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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) makers 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. APPROPRIATION (HEALTH SUPER-GROWTH FUND) BILL 2003

Introduced: 28 October 2003
House: Legislative Assembly
Minister: Hon C J Knowles MP
Portfolio: Infrastructure and Planning

Matters for comment raised by the Bill

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

Purpose and Description

1. The Bill's object is to appropriate out of the Consolidated Fund the sum of $420,000,000 for investment, and to apply the income from the investment towards capital works and services for public health purposes.

2. The income from the investment is to be paid into a fund, to be called the Health Super-Growth Fund, which is established as a Special Deposits Account.

3. It is the Government's intention to appropriate, in future annual Appropriation Acts, to the Minister for Health for recurrent services for public health purposes amounts which represent the increase in poker machine tax effected by the 2003–04 Budget.

Background

4. The NSW budget surplus for 2002-03 was $619 million, some $420 million higher than the June estimate.[1] At the NSW ALP State Conference on 5 October 2003, the Premier announced that these additional funds would be used to create a *Health Super Growth Fund* (the Fund). The interest from the amount invested – estimated at $78 million over the next four years[¶] – would be used to fund urgent hospital capital works.[2]

5. The Premier also stated that the revenue from the levy on poker machine profits would be allocated to the Fund.

6. This was re-iterated in the Bill's Second Reading speech by the Minister for Infrastructure and Planning.[3] The Minister indicated that all of the money from the increase in poker machine taxes will be allocated to the fund.

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[1] See Hon M R Egan MLC, Budget Speech, *NSW Parliamentary Debates (Hansard)* Legislative Assembly, 4 June 2002.

[¶] Error corrected from tabled version: formerly read "per annum".

[2] Hon R J Carr MP, Speech to NSW ALP State Conference 5 October 2003.

[3] Hon C J Knowles MP, *NSW Parliamentary Debates (Hansard)* Legislative Assembly, 28 October 2003.

7. The Minister stated that the Bill signalled:

> that the annual Appropriation Act for the 2004-05 financial year, and for each subsequent financial year, will include a separate appropriation to the Minister for Health for public health recurrent services representing the increase in poker machine tax.[4]

The Bill

8. Clause 4 of the Bill enables the Government to appropriate $420 million from the Consolidated Fund.

9. The Bill provides for the appropriated sum to be invested with the *NSW Treasury Corporation* [cl 5], and for the establishment of a Special Deposits Account called the Health Super-Growth Fund [cl 6].

10. Clause 7(1) provides that there is to be paid *into* the Fund:

- the income from the investment, under cl 5, of the appropriated sum, which income may be applied only for or towards public health capital works and services; and
- all other money required or authorised by or under any other Act to be paid into the Fund.

11. Clause 7 (2) provides that there is to be paid *out of* the Fund:

- such amounts as are determined from time to time by the Treasurer for the purpose of public health capital works and services; and
- all other payments required or authorised by or under this, or any other Act, to be paid from the Fund.

12. The Treasurer may authorise any money in the Fund that is not required to be paid for the purpose of public health capital works and services to be used for public health *recurrent services* [cl 7(3)].

13. Pursuant to cl 8, the appropriation effected by the Bill does not lapse at the end of the financial year in which it is made. This avoids the application of s 23(1) of the *Public Finance and Audit Act 1983*.[5]

14. The Bill is to commence on assent.

Issues Arising Under s 8A(1)(b)

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

The Committee makes no further comment on this Bill.

[4] Hon C J Knowles MP, *NSW Parliamentary Debates (Hansard)* Legislative Assembly, 28 October 2003.

[5] Section 23(1) of the *Public Finance and Audit Act 1983* provides that every appropriation out of the Consolidated Fund for any financial year shall lapse and cease to have any effect for any purpose, at the close of that year.

2. CONSTITUTION AMENDMENT (GOVERNOR'S SALARY) BILL 2003

Introduced: 31 October 2003
House: Legislative Assembly
Minister: The Hon B Carr MP
Portfolio: Premier

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to amend:

   - the *Constitution Act 1902;* and
   - the *Statutory and Other Offices Remuneration Act 1975*

   so as allow the salaries of *future* Governors of New South Wales to be determined by the *Statutory and Other Offices Remuneration Tribunal* (the Tribunal).

Background

2. The NSW Governor's salary is currently set by the *Governor's Salary Regulation 1990.*[6]

   As it is the Governor who formally makes regulations, this may give some the impression that the Governor sets his or her own salary. In practice, the Governor only makes regulations on the advice of the Government of the day.

3. The Bill gives the function of determining the Governor's salary to the Tribunal.

4. According to the Parliamentary Secretary's second reading speech,[7] the changes were precipitated by the Commonwealth Parliament passing legislation which removed the tax-free status of vice-regal representatives throughout Australia.

   While the relevant changes to the Income Tax legislation took effect at the Commonwealth level on 29 June 2001, they do not apply to State Governors until a new appointment is made. It will therefore be necessary to reassess and determine the level of remuneration for future Governors of this State.

The Bill

5. Schedule 1 of the Bill amends s 9I of the *Constitution Act 1902* to provide that the Governor is entitled to be paid such remuneration as determined by the Tribunal from time to time.

[6] Made under s 9I *Constitution Act 1902.*
[7] Mr Graham West MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)* Legislative Assembly 31 October 2003.

The schedule also provides that remuneration is not payable to a Governor for any period for which he or she is entitled to remuneration from the Commonwealth in respect of his or her administration of the Government of the Commonwealth.

6. Schedule 2 amends the *Statutory and Other Offices Remuneration Act 1975* to include "Governor" in the list of public offices under Schedule 1 of that Act.

According to the second reading speech:

> "...the Governor's salary will receive the protection of section 21[8], which is afforded to other office holders...such as judges and magistrates. This means that the Governor's salary can be reduced only by Parliament and not by a new determination of the Tribunal".[9]

7. Schedule 2 of the Bill also provides that, on, or as soon as practicable after, the commencement of the Act, the Tribunal is to make a determination of the remuneration to be paid to the holder of the office of Governor.

That determination of the Tribunal is to come into force on the date specified in the determination - which may or may not be the day on which the Act commences.

8. Clause 2 effectively provides for the Act to commence on the appointment of the next Governor of New South Wales.

The provisions of the Bill do not apply to the present Governor of New South Wales.

Issues Arising Under s 8A(1)(b)

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

The Committee makes no further comment on this Bill.

[8] s 21 of the *Statutory and Other Offices Remuneration Act 1975* provides:

(1) Notwithstanding any other section of this Act, a determination does not operate so as to reduce the rate at which remuneration is payable to the holder of an office specified in Schedule 1.

(2) Where an Act contains a provision to the effect that subsection (1) does not apply to a determination made before the date of assent to that Act, then, subject to that Act, the reduction effected by virtue of that Act does not, in relation to any period before that date, apply to a person who is not an office holder at that date.

(3) A determination does not operate so as to reduce, contrary to a written contract or agreement entered into by a person and by or on behalf of the State or the Government of the State, the rate at which remuneration is payable to the person as an office holder, unless the person agrees in writing.

[9] Mr Graham West MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)* Legislative Assembly 31 October 2003.

3. COPTIC ORTHODOX CHURCH (NSW) PROPERTY TRUST AMENDMENT BILL

Introduced: 29 October 2003
House: Legislative Assembly
Minister: Hon R J Debus MP
Portfolio: Attorney General

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to amend the *Coptic Orthodox Church (NSW) Property Trust Act 1990* (the Act) to reflect the new Constitution of the Coptic Orthodox Church in the Diocese of Sydney and Affiliated Regions (the Diocese).

2. At present, the Act constitutes a Trust to deal with certain property. The trustees of the Trust are the members of the New South Wales State Board of the Coptic Orthodox Church, New South Wales (the Board).

3. On 8 October 2002, a new Constitution of the Diocese of Sydney and Affiliated Regions was approved by His Holiness Pope Shenouda III, Pope of Alexandria and Patriarch of the See of St. Mark.

   Under the new Constitution, it is the Bishop of the Diocese who is the sole and exclusive authority in relation to financial matters in churches and in the Diocese.

   The Bill amends the Coptic Orthodox Church (NSW) Property Trust Act 1990 to reflect that change.

Background

4. Since the first Coptic liturgy was celebrated in Sydney in March 1970, the Coptic congregation in Sydney has grown to approximately 50,000 people, as at June 2003. This growth in the number of Copts in Sydney has been parallelled by an increase in the number of Coptic churches, schools, colleges, monasteries and centres for the aged.[10]

5. Previously, s 5 of the Act provided that all financial and property dealings concerning the Coptic Church were to be undertaken by the Coptic Orthodox Church (NSW) Property Trust (the Trust), constituted under s 4 of the Act.

6. However, in June 2002, His Holiness Pope Shenouda III officially ordained and appointed His Grace Bishop Daniel to be the first bishop of the Diocese, and since October 2002 the Diocese has been governed by the new Constitution.

[10] http://www.coptic.org.au/modules/sydneyregion.

7. Rule 3(6) of the new Constitution provides that:

> The Bishop of the Diocese has sole and exclusive authority for, and power over the spiritual, financial and administrative matters in his Diocese.
>
> **The Bishop only** has the right to dispose of any properties owned by the Churches in his Diocese for the good of the Church…[11]

8. It was stated in the Second Reading speech that the solicitors for the Coptic Church had contacted the Government to advise that the Act required amending to reflect the new Constitution.

   The solicitors for the Copts indicated that both the Board and Church parishioners support the request to amend the Act, so that it will be consistent with the new Constitution.[12]

The Bill

9. Under the Bill, the Bishop becomes the sole trustee of the Trust, replacing the members of the Board. A number of consequential changes are also required.

10. The Bill is to commence on assent.

Issues Arising Under s 8A(1)(b)

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

The Committee makes no further comment on this Bill.

[11] http://www.coptic.org.au/modules/thediocese/constitution. Paragraph 7 provides that the Bishop generally may not sell or mortgage church property without the approval of the Pope of Alexandria.

[12] Mr Graham West MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.

4. CORONERS AMENDMENT BILL 2003

Introduced:	29 October 2003
House:	Legislative Assembly
Minister:	The Hon R J Debus MP
Portfolio:	Attorney General

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to make miscellaneous amendments to the *Coroners Act 1980* (the ***Principal Act***) with respect to the holding of inquests and inquiries.

Background

2. According to the Parliamentary Secretary's second reading speech,[13] the Attorney General commissioned a broad ranging review of the Principal Act.

   Submissions were invited from interested members of the community and organisations.

3. This review led to a wide range of proposals.

   The Government has decided, however, to refer the more far-reaching proposals to an expert working party.

4. The Parliamentary Secretary stated that the Bill contains practical and expedient reforms which have been identified during the review.

   These are supported by court users, the State Coroner, Senior Deputy State Coroner and two Deputy State Coroners.

The Bill

5. The Bill clarifies the jurisdiction and duty of a coroner.

   It amends the Principal Act to provide that a coroner will have the jurisdiction and duty to hold an inquiry into "*the cause and origin of*" a fire or explosion – rather than, as at present, an inquiry into the "circumstances" of that fire or explosion – where he or she is informed that the fire or explosion has destroyed or damaged any property in the State.

   The reasons for this significant change are set out in the Second Reading Speech:

   > At present a fire is required to be reported to the Coroner where there has been a death or damage to property. This bill will not change that requirement. What this bill deals with is the terms of that inquiry, that is, what will be required in most cases…

[13] Mr Graham West, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.

> The interpretation of the term "circumstances" as contained in the Coroners Act 1980 has tended to be broad, resulting in lengthy and wide-ranging police coronial investigations, adding to the time victims, property owners, firefighters and the public must wait for an outcome. Over recent bushfire seasons the increased complexity of police investigations, due to the broad terms of the jurisdiction, has caused delays in the presentation of the hundreds of briefs of evidence to the coroner. Many of those briefs contain thousands of pages of evidence covering issues that are not necessarily needed to determine the cause and origin of the fire.
>
> Delays in investigating, preparing briefs, and holding and finalising a fire inquiry mean that the coroner's recommendations are sometimes made several bushfire seasons after the event, lessening their effectiveness as a tool for disaster prevention or better fire management. After considering the submissions to the review and the results of subsequent consultation, the Government is of the view that delays in holding coronial fire inquiries could best be avoided by clarifying the scope of the inquiry to the cause and origin of the fire rather than the broader and less easily defined term, "circumstances".[14]

6. The Bill provides that a (broader) *general inquiry* "concerning a fire or explosion" that has destroyed or damaged any property in the State is to be held

   - at the request of the NSW Fire Brigades, the Commissioner of the NSW Rural Fire Service, or the Minister; or
   - if the State Coroner is of the opinion that a *general inquiry* should be held [schedule 1 [4] & [5]].

7. Other amendments in the Bill:

   - make it clear that all coroners may give police officers directions concerning investigations [schedule 1[7]];
   - allow a coroner to hold an inquest in a building which is not open to the public (such as in a correctional centre, hospital, or private residence) if the coroner is of the opinion that the special circumstances make it necessary or desirable to do so [schedule 1[10];
   - allow a coroner to issue subpoenas for the appearance of witnesses or the production of documents without being first satisfied that the person will not appear or produce the document voluntarily [schedule 1[11]];
   - make it clear that a coroner's power to order all or any persons to go or remain outside the room or building in which an inquest or inquiry is being held out of regard for personal security extends to the personal security of the public or any person [schedule 1[17]]; and
   - make section 13B of the Principal Act, which limits a coroner's jurisdiction to investigating deaths or suspected deaths to those which appear to have occurred in last 100 years, apply to deaths which occurred before the commencement of that section in 1994 [schedule 1[18]].

[14] Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly 29 October 2003.

Issues Arising Under s 8A(1)(b)

Clause 2: Commencement

8. The Bill provides that the Act is to commence on a day or days to be proclaimed.

9. The Committee notes that providing that an Act 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 may be required. It also considers that, in some circumstances, such discretion can give rise to an inappropriate delegation of legislative power.

10. The Committee has written to the Attorney General seeking his advice as to the reason for commencement by proclamation and the likely commencement date of the Act.

Schedule 1 [10]: Place of inquest – Not open to the public

11. Schedule 1 [10] allows a coroner to hold an inquest or inquiry in a room or building that is not open to the public if the coroner is of the opinion that special circumstances make it necessary or desirable to do so.

Examples of such places given in the Bill include a room or building in a correctional centre, hospital, private residence or other residence not open to the public.

The Bill requires the Coroner to note on the record of proceedings the special circumstances that in his or her opinion make such a course of action necessary or desirable.

12. While the Committee recognises the fundamental importance of holding judicial proceedings in public, it also acknowledges that there are circumstances in which it is appropriate, in the interest of justice and/or in the public interest, for access to such proceedings to be limited.

To illustrate, Section 44(5) of the present Act gives the Coroner power to order any or all persons to go and remain outside the room or building in which an inquest is being held if he or she is of the opinion that it is in the public interest to do so.

The new proposed s 44(6) provides that, in forming that opinion, the coroner may have regard, without limitation, to:

- the administration of justice;
- national security; and
- the personal security of the public or any person.

13. The Committee also notes that transcripts are made of proceedings. Except to the extent that publication is prohibited under s 44 of the Act, the Committee understands that these transcripts would normally be available to any person with a *bona fide* reason for accessing them.

14. In the circumstances, the Committee does not consider that the provision permitting the Coroner to hold inquests or inquiries in places not open to the public unduly trespasses on personal rights.

15. The Committee is also of the opinion that such a provision does not make rights, liberties or obligations unduly dependent on non-reviewable decisions.

Schedule 1 [18]: No jurisdiction unless death occurred in last 100 years – Retrospective application

16. Section 13B of the Act provides that a coroner does not have jurisdiction to hold an inquest concerning a death or suspected death that occurred more than 100 years ago.

17. Clause 7 of schedule 3 of the present Act provides that s 13B does not apply to deaths or suspected deaths that occurred before the commencement of that section, which began in 1994. On one view, this makes the present s 13B ineffective until the year 2094.

18. To avoid this problem, Schedule 1 [18] of the Bill amends the Act to specifically provide that section 13B applies to deaths that occurred before the commencement of that section.

