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Legislation Review Committee

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TABLE OF CONTENTS

*** Denotes Private Member's Bill**

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

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

9 Functions with respect to Regulations:

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

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

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

Appendix 1: Index of Bills Reported on in 2005

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

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

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

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

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

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

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

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Appropriation (Budget Variations) Bill 2005

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

2. Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005

Rights associated with the Rule of Law: Schedule 1 Amendment of *Crimes (Sentencing Procedure) Act 1999*

Retroactivity

35. The Committee notes that by removing Blessington's right to have his application for redetermination determined until he has served at least 30 years of his sentence, the Bill removes whatever chance he currently has of being released on licence before that time.

36. It may be expected that legislative and administrative changes to systems of parole and remissions will affect persons serving long sentences. However, extending the period within which an application for redetermination is to be determined from after 8 to after 30 years of imprisonment is to make a significant adverse change.

37. The Committee notes that the resulting regime, whereby the possibility of a very limited right to release only accrues after serving 30 years of a sentence, is much harsher than a "life sentence" at the time Blessington committed the relevant crimes.

38. The Committee also notes that it is a fundamental human right expressed in Article 15 of the ICCPR and in the common law that a harsher penalty should not be imposed against a person than the one that was applicable at the time that the offence was committed.

39. The Committee further notes that this right is recognised to be of such importance that, under the European Convention of Human Rights, it is one of the few non-derogable rights.

40. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on a person's fundamental right not to have a harsher penalty imposed than the one that was applicable at the time the offence was committed.

Relatively general and prospective

47. The Committee notes that, while a recommendation by a sentencing judge made prior to 1997 would indicate that the person being sentenced had committed a heinous crime, the appropriateness of such a comment as a criterion for the mandatory application of the strict redetermination regime increased by the Bill may be questioned on the basis that such comments:

- had no statutory basis at the time;
- were not reviewable at the time;
- would not at the time have had any legal force regarding whether a prisoner should be released on licence;
- were often made without hearing evidence on sentence or submissions; and
- since they were made on the impulse of the judge, were unlikely to have been made in the sentencing of many, if not most, of those who had committed heinous crimes.

48. The Committee refers to Parliament the question as to whether the Bill, by extending the application of the regime based on such "recommendations" and removing the possibility of effective review of such "recommendations", unduly trespasses on the right to equality before the law.

50. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on Blessington's right to enjoy the "fruits of victory" in judicial proceedings.

Undue delay: proposed cl 21(2)

57. The Committee refers to Parliament the question as to whether the Bill requiring that Blessington's application for redetermination made in 1996 not be determined until 2019 unduly trespasses on his right to have a criminal proceeding affecting his liberty determined within a reasonable time.

***Ad hominem* legislation**

63. The Committee notes that the Bill is specifically aimed at ensuring that Blessington remains in prison.

64. The Committee further notes that the separation of the legislative and judicial powers, while not an explicit requirement of the Constitution of New South Wales, is an important protection against political interference in personal rights, particularly in relation to criminal matters.

65. The Committee also notes that making laws for the purpose of ensuring Blessington's ongoing imprisonment trespasses on his right to have his rights determined by an independent arbiter according to the rule of law.

66. The Committee refers to Parliament the question as to whether the Bill, by changing the law to ensure the continuing detention of Blessington, unduly trespasses on his right to have the length of his sentence determined by an independent arbiter according to the rule of law rather than by legislative intervention by the Parliament.

Convention on the Rights of the Child

72. The Committee notes that the Convention on the Rights of the Child, to which Australia is a party, requires that life imprisonment without the possibility of release shall not be imposed for offences committed by persons below eighteen years of age.

73. The Committee notes that the Bill ensures that there is negligible prospect of Blessington ever being released for a crime he committed when 14 years of age.

74. The Committee considers that in doing so the Bill is contrary to the spirit of the Convention on the Rights of the Child.

75. The Committee has written to the Attorney General to seek his advice as to whether the Bill contravenes Australia's obligations under that Convention, and if so, the justification for that contravention.

76. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on the right to not be imprisoned for life for a crime committed while a child.

Nullifying the right to appeal: Schedule 1[1]

85. The Committee notes that, under the Act, judicial comments while sentencing that subsequently have been made to comprise a non-release recommendation give those comments the character of an order that the offender shall never be released.

86. The Committee notes that the Bill renders any judicial review of such comments ineffective in restoring any rights affected under the Act by such comments.

87. The Committee considers that, just as any decisions or orders affecting the liberty of a person should be subject to judicial review, so any comments which are later given the character of orders should also be subject to such review.

88. The Committee refers to Parliament the question as to whether the Bill, by effectively denying any right to review non-release recommendations, trespasses on the right to have decisions affecting a person's liberty subject to judicial review.

3. Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005

Broad powers that prevail over primary legislation: Proposed section 32H

7. The Committee will always be concerned to identify when a Bill provides that regulations should modify the application of or prevail over an Act.

8.	However, given that the regulation making powers are limited to procedural issues relating to the claims process, the initial amendments to the regulation are included in the Bill, and the Parliament maintains the power to disallow any subsequent amendments, the Committee does not consider that proposed s 32H comprises an inappropriate delegation of legislative power.

4. Fair Trading Amendment (Responsible Credit) Bill 2005*

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

5. Fisheries Management Amendment (Catch History) Bill 2005*

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

6. Workplace Surveillance Bill 2005

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

Part One – Bills

SECTION A: COMMENT ON BILLS

1. APPROPRIATION (BUDGET VARIATIONS) BILL 2005

Date Introduced:	4 May 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Andrew Refshauge MP
Portfolio:	Treasurer

Purpose and Description

1. The Bill appropriates additional amounts from the Consolidated Fund for recurrent services and capital works and services for the years 2003-2004 and 2004-2005, for the purpose of giving effect to certain budget variations required by the exigencies of government.

Background

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

> ensures that all variations of expenditure from the annual Appropriation Act are reported and submitted for approval to Parliament. Throughout the year the Government is required to cater for unforeseen and urgent expenditures that were not forecast in the annual Appropriation Act that was finalised before the start of the financial year. The bill ensures that there is a transparent process for examining this expenditure. And so, this practice of seeking approval for supplementary appropriations to cover payments not provided for in the annual Appropriation Act has now become an important part of the annual budget process.
>
> This is a process that has been endorsed by the Auditor-General as well as the Legislative Council's General Purpose Standing Committee No. 1 in its report on appropriation processes. However, it is not always possible to seek Parliament's authority in advance for pressing expenditure needs and the Parliament has previously established procedures to provide for this eventuality. To ensure that the Government is able to meet unforeseen expenditure, each year the Parliament makes an advance available to the Treasurer, the Treasurer's Advance. In addition, section 22 of the Public Finance and Audit Act 1983 allows the Governor to approve expenditure for the exigencies of Government from the Consolidated Fund, in anticipation of appropriation by Parliament.[1]

The Bill

3. The Bill's key features were set out in the second reading speech:

- it provides an account to Parliament on how the Treasurer's Advance has been applied for recurrent and capital expenditure;

[1] The Hon A J Refshauge MP, Treasurer, Legislative Assembly *Hansard*, 4 May 2005.

- it seeks an adjustment of the advance prior to the end of the current financial year;
- it seeks appropriations to cover expenditure approved by the Governor under s 22 of the *Public Finance and Audit Act 1983*; and
- it seeks additional appropriation for payments which are intended to be made in the current financial year where no provision was made in the annual Appropriation Bill.

4. The Bill appropriates the following additional amounts:

(i) for the 2004-2005 Financial Year:

(a) $214,059,000 in adjustment of the vote "Advance for Treasurer";

(b) $152,907,000 for recurrent services and capital works and services in accordance with s 22(1) of the *Public Finance and Audit Act 1983*;

(c) $144,000,000 for additional recurrent services; and

(ii) for the 2003-2004 Financial Year:

(a) $172,970,000 in adjustment of the vote "Advance for Treasurer"; and

(b) $641,863,000 for recurrent services and capital works and services in accordance with s 22(1) of the *Public Finance and Audit Act 1983*.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

2. CRIMES (SENTENCING PROCEDURE) AMENDMENT (EXISTING LIFE SENTENCES) BILL 2005

Date Introduced:	4 May 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Pursuant to a suspension of Sessional and Standing Orders, the Bill passed all stages in the Legislative Assembly on 4 May 2005 and in the Legislative Council on 5 May 2005. It received the Royal Assent on 6 May 2005. Under s 8A(2) of the *Legislation Review Act 1989*, the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

Despite being enacted, the amending Act will be referred to as "the Bill" throughout the Committee's Report.

