

PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

ANNUAL REVIEW

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# Table of Contents

Membership & Staff.....	ii
<b>CHAPTER ONE - INTRODUCTION.....</b>	<b>1</b>
Committee’s functions and procedure.....	1
<b>CHAPTER TWO - SCRUTINY OF BILLS .....</b>	<b>3</b>
Bills considered.....	3
“Rights and liberties” .....	3
Issues arising in bills considered.....	4
<b>CHAPTER THREE - SCRUTINY OF REGULATIONS .....</b>	<b>13</b>
Regulations considered .....	13
Issues arising in regulations considered .....	13
<b>CHAPTER FOUR - OPERATIONAL ISSUES.....</b>	<b>15</b>
Membership of Committee.....	15
Operational Issues .....	15
<b>CHAPTER FIVE - STATISTICS .....</b>	<b>19</b>
<b>CHAPTER SIX - OUTCOMES .....</b>	<b>20</b>
<b>CHAPTER SEVEN - OTHER ACTIVITIES OF THE COMMITTEE.....</b>	<b>22</b>
<b>CHAPTER EIGHT - CONCLUSION .....</b>	<b>23</b>

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## Chairman's Foreword

Since September 2003 when the Legislation Review Committee of the New South Wales Parliament began its scrutiny of bills function, the Committee has developed effective practices for the consideration of NSW legislation, reporting to Parliament each sitting week on legislation introduced in the previous sitting week. In the period July 2004-June 2005, the Committee has, in accordance with its responsibilities under the *Legislation Review Act 1987*, reported to Parliament on 132 bills. The Committee's reports were published in 16 editions of the *Legislation Review Digest*.

This Report highlights the work of the Committee over the past year and sets out the main issues that the Committee has raised when commenting on bills and regulations. It also identifies some of the procedural problems that the Committee continues to encounter in fulfilling its functions with respect to bills.

I take this opportunity to thank Members for their positive and constructive comments on the *Legislation Review Digests* as well as the Ministers and their staff for their attention to the Committee's enquiries and correspondence. I continue to invite feedback from Ministers and all Members on the Committee's procedures and its *Digests* and how they may be improved to become even more useful for Members.

Finally, I express my appreciation of the other Members of the Committee and the Secretariat for their commitment and hard work.



**PETER PRIMROSE MLC**  
**CHAIRMAN**



## Chapter One - Introduction

- 1.1 On 15 August 2003, the Legislation Review Committee (the Committee) commenced its function of reviewing and reporting on all bills introduced into the Parliament.
- 1.2 The Committee's functions with respect to bills are set out in section 8A of the *Legislation Review Act 1987* (the Act).
- 1.3 In the reporting period ending 30 June 2005, the Legislation Review Committee has reported to Parliament on 132 bills introduced into Parliament in 16 *Legislation Review Digests (Digest)*.<sup>1</sup>
- 1.4 This Report briefly:
  - describes the work of the Committee over the course of the last financial year;
  - highlights the main issues that have arisen in the Committee's consideration of bills and regulations;
  - identifies certain procedural issues; and
  - notes some issues for future consideration.

### **Committee's functions and procedure**

- 1.5 The Committee has the functions of reviewing all bills introduced into Parliament and all regulations subject to disallowance.
- 1.6 The Committee's function with respect to bills is set out in section 8A of the Act. Section 8A(1)(b) requires the Committee to report to Parliament on whether a bill:
  - (i) trespasses unduly on personal rights and liberties, or
  - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
  - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
  - (iv) inappropriately delegates legislative powers, or
  - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.
- 1.7 The Committee's functions with respect to regulations are set out in section 9 of the Act. Under section 9(1), the Committee is to consider whether the special attention of Parliament should be brought to a regulation on any ground, including that:
  - (i) the regulation trespasses unduly on personal rights and liberties,
  - (ii) the regulation may have an adverse impact on the business community,
  - (iii) the regulation may not have been within the general objects of the legislation under which it was made,
  - (iv) 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) the objective of the regulation could have been achieved by alternative and more effective means,
  - (vi) the regulation duplicates, overlaps or conflicts with any other regulation or Act,

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<sup>1</sup> As the Committee reports the week following the introduction of a bill, this includes 7 bills introduced the last sitting week of June 2005 and excludes the 9 bills introduced the last sitting week of June 2004.

Introduction

- (vii) the form or intention of the regulation calls for elucidation, or
- (viii) 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.

