

PARLIAMENT OF NEW SOUTH WALES



# **Legislation Review Committee**

## LEGISLATION REVIEW DIGEST

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No 10 of 2004

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\* 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.



## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. AGRICULTURAL LIVESTOCK (DISEASE CONTROL FUNDING) AMENDMENT BILL 2004

Date Introduced:	22 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Primary Industries

**This Bill passed all stages in the Legislative Assembly on 22 June 2004 and all stages in the Legislative Council on 24 June 2004. On 6 July 2004 it received Royal Assent. Pursuant to s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has become an Act.**

### Purpose and Description

1. This Bill amends the *Agricultural Livestock (Disease Control Funding) Act 1998* (the Act):
  - (a) to provide for the collection of transaction based contributions from livestock producers to fund the provision of livestock disease control programs established under the Act;
  - (b) to provide for the refund of such contributions and for the review of decisions concerning such contributions by the Administrative Decisions Tribunal;
  - (c) to provide for the appointment of fund administrators for industry funds for livestock disease control programs established under the Act (*industry funds*);
  - (d) to make further provision with respect to the establishment, purposes, operation and winding up of industry funds;
  - (e) to require the Minister to have the benefit of certain expert advice before imposing an industry levy for payment into an industry fund or fixing such a levy; and
  - (f) to make provision for matters of savings and transitional nature.

### Background

2. The *Agricultural Livestock (Disease Control Funding) Act 1998* provides for the collection of funds from industry for the benefit of livestock disease control programs in this State.
3. According to the second reading speech:

The current provisions of the *Agricultural Livestock (Disease Control Funding) Act 1998* have been used to provide industry funds to support the National Ovine Johne's Disease [OJD] Control and Evaluation Program...

Agricultural Livestock (Disease Control Funding) Amendment Bill 2004

Since first being detected on the central tablelands in 1980, OJD has become a major issue in the sheep industry, particularly in New South Wales, which has been the most affected.

... OJD has been a very divisive issue for farmers whose sheep have contracted the disease and for those who wish to guard against it. A six-year \$40 million national program was set up to provide a co-ordinated approach to dealing with OJD. ... [T]he National Ovine Johne's Disease Control and Evaluation Program is set to conclude at the end of June 2004...

There is now an urgent need for a more practical and effective mechanism for the New South Wales sheep industry to collect industry funds to support the new national approach to OJD for the future management of the disease. The State's sheep industry, through the OJD Industry Advisory Committee, has long called for a transaction-based collection scheme to fund the OJD program to make the collection of funds far more equitable. It has also asked for a greater say in both the direction and operation of the disease control program.

The bill provides the mechanism for the collection of these funds and for greater industry consultation on how the funds are utilised. In doing so, it largely reflects suggestions and recommendations from reviews of the current OJD program by the Hon. Richard Bull and others.<sup>1</sup>

## The Bill

### Definitions

4. Section 3 of the Act is amended to insert definitions for new terms used in the Act and to omit or replace several existing definitions.

In particular, a *livestock transaction* is defined to mean the purchase or sale of livestock or any product made or derived from livestock.

### Disease control programs

5. Currently, section 5 of the Act defines "*disease control service*" as an agricultural service for livestock producers comprising a program, or series of programs, for the control of a particular disease in livestock.
6. The expression "disease control service" is deleted and replaced by a new term, "*disease control program*" [cl 3].

This new term is defined as an agricultural program for livestock producers comprising a service, or series of services, for the control of a particular disease in livestock.

7. The Bill amends section 6 of the Act to require the Minister to be satisfied that the rationale for a disease control program is soundly based, the objectives of the program are reasonably achievable and the program is financially viable before approving the funding for the program under the Act [schedule 1[4]].

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<sup>1</sup> The Hon John Watkins MP, Minister for Police, *Legislative Assembly Hansard*, 22 June 2004.

### Industry advisory committees

8. Currently, section 8 of the Act requires the Minister to establish an industry advisory committee for each disease control service established under the Act for livestock. The advisory committee's functions include advising the Minister on the funding of the designated disease control service [s. 8(4)].

The Bill amends section 8 to provide that one of the functions of an industry advisory committee for a disease control program established under the Act is to give advice to the Minister on the establishment and operation of transaction based contribution schemes for funding the program.

### Industry funds

9. Currently, Part 3 of the Act provides for voluntary industry funding for designated disease control services. Section 9 establishes two industry funds for each disease control service established under the Act:
- An *industry contribution fund* is established for such a service to provide a means by which voluntary contributions to fund the service may be made by relevant livestock producers and other persons and bodies.
  - If an *industry levy* is also imposed to fund the service, the Act requires the establishment of a second industry levy fund into which such levies are to be paid.

The Director-General of the Department of Agriculture administers both industry contribution funds and industry levy funds.

10. The Bill replaces Part 3 with a new Part 3 comprising three Divisions.
11. New Division 1 deals with the establishment and operation of industry funds [cl 8-14]. The principal features of the amended provisions are as follows:
- (a) There will be a single industry fund for each disease control program established under the Act. Each fund will have 4 separate accounts:
- (i) non-transaction based contributions to the fund;
  - (ii) transaction based contributions to the fund;
  - (iii) industry levies that are paid into the fund; and
  - (iv) for any other money paid into the fund.
- (b) Each fund will be administered by a fund administrator appointed by the Minister who may (but need not) be the Director-General.
- The Minister may appoint a corporation or trustees to administer a fund instead of the Director-General. However, in that event, the Director-General will be under a duty to keep under review the activities of such administrators and to make regular reports to the Minister on the administration of industry funds by such administrators.
- (c) The Minister is empowered to approve policy and priority guidelines for each industry fund by reference to which funds will be expended to provide the relevant disease control program.

12. A new section 26A of the Act makes it an offence for a fund administrator of an industry fund to make payments out of the fund if the fund is in deficit, or would be in deficit if the payments were made, unless the fund administrator has first obtained the written approval of the Minister.

Maximum penalty: 100 penalty units (currently, \$11,000).

13. The Minister may direct the fund administrator for an industry fund to wind up the affairs of the fund if the Minister is satisfied that it is in the best interests of the livestock industry for which the fund is established for it to be wound up. [proposed s 30A]

The Minister may also give directions about the payment of surplus funds to other persons or bodies.

### **Contributions to industry funds**

14. The new Division 2 in Part 3 deals with the funding of disease control programs by contributions from livestock producers and other persons and bodies [schedule 1, cl 15]. The new Division recognises 2 kinds of contributions, namely, ***non-transaction based contributions*** and ***transaction based contributions***.

15. A *non-transaction based contribution* is a monetary contribution made (or to be made) to an industry fund for a disease control program established under the Act otherwise than under a transaction based contribution scheme for the fund.

Livestock producers and other persons or bodies may make such contributions. They may be made as often and in such amounts as a contributor wishes.

In particular, the new Division authorises rural lands protection boards, local councils and other public or local authorities to make non-transaction based contributions to an industry fund if they wish to do so.

16. A *transaction based contribution* is a monetary contribution made (or to be made) to an industry fund under a transaction based contribution scheme for the fund.

A transaction based contribution scheme for a fund is established by the Minister, by order published in the Gazette, for the collection from certain livestock producers of contributions based on their livestock transactions for payment into the industry fund.

17. The order establishing the transaction based contribution scheme must provide for the following matters:

- (a) the livestock transactions by reference to which contributions under the scheme are to be collected;
- (b) the designated livestock producers from whom contributions are to be collected under the scheme;
- (c) the amount of a contribution (or the manner in which the amount of a contribution is to be calculated) under the scheme;

## Agricultural Livestock (Disease Control Funding) Amendment Bill 2004

- (d) the times and manner in which contributions are to be collected under the scheme and paid into the industry fund concerned; and
- (e) the collection agents who are authorised to collect contributions for the scheme.

Such order must be tabled before Parliament and will be disallowable in the same way as a statutory rule.

New Division 2 makes it an offence for a collection agent:

- (a) not to collect contributions from the proceeds of any livestock transaction of a livestock producer to which the scheme applies as provided by the scheme;
- (b) not to pay any contribution collected under the scheme to the fund administrator for the appropriate industry fund as provided by the scheme;
- (c) not to keep such records concerning the collection and payment of such contributions as may be prescribed by the regulations;
- (d) not to provide the livestock producer from whom the contribution was collected with a written receipt for the contribution; or
- (e) not to produce to the Director-General or the relevant fund administrator, if requested to do so, records of the collection agent concerning the collection or payment of contributions under this scheme.

Maximum penalty: 100 penalty units (currently, \$11,000).

18. A transaction based contributor can obtain a refund of a transaction based contribution paid during a financial year. An application for the refund is to be made to the fund administrator to whom it was paid no later than 7 days after the end of the financial year during which the contribution was made.

However, a person who obtains a refund is not entitled to receive certain services under the designated disease control program concerned.

### Industry levies

19. Schedule 1 [16] converts Part 4 of the Act (which deals with industry levies for disease control services) into Division 3 of Part 3.
20. Current section 13 is amended to provide that the Minister may authorise the imposition of an industry levy for payment into an industry fund for a disease control program only if:
- (a) the Minister is satisfied, having regard to advice of the industry advisory committee concerned, that the relevant industry fund may not be sufficient to fund the necessary program; and
  - (b) the Minister is satisfied that the relevant livestock industry has been consulted concerning the imposition of the levy [cl 17].
21. Schedule 1 [20] amends section 16 of the Act to make similar provision in relation to fixing the rate of a levy in a subsequent order of the Minister.

22. Formerly, sections 14 and 17 of the Act provided that if a minimum voluntary contribution is made to an industry contribution fund during a levy period by a livestock producer, the producer is entitled to a refund of an industry levy paid by the producer into the industry levy fund during that period.<sup>2</sup>

Schedule 1, clauses 18 and 21 remove this entitlement.

### **Review of funding decisions by Administrative Decisions Tribunal**

23. Schedule 1 [23] creates a new Part 5A dealing with reviews of funding decisions by the Administrative Decisions Tribunal.

Section 25, which currently provides for reviews of certain decisions of the Director-General concerning industry levies, will be located in the new Part.

24. Schedule 1 [25] inserts a new section 25A in the new Part. It provides for the review by the Administrative Decisions Tribunal of certain decisions of the Director-General or fund administrators in respect of transaction based contributions.

### **Offences**

25. Schedule 1 [32] amends section 31 of the Act to make it clear that nothing in the Act renders the Director-General or the Crown liable to prosecution for an offence.

26. Schedule 1 [33] inserts a new section 31A in the Act. The new section contains the standard provisions with respect to the liability of directors and managers of corporations for contraventions of the Act or the regulations by corporations.

## **Issues Considered by the Committee**

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

#### **Clauses 15, 16 & 20**

27. Providing for transaction based contributions and industry levies to be established by Ministerial order is a very significant delegation of legislative power which should be subject to appropriate parliamentary scrutiny and control.
28. In relation to orders regarding the transaction based contributions and industry levies, it is important to note that:
- such orders are disallowable by either House of Parliament;
  - contributions must go towards the designated disease control program;

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<sup>2</sup> Section 30A of the Act Provides that the Minister may wind up an industry fund “if satisfied that is in the best interests of the livestock industry for which the fund is established is for it to be wound up.” Subsection 30A(4) provides that the Minister *may* “direct that any money standing to the credit of any such fund may be applied for the benefit of such persons or bodies representing the livestock industry concerned (including for the purpose of payment into another industry fund established for the industry)” (emphasis added).

## Agricultural Livestock (Disease Control Funding) Amendment Bill 2004

- such orders can only be made on the advice of the industry advisory committee<sup>3</sup> and if the Minister is satisfied that the relevant livestock industry has been consulted; and
- in the case of transaction based contributions, contributors can opt out of the scheme and obtain a refund of contributions.<sup>4</sup>

**29. The Committee notes that:**

- **orders establishing transaction based contribution schemes or industry levies can be disallowed by either House;**
- **funds contributed must go towards the designated scheme; and**
- **orders establishing transaction based contribution schemes and industry levies can only be made after industry advisory committee advice and industry consultation.**

**30. For these reasons, the Committee does not have any concerns regarding these delegations of legislative power.**

*The Committee makes no further comment on this Bill.*

<sup>3</sup> Under section 8 of the Act, the Minister is to establish an industry advisory committee for each designated disease control program. Committee functions are to advise the Minister on the funding of the designated disease control program, including the services to be funded, the policies and priorities for expenditure from the industry funds established in respect of the designated disease control program, any industry levy that may be imposed under this Act, the establishment and operation of any transaction based contribution scheme to fund the designated disease control program, and such other functions with respect to the designated disease control program as the Minister directs.

<sup>4</sup> It should be noted that a contributor who seeks a refund of their transaction contributions, and thereby is disentitled to the benefits of a the designated scheme, is still liable to any industry levy imposed.

Appropriation Act 2004,  
Appropriation (Parliament) Act 2004, Appropriation (Special Offices) Act 2004, Crown Lands  
Legislation Amendment (Budget) Act 2004, Sustainable Energy Development Repeal Act 2004

## **2. APPROPRIATION ACT 2004, APPROPRIATION (PARLIAMENT) ACT 2004, APPROPRIATION (SPECIAL OFFICES) ACT 2004, CROWN LANDS LEGISLATION AMENDMENT (BUDGET) ACT 2004, SUSTAINABLE ENERGY DEVELOPMENT REPEAL ACT 2004**

Date Introduced: 22 June 2004  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Michael Egan MLC  
Portfolio: Treasurer

**Pursuant to suspensions of Sessional and Standing Orders, the Bill passed all stages in the Legislative Assembly on 23 June 2004 and the Legislative Council on 29 June 2004. It received the Royal Assent on 6 July 2004. Under s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### **Purpose and Description**

#### **Appropriation Bill 2004**

1. The object of this Bill is to appropriate various sums of money required for the recurrent services and capital works and services of the Government during the 2004–05 financial year.
2. The Bill relates to appropriations from the Consolidated Fund—the principal account of the Government for General Government Budget Dependent transactions.  
  
The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.<sup>5</sup>
3. The Bill for the 2004–05 year contains an additional appropriation, which allocates the additional revenue raised in connection with changes to gaming machine taxes to the Minister for Health for spending on health related services.

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<sup>5</sup> In addition to allocations from the Consolidated Fund, most General Government Budget Dependent agencies have other sources of moneys available to them. These moneys could arise from user charges, retention of asset sale proceeds, industry contributions, etc. These are not appropriated by Parliament as they are not in the nature of taxes or other mandatory levies for which a service is not provided in return for payment.