Purpose and Description

1. According to the Explanatory Note for the Bill:

> In 1997, the *Sentencing Amendment (Transitional) Act 1997* was enacted to apply changes to the rules for redetermination of existing life sentences to pending applications that had not been determined at that time. In a recent decision of the Supreme Court (*Regina v Bronson Mathew Blessington* [2005] NSWSC 340), it has been held that the current rules for redetermination do not apply to applications for redetermination that were made before 8 May 1997 and are still pending before the Court. The decision also canvassed the possibility that those applicants (and any others who have not yet had their application determined) might now be able to appeal the sentencing court's recommendation that they never be released and thereby be excluded from the application of the current regime for redetermination of those "never to be released" offenders.
>
> The object of this Bill is to amend the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* so as to ensure that the current regime for redetermination of existing life sentences of "never to be released" offenders:
>
> (a) extends to all of those offenders whose original sentences have not yet been redetermined (including the future determination of the application the subject of the above Supreme Court decision), and
>
> (b) applies to those offenders even if the original non-release recommendations are now appealed.

Background

2. The *Crimes (Life Sentences) Amendment Act 1989* and the *Sentencing (Life Sentences) Amendment Act 1989* provided, as part of the "truth in sentencing" regime, that persons sentenced to life imprisonment are to serve that sentence for the

term of the person's natural life and are not eligible for early release. Offenders sentenced to life imprisonment before the present regime was established were eligible to be released on licence.

3. For existing offenders, the regime established a procedure by which an offender, after serving 8 years of his or her sentence, could apply to the Supreme Court for a redetermination of his or her original sentence. The Court could then replace the life sentence with a sentence for a fixed term and set a non-parole period after the expiry of which the Parole Board could (but need not) release the offender on parole.

4. The *Sentencing Legislation Further Amendment Act 1997* (1997 Act) subsequently imposed a much stricter redetermination regime for those existing offenders who were subject to a recommendation by the sentencing court that they should *never be released*. This scheme provided that:

- the earliest time at which an existing offender can apply for a redetermination was 20 years after the original sentence commenced;
- the Supreme Court must be satisfied that there are "special reasons" which justify the making of a determination; and
- the Supreme Court must give substantial weight to the non-release recommendation of the trial judge.

5. This was followed by the *Crimes Legislation Amendment (Existing Life Sentences) Act 2001*, which added the following further restrictions:

- the earliest time at which an existing offender can apply for a redetermination is 30 years after the original sentence commenced;
- on a redetermination, the Supreme Court cannot set a fixed term after which the offender would be eligible for automatic release;
- if the Court does determine a non-parole period, parole cannot be granted after that period unless the offender:
  - is in imminent danger of dying or no longer has the physical ability to harm anyone, and
  - has demonstrated that he or she does not pose a risk to the community.

6. The *Sentencing Amendment (Transitional) Act 1997* (1997 Transitional Act) applied the changes in the 1997 Act to the rules for redetermination of existing life sentences to pending applications that had not been determined at that time.

The decision in *Blessington*

7. Bronson Blessington was sentenced to life in prison for the murder, abduction and rape of Janine Balding in 1988 with what is now a non-release recommendation for the purposes of the Act. In 1996, he made an application for re-determination of his life sentence.[2] On 15 April 2005, in the case of *Regina v Bronson Mathew*

[2] This was in accordance with the original version of s 13A of the *Sentencing Act 1989*.

Blessington [2005] NSWSC 340, Dunford J determined certain questions in relation to that application.

8. In his decision, Dunford J decided that Blessington was not affected by the amendments in the 1997 Act which extended the period of sentence that must be served before an application for redetermination can be made from 8 to 20 years.

9. This was because neither the 1997 Act, nor the 1997 Transitional Act, purported to retrospectively change the rules relating to the *making* of applications in relation to an application already made.[3] They only changed the rules relating to the *determination* of an application.[4]

10. As a result of this decision, Blessington was able to make the application for a re-determination of his sentence after having served 8 years in 1996, although any determination would be subject to the changes to the rules for determining applications under the 1997 Act.

The suggestion in *Blessington*

11. In *Blessington*, Dunford J also made certain comments which suggested that the Court of Criminal Appeal (CCA) might have the power to quash "never to be released" recommendations by sentencing judges. Such an outcome could have a significant impact on the redetermination regime, given that the applicable rules in any given case depend on whether the offender was the subject of such a recommendation.

12. Dunford J noted that one of the side-effects of giving retrospective legal authority in the 1997 Act to what was originally an informal recommendation of the trial judge with no statutory basis, may have been to make it a "sentence" within the meaning of the *Criminal Appeal Act 1912*:

> I have already referred to the fact that when the applicant appealed against his life sentence the Court of Criminal Appeal expressed some misgiving about the making of a never to be released recommendation particularly in the case of a young person such as the present applicant, but noted that there was no statutory basis for making the "*recommendation"* nor any statutory basis for appealing against it, it being agreed by Counsel that the "*recommendation*" would have no legal effect if and when an application was made to fix a determinate sentence.
>
> At the time, the "*recommendation*" was not an "order" and consequently not a "sentence" within the meaning of that word as it then stood or now stands in the *Criminal Appeal Act 1912* s 2. It may be arguable that as a result of the amendments effected by the 1997 Act which gave legal effect and authority to such a recommendation, such recommendation became retrospectively an "order" and therefore a "sentence". If this is so, it may be that, subject to obtaining leave to

[3] As Dunford J noted at paragraph 30:
> "The Act could have provided that such applications should be deemed not to have been made, or that they be rendered null and void, or that any non-release recommendation prisoner irrespective of when his application was made should have to serve 20 years before having his application considered, but it did none of these".

[4] In answer to the question regarding whether the 1997 Act applied to Blessington's 1996 application, Dunford J ruled that the question "should be answered 'no' as to the making of the application, but 'yes' as regards the determination of the application": paragraph 33.

> appeal out of time, an appeal could now be brought against the "*recommendation*" pursuant to s 5(1)(c) of that Act.[5]

13. While special leave to raise such an issue would be required because of the long delay since the original conviction and sentence of Blessington in 1990, one argument in favour of this would be that the legal status of the recommendation was not recognised until 1997.

The Bill

Non-release recommendations

14. Currently, Sch 1 to the *Crimes (Sentencing Procedure) Act 1999* defines ***non-release recommendation***, in relation to an offender serving an existing life sentence, as a recommendation or observation, or an expression of opinion, by the sentencing court that (or to the effect that) the offender should never be released from imprisonment.

15. The Bill amends this definition to include:

> any such recommendation, observation or expression of opinion that ... has been quashed, set aside or called into question.

16. This is to ensure that if any of the prisoners currently subject to a non-release recommendation successfully bring an appeal against that "recommendation", as suggested might by possible by Dunford J, he would nevertheless continue to be treated as if he were subject to a non-release recommendation.

Blessington's application

17. The Bill also provides that any application for redetermination made before 8 May 1997 is not to be determined until the offender has served at least 30 years of the existing life sentence. This has the sole effect of requiring that Blessington's 1996 application cannot be determined until he has served 30 years of his sentence.

Issues Considered by the Committee

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

18. The Bill delays the determination of Blessington's application for redetermination of his life sentence and removes any potential for effective appeal against non-release recommendations. It thereby potentially increases the time and incidents of the application of the stringent regime for the redetermination of life sentences.

19. By so increasing the scope of the redetermination regime, the Bill shares in the trespasses to rights that regime causes in addition to those issues it uniquely raises.

20. The testing of the constitutional validity of the scheme in the High Court in *Baker* has given occasion for a range of the rights implications of the scheme to be judicially

[5] *Blessington* at paragraphs 51 – 52.

noted.[6] In that case, the High Court, by majority, found that the Parliament of New South Wales had the power to make such a regime, regardless of it arguably trespassing on a range of fundamental human rights.[7] This highlights the importance of the Parliament having careful regard to whether any trespass to rights in a proposed law is undue.

Rights associated with the Rule of Law: Schedule 1 Amendment of *Crimes (Sentencing Procedure) Act 1999*

21. The doctrine of parliamentary supremacy provides that the legislative branch of government may make any laws it chooses to make (to the extent of its constitutional authority). This law-making supremacy extends to the enactment of legislation that overturns the result of a judicial decision. Although the use of the NSW Parliament's supreme law-making power in this way is by no means unprecedented, it is sufficiently uncommon to raise questions about its appropriateness when it does occur.[8]

22. In a constitutional democracy, citizens are entitled to expect that all arms of government will act in accordance with the Rule of Law. The Rule of Law embodies a set of principles for "legal restraint and fairness in the use of government power."[9]

23. The Universal Declaration of Human Rights expressly recognises the relationship between the Rule of Law and the protection of human rights, and the Rule of Law is implicit in the Australian Constitution.[10]

24. The argument that rights associated with the rule of law are infringed by the enactment of legislation which overturns the result of a judicial decision is strengthened when, as in the case of the Bill, the legislation is enacted before the executive arm of government has exhausted judicial review opportunities (ie, by appealing the decision of Dunford J to the CCA).

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[6] In particular, Kirby J noted that it appeared that the case engaged Articles 6.1 (right to life), 7 (cruel, inhuman or degrading treatment or punishment), 9.1 (right to liberty), 14.1 (equality before the courts) and 15.1 (retrospective criminal laws) of the International Covenant on Civil and Political Rights: *Baker v The Queen* [2004] HCA 45 at paragraph 139.

