chair the meeting by the members present shall preside at a meeting of the Committee.



- (5) The Vice-Chairman or other member presiding at a meeting of the Committee shall, in relation to the meeting, have all the functions of the Chairman.
- (6) The Chairman, Vice-Chairman or other member presiding at a meeting of the Committee shall have a deliberative vote and, in the event of an equality of votes, shall also have a casting vote.
- (7) A question arising at a meeting of the Committee shall be determined by a majority of the votes of the members present and voting.
- (8) The Committee may sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament.
- (9) The Committee may sit and transact business on a sitting day of a House of Parliament during the time of the sitting.

## **Part 3 Functions of Committee**

### **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,

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- (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 with respect to regulations 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.

### **10 Reports as to Bills or regulations**

- (1) If, at the time at which the Committee seeks to report to either House of Parliament in accordance with section 8A or 9, the House is not sitting, the Committee shall present copies of its report to the Clerk of the House.
- (2) A report so presented to the Clerk of a House shall:
  - (a) on presentation and for all purposes, be deemed to have been laid before the House,
  - (b) be printed by authority of the Clerk,
  - (c) for all purposes, be deemed to be a document published by order or under the authority of the House, and
  - (d) be recorded in the Minutes of the Proceedings of the Legislative Council or the Votes and Proceedings of the Legislative Assembly, as the case requires.

## **Part 4 Miscellaneous**

### **11 Evidence**

- (1) The Committee shall have power to send for persons, papers and records.
- (2) Subject to section 12, the Committee shall take all evidence in public.
- (3) Where the Committee as constituted at any time has taken evidence in relation to a matter but the Committee as so constituted has ceased to exist before reporting on the matter, the Committee as constituted at any subsequent time, whether during the same or another Parliament, may consider that evidence as if it had taken the evidence.

- (4) The production of documents to the Committee shall be in accordance with the practice of the Legislative Assembly with respect to the production of documents to select committees of the Legislative Assembly.

## 12 Confidentiality

- (1) Where, in the opinion of the Committee, any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced in evidence to, the Committee relates to a secret or confidential matter, the Committee may, and at the request of the witness giving the evidence or producing the document shall:
- (a) take the evidence in private, or
  - (b) direct that the document, or the part of the document, be treated as confidential.
- (2) Where a direction under subsection (1) applies to a document or part of a document produced in evidence to the Committee, the contents of the document or part shall, for the purposes of this section, be deemed to be evidence given by the person producing the document and taken by the Committee in private.  
Penalty: 20 penalty units or imprisonment for 3 months
- (3) Where, at the request of a witness, evidence is taken by the Committee in private: disclose or publish the whole or a part of that evidence.
- (a) the Committee shall not, without the consent in writing of the witness, and
  - (b) a person (including a member of the Committee) shall not, without the consent in writing of the witness and the authority of the Committee under subsection (5),
- Penalty: 20 penalty units or imprisonment for 3 months.
- (4) Where evidence is taken by the Committee in private otherwise than at the request of a witness, a person (including a member of the Committee) shall not, without the authority of the Committee under subsection (5), disclose or publish the whole or a part of that evidence.
- (5) The Committee may, in its discretion, disclose or publish or, by writing under the hand of the Chairman, authorise the disclosure or publication of evidence taken in private by the Committee, but this subsection does not operate so as to affect the necessity for the consent of a witness under subsection (3).
- (6) Nothing in this section prohibits:
- (a) the disclosure or publication of evidence that has already been lawfully published, or
  - (b) the disclosure or publication by a person of a matter of which the person has become aware other than by reason, directly or indirectly, of the giving of evidence before the Committee.
- (7) This section has effect despite section 4 of the *Parliamentary Papers Supplementary Provisions) Act 1975*.
- (8) Where evidence taken by the Committee in private is disclosed or published in accordance with this section:
- (a) sections 6 and 7 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* apply to and in relation to the disclosure or publication as if it were a publication of that evidence under the authority of section 4 of that Act, and
  - (b) Division 5 of Part 3 of, and Schedule 2 to, the *Defamation Act 1974* apply to and in relation to that evidence as if it were taken by the Committee in public.