Appropriation Act 2004,  
 Appropriation (Parliament) Act 2004, Appropriation (Special Offices) Act 2004, Crown Lands  
 Legislation Amendment (Budget) Act 2004, Sustainable Energy Development Repeal Act 2004

#### Appropriation (Parliament) Bill 2004

4. The object of this Bill is to appropriate out of the Consolidated Fund the following sums for the recurrent services and capital works and services of the Legislature for the year 2004–05:

Recurrent Services	\$80,760,000
Capital Works and Services	\$2,244,000

The amount appropriated is intended to be applied to the following services/functions:

	Recurrent Services (\$,000)	Capital Works and Services (\$,000)
Legislative Council	17,193	252
Legislative Assembly	49,604	1,383
Joint Services	13,963	609
<b>Total</b>	<b>80,760</b>	<b>2,244</b>

#### Appropriation (Special Offices) Bill 2004

5. The object of this Bill is to appropriate out of the Consolidated Fund the following sums for the recurrent services and capital works and services for the year 2004–05 of the offices specified:

	Recurrent Services (\$,000)	Capital Works and Services (\$,000)
Independent Commission Against Corruption	15,165	240
Ombudsman's Office	16,217	67
State Electoral Office	9,251	—
Office of the Director of Public Prosecutions	71,324	1,225

#### Crown Lands Legislation Amendment (Budget) Bill 2004

6. The object of this Bill is to amend certain Crown Lands and other legislation for the following purposes:
- (a) to provide for a uniform minimum annual rent in respect of certain leases, licences and enclosure permits relating to Crown land and other land and to provide for the adjustment of that minimum annual rent in line with movements in the Consumer Price Index (the CPI);
  - (b) to provide for the CPI adjustment of certain annual rents payable under the Crown Lands (Continued Tenures) Act 1989;
  - (c) to provide for a minimum annual instalment or half-yearly instalment in respect of the purchase of certain land under that Act and under the Hay Irrigation Act 1902;
  - (d) to discontinue the practice of allowing land comprised in certain leases to be purchased by payment of instalments, in respect of new purchase applications;
  - (e) to provide for the redetermination of the rent of certain leases under the Crown Lands (Continued Tenures) Act 1989 to market rates at intervals of 3 years;

Appropriation Act 2004,  
Appropriation (Parliament) Act 2004, Appropriation (Special Offices) Act 2004, Crown Lands  
Legislation Amendment (Budget) Act 2004, Sustainable Energy Development Repeal Act 2004

- (f) to establish special arrangements for the purchase by a lease holder of land comprised in a perpetual lease under that Act, if the rent is not subject to redetermination, and to provide for the redetermination of the rent of such leases to market rates in the event that the land is not purchased under those arrangements;
- (g) to allow the Minister, on behalf of the Crown, to impose certain restrictions or public positive covenants on land purchased under the special arrangements;
- (h) to make it clear that fees may be charged for services provided by the Department of Lands in connection with Crown lands; and
- (i) to make provisions of a savings, transitional or consequential nature.

### **Sustainable Energy Development Repeal Bill 2004**

7. The Sustainable Energy Development Authority (**SEDA**) is constituted by the *Sustainable Energy Development Act 1995*. The objects of this Bill are as follows:
- (a) to repeal that Act;
  - (b) to amend the Energy Administration Act 1987 to expressly abolish SEDA and to provide for the transfer of its assets, rights and liabilities to the Crown and for its staff to be transferred to the Department of Energy, Utilities and Sustainability; and
  - (c) to remove references to SEDA in a number of other Acts and to make certain other consequential amendments.

### **Issues Considered by the Committee**

8. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1989*.

***The Committee makes no further comment on this Bill.***

### 3. CHILD PROTECTION (OFFENDERS REGISTRATION) AMENDMENT BILL 2004

Date Introduced:	23 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Police

#### Purpose and Description

1. The Bill amends the *Child Protection (Offenders Registration) Act 2000* [the Principal Act], in connection with a national reporting scheme, to:
  - make provision for the recognition of, and reporting obligations of, offenders subject to reporting requirements in other jurisdictions who come to New South Wales;
  - specify certain offences in the lists of offences relating to children for which a person who is found guilty of such an offence (a **registrable person**) is required to report relevant personal information to police in accordance with the Principal Act and to make other changes to those lists;
  - extend the operation of reporting requirements to other offenders by child protection registration orders, where there is a risk to the lives or sexual safety of one or more children, or children generally;
  - extend the kind of information that must be reported by registrable persons subject to reporting requirements and to enable certain changes in information to be reported other than in person;
  - provide for annual reports of relevant personal information to be made by registrable persons;
  - require the Commissioner of Police to inform the Commissioner of the Australian Federal Police of a registrable person's intentions in relation to travel out of Australia;
  - provide for interpreters to be made available when reports are being made and to provide for fingerprints and photographs to be taken when reports are made;
  - make additional provision with respect to giving notice of reporting obligations and to enable police officers to detain persons for the purpose of giving notice of reporting obligations;
  - enable special arrangements to be made for reports where a registrable person resides more than 100 kilometres from a police station at which a report may be made;
  - extend certain obligations to participants in the witness protection program who reside outside New South Wales;

Child Protection (Offenders Registration) Amendment Bill 2004

- enable the application of modified reporting procedures for registrable persons who are participants in the witness protection program to offenders protected under witness protection laws in other jurisdictions and to make other provision with respect to such persons;
- lengthen some reporting periods that currently apply in respect of registrable persons;
- remove the power of the Administrative Decisions Tribunal [ADT] to suspend life-time reporting obligations pending determination of an application for suspension and to make other amendments relating to such orders in respect of corresponding legislation in other jurisdictions;
- bar prosecutions of registrable persons who breach travel notification requirements but who are found guilty in another jurisdiction of failing to report their presence in that jurisdiction;
- rename the Register established under the Act the *Child Protection Register* and to provide for its form and content in a way that will support the creation of equivalent registers on a national basis;
- confer an express right for a registrable person to be provided with a Protection Register;
- remove the limitation period for taking proceedings for offences under the Principal Act;
- enable a government agency to disclose information about registrable persons to the Commissioner of Police or a supervising authority;
- insert supplementary regulation-making powers; and
- make other minor and consequential amendments and to enact savings and transitional provisions.

## Background

2. The Principal Act currently requires child sex offenders and other specified serious offenders against children to keep police informed of certain personal details for a period of time after their release into the community. This information is placed on the NSW Police *Child Protection Register* [the Register].
3. One of the scheme's limitations is that other jurisdictions do not have similar arrangements in place. Once a person who is on the Register has left New South Wales, it is difficult to detect their re-entry into the State.

Similar difficulties arise in respect of offenders who enter New South Wales after being sentenced or released from custody in another jurisdiction.

4. The Australasian Police Ministers Council [APMC] has developed complementary State and Territory legislation which draws heavily on the current New South Wales scheme, but also incorporates a number of reforms identified by operational police and elements from legislation introduced in the United Kingdom, the United States of America, Canada and New Zealand.

## Child Protection (Offenders Registration) Amendment Bill 2004

5. The Bill provides for the recognition and reporting obligations of offenders subject to reporting requirements in other jurisdictions who come to New South Wales. It has been developed in consultation with all other jurisdictions so that New South Wales can participate in the national child protection offender registration scheme.<sup>6</sup>
6. The Act was recently amended by the *Child Protection (Offenders Prohibition Orders) Act 2004* [Prohibition Orders Act] to apply the reporting obligations under that Act to persons subject to a Child Protection Prohibition Order. The Committee reported on that Act in its *Legislation Review Digest* No. 9 of 2004.

However, although the Prohibition Orders Act received the Royal Assent on 6 July 2004, it has not yet been proclaimed.

## The Bill

7. A **registrable offence** is defined extensively in proposed s 3(1) of the Principal Act. Generally, these can be summarised as a serious offence of a violent or sexual nature relating to a child.

Examples of registrable offences include murder of a child, sexual intercourse with a child, an act of indecency against a child, kidnapping a child, promoting or engaging in an act of child prostitution and filming a child for indecent purposes.

8. The Bill expressly provides for the Class 1<sup>7</sup> and Class 2<sup>8</sup> offences for which a person becomes a registrable person under the Act to include additional specified Commonwealth offences relating to sexual intercourse with children overseas. Previously they were covered by general words.
9. The Bill also enables regulations to be made to include additional offences of a foreign jurisdiction that do not have a New South Wales equivalent.

<sup>6</sup> Hon J A Watkins MP, Minister for Police, Legislative Assembly *Hansard*, 23 June 2004.

<sup>7</sup> A **class 1 offence** means:

- (a) the offence of murder, where the person murdered is a child, or
- (b) an offence that involves sexual intercourse with a child (other than an offence that is a Class 2 offence);
- (c) an offence against s 66EA of the *Crimes Act 1900*;
- (d) an offence against s 50BA or 50BB of the *Crimes Act 1914* of the Commonwealth;
- (e) any offence under a law of a foreign jurisdiction that, if it had been committed in New South Wales, would have constituted an offence of a kind listed in this definition;
- (f) an offence under a law of a foreign jurisdiction that the regulations state is a Class 1 offence;
- (g) an offence an element of which is an intention to commit an offence of a kind listed in this definition;
- (h) an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this definition; or
- (i) an offence that, at the time it was committed:
  - (i) was a Class 1 offence for the purposes of this Act; or
  - (ii) in the case of an offence occurring before the commencement of this definition, was an offence of a kind listed in this definition.

<sup>8</sup> A **class 2 offence** generally includes offences that involves acts of indecency with a child but does not include offences of the most serious nature, such as murdering or having sexual intercourse with a child: s 3 of the *Child Protection (Offenders Registration) Act 2000*.

### Registrable person

10. Currently under the Principal Act, a *registrable person* is a person whom a court has at any time found guilty and sentenced in respect of a registrable offence [s 3].

The Bill contains a number of *exceptions* to this definition. These include, eg, a person in respect of whom a court has made an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999*<sup>9</sup> or s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987*<sup>10</sup> in respect of the offence, or a person whom a court has found guilty of a registrable offence before the commencement of s 3 of the Act, unless that person is an existing controlled person.<sup>11</sup>

11. The definition of registrable person inserted by the Bill reflects the current definition, except that it includes *corresponding registrable persons*, ie, persons from another jurisdiction who are still subject to reporting obligations in that jurisdiction, but not in New South Wales [proposed s 3A].<sup>12</sup>

12. A *corresponding registrable person* is a person who:

- (a) had at any time (whether before, on or after the commencement of this section) been in a foreign jurisdiction and at that time had been required to report to the corresponding registrar in that jurisdiction for a longer period than the person would have been required to report under the Act; and
- (b) would, if the person were currently in that jurisdiction, be required to report to the corresponding registrar in that jurisdiction for a longer period (the *corresponding foreign reporting period*) than the person would be required to report under the Act; and
- (c) falls within a class of person whom the regulations prescribe as corresponding registrable persons for the purposes of the Act [proposed s 3C].

13. A person *ceases* to be a registrable person when the finding of guilt for the only offence that makes the person a registrable person is quashed or set aside by a court, or a sentence imposed is reduced or altered so that the person would not originally have been a registrable person or, in the case of a person subject to a child protection registration order, the order is quashed on appeal [proposed s 3C].

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<sup>9</sup> Section 10 of the *Crimes (Sentencing Procedure) Act 1999* provides for the dismissal of charges and conditional discharge of offender without proceeding to conviction.

<sup>10</sup> Section 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* provides that if the Children's Court finds a young person guilty of an offence it may make an order dismissing the charge, or it may make an order dismissing the charge and administer a caution to the person.

<sup>11</sup> An existing controlled person is defined extensively in s 3 of the *Child Protection (Offenders Registration) Act 2000*, but may be summarised as a person who prior to the commencement of that Act had been convicted of an offence, which by operation of the 2000 Act became a registrable offence.

<sup>12</sup> It also differs from the current definition by excluding children who have committed a single offence under s 21G (1) of the *Summary Offences Act 1988*, and also by excluding persons receiving protection under foreign witness protection laws specified by the regulations.

**Child protection registration orders**

14. The Bill provides that, if a court finds a person guilty of an offence that is *not* a Class 1 or a Class 2 offence, it may nonetheless order that the person comply with the reporting obligations of the Principal Act [proposed s 3D(1).]
15. A person subject to an order under proposed s 3D is *deemed* to have been found guilty of a Class 2 offence for the purposes of proposed Part 3 Division 6 [length of reporting period]
16. A court may only make such an order if:
  - it is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally [proposed s 3D(2)];<sup>13</sup>
  - it imposes a sentence in relation to the offence (other than an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* or s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987*) and must make the order concurrently with that sentence<sup>14</sup> [proposed s 3D(4)]; and
  - an application for the imposition of the order is made by the prosecution [proposed s 3D(5)].
17. For the purposes of proposed s 3D, a person poses a *risk to the lives or sexual safety of one or more children, or children generally* if there is a risk that the person will engage in conduct that may constitute a Class 1 or Class 2 offence against or in respect of a child or children.<sup>15</sup>
18. The Bill provides for the Minister for Police to review proposed s 3D as soon as possible after the expiration of 2 years after the commencement of the Act [proposed s 3E].

**Notice of reporting obligations**

19. The Bill amends the Act to provide for the notification of reporting obligations. The Commissioner of Police [the Commissioner] must notify a registrable person who enters New South Wales of that person's reporting obligations, and of the consequences of failing to comply with them, if the person has not been previously notified.

The Commissioner must also to give notice to a person in New South Wales who becomes a corresponding registrable person [proposed s 7A].<sup>16</sup>

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<sup>13</sup> For the purposes of proposed s 3D(2), it is not necessary that the court be able to identify a risk to particular children, or a particular class of children: proposed s 3D(3) of the *Child Protection (Offenders Registration) Act 2000*.

<sup>14</sup> The effect of this subsection is to prevent a child protection registration order being made concurrently with an order dismissing the charge or conditionally discharging the offender.

<sup>15</sup> Similar provisions exist in the amendments made to the *Child Protection (Offenders Registration) Act 2000* by the *Child Protection (Offenders Prohibition Orders) Act 2004* in relation to Child Protection Prohibition Orders.

<sup>16</sup> The Commissioner must also notify a registrable person as soon as practicable after a change to the person's reporting obligations, since the person was last notified of the period in New South Wales: proposed s 7B of the *Child Protection (Offenders Registration) Act 2000*.

20. A police officer may detain a person if it is reasonably necessary to do so to:
- determine whether or not the person is a registrable person or has been notified of the person's reporting obligations; or
  - enable a person to be given notice of the person's reporting obligations [proposed s 7C].
21. A police officer may only exercise a power of detention under proposed s 7C if:
- there are reasonable grounds to suspect that a person is a registrable person and that the person has not been given notice, or is otherwise unaware, of the person's reporting obligations; and
  - all other reasonably appropriate means of determining whether the person is a registrable person, or of notifying the person of reporting obligations, as the case requires, have been taken [proposed s 7C(1)].

### **Reporting obligations**

22. In addition to the information currently required to be reported, the Bill requires a registrable person to also report:
- the periods during which the person has been known by any other name;
  - the names and ages of any children who generally reside in the same household as the registrable person or with whom the person has unsupervised contact;
  - details of affiliation with any club or organisation that has child membership or child participation in activities;
  - details of tattoos or other distinguishing marks;
  - whether the person has been found guilty in a foreign jurisdiction of a registrable offence; and
  - details of any other government custody since sentence or release and of any regular travel outside New South Wales [proposed s 9].
23. Other amendments made by the Bill include:
- reducing the period in which a person who enters New South Wales must report to police from 28 days to 14 days [proposed s 9A<sup>17</sup> - see Annexure A];
  - obliging a person who is required to report to a corresponding registrar in a foreign jurisdiction to contact a person nominated by the Commissioner for information about any applicable New South Wales reporting obligations. It also prevents a person from being guilty of an offence of failing to comply with reporting obligations in certain specified circumstances [proposed s 9C];

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<sup>17</sup> Proposed s 9B sets out the circumstances and times within which a registrable person whose reporting period has expired but who becomes subject to new reporting obligations must report the person's relevant personal information to the Commissioner. It also provides for corresponding registrable persons and obligations on an order suspending reporting obligations ceasing to have effect.

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- requiring registrable persons to report relevant personal information annually to the Commissioner [proposed s 10];
- requiring a registrable person to report to the Commissioner any change in the person's relevant personal information within 14 days after that change occurs [proposed s 11(1)]<sup>18</sup>;
- expanding the current requirements to report to the Commissioner when leaving New South Wales. A report must be made if a registrable person intends to leave for 14 or more consecutive days<sup>19</sup> [proposed s 11A];
- requiring a registrable person who decides to extend a stay outside New South Wales in Australia beyond 13 days, or to change details reported under proposed s 11A, to report the details to the Commissioner [proposed s 11B];
- requiring a registrable person to report to the Commissioner frequent absences from New South Wales [proposed s 11D];
- requiring the Commissioner to provide the Commissioner of the Australian Federal Police with a copy of reports received relating to registrable persons' intentions in relation to travel outside Australia [proposed s 11E].