[7] In argument in *Baker*, McHugh J noted: "I would have thought the New South Wales Parliament, subject to the federal Constitution, [could] take any fact it likes as the basis of one of its laws. If it wanted to, it could have made it a condition of these applications [for redetermination of a life sentence] that you are named in a particular newspaper on a particular day": Baker v The Queen [2004] HCATrans 3 (4 February 2004).

[8] The High Court has held that the Commonwealth is empowered to enact retrospective legislation which specifically and deliberately impacts upon the rights of individuals: see *R v Kidman* (1915) 20 CLR 425, where the Court upheld the validity of the offence of "conspiracy to defraud the Commonwealth" being added to the *Crimes Act 1914* (Cth) by amendment in 1915, but deemed to have been in force from 29 October 1914. This was not overruled in *R v Polyukhovich* (1991) 174 CLR 501 (retrospective war crimes legislation). Despite the application to the States of an attenuated form of separation of powers in *Kable*, the absence of an express separation in the *Constitution Act 1902* (NSW) strengthens the ability of the NSW Parliament to pass effectively retrospective and individualized legislation such as the Bill. On this point see the Committee's reports on the *Civil Liability (Mental Illness) Bill 2003* and the *Clyde Waste Transfer Terminal (Special Provisions) Bill 2003*, Legislation Review *Digest* No.7 of 2003.

[9] Professor G de Q Walker, *The Rule of Law*, (1988), p 3.

[10] See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

25. The enactment of legislation in these circumstances may be considered to be inconsistent with the right of citizens of New South Wales to expect that government will act in accordance with principles and rights associated with the Rule of Law.

26. The specific aspects of the Rule of Law with which the Bill and the regime of which it is a part could be said to be inconsistent are:

- legislation should not be **retroactive**;
- legal rules should be "**sufficiently stable** to allow people to be guided by their knowledge of the content of the rules"; and
- government decisions in specific situations should be guided by applicable legal rules that are **relatively general and prospective**.[11]

27. These issues are further considered below.

Retroactivity

28. Prior to 1989, an offender sentenced to the indeterminate sentence of "life imprisonment" could reasonably expect to be released after 15-30 years. It was, in practice, a finite sentence. It may be reasonably assumed that when the definition of "life imprisonment" was amended in 1989 to mean "natural life", the initiation of the redetermination regime was based on a recognition that it would be inappropriate to retrospectively apply this longer sentence to those who had been sentenced to "life" prior to the 1989 changes.

29. The more stringent regime initiated in 1997 for offenders who were subject to a "never to be released" recommendation was designed to expose the offender to the substantial risk of a retroactive increase in the anticipated length of the original sentence.

30. The Bill ensures that Blessington will be in gaol for an absolute minimum of 30 years, whereas if his application could be determined now (ie in 2005) there would at least be the possibility that he might be released before the expiration of 30 years.

31. To this extent it parallels the situation considered by the High Court in *Baker*:

> Reading the language of the impugned provisions and especially alongside the record of the Parliamentary debates, there can be no doubt that their substantive purpose was to impose upon the appellant… special, personal and additional punishment that would not otherwise have applied…
>
> In this sense, the impugned law is in substance one that has, and was designed to have, serious retroactive effects on the appellant's entitlement to liberty. By superimposing that consequence upon the operation of the life sentence imposed by the judge upon the appellant at his trial, Parliament has intruded, with retroactive effect, upon the operation of a judicial sentence.[12]

[11] See J Finnis, *Natural Law and Natural Rights* (1980) pp 270-271.
[12] *Baker* at paragraph 99.

32. In this respect, the Bill may be considered to offend the rule against retroactive criminal punishment, in the sense that it effectively creates the substantial risk of a harsher punishment than the one originally imposed by the sentencing judge.

33. As Kirby J noted further in *Baker*:

> The imposition of punishment, or added punishment, by the operation of a new law having retroactive effect is not only contrary to our legal tradition and offensive to its basic principles. It is also incompatible with the fundamental rules of universal human rights forbidding retroactive criminal punishment. In the European treaty system this is one of the comparatively few stated rights that is non-derogable – so crucial is it regarded.[13]

34. The legislative regime, in its application to Blessington and others, is in substance inconsistent with the human rights standards established by the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. Article 15 of the ICCPR provides that in no cases shall "a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."[14]

35. The Committee notes that by removing Blessington's right to have his application for redetermination determined until he has served at least 30 years of his sentence, the Bill removes whatever chance he currently has of being released on licence before that time.

36. It may be expected that legislative and administrative changes to systems of parole and remissions will affect persons serving long sentences. However, extending the period within which an application for redetermination is to be determined from after 8 to after 30 years of imprisonment is to make a significant adverse change.

37. The Committee notes that the resulting regime, whereby the possibility of a very limited right to release only accrues after serving 30 years of a sentence, is much harsher than a "life sentence" at the time Blessington committed the relevant crimes.

38. The Committee also notes that it is a fundamental human right expressed in Article 15 of the ICCPR and in the common law that a harsher penalty should not be imposed against a person than the one that was applicable at the time that the offence was committed.

39. The Committee further notes that this right is recognised to be of such importance that, under the European Convention of Human Rights, it is one of the few non-derogable rights.

40. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on a person's fundamental right not to have a harsher penalty imposed than the one that was applicable at the time the offence was committed.

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[13] *Baker* at paragraph 109. On this point his Honour referred to Art 15.1 of the International Covenant on Civil and Political Rights; Art 7.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and *R (on the application of Uttley) v Secretary of State for the Home Department* [2003] 1 WLR 2590; [2003] 4 All ER 891. See also *Welch v United Kingdom* (1995) 20 EHRR 247 and *Ibbotson v United Kingdom* [1999] Crim LR 153 (European Court of Human Rights).

[14] See, eg, *Gómez Casafranca v Peru*, UN Human Rights Committee decision 981/01. Article 15 is set apart from other due process rights, probably because it is a non-derogable right: S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Material and Commentary*, 2nd ed, (Oxford, 2004), p.463.

Instability/Uncertainty

41. In a democracy which respects the Rule of Law, individuals are entitled to expect that, as far as possible, the law will be stable and certain – especially the rules relating to criminal responsibility and punishment, given their significance for personal liberty.

42. Regular changes in the rules relating to criminal punishment, particularly where the changes appear to be prompted by political expediency in relation to specific controversies concerning particular individuals, risk undermining confidence in the integrity of the law and the legal system.

Relatively general and prospective

43. All persons have the right to expect "equality before the law", including that decision-making criteria be rational, rather than arbitrary or discriminatory. This right is expressed in Art 14.1 of the ICCPR.

44. The criterion for the application of the regime extended by the Bill is the criterion of whether or not the judge made an informal "never to be released" recommendation at the original sentencing hearing. At the time, such recommendations had no legislative basis, and practice varied within the judiciary. It is clearly questionable whether such a criterion provides a suitably rational, non-discriminatory basis for determining whether an offender, in effect, should never be released rather than be subject to the usual conditions of a life sentence. As Kirby J observed in *Baker*:

> For Parliament to select non-normative, non-binding and possibly emotional remarks in one judge's reasons for sentence as the ground, decades later, to control the judicial orders of contemporary judges is to impose on the latter obligations of arbitrary conduct by reference to a discriminatory criterion. The arbitrary and discriminatory nature of the chosen criterion is demonstrated, first, by the fact that, although persons such as the appellant are now excluded (barring such "special reasons") from the possibility of a redetermination of sentence, redeterminations of life sentences *have* been made, both before the 1997 amendment and afterwards, in crimes of comparable gravity (including crimes by triple murderers), without any requirement for "special reasons" as specified in the Act. In the latter case, such redetermination was possible under the Act, not because the offences were less serious, but only because the case was not burdened by a contemporaneous judicial "non-release recommendation" of no apparent legal effect when it was uttered.[15]

45. Gleeson CJ, in *Baker*, being part of the majority that upheld the legal validity of the special redetermination NSW regime for "never to be released" offenders which was established in 1997, did not consider that the criterion was arbitrary or irrelevant. He nevertheless also acknowledged the inherent unfairness of such an approach:

> It might be argued, as a matter of legislative policy, that it was unreasonable of Parliament to single out for special, and disadvantageous, treatment those prisoners who had been sentenced by judges who were willing to make non-release recommendations when others who had also committed heinous crimes might have escaped such recommendations because of the inclinations of a particular sentencing

[15] *Baker* at paragraph 116.

> judge. As a matter of policy, I see the force of that argument, but its significance in terms of legislative power is another matter.[16]

46. Clearly, in Australia, whether the Bill trespasses on personal rights and liberties is a separate issue from whether the Bill is a legally valid enactment.

47. The Committee notes that, while a recommendation by a sentencing judge made prior to 1997 would indicate that the person being sentenced had committed a heinous crime, the appropriateness of such a comment as a criterion for the mandatory application of the strict redetermination regime increased by the Bill may be questioned on the basis that such comments:

- **had no statutory basis at the time;**
- **were not reviewable at the time;**
- **would not at the time have had any legal force regarding whether a prisoner should be released on licence;**
- **were often made without hearing evidence on sentence or submissions; and**
- **since they were made on the impulse of the judge, were unlikely to have been made in the sentencing of many, if not most, of those who had committed heinous crimes.**

48. The Committee refers to Parliament the question as to whether the Bill, by extending the application of the regime based on such "recommendations" and removing the possibility of effective review of such "recommendations", unduly trespasses on the right to equality before the law.