19. This retrospective effect is necessary to achieve the Bill's purpose of excluding deaths more than 100 years old from the jurisdiction of the coroner.

20. The Committee considers that, in the circumstances, this retrospective effect of the new proposed section 13B does not trespass unduly on personal rights.

The Committee makes no further comment on this Bill.

5. COURTS LEGISLATION AMENDMENT BILL 2003

Introduced: 31 October 2003
House: Legislative Assembly
Minister: The Hon RJ Debus MP
Portfolio: Attorney General

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to amend legislation affecting the operations of New South Wales courts as follows:

(a) to amend the *Crimes (Local Courts Appeal and Review) Act 2001* to confirm the power of an appeal court under that Act to take into account any period of suspension of a driver licence under s 34 of the *Road Transport (General) Act 1999*, and any other periods during which the defendant was or was not licensed to drive, when deciding whether to backdate the commencement of a disqualification from holding a driver licence that it confirms or varies on appeal,

(b) to amend the *Criminal Procedure Act 1986* to extend the classes of persons who may take depositions from dangerously ill persons in order to preserve evidence of indictable offences for court proceedings,

(c) to amend the *District Court Act 1973* to enable the Court to sit in places directed by the Chief Judge of the Court even if those places are not proclaimed places within the meaning of that Act,

(d) to amend the *Industrial Relations Act 1996*:

(i) to confer power on a judicial member of the Industrial Relations Commission to order the commencement of proceedings for contempt of the Commission, and

(ii) to confirm the powers of the Commission to make orders prohibiting or restricting the disclosure or publication of matters before the Commission,

(e) to amend the *Jury Act 1977*:

(i) to make it clear that a court may make an order for the separation of a jury in criminal proceedings after it retires even if the jury is not present when the order is made, and

(ii) to increase the penalties for the offence of willfully disclosing the address or identity of a juror,

(f) to amend the *Local Courts (Civil Claims) Act 1970*:

(i) to increase the jurisdictional limit of the General Division of a Local Court from $40,000 to $60,000, and

(ii) to update an outdated reference to an auctioneer licensed under the repealed *Auctioneers and Agents Act 1941*,

(g) to amend the *Oaths Act 1900* to authorise barristers (as well as solicitors) to witness statutory declarations and take and receive affidavits,

(h) to amend the *Supreme Court Act 1970*:

(i) to remove the power of the Court to refer matters for neutral evaluation, and

(ii) to provide greater flexibility in relation to the nomination and appointment of mediators by the Court.

The Bill

Schedule 1: Amendment of *Crimes (Local Courts Appeal and Review) Act 2001*

2. This Bill inserts a provision in s 68 of the *Crimes (Local Courts Appeals and Review) Act 2001* allowing an appeal court, in relation to a sentence that consists of, or includes, a disqualification from holding a drivers license to take into account:

(a) any period during which the defendant's drivers licence was suspended under s 34 of the *Road Transport Act (General) 1989,* and

(b) any other periods after committing the offence to which the sentence relates during which the defendant held, or did not hold, a drivers license that would have permitted the defendant to drive a motor vehicle.

3. Section 34 of the *Road Transport (General) Act 1989* provides for the immediate suspension, by written notice, of a drivers licence by a police officer within 48 hours of a person being charged with certain offences involving drug or alcohol use under the *Road Transport (Safety and Traffic Management) Act 1999.*[15] The suspension remains valid until the charge is heard and determined by a court, or withdrawn.[16]

4. Section 63 of the *Crimes (Local Courts Appeals and Review) Act 2001* allows for the suspension of a licence to be stayed pending the final determination of an appeal made under that Act.

5. According to the second reading speech, this amendment is necessary because:

> If an appeal to the District Court is unsuccessful, and the disqualification period imposed by the Local Court is confirmed, District Court judges are unclear as to their power to vary the commencement date to take into account any suspension imposed

[15] The offences under the *Road Transport (Safety and Traffic Management) Act 1999* for which a persons license may be immediately suspended under s 34 of the *Road Transport (General) Act 1998* are as follows:
(a) mid or high range drink driving [s 9(3) and s 9(4)];
(b) refusing to submit to a breath analysis in accordance with the direction of a police officer after arrest [s 15(4)];
(c) wilfully altering blood concentration following a request for breath test or analysis [s 16]; and
(d) hindering or obstructing a health professional from taking a blood sample after a motor vehicle accident for which a person has attended, or been admitted to hospital, or wilfully doing anything to alter the concentration of alcohol in the person's blood between the time of the accident concerned and the taking of the sample [s 22(2)]

[16] Section 34(3) of the *Road Transport (General) Act 1989*

> when the offence was committed, or any driving or non-driving period between the Local Court hearing and the District Court appeal. The amendment clarifies that District Court judges have discretion to vary the commencement date for a person's licence suspension after an unsuccessful appeal.[17]

6. This amendment extends to appeals commenced, but not finally determined, before the commencement of the amendment [proposed Schedule 1, Part 3, Clause 8].

Schedule 2: Amendment of *Criminal Procedure Act 1986*

7. Section 284 of the *Criminal Procedure Act 1986* provides for the taking of a deposition of a dangerously ill person by a judge when the person has material information to give about an indictable offence and where the person's evidence would probably be lost if not immediately taken.

8. The proposed changes will allow a deposition to be taken by an ***authorised person,*** defined by the proposed s 284(5) as:

   (a) a Judge;

   (b) a justice of the peace who is a registrar of a Local Court or the Drug Court; or

   (c) a justice of the peace who is an employee of the Attorney General's Department authorised in writing by the Attorney General to be an authorised person for the purposes of this section.

9. According to the second reading speech:

> The effect of the changed wording has been to limit the range of persons empowered to take depositions of dangerously ill persons. This poses difficulties when magistrates are not available on an urgent basis, particularly in rural circuit court areas where the same magistrate sits in several geographically remote courts. Important evidence may be lost if a person dies before it is possible to take a deposition.[18]

Schedule 3: Amendment of the *District Court Act 1973*

10. Currently s 32 and s 173 of the *District Court Act* limit the power of the Chief Justice of the District Court to direct where the Court will sit in its civil and criminal jurisdiction respectively, to *proclaimed places*.

11. Under the Act, a *proclaimed place* is a location proclaimed by the Governor under s 18F and published in the Gazette.

12. This Bill proposes to amend the *District Court Act 1973* by extending the number of locations where the District Court may sit. This amendment allows the Chief Judge to direct that sittings of the Court in its civil and criminal jurisdiction respectively may be held at places other than proclaimed places as well as at proclaimed places.

[17] Mr G West MP (Parliamentary Secretary), *NSW Parliamentary Proceedings (Hansard),* Legislative Assembly, 31 October 2003.

[18] Mr G West MP (Parliamentary Secretary), *NSW Parliamentary Proceedings (Hansard),* Legislative Assembly, 31 October 2003.

13. According to the second reading speech, this will allow the court to conduct sittings at venues that are closer to where parties and witnesses live, and where the cause of action arose.[19]

Schedule 4: Amendment of *Industrial Relations Act 1966*

Contempt proceedings

14. Section 153(2) of the *Industrial Relations Act 1966* specifies that proceedings for contempt in the Industrial Relations Commission (the Commission) may only be exercised by a Full Bench of the Commission in Court Session.

15. A Full Bench of the Commission in Court Session consists of at least 3 judicial members constituted as a Full Bench by the President for the purposes of the proceeding.[20]

16. This Bill proposes to amend s 153(2) to allow the functions of the Commission relating to *commencement* of contempt proceedings to be exercised by either:

    (a) the Full Bench of the Commission in Court Session; or

    (b) a judicial member.

17. The proposed s 153(3) makes clear that the functions of the Commission relating to *proceedings* for contempt of the Commission may only be exercised by the Full Court of the Commission sitting in Court session.

18. These changes will affect any contempt committed before the commencement of the amendment, but do not extend to proceedings for contempt that are pending immediately before the commencement of the provision [proposed Schedule 4, Part 9(1)].

19. A further consequential amendment is made to s 164 of the Act. This gives the Commission the power to exercise the functions of the Supreme Court as to the production of evidence, perjury and contempt. The Amendment allows a judicial member to exercise these functions of the Supreme Court in relation to the commencement of proceedings for contempt of the Commission.

Non-Disclosure Orders

20. This Bill proposes to give the Commission power to make non-disclosure orders in relation to matters before the Commission.

21. A *non-disclosure order* is defined as any one of the following orders:-

    (a) an order prohibiting or restricting:

[19] Mr G West MP (Parliamentary Secretary), *NSW Parliamentary Proceedings (Hansard),* Legislative Assembly, 31 October 2003.

[20] *Industrial Relations Act 1996,* s 156. The Commission in Court Session is the Commission constituted by a judicial member or members only for the purposes of exercising the functions that are conferred or imposed on the Commission in Court Session by or under this or any other Act or law (s 151 *Industrial Relations Act 1996*).

(i) the disclosure of the name, address, picture or any other material that identifies, or may lead to the identification of, any person (whether or not a party to proceedings before the Commission or a witness summoned by, or appearing before, the Commission), or

(ii) the doing of any other thing that identifies, or may lead to the identification of, any such person,

(b) an order prohibiting or restricting the publication or broadcast of any report of proceedings before the Commission,

(c) an order prohibiting or restricting the publication of evidence given before the Commission, whether in public or in private, or of matters contained in documents lodged with the Commission or received in evidence by the Commission,

(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Commission, or of the contents of a document lodged with the Commission or received in evidence by the Commission, in relation to the proceedings [proposed s 164A(1)].

22. The Commission in Court Session will have the power to make a non-disclosure order if satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason [proposed s 164A(2)].

23. The Commission (other than in Court Session) may make any non-disclosure order only if:

(a) in relation to proceedings under the *Child Protection (Prohibited Employment) Act 1998*—it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, or

(b) in relation to any other proceedings—it is satisfied that it is necessary to do so in the interests of justice [proposes s164A(3)].

24. According to the second reading speech:

> The need for non-publication orders is especially important in *Child Protection (Prohibited Employment) Act 1998* cases to protect the identity of individuals alleged to have been convicted of "serious sex offences", the employer, such as a school, and/or other associates, such as the teacher's former students.[21]

Schedule 5: Amendment of *Jury Act 1977*

25. This Bill amends the *Jury Act 1977* by increasing the penalty for wilfully publishing any material, broadcasting any matter or otherwise disclosing any information which is likely to lead to the identification of a juror or former juror in a particular trial or inquest[22].

26. Penalties for this offence are increased as follows:

[21] Mr G West MP (Parliamentary Secretary), *NSW Parliamentary Proceedings (Hansard),* Legislative Assembly, 31 October 2003.

[22] Section 68 *Jury Act 1977.*

- In the case of a corporation, from 50 penalty units (currently $5,500) to $250,000; and
- In any other case, from 20 penalty units (currently $2,200) to 50 penalty units (currently $5,500), or imprisonment for two years, or both [proposed s68 (1)].

27. This Bill also amends s 54 of the *Jury Act 1977* to allow an order to separate the jury to be made, being an order to allow the jury to finish for the day and leave the court or jury room, notwithstanding that the jury is absent when the order is made.

28. This purpose of this provision is to 'prevent the delays and inconvenience caused by moving the jury backwards and forwards from the courtroom to the jury room'.[23] This was made necessary by the judgement in *R v Radju* (2001) 53 NSWLR 471 in which the NSW Court of Criminal Appeal held that it was proper practice for an order to separate the jury to be made with the jury present.

Issues Arising Under s 8A(1)(b)

Clause 2, Commencement

29. This Act is to commence by proclamation.

30. The Committee notes that providing that an Act 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. The Committee recognises that there may be good reasons why such a discretion may be required. It also considers that, in some circumstances, such discretion can give rise to an inappropriate delegation of legislative power.

31. The Committee has written to the Attorney General seeking his advice as to the reason for commencement by proclamation and the likely commencement date of the Act.

Schedule 1[4] - Retrospectivity

32. The proposed Schedule 1, Part 3, Clause 8 of the *Crimes (Local Courts Appeal and Review) Act 2001* provides that the provisions of the proposed s68(1) applies to appeals commenced, but not finally determined, before the commencement of the new provisions. Consequently, the Bill has a retrospective effect.

33. The Committee notes that the purpose of s68 (1) is to *clarify* the discretion of a District Court judge to vary the commencement date for a person's suspension after an unsuccessful appeal. The operation of s68 (1) largely benefits the appellant, by confirming the Court's power to take into consideration any period of disqualification already served. The Committee therefore does not consider that this retrospective provision unduly trespasses on personal rights or liberties.

[23] Mr G West MP (Parliamentary Secretary), *NSW Parliamentary Proceedings (Hansard),* Legislative Assembly, 31 October 2003.

Schedule 4[6] - Retrospectivity

34. The proposed Schedule 4, Part 9 of the *Industrial Relations Act 1996* provides that amendments to s 153(4), enabling a single judicial member to perform the functions of the Commission in relation to the commencement of proceedings for contempt, applies to any contempts committed before the commencement of the amendment. Consequently, the provision has a retrospective effect.

35. The Committee considers that no person will be detrimentally affected by the retrospectivity of this clause. The Committee therefore considers that the clause does not unduly trespass on personal rights or liberties.

Schedule 4[4] - Non-disclosure orders

36. The proposed inclusion of s164A into the *Industrial Relations Act 1996* will allow the Industrial Relations Commission to make an order of non-disclosure of evidence (e.g. personal identifying information) and proceedings before the Commission.

37. The Committee is of the view that the public have the right to be fully informed of judicial proceedings. However, the Committee notes that this right is not absolute and that in some instances information relating to proceedings needs to be restricted to protect other important rights and interests.

38. The Committee is of the view that the power of the Industrial Relations Commission to make non-disclosure orders if satisfied that it is desirable to do so because of the confidential nature of the evidence or matter, or if satisfied that it is necessary to do so in the interests of justice, does not unduly trespass on personal rights and liberties.

The Committee makes no further comment on this Bill.

6. FIREARMS AND CRIMES LEGISLATION AMENDMENT (PUBLIC SAFETY) BILL 2003

Introduced: 29 October 2003
House: Legislative Assembly
Minister: Hon J A Watkins MP
Portfolio: Police

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to create new offences under the *Crimes Act 1900* (Crimes Act) and the *Firearms Act 1996* (Firearms Act) to improve public safety.

   [Note: Unless otherwise stated, the prison terms referred to in this Report are *maximum terms of imprisonment*]

2. The new offences under the Crimes Act are as follows:

   (a) firing a firearm at a dwelling-house or other building with reckless disregard for the safety of any person (14 years imprisonment);

   (b) stealing a firearm (14 years imprisonment); and

   (c) possession by an unauthorised person of an unregistered firearm in a public place (10 years imprisonment) as well as a separate offence (14 years imprisonment) in aggravated circumstances (namely, if the offence involves more than one unregistered firearm, an unregistered prohibited firearm or an unregistered pistol).

3. The new offences under the Firearms Act are as follows:

   (a) selling a firearm part to an unauthorised person (5 years imprisonment) as well as a separate offence (10 years imprisonment) of selling a firearm part that relates to any kind of prohibited firearm or pistol;

   (b) selling firearm parts illegally on an ongoing basis (20 years imprisonment); and

   (c) using a false document (such as a document that purports to be a firearm licence or permit) in order to obtain a firearm (10 years imprisonment).

4. The Bill also makes other miscellaneous amendments (including amendments of a consequential nature) to the Crimes Act and the Firearms Act as well as to the *Criminal Procedure Act 1986* and the *Firearms (General) Regulation 1997*.