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### 13 Application of certain Acts etc

For the purposes of the *Parliamentary Evidence Act 1901* and the *Parliamentary Papers (Supplementary Provisions) Act 1975* and for any other purposes:

- (a) the Committee shall be deemed to be a joint committee of the Legislative Council and Legislative Assembly, and
- (b) the proposal for the appointment of the joint committee shall be deemed to have originated in the Legislative Assembly.

### 14 Validity of certain acts or proceedings

Any act or proceeding of the Committee is, even though at the time when the act or proceeding was done, taken or commenced there was:

- (a) a vacancy in the office of a member of the Committee, or
- (b) any defect in the appointment, or any disqualification, of a member of the Committee,

as valid as if the vacancy, defect or disqualification did not exist and the Committee were fully and properly constituted.

### 15 Proceedings for offences

Proceedings for an offence against this Act shall be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

### 16 Reports as to the Committee's operations

- (1) The Committee shall furnish a report to both Houses of Parliament as soon as possible after the first 2 years after the commencement of this Act.
- (2) The report shall relate to the past and current activities of the Committee (however constituted) and the past and current arrangements concerning its operations.
- (3) The report may include such recommendations respecting the future activities of the Committee (however constituted) and arrangements as it thinks appropriate.

### 17 Savings and transitional provisions

- (1) In this section:  
***the amending Act*** means the *Legislation Review Amendment Act 2002*.  
***the reconstitution day*** means the day on which the amendment made to section 4 by Schedule 1 [6] to the amending Act commences.
- (2) On and from the reconstitution day:
  - (a) the Regulation Review Committee constituted under section 4 immediately before that day continues in existence and is to be known as the Legislation Review Committee, and
  - (b) anything done by, or in relation to, the Regulation Review Committee is taken to have been done by, or in relation to, the Legislation Review Committee, and
  - (c) a reference in any other Act, in any instrument made under an Act or in any other document to the Regulation Review Committee is to be read as a reference to the Legislation Review Committee.

## APPENDIX 2: SECOND READING SPEECH, *LEGISLATION REVIEW (AMENDMENT) BILL 2002*

**Mr WHELAN (Strathfield—Parliamentary Secretary) [5.20 p.m.]: I move:  
That this bill be now read a second time.**

In October last year the Legislative Council Standing Committee on Law and Justice tabled its report entitled "A New South Wales Bill of Rights". This bill is the Government's response to that report. The standing committee found that it is not in the public interest for New South Wales to have a bill of rights. The Government endorses that finding. As the Premier indicated in his submission to the standing committee's inquiry, a bill of rights transfers decisions on major policy issues from the Legislature to the judiciary. No right is absolute. Rights conflict. The right to free speech will conflict with the right to equality. The right to equality will, in turn, conflict with the right to freely exercise one's religion. A bill of rights could be interpreted only by balancing these rights and interests. This balancing should be done by an elected Parliament, and not by an unelected judiciary. As the standing committee found:

It is ultimately against the public interest for Parliament to hand over such decisions to an unelected Judiciary who are not directly accountable to the community for the consequences of their decisions.

Members of Parliament are ultimately responsible to the people for the decisions we make. The people elect us to make difficult decisions about balancing rights and interests. We should not shirk this responsibility, and nor should we put the judiciary in the position of having to make such decisions. The standing committee also found:

The Committee believes an increased politicisation of the Judiciary is an inevitable consequence of the introduction of a Bill of Rights.

A bill of rights would undermine parliamentary sovereignty, and the independence and quality of the judiciary. It would introduce widespread uncertainty in the law, and would encourage a litigation culture. The Government agrees with the standing committee that a bill of rights must be rejected. The standing committee recommended that the Parliament establish a scrutiny of legislation committee, similar to the Senate Scrutiny of Bills Committee. The standing committee recommended that the new committee should be a joint committee. It also recommended that the new committee should be separate from the Regulation Review Committee. The bill responds to this part of the standing committee's report. Accordingly, the bill proposes to establish a Legislation Review Committee to perform the role proposed by the standing committee.