49. The Bill could also be regarded as an infringement of Blessington's right to enjoy the "fruits of victory" in judicial proceedings.[17] By effectively neutralising the decision of the Supreme Court, the Bill denies Blessington (and, to some extent, others) the anticipated benefit of his successful litigation. By "undoing" the decision of the Supreme Court in *Blessington*, the Bill erodes a pre-existing statutory right which would otherwise have been enjoyed by Blessington – namely, to have his application determined now.

50. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on Blessington's right to enjoy the "fruits of victory" in judicial proceedings.

[16] *Baker* at paragraph 9.

[17] "The simple rule would seem to be that, just as the legislature cannot directly reverse the judgment of the court, so it cannot, by a declaratory law, affect the rights of the parties in whose case the judgment was given ... That is to say, the legislature may overrule a decision, though it may not reverse it; it may declare the rule of law to be different from what the courts have adjudged it to be, and may give a retrospective operation to its declaration, except so far as the rights of parties to a judicial decision are concerned ... In other words, the sound rule of legislation, that the fruits of victory ought not to be snatched from a successful litigant, is elevated into a constitutional requirement": Sir J Quick and Sir R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, 3rd ed, 1995), p 722.

Undue delay: proposed cl 21(2)

51. An important element of the due process to which persons accused or convicted of criminal offences are entitled is that there should not be undue delay in the resolution of court proceedings. This human right is reflected in Art 14(3)(c) of the ICCPR, with specific reference to the trial of an accused person.

52. Article 14(3)(c) applies not only to the commencement of proceedings, but also to the time by which a trial should end and judgment be handed down, both at first instance and on appeal.[18]

53. The same principle can be applied in relation to criminal proceedings *generally*, including the life sentence redetermination procedure in NSW.

54. Similarly, Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides in part that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[19]

55. By virtue of the particular mechanism employed by the legislature in order to achieve its objective of keeping Blessington in gaol, the Bill effectively requires a further delay of approximately 19 years, by preventing the Supreme Court from determining his application until 2019 (ie, 30 years from the date of his original sentencing).

56. Inaction by a court for such a long period, in relation to a matter affecting how long a person should remain in prison, is prima facie an infringement on the right to speedy resolution of criminal court proceedings.

57. The Committee refers to Parliament the question as to whether the Bill requiring that Blessington's application for redetermination made in 1996 not be determined until 2019 unduly trespasses on his right to have a criminal proceeding affecting his liberty determined within a reasonable time.

***Ad hominem* legislation**

58. As Blessington is the only person who had a pending application at 8 May 1997 whose application has not yet been determined,[20] he is the only person to whom the new rule in Sch 1[3] of the Bill is to apply. Consequently, the Bill is effectively an *ad hominem* law, an Act which, while providing for judicial procedures, alters the rules of criminal procedure and evidence to facilitate a certain specified outcome.

[18] See S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Material and Commentary*, 2nd ed, (Oxford, 2004), p 432. See also Human Rights Committee, General Comment 13 (1984). In the case of *Yasseen and Thomas v Republic of Guyana* (676/96), the UN Human Rights Committee found that a delay of two years between an order for a retrial and the conclusion of the appeal from the retrial breached Art 14(3)(c).

[19] Article 6(1) imposes on the States parties the duty to organise their judicial systems in such a way that their courts can meet each of its requirements including the obligation to hear cases within a reasonable time.

[20] See Dunford J at paragraph 14.

59. *Ad hominem* legislation infringes a person's right to expect, in accordance with the Rule of Law and the separation of powers, that laws will be general in nature, and will not usurp judicial power.[21]

60. In *Nicholas v The Queen*, McHugh J observed that:

> [t]he distinction between an infringement and a usurpation of judicial power is of little, if any, practical importance but, speaking generally, an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and an usurpation occurs when the legislature has exercised judicial power on its own behalf…A legislature clearly usurps judicial power when it brings down a "legislative judgment" directed against specific individuals. [22]

61. In that decision, his Honour endorsed the statement of Professor Lane to the effect that:

> judicial power is usurped according to *Liyanage*[23] when there is "(a) legislative interference 'in specific proceedings'; (b) the interference 'affect[s] … pending litigation' … (c) the interference affects the judicial process itself, that is, 'the discretion or judgment of the judiciary', or 'the rights, authority or jurisdiction of [the] court.'"[24]

62. Moreover *Liyanage* illustrated two relevant propositions, namely that:

- the Court's concern in analysing legislation is with *substance*, not simply *form*; and
- both the concept of judicial power - and impermissible intrusions upon its exercise – go beyond "purely abstract conceptual analysis" and require consideration of the historic functions and processes of courts of law. [25]

63. The Committee notes that the Bill is specifically aimed at ensuring that Blessington remains in prison.

[21] In *Liyanage*, the Parliament of Ceylon had legislated to prevent the exclusion of confessions for an attempted *coup d'état*, as well as inserted new offences and increased penalties. The amendments were struck down by the Privy Council: [1967] 1 AC 259 (PC).

[22] (1998) 193 CLR 173. In *Nicholas*, the High Court considered a provision of the Commonwealth *Crimes Act 1914* which directed judges to disregard the criminal conduct of law enforcement officers engaged in obtaining evidence of a narcotics offence by the accused. A majority of the Court held that this was not an usurpation of judicial power such as would infringe the separation of powers doctrine implicit in Chapter III of the Constitution. However, McHugh and Kirby JJ dissented.

[23] Gummow J noted in *Nicholas* that *Liyanage* was an attempt to "circumscribe the judicial process on the trial of particular prisoners charged with particular offences on a particular occasion and to affect the way in which judicial discretion as to sentence was to be exercised so as to enhance the punishment of those prisoners". The relevant legislation was held to be invalid, as it constituted a marked interference with the judicial process: paragraph 147.

[24] P Lane, *The Australian Constitution*, (2nd ed, 1997) at 484 (footnote added).

[25] *Nicholas* per Gummow J at paragraph 148. See Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394. Mason J has noted of the notion of usurpation of the judicial power that it is a concept "which is not susceptible of precise and comprehensive definition": *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 249-250.

64. The Committee further notes that the separation of the legislative and judicial powers, while not an explicit requirement of the Constitution of New South Wales, is an important protection against political interference in personal rights, particularly in relation to criminal matters.

65. The Committee also notes that making laws for the purpose of ensuring Blessington's ongoing imprisonment trespasses on his right to have his rights determined by an independent arbiter according to the rule of law.

66. The Committee refers to Parliament the question as to whether the Bill, by changing the law to ensure the continuing detention of Blessington, unduly trespasses on his right to have the length of his sentence determined by an independent arbiter according to the rule of law rather than by legislative intervention by the Parliament.

Convention on the Rights of the Child

67. In *Blessington*, Dunford J noted the following with respect to the appellant:

> Not only was he aged only 14 at the time of the offences but he and his co-offenders were "street kids" accustomed to sleeping on park benches and in empty railway carriages, and psychiatric evidence adduced on the sentencing proceedings indicated that his mental age at the time was even lower, and he was illiterate. The psychiatrist who examined him for the purpose of the sentencing proceedings considered that he had an abnormality of mind from an inherent cause present at the time of the offence, which fitted the criteria for a defence of diminished responsibility, although no such defence had been raised during the course of the trial.[26]

68. Australia is one of 192 state parties to the Convention on the Rights of the Child (CROC). Article 37(a) of CROC provides that:

> Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.

69. CROC had not been ratified by Australia at the time this sentence was imposed, ie 1990.[27] Even if it had been, the life sentence would not have been regarded as incompatible with Art 37(a) because under NSW law at the time, it is highly likely that he would have been released prior to his death (because "life" did not mean "until death"). There was a real possibility of release.[28]

70. It is arguable that even under the current regime, there is still no breach of the Convention because there remains a *possibility* that the "special reasons" will be satisfied, and that Blessington will be regarded as falling within the scope of the restrictive circumstances in which parole can be granted.[29]

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[26] *Blessington* at paragraph 4.

[27] CROC entered into force on 2 September 1990 and was ratified by Australia on 16 January 1991.

[28] In dismissing Blessington's appeal on his sentence in *R v Jamieson, Elliott and Blessington* (1992) 60 A Crim R 68, Gleeson CJ, with whom Hope AJA and Lee AJ agreed stated:
"Under the relevant legislation, the appellants will have the right, after the lapse of a certain period of time, to apply to a Judge of this Court to change the indeterminate sentences to determinate sentences. A decision in that regard can then be made in light of all the relevant factors, including the custodial history of the appellants up until the date of the application."

[29] See s 154A of the *Crimes (Administration of Sentences) Act 1999*.