**Proof of Identity**

24. The Bill sets out the matters that a person making a report must present as proof of identity.<sup>20</sup> These requirements may be waived if the person permits his or her fingerprints to be taken, or if the relevant police officer is otherwise satisfied as to identity [proposed s 12D].
25. A police officer may take the fingerprints of a registrable person if the police officer is not reasonably satisfied as to the identity of the person after examining all the material provided, or if there are no fingerprints of the person held by NSW Police [proposed s 12E], and may also require a registrable person to be photographed [proposed s 12F].<sup>21</sup>
26. According to the second reading speech:
- [t]his power is consistent with certain United States of America, Canadian and United Kingdom offender registration legislation. The advantages of this are that the onus to provide photos is removed from the offender, the photos will be of higher quality, digital photos will be able to be scanned directly onto the register, and photos will be able to be taken of tattoos and other distinguishing marks by which an offender might be identified.<sup>22</sup>

<sup>18</sup> For the purposes of proposed s 11(1), a change occurs in the place where the registrable person or a child generally resides, or as to when the registrable person has unsupervised contact with a child, or in the place where the registrable person is generally employed, or the motor vehicle that the person generally drives, only on the expiry of the relevant 14-day period referred to in proposed s 9(2).

<sup>19</sup> Details are to be provided of places and dates of travel and residence, as well as details of proposed return or otherwise.

<sup>20</sup> Examples of proof of identity are documents such as a drivers licence, birth certificate, or Australian passport; proposed s 12D of the *Child Protection (Offenders Registration) Act 2000*.

<sup>21</sup> However, a police officer cannot require a registrable person to expose his or her genitals, the anal area of his or her buttocks or, in the case of females or transgender people who identify as females, their breasts; proposed s 12F(2) of the *Child Protection (Offenders Registration) Act 2000*.

<sup>22</sup> Hon J A Watkins MP, Minister for Police, Legislative Assembly *Hansard*, 23 June 2004.

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27. The Bill provides that that if a registrable person refuses to give the person's fingerprints, or to expose part of the person's body (as the case may be) voluntarily, reasonable force may be used by a police officer [proposed s 12G(b)]
28. The Commissioner may retain documents, fingerprints or photographs provided for identification when reports are given for other purposes of identification, law enforcement or child protection. It is an offence to use documents, fingerprints or photographs so provided for any other purposes [proposed s 12H(2)].

However, fingerprints may be retained during the reporting period, despite any other law that would require their destruction [proposed s 12H].

### Reporting periods

29. The Bill replaces the current provisions of the Principal Act relating to the periods for which registrable persons are to report to the Commissioner.<sup>23</sup>
30. The relevant changes are as follows:
- the new period for a person who has been found guilty of a single Class 1 offence is 15 years (previously 10 years);
  - a registrable person in respect of a Class 1 offence who subsequently commits another registrable offence must report for life (previously 15 years or life, depending on the offence);
  - a person who commits a Class 2 offence subsequent to one or more earlier Class 2 offences is to report for 15 years (previously 12 years);
  - a registrable person in respect of a Class 2 offence who subsequently commits a Class 1 offence is to report for life (previously 15 years);
  - a registrable person in respect of a Class 2 offence who subsequently commits a Class 2 offence and who has ever been found guilty of 3 or more Class 2 offences is to report for life (previously 12 years)<sup>24</sup>; and
  - the reporting period for persons who have committed a single Class 2 offence remains 8 years [proposed s 14A].<sup>25</sup>
31. The Bill inserts a new provision requiring corresponding registrable persons to continue to report for the corresponding foreign reporting period [proposed s 14D].

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<sup>23</sup> A registrable person's reporting obligations in respect of a registrable offence begin:

(a) when the person is sentenced for the offence; or

(b) when the person ceases to be in government custody in relation to the offence,

whichever is the later : proposed s 14 of the *Child Protection (Offenders Registration) Act 2000*.

<sup>24</sup> The life time reporting obligation does not apply unless the registrable person was given notice of reporting obligations before committing the subsequent offences: proposed s 14A(2) of the *Child Protection (Offenders Registration) Act 2000*.

<sup>25</sup> The halving of reporting periods for registrable persons who were children when they committed the relevant offences is retained: proposed s 14B of the *Child Protection (Offenders Registration) Act 2000*.

## Offences

### 32. The Bill:

- removes the general time limit for taking proceedings for offences that would otherwise apply in respect of offences under the Principal Act [proposed s 21B];<sup>26</sup>
- makes it clear that the fact that a conviction for a registrable offence becomes spent<sup>27</sup> does *not* affect the status of the offence as a registrable offence, nor any reporting obligations under the Principal Act [proposed s 21C]; and
- enables a government agency to disclose information concerning a registrable person to the Commissioner or a supervising authority [proposed s 21D].

## Administrative Decisions Tribunal

33. The Bill generally re-enacts the provisions enabling the ADT to exempt registrable persons who would otherwise be subject to lifetime reporting obligations from having to report,<sup>28</sup> although the power of the ADT to suspend obligations pending a determination has been removed.

34. The Bill also provides for an exemption order made by the ADT to cease to have effect if the registrable person:

- is made subject to a child protection registration order;
- is found guilty of a registrable offence; or
- becomes a corresponding registrable person subject to reporting obligations [proposed s 16A].

## Child Protection Register

35. The Bill replaces the provisions of the Act relating to the Register of Offenders and expands the range of matters which are to be included in the Register. These include details of offences and any special needs or disabilities [proposed s 19].

36. Changes include:

- a new restriction on access to personal information in respect of protected witnesses [proposed s 19A]; and
- the ability of a registrable person to request a copy of all reportable information held in the Register with respect to the person and to request that incorrect information be amended [proposed s 19B].

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<sup>26</sup> However, proposed s 21B, does *not* apply to an offence committed before the commencement of that section if the limitation period for commencing proceedings expired before that commencement: Sch 2 to the *Child Protection (Offenders Registration) Amendment Bill 2004*.

<sup>27</sup> The *Criminal Records Act 1990* limits the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. On completion of the period, the conviction is to be regarded as spent and, subject to some exceptions, is not to form part of the person's criminal history.

<sup>28</sup> An additional requirement that the registrar of the ADT notify the Commissioner of the Commission for Children and Young People of proceedings for an exemption order is included (the Commission is already entitled to be a party to such proceedings).

## Regulations

37. Proposed s 22(1A) adds to the Principal Act an extensive list of specific matters for which regulations may be made.
38. These include:
- (a) requiring a person or body to provide specified information to registrable persons concerning their reporting obligations;
  - (b) requiring a person or body to inform the Commissioner:
    - (i) that a registrable person has left the custody or control of the person or body;
    - (ii) that the person or body has given specified information to a registrable person; and
    - (iii) that, in the opinion of the person or body, a registrable person does or does not have the legal capacity to understand specified information; and
  - (c) requiring a person or body to give to the Commissioner any acknowledgment by a registrable person of the receipt of a notice or any other specified information that is held by the person or body [proposed s 22(1A)].

## Transitional provisions

39. The Bill inserts savings and transitional provisions consequent on the enactment of the proposed Act. Among these provisions is a regulation-making power enabling the retrospective application of new reporting periods so that they fit in with complementary legislation of other jurisdictions that may commence before the proposed Act [Sch 1[48]].

## Issues Considered by the Committee

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

#### Child Protection Registration Orders: proposed s 3D

40. As noted above, on the application of the prosecution, a court may order that a person comply with the reporting obligations of the Principal Act, even if that person has been found guilty of an offence ***that is not a Class 1 or a Class 2 offence*** if the court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally [proposed s 3D(2)].

For the purposes of Division 6 of Part 3 of the amended Principal Act,<sup>29</sup> such a person is deemed to have been found guilty of a Class 2 offence.

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<sup>29</sup> Division 6 Part 3, as inserted into the *Child Protection (Offenders Registration) Act 2000* by the *Child Protection (Offenders Registration) Amendment Bill 2004* deals with the period of reporting obligations of registrable persons.

## Child Protection (Offenders Registration) Amendment Bill 2004

41. Under the Bill, a person poses a *risk to the lives or sexual safety of one or more children or children generally* if there is a risk that the person will engage in conduct that may constitute a Class 1 or Class 2 offence against or in respect of a child or children generally [proposed s 3D(2)].
42. Subjecting a person to the reporting requirements of a registrable person deprives that person of rights and liberties enjoyed by the general population.
43. It is not usual to so deprive a person of rights and liberties in a liberal democracy on the basis of an *assessment of risk of harm* that that individual may perpetrate rather than as a *punishment for a crime*.

While an order under proposed s 3D is to be given at the same time as a sentence, there is no suggestion that such an order would comprise part of the sentence.

44. As drafted, proposed s 3D does not require there to be any connection between the offence committed and the assessment of risk a person poses. Consequently, the fact of being sentenced for an offence could in theory enable a court to impose reporting requirements in response to an assessment of risk wholly based on evidence not related to the offence.
45. However, in respect of a court ordering a person convicted of a non-registrable offence to register, the Minister noted that:

[t]here may be evidence admitted in the successful prosecution of some non-registrable offences that clearly demonstrates an offender poses a risk to the sexual safety or life of a child, or children generally. The bill enables the sentencing court to make a child protection registration order, on the application of the prosecution, where it is satisfied that there is a risk the offender will engage in conduct that may constitute a registrable offence.<sup>30</sup>

- 46. The Committee notes that a person sentenced for any offence may be placed on the Child Protection Register even if they have not been found guilty of a Class 1 or Class 2 offence.**
- 47. The Committee also notes that the Bill does not require that there be any connection between the specific offence committed and the assessment of risk to children. Clearly, however, the court would require appropriate evidence to be adduced by the prosecution in support of its application.**
- 48. The Committee also notes the Minister's express intention that in practice, an order under proposed s 3D will only be made on the application of the prosecutor where a court is satisfied that there is a risk that the offender will engage in conduct that may constitute a registrable offence.**
- 49. Having regards to the aims of the Principal Act and the Bill, and the Government's express intention that a court will only make an order for registration of a person convicted of a non-registrable offence where it is satisfied that the offender may otherwise commit a registrable offence, the Committee does not consider that proposed s 3D constitutes an undue trespass on individual rights and liberties.**

<sup>30</sup> Hon J A Watkins MP, Minister for Police, Legislative Assembly *Hansard*, 23 June 2004.

**Detention in respect of reporting obligations: proposed s 7C**

50. A police officer may detain a person in order to determine whether or not the person is a registrable person, or has been notified of the person's reporting obligations; or to enable a person to be given notice of those obligations [proposed s 7C].
51. Granting police the power to detain a person who may or may not be liable to registration under the Principal Act ought not to be done lightly. The Bill does not specify for what period of time a person may be detained for the purposes of ascertaining whether or not he or she is indeed a registrable person. In the case of a corresponding registrable person, the process might take a considerable period of time.
52. However, the Bill provides that this power may only be exercised if:
- there are reasonable grounds to suspect that a person is a registrable person and that the person has not been given notice, or is otherwise unaware, of the person's reporting obligations; and
  - all other reasonably appropriate means of determining whether the person is a registrable person, or of notifying the person of reporting obligations, as the case requires, have been taken [proposed s 7C(1)].
53. In addition, given that failing to comply with reporting requirements under the Principal Act is an offence [s 17]<sup>31</sup>, ensuring that a person is aware of his or her responsibilities under the Principal Act ameliorates the potential trespass to individual rights.

- 54. The Committee notes that the right of individuals not to be deprived of their liberty in the absence of offending on their part is a fundamental element of the rule of law.**
- 55. The Committee also notes that the detention of a person as envisaged by proposed s 7C appears to be a form of "last resort", designed to ensure persons are aware of their responsibilities under the *Child Protection (Offenders Registration) Act 2000*.**
- 56. Having regards to the aims of the Bill, and the safeguards contained in s 17C(1), the Committee does not consider that the right to detain contained in proposed s 17C is an undue trespass on individual rights and liberties.**

**Child Protection Register: proposed s 19**

57. The Bill replaces the existing Register of Offenders with a Child Protection Register. Information which is required to be included in the Register must be provided by a registrable person to a police officer.
58. Access to information relating to protected witnesses is restricted [proposed s 19A]. However, there appears to be no corresponding general restriction in the Bill, nor in

<sup>31</sup> Nonetheless, it is a defence to proceedings for an offence arising under s 17 if it is established by or on behalf of the registrable person charged with the offence that, at the time the offence is alleged to have occurred, the person had not received notice, and was otherwise unaware, of the person's reporting obligations; s 17(c) of the *Child Protection (Offenders Registration) Act 2000*.

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the *Child Protection (Offenders Registration) Regulation 2001*, on access to information on the Register.

Indeed, the Bill enables a government agency to disclose information concerning a registrable person to the Commissioner or to a supervising authority [proposed s 21D].<sup>32</sup>

59. In the second reading speech of the Principal Act, the then Minister for Police noted that:

[o]nce information on child sex offenders is released to a small number of people it is difficult to prevent it being spread throughout the community. This is particularly the case in small or isolated communities. Available research suggests community notification does not reduce recidivism amongst child sex offenders. Indeed, there are strong concerns that community notification may increase the risks of recidivism, thereby exposing children to additional danger.<sup>33</sup>

60. By way of comparison, s 9(4) of the recent Canadian *Sex Offender Information Registration Act 2004* provides that the person who collects information for inclusion on the equivalent Register shall ensure that:

- (a) the sex offender's privacy is respected in a manner that is reasonable in the circumstances; and
- (b) the information is provided and collected in a manner and in circumstances that ensure its confidentiality.

61. Other jurisdictions, while allowing public access to offender records, make it an offence to misuse information obtained from those records.<sup>34</sup>

62. The right to privacy is an internationally recognised right.<sup>35</sup> However, the right to privacy of registrable persons must be balanced against the safety of children.

**63. The Committee notes that it is necessary to balance an offender's right to privacy with the community's reasonable expectations as to the safety of children.**

**64. The Committee has written to the Minister seeking his advice as to what restrictions are to be imposed on access to information held on the Child Protection Register, other than that access provided to registrable persons themselves pursuant to proposed s 19B.**

<sup>32</sup> A supervising authority means the Director of the Pre-Trial Diversion of Offenders Program, the Director-General of the Department of Juvenile Justice, the Commissioner of Corrective Services, or the Director-General of the Department of Health, as applicable: cl 5 of the *Child Protection (Offenders Registration) Regulation 2001*.

<sup>33</sup> Hon P F P Whelan MP, Minister for Police, Legislative Assembly *Hansard*, 1 June 2000.

<sup>34</sup> See, eg, M Burns, "Do Sexual Predators Have the right to Privacy? Confidentiality Provisions for Registered Sex Offenders in California and Massachusetts", [www-2.cs.cmu.edu/~burnsm/SPR.html](http://www-2.cs.cmu.edu/~burnsm/SPR.html); and Lane Council of Governments, *Managing Sex Offenders in the Community: A National Overview*, 2003, [www.atsa.com/pdfs/Managing%20Sex%20Offenders%20in%20the%20Community-A%20National%20Overview-2003.pdf](http://www.atsa.com/pdfs/Managing%20Sex%20Offenders%20in%20the%20Community-A%20National%20Overview-2003.pdf).