Background

5. In the Second Reading Speech, the Minister described the Bill as:

> part of the package of measures to improve the comprehensive, co-ordinated approach taken by NSW Police to illegal gun availability, detection, apprehension and prosecution.[24]

6. More specifically, the Bill deals with the policing difficulties posed by the recent decision in *Hardman v Director of Public Prosecutions*.[25]

In that case, a majority of the Court of Criminal Appeal[26] held that, read together, s 8 and s 327(2) of the Crimes Act provided a distinction between being in a public place *per se*, and being in a motor vehicle which is in a public place. Accordingly, possession of a loaded firearm in a motor vehicle on a public road did *not* constitute possession of the firearm in a public place, for the purposes of s 93G(1)(a)(i) of the Crimes Act.[27]

7. In her decision, McColl JA stated that:

> the purpose of s 93G is to guard the public against the risk posed by the possession of a loaded firearm but to weigh that risk by reference to the place in which the firearm is possessed or by reference to the activity being undertaken in relation to it. Where the loaded firearm is actually in the public place then the risk is, to adopt the respondent's expression, "self evident".[28]

8. In response, the Minister stated in the Bill's Second Reading Speech, that:

> A recent court decision would have it that a firearm which is inside a private vehicle which is in a public place is not necessarily itself within that public place. That is clearly nonsense, and new section 93F in schedule 1 to the bill amends the Crimes Act to clarify this.[29]

The Bill

Amendment of *Crimes Act 1900*

9. Schedule 1 [1] of the Bill specifies that, for the purposes of the existing offences under Part 3B of the Crimes Act, being in a public place includes being in a vehicle or vessel that is in a public place [s 93F].

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[24] Hon J A Watkins MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 29 October 2003.
[25] [2003] NSWCA 130, 29 July 2003.
[26] McColl and Tobias JJA, reversing the decision of Simpson J; Meagher JA dissenting.
[27] Section s 93G(1) of the *Crimes Act 1900* provides that any person who:
(a) possesses a loaded firearm or loaded spear gun:
(i) in a public place, or
(ii) in any other place so as to endanger the life of any other person, or
(b) fires a firearm or spear gun in or near a public place, or
(c) carries or fires a firearm or spear gun in a manner likely to injure, or endanger the safety of, himself or herself or any other person or any property, or with disregard for the safety of himself or herself or any other person,
is liable to imprisonment for 10 years.
[28] *Hardman v Director of Public Prosecutions* [2003] NSWCA 130 at paragraph 94.
[29] Hon J A Watkins MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 29 October 2003.

10. Schedule 1 [2] creates a new offence under proposed s 93GA of firing a firearm at a dwelling-house or other building, with reckless disregard for the safety of any person. Pursuant to s 3 of the Crimes Act, dwelling house includes:

- any building or other structure intended for occupation as a dwelling and capable of being so occupied, although it has never been so occupied;
- a boat or vehicle in or on which any person resides; and
- any building or other structure within the same curtilage as a dwelling-house, and occupied therewith or whose use is ancillary to the occupation of the dwelling-house.

The maximum penalty for the new offence is imprisonment for 14 years.

11. The basis of this offence is that an accused has foreseen the possible consequences of firing a firearm at a dwelling house, ie, injury or loss of life, and simply *not cared* whether such injury or loss of life consequently occurred, Accordingly, in the prosecution of an offence under s 93GA, it is not necessary to prove that a person was *actually placed in danger* by the firing of the firearm [s 93GA(2)].

12. Schedule 1 [3] creates a new offence of possession by an unauthorised person of an unregistered firearm in a *public place*. The maximum penalty for the new offence is imprisonment for 10 years [proposed s 93I].

Under s 8 of the Crimes Act, a place is *deemed* to be public even if it is ordinarily private, but is at the relevant time used for a public purpose, or as a place of "common resort", or is open to the public on the payment of money or otherwise.[30]

13. The Bill also creates a separate offence if the offence under s 93I is committed in circumstances of aggravation, which is punishable by a maximum penalty of imprisonment for 14 years.

An offence is committed in ***circumstances of aggravation*** if it involves the possession of:

- more than one unregistered firearm; or
- an unregistered firearm that is a pistol; or
- an unregistered firearm that is a prohibited firearm [s 93I(3)].

14. Schedule 1 [4] inserts a new s 154D into Part 4 Division 1 Subdivision 3 of the Crimes Act. The proposed section creates a new offence of stealing a firearm.[31] The maximum penalty for this new offence is imprisonment for 14 years.

[30] "Place" includes a vessel or vehicle, a room, or field: *Crimes Act 1900* s 8.

[31] Pursuant to the new s 154D(2) of the *Crimes Act 1900*, "firearm" means a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun: *Firearms Act 1996* s 3.

Amendment of *Firearms Act 1996*

15. The Firearms Act was introduced in June 1996 to implement the resolutions of the Australasian Police Ministers' Council that followed the Port Arthur shooting tragedy in April 1996.[32]

16. The underlying principles of the Firearms Act are to:

- confirm firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety, and improve public safety:
  - (i) by imposing strict controls on the possession and use of firearms; and
  - (ii) by promoting the safe and responsible storage and use of firearms; and
- facilitate a national approach to the control of firearms.[33]

17. The objects of the Firearms Act are to:

- prohibit the possession and use of all automatic and self-loading rifles and shotguns except in special circumstances;
- establish an integrated licensing and registration scheme for all firearms;
- require each person who possesses or uses a firearm under the authority of a licence to prove a genuine reason for possessing or using the firearm;
- provide strict requirements that must be satisfied in relation to licensing of firearms and the acquisition and sales of firearms;
- ensure that firearms are stored and conveyed in a safe and secure manner; and
- provide for compensation in respect of, and an amnesty period to enable the surrender of, certain prohibited firearms.[34]

18. Schedule 2 [1] of the Bill inserts a new s 50AA into Division 2 Part 6 of the Firearms Act. This makes it an offence for an unauthorised person to purchase a firearm part,[35] with a maximum penalty of imprisonment for 5 years.

19. A separate offence is created of purchasing a firearm part that relates to any kind of prohibited firearm or pistol that the person is not authorised to possess [s 50AA(2)]. The maximum penalty for the new offence is imprisonment for 10 years.

20. Schedule 2 [2] modifies the existing offence of selling firearms illegally on an ongoing basis. Currently the offence involves 3 occasions of sale over a consecutive period of 30 days.

    The Bill changes this to any consecutive period of 12 months. The Minister noted that this change:

[32] Hon P F Whelan MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 19 June 1996.
[33] *Firearms Act 1996* s 3(1).
[34] *Firearms Act 1996* s 3(2). Schedule 1 of the *Firearms Act 1996* sets out an extensive list of prohibited firearms.
[35] "Firearm part" means a barrel, breech, pistol slide, frame, receiver, cylinder, trigger mechanism, operating mechanism or magazine designed as, or reasonably capable of forming, part of a firearm: *Firearms Act 1996* s 4.

> recognises that the modus operandi in regard to illegal firearm sales is very different from that in regard to prohibited drugs, on which the three sales in 30 days time frame was originally modelled.[36]

21. Schedule 2 [3] inserts proposed s 51BA and s 51BB. Proposed s 51BA makes it an offence to sell a firearm part to an unauthorised person (imprisonment for 5 years).

    A separate offence is also created (imprisonment for 10 years), if the firearm part relates to any kind of prohibited firearm or pistol [s 51BA(2)].

22. The proposed s 51BB creates an offence of selling firearm parts illegally on an ongoing basis, in the same terms as s 51BA, ie, 3 or more separate occasions over any consecutive period of 12 months.

    The maximum penalty for the offence under proposed s 51BB is imprisonment for 20 years, which is the same penalty for the existing offence under s 51B of selling firearms illegally on an ongoing basis.

23. Schedule 2 [4] omits the existing offence of forging or fraudulently altering a firearms licence or permit (maximum penalty of 50 penalty units or imprisonment for 2 years, or both).

    Schedule 2 [5] inserts a note making it clear that the existing offence under s 300(1) of the Crimes Act of making a false document applies to a forged firearms licence or permit. The maximum penalty is imprisonment for 10 years.

24. Schedule 2 [6] inserts a new s 71A into the Firearms Act making it an offence to use a false document (such as a forged or fraudulently altered firearms licence or permit) with the intention of obtaining a firearm.

    The maximum penalty for the offence is imprisonment for 10 years.

25. The remainder of the Bill makes miscellaneous amendments to the Crimes Act and the Firearms Act, as well as to the *Criminal Procedure Act 1986* and the *Firearms (General) Regulation 1997*.

Issues Arising Under s 8A(1)(b)

Clause 2, Commencement

26. This Act is to commence by proclamation.

27. The Office of the Police Minister has advised the Committee that the delayed commencement date is due to the need to update the Computerised Operational Policing System, to allow for recording incidents, investigations, etc., in relation to the new offences. It is anticipated that it will take approximately four weeks to complete this update, at which time the ensuing Act will be proclaimed.

[36] Hon J A Watkins MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 29 October 2003.

28. The Committee considers that allowing time to allow for the update of the Computerised Operational Policing System, to effectively manage information relating to the new offences, is an appropriate reason to delay the commencement of the Bill.

Schedule 3 [11] Trespasses unduly on personal rights and liberties: Retrospectivity

29. Schedule 3 [11] of the Bill provides that:

> For the purposes of section 51B (as amended by Schedule 2 [2] to the *Firearms and Crimes Legislation Amendment (Public Safety) Act 2003*), a consecutive period of 12 months may include a period part of which occurs before the commencement of that amendment so long as that part period does not exceed 30 days.

30. As noted above, Sch 2 [2] modifies the existing offence of firearms trafficking, to substitute 3 occasions of sale over any consecutive period of 12 months, for the existing period of 30 days.

As noted in the Second Reading speech, this amending clause is an adaptation of the legislative response to drug trafficking.[37]

31. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.

Therefore, the effect of Sch 3 [11] is that any *series* of illegal firearms sales that would constitute an offence under the amended s 51B may be considered to have begun with a single sale some 30 days before the currently-unspecified commencement date of the new Act.

32. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights, especially such provisions where they would criminalise previously non-criminal behaviour.

33. However, having regard to the existing provisions of the *Firearms Act 1996,* and the public interest in stopping the trade in illegal firearms, the Committee is of the opinion that schedule 3 [11] of the Bill does not unduly trespass on personal rights and liberties.

The Committee makes no further comment on this Bill.

[37] Hon J A Watkins MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 29 October 2003.

7. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (ETHICS COMMITTEE) BILL 2003

Introduced: 31 October 2003
House: Legislative Assembly
Minister: The Hon R J Carr MP
Portfolio: Premier

Matters for comment raised by the Bill

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

Purpose and Description

1. The objects of this Bill are:

   (a) to replace the Legislative Assembly's statutory Standing Ethics Committee, providing instead for the Legislative Assembly to designate a committee to carry out the functions concerned, in line with the provisions applying to the Legislative Council, and

   (b) to require the designated committees to review the codes of conduct for Members of the Legislative Assembly and the Legislative Council, every 4-year (rather than the present 2 years).

Background

2. Part 7A of the *Independent Commission Against Corruption Act 1988* (the ***ICAC Act***) established the *Standing Ethics Committee*:

   (a) to prepare and review codes of conduct for members of the Legislative Assembly; and

   (b) to carry out educative and advisory work on ethical standards applying to members of the Legislative Assembly.

   The Committee currently has no role in relation to matters of privilege, and is expressly prohibited from considering matters involving individual members.[38]

3. Part 7A of the ICAC Act requires the Legislative Council to designate one of its existing committees to carry out equivalent functions in relation to members of the Legislative Council. The Standing Committee on Parliamentary Privilege and Ethics was designated for this purpose.

4. This Bill enables the Legislative Assembly to designate an existing committee as having the functions relating to parliamentary ethics under the ICAC Act – a practice similar to that of the Legislative Council.

[38] Mr Graham West MP, Parliamentary Secretary *Parliamentary Debates (Hansard)* Legislative Assembly 31 October 2003.

5. In his second reading speech, the Parliamentary Secretary said the main purpose of the Bill is "to facilitate the reconstitution of the Standing Ethics Committee as a Privileges and Ethics Committee with expanded functions."[39]

6. The Bill also implements:

- the suggestion of the Legislative Assembly Standing Ethics Committee that it would be more appropriate that the codes of conduct be reviewed every four years instead of every two years as currently required; and
- a recommendation of that Committee that the requirement of permanent community members on the Committee be removed.[40]

The Bill

7. The Bill amends the ICAC Act to:

- extend the minimum period of review for the codes of conduct adopted by the Legislative Council and Legislative Assembly from two to four years [schedule 1, [1] and [7];
- transfer the functions of the Standing Ethics Committee to a committee designated by the Legislative Assembly [schedule 1, [2] and [3]];
- allow the designated committee to appoint any member of the public to assist the committee in carrying out any of its functions in relation to a code of conduct [schedule 1[4]]; and
- remove the provisions relating to the membership of the Standing Ethics Committee, including the requirement for community members.

Issues Arising Under s 8A(1)(b)

Clause 2 – Commencement by proclamation

8. Clause 2 provides that the Act commences on a day or days to be proclaimed.

9. 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 discretion may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

10. The Committee has written to the Premier seeking his advice as to the reasons why the proposed Act will not commence on assent and to ask for an indication of the likely date for commencement of this Bill.

The Committee makes no further comment on this Bill.

[39] Mr Graham West MP, Parliamentary Secretary *Parliamentary Debates (Hansard)* Legislative Assembly 31 October 2003.
[40] NSW Legislative Assembly Standing Ethics Committee, *Review of the Code of Conduct*, 27 June 2002.

8. LOCAL GOVERNMENT AMENDMENT (CUDGEGONG (ABATTOIR) COUNTY COUNCIL DISSOLUTION) BILL 2003

Introduced: 29 October 2003
House: Legislative Assembly
Minister: Hon A B Kelly MLC
Portfolio: Local Government

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to make special provisions concerning the winding up and dissolution of Cudgegong (Abattoir) County Council (which trades under the name of Mudgee Regional Abattoir).

   This is done by applying the *Corporations Act 2001* (Cth) (the Corporations Act) to the winding up.

2. As a result of applying the Corporations Act:

   - certain entitlements of former employees of the abattoir are given protection from claims by other unsecured creditors; and
   - any money provided to former employees by the Commonwealth under its General Employee Entitlements and Redundancy Scheme (GEERS) may later be repaid to the Commonwealth in the winding up.

Background

3. The Cudgegong (Abattoir) County Council (the County Council) commenced operations in 1960. Although the governing body of the County Council was comprised of four members elected from Mudgee Shire councillors and two members elected from among the Rylstone Shire councillors, the County Council formed a separate legal entity.[41]

   The sole purpose of the County Council was to run the Mudgee Regional Abattoir, which grew to become the region's largest employer.

4. On 3 September 2003 the County Council became insolvent and its board members resigned. An administrator was appointed under the *Local Government Act 1993* (LGA). On 8 September 2003, the administrator sought financial assistance from Mudgee Shire Council. This was refused. The administrator then indicated to the

[41] Miss C A Burton MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 29 October 2003.

Minister for Local Government that without the required financial assistance the abattoir would close.

On 9 September 2003 all of the abattoir employees were stood down.[42]

5. The Bill aims to ensure that creditors of the County Council may be paid out and, in particular, that employee entitlements may immediately be paid.

This is necessary, as the Commonwealth Government will not release GEERS funding to former abattoir employees until State legislation is passed to ensure the Commonwealth has the means to recover the GEERS funding if the liquidation of the abattoir's assets provides the funds, pursuant to Parts 5.5 to 5.9 of Ch 5 of the Corporations Act.[43]

6. The Bill is also a response to the rejection by the Mudgee and Rylstone Shire Councils of legal responsibility for the debts of the County Council.

In the Bill's Second Reading Speech in the Legislative Assembly, the Parliamentary Secretary referred to advice from the Crown Solicitor that s 213, s 387, s 397 and s 398 of the LGA provide not only for the dissolution of the County Council, but the concurrent apportionment of its assets, rights and liabilities, by way of proclamation. Such a proclamation must be preceded by compliance with the public notice and consultation provisions set out in s 384 and s 385 of the LGA.[44]

7. The Parliamentary Secretary noted that:

> Importantly, the power to apportion a county council's assets, rights and liabilities at the point of its dissolution has remained essentially unchanged since the 1919 [Local Government] Act. This bill provides the opportunity to reinforce that power. Dissolution of the county council will occur in the near future upon the advice of the administrator.[45]

8. Given the urgency of the Bill and pursuant to suspensions of Standing Orders, the Bill passed all stages in both the Legislative Assembly and the Legislative Council on 29 October 2003.