71. However, the reality is that there is very little possibility that he will ever be released from prison. In these circumstances, Art 37(a) of CROC is effectively compromised. As Kirby J noted in Baker:

> On a true construction of the impugned law, Mr Blessington's "possibility of release" is, in my view, a chimera, and deliberately so. If that is the case, the impugned law is in conflict with binding international obligations expressing universal human rights and fundamental freedoms.[30]

72. The Committee notes that the Convention on the Rights of the Child, to which Australia is a party, requires that life imprisonment without the possibility of release shall not be imposed for offences committed by persons below eighteen years of age.

73. The Committee notes that the Bill ensures that there is negligible prospect of Blessington ever being released for a crime he committed when 14 years of age.

74. The Committee considers that in doing so the Bill is contrary to the spirit of the Convention on the Rights of the Child.

75. The Committee has written to the Attorney General to seek his advice as to whether the Bill contravenes Australia's obligations under that Convention, and if so, the justification for that contravention.

76. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on the right to not be imprisoned for life for a crime committed while a child.

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

Nullifying the right to appeal: Schedule 1[1]

77. As noted above, Sch 1 to the *Crimes (Sentencing Procedure) Act 1999* defined *non-release recommendation*, in relation to an offender serving an existing life sentence, as a recommendation or observation, or an expression of opinion, by the sentencing court that (or to the effect that) the offender should never be released from imprisonment.

78. Blessington is such a non-release prisoner on the basis of Newman J's comment to that effect at trial. As noted above, at that time, such recommendations had no legislative basis, and practice varied within the judiciary.

79. In Blessington's 1992 appeal, Gleeson CJ on behalf of the CCA stated:

> With respect to the learned sentencing judge however, I have a problem concerning his recommendation that the appellant should never be released. Counsel agreed that this would have no legal effect if and when an application to fix a determinate sentence is made. There does not appear to have been any statutory basis for the making of the "recommendation", nor, for that matter does there seem to be any statutory basis for appealing against it. Even so, I think it appropriate to express the view that, especially where the offender is a young person, and there are so many different possibilities as to what might happen in the future, it is normally not appropriate for a sentencing judge to seek to anticipate decisions that might fall to be

[30] *Baker* at paragraph 137.

> made by other persons, and in other proceedings, or under other legislation, over the ensuing decades. For that reason, I should indicate that I do not support the recommendation made by Newman J.

80. In his decision, Dunford J raised the possibility that one of the side-effects of giving retrospective legal authority in the 1997 Act to what was originally an informal recommendation of the trial judge with no statutory basis, may have been to make it a "sentence" within the meaning of the *Criminal Appeal Act 1912*:

> I have already referred to the fact that when the applicant appealed against his life sentence the Court of Criminal Appeal expressed some misgiving about the making of a never to be released recommendation particularly in the case of a young person such as the present applicant, but noted that there was no statutory basis for making the "*recommendation"* nor any statutory basis for appealing against it, it being agreed by Counsel that the "*recommendation*" would have no legal effect if and when an application was made to fix a determinate sentence.
>
> At the time, the "*recommendation*" was not an "order" and consequently not a "sentence" within the meaning of that word as it then stood or now stands in the *Criminal Appeal Act 1912* s 2. It may be arguable that as a result of the amendments effected by the 1997 Act which gave legal effect and authority to such a recommendation, such recommendation became retrospectively an "order" and therefore a "sentence". If this is so, it may be that, subject to obtaining leave to appeal out of time, an appeal could now be brought against the "*recommendation*" pursuant to s 5(1)(c) of that Act.[31]

81. As Dunford J noted, the problem of conferring the status of "sentence" on such a recommendation is:

> compounded by the fact that the making of non-release recommendations was arbitrary and of no legal effect when made, a course adopted by some judges, but not by others, and in the former case, often made without hearing evidence on sentence or submissions.[32]

82. In response to these comments, the Bill amends the existing definition of *non-release recommendation* so as to ensure that an existing life sentence within the meaning of Sch 1 does *not* cease to be the subject of a non-release recommendation because the recommendation is, or has at any time been, quashed, set aside or called into question.

83. Indeed, the Attorney General specifically stated in the second reading speech that the Bill:

> ensures that the quashing of the setting aside of a never-to-be-released recommendation by an appeal court would not remove Blessington or any of the other never-to-be-released offenders from the scheme.[33]

84. Accordingly, whilst previous amendments to NSW sentencing legislation have effectively elevated "never to be released" *obiter* to the status of sentences, the Bill

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[31] *Blessington* at paragraphs 51 – 52. Section 5(1)(c) of the *Criminal Appeal Act 1912* provides that a person convicted on indictment may appeal to the Court of Criminal Appeal with that court's leave against the sentence passed on the person's conviction.

[32] *Blessington* at paragraph 47.

[33] The Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 4 May 2005.

provides that even if such a "sentence" is successfully appealed to the CCA (or indeed the High Court) it will in no way affect the application of the non-release regime to the successful appellant.

85. The Committee notes that, under the Act, judicial comments while sentencing that subsequently have been made to comprise a non-release recommendation give those comments the character of an order that the offender shall never be released.

86. The Committee notes that the Bill renders any judicial review of such comments ineffective in restoring any rights affected under the Act by such comments.

87. The Committee considers that, just as any decisions or orders affecting the liberty of a person should be subject to judicial review, so any comments which are later given the character of orders should also be subject to such review.

88. The Committee refers to Parliament the question as to whether the Bill, by effectively denying any right to review non-release recommendations, trespasses on the right to have decisions affecting a person's liberty subject to judicial review.

The Committee makes no further comment on this Bill.

3. DUST DISEASES TRIBUNAL AMENDMENT (CLAIMS RESOLUTION) BILL 2005

Date Introduced:	5 May 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Dust Diseases Tribunal Act 1989* and the *Dust Diseases Tribunal Regulation 2001* to allow regulations to be made to establish a new claims resolution process for asbestos related compensation claims and the jurisdiction and practice and procedure of the Dust Diseases Tribunal. The Bill also makes consequential amendments to the *Civil Procedure Act 2005* and the *Dust Diseases Tribunal Rules*.

Background

2. In his second reading speech, the Attorney General said:

> The Bill amends the *Dust Diseases Tribunal Act 1989* to support the making of regulations to establish a new claims resolution process for asbestos-related compensation claims. The Bill also amends the *Dust Diseases Tribunal Regulation* to establish the new claims resolution process.
>
> The new claims resolution process was described in detail in the report of the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims...
>
> The new process focuses on the early exchange of information and the compulsory mediation of claims. The new claims resolution process will apply to asbestos-related claims only... The Bill and regulation will not affect the right of claimants to commence proceedings in the Dust Diseases Tribunal...
>
> This Bill is the result of much consideration and consultation. It implements the recommendations of the Review of Legal and Administrative Costs conducted by Mr Laurie Glanfield, AM, director of the Attorney General's Department and Ms Leigh Sanderson, Deputy Director-General of the Cabinet Office. The review was established by the New South Wales Government after the issue of improving the efficiency with which dust diseases compensation claims are resolved was canvassed in negotiations with James Hardie Industries to secure funding to compensate the victims of its asbestos products.
>
> Mr Greg Combet of the Australian Council of Trade Unions, Mr John Robertson of the New South Wales Labor Council, and Mr Bernie Banton, representing asbestos victims, identified that any changes to the existing system would affect all claimants and defendants. Accordingly, they recommended that the New South Wales Government initiate a review to identify cost savings within the existing common law system without impacting adversely on claimants' compensation rights. The New South Wales Government agreed to establish that review. As the Government announced last December, implementation of the review through the passage of this bill is a condition precedent to James Hardie Industries providing funding for asbestos compensation.
>
> Stakeholders have been extensively consulted throughout the review process, including during the development of the amendments to the regulation. The review released an issues

paper late last year and received 31 submissions from stakeholders to assist with the preparation of its report. The report of the review was released on 8 March 2005 and the Government adopted the recommendations of the report on the same day. Following the release of the report of the review a draft regulation to establish the new claims process was released for public consultation. Targeted consultation occurred with defendants on a number of specific issues relevant to multiple defendant claims.

Numerous meetings were also held with key stakeholders in the preparation of the report of the review and the development of the regulation…The Dust Diseases Tribunal has been consulted over the course of the review.[34]

The Bill

3. The Bill amends the *Dust Diseases Tribunal Act 1989* (the Act) and the *Dust Diseases Tribunal Regulation 2001* (the Regulation) as follows:

   (a) the Regulation is amended to provide a new ***claims resolution process*** for claims involving asbestos-related conditions (the main features of which are described below);

   (b) the Regulation is also amended to provide new procedures for the issue of subpoenas and the making and acceptance of offers of compromise, and for requiring detailed information about the settlement or determination of claims to be provided to the Registrar of the Tribunal;

   (c) the Act is amended to provide an extensive regulation-making power that will authorise the making of the regulations referred to in paragraphs (a) and (b);

   (d) the Act is amended to clarify the extent of the jurisdiction of the Dust Diseases Tribunal by providing that the Tribunal's jurisdiction to determine claims for damages in respect of dust-related conditions extends to claims for contribution between tort-feasors liable in respect of any such damages;

   (e) the Act is amended to require a judgment of the Tribunal to identify issues of a general nature determined on the basis of their determination in earlier proceedings (which prevents issues being re-litigated or reargued); and

   (f) various provisions of the Act are amended or omitted as a consequence of the proposed *Civil Procedure Act 2005*.