<sup>35</sup> See, eg, Article 17(1) of the United Nations *International Covenant on Civil and Political Rights*: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

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

**Commencement by proclamation: Clause 2**

65. The Bill is to commence on a day or days to be appointed by proclamation.
66. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act, or parts of the Act, at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

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| <p><b>67. The Committee has written to the Minister's office seeking his advice as to why the Act is to commence on proclamation.</b></p> |
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*The Committee makes no further comment on this Bill.*

## Annexure A – Initial reporting requirements under proposed s 9A

Registrable person	Period for initial report
A registrable person (other than a corresponding registrable person) who enters government custody in New South Wales before, on or after the commencement of this section as a consequence of having being sentenced for a registrable offence and who ceases to be in government custody while in New South Wales	Within 28 days after the registrable person ceases to be in government custody
Any other registrable person who is sentenced for a registrable offence in New South Wales	Within 28 days after the registrable person is sentenced for the registrable offence
A registrable person who enters New South Wales from a foreign jurisdiction and who has not previously been required under this Act to report his or her relevant personal information to the Commissioner of Police	Within 14 days after entering and remaining in New South Wales for 14 or more consecutive days, not counting any days spent in government custody
A corresponding registrable person who has not previously reported the person's relevant personal information to the Commissioner of Police and who is in New South Wales on the date on which the person becomes a corresponding registrable person	Within 28 days after the person becomes a corresponding registrable person or 28 days after the person ceases to be in government custody whichever is the later

## 4. CRIMES LEGISLATION AMENDMENT (TERRORISM) ACT 2004, SYDNEY OPERA HOUSE TRUST AMENDMENT ACT 2004

Date Introduced:	22 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

**These Bills passed all stages in the Legislative Assembly on 22 June 2004 and all stages in the Legislative Council on 24 June 2004. On 6 July 2004 they received Royal Assent. Pursuant to s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has become an Act.**

### Purpose and Description

#### ***Crimes Legislation Amendment (Terrorism) Bill 2004***

1. The Bill made a number of miscellaneous amendments to the *Crimes Act 1900*, the *Criminal Procedure Act 1986*, the *Terrorism (Police Powers) Act 2002* and the *State Emergency and Rescue Management Act 1989* arising from a review of offences and powers relating to terrorism.

#### ***Sydney Opera House Trust Amendment Bill 2004***

2. This Bill amended the *Sydney Opera House Trust Act 1961*:
  - (a) to create new offences of trespassing at the Opera House, trespassing at the Opera House with intent to cause damage or serious disruption, or to commit certain offences, and intentionally or recklessly damaging the Opera House;
  - (b) to increase from 10 to 50 penalty units the maximum penalty that may be imposed for a breach of the by-laws under the Act;
  - (c) to remove the need for the Governor to approve delegations under the Act; and
  - (d) to update provisions for the employment of staff of the Opera House Trust.
3. The Bill also made consequential amendments to the *Criminal Procedure Act 1986* to provide for the summary disposal of certain of the new offences that are indictable offences.

### Background

#### ***Crimes Legislation Amendment (Terrorism) Bill 2004***

4. In his second reading speech, the Attorney General stated:

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 Crimes Legislation Amendment (Terrorism) Act 2004, Sydney Opera House Trust Amendment Act 2004

The *Crimes Legislation Amendment (Terrorism) Bill* is the second bill implementing the counter-terrorist reform package announced by the Government on 14 May.

...

In 2002 the Government enacted the *Terrorism (Police Powers) Act*, which gives police extraordinary powers to stop and search persons and vehicles, or to search areas and buildings, in order to prevent a terrorist attack, or after an attack to assist in catching the terrorists red-handed.

...

On 6 May the Premier announced the establishment of the counter-terrorism laws task force... The task force will monitor and review the laws of New South Wales and make recommendations for legislative amendments. In early June the first of these legislative amendments was made—the creation of a presumption against bail for persons charged with terrorist offences under the Commonwealth Criminal Code. This bill makes a range of other amendments to New South Wales legislation.

When it comes to prosecuting persons accused of terrorist activity under the law the first line of defence will be the terrorist offences created by the Commonwealth Criminal Code. Indeed, all persons arrested and charged in New South Wales to date have been charged with Commonwealth terrorist offences. There are limited circumstances, however, where New South Wales criminal offences will be relevant in a prosecution of terrorist activity, for instance, when there is incidental criminal activity discovered during an investigation or when there is no clear evidence that the incident was motivated by terrorism, as defined by the Commonwealth legislation, but the actions are clearly criminal under New South Wales law.

In light of the referral of power to the Commonwealth for terrorism matters, New South Wales law will not create any specific terrorist offences, but will focus on ensuring that offences of the type committed by terrorists, namely offences against the person and offences against property, are relevant and comprehensive.

The bill will also clarify the trigger for the use of the powers provided to police under the *Terrorism (Police Powers) Act 2002* and will augment the existing powers by introducing a power for the Commissioner of Police to set up cordons and give reasonable directions to government bodies and agencies to facilitate the exercise of the powers.<sup>36</sup>

### ***Sydney Opera House Trust Amendment Bill 2004***

5. The Attorney General stated that this Bill makes it a criminal offence to trespass on, or trespass with intent to cause damage to, or seriously disrupt the operations of, the Opera House. Courts will be able to require offenders to compensate the Opera House for criminal damage.<sup>37</sup>

## **The Bills**

### ***Crimes Legislation Amendment (Terrorism) Bill 2004***

6. This Bill comprises 4 Schedules amending the following Acts:

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<sup>36</sup> The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly Hansard, 22 June 2004.

<sup>37</sup> The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly Hansard, 22 June 2004.

- Crimes Act, 1900;
- Criminal Procedure Act, 1986;
- Terrorism (Police Powers) Act, 2002; and
- State Emergency and Rescue Management Act, 1989.

### **Schedule 1 - Amendments to the *Crimes Act***

#### *Poisoning offences*

7. Prior to these amendments, the Crimes Act contained a number of offences relating to poisoning.<sup>38</sup> These offences required a person to “administer” or to cause a person to “take” poison or other noxious substance.

Clause 1 amends section 4 of the Crimes Act to provide that a reference in these offences (or any other offence) under the Act to “administer” or “cause to take” poison includes a reference to “causing any person to inhale, take or be exposed to the poison or thing by its release into the person’s environment”.<sup>39</sup>

This amendment was intended to make clear that the offences relating to poisoning extend also to poisoning by way of releasing poison or other noxious substance into a person’s environment.

#### *Placing explosives*

8. Clause 2 replaces section 48, which made it an offence to place gunpowder or other explosives into, upon, against, or near any building, ship or vessel.

The new section 48 extends the offence so that it applies to placing explosives in or near a building, public place, vehicle, train or other conveyance.

The penalty for this offence remains the same (maximum of 14 years imprisonment).

#### *Possessing or making explosives*

9. Prior to these amendments, the penalty for the offence of possessing or making explosives, noxious things or any other instrument or thing with the intention of injuring persons was a maximum 5 years.

The bill increased this penalty to 10 years [cl 3].

10. New section 93FA creates 2 new offences of possessing or making explosives.

New subsection 93FA(1) creates the new offence (maximum penalty: imprisonment for 5 years) of possessing explosives in a public place without reasonable excuse or lawful purpose.

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<sup>38</sup> For example, administering poison with intent to injure or annoy (section 41) and using poison etc so as to endanger life (section 39).

<sup>39</sup> See Schedule 1[1].

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 Crimes Legislation Amendment (Terrorism) Act 2004, Sydney Opera House Trust Amendment Act 2004

New subsections 93FA (2)–(4) contain the summary offence, formerly in section 545D, of possessing or making explosives in suspicious circumstances.

They increase the maximum penalty from imprisonment for 1 year or a fine of 10 penalty units (or both) to imprisonment for 2 years or a fine of 50 penalty units (or both).<sup>40</sup>

11. Subsection (4) of s 93FA provides that a person is not guilty of either offence if they satisfy the court that he or she had a reasonable excuse for possessing or making an explosive or did so for a lawful purpose.
12. Formerly section 200 provided imprisonment of 3 years for the offence of having possession, custody or control of an article with the intention that it be used maliciously to destroy or damage property.

The Bill amends this section by increasing the penalty to 7 years imprisonment if the article concerned is an explosive [cl 6].

### *Sabotage*

13. The offence of *sabotage* under the Act covers conduct that causes damage to a public facility where the person causing the damage intended to cause extensive destruction of property or major economic loss [s. 203B].
14. Section 203A defines “*public facility*” as including any of the following (whether publicly or privately owned):
  - (a) a government facility, including premises used by government employees in connection with official duties;
  - (b) a public infrastructure facility, including a facility providing water, sewerage, energy or other services to the public;
  - (c) a public transport facility, including a conveyance used to transport people or goods; or
  - (d) a public place, including any premises, land or water open to the public.

The Bill amends the definition of public facility to include public computer systems [cl 7].

### **Schedule 2 - Amendments to the *Criminal Procedure Act 1986***

15. Table 2 of Schedule 1 of this Act has been amended to provide that the proposed new offence of possessing explosives in a public place is to be tried summarily, unless the prosecution otherwise elects.

### **Schedule 3 - Amendments to the *Terrorism (Police Powers) Act 2002***

16. According to the Attorney General, the *Terrorism (Police Powers) Act* gives:

[P]olice extraordinary powers to act in emergency situations when there were grounds to believe a terrorist act might be about to occur or had just occurred. Where the Act

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<sup>40</sup> 10 penalty units are currently \$1100. 50 penalty units are currently \$5500.

Crimes Legislation Amendment (Terrorism) Act 2004, Sydney Opera House Trust Amendment Act 2004

is triggered, by a very senior police officer, a range of powers of stop and search are available to police to attempt to frustrate a terrorist attack or rapidly close the net on terrorists who may be leaving the scene of an attack.

While this Act has not been used, it has been tested in counter-terrorism exercises. Experience in working with the Act in exercises has shown that clarification is required to the trigger to activate the powers and also that some additional powers are needed.<sup>41</sup>

17. Clause 1 amends section 5 of the Act. The amendment is intended to clarify the circumstances in which the special powers conferred by the Act may be authorised.
18. Section 5 previously provided that the special powers are only exercisable if the Commissioner or a Deputy Commissioner of Police (or other available senior police officer) is satisfied that there are reasonable grounds for believing that there is an *imminent* threat of a terrorist act. The Commissioner must also be satisfied that the exercise of those powers will substantially assist in preventing the terrorist act.

The amendment broadens the circumstances in which the Commissioner may exercise these special powers by removing the requirement that the Commissioner be satisfied that the terrorist threat is imminent. Under the amended section 5, the Commissioner need only be satisfied of a threat *occurring in the near future*.

The Commissioner must still, however, be satisfied that the exercise of those powers will substantially assist in preventing the terrorist act remained unaltered.

19. In speaking on this amendment, the Attorney General stated that the “concern the police have must be based on evidence. The trigger does create a genuine test. But that test must have a relatively low threshold given the consequences if police do not act”.<sup>42</sup>

He also said that the two limbs of the test (satisfied of a threat in the near future and that the exercise of the powers will substantially assist in preventing a terrorist act):

... prevents the legislation from being triggered merely by reference to the general background threat that exists against this country. There must be some combination of factors suggesting that an act may be about to occur. The use of the term "threat", with its connotations of risk and uncertainty, makes it clear that the reasonable belief that there is the threat that a terrorist act may occur in the near future can be based on information that is itself uncertain or vague.

...

The existing safeguards under the Act remain. The decision of senior police to activate the powers must be ratified by the Minister for Police. Similarly, when the powers are used, a report must be made by NSW Police to the Attorney General and the Minister for Police. The Act also has a built-in requirement that it be reviewed annually.<sup>43</sup>

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<sup>41</sup> The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly Hansard, 22 June 2004.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

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Crimes Legislation Amendment (Terrorism) Act 2004, Sydney Opera House Trust Amendment Act 2004

20. The amendments also give authority to the Commissioner of Police or a Deputy Commissioner (or other available senior police officer) to give directions to government agencies (and their members and officers) with respect to the exercise of the powers and functions of the agency for the purpose of facilitating the exercise of the police special powers under this Act [cl 2, new section 14A].

An agency so directed must comply with the direction.

21. The new section 19A confers a specific power on police officers to place a roadblock or other cordon in or around a target area in order to carry out authorised searches on search persons, vehicles or premises [cl 3].

**Schedule 4 - Amendments to the *State Emergency and Rescue Management Act 1989***

22. The definition of “emergency” (Section 4) is amended to make it clear that a terrorist act is included in the actual or imminent occurrences (such as fires, floods, storms, earthquakes, explosions, accidents, epidemics or warlike actions) that can constitute an emergency for the purposes of the Act.

Accordingly, the Premier may now declare a state of emergency under section 33 of the Act in connection with a terrorist act if satisfied that it constitutes a significant and widespread danger to life or property in New South Wales.

***Sydney Opera House Trust Amendment Bill 2004***

*New offences*

23. Schedule 1 inserted sections 28A–28E into this Act creating the following new offences:
- (a) trespassing at the Opera House [maximum penalty 200 penalty units (currently \$22,000) or imprisonment for 2 years, or both] [s 28A];
  - (b) trespassing at the Opera House with intent to cause damage to the Opera House, seriously disrupt the operations of the Opera House, or commit any offence punishable by imprisonment or arising under the *Summary Offences Act 1988* (maximum penalty 7 years imprisonment) [s 28B]; and
  - (c) intentionally or recklessly damaging the Opera House (maximum penalty 5 years imprisonment) [s 28C].

*Miscellaneous amendments*

24. Schedule 2 [4] replaced existing provisions for the appointment of staff of the Trust by the Governor with current provisions for the appointment of staff under the *Public Sector Employment and Management Act 2002*.
25. Schedule 2 [6] increased the maximum penalty that may be imposed by the by-laws under the Act from 10 to 50 penalty units (currently \$1,100 to \$5,500).

## Issues Considered by the Committee

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

#### Reversal of onus of proof: Schedule 1, Clause 5, Section 93FA, *Crimes Act 1900*

26. New subsection 93FA(1) of the Crimes Act creates a strict liability offence for possessing explosives in a public place, punishable by a maximum jail term of 5 years.

S93FA(2) creates a summary offence, punishable by two years imprisonment where a person possesses or makes explosives in circumstances giving rise to a reasonable suspicion that the person did not possess or make explosives for a lawful purpose.

27. Subsection 93FA(4) provides that a person is not guilty of these offences if they satisfy the court they had a reasonable excuse for possessing or making an explosive or did so for a lawful purpose. The need to “satisfy the court” means the defendant must satisfy the court on the balance of probabilities.

28. Criminal offences usually comprise both a criminal act (*actus reas*) and a “guilty mind” (*mens rea*). The prosecution normally must prove both the criminal act and the knowledge of wrongfulness beyond reasonable doubt.

Providing a defence of reasonable or lawful excuse that *the defendant must prove* instead of a criminal intent that *the prosecution must prove*, effectively reverses the onus of proof regarding the defendant’s intentions.<sup>44</sup>

29. The Committee is strongly of the view that the principle that the prosecutor bears the onus of proving beyond reasonable doubt all the elements of a criminal offence against an accused person, consistent with the presumption of innocence, is fundamental to the maintenance of personal rights.

The presumption of innocence is a key principle of the Australian criminal justice system and a fundamental human right.<sup>45</sup> This right should not be derogated from, including by reversing the onus of proof, unless there are clear and compelling public interest justifications for doing so.

The Committee is of the view that when a person faces imprisonment for a conviction on a criminal offence, derogation from this principle requires a clear and compelling public interest justification.

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<sup>44</sup> Lord Hutton noted in *R. v Lambert*, [2001] UKHL 37, at para 185, that “the Crown cannot rebut an argument based on a violation of Article 6(2) [of the European Convention on Human Rights regarding the presumption of innocence] by simply contenting that the Government of the United Kingdom is entitled ‘to define the constituent elements of the ... offence’, and that a violation of Article 6(2) is avoided because the 1971 Act makes absence of knowledge of being in possession of a controlled drug a defence rather than making knowledge an ingredient of the offence which the prosecution has to prove.”

<sup>45</sup> See for example, article 11(1), Universal Declaration of Human Rights and Article 14(2) of the *International Covenant on Civil and Political Rights*, to which Australia became a party in 1980. Also, Article 6(2) of the *European Convention on Human Rights*.