9. However, the Committee notes that, under s 8A(2), it is not precluded from reporting on a Bill because it has passed a House of the Parliament, or become an Act.

[42] Miss C A Burton MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 29 October 2003.

[43] Generally, former employees of insolvent statutory corporations are not recognised under the *Corporations Act 2001* (Cth), and are not considered eligible for GEERS funding. The *Corporations (Ancillary Provisions) Act 2001* (Cth) specifically allows States to adopt provisions of the Corporations Law into State legislation and declare it to apply to legal entities to which it would not otherwise apply. A previous example is the *Corporations (Consequential Amendments) Act 2001* (NSW), which was passed to specifically apply parts 5.5 to 5.9 of Ch 5 of the *Corporations Act 2001* (Cth) to the Centenary Institute of Cancer Medicine and Cell Biology, and to the Garvan Institute of Medical Research.

[44] Miss C A Burton MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 29 October 2003.

[45] Miss C A Burton MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 29 October 2003.

The Bill

10. Schedule 1[4] inserts a new Schedule 9 into the LGA containing special provisions relating to the County Council.

11. The new Sch 9 Pt 1 of the LGA provides for the winding up of the County Council. Schedule 9 cl 1(2) declares the winding up to be an applied Corporations legislation matter for the purposes of Part 3 of the *Corporations (Ancillary Provisions) Act 2001* (Cth).

    This Part provides for the application of provisions of the Corporations Act as laws of the State in respect of any matter declared by a law of the State to be an applied Corporations legislation matter for the purposes of that Part.

12. Schedule 9 cl 2 of the LGA validates acts of the liquidator of the County Council dating back to 3 September 2003, if the liquidator is the same person who was appointed administrator of the County Council on that date.

13. The new Sch 9 Pt 2 of the LGA makes provision for a proclamation dissolving the County Council under s 397 of the LGA. Schedule 9 cl 3(2) provides that:

> Any such proclamation may include provisions:
>
> (a) transferring the liabilities of Cudgegong (Abattoir) County Council to Mudgee Shire Council or Rylstone Shire Council (or to both) to the extent, or in the proportions, specified in or determined in accordance with the proclamation, and
>
> (b) appointing a person to direct Mudgee Shire Council or Rylstone Shire Council (or both) as to how to deal with any such transferred liabilities.

14. Schedule 9 cl 3(6) of the LGA specifies liabilities of the County Council as:

    - any liability that is proved in the winding up of the County Council; and
    - any liability to repay the Commonwealth Government any GEERS payments made in respect of wages, or superannuation contributions; or in respect of leave of absence or termination of employment, under an industrial instrument.

15. Schedule 9 cl(4) requires Mudgee Shire Council and Rylstone Shire Council to comply with directions given to them by any person appointed by the proclamation under s 397 of the LGA.

16. Schedule 9 cl(5) revokes the appointments of administrator, and receiver and manager, on the date of the winding up of the County Council.

17. The Bill is to commence on assent.

Issues Arising Under s 8A(1)(b)

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

The Committee makes no further comment on this Bill.

9. LORD HOWE ISLAND AMENDMENT BILL 2003

Introduced:	29 October 2003
House:	Legislative Assembly
Minister:	The Hon RJ Debus MP
Portfolio:	Minister for the Environment

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to amend the *Lord Howe Island Act 1953* (***the Principal Act***) so as:

   (a) to increase the membership of the Lord Howe Island Board (***the Board***) from 5 to 7, and

   (b) to establish the Board's charter, along the lines of a local government council's charter under the *Local Government Act 1993*, and

   (c) to remove the Board's current monopoly on the gathering, collection and sale of Kentia palms, seeds and seedlings, and

   (d) to make provision with respect to the payment of compensation to the holder of a special lease under section 22 of the Principal Act for loss suffered by the holder when lands are withdrawn from the lease or the lease is not renewed, and

   (e) to transfer, from the Principal Act to the regulations under that Act, certain constraints on the Board's powers to determine annual rentals, and

   (f) to increase certain penalties for offences under the Principal Act and the regulations under that Act, and

   (g) to allow offences under the Principal Act and the regulations under that Act to be dealt with by way of penalty notice, and

   (h) to provide that the Board's staff are to be employed under the *Public Sector Employment and Management Act 2002*, and

   (i) to ensure that the Board's members and staff are not personally liable for anything done or omitted to be done by them in good faith for the purpose of executing the Principal Act, and

   (j) to provide for the future review of the Principal Act, and

   (k) to make other minor, consequential or ancillary amendments to the Principal Act, and

   (l) to enact consequential savings and transitional provisions.

Background

2. The *Lord Howe Island Act 1953* has not been amended since 1981 and a number of its provisions are now out of date.

Recent reviews of the Act and of the Island's administration identified a number of areas for legislative reform.

In particular, an ICAC discussion paper and Report on governance by the Lord Howe Island Board (the Board), and the National Competition Policy (NCP) Review of the Act, identified aspects of the Act that need reform.[46]

3. The ICAC Report made recommendations to amend the Act in order to strengthen good governance on Lord Howe Island- particularly in relation to the declaration of interests held by Board members.

A number of these recommendations are implemented in this Bill.

4. Similarly, the NCP Review considered a number of restrictions in the Act and Regulations that have anti-competitive elements.[47]

The Review recommended amending the Act to remove some of these elements – in particular the monopoly of the Crown over the Island's Kentia Palm industry.

This recommendation is adopted by the Bill.

The Bill

The Board

5. The Lord Howe Island Board, which is established under the Act, is the primary decision maker and government service provider on the Island.

The Board is answerable to the Minister for the Environment.

A number of amendments in the Bill are aimed at improving the accountability of the Board and increasing transparency in the performance of its functions.

6. To this end, the Bill increases the Board's membership from five to seven.

Four members are to be Islanders (an increase of one). The Minister will appoint two persons, one to represent the interests of business and tourism (new position), and the other to represent the interests of conservation.

The seventh member is to be an officer of the Department of Environment and Conservation [cl 1, Schedule 1, new s.4].

7. The Bill adds a *Charter* for the Board, adapted from the *Local Government Act 1993*.

[46] *Trouble in Paradise: Governance issues in small communities - Lord Howe Island,* ICAC Discussion Paper, June 2001; *Preserving Paradise – Good governance issues in small communities - Lord Howe Island,* ICAC Report, November 2001. *National Competition Policy Review of the Lord Howe Island Act 1953, A Report to the NSW Minister for the Environment*, May 2000. This Report is not yet publicly available.

[47] *National Competition Policy Review of the Lord Howe Island Act 1953, A Report to the NSW Minister for the Environment*, May 2000, p. vii.

The Charter refers specifically to the Board's obligation to manage, protect, restore, enhance and conserve parts of the Island (eg, Crown lands) in a manner that recognises the Island's World Heritage Status.

Other responsibilities of the Board under its Charter include having regard to the long-term and cumulative effect of its decisions, to promote the Island as a tourist destination and to ensure that it acts consistently and without bias in the performance of its functions and duties.

Disclosure of conflicts of interest

8. The disclosure of interests by Board members was one of the key issues considered in the ICAC Report.[48]

The ICAC Report recommended that the Minister amend the Act to require full disclosure of interests by members and the maintenance of a public register of those interests.

ICAC also recommended that a member withdraw from a meeting of the Board if that member has a pecuniary or non-pecuniary interest in any matter on which he or she should not vote.

These recommendations are implemented in the Bill.

9. All members of the Board must declare, as soon as possible, any direct or indirect pecuniary interest or other interest in a matter to be considered by the Board.

In addition, members must disclose the nature of any interest that appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter [cl 26, Schedule 1, new Schedule 1A, s. 8].

10. Clause 26, Schedule 1 [new Schedule 1A, s 8(3)] requires a public register of interests to be kept and made available for inspection by the public.

11. In addition, the Bill provides that after a member has disclosed the nature of an interest in any matter, the member must not be present during any deliberation of the Board or take part in any decision of the Board with respect to that matter [cl 26, Schedule 1, new Schedule 1A, , ss 8(4) & (5)].

12. One concern expressed by the Board in consultations with ICAC on these recommendations was that, if adopted, they could lead to a loss of quorum.

The Bill addresses this concern by providing that the Minister is to make the decision or determination if the Board cannot convene a quorum because a number of members have recused themselves due to a conflict of interest [cl 26, Schedule 1, new Schedule 1A, ss 8(8) & (9)].

[48] *Preserving Paradise – Good governance issues in small communities - Lord Howe Island*, ICAC Report, November 2001, Recommendations 11-13, pp 12 & 13.

13. A further recommendation made by ICAC and adopted in the Bill authorises the Minister to remove an elected Islander Board member for corrupt conduct.

The Minister can remove such a member if ICAC recommends, in a report made under its Act, that consideration be given to suspending the member from office with a view to their dismissal for serious corrupt conduct.[49]

Appointed non-Islander members can already be removed from the Board [cl 26, Schedule 1, new Schedule 1A, s 6(3)].

Rental charges

14. There is no freehold land on the Island. All land is vested in the Crown.

Perpetual leases provide the main land tenure type for residential and commercial development.

Rent on these leases- rather than rates or charges- provides revenue for the management of the Island and provision of services.

15. The maximum perpetual lease rental is currently $200 per hectare.

Rents can only be revised every 10 years and cannot be increased by more than $100 per hectare.

16. The Bill removes the rent-setting provisions from the Act, enabling the Board to make Regulations to set annual rentals.

In addition, rents will be reviewable every 3 years – instead of every 10 years – and rent levels will be determined on the basis of advice from the Valuer-General as well as budgetary circumstances of the Board and the Island Community [clauses 8, 9 &10, Schedule 1].

Compensation payable

17. Under the present Act, the Board can withdraw or not renew leases for Crown land without having to pay any compensation.

Clause 11, Schedule 1 [new ss 22(8)] provides that a lessee whose lease land has been withdrawn or not renewed is entitled to compensation as determined by the Valuer-General for the loss of that land from the lessee as well as for the loss of the improvements on that land [Clause 11, Schedule 1, new subsections 22(9) & (11)].

18. Clause 11, Schedule 1 [new ss 22(13)] provides that a lessee may appeal a determination of compensation by the Valuer-General to the Land and Environment Court.

[49] *Preserving Paradise – Good governance issues in small communities - Lord Howe Island*, ICAC Report, November 2001, Recommendations 17, p 16. Clause 6(2) of the Bill provides for this. "**Serious corrupt conduct**" is defined in s 124A(11) of the Environmental Planning and Assessment Act 1979.

Kentia Palm Industry

19. The Bill removes the anti-competitive provisions in the Act relating to Crown ownership of Kentia palm seed and Board control of its harvesting and sale.

    The Second Reading Speech states that the Bill allows leaseholders to dispose of seed from their perpetual leases as they choose. Leaseholders will also have ownership and a financial stake in the cultivation and management of Kentia palms and seeds on their leaseholds.[50]

20. Clause 28 of Schedule 1 provides that the Minister may revoke any condition of a lease that has the effect of reserving to the Crown any palm trees or palm tree products.

21. According to the Second Reading Speech, these changes are in line with the recommendations of the May 2000 National Competition Policy Review of the Act.[51]

Issues Arising Under s 8A(1)(b)

Clause 2 – Commencement by proclamation

22. Clause 2 provides that this Bill commences on proclamation.

23. 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 discretion may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

24. The Committee has written to the Minister seeking reasons as to the commencement of the Bill on proclamation and requesting an indication of its likely commencement date.

The Committee makes no further comment on this Bill.

[50] Mr Graham West, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.
[51] *National Competition Policy Review of the Lord Howe Island Act 1953, A Report to the NSW Minister for the Environment*, May 2000.

10. MOTOR ACCIDENT COMPENSATION AMENDMENT (TERRORISM) BILL 2003

Introduced: 29 October 2003
House: Legislative Assembly
Minister: The Hon J J Della Bosca MLC
Portfolio: Minister for Commerce

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to remove the expiry date for the exclusion for acts of terrorism from:

   - the compulsory third-party insurance coverage provided under the *Motor Accidents Compensation Act 1999;* and
   - claims against the Nominal Defendant.

2. The Bill provides instead that the exclusion of acts of terrorism will operate until a date appointed by proclamation.

Background

3. In 2002, the *Motor Accidents Compensation Act* was amended to exclude all liability arising from a terrorist act[52] involving a motor vehicle, from the Compulsory Third Party (CTP) motor accidents insurance scheme for a 12 months period from 1 January 2002.

   This exclusion was extended for a further 12 months period until 1 January 2004.[53]

4. According to the Second Reading Speech,[54] these exclusions were introduced in response to changes in the international reinsurance market after the 11 September 2001 terrorist attacks in the USA. After these attacks, international reinsurers withdrew unlimited liability cover for terrorist-related losses.

5. To prevent CTP insurers from being exposed to a potential liability that could not be covered by reinsurance, the Government enacted the present legislation.

[52] Subsection 15A(2) of the Act states that an act can be characterised as an act of terrorism if it:
(a) causes or threatens to cause death, personal injury or damage to property, and
(b) is designed to influence a government or to intimidate the public or a section of the public, and
(c) is carried out for the purpose of advancing a political, religious, ideological, ethnic or similar cause.
[Subsection 15A(1) provides that: "Any lawful activity or any industrial action cannot be characterised as an act of terrorism for the purposes of this section.]

[53] *Motor Accidents Compensation Further Amendment (Terrorism) Act 2002.*

[54] Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.

6. According to the Second Reading Speech, the Government had indicated that if no viable alternatives emerged, it would be necessary to extend the terrorism exclusion further into the future.

   In the Second Reading Speech, the Parliamentary Secretary said "the reinsurance market conditions which necessitated the introduction in 2002 of the terrorist exclusion for the motor accident scheme remains unchanged."[55] This necessitates the continuation of the terrorism exclusion from the scheme.

7. According to the Second Reading Speech, the Government is pursuing discussions with the Commonwealth to determine if there is a viable way to include the CTP scheme in a national approach for terrorism insurance cover.

   However, these discussions will not be finalised before the expiry of the terrorism exclusion currently in place until 1 January 2004. For this reason, a further extension is required.

8. The Bill proposes that the motor accidents scheme terrorism exclusion continue to operate until a date appointed by proclamation. In the meantime – according to the Second Reading Speech - the Government is committed to pursuing discussions with the Commonwealth to determine if an affordable alternative arrangement can be made.

The Bill

9. Section 15A of the present Act provides that a third-party policy does not extend to insure the owner or driver of a motor vehicle against liability for an act that can reasonably be characterised as an act of terrorism. This exclusion applies to an act of terrorism that occurs on or after 1 January 2002 and before 1 January 2004, or on a date before 1 January 2004 that is appointed by proclamation for the purposes of the section.[56]

10. Section 35A of the present Act excludes liability for claims made with respect to uninsured or unidentified motor vehicles against the *Nominal Defendant*[57].

    The exclusion of acts of terrorism from cover in cases against the Nominal Defendant also expires on 1 January 2004.

11. Schedule 1, clause 1 amends section 15A by providing that the section applies to an act of terrorism that occurs on or after 1 January 2002 and before such date as may be appointed by proclamation for the purposes of this section [subsection 15A(3)]. Schedule 1, clause 2 makes an identical amendment to section 35A.

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[55] Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.

[56] This section does not affect any claim that is paid in full before the date of assent to the *Motor Accidents Compensation Amendment (Terrorism) Act 2002*.

[57] An action may be brought against the Nominal Defendant for the recovery of damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle that is not an insured motor vehicle in the use or operation of the vehicle on a road in NSW. In such an action, the Nominal Defendant is liable as if it were the owner or driver of the motor vehicle [s.33]. Subsection 32(1) provides that the Nominal Defendant is the Motor Accidents Authority of New South Wales for the purposes of the Act.