4. The new claims resolution process under the Regulation has the following features:

   (a) all claims will be subject to the process with some exceptions for urgent cases, removal from the process by agreement or removal for failure to comply with a requirement of the process;

   (b) while a claim is subject to the claims resolution process proceedings in the Tribunal are deferred and the claim is not subject to case management by the Tribunal;

   (c) the plaintiff is required to provide a statement of particulars of the claim and there are fixed time-frames within which cross-claims are required to be made, defendants are required to reply to claims and medical examinations are required to take place;

[34] The Hon Bob Debus MP, Attorney General, Legislative Assembly *Hansard*, 5 May 2005.

(d) claims are subject to compulsory mediation with provision for costs sanctions for failing to participate in mediation in good faith and for unreasonably leaving issues in dispute following unsuccessful mediation;

(e) provision for the apportionment of liability between defendants for the purposes of the settlement or determination of the plaintiff's claim, including provision for contribution to be determined by a Contributions Assessor if defendants cannot agree on contribution;

(f) provision for the appointment of a single claims manager to manage and negotiate the settlement of a plaintiff's claim on behalf of multiple defendants;

(g) special procedures for the return of claims to the Tribunal that have failed to settle; and

(h) costs penalties for failure to comply with a requirement of the claims resolution process.

Issues Considered by the Committee

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

Broad powers that prevail over primary legislation: Proposed section 32H

5. Proposed section 32H provides wide powers for the making of regulations under the Act. These powers enable the new claims process to be implemented by regulation in the *Dust Diseases Tribunal Regulation 2001*. The Bill contains amendments to this Regulation to implement the new claims process.

6. The Bill also provides that any regulations made under proposed section 32H may exclude proceedings from any specified provision of or rule under the *Civil Procedure Act 2005*, or modify the application of such provisions or rules to the proceedings. Further, regulations made under the section prevail over the *Civil Procedure Act* to the extent of any inconsistency with that Act.

7. The Committee will always be concerned to identify when a Bill provides that regulations should modify the application of or prevail over an Act.

8. However, given that the regulation making powers are limited to procedural issues relating to the claims process, the initial amendments to the regulation are included in the Bill, and the Parliament maintains the power to disallow any subsequent amendments, the Committee does not consider that proposed s 32H comprises an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

4. FAIR TRADING AMENDMENT (RESPONSIBLE CREDIT) BILL 2005*

Date Introduced:	5 May 2005
House Introduced:	Legislative Council
Member Responsible:	Ms Sylvia Hale MLC

Purpose and Description

1. The object of this Bill is to amend the *Fair Trading Act 1987* to impose obligations on credit providers with respect to credit card contracts and increases in credit card limits.

Background

2. In the second reading speech, Ms Hale stated:

> Financial counsellors report that it is common to find people with no income other than a government benefit with credit card limits greater than their entire annual income... The Banking and Financial Services Ombudsman, whose activities are underwritten by 30 banks and 17 non-bank financial institutions, acknowledged the problem in the 2004 annual report:
>
> > For credit card accounts the main problems identified were unauthorised transactions and maladministration in providing credit. Maladministration arises when credit is provided to a customer in circumstances where they had no reasonable prospect of servicing the repayments.
>
> ... Following recommendations from the Australian Bankers Association in 2001, the Banking Code of Practice was amended to place some responsibility on lenders prior to increasing credit limits. This measure, however, has had virtually no impact because the code is a voluntary one and is self-administered by the industry, with no mechanisms in place for compliance or enforcement.[35]

The Bill

3. Section 5 of the *Consumer Credit (NSW) Act 1995* provides that the Consumer Credit Code set out in the Appendix to the *Consumer Credit (Queensland) Act* applies as a law of New South Wales and is to be referred to as the *Consumer Credit (New South Wales) Code*.

4. The Bill purports to amend that Code in relation to the provision of credit, increasing credit limits and the information that is to be provided on credit card account statements. These amendments apply to the provision of credit from the commencement of the Bill and cover any credit contract to which the Code applies that is in force on the commencement of the Bill [proposed s 60W].

[35] Ms SP Hale MLC, Legislative Council *Hansard*, 5 May 2005.

5. Specifically, the amendments include:

- requiring that a credit provider ***not*** enter into any credit contract or increase the credit limit under an existing credit contract if they know or ought, after reasonable enquiry, to have known that the debtor does not have the capacity to pay the amounts required under the contract or would incur "***substantial hardship***" in paying such amounts [proposed section 14A of the Code];
- providing that a credit contract is unenforceable by the credit provider to the extent that it imposes a monetary liability in the debtor in contravention of proposed section 14A of the Code;
- a definition of "substantial hardship" as including, but not limited to, "circumstances where the debtor is unable to repay the whole of the amount of the credit limit or the amount of credit within 5 years";
- prohibiting the unilateral provision of credit in excess of the amount of credit or credit limit specified in the credit contract, punishable by a maximum penalty of 100 penalty units, ***unless*** the debtor has given written consent or the excess credit does not exceed 10% of the amount of creditor credit limit;
- requiring a statement of account which includes a minimum repayment to include details of the time period required to repay the total amount by making the minimum repayments and the total amount of interest that will be paid during this time; and
- requiring that a statement of account clearly show any "interest free" amount or period and details of any fees or charges that relate to that "interest free" amount or period.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

5. FISHERIES MANAGEMENT AMENDMENT (CATCH HISTORY) BILL 2005*

Date Introduced:	5 May 2005
House Introduced:	Legislative Assembly
Member Responsible:	Mr Andrew Constance MP

Purpose and Description

1. Under the *Fisheries Management Act 1994* (the Act), shares in a share management fishery are to be allocated to a person in proportion to the person's catch history. Section 51 of the Act provides that the catch history of a person is to be determined under and in accordance with the criteria specified by the Minister for Primary Industries (Minister). However, the Minister may increase the catch history of a person who is a representative of the commercial fishing industry to compensate for any period during which the person was unable to engage in the person's usual fishing activities due to the person's industry responsibilities.

2. The Bill amends section 51 to make it mandatory for the Minister to increase the catch history of a person for any period during which the person was unable to engage in their usual fishing activities because of their duties as a representative of the commercial fishing industry on a Management Advisory Committee or on any other organisation, such as a fisheries co-operative or an environmental committee.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

6. WORKPLACE SURVEILLANCE BILL 2005

Date Introduced:	4 May 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill:

- prohibits the surveillance by employers of their employees at work except by surveillance of which employees have been given notice or surveillance carried out under the authority of a covert surveillance authority issued by a Magistrate for the purpose of establishing whether or not an employee is involved in any unlawful activity at work;
- restricts and regulates the blocking by employers of emails and Internet access of employees at work;
- provides for the issue of covert surveillance authorities by Magistrates and to regulate the carrying out of surveillance under a covert surveillance authority and the storage of covert surveillance records; and
- restricts the use and disclosure of covert surveillance records.

2. The Bill repeals and replaces the *Workplace Video Surveillance Act 1998* (the 1998 Act), which applied only to video, ie camera, surveillance.

Background

3. The background to the Bill is set out in the second reading speech:

> [The 1998 Act] established a new system of regulation for video surveillance in the context of employment. The Act arose out of a number of industrial disputes over video surveillance by employers and was the result of extensive consultations between employee and employer organisations…
>
> …As the use of technology has grown, it has become apparent that the provisions of the [1998 Act] were not wide enough to protect employees from intrusive acts of covert surveillance. People are concerned that what they consider to be essentially private communications by way of email may end up being intercepted and read by employers. Technological advances allow small tracking devices to transmit movements outside of the traditional workplace and the capture of every word typed into a computer.
>
> This bill ensures that employees are made aware of any such surveillance. It extends to computer surveillance—surveillance of the input, output or other use of a computer by an employee— and tracking surveillance—surveillance of the location or movement of an employee…

> A number of amendments were made to the exposure draft bill to take account of concerns raised in submissions on the draft bill. They … include the introduction of more flexibility into notification procedures; assurance that the use of antivirus and antispam software is not affected; clarification that an employer has to give notice of their computer surveillance policy only and not notice of every individual act of computer surveillance; the allowance of accepted business practices; and provisions to address the use of work computers at home.[36]

The Bill

4. The Bill applies only to:

   - camera surveillance;
   - computer surveillance (surveillance of the input, output or other use of a computer by an employee); and
   - tracking surveillance (surveillance of the location or movement of an employee).

5. The Bill applies to the surveillance of an employee carried out or caused to be carried out by the employee's employer while the employee is at work[37] for the employer [proposed s 9].[38]

Prohibited surveillance

6. Surveillance of an employee may be undertaken, but only with at least 14 days prior notice in writing[39] to the employee, ie, overt surveillance. However, the Bill prohibits *any* surveillance by an employer of an employee:

   - in a change room, toilet facility or shower or other bathing facility at a workplace; and
   - when not at work by means of a device used for surveillance of the employee at work except computer surveillance of the use by the employee of equipment or resources provided by or at the expense of the employer [proposed s 15].