30. The Committee acknowledges that there are numerous criminal offences, created by NSW statutes, which effectively shift the burden of proof to the accused person, but which also provide for statutory defence on the “balance of probabilities”. Examples include Goods in Custody [Crimes Act, s527C] and “deemed supply” offences [Drug Misuse and Trafficking Act, s29].

The former requires the defender to satisfy the Court that he or she had reasonable grounds for suspecting the goods were stolen or unlawfully obtained. The latter requires the defendant to show that the drugs in his or her possession were for his or her own personal use (as opposed to possession for the purpose of supply).

In both cases, these matters are particularly within the knowledge of the defendant, and they both require the (lesser) civil standard of proof (ie on the balance of probabilities) rather than the criminal standard of proof (ie beyond reasonable doubt).

### **Presumption of innocence under the European Convention on Human Rights**

31. The question of how to balance the ability of the state to secure prosecutions in such circumstances with the presumption of innocence in matters that involve serious penalties has been considered in other jurisdictions.
32. The response of the United Kingdom in attempting to balance the need of the state to be able to secure a prosecution with the right to the presumption of innocence under Article 6(2) of the European Convention on Human Rights<sup>46</sup> is of particular relevance to jurisdictions with a common law tradition.
33. The European Court of Human Rights, in applying Article 6, has accepted that clauses reversing the onus of proof do not necessarily breach the principle of the presumption of innocence.<sup>47</sup> However, it has also held that such provisions must be kept within reasonable limits.<sup>48</sup>

In applying that general principle, the House of Lords has said that the right to be presumed innocent under Article 6 of the European Convention on Human Rights,

...is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality. It is now well settled that the principle which is to be applied requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.<sup>49</sup>

<sup>46</sup> “Everyone charge with a criminal offence shall be presumed innocent until proved guilty according to law.” Article 6(2), *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

<sup>47</sup> Article 6(2) of the European Convention on Human Rights sets out this right.

<sup>48</sup> See *Salabiaku v France*, ECHR 1988. See also, *R v DPP, ex parte Kebilene* [2000] 2 AC 326, at 383-388 per Lord Hope of Craighead.

<sup>49</sup> Lord Hope of Craighead in *R. v Lambert*, [2001] UKHL 37, para 88.

34. The House of Lords has concluded that this “balance” can be met by reverse onus of proof clauses imposing an *evidential*<sup>50</sup> rather than a *legal*<sup>51</sup> burden on defendants.

In *R v Lambert*,<sup>52</sup> for example, the majority of the House of Lords held that, in accordance with the principle of proportionality, reverse onus of proof clauses in the *Misuse of Drugs Act 1971* should be “read down” so as to impose only an evidential rather than a legal burden of proof, in order to comply with the presumption of innocence under Article 6(2) of the European Convention on Human Rights.<sup>53</sup>

35. In response to this ruling, when the UK Parliament enacted the *Terrorism Act 2000*, it explicitly provided that where a defendant bears the burden of proof (eg, in relation to a defence), it is an evidential and not a legal one.<sup>54</sup>

Section 118(2) of that Act provides that where certain defences are provided under the Act:

If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.<sup>55</sup>

#### “Evidential” vs “legal” burden in certain other jurisdictions

36. In the Commonwealth Criminal Code, the **Australian Federal Parliament** has also found that the correct balance is *normally* struck by imposing only an evidential burden of proof on defendants, although laws can change this balance.<sup>56</sup>

The Commonwealth *Criminal Code Act 1995* distinguishes between an *evidential* and a *legal* burden of proof.

In that Act:

“*legal burden*”, in relation to a matter, means the burden of proving the existence of the matter. [sect 13.1]<sup>57</sup>

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<sup>50</sup> Under the Criminal Code Act 1995 (Cth), an ‘*evidential*’ burden of proof imposed on a defendant “in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.” Clause 13.3(6).

<sup>51</sup> The House of Lords actually used the term *persuasive burden* but the term *legal burden* is used here for consistency with the *Commonwealth Criminal Code Act 1995*. Clause 13.1(3) of the *Code* states that a “legal burden, in relation to a matter, means the burden of proving the existence of the matter.” Section 13.2(1) states that a “legal burden of proof on the prosecution must be discharged beyond reasonable doubt.”

<sup>52</sup> *R. v Lambert*, [2001] UKHL 37.

<sup>53</sup> For an alternate view on this point, see minority view of Lord Hutton. In relation to drugs offences he stated: “[M]y conclusion is that the difficulty in some cases of convicting those guilty of the crime of possession of a controlled drug with intent to supply, if the burden of proving knowledge beyond a reasonable doubt rests on the prosecution, is not resolved by placing an evidential burden on the defendant, and that it is necessary to impose a persuasive burden... I further consider that the transfer of the onus satisfies the test that it has a legitimate aim in the public interest and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.” Lord Hutton, *R. v Lambert*, [2001] UKHL 37, para 198.

<sup>54</sup> For example, *R v Director of Public Prosecutions, Ex Parte Kebilene*, [2002] 2 AC 326.

<sup>55</sup> Section 118, *The Terrorism Act 2000* (United Kingdom).

<sup>56</sup> Section 13.4 *Commonwealth Criminal Code Act 1995*

"**evidential burden**", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist [sect 13.3].

37. In relation to the offence of knowingly or recklessly possessing things connected with terrorist acts, the Code explicitly applies the evidential burden to the defence of not intending to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.<sup>58</sup>
38. Taking an approach similar to that of the UK, the **South African Constitutional Court** and **Canadian Supreme Court**<sup>59</sup> limited such reversals of the onus of proof to imposing an evidential burden on the defendant.
39. The South African Constitution provides that:
- Every accused person has a right to a fair trial, which includes the right –
- ...
- (h) to be presumed innocent ...<sup>60</sup>
40. In a case concerning the handling of stolen goods, the majority of the South African Constitutional Court held that:
- [A] reverse burden provision in respect of handling recently stolen goods was incompatible with a constitutional presumption of innocence. On the other hand, an evidential burden requiring the accused to explain his possession of the goods would not have amounted to a violation of the constitutional right of silence.<sup>61</sup>

The majority of that Court also observed:

...the state has failed, in our view, to discharge the onus of establishing that the extent of the limitation is reasonable and justifiable and that the relation between the limitation and its purpose is proportional. It equally failed to establish that no less restrictive means were available to Parliament in order to achieve the purpose...<sup>62</sup>

## The Bill

41. The Committee notes that the possession of explosives in a public place without a lawful purpose provides a significant threat to public safety.
42. The Committee further notes that, given the current increased risk of terrorism, it is of utmost importance that the police and the courts are able to respond appropriately if any person has explosives in a public place without good reason.

<sup>57</sup> The *standard of proof* for the legal burden for the prosecution is normally *beyond reasonable doubt*, while for the defence is *on the balance of probabilities* [sect 13.2 & 13.5].

<sup>58</sup> Section 101.4 Commonwealth *Criminal Code Act 1995*

<sup>59</sup> For Canadian jurisprudence see *R v Oakes* (1986) 26 DLR (4th) 200; *R v Whyte* (1988) 51 DLR 4th 481; *R v Downey* (1992) 2 SCR 10; *R v Osolin* [1993] 4 SCR 595; and *Hogg, Constitutional Law of Canada*, 4th ed., 1997.

<sup>60</sup> Chapter 2, Article 35(3), *The Constitution of the Republic of South Africa*, 1996.

<sup>61</sup> *State v Manamela*, [2000] 5 LRC 65.

<sup>62</sup> *State v Manamela*, [2000] 5 LRC 65, para 49.

43. The Committee notes that requiring a defendant to prove a reasonable or lawful excuse on the balance of probabilities reverses the burden of proof.
44. The Committee note the policy implications expressed by the Minister in his second reading speech:  
“regardless of whether a person has terrorist motives or not, they should not be possessing or using explosives or bombs unless they have a legitimate or lawful motive for doing so.”<sup>63</sup>
45. The Committee is of the view that, in this particular case, there is a clear and compelling public interest justification for reversing the onus of proof.
46. The Committee also notes that under the Bill, the prosecution still bears the burden of proving, beyond reasonable doubt, that a person had possession of explosives in a public place.
47. The Committee considers that, given the regulatory controls on explosives and their limited lawful use, a person with explosives in a public place who had a reasonable or lawful excuse is unlikely to find such proof onerous.

- 48. The Committee notes that the presumption of innocence is a fundamental personal right.**
- 49. The Committee is of the view that clauses reversing the onus of proof for a particular element of an offence may not necessarily breach the principle of the presumption of innocence, but only if such provisions are within reasonable limits: balancing the need to protect the rights of the accused with the need to meet other important public interests.**
- 50. The Committee considers that normally a reasonable limit for a reversal of onus of proof would be placing no more than an *evidential* burden on a defendant.**
- 51. The Committee is of the view that the public interest in preventing unlawful possession of explosives in public places is compelling. In addition, the Committee considers that it is likely that a person who was authorised to possess explosives in a public place could prove that fact relatively easily.**
- 52. Accordingly, the Committee considers that the reversal of onus in clause 93FA is within reasonable limits and does not trespass unduly on the right of an individual to be presumed innocent.**

***The Committee makes no further comment on this Bill.***

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<sup>63</sup> The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly Hansard, 22 June 2004.

## 5. CROWN LANDS (PREVENTION OF SALE) BILL 2004\*

Date Introduced: 28 June 2004  
House Introduced: Legislative Council  
Member: Mr Ian Cohen MLC

### Purpose and Description

1. The objects of this Bill are:
  - (a) to identify and protect the values of certain Crown land (termed *protected land*) by requiring specified Government agencies and the Director-General of the Department of Lands to participate in an assessment process and by preventing the sale, or the revocation of any reservation from sale applying to, protected land in certain circumstances; and
  - (b) to enable certain nominated agencies to recommend that protected land be reserved from sale.
2. No restriction is placed on the types of values that may be identified for the purposes of assessing Crown land under the proposed Act. However, examples set out in Schedule 1 to the proposed Act include value for the purpose of ensuring or assisting environmental protection, nature conservation, conservation of water resources and protection and conservation of Aboriginal and European heritage and for recreation.
3. The proposed Act operates retrospectively by rendering void any dealings of specified kinds with protected land that may occur after the date of introduction of this Bill into the Legislative Council.

### Background

4. In his second reading speech, Mr Cohen stated that:

[The] announcement in the mini-budget of 6 April that [the Government] would seek to encourage the conversion of freehold status of approximately 11,000 Crown leases, is one of the biggest privatisation exercises in the past 50 years.

...

The sale of that one million hectares, about 2,500 Crown leases, requires the approval of the Minister for the conversion to proceed. Almost all the lands have outstanding conservation value and should be protected at all costs. Many are the last remnants of vegetation on which the very survival of plants and animals in the region will depend. Converting them to freehold will see the Government lose control and the conservation value lost for ever...

The Government is now proceeding with its plan through the *Crown Lands Legislation Amendment (Budget) Bill*, which was introduced last Tuesday as a cognate bill to the *Appropriation Bill*.<sup>64</sup>

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<sup>64</sup> Mr Ian Cohen, MLC, Second Reading Speech, Legislative Council, 28 June 2004. The *Crown Lands Legislation Amendment (Budget) Bill 2004* and the *Appropriation Bill 2004* were passed by both Houses and received Royal Assent on 6 July 2004.

## The Bill

5. The Bill provides that the Minister must not sell, grant an application to purchase, or revoke a reservation from sale applying to protected land unless:
- the requirements under the Bill have been complied with; and
  - the sale, granting of the application or the revocation is not prevented by an objection made by an agency under the bill or the *Forestry Act 1910* [cl 7].

6. “Protected land” is crown land specified in clause 5.

7. Agencies that may object under this Bill are listed in cl 3 and include the Departments of Infrastructure, Planning and Natural Resources, Environment & Conservation, Primary Industries and Aboriginal Affairs. Other agencies include the Heritage Council and the relevant local council [see also clauses 11, 12 & 18].

8. The Departments of Environment & Conservation and Primary Industries may object within 3 months of receiving notification of the proposed sale etc of protected land from the Director-General [clauses 11 & 12 respectively].

Agencies listed in clause 3 may object at a later stage in the process [see below re clause 18].

9. Before selling etc any protected land, the Director-General of the Department of Lands must give each agency 28 days written notification of the proposed sale etc [cl 8].

In addition, the Director-General must publish notification of the proposed sale no later than 21 days after notifying the agencies under cl 8. This notification must be published in the Gazette and in a newspaper circulating generally in the area in which the protected land concerned is situated [cl 10].

The Director-General also must notify each agency of any objection made under the Bill [cl 13].

10. If no objection is made, each agency must provide the Director-General with:

- a report that assesses the values<sup>65</sup> of the protected land described in the Minister’s notice from the perspective of the agency concerned; or
- a certificate that states that, after having considered applicable land evaluation criteria, the agency is of the opinion that the values of the land are of insufficient significance to justify an objection to its sale etc [cl 14].

Each agency must comply with this provision within 4 months of receiving notification from the Minister of a proposed sale etc of protected land.

Such reports and certificates are to be made available for public inspection [cl 15].

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<sup>65</sup> Schedule 1 to the Bill sets out a list of examples of the values to be considered in making these assessments.

11. The Director-General must prepare an assessment report on the values of protected land. In making the assessment, the Director-General must consider the reports or certificates made under cl 14 concerning the protected land [cl 16].

This report must be completed within 7 months of giving notice of the proposed sale of protected land and the Minister must table the report in each House of Parliament [cl 17].

12. Within 3 months of the publication of the Director-General's assessment report, any of the listed agencies may object to the sale etc of protected land [cl 18]. Any such objection must be made public [cl 20].

If an objection is made under cl 18, an application to purchase protected land pending at the time is taken to be refused and a revocation of a reservation from sale cannot be made<sup>66</sup> and no further proposal for sale etc of that land concerned may be considered under the Bill for the next 5 years [cl 19].

In addition, agencies can recommend that protected land be reserved from sale [cl 22].

13. A person may seek to remedy or restrain a breach of the proposed Act by taking proceedings in the Land and Environment Court.[cl 25].

14. Clause 26 contains provisions of a transitional nature relating to dealings with protected land that may occur between the date of introduction of this Bill into the Legislative Council and the date on which the Bill receives assent.

Specifically, cl 26 provides that any sale etc of such protected land that occurs after the introduction of the Bill and before it commences, is void.

## Issues Considered by the Committee

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

#### Retrospectivity and unjust enrichment: Clause 26

15. Clause 26 refers to 4 separate transactions relating to protected land, namely:
- (a) the sale of protected land;
  - (b) entry into a contract to sell protected land;
  - (c) the grant of an application to purchase protected land; and
  - (d) the revocation of a reservation from sale that applies to protected land.
16. Under clause 26, any such transactions taking place between the date of introduction of the Bill and the date of assent are void.

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<sup>66</sup> The explanatory note states that cl 19 voids any purported sale if an objection is made, but it is not clear to the Committee from the terms of cl 19 how this would be effected.

Crown Lands (Prevention Of Sale) Bill 2004\*

The effect of this section is that these transactions are treated as if they had never taken place.

17. Clause 26 also has retrospective effect. Not only does it void certain dealings in land that occurred in the period between the introduction of the Bill into Parliament and the date of assent, it probably applies also to transactions (eg contracts for sale) entered into before that period but completed afterwards.
18. Clause 26 may also result in unjust windfall to the Crown or unjust enrichment.<sup>67</sup>

The Bill does not contemplate compensation for loss or expenses incurred, or the return of a purchase price paid on the conclusion of a sale of protected land that is voided under clause 26.

***Interests affected by voiding sales or contracts for sale***

19. One consequence of the voiding of these transactions might be significant financial loss for individuals who, in good faith, have entered into contracts for sale of land with the Government or otherwise relied on action lawfully undertaken by the Minister in respect of a prospective sale of protected land.