The Government agrees with the standing committee that the protection of rights and liberties is the responsibility of the whole Parliament. Accordingly, the Legislation Review Committee will be a committee of both Houses. The Government does not agree with the standing committee's recommendation that the scrutiny of legislation committee should be separate from the Regulation Review Committee. The Government notes the standing committee's observation that the criteria for an effective scrutiny committee are already reflected in the way the Regulation Review Committee works. The standing committee

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recommended a separate committee to ensure that it could give sufficient attention to its task. The Government believes that the standing committee's concern about the Regulation Review Committee's workload can be addressed by the methods adopted in the bill. In particular, the membership of the committee will be expanded from eight members to 12 members. Also, if the Government's proposal is accepted, the Government is prepared to allocate additional funding to the renamed Regulation Review Committee to enable it to carry out this new function.

I now turn to the provisions of the bill. The bill renames the Regulation Review Act as the Legislation Review Act. It also renames the Regulation Review Committee as the Legislation Review Committee. These name changes reflect the proposed new role for the committee in reviewing bills, as well as its current role in reviewing regulations. The bill increases the number of members of the committee from eight members to 12 members. The bill provides for the committee to comprise five members of the Legislative Council and seven members of the Legislative Assembly, which is an increase of two members from each House. The quorum for meetings of the committee is increased from four members to six members. The bill will insert a new section 8A into the Act. This is the section that gives the committee its new functions in relation to bills. The committee will have the function of considering any bill introduced into Parliament and reporting to both Houses on the bill.

The committee will be required to report on whether a bill, by express words or otherwise, trespasses unduly on personal rights and liberties; makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; inappropriately delegates legislative powers; or insufficiently subjects the exercise of legislative power to parliamentary scrutiny. These are the same matters on which the Senate Scrutiny of Bills Committee may report. New section 8A will also make it clear that a House of Parliament may pass a bill whether or not the committee has reported on the bill. However, the section also makes it clear that the committee is not precluded from reporting on a bill because the bill has been passed by either House or has become an Act. These provisions are designed to permit flexibility in timing so that bills will not be delayed, but nor will the committee's consideration of a bill be curtailed.

I wish now to make some comments on the intended functioning of the committee. The committee is not intended to be a third House of Parliament. It is not intended to debate matters exhaustively. The committee's decisions will not be final or binding on Parliament. Rather, it is intended to provide a timely digest of brief advice to members on the matters within its jurisdiction. It should be flagging issues for members' attention, rather than attempting to duplicate parliamentary debate. Ultimately, whether a bill unduly trespasses on personal rights and liberties is a matter for Parliament and not for the committee. The committee will make a contribution to Parliament in its new role if it operates as intended by the standing committee—that is, it should put in place mechanisms to refer all new bills quickly to an expert adviser for urgent assessment and advice. As with the Senate committee, a weekly turnaround should be possible—that is, members should have the benefit of the committee's report on a bill in time for debate in the week after the bill was introduced.

The committee should not hold inquiries or invite submissions. This is not the way the Senate committee or committees in other States work. Such a lengthy process would

unreasonably interfere with the Government's legislative program and the functioning of the committee. It would be an impossible workload for any committee. If, for example, the Legislative Council wished to inquire more deeply into a particular issue raised by a bill, it could do so through its existing committee structure. Conducting lengthy inquiries is not the role of this committee. As I indicated earlier, if the Government's proposal for the Legislation Review Committee is accepted, the Government is prepared to allocate additional funding to the committee to enable it to carry out its new function. The funding will provide a budget for the committee to obtain academic legal advice, as recommended by the standing committee. This advice, and the budget for it, will be critical to ensuring that the committee can report quickly and avoid delaying the Government's legislative program. I commend the bill to the House.