7. The Bill also prohibits the blocking of emails sent to or by an employee and Internet access by an employee, unless:

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[36] The Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 4 May 2005. See also the 2001 NSW Law Reform Commission Report No 98, *Surveillance: An Interim Report*.

[37] An employee is *at work* for an employer when the employee is:
(a) at a workplace of the employer (or a related corporation of the employer) whether or not the employee is actually performing work at the time; or
(b) at any other place while performing work for the employer, or a related corporation of the employer: proposed s 5.

[38] The Bill creates an exemption from the employee notification requirements for surveillance of a workplace that is not for the purpose of employee surveillance and is done by agreement: proposed s 14 of the *Workplace Surveillance Act 2005*.

[39] The notice must indicate:
(a) the kind of surveillance to be carried out (camera, computer or tracking); and
(b) how the surveillance will be carried out;
(c) when the surveillance will start;
(d) whether the surveillance will be continuous or intermittent; and
(e) whether the surveillance will be for a specified limited period or ongoing: proposed s 4.

- the employer is acting in accordance with the employer's email and Internet access policy notified to the employee; and (except in the case of spam or menacing or offensive emails)
- the employee is notified as soon as practicable that an email has been blocked [proposed s 17].[40]

8. A maximum penalty of 50 penalty units (currently $5,500) applies for a breach of these prohibitions.

Covert surveillance of employees at work

9. The Bill prohibits the *covert surveillance* of an employee at work, except as authorised by a covert surveillance authority [proposed s 18].[41]

10. A covert surveillance authority (see below) may authorise the covert surveillance of employees for the purpose of establishing whether or not an employee is involved in any unlawful activity at work [proposed s 19(1)]. The covert surveillance must be overseen by a *surveillance supervisor* for the authority.[42]

11. A covert surveillance authority does *not* authorise the carrying out, or causing to be carried out, of covert surveillance of any employee:

    (a) for the purpose of monitoring the employee's work performance; or

    (b) in any change room, toilet facility or shower or other bathing facility [proposed s 19(3)].

Covert surveillance authorities

12. The Bill provides for the making of an application to a Magistrate for a covert surveillance authority [proposed s 22(1)].

13. In issuing such an authority, a Magistrate must:

- find that reasonable grounds exist to justify the issue [proposed s 24];
- have regard to whether the covert surveillance might unduly intrude on the privacy of employees or any other person [proposed s 25]; and
- designate one or more surveillance supervisors to oversee the conduct of surveillance operations under the authority [proposed s 26].[43]

[40] An employer's email and Internet access policy cannot authorise blocking of emails or Internet access merely because the content relates to industrial matters: proposed s 17(4).

[41] Covert surveillance is surveillance that is not carried out in compliance with the requirements of Part 2 of the proposed Act. The Bill creates a defence in the case of covert surveillance that is necessary for the security of the workplace: proposed s 21(1).

[42] A surveillance supervisor means a person named in the authority as a person who is to be responsible for the oversight of the conduct of the covert surveillance authorised by the authority. There are exceptions from the requirement for a covert surveillance authority for law enforcement agencies, correctional centres, the casino, and camera surveillance of legal proceedings: proposed s 20.

[43] A Magistrate must not issue an authority unless the information given by the applicant in or in connection with the application is verified before the Magistrate on oath or affirmation or by affidavit [proposed s 22(5)]. An employer or employer's representative must report to the issuing Magistrate on surveillance carried out

14. The Bill provides an extensive list of matters to be specified in an authority and the conditions governing the authority [proposed s 27 and s 28]. These were referred to in the second reading speech:

> In brief, they require that surveillance supervisors can only give employers access to those portions of surveillance records relevant to establishing the involvement of employees and others in unlawful activity, that surveillance supervisors must erase or destroy all parts of a surveillance record, not required for evidentiary purposes, within three months of the expiry of the authority, and that employees must be provided with access to covert surveillance records that are to be used in taking detrimental action against the employee.[44]

15. Contravening a condition of a covert surveillance authority is an offence with a maximum penalty of 50 penalty units (currently $5,500) [proposed s 29].

Covert surveillance records

16. The Bill imposes restrictions on the *storage* of records of covert surveillance to ensure that they are protected against loss or unauthorised access or use [proposed s 35].

17. It also imposes restrictions on the *use and disclosure* of records of covert surveillance for irrelevant purposes:[45]

> Where covert surveillance has been authorised, the bill makes it clear that it is acceptable for the records to be used as authorised or required under the conditions of the covert surveillance authority; to establish whether an employee is involved in unlawful activity while at work for the employer; to take disciplinary action or legal action against an employee as a consequence of alleged unlawful activity while at work for the employer; to establish security arrangements or take other measures to prevent or minimise the opportunity for unlawful activity while at work for the employer of a kind identified by the surveillance record to occur while at work for the employer; to avert an imminent threat of serious violence to persons or of substantial damage to property; to disclose to a law enforcement agency for use in connection with the detection, investigation or prosecution of an offence; and for purposes related to the taking of proceedings for an offence or for taking any other action required or authorised under the bill.
>
> This is to ensure that covert surveillance records are not used for frivolous, vexatious, or any other irrelevant purposes. Where covert surveillance of an employee has not been authorised, use or disclosure is only allowed for a purpose related to the taking of proceedings for an offence or by and to law enforcement agencies for any purpose in connection with the detection, investigation or prosecution of an offence.[46]

Offences by corporations

18. The Bill provides that if a corporation contravenes any provision of the ensuing Act or Regulations, each person who is a director of the corporation or who is concerned in

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under an authority within 30 days after the expiry of the authority. Failure to do so is an offence: proposed s 34.

[44] The Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 4 May 2005.

[45] However, information obtained inadvertently or unexpectedly as a result of covert surveillance is not considered to have been obtained unlawfully for the purposes of determinations about admissibility of evidence: proposed s 37.

[46] The Hon R J Debus MP, Attorney General, Legislative Assembly *Hansard*, 4 May 2005; see proposed s 36.

the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention [proposed s 42(1)].

19. A person may be proceeded against and convicted under a provision pursuant to proposed s 42(1) whether or not the corporation has been proceeded against or convicted under that provision [proposed s 42(2)].

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Centennial Park and Moore Park Trust Regulation 2004	27/08/04	6699	05/11/04 29/04/05	21/04/05
Institute of Teachers Regulation	21/01/05	183	01/04/05	
Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005	08/04/05	1245	29/04/05	
Occupational Health and Safety Amendment (Transitional) Regulation 2004	17/12/04	9354	01/04/05 23/05/05	19/05/05
Protection of the Environment Operations (General) Amendment (Luna Park) Regulation 2005	11/03/05	698	29/04/05	
Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005	14/01/05	111	01/04/05	

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Occupational Health and Safety Amendment (Transitional) Regulation 2004 • Letter dated 01/04/2005 to the Minister for Commerce • Letter dated 19/05/2005 from the Minister for Commerce • Letter dated 23/05/2005 to the Minister for Commerce	17/12/2004 page 9354

1. Occupational Health and Safety Amendment (Transitional) Regulation 2004

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

1 April 2005

Our Ref: LRC1120

The Hon John Della Bosca MLC
Minister for Commerce
Level 30, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Occupational Health and Safety Amendment (Transitional) Regulation 2004

The Legislation Review Committee considered the above Regulation at its meeting of 1 April 2005 and resolved to seek your advice on an issue relating to review rights.

Under cl 217A of the Occupational Health and Safety Regulation 2001 (principal Regulation), WorkCover may accredit persons to conduct occupational health and safety (OHS) induction training in the construction field. Any decision made by WorkCover under cl 217A, including a decision to refuse to accredit a person or to suspend or cancel their accreditation, is not reviewable by the Administrative Decisions Tribunal (ADT).

The Committee notes that decisions that are comparable in their nature and their potential impact on persons to decisions made under clause 217A are reviewable by the ADT. For example, decisions by WorkCover to refuse to accredit a person to conduct training for OHS representatives under cl 31(4) or to be an assessor under cl 284(2A) are reviewable by the ADT (principal Regulation, cl 351(1)). Further, decisions by WorkCover to suspend or cancel the accreditation of an assessor under cl 287 are also reviewable.

The Committee also notes that WorkCover's right to refuse to accredit a person "for such reasons as it considers sufficient" under cl 217A(2) is extremely broad. This discretion allows WorkCover to take account of a range of relevant factors in considering whether to grant accreditation.

However, the absence of any explicit grounds for refusal in the principal Regulation makes it possible that cl 217A accreditation could be refused on irrelevant or inappropriate grounds. Without an accompanying right of review,

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it appears that an aggrieved person is unduly dependent on an insufficiently defined administrative power, potentially diminishing their right to fairness.

The Committee seeks your advice on the rationale for not providing a right of ADT review in respect of cl 217A decisions by amending the 2001 Regulation.