Such costs might include the purchase price, processing charges (eg, in relation to applications to purchase Crown land), legal fees and disbursements associated with the purchase of the land or the entering into of a contract for sale, stamp duty, consultants' fees, loss of interest on the purchase price (or deposit) or rates and taxes (if applicable to the protected land).

20. The Bill is also silent on the transfer of title back to the Crown in the case of a completed sale of land.
21. By distinguishing between a 'sale' and 'entry into a contract to sell', clause 26 draws a distinction between a completed sale, on the one hand, and mere entry into, (but not completed) contract for the sale of land, on the other.

Completion of a sale of land usually implies legal transfer of title to the land from the vendor to the purchaser and payment of the full purchase price by the purchaser to the vendor on settlement.

22. By contrast, mere entry into a contract to sell land does not involve the transfer by the vendor to the purchaser of the *legal* title to the land (such legal transfer occurring only on completion of the sale). This usually only involves the payment of a deposit by the purchaser to the vendor (rather than payment of the full purchase price).

Purchasers of land are regarded, upon entry into a valid (specifically enforceable) contract to purchase the land, as acquiring an *equitable* interest in that land.

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<sup>67</sup> According to *Osborn's Concise Law Dictionary*, "unjust enrichment... action is applicable wherever the defendant has received money which, in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff." *Osborn's Concise Law Dictionary*, Roger Bird (ed) 7<sup>th</sup> Ed, 1983, at p 273.

23. Although clause 26 refers to a 'sale' or 'contract' as if those terms were interchangeable, the consequences of voiding a completed contract (where the purchaser has already obtained the legal title and has paid the full purchase price) differ from the voiding of a contract to sell (where the purchaser has probably only paid a deposit and only has an equitable interest in the land).

The Committee notes that, the Bill is silent regarding the refund of any deposit, purchase price or other consideration paid and the re-transfer of the legal title to the land back to the Crown.

This is of particular importance in the case of a completed sale of protected land under Torrens title land where the Torrens register provides conclusive proof of land ownership.

***Interests affected by voiding a grant of application to purchase protected land***

24. The reference to the 'grant' of an application to purchase land presumably is intended to refer to the acceptance by the Crown of an application for the purchase of Crown land by private treaty under section 34 of the *Crown Lands Act 1989*.

An application to purchase appears to be an offer by a third party to purchase the Crown land.

25. Once the Minister unconditionally accepts that offer a contract to sell the protected land comes into existence and the purchaser will have an equitable interest in the protected land.

***Interests affected by voiding a revocation of reservation from sale of protected land***

26. The mere act of revoking a reservation from sale under section 90 of the Crown Lands Act does not of itself create any interest in the land.

***Effect of clause 26***

27. As stated above, the Bill is silent on whether compensation is payable for those who may have purchased land, entered into a contract for sale or otherwise incurred costs on the basis of a grant of an application to purchase or the revocation of a reservation from sale of protected land.

Further, it is unlikely that the *Land Acquisition (Just Terms Compensation) Act 1991* (Just Terms Act) would apply. That Act governs the acquisition of land by compulsory processes.

28. It is arguable that, by depriving people of their interests in land and effectively extinguishing those interests, amounts to an acquisition of those interests by the Crown. In this case, there may be an entitlement under the *Just Terms Act* to compensation for the loss of those interests and any other damage.

However, section 6(c) of the *Just Terms Act* provides that that Act does *not* apply if the acquisition consists of an interest in land that is acquired 'otherwise than by agreement or compulsory process'.

Crown Lands (Prevention Of Sale) Bill 2004\*

Under clause 26, completed sales of protected land and certain types of contracts to sell such land are not “acquired” as such by the Crown, they are deemed never to have existed.

29. Under the *Just Terms Act*, an *acquisition* is a positive act, involving the transfer of an interest to the Crown.

By contrast, the voiding of rights is a negative act that effectively negates the existence of those rights. For this reason, it is unlikely that the *Just Terms Act* would apply to the voiding of the contracts of sale and other land transactions under clause 26.

30. Given that clause 26 does not contemplate the refund of any money paid to the Crown under a voided sale or contract to sell, or payment of any compensation for improvements etc made to the land and that the *Just Terms Act* does not apply, it appears as if the Crown would not have to refund the purchase price under this Bill.

This means that, in its current form, clause 26 could confer an *unjust windfall* on the Crown at the expense of those who, in good faith, contracted etc with the Crown for the purchase of protected land.

31. Those affected by the voiding would have to sue for redress on the basis, for example, of unjust enrichment, estoppel<sup>68</sup> or misrepresentation<sup>69</sup>.

32. The Committee is strongly of the view that the retrospective voiding of lawfully made contracts and other arrangements by Parliament is contrary to the rule of law. Individuals are entitled to rely on such contracts.

Alteration or revocation of such agreements should be made in accordance with established legal principles, including the giving of notice and payment of compensation for termination of the contract other than in accordance with the terms of the contract itself or as otherwise provided for by law.

33. The Committee is also of the view that where Parliament decides to void lawfully made contracts, it should provide for appropriate compensation for loss or damage incurred, including the refund of all consideration paid (eg purchase price).

34. The Committee is aware that the intended purpose of the Bill is to protect certain Crown land from environmental degradation by ensuring that it remains within the control of the Crown. Clause 26 is important for this purpose as it purports to undo any transfer of such Crown land to private owners under the *Crown Lands Legislation Amendment (Budget) Bill 2004*, which was passed by Parliament in June and which commenced in July.

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<sup>68</sup> “Estoppel: The Rule of evidence...which precludes a person from denying the truth of some statement formerly made by him, or the existence of facts which he has by words or conduct led others to believe in...” *Osborn’s Concise Law Dictionary*, Roger Bird (ed) 7<sup>th</sup> Edition, at p 137.

<sup>69</sup> “A statement or conduct which conveys a false wrong impression... when a person has been induced to enter into a contract by misrepresentation, he may in general either (1) affirm the contract and insist on the misrepresentation being made good, if that is possible; or (2) rescind the contract if it is still executory, and if all parties can be restored to their original positions; or (3) bring an action for damages...” *Osborn’s Concise Law Dictionary*, Roger Bird (ed) 7<sup>th</sup> Edition, at p 222.

Nevertheless, the Committee is of the view that clause 26 trespasses on individual rights to a significant degree.

- 35. The Committee notes that the Bill adversely affects individuals' rights by retrospectively rendering void any sale, contracts of sale, grant of an application to purchase, or revocation of a reservation from sale, of protected land between the date on which the Bill was introduced into Parliament and the date on which it receives Royal Assent.**
- 36. The Committee notes that the effect of clause 26 could seriously impact adversely on individuals, and may render those individuals liable to significant financial loss. At the same time, the Bill makes no specific provision for compensation.**
- 37. The Committee notes that the retrospective voiding of lawfully made contracts is contrary to the rule of law. The Committee also notes that individuals are entitled to rely on such contracts and that any alteration or revocation of such agreements should be made in accordance with established legal principles.**
- 38. The Committee is also always concerned with retrospective provisions that have an adverse impact on any person, as contrary to the rule of law, they undermine a person's right to be able to rely on the law.**
- 39. The Committee further notes that clause 26 is intended to protect certain land from further environmental degradation by ensuring that it continues to be held by the Crown.**
- 40. The Committee refers to Parliament the question of whether clause 26 trespasses unduly on personal rights and liberties.**

*The Committee makes no further comment on this Bill.*

## 6. RETAIL LEASES AMENDMENT BILL 2004

Date Introduced:	29 June 2004
House Introduced:	Legislative Council
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Minister for Small Business

### Purpose and Description

1. The object of this Bill is to amend the Retail Leases Act 1994 (the *Principal Act*):
  - (a) to prohibit (with certain exceptions) lessors under retail shop leases from recovering lease preparation expenses from lessees; and
  - (b) to remove the current requirement for lessors to make available to lessees six-monthly statements of actual expenditure on outgoings to which lessees contribute.

### Background

2. The second reading speech stated that:

The Retail Leases Act 1994 established a legislative framework for regulating the relationship between landlords and small- to medium-sized retailers. It introduced minimum standards for the leasing of retail space and created a mechanism for dispute resolution...

Since its establishment in 1994 the Retail Tenancy Unit has handled over 37,500 inquiries from landlords and retail tenants, resulting in over 3,800 informal mediations and over 1,600 formal mediations. Ninety per cent of these mediations have successfully resolved the matters in dispute. It is also noted that since the introduction of the Act fewer than 0.004 per cent of the retail leases in New South Wales are formally mediated through the New South Wales Retail Tenancy Unit in any one year.

The amendments implement the recommendations of a national competition policy review of the Act. The review report found that the Retail Leases Act 1994 does not have the effect of restricting competition and recommends retention of the legislative scheme on net public benefit grounds. While the Act does impose some conditions on retail leasing, the associated compliance costs are considered to be minimal and are offset by the associated benefits...

However, the report did recommend changes, first, to the recovery of lease preparation expenses by landlords from tenants and, second, to six-monthly statements of expenditure on outgoings.<sup>70</sup>

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<sup>70</sup> The Hon A Kelly MLC, Minister for Local Government, *Legislative Council Hansard*, 29 June 2004.

## The Bill

### Commencement

3. The Bill commences on a day or days to be appointed by proclamation.

### Lease preparation expenses

4. Currently under the Retail Leases Act (the Act) sections 14 and 45 make it an offence for a person, as lessor or on behalf of the lessor, to seek or accept the payment of key-money<sup>71</sup> in connection with granting, renewing or extending a retail shop lease.
5. Under these provisions, a retail shop lease is void to the extent that it requires or has the effect of requiring the payment of key-money in connection with granting, renewing or extending a lease.
6. Section 14 is amended:
  - (a) to add the offence of seeking or accepting the payment of lease preparation expenses in connection with the granting of a retail shop lease; and
  - (b) to provide that a retail shop lease is void to the extent that it requires or has the effect of requiring the payment of lease preparation expenses in connection with the granting of the lease [schedule 1, cl 3].

*“Lease preparation expenses”* are defined in a new definition inserted in section 3 as “legal or other expenses incurred by the lessor in connection with the preparation or entering into of a retail shop lease, except for registration fees under the *Real Property Act 1900*.”

7. Proposed section 14(4) provides that the amended section 14 does not preclude any right a person, as lessor or on behalf of the lessor, may have to recover a reasonable sum from the lessee in respect of expenses incurred by the lessor in connection with making amendments to the proposed lease requested by the lessee [schedule 1, cl 5].

Lessee-requested amendments in connection with which lease preparation expenses are allowed to be recovered do not include amendments:

- in respect of certain particulars;
  - in respect of terms a lessor fails to include or omit as agreed; and
  - requested before a lessee’s disclosure statement is given.
8. Proposed section 14 (5) requires a lessor to provide the prospective lessee or lessee with a copy of any account presented to the lessor in respect of lease preparation expenses that the lessee is liable to pay [schedule 1, cl 15].

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<sup>71</sup> Section 3 of the Act defines “key-money” as any money paid to or at the direction of a lessor or lessor’s agent, by way of a premium, non-repayable bond or otherwise, or any benefit that is conferred on or at the direction of a lessor or lessor’s agent, in connection with the granting, renewal, extension or assignment of a lease (and a reference in this Act to the payment of key-money includes a reference to the conferral of any such benefit).

Retail Leases Amendment Bill 2004

9. Schedule 1[7] and [9] make amendments to section 45 that correspond to the amendments proposed by schedule 1[3] and [5] in respect of the renewal or extension of a retail shop lease.

According to the second reading speech, these “amendments will prohibit landlords from recovering the costs of preparing and entering into a lease from tenants, except the costs associated with specific requests from a tenant”.<sup>72</sup>

10. Schedule 1 [2] omits section 13, which currently makes provision with respect to the payment by a lessee of a reasonable sum in respect of any legal or other expenses incurred in connection with the preparation of a retail shop lease.
11. Schedule 1 [6] omits section 27 (c) and (d) of the Principal Act. Those provisions currently impose a requirement on a lessor to make available for examination by a lessee a six-monthly written expenditure statement by the lessor on account of outgoings to which the lessee contributes.

According to the second reading speech:

This reporting requirement was found to be costly to landlords and to provide little benefit to tenants.<sup>73</sup>

## Issues Considered by the Committee

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

#### Commencement by Proclamation: Clause 2

12. The Bill commences on a day or days to be appointed by proclamation. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses, or not to commence the Act at all.
13. The Minister’s office has advised the Committee that the Bill commences on proclamation to allow time to conduct an education campaign for landlords and tenants.
14. The Bill changes the responsibility for some costs in relation to retail leases.
15. The Minister’s office does not wish to commence the Bill until they are satisfied that all stakeholders have been made adequately aware of these changes.
16. They expect the Bill to be commenced by the end of this year, but cannot give a specific timeframe.

***The Committee makes no further comment on this Bill.***

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<sup>72</sup> The Hon A Kelly MLC, Minister for Local Government, *Legislative Council Hansard*, 29 June 2004.

<sup>73</sup> The Hon A Kelly MLC, Minister for Local Government, *Legislative Council Hansard*, 29 June 2004.

## 7. STATE REVENUE LEGISLATION FURTHER AMENDMENT ACT 2004

Date Introduced:	23 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	Hon M R Egan MLC
Portfolio:	Treasury

**Pursuant to suspensions of Sessional and Standing Orders, the Bill passed all stages in the Legislative Assembly on 23 June 2004 and the Legislative Council on 29 June 2004. It received the Royal Assent on 6 July 2004. Under s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

### Purpose and Description

1. The Act amends the *Duties Act 1997* [Duties Act] as follows:
  - (a) the criteria for eligibility for the ***First Home Plus*** stamp duty concession for first home buyers will be clarified in their application to vacant land by:
    - (i) removing the criteria relating to a required period of residency in the home after its completion and relying on the Chief Commissioner being satisfied that the applicant will build a home on the land and reside in it; and
    - (ii) preventing a new home buyer obtaining the concession twice (once in relation to vacant land and once in relation to an existing dwelling) by providing that a person can only receive the concession once: Sch 1 [2]–[5];
  - (b) the operation of the new ***Premium Property Duty*** (which is applicable to residential property sold for more than \$3 million) will be clarified so that, where a transaction involves more than one property that is sold for over \$3 million, the premium property duty rate will only apply to that part of the consideration for each property that exceeds \$3 million: Sch 1 [1];
  - (c) the limitations on the kinds of conservation agreements under the *National Parks and Wildlife Act 1974* that qualify land for exemption from the new vendor duty will be removed, so that *any* conservation agreement under that Act will qualify for exemption. The exemption will also be extended to land the subject of a registered trust agreement under the *Nature Conservation Trust Act 2001*: Sch 1 [15] and [16];
  - (d) the application of certain purchaser duty provisions to the determination of dutiable value of dutiable property for the purposes of vendor duty will be clarified: Sch 1 [6];
  - (e) the vendor duty concession for sale of a former principal place of residence (under which a home owner can be treated as still living in the former residence during a period of absence of up to 6 years) will be clarified, so that a home owner will not be able to count any period of *deemed* occupation of the