12. The Bill is to commence on assent.

Issues Arising Under s 8A(1)(b)

13. The Bill does not raise any issues for consideration by the Committee under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

11. NATIONAL PARKS AND WILDLIFE AMENDMENT (KOSCIUSZKO NATIONAL PARK ROADS) BILL 2003

Introduced: 29 October 2003
House: Legislative Assembly
Minister: The Hon R J Debus MP
Portfolio: Minister for the Environment

Matters for comment raised by the Bill

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

Purpose and Description

1. This Bill excises certain land from Kosciuszko National Park and vests that land in the Roads and Traffic Authority of NSW (RTA) so that public authority will be responsible for the development of the land for the purpose of roads.

   The land vested in the RTA comprises the Alpine Way and Kosciuszko Road.

2. The Bill also makes ancillary provisions that will facilitate the use of that land for that purpose.

Background

3. In 2000, the State Coroner brought down his findings following an Inquiry into the events leading to the landslide on the Alpine Way above Thredbo that killed 18 people.

4. Among other things, the Coroner recommended that the Government commission an independent review of the appropriateness of the National Parts and Wildlife Service retaining responsibility for urban communities and road maintenance within national parks. Mr Bret Walker SC was appointed to conduct this review.

5. Mr Walker recommended that:

   - the ski resort areas be retained within Kosciuszko National Park;
   - a new planning regime be put in place for the ski resorts, with the Minister for Infrastructure, Planning and Natural Resources as the consent authority; and
   - responsibility for the Alpine Way and Kosciuszko Road be transferred from the National Parks and Wildlife Service to the Roads and Traffic Authority.[58]

6. The Parliamentary Secretary stated that the Bill implements these recommendations.[59]

[58] Second Reading Speech, Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.
[59] Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.

The Bill

7. The Bill amends the *National Parks and Wildlife Act 1974* to remove the Alpine Way and Kosciuszko Road from Kosciuszko National Park and vest the land in the RTA. According to the Second Reading Speech:

> The road corridor to be transferred generally comprises the alignment of the Alpine Way and Kosciuszko Road, measured 20 metres from each side of the road's centre line, with deviations to ensure that the major structural works that are integral to the road's long-term stability will lie within the road reserve.[60]

8. The Bill inserts a new section 184A into the *National Parks and Wildlife Act*. The section provides that, on the vesting, the reservation of that land as national park is revoked [subsection (2)] and any other existing estates or interests that affected the land, other than any native title rights and interests, are discharged [subsections (3) and (9) respectively].

9. A right to enter adjoining or adjacent land is given to persons authorised by the RTA to carry out activities concerned with road building, drainage and maintenance [subsection 4].

10. Any infrastructure or device placed on the land by the RTA is declared the property of the RTA and may remain and be used on that land without giving rise to any action in nuisance[61] [subsection (5)].

11. No compensation is payable as a consequence of the operation of subsections (2), (3), (4) or (5) [subsection 6].

12. For the purposes of park management under the Act, and the collection of fees for park use, the excised land is taken to be reserved as part of Kosciuszko National Park. This means that the National Parks and Wildlife Service can continue to control traffic and collect fees for park use [subsection (7)].

13. Under a memorandum of understanding, the RTA will manage the road reserve, including the usual functions of carrying out road works and managing traffic and road safety. According to the Second Reading Speech, it will also manage and maintain geotechnical monitoring equipment and structural works located in the adjoining national park that are integral to road stability.[62]

14. The Minister's office has advised that the land being transferred under the Bill to the RTA includes land located in the Thredbo and Perisher areas.

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[60] Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003. New Schedule 16 specifies the land to be excised (schedule 1, clause 2).

[61] A "public or common nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on highways, etc. … A private nuisance is a tort consisting of (1) any wrongful disturbance or interference with a person's use or enjoyment of land or of an easement …; (2) the act of wrongfully causing or allowing the escape of deleterious things onto another person's land, *e.g.* water, smoke, smell, … Nuisance is commonly a continuing injury, and is actionable only at the suit of the person in possession of the land injuriously affected by it: there must be actual damage to the plaintiff." (*Osborn's Concise Law Dictionary*, 7th Edition, page 236).

[62] Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 2003.

The leases in this area are the only private interests likely to be affected by the provisions of this Bill. These leases are held by companies, which run the ski resorts of Thredbo and Perisher and currently overlay the National Park. They will be re-negotiated as part of the changes made in this Bill.

15. According to the Minister's office, these leaseholders were consulted on the Bill and are supportive of its objectives.

Issues Arising Under s 8A (1)(b)

Schedule 1, New sub section 184A(5) – No action in nuisance & retrospectivity

16. New subsection 184A(5) provides:

> Despite any lease or licence entered into before of after the commencement of this section, any … ancillary infrastructure or device …. placed on the adjoining or adjacent land before or after the commencement of this section by a person authorised by the RTA:
>
> (a) is the property of the RTA, and
>
> (b) without giving rise to an action in nuisance, may remain on that land.

17. A "*nuisance*" in this context refers either to "public" or "private" nuisance (see footnote 4).

A person affected by a *public nuisance* may bring a court action to stop the nuisance or, in some cases, seek damages against the person causing the nuisance.

A person in possession of the land that suffers damage because of the *private nuisance* may ordinarily bring an "action in nuisance" to recover damages or have the nuisance stopped.

18. The effect of subsection 184A(5) is that a person will not be able to bring an action in nuisance, public or private, where that nuisance is caused by the RTA placing any ancillary infrastructure or devices on land that is adjoining or adjacent to the land that is vested in the RTA under this Bill.

The right of a person to seek damages or to have the RTA stop the nuisance is removed by this clause.

19. This clause is retrospective in that it applies to any lease or licence entered into before section 184A commences.

20. The Committee is of the view that the right to seek damages or to have a nuisance removed is an important personal right and that these rights should not be removed or restricted by legislation unless there is clear and compelling public interest in doing so.

Further, giving retrospective effect to a legislative provision that seeks to limit such rights will always be of concern to the Committee.

21. The Committee notes the advice from the Minister's office that the only leaseholders and licensees likely to be affected by the Bill are located in the immediate vicinity of the relevant land.

22. The Committee further notes the advice that those leaseholders and licensees have been consulted on, and are supportive of, the Bill.

    Significantly, the Bill does not preclude any action to recover damages arising from any negligence on the part of the RTA

23. The Committee notes that the purpose of the Bill is to promote public safety and implement the Recommendations of the Walker Review. The Committee further notes that individual rights, such as the right to seek damages for the tort of nuisance, must give way to other interests, such as public safety, in some circumstances.

24. At the same time, the Committee recognises that the tort of nuisance is not necessarily confined to the land upon which or adjoining land from which it originates. The obvious examples of this include escaping water, smoke or smells.

    The proposed provision would appear to exclude the possibility of any action in nuisance by persons with rights in land outside that contemplated by the Bill.

25. The Committee has written to the Minister to seek his advice as to the need to exclude all actions in nuisance under proposed sub-section 184A(6) and the potential for private rights to be affected.

Schedule 1, New subsection 184A(6) – No compensation payable

26. New subsection 184A(6) provides that no compensation is payable by the Minister, the RTA or any lessee, sublessee or licensee as a consequence of the transfer of land to the RTA under the Bill.

27. The Committee takes the view that the right to seek compensation for loss or damage to property or for injury is an important personal right.

    The Committee is strongly of the view that this right should not be removed or restricted by legislation unless there is clear and compelling public interest in doing so.

28. The Minister's office has advised that no private rights are affected by this subsection.

    The Minister's office has further advised that s 184A(6) has been included to ensure that the National Parks and Wildlife Service, a government agency, is not able to claim compensation from another government agency (eg, the RTA) for any loss incurred as a result of the transfer.

29. Given the advice received from the Minister's office, the Committee considers that section 184A does not trespass unduly on personal rights.

Clause 2 – Commencement by proclamation

30. 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 discretion may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

31. The Committee has written to the Minister seeking his advice as to the reasons why the proposed Act will not commence on assent and to ask for an indication of the likely date for commencement of this Bill.

The Committee makes no further comment on this Bill.

12. SYDNEY WATER CATCHMENT MANAGEMENT AMENDMENT BILL 2003

Introduced: 29 October 2003
House: Legislative Assembly
Minister: The Hon R J Debus MP
Portfolio: Environment

Matters for comment raised by the Bill

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

Purpose and Description

1. The object of this Bill is to amend the *Sydney Water Catchment Management Act 1998* (the Act):

   - to allow the *Sydney Catchment Authority* (the SCA) to generate and supply hydro-electricity and undertake associated activities;
   - to provide for the payment into the *Sydney Catchment Management Fund* (the Fund) of any money received by the Authority from the generation and supply of hydro-electricity; and
   - to allow money to be paid out of the Fund for the purpose of capital and recurrent expenditure in relation to hydro-electric plants and associated infrastructure and works.

Background

2. According to the second reading speech, it is possible to install small hydro-electricity turbines on some water outlets of the State's dams.

   The SCA is proposing to generate hydro-electricity by building small hydro plants on its dams, where these plants can demonstrate their commercial viability.

   This Bill ensures that the SCA 'has all the necessary power in law to undertake these projects'.[63]

3. The second reading speech also indicates that in 1998 the *Sustainable Energy Development Authority* (SEDA) released an assessment of potential small-hydroelectricity facilities on New South Wales dams. According to the second reading speech:

   > The study identified the SCA's dams as having a strong potential for mini hydro-electricity plants. As part of its Energy Management Plan 2001-06, the SCA commissioned a feasibility study for such plants on its dams.

[63] West MP, Mr Graham, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard),* Legislative Assembly, 29 October 2003.

> The study ... found that the dams with greatest potential for technically viable plants are Warragamba, Cataract, Cordeaux, Nepean, Woronora and Tallowa on the Shoalhaven River.[64]

The Bill

4. This Bill expands the definition of ***catchment infrastructure works***[65] in the Act to include hydro-electric plants or associated infrastructure and works.

5. The Bill amends s 16(1) of the Act so as to include the generation and supply of hydro-electricity and the undertaking of associated activities as a specific function of the Authority.

   The section permits the generation and supply of hydroelectricity and associated activities on the Authority's own account or with others.

6. The Bill also amends 24B of the Act to require that any money received by the Authority from the generation and supply of hydro-electricity is to be paid into the Fund.

7. Under s 24C of the present Act, the Fund may be applied for any or all of the following:

   (a) capital and recurrent expenditure in relation to the Authority's works;

   (b) carrying out and giving effect to plans of management in accordance with section 50 (including payment of money to the Director-General of National Parks and Wildlife in that connection);

   (c) acquiring land (including an interest in land) as referred to in section 60;

   (d) the provision of financial assistance for the purpose of funding catchment management activities carried out by other persons and bodies, including local councils, but only if those activities are consistent with the Authority's objectives;

   (e) payment of any dividends, tax-equivalents or guarantee fees referred to in section 34 (2) (b), and any dividends of the kind referred to in section 59B of the *Public Finance and Audit Act 1983*;

   (f) the costs incurred by the Authority in maintaining the Fund; and/or

   (g) any other costs and expenses incurred by the Authority in connection with the exercise of its functions.

8. The Bill is to commence on assent.

Issues Arising Under s 8A(1)(b)

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

The Committee makes no further comment on this Bill.

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[64] Mr G West MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard),* Legislative Assembly, 29 October 2003.

[65] *Sydney Water Catchment Management Act 1998*, s 3.

13. TRANSPORT LEGISLATION AMENDMENT (SAFETY AND RELIABILITY) BILL 2003

Introduced: 29 October 2003
House: Legislative Council
Minister: The Hon M Costa MLC
Portfolio: Transport Services

Matters for comment raised by the Bill

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

Purpose and Description

1. The Bill's objects are to:

   (a) constitute the Independent Transport Safety and Reliability Regulator (the ***ITSRR***) and the Independent Transport Safety and Reliability Advisory Board (the ***Board***);

   (b) confer on the ITSRR the function of accrediting railway operators in this State, and functions relating to the inspection, monitoring and auditing of the safety and reliability of public train, bus and ferry services;

   (c) confer on the ITSRR the functions of reporting to and advising the Minister of Transport Services (the Minister) as to the safety and reliability of public train, bus and ferry services;

   (d) remove requirements for licensing of ferries and masters of ferries under the *Passenger Transport Act 1990*, as they are also licensed under marine legislation;

   (e) confer on the ITSRR and the Chairperson of the Board the function of holding inquiries into rail, bus and ferry accidents and incidents and reporting on those inquiries;

   (f) require operators of buses and ferries to have and to implement safety management systems;

   (g) make provision with respect to the safety of public ferry wharves,

   (h) make other consequential amendments and law revision amendments; and

   (i) make provision for consequential savings and transitional matters.

Background

2. The April 2001 *Report of the Special Commission of Inquiry into the Glenbrook Rail Accident* (the McInerny Report) contained a number of recommendations relating to the structure of rail safety management. The McInerny Report recommended the establishment of an Office of the Rail Regulator, an Office of the Co-ordinator General of Rail, a Rail Safety Inspectorate and a Rail Accident Investigation Board.[66]

[66] *Report of the Special Commission of Inquiry into the Glenbrook Rail Accident*, April 2001, at 160.

3. As a component of the Government's response to the Report, the Bill aims to further implement transport structural reforms. In the Bill's Second Reading Speech, the Minister stated the following:

> On 8 April this year I announced the Government's intention to put in place a range of reforms to focus the full resources of the State's public transport system on safety, reliability and cleanliness. The first priority is safety. A clean, safe and reliable system will be achieved only if accountabilities and responsibilities are clear to its operators, the Government and the public...This bill builds on the Rail Safety Act, strengthens its provisions and extends its principles across the other transport modes. [67]

The Bill

4. The Bill consists of 4 clauses, and 9 Schedules amending Acts These amended Acts are:

- *Transport Administration Act 1988* - Schedule 1;
- *Marine Safety Act 1998* - Schedule 2;
- *Passenger Transport Act 1990* - Schedule 3;
- *Rail Safety Act 2002* - Schedule 4;
- *Freedom of Information Act 1989* - Schedule 5;
- *Industrial Relations Act 1996* – Schedule 6;
- *Law Enforcement (Powers and Responsibilities) Act 2002* – Schedule 7;
- *Public Finance and Audit Act 1983* – Schedule 8; and
- *Search Warrants Act 1985* – Schedule 9.

5. Clause 4 of the Bill repeals the *Transport Administration Act Amendment (Rail Management) Act 2000*. This Act was introduced as a preliminary step in rationalising the safety management of the rail network in New South Wales. This was in line with the interim recommendations of the McInerny Inquiry.

Schedule 1: Amendment of *Transport Administration Act 1988*

6. Schedule 1 [10] of the Bill inserts a new Part 4A into the *Transport Administration Act 1988* (TAA). This Part:

- constitutes the ITSRR and sets out its function;
- makes the ITSRR subject to the direction of the Minister, except in relation to:
  - certain matters regarding accreditation of railway operators,
  - decisions to take enforcement action or commence inquiries,
  - the outcome of monitoring and auditing safety or reliability of transport services,
  - the contents of reports and recommendations, and
  - directions to the Director-General or the Waterways Authority;

[67] Hon M Costa MLC, *NSW Parliamentary Proceedings (Hansard)*, Legislative Council, 29 October 2003.

- provides for the Office of Transport Safety Investigations and Chief Investigator;
- establishes the Independent Transport Safety and Reliability Regulator Advisory Board;
- requires that the Minister review the amendments made by the Bill within 12 months; and
- abolishes the Public Transport Authority of New South Wales and the Public Transport Advisory Council and establishes the Transport Advisory Group.

Schedule 2: Amendment of *Marine Safety Act 1998*

7. Schedule 2 of the Bill amends the *Marine Safety Act 1998* (MSA).

8. Schedule 2 amends Division 3 (Investigation of marine accidents and other marine safety matters) of the MSA to:

- clarify that investigations may be made under the MSA into a ferry accident, in addition to any one conducted under the PTA; and
- enable the Minister to appoint the Chairperson of the Board as the investigator for an MSA investigation.

9. Schedule 2 also inserts a new Division 5 of Part 8 into the MSA, which provides for:

- a definition of "public ferry wharf";
- the inspection of public ferry wharves;
- the issuing of an improvement notice to the owner of a public ferry wharf by the Minister,
- the issuing of a notice prohibiting the carrying on of an activity at a public ferry wharf;
- the making of an offence to fail to comply with an improvement notice without reasonable excuse;
- the review of notices issued under the Division;
- applications to the Administrative Decisions Tribunal (ADT) for a stay of a prohibition notice;
- appeals to the ADT for a review of a Ministerial decision; and
- the withdrawal of an improvement or prohibition notice.