Yours sincerely

Peter Primrose MLC
Chairman

Special Minister of State
Minister for Commerce
Minister for Industrial Relations
Minister for Ageing
Minister for Disability Services
Assistant Treasurer
Vice President of the Executive Council

Ref: WC00479/05
A30164

RECEIVED
19 MAY 2005
LEGISLATION REVIEW COMMITTEE

17 MAY 2005

The Hon Peter Primrose MLC
Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Primrose

I refer to your letter of 1 April 2005, regarding the *Occupational Health and Safety Amendment (Transitional) Regulation 2004,* in which you sought my advice on the rationale for not providing a right of Administrative Decisions Tribunal review in respect of clause 217A decisions in amending the *Occupational Health and Safety Regulation 2001* (the OHS Regulation).

Clause 351 of the OHS Regulation sets out the decisions which are subject to Administrative Decisions Tribunal review. These relate principally to decisions regarding registration of plant, certification of workers, asbestos licensing and demolition, and exemption from the operation of the OHS Regulation. Clause 351 does not operate to provide the Tribunal review of all decisions made pursuant to powers under the OHS Regulation. However, neither the *Occupational Health and Safety Act 2000* nor the OHS Regulation operate to preclude other forms of judicial review of decisions, such as an application to the Administrative Law Division of the Supreme Court.

Clause 217A of the OHS Regulation provides for the approval, refusal, suspension and cancellation of a persons's accreditation as a trainer to provide construction induction training. Clause 217A is contained in Chapter 8 of the Regulation entitled "Construction Work". This Chapter is not within the operation of Clause 351.

You are correct in pointing out that WorkCover has a broad discretion to approve or to refuse an application for accreditation under section 217A(2). However, clause 217A was made in the context of an inquiry by the Independent Commission Against Corruption into alleged corrupt conduct by assessors and trainers. Construction induction was the subject of specific findings by the Independent Commission Against Corruption, which recognised the need for WorkCover to have a more transparent and less complicated operating environment. As stated above, judicial review could be sought of a decision to refuse to accredit a person, if for example, there was an allegation of bias.

Swift action is required by the regulator when inappropriate activity comes to light. However, the statutory process set out in clause 217A ensures that procedural fairness will be afforded. Before WorkCover can cancel or suspend a person's accreditation as a construction induction trainer, it must give notice in writing of the proposed suspension or cancellation, give the person a reasonable opportunity to make representations, and take such representations into account in making its decision.

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Tel: (02) 9228-4777 Fax: (02) 9228-4392 E-Mail: office@smos.nsw.gov.au

A decision to suspend or cancel accreditation can only be made on the grounds set out in clause 217A(3), namely, if WorkCover is satisfied that:

(a) the person is no longer competent to conduct the training for which the person is an accredited person, or

(b) the person has been convicted of an offence against the Act or the associated occupational health and safety legislation, or any regulation under the Act or that legislation, or of an offence against a corresponding law or any regulation under a corresponding law, or

(c) the person was accredited on the basis of false or misleading information or a failure to disclose or provide required information, or

(d) the person has contravened the conditions of his or her accreditation or a guideline relating to the provision of OHS induction training, or

(e) the person has had his or her accreditation as an assessor suspended or cancelled under clause 287, or has had his or her approval as a Premium Discount Advisor suspended or cancelled under the regulations under the *Workers Compensation Act 1987,* for reasons of a kind referred to in paragraph (b), (c) or (d).

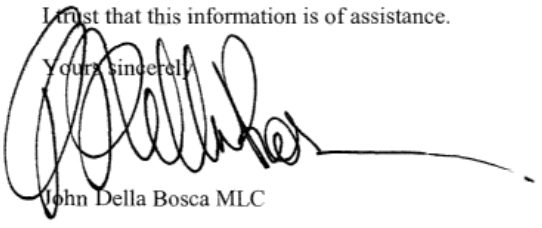
Further, if a decision is made to suspend or cancel the accreditation, WorkCover must give reasons. These requirements reflect the principles of natural justice, which the law has long recognised as applying to decisions affecting a person's livelihood.

As such, whilst a decision by WorkCover to suspend or cancel the accreditation of a person to provide occupational health and safety induction training pursuant to clause 217A of the OHS Regulation is not a decision to which an appeal to the Administrative Decisions Tribunal lies pursuant to clause 351, such a decision is nonetheless one which WorkCover must make in accordance with the principles of natural justice and procedural fairness. Any person aggrieved by WorkCover's decision may seek judicial review in an appropriate forum such as the Supreme Court. The reasons, which must be provided, would be considered as part of that judicial review process.

The experience of WorkCover is that the existing avenues of appeal to the Administrative Decisions Tribunal often involve significant expense with little substantial benefit. For example, there have been six appeals to the Tribunal in relation to assessors, in each of which the Tribunal has supported the decisions of WorkCover.

I trust that this information is of assistance.

Yours sincerely



John Della Bosca MLC

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

23 May 2005

Our Ref: LRC1120

The Hon John Della Bosca MLC
Minister for Commerce
Level 30, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Occupational Health and Safety Amendment (Transitional) Regulation 2004

Thank you for your letter dated 17 May 2005 clarifying why WorkCover decisions under cl 217A of the *Occupational Health and Safety Regulation 2001* are not subject to a right of review by the Administrative Decisions Tribunal.

The Committee notes that the statutory procedural fairness requirements in cl 217A apply only to decisions to suspend or cancel an existing accreditation, not to a refusal to grant accreditation.

Particularly given the broad nature of WorkCover's discretion to refuse an application, the Committee considers that it would be appropriate for WorkCover to be required to give reasons for such refusals in similar terms to those provided in cl 284(5).

The Committee therefore recommends that the Regulation be amended to such effect.

Yours sincerely

Peter Primrose MLC
Chaiman

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Appendix 1: Index of Bills Reported on in 2005

	Digest Number
Appropriation (Budget Variations) Bill 2005	6
Civil Liability Amendment (Food Donations) Bill 2004	1
Civil Liability Amendment (Offender Damages) Bill 2005	2, 3
Civil Procedure Bill 2005	5
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	3
Coal Acquisition Amendment (Fair Compensation) Bill 2005	5
Court Security Bill 2005	2
Crimes Amendment (Grievous Bodily Harm) Bill 2005	3
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	6
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	3
Criminal Procedure Amendment (Evidence) Bill 2005	3
Criminal Procedure Further Amendment (Evidence) Bill 2005	4
Crown Lands Amendment (Access to Property) Bill 2005*	4
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005	6
Electricity Supply Amendment Bill 2005	2, 5
Energy Administration Amendment (Water and Energy Savings) Bill 2005	5
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004	1
Fair Trading Amendment (Responsible Credit) Bill 2005*	6
Fisheries Management Amendment (Catch History) Bill 2005*	6
Game and Feral Animal Control Amendment Bill 2005	5
Independent Commission Against Corruption Amendment Bill 2005	2, 3
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	1
Legal Profession Bill 2004	1, 5
Marine Safety Amendment (Random Breath Testing) Bill 2004	1
National Parks and Wildlife (Adjustment of Areas) Bill 2005	3
Photo Card Bill 2004	1

	Digest Number
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	2
Prisoners (Interstate Transfer) Amendment Bill 2005	4, 5
Protection of Agricultural Production (Right to Farm) Bill 2005*	4
Road Transport (General) Bill 2004	1, 4
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	1, 4
Sheriff Bill 2005	2
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	1
Standard Time Amendment (Co-ordinated Universal Time) Bill 2005	2
Transport Administration Amendment (Transport Levy For Major Events) Bill 2005	2
Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill 2005*	2
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	3
Workplace Surveillance Bill 2005	6

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Child Protection (Offender Prohibition Orders) Bill 2004	Minister for Police	18/06/04		6	
Civil Liability Amendment (Offender Damages) Bill 2005	Minister for Justice	01/03/05	08/03/05		2, 3, 5
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05			6
Electricity Supply Amendment Bill 2005	Minister for Energy and Utilities	01/03/05	30/03.05		2, 5
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	07/04/05		1, 5
Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004	Minister for Commerce	03/12/04	09/12/04	17	1
Marine Safety Amendment (Random Breath Testing) Bill 2004	Minister for Ports	17/02/05			1
Photo Card Bill 2004	Minister for Roads	17/02/05			1
Prisoners (Interstate Transfer) Amendment Bill 2005	Minister for Justice	01/04/05	18/04/05		4, 5
Road Transport (General) Bill 2004	Minister for Roads	17/02/05	14/03/05		1, 4
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04	01/12/04	9	1, 5
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	Minister for Roads	17/02/05	14/03/05		1, 4
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				
Civil Procedure Bill 2005	N			N	
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	R				
Court Security Bill 2005				N	
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	R, C		R		
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	R				
Criminal Procedure Amendment (Evidence) Bill 2005	N				
Criminal Procedure Further Amendment (Evidence) Bill 2005	C			N	
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005				N	
Electricity Supply Amendment Bill 2005				C	
Energy Administration Amendment (Water and Energy Savings) Bill 2005				R, N	
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004			N	N	N
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	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
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				
Prisoners (Interstate Transfer) Amendment Bill 2005				C	
Protection of Agricultural Production (Right to Farm) Bill 2005*	R				
Road Transport (General) Bill 2004	N	C		C	
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	N			C	
Sheriff Bill 2005				N	
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	R, N				
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	N			N	N

Key

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

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

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