State Revenue Legislation Further Amendment Act 2004

- former residence as a period of occupation of any other residence for vendor duty concession purposes: Sch 1 [25] and [26];
- (f) the vendor duty concession that applies to the sale of a former principal place of residence within 6 months of ceasing to occupy the residence will be broadened so that:
- (i) the Chief Commissioner may extend the period of 6 months, if satisfied that there is good reason for doing so; and
  - (ii) an owner who ceased occupation within 6 months before 1 June 2004 (the commencement of the vendor duty provisions) will get the concession if he or she sells within 6 months after 1 June 2004: Sch 1 [22] and [24];
- (g) the vendor duty exemption that applies to the sale of a principal place of residence will be tightened, so that the exemption will *not* apply unless at least 50% of the ownership interest is held by one or more natural persons who reside in the home as their principal place of residence. The Act also removes a restriction that prevents the principal place of residence exemption applying where any of the vendors is not a natural person - this is made redundant by the requirement for at least 50% ownership by a natural person residing in the home: Sch 1 [7] and [8];
- (h) the operation of the 12% increase in value test for vendor duty will be clarified, so that where several interests in a single dutiable property are purchased over time and the interests are sold together, the test will be applied separately to each of the several interests: Sch 1 [9] and [10];
- (i) the vendor duty exemption for new and substantially new buildings will be revised to:
- (i) make it clear that the concession for buildings unoccupied before sale only applies where the building has never been occupied before sale;
  - (ii) provide the Chief Commissioner with a discretion to allow the concession for new buildings constructed for residential purposes that have never been occupied for residential purposes before sale (even if occupied before sale for other purposes, such as display homes);
  - (iii) provide that the concession only applies once (to the first sale after completion of the building), including in the case of "off the plan" sales of new buildings; and
  - (iv) provide certainty as to when construction of a building is completed, by linking completion to the issue of a local council occupation certificate: Sch 1 [11];
- (j) the vendor duty exemption for improved vacant land will be revised by requiring the improvements to have been made at the vendor's expense: Sch 1 [12];
- (k) the operation of the vendor duty exemptions for transactions and entities that are the subject of exemptions and concessions for ad valorem purchaser duty will be revised to clarify their operation and provide that an exemption from vendor duty does not apply to persons selling to exempt or concessional entities: Sch 1 [17], [18] and [20];

## State Revenue Legislation Further Amendment Act 2004

- (l) the vendor duty concession that applies to the sale of the principal place of residence of a person within 12 months after their death will be revised so that:
    - (i) the 12 months will start from the grant of probate or letters of administration (rather than the date of death); and
    - (ii) if probate or letters of administration were granted before 1 June 2004, the 12 months will date from 1 June 2004: Sch 1 [22] and [27].
  - (m) the operation of the vendor duty concession that applies to the sale of the principal place of residence of a deceased person following the termination of a life estate created on the death of the person will be clarified to provide that on the termination of the life estate, the executor or beneficiary has a further 12 months to sell the property: Sch 1 [28];
  - (n) a new vendor duty exemption will be created for the sale of land-related property by a mortgagee, receiver, liquidator or trustee in bankruptcy pursuant to the bona fide exercise of a power of sale: Sch 1 [14];
  - (o) the vendor duty exemption for the sale of a business will be revised to limit the exemption to the sale of land-related property pursuant to the sale of the whole of a business (not just part of a business): Sch 1 [13]; and
  - (p) provision for the imposition of duty on an inter-jurisdictional mortgage will be revised, so that duty will not be payable on property located in the ACT or Northern Territory (in line with the treatment of inter-jurisdictional mortgages affecting property in other States): Sch 1 [19].
2. The Act also revokes the repeal of the *Petroleum Products Subsidy Act 1965* [s 5], and amends the *Land Tax Management Act 1956* to remove restrictions on a land tax exemption for land subject to a conservation agreement under the *National Parks and Wildlife Act 1974*, and to extend that exemption to land the subject of a registered trust agreement under the *Nature Conservation Trust Act 2001* [Sch 2].

## Background

3. According to the second reading speech, the Act clarifies a number of issues that emerged following the passage of the *State Revenue Legislation Amendment Act 2004* in May 2004.<sup>74</sup>
4. The *State Revenue Legislation Amendment Bill 2004* increased the threshold below which first home buyers pay no transfer duty or mortgage duty, so that first home buyers pay no transfer duty or mortgage duty on a home worth up to \$500,000 or vacant residential land worth up to \$300,000. The relevant sections came into effect on 4 April 2004.<sup>75</sup>

## The Act

5. The Act's provisions are set out above.

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<sup>74</sup> Mr G J West, MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 23 June 2004.

<sup>75</sup> Mr G J West, MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 7 May 2004.

## Issues Considered by the Committee

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

#### Issue: Section 2(2) and Schedule 1 [23] Retrospectivity

6. Subject to s 2(2), the Act commenced on assent.
7. Section 2(2)(a) provides that those clauses of Sch 1 to the Act relating to the *First Home Plus Scheme* are taken to have commenced on 1 July 2004.

As noted above, the Act received the Royal Assent on 6 July 2004.

8. According to the second reading speech, the Act:

clarifies that, if the [First Home Plus Scheme] concession is claimed in relation to the acquisition of vacant land and the subsequent construction of a dwelling, the concession is not subsequently available for the acquisition of an existing dwelling. For purchases of vacant land, the bill replaces the requirement that the home, once constructed, be occupied to qualify for the concession, with a provision allowing the chief commissioner to grant the concession if satisfied that the applicant will build a home on the land and reside in it. This change will be taken to apply from 1 July 2004, the date that the other reforms introduced in May are to take effect.<sup>76</sup>
9. Accordingly, it would appear that the only adverse effect of the Act's limited retrospectivity might be on those persons who had attempted to take advantage of the ambiguity in the earlier Act in order to "double dip" on the *First Home Plus Scheme* in the manner set out in the second reading speech.
10. Schedule 1 [23] provides that any amendment which the Act makes to the Duties Act – other than as provided for in s 2(2) - takes effect as if it had commenced on 1 June 2004.<sup>77</sup>

This is aimed at the operation of the new *Premium Property Duty*, pursuant to which a transaction involving more than one residential property that is sold for over \$3 million only attracts the premium property duty rate on that part of the consideration for each property exceeding \$3 million [new s 32A(2) of the Duties Act].
11. In the second reading speech, the Parliamentary Secretary specifically noted that this provision will be taken to have applied from 1 June 2004, the date on which the premium property duty was introduced.<sup>78</sup>

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<sup>76</sup> Mr G J West, MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 23 June 2004.

<sup>77</sup> A specific exception is made for a vendor duty transaction that occurred on or after 1 June 2004 in respect of which vendor duty is chargeable because of the amendments made to the *Duties Act 1997*. If the vendor duty has not already been paid it becomes chargeable with that duty on the date of assent to that Act. Similarly, the imposition, payment and recovery of duty under the *Duties Act 1997* before the date of assent to the *State Revenue Legislation Further Amendment Act 2004* is taken to have been validly done to the extent that it would have been validly done had the amendments made by that Act been in force at the time it was done: Sc 1 [19] to the *State Revenue Legislation Further Amendment Act 2004*.

<sup>78</sup> Mr G J West, MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 23 June 2004.

- 12. The Committee will always be concerned with retrospective application of laws, as they create uncertainty as to the state of the law.**
- 13. However, having regard to the aims of the Act and the limited period of its retrospectivity, the Committee does not consider that the Act's retrospective operation unduly trespasses on personal rights and liberties.**

*The Committee makes no further comment on this Bill.*

## **SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED**

### **8. COMMENCEMENT OF ACTS**

#### **Background**

1. The Committee wrote to the Attorney General on 13 February 2003 (below) regarding the practice of providing for Acts to commence on a day or days to be proclaimed in response to correspondence relating to the *Lord Howe Island Amendment Bill 2003* (see *Legislation Review Digest* No 1 of 2004).
2. In particular, the Committee noted the practices of the Federal Government and in Queensland, which provided generally applicable limits on delaying the commencement of Acts.
3. As the Committee's letter raised issues impacting upon all Government legislation, the Attorney referred the letter to the Premier.

#### **Premier's Reply**

4. In his reply of 13 July 2004 (below), the Premier noted that Ministers have been addressing the need for commencement on a day or days to be proclaimed in their second reading speeches or have been providing specific advice to the Committee.
5. The Premier expressed the view that practices such as those of the Federal Government and in Queensland would impose additional costs on the Government and the Parliament without delivering any benefits.
6. The Premier also noted that the tabling every three months of the list of unproclaimed legislation provides an opportunity for Members and the Committee to identify specific concerns they may have with the failure to commence particular legislation.

#### **Committee's Response**

7. The Committee thanks the Premier for his reply.



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

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13 February 2004

Our Ref: LRC475/CP3739a

The Hon R J Debus MP  
Minister for the Environment  
Level 36 Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Minister

**Lord Howe Island Amendment Bill 2003**

Thank you for your letter of 26 November regarding the commencement of the above Bill.

The Committee notes your intention for the Bill to commence as soon as practicable after being passed.

As to whether the Committee considers a change to the Bill to be necessary, the Committee again notes that providing an unfettered power to commence a Bill on a day to be proclaimed effectively gives the Government a power of veto over a Bill.

The Committee appreciates, however, the need for flexibility in commencing legislation in certain circumstances, most commonly to allow time for the preparation of regulations.

The Committee's concerns regarding commencement powers would be addressed by adopting a legislative practice that allows the Government sufficient flexibility in commencement while maintaining a sufficient level of accountability to, and control by, the Parliament.

As an example, the Committee notes section 15DA of the Queensland *Acts Interpretation Act 1954*. Under that provision, Acts that have not commenced a year after assent automatically commence unless a regulation is made postponing commencement for up to another year. This approach appears to strike a balance between flexibility and Parliamentary control. It does this in the following ways:

- it allows an initial period of 12 months in which to commence an Act;
- if this is insufficient, the Government can extend the period for another 12 months, with Parliament having the opportunity to disallow such an extension;

Commencement of Acts

- if, due to unforeseen circumstances, commencement needs to be postponed beyond 24 months from assent, the Government must submit the postponement to the Parliament in the form of amending legislation; and
- if a greater degree of flexibility is required for a particular Bill, that Bill can specifically provide for alternative commencement arrangements.

Another, less flexible, model is the practice at the Federal level. The Commonwealth Parliamentary Counsel's *Drafting Direction 2002, No 2* provides that, if a specific date for commencement is not provided, a Bill should normally either be automatically commenced or repealed within 6 months of assent.

These models contrast with the current practice in New South Wales, whereby legislation is routinely commenced on a day or days to be proclaimed, with Ministers tabling in Parliament lists of all legislation not commenced within 90 days of assent. It does not appear to the Committee that this achieves the best balance between Parliament's control of the legislative process and the need for flexibility in commencement.

In the absence of any control on the commencement of Acts, the Committee considers it both desirable and appropriate that an explanation be given to Parliament as to the need for a provision to be commenced on proclamation and the intended timeframe for its commencement.

The Committee welcomes your views.

Yours sincerely



**BARRY COLLIER MP**  
**CHAIRPERSON**



Premier of New South Wales  
Australia



TCO/LB

13 JUL 2004

Mr Barry Collier  
Chair  
Legislation Review Committee  
Parliament House  
SYDNEY NSW 2000

Dear Mr Collier

I refer to your letter to the Attorney General, the Hon Bob Debus MP, concerning the commencement of the *Lord Howe Island Amendment Bill*.

As you would be aware, the Attorney General has referred your letter to me for response as you have raised whole-of-government issues in relation to the commencement of Acts.

I do not agree with your view that such provisions constitute an "unfettered power" or a "power of veto" or that such a description provides any basis for changing the existing practice in New South Wales.

It remains a matter for Parliament to determine whether a power to commence an Act by proclamation is appropriate. Ministers have been addressing the need for such commencement provisions in second reading speeches or have been providing specific advice to your Committee to assist it in advising Parliament as to whether such a power is appropriate.

The additional costs imposed on Government and Parliament in complying with the alternative commencement requirements the Committee proposes would not deliver additional benefits or result in any improvement on the existing system.

Under the current system, the Government tables a list of unproclaimed legislation in Parliament every three months. The tabling of this document provides an opportunity for members, or indeed your Committee, to identify specific concerns they may have with the failure to commence particular legislation and, if appropriate, to raise it with the relevant Minister.

Indeed I responded to a parliamentary question concerning the commencement of the legislation which established your Committee. I advised that some delay was necessary in view of the need for your

Commencement of Acts

Committee to put in place procedures to discharge its functions, and the legislation was commenced as soon as practicable.

Any Minister who failed to commence legislation without providing an adequate reason would be subject to criticism.

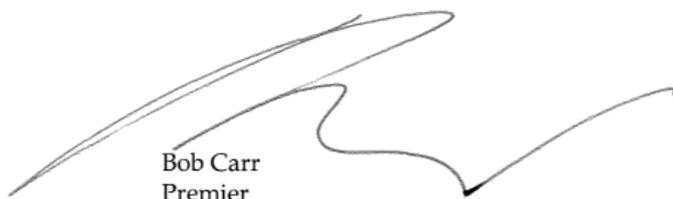
Despite the provision of information to the Parliament to assist it in monitoring the commencement of legislation, I am advised that the option of raising in Parliament concerns as to the timing of the commencement of legislation appears to have been pursued on very few occasions since 1995 by members.

Given that this issue does not appear to be of concern to members, your proposal might result in some of Parliament's time being diverted from matters that are more significant to members.

The proposed requirement for Ministers to either make a regulation or introduce a Bill to postpone commencement of legislation would result in the diversion of parliamentary, drafting and departmental resources. This could further delay commencement of the relevant legislation.

In the absence of any specific problems with the current system, I do not consider that changes to the Government's current practices are needed. I will, however, consider further the need for an administrative process within Government to ensure that the commencement of legislation is reviewed from time to time.

Yours sincerely



Bob Carr  
Premier

## 9. COMMERCIAL AGENTS AND PRIVATE INQUIRY AGENTS BILL 2004

Date Introduced: 3 June 2004  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon John Watkins MP  
Portfolio: Police

### Background

1. The Committee reported on the *Commercial Agents and Private Inquiry Agents Bill 2004* in Legislation Review Digest No 9 of 2004.
2. The Committee noted that the Bill provided for the ensuing Act to commence on a day or days to be appointed by proclamation, with the exception of Schedules 3.1 and 3.3 (which make consequential amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* and were to commence on the commencement of Division 4 of Part 5 of that Act).
3. The Committee wrote to the Minister to seek his advice as to the reasons for commencing the Bill by proclamation and a likely timeframe for the commencement of the Act.

### Minister's Reply

4. In a letter dated 29 July 2004 (below) the Minister for Police advised the Committee that the decision to commence the Act by proclamation was made to provide flexibility to carry out certain preparations and processes prior to commencement.
5. In particular, to allow for regulations to be drafted in consultation with the Commercial Agents and Private Inquiry Agents industries.
6. The Minister advised that:

“Until the Act is passed, and therefore the exact provisions of the Act are known, it is not possible to draft the supporting Regulations.  
Once the Regulations are drafted, approved and ready to be Gazetted, most of the Act can be commenced concurrently.”
7. The Minister further advises that:

“while it is anticipated that the Regulations will be finalised some time in late 2004, it is not intended for the new licences be operational until 1 July 2005.”

### Committee's Response

**8. The Committee thanks the Minister for his reply.**

*The Committee makes no further comment on this Bill.*



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

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18 June 2004

Our Ref: LRC771

The Hon J Watkins MP  
Level 34 Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Minister

**Commercial Agents and Private Inquiry Agents Bill 2004**

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 9 of 2004*.

The Committee notes that this Bill provides that the ensuing Act is to commence on a day or days to be appointed by proclamation, with the exception of Schedules 3.1 and 3.3 which are to commence on the commencement of Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent, or not to commence the Act at all. While there may be good reasons why such a discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

The Committee has therefore resolved to seek your advice as to the reasons for commencing this Bill by proclamation, and a likely commencement timeframe for the whole Act.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Collier', written over a large, stylized flourish.

**BARRY COLLIER MP  
CHAIRPERSON**

## Commercial Agents and Private Inquiry Agents Bill 2004



NEW SOUTH WALES

## Minister for Police

Mr Barry Collier, MP  
Chairman  
Legislation Review Committee  
NSW Parliament  
Macquarie St  
SYDNEY NSW 2000



Dear Mr Collier,

I refer to the Committee's letter of 18 June 2004 concerning the commencement date of the *Commercial Agents and Private Inquiry Agents Bill 2004*.