Schedule 3: Amendment of *Passenger Transport Act 1990*

10. Schedule 3 of the Bill amends the PTA by extending to bus and ferry services the accreditation process currently in place for rail operators. It includes provisions for:

- accreditation;
- safety management systems for bus services; and
- service contracts for ferry services:

11. A new Part 4C covers investigations and enforcement by the ITSRR or the Board [Schedule 3 [18]]. It includes provisions for:

- ITSRR or Chairperson of the Board inquiring into bus or ferry accidents or incidents. The Minister may not direct the termination of an inquiry;
- transport safety inquiry procedure;
- transport safety inquiry reports being laid before Parliament;
- confidential voluntary reporting by transport safety employees relating to matters that may affect the safe carrying out of a bus or ferry public passenger service;
- Director-General and the ITSRR causing inspection of operators of bus or ferry services with respect to compliance; and
- extensive powers for authorised officers with regards to inspecting and investigating transport safety inquiries.

12. Schedule 3 [22] inserts the following offences:

- obstructing an authorised officer;
- failing to provide reasonable facilities and assistance to an authorised officer;
- failing (without reasonable excuse) to answer questions or give information when required to do so by an authorised officer;
- failing to produce documents for inspection when required to do so by an authorised officer - Maximum penalties of $110,000 (corporations) or $55,000 (individuals); and
- providing false or misleading information - Maximum penalty of $16,500 (corporations) or $11,000 (individuals).

13. Schedule 3 [32] provides for the conduct of transport safety inquiries by the ITSRR or the Board.

Schedule 4: Amendment of *Rail Safety Act 2002*

14. Major amendments to the RSA made by Sch 4 of the Bill include:

- a requirement on the ITSRR to refer matters to the Board for advice prior to granting, refusing, varying, suspending and cancelling, or cancelling accreditation;
- the right to appeal such decisions to the ADT;
- the ability of railway operators to issue certificates of competency for employees of other railway operators;
- the creation of an offence for a railway employee who is carrying out railway safety work to fail to produce, when requested by an authorised officer, proof that the employee is the holder of an appropriate certificate of competency;
- enabling the ITSRR or Chairperson of the Board to conduct rail safety inquiries rather than the Director-General or rail investigation panels;

- enabling the ITSRR or Chairperson of the Board to disclose the whole or part of a train safety record to the Commonwealth, or a Commonwealth authority, with the consent of the Minister;
- enabling the ITSRR or Chairperson of the Board to disclose or produce the whole or part of a train safety record to a person or a court in certain specified circumstances;
- allowing the ITSRR or Chairperson of the Board to not comply with a subpoena or similar direction within 6 months of an accident or incident subject to a rail safety inquiry;
- an extension of the protection against personal liability to the ITSRR or Chairperson of the Board, in connection with anything done in good faith in connection with the preparation, or making public, of a report;
- enumerating functions of the Board and the Chairperson of the Board; and
- clarifying that sentences of imprisonment may be imposed for certain offences relating to carrying out railway safety work while being affected by alcohol or other drugs.

Schedule 5: Amendment of *Freedom of Information Act 1989*

15. Schedule 5 [1] provides an exemption from the application of the *Freedom of Information Act 1989* for documents relating to an inquiry under s 46B of the PTA.[68]

16. This mirrors the existing exemption in Sch 1 cl 20(1)(f) for documents relating to an inquiry under s 66 or s 67 of the RSA.

Other Schedules

17. Schedules 6 to 9 make consequential amendments to the following legislation:
    - *Industrial Relations Act 1996;*
    - *Law Enforcement (Powers and Responsibilities) Act 2002*;
    - *Public Finance and Audit Act 1983*; and
    - *Search Warrants Act 1985*.

Issues Arising Under s 8A(1)(b)

Clause 2 – Commencement

18. Clause 2 of the Bill provides that the ensuing Act will commence "on a day or days to be appointed by proclamation". The exceptions are Schedules 3 [31] and 4 [116], which commence on the date of assent.[69]

[68] Any such document ceases to be an exempt document when the report into the inquiry is tabled before both Houses of Parliament: *Freedom of Information Act 1989* Sch 1 cl 20(3).

[69] These clauses amend the *Passenger Transport Act 1990* and the *Rail Safety Act 2002* by providing that a transport safety employee who carries out transport safety work while under the influence of alcohol or any other drug, or while the prescribed concentration of alcohol or prescribed concentration or amount of another

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

20. The Committee has written to the Minister seeking his advice as to the reasons for commencement by proclamation and the likely commencement date of the Act.

Section 42L of the *Transport Administration Act 1988* – Disclosure of information by ITSRR

21. The proposed s 42L of the TAA provides that the ITSRR may:

- if it thinks it *necessary for the safe operation of a transport service*, disclose information acquired in the performance of its functions to *any other person*;
- if it thinks it *desirable for the promotion of the safe operation* of a transport service, *publish any information*, but *not so as to identify a person by name*.

22. The section does not affect the confidentiality safeguards for voluntary reporting by railway and transport safety employees of matters that may affect safety [proposed s 65A of the Rail Safety Act and s 46E of the Passenger Transport Act].

23. Proposed s 42L gives the ITSRR broad powers to disclose information, which may include personal information regarding employees. The Committee notes, however, that the names of employees may only be disclosed to the extent considered necessary for the safe operation of a transport service.

24. The Committee also notes that information made publicly available for the promotion of the safe operation of a transport service must not include the name of the person, but could otherwise include identifying information.

25. Given the objects of these disclosures and the limitations provided, the Committee does not consider that this power to disclose information unduly trespasses on personal rights.

Section 42Q of the *Transport Administration Act 1988* – Delegation of functions of the ITSRR

26. The proposed s 42Q of the TAA provides that the ITSRR may delegate any of its functions and that any delegate may sub-delegate to an authorised person any function delegated by the ITSRR, if the delegate is authorised to do so by the ITSRR.

The only exceptions to this are the power of delegation itself, and any function delegated to the ITSRR by the Minister under the RSA.

27. Under s 42Q, an "authorised person" is an officer of the ITSRR, or a member of a class of persons prescribed by the regulation or *approved by the ITSRR*.

drug is present in the employee's blood or urine, may be liable to punishment by imprisonment for a period not exceeding 9 months.

28. The Bill provides the ITSRR with wide range of review, monitoring, investigation and reporting functions.

29. Importantly, s 42P(2) provides a list of matters in respect of which the ITSRR is *not* subject to the direction and control of the Minister. Among these is the decision to take, or not to take, enforcement action under any Act [s 42P(2)(b)].

30. Consequently, any decision whether or not the ITSRR should take enforcement action under the TAA or *any other Act* may be subject to a process of delegation and sub-delegation, pursuant to s 42Q.

31. The Committee notes that the definition of "authorised persons" to whom delegation may be made can be expanded by Regulation or by the approval of the Independent Transport Safety and Reliability Regulator.

32. The Committee refers to Parliament the question of whether, in the light of the nature of the functions of the Independent Transport Safety and Reliability Regulator that may be delegated, this constitutes an inappropriate delegation of legislative power.

Sections 46F-46W: Inspection under Part 4C Division 2 of the *Passenger Transport Act 1990*

33. The proposed Part 4C Division 2 of the PTA provides authorised officers under the PTA with extensive powers of entry and investigation, including:

- to inspect the performance of transport safety employees to ensure that a person carrying on a public bus or ferry passenger service is complying with their accreditation or service contract under the Act, or with the requirements of the Act relating to a safety management system [s 46H(3)(a)];
- to enter premises (other than those used as a dwelling) that the officer reasonably suspects are being used for the purposes of a public passenger service, a taxi-cab network or for the keeping of records for any such purpose at a reasonable hour in the daytime or when the service is in operation [s 46I]; and
- on such entry [s46J]:
  - to inspect vehicles, maintenance facilities and equipment;
  - to take samples and photographs in connection with any inspection or inquiry;
  - to search for evidence of any contravention of the Act;
  - to search for and inspect relevant documents and require the production of documents, and to seize and copy such documents; and
  - to require any person in or on the premises to answer questions.

34. Reasonable notice must be given prior to entry, unless that would defeat the purpose of the entry, or in an emergency [s 46N].

35. No more than reasonable force may be used in exercising powers under the Act [s 46O] and care must be taken to do as little damage as possible [s 46P].

36. Compensation is payable for any damage cause by an authorised officer unless the inspection reveals a contravention of the law [s 46Q].

Search without warrant

37. The committee notes that the power to enter private land is a trespass on the rights to property and privacy. The power to enter private land without a warrant should only be given when overwhelmingly in the public interest.

38. The Committee notes that the powers of entry in the Bill:

- are limited to premises related to public passenger services;
- exclude premises used as a dwelling;[70]
- may only be exercised at a reasonable times; and
- must normally be exercised with prior notice.

39. Given the limitations on the entry powers and the significant public interest in ensuring safety of public transport services, the Committee does not consider that the powers of entry and search without a warrant in the Bill unduly trespass on individual rights.

Definition of authorised officers

40. The Bill amends the definition of ***authorised officer*** in the *Passenger Transport Act 1990* to mean:

> a person, or a member of a class of persons, appointed for the time being by the Director-General or ITSRR as an authorised officer or class of authorised officers for the purposes of the provision in which the expression is used, and includes an authorised officer appointed by the Director-General or ITSRR for the purposes of regulations made under Schedule 5.

41. The Bill does not put any limits on, or qualifications for, the persons who may be authorised by the Director-General or ITSRR.

42. The Committee has previously expressed the view that, when legislation conveys on persons administrative powers that can significantly affect personal rights, it should include appropriate limits as to who may be authorised to exercise those powers.[71]

43. The Committee has written to the Minister to seek his advice as to why there are no requirements regarding the qualifications or attributes of persons who may be appointed as authorised officers under the proposed amendments to the *Passenger Transport Act 1990*.

44. The Committee refers to Parliament the question of whether the unfettered discretion for the Director-General or ITSRR to appoint authorised officers in the Bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

[70] Search warrants may be obtained from an authorised justice to enter and search any premises: s 46V *Passenger Transport Act 1990*.

[71] *Legislation Review Digest No 4 of 2003*, 27 October 2003, at 30-31.

Self-incrimination

45. Proposed s 46U deprives a person of the right to refuse to comply with requirements under the PTA on the grounds that it may incriminate him or her. Any such compliance that tends to incriminate a person may be used in civil or criminal proceedings against them. There is an exception only on the admissibility of such evidence in *criminal* proceedings if:

> (a) the person claims before giving the answer, producing the thing or making the statement that it might tend to incriminate the person, or
>
> (b) the person's entitlement to make a claim of the kind referred to in paragraph (a) was drawn to the person's attention before the answer was given, the thing was produced or the statement was made [s 46U(2)].

46. The common law of Australia jealously protects the privilege against self-incrimination. It applies both in the pre-trial and trial phase. The principle *nemo tenetur accusare se ipsum* (no person is bound to accuse himself or herself) originated as a means of protecting suspects from torture and oppressive interrogation, but is now recognised as a basic human right protecting personal freedom and human dignity.[72]

47. Article 14(3)(g) of the International Covenant of Civil and Political Rights (ICCPR) states that a person has the right "[n]ot to be compelled to testify against himself or to confess guilt". Outside the criminal context, the privilege is an attribute of the wider right to a fair trial protected by Art 14(1) of the ICCPR.

48. The privilege provides that a person is not under a duty to answer questions or otherwise cooperate with public officials engaged in the investigation or prosecution, often called the *right to silence*. This right has been described by the High Court as:

> an entitlement to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of participants and the roles that they played.[73]

49. It is clear that an investigator exercising powers under the Bill is acting as a "person in authority", and that the exercise of these powers poses a threat to the privilege against self-incrimination.

50. The Bill seeks to address this threat to the privilege against self-incrimination in proposed s 46U. Section 46U states that a person is "not excused" from answering questions, etc, on the grounds that it may self-incriminate, and that the evidence obtained may be used in any civil and criminal proceedings.

51. The only protective qualification to the use of such material is s 46U(2)(a)-(b). This makes this material ***inadmissible*** in criminal proceedings in two circumstances, namely where, prior to answering the question, etc, the person:

[72] The historical origins and modern rationale of the privilege are explored in *EPA v Caltex* (1993) 178 CLR 447.

[73] Adverse inferences cannot be drawn from the failure to answer in these circumstances. *R v Petty* (1991) 173 CLR 95 at 95.

- claimed that the giving of the answer, production of the thing or making of the statement might incriminate the person; or
- was not informed of his or her right to make such a claim.

52. There is no equivalent privilege against self-incrimination in respect of civil proceedings [s 46U(3)].

53. Thus, the privilege against self-incrimination is restricted to criminal proceedings where the person had made a prior statement that they may have been about to incriminate themselves [s 46U(2)(a)], or had not been advised of the right to make such a statement [s 46U(2)(b)].

54. Pursuant to proposed s 56, an individual who, without reasonable excuse, fails to answer questions or give information, or to produce documents for inspection may incur a maximum penalty of $55,000.

55. In *Pavic and Swaffield*,[74] the High Court emphasised that the right to silence was a fundamental rule of law (not restricted to formal interviews) and that this could be infringed even by covert questioning by police or informers. The rationale for exclusion of a confession was that the confession was unfairly elicited in derogation of the free choice to speak or be silent.

56. The approach favoured by the Bill actually places the accused under an *obligation* to speak, in order to assert the entitlement once he or she has been advised of the issue of self-incrimination. This approach has generally been rejected by the courts. As the Supreme Court of Canada has observed:

> [i]t would be absurd to impose on the accused an obligation to speak in order to activate the right to silence.[75]

57. As presently drafted, s 46U appears to impose such an obligation.

58. The scope of the protection afforded by s 46U(2) is further restricted. Section 46U provides that the inadmissibility of material covers "information obtained as a *direct* result of an answer".

59. Information obtained by investigator that is inadmissible under s 46U may nonetheless provide the basis for a search warrant, or questioning of third parties, during which further independent incriminating material of the person is found. In this indirect way, information that was otherwise inadmissible on the ground that it violated the privilege against self-incrimination has been used to incriminate that person.

60. It is noteworthy that requiring a person under compulsion to produce potentially incriminating documents poses fewer concerns from this fairness/rights perspective. The authorities in Australia suggest that the privilege against self-incrimination only attaches to evidence produced through the exercise of free-will (eg statements etc) rather than to physical evidence (eg blood samples, breath specimens).

[74] (1998) 192 CLR 159.
[75] *R v Liew* [1999] 3 SCR 227 at paragraph 44.

61. There is strong legal support for making this distinction. The High Court has observed, the privilege "has no application to the seizure of documents or their use for the purpose of incrimination provided that they can be proved by some independent means. The privilege is not a privilege against incrimination; it is a privilege against self-incrimination".[76]

62. A similar view has been taken by the European Court of Human Rights in *Saunders v United Kingdom,*[77] which observed that the right not to incriminate oneself is "primarily concerned with respecting the will of an accused person to remain silent", and thus:

> did not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.[78]

63. This distinction is absent from proposed s 46U, which applies equally to giving an answer, producing a thing, or making a statement.

64. The Committee notes that the right against self-incrimination (or "right to silence") is a fundamental right. This right should only be eroded when overwhelmingly in the public interest.[79] The Committee also considers that, as a rule, when a person is compelled to answer incriminating questions, that information should not be capable of being used against the person.

65. The Committee notes that, under the terms of proposed s 46U, information can only be used against a person in criminal proceedings if, after being advised of the consequences of not doing so, the person does not make a statement that the information they are about to give might tend to incriminate them.

66. The Committee further notes that such protection against the consequences of self-incrimination is of limited value if the information forcibly obtained can form the basis of investigations leading to criminal proceedings.[80]

67. The Committee also notes that proposed s 46U contains no privilege whatsoever against self-incrimination in respect of civil proceedings

[76] *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 393, per Gibbs CJ, Mason and Dawson JJ.