The decision to commence the Act on a day or days to be appointed by proclamation was made to provide flexibility to be carry out certain processes and preparations prior to the commencement of the legislation. In particular, the decision was made to commence the Bill by proclamation to allow regulations to be drafted in consultation with the Commercial Agents and Private Inquiry Agents industries. Until the legislation is passed, and therefore the exact provisions of the Act are known, it is not possible to draft the supporting Regulations. Further, it is imperative that the industry have some input into the details contained in the Regulations.

Once the Regulations are drafted, approved and ready to be Gazetted, most of the Act can be commenced concurrently. This will enable all the preparations and issuance of licences to be in place to provide for the new licensing regime to begin. However, while it is anticipated that the Regulation will be finalised some time in late 2004, it is not intended for the new licences to be operational until 1 July 2005. Therefore flexibility is needed in commencing the Act by proclamation.

Yours sincerely

A handwritten signature in black ink that reads 'John Watkins'.

John Watkins MP  
**Minister for Police**

29 JUL 2004

## 10. POLICE AMENDMENT (SENIOR EXECUTIVE TRANSFERS) BILL 2004

Date Introduced: 3 June 2004  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon John Watkins MP  
Portfolio: Police

### Background

1. The Committee reported on the *Police Amendment (Senior Executive Transfers) Bill 2004* in Legislation Review Digest No 9 of 2004.
2. The Committee noted that the Bill provided for the ensuing Act to commence on a day or days to be appointed by proclamation.
3. The Committee wrote to the Minister to seek his advice as to the reasons for commencement by proclamation and the likely timeframe within which it is expected the Bill will commence.

### Minister's Reply

4. In a letter dated 21 July 2004 (below) the Minister advised the Committee that:  
“[t]he decision to commence the Act on a day or days to be appointed by proclamation was made to provide flexibility in case certain processes had to be carried out prior to the commencement of the legislation. In particular it had regard to the proposal that the Commissioner of Police, in consultation with the Police Association, will release a Police Senior Executive Service Transfer Policy to outline the manner in which the Commissioner will exercise his discretion to offer transfers...”
5. The Minister advised that while the policy is not anticipated to be completed for a number of months, it is not a prerequisite for the commencement of the legislation.
6. As such, the Minister advised that he intends to commence the Act by proclamation in the Government Gazette on the earliest possible date after the Act is assented to.

### Committee's Response

7. **The Committee thanks the Minister for his reply.**

***The Committee makes no further comment on this Bill.***



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

18 June 2004

Our Ref: LRC770

The Hon J Watkins MP  
Level 34 Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Minister

**Police Amendment (Senior Executive Transfers) Bill 2004**

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 9 of 2004*.

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

The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent, or not to commence the Act at all. While there may be good reasons why such a discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

The Committee has therefore resolved to seek your advice as to the reasons for commencing this Bill by proclamation, and a likely commencement date of the Act.

Yours sincerely



**BARRY COLLIER MP  
CHAIRPERSON**



Minister for Police



Mr Barry Collier, MP  
Chairman  
Legislation Review Committee  
NSW Parliament  
Macquarie St  
SYDNEY NSW 2000

Dear Mr Collier,

I refer to the Committee's letter of 18 June 2004 concerning the commencement date of the *Police Amendment (Senior Executive Transfers) Bill 2004*.

The decision to commence the Act on a day or days to be appointed by proclamation was made to provide flexibility in case certain processes had to be carried out prior to the commencement of the legislation. In particular, it had regard to the proposal that the Commissioner of Police, in consultation with the Police Association, will release a Police Senior Executive Service Transfer Policy to outline the manner in which the Commissioner will exercise his discretion to offer transfers to removed sworn (not civilian) PSES officers. The Commissioner and the Association believe that the introduction of clear guidelines in this area will remove some of the reluctance police have in applying for PSES appointments.

I anticipate the policy will not be completed for a number of months. However, I do not believe that it should be a prerequisite for the commencement of the legislation.

My intention is to commence the Act by proclamation in the Government Gazette on the earliest possible date after the Act is assented to.

Yours sincerely

A handwritten signature in cursive script that reads 'John Watkins'.

John Watkins MP  
**Minister for Police**

21 JUL 2004

## Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04 30/04/04	01/04/04
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 12/09/03	29/08/03 11/03/04
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	05/03/04	957	30/04/04	
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	15/06/04
Road Transport (General) Amendment (Interlock Devices) Regulation 2003	29/08/03	8610	13/02/04 01/06/04	13/05/04



## Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Agricultural Livestock (Disease Control Funding) Amendment Bill 2004	10
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	2
Appropriation Bill 2004	10
Appropriation (Budget Variations) Bill 2004	5
Appropriation (Parliament) Bill 2004	10
Appropriation (Special Offices) Bill 2004	10
Bail Amendment (Terrorism) Bill 2004	9
Botany Bay National Park (Helicopter Base Relocation) Bill 2004	5
Child Protection (Offenders Prohibition Orders) Bill 2004	9
Child Protection (Offenders Registration) Bill 2004	10
Children (Detention Centres) Amendment Bill 2004	4
Civil Liability Amendment (Offender Damages) Bill 2004	5,7
Commercial Agents and Private Inquiry Agents Bill 2004	9,10
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Compulsory Drug Treatment Correctional Centre Bill 2004	8
Constitutional Amendment (Pledge of Loyalty) Bill 2004*	7
Courts Legislation Amendment Bill 2004	7
Crimes Amendment (Child Neglect) Bill 2004	7
Crimes Legislation Amendment Bill 2004	3
Crimes Legislation Amendment (Terrorism) Bill 2004	10
Crimes (Administration of Sentences) Bill 2004	9
Crimes (Interstate Transfer of Community Based Sentences) Bill 2004	9
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Criminal Procedure (Sexual Offence Evidence) Bill 2004	8
Cross-Border Commission Bill 2004	3
Crown Lands Legislation Amendment (Budget) Bill 2004	10
Crown Lands (Prevention of Sales) Bill 2004*	10
Education Amendment (Non-Government Schools Registration) Bill 2004	2
Electricity (Consumer Safety) Bill 2003	1,2
Fair Trading Amendment Bill 2004	4
Filming Approval Bill 2004	7,8
Fines Amendment Bill 2004	9

	Digest Number
Fisheries Management Amendment Bill 2004	6
Food Legislation Amendment Bill 2004	3
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	2
Greyhound and Harness Racing Administration Bill 2004	7,9
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	6
Health Legislation Amendment Bill 2004	6
Institute of Teachers Bill 2004	8
Legal Profession Amendment Bill 2004	9
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
Liquor Amendment (Parliament House) Bill 2004	6
Liquor Amendment (Parliamentary Precincts) Bill 2004	8
Liquor Amendment (Racing Clubs) Bill 2004	9
Local Government Amendment (Council and Employee Security) Bill 2004	5
Local Government Amendment (Discipline) Bill 2004	9
Local Government Amendment (Mayoral Elections) Bill 2004	9
Lord Howe Island Amendment Bill 2003	10
Mine Health and Safety Bill 2004	8,9
Mining Amendment (Miscellaneous Provisions) Bill 2004	6,8
National Competition Policy Amendment (Commonwealth Financial Penalties) Bill 2004	2
National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004	7
National Competition Policy Liquor Amendment (Commonwealth Financial Penalties) Bill 2004	7
National Parks and Wildlife Amendment (Jenolan Caves Reserve Trust) Bill 2004	9
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Parliamentary Electorates and Elections Amendment (Prohibition on Voting by Criminals) Bill 2004*	5
Partnership Amendment (Venture Capital Funds) Bill 2004	3
Passenger Transport Amendment (Bus Reform) Bill 2004	8,9
Police Amendment (Crime Reduction and Reporting) Bill 2004	3
Police Amendment (Senior Executive Transfers) Bill 2004	9,10
Prevention of Cruelty to Animals (Tail Docking) Bill 2004	4,6
Public Lotteries Legislation Amendment Bill 2004	2
Regional Development Bill 2004	7
Residential Tenancies (Public Housing) Bill 2004	9

	Digest Number
Retail Leases Amendment Bill 2004	10
Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (General) Amendment (Licence Suspension) Bill 2004	9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1,7
Snowy Mountains Cloud Seeding Trial Bill 2004	5
State Revenue Legislation Amendment Bill 2004	7
State Revenue Legislation Further Amendment Bill 2004	10
State Water Corporation Bill 2004	8
Statute Law (Miscellaneous Provisions) Bill 2004	9
Stock Diseases Amendment (Artificial Breeding) Bill 2004	6,8
Stock Diseases Amendment (False Information) Bill 2004	4,9
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
Sustainable Energy Development Repeal Bill 2004	10
Sydney Opera House Trust Amendment Bill 2004	10
The Synod of Eastern Australia Property Amendment Bill 2004	2
Thoroughbred Racing Legislation Amendment Bill 2004	4,6
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	6
Wool, Hide and Skin Dealers Bill 2004	2
Workers Compensation Legislation Amendment Bill 2004	9

## Appendix 2: Index of Ministerial Correspondence on Bills in 2004

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Child Protection (Offenders Registration) Bill 2004	Minister for Police	27/08/04			10
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Civil Liability Amendment (Offender Damages) Bill 2004	Minister for Justice	26/03/04	13/04/04		5,7
Commercial Agents and Private Inquiry Agents Bill 2004	Minister for Police	18/06/04	29/07/04		9,10
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03	19/03/04	4	5
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03	19/03/04	7	5
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Filming Approval Bill 2004	Minister for the Environment	11/05/04	12/05/04		7,8
Greyhound and Harness Racing Administration Bill 2004	Minister for Gaming and Racing	11/05/04	31/05/04		7,9
Lord Howe Island Amendment Bill 2003	Attorney General/ Premier	13/02/04	Premier 13/07/04		1,10 <sup>79</sup>
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04	23/03/04		1,5
Mine Health and Safety Bill 2004	Minister for Mineral Resources	28/05/04	09/06/04		8,9
Mining Amendment (Miscellaneous Provisions) Bill 2004	Minister for Mineral Resources	30/04/04	17/05/04		6,8
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04	23/03/04		3,5

<sup>79</sup> Published under the title "Commencement of Acts."

<b>Bill</b>	<b>Minister/Member</b>	<b>Letter sent</b>	<b>Reply</b>	<b>Digests 2003</b>	<b>Digest 2004</b>
Passenger Transport Amendment (Bus Reform) Bill 2004	Minister for Transport Services	28/05/04 18/06/04	17/06/04		8,9
Police Amendment (Senior Executive Transfers) Bill 2004	Minister for Police	18/06/04	21/07/04		9,10
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	05/04/04		4,6
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04	23/03/04		1,5
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04			9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04	05/05/04		1,7
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Stock Diseases Amendment (Artificial Breeding) Bill 2004	Minister for Agriculture and Fisheries	30/04/04	21/05/04		6,8
Stock Diseases Amendment (False Information) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	28/05/04		4,9
Strata Schemes Management Amendment Bill 2003	Minister for Fair Trading	13/02/04	27/02/04		1,3
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04	18/03/04		1,5
Thoroughbred Racing Legislation Amendment Bill 2004	Minister for Gaming and Racing	16/03/04	07/04/04		4,6
Water Management Amendment Bill 2004	Minister for Natural Resources	28/05/04			8
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Agricultural Livestock (Disease Control Funding) Amendment Bill 2004				N	
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Bail Amendment (Terrorism) Act 2004	N				
Botany Bay National Park (Helicopter Base Relocation) Bill 2004				N	
Child Protection (Offenders Prohibition Orders) Bill 2004	N			C	
Child Protection (Offenders Registration) Bill 2004	N,C			C	
Civil Liability Amendment (Offender Damages) Bill 2004	R			C	
Commercial Agents and Private Inquiry Agents Bill 2004	R			C	
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Compulsory Drug Treatment Correctional Centre Bill 2004	N			N	
Courts Legislation Amendment Bill 2004				N	
Crimes Amendment (Child Neglect) Bill 2004				N	
Crimes Legislation Amendment (Terrorism) Bill 2004	N				
Crimes (Administration of Sentences) Bill 2004	N			N	
Crimes (Interstate Transfer of Community Based Sentences) Bill 2004				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Criminal Procedure (Sexual Offence Evidence) Bill 2004	N				
Crown Lands (Prevention of Sales) Bill 2004*	N, R				
Education Amendment (Non-Government Schools Registration) Bill 2004				N	
Electricity (Consumer Safety) Bill 2003	N, R				C
Fair Trading Amendment Bill 2004				N	
Filming Approval Bill 2004				C	
Fines Amendment Bill 2004				N	
Fisheries Management Amendment Bill 2004				N	
Food Legislation Amendment Bill 2004				N	
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Greyhound and Harness Racing Administration Bill 2004			R, C	N	
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	N		R		
Health Legislation Amendment Bill 2004	N			N	
Institute of Teacher Bill 2004				N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Liquor Amendment (Parliamentary Precincts) Bill 2004				N	
Local Government Amendment (Council and Employee Security) Bill 2004	N			N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Local Government Amendment (Discipline) Bill 2004				N	
Mine Health and Safety Bill 2004	N, R	N	C	N, R	
Mining Amendment (Miscellaneous Provisions) Bill 2004	C, R			N	
National Parks and Wildlife Amendment (Jenolan Caves Reserve Trust) Bill 2004	N				
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Parliamentary Electorates and Elections Amendment (Prohibition on Voting Rights by Criminals) Bill 2004*	R				
Partnership Amendment (Venture Capital Funds) Bill 2004	C			C	
Passenger Transport Amendment (Bus Reform) Bill 2004	N, R		N, C, R	N	
Police Amendment (Senior Executive Transfers) Bill 2004				C	
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004				C	
Public Lotteries Legislation Amendment Bill 2004				N	
Regional Development Bill 2004				N	
Residential Tenancies (Public Housing) Bill 2004	N			N	
Retail Leases Amendment Bill 2004				N	
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N, C				
Road Transport (General) Amendment (Licence Suspension) Bill 2004	N	C	R		
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Snowy Mountains Cloud Seeding Trial Bill 2004				N	
State Revenue Legislation Further Amendment Bill 2004	N				
State Water Corporation Bill 2004				N	
Stock Diseases Amendment (Artificial Breeding) Bill 2004	C, R			N	N
Stock Diseases Amendment (False Information) Bill 2004	C			C	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	
Sydney Opera House Trust Amendment Bill 2004	N				
Thoroughbred Racing Legislation Amendment Bill 2004				C	
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	R			N	
Wool, Hide and Skin Dealers Bill 2004				N	
Workers Compensation Legislation Amendment Bill 2004	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 2004

<b>Regulation</b>	<b>Minister/Correspondent</b>	<b>Letter sent</b>	<b>Reply</b>	<b>Digest Number</b>
Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 & Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	Minister for Community Services	13/02/04	21/04/04	1,7
Consultation on Regulations	Premier/Acting Premier	05/03/04	15/06/04	9
Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003	Attorney General	07/11/03	03/12/03	1
Determination of Regulatory Fee Increases	Premier	24/10/03	18/03/04	5
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	Minister Assisting the Minister for Infrastructure and Planning (Planning Administration)	05/03/04 30/04/04	01/04/04 01/06/04	6,9
Landlord and Tenant (Rental Bonds) Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Occupational Health and Safety Amendment (Accreditation and Certification) Regulation 2003	Minister for Commerce	26/03/04 30/04/04	15/04/04 05/05/04	6,7
Pawnbrokers and Second-hand Dealers Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Radiation Control Regulation 2003	Minister for the Environment	24/10/03	23/01/04	1
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	Minister for Roads	13/02/04	15/06/04	9
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Privacy Commissioner	24/10/03	27/11/03	1
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Minister for Roads	13/02/04 01/06/04	20/05/04	1,8