[77] [1996] 23 EHRR 313.

[78] [1996] 23 EHRR 313 at 338, at para 69.

[79] Thus, legislative abrogation of the right to silence in the United Kingdom has been held to infringe the right to a fair trial contained in Article 6 of the European Convention on Human Rights: *Condron v United Kingdom* [2001] 31 EHRR 1.

[80] The Senate Standing Committee for the Scrutiny of Bills "generally holds to the view that the interest of having government properly informed can more easily prevail where the loss of a person's right to silence is balance by a prohibition against both the direct and indirect use of the forced disclosure. The Committee is concerned to limit exceptions to the prohibition against such use. In principle, a forced disclosure should be available for use in criminal proceedings only when they are proceedings for giving false or misleading information in the statement which the person has been compelled to make." (emphasis in original) Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament, November 1998 – October 2001.*

68. The Committee also notes the public benefit of obtaining information regarding the safety of public transport.

69. The Committee refers to Parliament the question of whether the removal of the right against self-incrimination in the Bill unduly trespasses on personal rights.

The Committee makes no further comment on this Bill.

14. VETERINARY PRACTICE BILL 2003

Introduced:	29 October 2003
House:	Legislative Council
Minister:	The Hon Ian Macdonald MLC
Portfolio:	Agriculture and Fisheries

Matters for comment raised by the Bill

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

Purpose and Description

1. The objects of this Bill include:

   (a) providing for the registration of persons as veterinary practitioners;

   (b) providing for the constitution and functions of the Veterinary Practitioners Board (the ***Board***);

   (c) regulating the conduct of veterinary practitioners;

   (d) creating offences that prohibit persons from representing themselves or others to be veterinary practitioners when they are not registered as veterinary practitioners;

   (e) repealing the *Veterinary Surgeons Act 1986* (the Act) and the *Veterinary Surgeons Regulation 1995*;

   (f) enacting savings, transitional and other provisions consequent on the enactment of the proposed Act.

Background

2. According to the Second Reading Speech,[81] the matters addressed in this Bill have arisen primarily from a competition policy review of the *Veterinary Surgeons Act 1986*. The reforms arising from that review and adopted in this Bill include:

   - creating a class of veterinary science services, known as restricted acts of veterinary science, that only registered veterinarians may perform;
   - providing that restricted acts of veterinary science are to be specified in regulations after advice on those regulations has been taken from an advisory committee established by the Minister;
   - amending the registration scheme for veterinary surgeons;
   - enabling a corporation, partnership or other firm to represent that it is a veterinary practice if the controlling interest in the corporation or firm is held by one or more veterinary practitioners;
   - enabling premises to be licensed as a veterinary hospital if it is demonstrated that the premises are of a suitable standard;
   - providing that acts of major surgery may only be carried out at a licensed veterinary hospital (with certain exceptions);

[81] Mr Ian Macdonald MLC, *Parliamentary Debates (Hansard)* Legislative Council, 29 October 2003.

- introducing a new system for making complaints against, and the disciplining of, veterinarians who are found guilty of unsatisfactory professional conduct or professional misconduct and, in particular, removing the role of the current Investigating Committee from disciplinary proceedings;
- changing the membership of the Board of Veterinary Surgeons of New South Wales (to be renamed the Veterinary Practitioners Board) and, in particular, including representatives of consumers of veterinary services on the Board; and
- removing the current restrictions on advertising by veterinary practitioners.

The Bill

The Veterinary Practitioners Board

3. The Veterinary Practitioners Board is established by the Bill. Its membership will increase from 6 to 8 members with the addition of two community representatives. According to the Minister, the community representatives will ensure that community expectations in areas such as animal welfare are considered in the Board's deliberations.[82]

Advisory Council

4. Clause 8 establishes a new advisory council. Its members will be appointed by the Minister and will, according to the Minister, include persons with appropriate technical expertise, including experts in animal welfare, veterinary practice and animal husbandry.

5. The advisory committee's role is to advise the Minister on what veterinary science services should be included in the prescribed list of services that *only* registered veterinary practitioners may provide. These services are referred to in the Bill as "**restricted acts of veterinary science**" [cl. 7(1)]. These acts will be prescribed by regulation, but only after the advisory council has given its advice.

Practice of veterinary science

6. Currently, only registered veterinary practitioners can provide veterinary science services. According to the Second Reading Speech, a key reform in the Bill is reducing the scope of this monopoly so that unregistered persons may provide a limited range of veterinary science services. Specifically, they may provide veterinary science services that are *not* included in the list of restricted acts of veterinary science.

7. To include an act in the list of restricted acts, the advisory committee must be satisfied that allowing a person who is not a veterinary practitioner to perform the act would likely:
   - cause unacceptable levels of harm or suffering to the animal;
   - affect human health adversely; or

[82] Mr Ian Macdonald MLC, *Parliamentary Debates (Hansard)* Legislative Council, 29 October 2003.

- affect domestic or international trade adversely.

Registration of veterinary practitioners with overseas qualifications

8. Clause 20 provides that a person may be granted full registration as a veterinary practitioner if they hold an academic award in veterinary science from an approved tertiary education institution.

   This provision allows for graduates with overseas qualifications to be registered in NSW provided that they gained their qualifications from an institution that the Board has approved.

9. The Board must review the tertiary institutions that are approved for the purposes of this section annually. According to the Minister, the requirement to review the list of approved tertiary institutions will ensure that these arrangements stay current and do not unnecessarily exclude certain overseas graduates from automatic registration.

Cancellation and suspension of registration

10. Some changes are introduced to the registration requirements, including supplementing the existing "good character test" with provisions that allow practitioners to be precluded from being registered or to have their registration suspended or cancelled if they have committed criminal offences under certain legislation such as the *Prevention of Cruelty to Animals Act 1979,* the *Stock Medicines Act 1989* and the *Poisons and Therapeutic Goods Act 1966.*

11. Under clause 33, a person may apply to the Administrative Decisions Tribunal (the ADT) for a review of a decision by the Board to refuse to grant the person full registration, to impose conditions in the full registration of the person or a decision to remove a person's name from the Register (in other words to de-register them).

12. However, a person cannot seek review of a decision refusing registration if the reason for the refusal was that the person had failed to pass an examination that they are required to pass.

Offences

13. The Bill creates a number of offences, including performing any restricted act of veterinary science unless the person is a veterinary practitioner [cl.9(1)] or falsely representing oneself to be a veterinary practitioner [cl.11(1)].[83]

    The penalty for these offences for an individual is a maximum of 50 penalty units (currently $5500) or 12 months imprisonment, or both. In the case of a corporation, the penalty is 100 penalty units (currently $11,000).

[83] There are exceptions to this rule set out in clause 9(2). These include that the person is the owner of the animal concerned or is a student of veterinary science and is doing the restricted act under the direct supervision of a veterinary practitioner or it is necessary to do the act because of an emergency situation.

Complaints against veterinary practitioners

14. Clause 37 enables any person (including the Board) to make a complaint against a veterinary practitioner in respect of the veterinary practitioner's conduct as a veterinary practitioner. The Board must investigate a complaint made against a veterinary practitioner [cl 41].[84]

15. The Board may dismiss a complaint if it is frivolous or vexatious, trivial or otherwise lacking in merit, or if it has already been dealt with as a complaint under the Act.

16. The Board must notify the person against whom a complaint has been made of the making of the complaint, the type of unsatisfactory professional conduct or professional misconduct that the Board considers may be indicated by the complaint and the identity of the complainant [cl 40].

17. "**Professional misconduct"** is defined in clause 34 as:

    (a) unsatisfactory professional conduct of a sufficiently serious nature to justify the suspension or cancellation of a veterinary practitioner's registration; or

    (b) any other conduct that is declared by the regulations to professional misconduct for the purposes of the Act.

18. "**Unsatisfactory professional conduct**" is defined in clause 34. Such conduct includes any of the following:

    - knowingly providing false or misleading information about one's qualifications as a veterinary practitioner;
    - engaging in conduct in the veterinary practitioner's professional capacity that, if repeated or continued, is likely to:
        - cause unnecessary suffering to an animal;
        - adversely affect the safety of a person;
        - damage the international reputation of Australia in relation to animal exports, animal welfare, animal produce or sporting events;
    - any conduct that demonstrates that the person is not fit to practice veterinary science because of injury or illness;
    - any other improper or unethical conduct of a veterinary practitioner in the course of the practice of veterinary science; or
    - any conduct that is declared by the regulations to be unsatisfactory professional misconduct.

19. If the Board is satisfied that the veterinary practitioner is guilty of *professional misconduct*, it must apply to the ADT for a disciplinary finding against the veterinary

[84] The Board may directly investigate the complaint or may delegate its powers to handle complaints to a subcommittee of the Board. Under the present Act, only the Veterinary Surgeons Investigating Committee could investigate complaints. Also, the Board has the power to summon a person to appear before it to give evidence or to produce documents [s. 43(1)]. Failure to appear as required by summons is an offence (20 penalty units or $2200).

practitioner and it may, pending the determination of the application, suspend the veterinary practitioner's registration.

20. If the Board is satisfied that the veterinary practitioner is guilty of *unsatisfactory professional conduct* (but not professional misconduct), it may apply to the ADT for a disciplinary finding against the veterinary practitioner or it may itself take any one or more of the following actions against the veterinarian:

    (a) reprimand or caution the veterinary practitioner,

    (b) impose a maximum fine on the veterinary practitioner of $5,000,

    (c) impose conditions on the veterinary practitioner's registration,

    (d) require the veterinarian to complete specified educational courses,

    (e) require the veterinarian to report on their veterinary practice as specified,

    (f) require the veterinary practitioner to seek and take advice, in relation to the management of their veterinary practice, from a specified person,

    (g) require the veterinarian to pay costs relating to the hearing.

21. A person against whom the Board has made a disciplinary finding may apply to the ADT for a review of that finding and any action taken against the person by the Board [cl. 47].

22. The Board can delegate its functions under the proposed Part to specially constituted committees of the Board [cl. 48].

23. The Board may also apply to the ADT for a disciplinary finding against a veterinary practitioner with respect to a complaint against the veterinary practitioner [cl 49].

24. If the ADT finds that the veterinary practitioner is guilty either of *professional misconduct* or *unsatisfactory professional conduct*, the ADT may make the same orders that the Board may make after a finding of guilt.

    In addition, the ADT may cancel the veterinary practitioner's registration or suspend it for a period of 12 months or less. The ADT may also impose a maximum fine on the veterinary practitioner of $25,000.

25. A decision of the ADT on an application for a disciplinary finding may be appealed to an Appeal Panel of the ADT under Part 1 of Chapter 7 of the *Administrative Decisions Tribunal Act 1997.*

Publicising disciplinary action

26. Under clause 58, the Board must publicise disciplinary action taken against a veterinary practitioner.[85]

[85] Subsection (4) enables the Board to publicise disciplinary action taken under the present Act and before the commencement of this section.

27. In addition, the Registrar of the Board must keep a *Register of disciplinary action* and make it available to the public [cl 59]. The Register is to include name and particulars of any disciplinary action taken.[86]

28. If the ADT quashes a decision of the Board to take disciplinary action against a veterinary practitioner, the Board must publicise that decision of the ADT and must update the register of disciplinary action to reflect the quashing of the action [cl 60].

29. No liability is incurred by the State, the Board, the Registrar or a person acting at the direction of the Board or Registrar in respect of anything done in good faith for the purpose of publicising disciplinary action or otherwise carrying out functions under the proposed Division. It also provides that no liability is incurred by a person who publishes a fair report or summary of disciplinary action that is publicised [cl 61].

Issues Arising Under s 8A(1)(b)

Clause 2 – Commencement by proclamation

30. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

31. 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 discretion may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

32. The Committee has written to the Minister seeking his advice as to the reasons why the proposed Act will not commence on assent and to ask for an indication of the likely date for commencement of this Bill.

Clause 34, Definition of *unsatisfactory professional conduct*

33. The definition of "*unsatisfactory professional conduct"* in clause 34 may be overly broad and may unintentionally trespass on a person's right to free speech.

34. Of concern is that part of the definition that states that unsatisfactory professional conduct may include conduct undertaken in a professional capacity that, if repeated or continued, is likely to "damage the international reputation of Australia in relation to animal exports, animal welfare, animal produce or sporting events".

35. There are no objective criteria prescribed for determining whether Australia's international reputation has been "damaged" by the conduct. This makes it difficult to determine the intended scope of the definition.

[86] There are exceptions to this rule. In the case of the suspension or cancellation of the registration of a person, or a refusal to register a person as a veterinary practitioner because of their infirmity or illness, the particulars of the illness or infirmity are not to be publicised or recorded in the Register. However, the name of the veterinarian and the nature of the disciplinary proceedings must be publicised and recorded in the Register.

For example, it is possible to read this clause as including conduct such as a veterinary practitioner's professional written publications or other public statements that express concern about or criticise an aspect of Australia's animal exports, animal welfare, animal produce or participation in sporting events.

36. The Committee is of the view that this provision requires further clarification to ensure that it does not unintentionally trespass on the fundamental right to freedom of speech.

37. The Committee has written to the Minister seeking clarification as to the intended scope of this definition.

38. The Committee refers to Parliament the question of whether this definition unduly trespasses on personal rights.

The Committee makes no further comment on this Bill.

SECTION B: RESPONSES TO PREVIOUS DIGESTS

1. MINISTERIAL CORRESPONDENCE — CHILD PROTECTION LEGISLATION AMENDMENT BILL 2003

Introduced: 3 September 2003
House: Legislative Assembly
Minister: The Hon C Tebbutt MLC
Portfolio: Community Services

Background

1. The Committee reported on the *Child Protection Legislation Amendment Bill 2003* in Legislation Review Digest No 2 of 16 September 2003.

2. The Committee noted that the Act was to commence by proclamation and therefore wrote to the Minister seeking advice as to the likely commencement date of the Bill.

Minister's Reply

3. In a reply received 6 November 2003 (below), the Minister responded to the Committee, indicating that commencement of the Act should be coordinated with the commencement of the Working With Children Check Guidelines, and that it will take at least 12 weeks after the passage of the Act to commence the guidelines.

Committee's Response

4. The Committee thanks the Minister for her reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

12 September 2003

Our Ref:LRC393/CP3663

The Hon Carmel Tebbutt MLC
Minister for Community Services
Level 29
9 Castlereagh Street
SYDNEY NSW 2000

Dear Minister

CHILD PROTECTION LEGISLATION AMENDMENT BILL

The Committee has considered this Bill and notes that it is to commence by proclamation.

The Committee notes that providing that an Act 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. The Committee recognises that there may be good reasons why such a discretion may be required. It also considers that, in some circumstances, such a discretion can give rise to an inappropriate delegation of legislative power.

Given the importance of this particular legislation, the Committee has resolved to seek your advice as to the likely commencement date of the Act.

Yours sincerely

Barry Collier MP
Chairperson

FAXED 12/9/03

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The Hon Carmel Tebbutt MLC
Minister for Community Services
Minister for Ageing
Minister for Disability Services
Minister for Youth

Mr B Collier
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RECEIVED
06 NOV 2003
LEGISLATION REVIEW COMMITTEE

Dear Mr Collier

I am writing in response to your letter of 12 September 2003 seeking advice as to the likely commencement date of the *Child Protection Legislation Amendment Act 2003*.

The commencement of the Act should be coordinated with the commencement of the Working With Children Check Guidelines.

The Commission for Children and Young People has advised that it will need a minimum of 12 weeks after the passage of the legislation to commence the Guidelines. This time is needed to update the Guidelines to reflect the new legislation and to print and distribute the Guidelines to employers.

During this time the *Commission for Children and Young People Regulation 2000* may also need amendment to make it consistent with the *Child Protection Legislation Amendment Act 2003*.

Therefore I recommended that the *Child Protection Legislation Amendment Act 2003* not be proclaimed until the Guidelines which will support employers in their application of the Act are available, being at least 12 weeks after the passage of the legislation.

I will provide further advice regarding the proclamation date following the passage of the *Child Protection Legislation Amendment Bill 2003*.

Yours sincerely

Carmel Tebbutt MLC
Minister for Community Services
Minister for Ageing
Minister for Disability Services
Minister for Youth

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GPO Box 5070, SYDNEY NSW 2001
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2. MINISTERIAL CORRESPONDENCE — SYDNEY WATER AMENDMENT (WATER RESTRICTIONS) BILL 2003

Introduced: 15 October 2003
House: Legislative Assembly
Minister: The Hon F Sartor MP
Portfolio: Energy and Utilities

Background

1. The Committee reported on the *Sydney Water Amendment (Water Restrictions) Bill 2003* in Legislation Review Digest No 4 of 27 October 2003.

2. The Committee wrote to the Minister seeking advice as to the likely commencement date of the Bill and the reason why there were no requirements regarding the qualifications or attributes of person who may be appointed as authorised persons for the purposes of the Bill.

3. The Committee also referred to the Parliament issues regarding:

   - reversing the onus of proof for owners and occupiers in relation to water restriction offences; and
   - allowing authorised persons to enter private land, including the lack of time limits on when such persons may enter private land and limiting the obligation for such persons to show identification only to occupiers of the land.

Minister's Reply

4. In his reply dated 27 October 2003 (below), the Minister responded to the range of issues raised by the Committee.

Committee's Response

5. The Committee thanks the Minister for his prompt reply in response to the issues raised by the Committee.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref: LRC455/CP3710

The Hon F Sartor MP
Minister for Energy and Utilities
Level 31
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister Frank

Sydney Water Amendment (Water Restrictions) Bill 2003

The Committee has considered this Bill under s 8A of the *Legislation Review Act 1987* and notes that it is to commence by proclamation.

The Committee is of the view 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 discretion may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

The Committee also notes that the proposed s 53A provides that the definition of authorised person has the same meaning as in s 50, which is a person authorised in writing by the Minister as an authorised person. The Committee is of the view that when legislation conveys on persons administrative powers that can significantly affect personal rights, the legislation should include appropriate limits on who may be authorised to exercise such powers.

The Committee has therefore resolved to write to you to seek your advice as to the likely time frame within which the Act will commence after assent, and also to seek your advice as to why there are no requirements regarding the qualifications or attributes of persons who may be appointed as authorised persons for the purposes of the Bill.

Yours sincerely

Barry Collier MP
Chairperson

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NEW SOUTH WALES

MINISTER FOR ENERGY AND UTILITIES
MINISTER FOR SCIENCE AND MEDICAL RESEARCH
MINISTER ASSISTING THE MINISTER FOR HEALTH (CANCER)
MINISTER ASSISTING THE PREMIER ON THE ARTS

Barry Collier MP
Chairperson
Legislation Review Committee
Parliament House
Macquarie Street
Sydney 2000

27 October 2003

Dear Mr Collier

I refer to your letter dated 24 October 2003 and the Report of the Legislation Review Committee (**the Committee**) on the Sydney Water Amendment (Water Restrictions) Bill 2003 (**the Bill**).

I wish to respond to the matters raised in your letter and also to provide further information in relation to the operation of the Bill.

1. Commencement upon proclamation

The Committee has expressed a concern that, because the Bill commences upon proclamation, this may give rise to "an inappropriate delegation of legislative power" as the Government may choose the date of proclamation or may choose not to proclaim a Bill at all.

I wish to assure the Committee that the Government intends to proclaim the Bill as expeditiously as possible after passage by the Parliament. This is necessary to facilitate the implementation of penalties for compulsory water restrictions.

2. Definition of "authorised person"

The Committee has referred to Parliament the question whether "an unfettered discretion to appoint authorised persons under the Bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers".

Under section 50 of the Sydney Water Act, the Minister is already empowered to appoint "authorised persons" for the purposes of enforcing water restriction offences.

The Bill inserts a new Division into the Act relating to the enforcement of water restriction offences. The amendment proposed by the Bill clarifies that the existing

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reference to "authorised persons" in section 50 of the Bill also applies in the new Division of the Act.

On 10 September 2003, I appointed certain Sydney Water staff holding certificates of authority under section 39 of the Sydney Water Act and local councils in Sydney, the Illawarra and Blue Mountains as authorised persons under section 50 of the Sydney Water Act for the purpose of issuing penalty notices for breaches of water restrictions.

Sydney Water's Water Restrictions Patrol members are being trained in appropriate practices and are required to comply with Sydney Water's Guidelines for the Enforcement of Water Restrictions.

Local councils have been notified of their appointment and the subsequent need to delegate this power to serve penalty notices for water restriction offences to appropriate employees. Any delegation by local councils must be in accordance with the provisions of the *Local Government Act 1993*.

In the event that any member of the community is concerned that authorised persons are acting inappropriately in carrying out their enforcement activities, transparent complaint processes will be available.

For Sydney Water, initial complaints will at first instance be considered by a senior Sydney Water manager. If the complainant is not satisfied, then a complaint can be made to the Energy and Water Ombudsman (EWON) for external consideration.

Complaints about council rangers can be made in accordance with existing complaints procedures established by the relevant local council. If the complainant is not satisfied, then the matter can be further considered by the NSW Ombudsman or the Department of Local Government.

The Government's view is that both the power to appoint authorised persons and the way in which that power has been exercised is entirely appropriate.

3. Provisions relating to liability of owners and occupiers

The Committee has referred to Parliament the question whether the provisions of the Bill which establish liability for owners and occupiers are "undue, given the object of facilitating the enforcement of water restrictions".

The Sydney Water Regulation 2000 permits the Minister to impose water restrictions on the basis that "it is necessary in the public interest for the purpose of maintaining the water supply".

In order to have an effective water restrictions enforcement regime, it is necessary that the current method of issuing penalty infringement notices be improved.

Under the present system, where an inspector finds that a sprinkler has been left on, but nobody is present at the premises at the time of the offence, it is not possible to issue a penalty notice for the offence.

The Government's view is that the community would expect that if somebody turns on a sprinkler all day and then leaves home, they should not be able to escape liability because there appears to be no-one at home to issue a penalty notice to.

For this reason, the Government has proposed that owners and occupiers of premises will be held responsible for water restriction breaches committed at the premises where it is not possible to establish the identity of the offender.

As the Committee has observed, this is similar to the system which currently applies for traffic offences. With respect to the position of occupiers of land, I do not accept the Committee's observation that the burden on occupiers is "far more onerous" than that borne by owners.

In all instances where an owner or occupier was not responsible for a water restriction offence, that person will be able to provide an appropriate statutory declaration.

Proposed section 53B(4)(b) of the Bill provides that an occupier may avoid liability for the offence if he or she provides a statutory declaration that he or she did not commit the offence and did not know, and could not with reasonable diligence have ascertained, the name and address of the person who committed the offence. Unless there is evidence to the contrary, such a statutory declaration will be sufficient to avoid liability for the offence.

Any person served with a penalty notice who wishes to challenge the notice is also entitled to elect to have the matter heard in the Local Court.

The Government's view is that the measures in the Bill are appropriate and necessary for the proper enforcement of the mandatory water restrictions.

4. Powers of entry

The Bill provides for a very limited power of entry for authorised persons to investigate water restriction offences.

The Committee has referred to Parliament "the question whether this power of entry unduly trespasses on personal rights".

As the Committee is aware, the following significant constraints apply to the proposed power of entry:

- it only allows entry onto land, not dwellings or any enclosed structure on the land such as a shed or a garage;
- the entry must be for no longer than is reasonably necessary for the investigation of the offence;
- entry can only be made where there is a reasonable suspicion that a water restriction offence is being committed at that time – random searches will not be permitted;
- the power of entry may only be exercised at a reasonable time; and

- an authorised person is required to produce identification on request to any occupier of the land.

I am pleased that the Committee has recognised that the power of entry is required by the nature of the offences which it is to be used to enforce. As the Committee noted in its report:

> "Unlike offences committed under existing legislation... the relevant conduct for offences relating to unlawful use of water in gardens can usually be terminated as quickly as it takes to turn off a tap, and potentially incriminating evidence of past wrongdoing can be explained away as stemming from lawful use...
>
> Another factor to be considered is that if authorised persons did not have the power of entry, the legislation would have the potential to interfere with personal rights and liberties in an arbitrary and discriminatory manner by only exposing to criminal liability those owners and occupiers whose land is visible from public areas.
>
> Without this power, it is likely that water restriction offences could only be enforced against owners and occupiers of secluded land if evidence was provided, or investigation facilitated, by neighbours...
>
> [T]here will be a significant gap in the enforcement of the legislation if it is difficult to enforce it at a time when there is the strongest temptation to breach it (under the cover of darkness)."

The Government's view is that the limited power which has been provided is reasonable and necessary for the effective enforcement of water restrictions.

Specific issues raised by the Committee in relation to the power of entry are addressed below.

4.1 Time that the power may be exercised

The Government's view is that it would not be appropriate to confine the exercise of the power only to daylight hours.

This would send a clear signal that people could breach water restrictions at night in the knowledge that the capacity to prove offences would be severely hampered.

It is anticipated that most enforcement activity will occur during daylight hours. There may, however, be exceptional circumstances that justify entry outside daylight hours.

This includes circumstances where Sydney Water has received advice of repeated breaches of the restrictions at night. If such an offence is suspected, an authorised person may enter the property to confirm that an offence is taking place.

Under the enforcement guidelines which are being developed by Sydney Water, the hours within which any attempt to approach the occupier to ascertain the name of the offender will be limited.

Where necessary, the authorised person will visit the property again during daylight hours within 24 hours to attempt to ascertain the name of the offender.

4.2 Production of identification by authorised persons

The Committee has also expressed concern whether persons other than tenants would be entitled to demand identification from water inspectors.

The Bill includes a provision under which authorised persons are required to display identification on request to any occupier of the land. The term "occupier" is defined inclusively in the Bill. I am advised that this would include any person who is lawfully on the land – including visitors, housesitters, babysitters, concerned neighbours and property managers.

Sydney Water's Guidelines will state that authorised persons must provide proof of identification on request by any person on the land.

I trust that this assists the Committee in any further consideration it gives to the Bill.

Yours sincerely

Frank Sartor MP
Minister for Energy and Utilities

Part Two – Regulations

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

Regulation	Gazette reference		Information sought
	Date	Page	
Aboriginal Land Rights Amendment (Rate Exemptions) Regulation 2003	04/07/03	6805	20/08/03
Child and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 and Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	11/07/03	7021 7054	20/08/03
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 16/09/03
Landlord and Tenant (Rental Bonds) Regulation 2003	29/08/03	8434	24/10/03
Pawnbrokers and Second Hand Dealers Regulation 2003	29/08/03	8698	24/10/03
Radiation Control Regulation 2003	29/08/03	8534	24/10/03
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	29/08/03	8434	24/10/03
Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003	12/09/03	9227	07/11/03
Protected Estates Regulation 2003	26/09/03	9575	07/11/03

Appendix 1: Index of Bills Reported on in 2003

	Digest Number
Appropriation (Health Super-Growth Fund) Bill 2003	5
Child Protection Legislation Amendment Bill 2003	2,5
Commonwealth Powers (De Facto Relationships) Bill 2003	2
Community Relations Commission and Principles of Multiculturalism Amendment Bill 2003	3
Constitution Amendment (Governor's Salary) Bill 2003	5
Coptic Orthodox Church (NSW) Property Trust Amendment Bill 2003	5
Coroners Amendment Bill 2003	5
Courts Legislation Amendment Bill 2003	5
Crimes Amendment (Protection of Innocent Accused) Bill 2003	2
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	1
Defamation Amendment (Costs) Bill 2003	3
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	2
Education Amendment (Computing Skills) Bill 2003	2
Environmental Planning and Assessment Amendment (Development Consents) Bill 2003	4
Evidence Legislation Amendment (Accused Child Detainees) Bill 2003	3
Firearms and Crimes Legislation Amendment (Public Safety) Bill 2003	5
Funeral Funds Amendment Bill 2003	4
Gaming Machines Amendment (Miscellaneous) Bill 2003	3
Hairdressers Bill 2003	4
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003	5
Industrial Relations Amendment (Public Vehicles and Carriers) Bill 2003	4
Local Government Amendment (Cudgegong (Abattoir) County Council Dissolution) Bill 2003	5
Local Government Amendment (No Forced Amalgamations) Bill 2003	2,3
Lord Howe Island Amendment Bill 2003	5
Motor Accidents Compensation Amendment (Terrorism) Bill 2003	5
National Park and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	5
Police Association Employees (Superannuation) Amendment Bill 2003	4
Powers of Attorney Bill 2003	2,4
Prevention of Cruelty to Animals (Penalties) Bill 2003	3
Privacy and Personal Information Protection Amendment Bill 2003	4
Quarantine Station Preservation Trust Bill 2003	2
Road Transport Efficiency Bill 2003	3

	Digest Number
Royal Blind Society (Corporate Conversion) Bill 2003	4
Sydney Water Amendment (Water Restrictions) Bill 2003	4,5
Sydney Water Catchment Management Amendment Bill 2003	5
Sporting Venues (Pitch Invasion) Bill 2003	2
Transport Legislation Amendment (Safety and Reliability) Bill 2003	5
Veterinary Practice Bill 2003	5
Voluntary Euthanasia Trial (Referendum) Bill 2003	3

Appendix 2: Index of Ministerial Correspondence on Bills from September 2003

Bill	Minister/Member	Letter sent	Reply	Digests
Child Protection Legislation Amendment Bill 2003	Minister for Community Services	12/09/03	07/11/03	2,5
Powers of Attorney Bill 2003	Attorney General	12/09/03	07/10/03	2,4
Gaming Machines Amendment (Miscellaneous) Bill 2003	Minister for Gaming and Racing	10/10/03		3
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03		4
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03		4
Sydney Water Amendment (Water Restrictions) Bill 2003	Minister for Energy and Utilities	24/10/03	27/10/03	4,5
Coroners Amendment Bill 2003	Attorney General	07/11/03		5
Courts Legislation Amendment Bill 2003	Attorney General	07/11/03		5
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003	Premier	07/11/03		5
Lord Howe Island Amendment Bill 2003	Minister for the Environment	07/11/03		5
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03		5
Transport Legislation Amendment (Safety and Reliability) Bill 2003	Minister for Transport Services	07/11/03		5
Veterinary Practice Bill 2003	Minister for Agriculture and Fisheries	07/11/03		5

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2003

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Child Protection Legislation Amendment Bill 2003	N			C	
Commonwealth Powers (De Facto Relationships) Bill 2003				N	
Coroners Amendment Bill 2003	N		N	C	
Courts Legislation Amendment Bill 2003	N			C	
Crimes Amendment (Protection of Innocent Accused) Bill 2003	R				
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	N				
Defamation Amendment (Costs) Bill 2003	R				
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	N		N		
Environmental Planning and Assessment Amendment (Development Consents) Bill 2003	N		N	C	
Evidence Legislation Amendment (Accused Child Detainees) Bill 2003	N			N	
Firearms and Crimes Legislation Amendment (Public Safety) Bill 2003	N				
Funeral Funds Amendment Bill 2003	N			N	
Gaming Machine Amendment (Miscellaneous) Bill 2003	N			C	
Hairdressers Bill 2003				N	
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003				C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Industrial Relations Amendment (Public Vehicles and Carriers) Bill 2003	N			N	
Lord Howe Island Amendment Bill 2003				C	
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	C			C	
Powers of Attorney Bill 2003	N			C	
Privacy and Personal Information Protection Amendment Bill 2003	R			C	R
Quarantine Station Preservation Trust Bill 2003		R			
Road Transport Efficiency Bill 2003				R	N
Royal Blind Society (Corporate Conversions) Bill 2003	N		N		
Sporting Venues (Pitch Invasion) Bill 2003	R				
Sydney Water Amendment (Water Restrictions) Bill 2003	R	R		C	
Transport Legislation Amendment (Safety and Reliability) Bill 2003	N,R	C		R	
Veterinary Practice Bill 2003	C,R			C	
Voluntary Euthanasia Trial (Referendum) Bill 2003				R	N

Key

R Issue referred to or brought to the attention of Parliament
C Correspondence with Minister/Member
N Issue Notes