## Scrutiny of bills

- 1.8 The Committee reports on its consideration of bills in its *Digest*. The *Digest* is normally tabled out of session at 11.00 am on the Monday of a sitting week or in the House on the Tuesday of a second consecutive sitting week. This timing ensures that Members have the *Digest* prior to the resumption of the second reading debate (following the adjournment after the second reading speech).
- 1.9 The Committee's report on any given bill is based on the bill itself, the Minister or Private Member's second reading speech, and, where necessary, on expert legal advice. Where it requires further clarification of any issue regarding a bill, the Committee writes to the mover of the bill. This correspondence is published in the *Digest*.
- 1.10 The Secretariat to the Committee advises the Committee in its consideration of most bills and regulations. The Committee also retains a panel of expert legal advisers to assist it further in the preparation of its reports to Parliament on bills and complex areas of law. Over the last 12 months, the Committee has sought advice from these experts in relation to 10 bills.

## Scrutiny of regulations

- 1.11 The wider terms of reference and longer timeframe for regulations (15 sitting days instead of 5 calendar days) leads the Committee to adopt different procedures for its regulation scrutiny function.
- 1.12 Rather than flagging issues for debate in the House, the Committee usually enters into correspondence with the responsible Minister to seek further information regarding any concerns the Committee may have on a regulation. If a regulation requires further investigation, the Committee may seek submissions from, and hold hearings with, interested parties.
- 1.13 Once the Committee has concluded its consideration of a regulation, it publishes correspondence with the Minister in its *Digest*. If the Committee has significant continuing concerns, it may also include a report in the *Digest* drawing the regulation to the attention of Parliament.
- 1.14 During the year, the Committee also adopted the policy of publishing any unanswered correspondence after 3 months. The Committee is pleased to note that this has not been necessary to date and thanks Ministers for their timely responses.



## Chapter Two - Scrutiny of Bills

### Bills considered

- 2.1 In the last 12 months, the Committee published 16 *Digests* reporting on 132 bills. In the previous 2003-04 reporting period, the Committee published 16 *Digests* reporting on 143 bills.<sup>2</sup>
- 2.2 The Committee reported on every bill by the beginning of the sitting week following its introduction and conclusion of the mover's second reading speech.
- 2.3 The Act allows the Committee to report on a bill even if it has been passed by both Houses of Parliament or has become an Act. This happens when the House declares that the bill is urgent or suspends the standing orders so that the bill can be passed without delay. In the last year, the Committee reported on 15 bills after they had been passed by both Houses.<sup>3</sup> Nine of these bills were passed by both Houses within 2 days of their introduction into the Parliament. The other 6 bills were budget-related bills introduced and passed immediately before the winter recess.

### “Rights and liberties”

- 2.4 The scrutiny criteria in section 8A(1)(b) of the Act can be divided into two broad types:
- (a) scrutiny as to how the bill could adversely affect personal rights and liberties; and
  - (b) scrutiny of provisions regarding the delegation and exercise of legislative power.
- 2.5 In the absence of a definition of “rights and liberties” in the Act and in the absence of any other legislative statement as to the content of rights and liberties (eg, a bill of rights) the Committee takes into account;
- rights protected under the common law (eg, right to silence), as developed by the courts;
  - rights protected under New South Wales and Commonwealth statute law (eg, *Anti Discrimination Act 1977* (NSW), *Racial Discrimination Act 1975* (Cth));
  - rights protected under the Commonwealth Constitution;

<sup>2</sup> Note that this reporting period began on 1 September 2003, the day on which the Committee's bill scrutiny function began, and ended on 30 June 2004.

<sup>3</sup> These Bills were the Agricultural Livestock (Disease Control Funding) Amendment Bill 2004, the Appropriation Bill 2004, the Appropriation (Parliament) Bill 2004, the Appropriation (Special Offences) Bill 2004 (*Digest* No. 10 of 2004); the Crimes (Administration of Sentences) Amendment (Norfolk Island Prisoners) Bill 2004 (*Digest* No. 13 of 2004); the Crimes Legislation Amendment (Terrorism) Bill 2004 (*Digest* No. 10 of 2004); the Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005); the Crown Lands Legislation Amendment (Budget) Bill 2004 (*Digest* No. 10 of 2004); the Law Enforcement (Powers and Responsibilities) Amendment (In-car video systems) Bill 2004, the Legal Profession Bill 2004 (*Digest* No. 1 of 2005); the Special Commission of Inquiry (James Hardie Records) Bill 2004 (*Digest* No. 15 of 2004); the Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004 (*Digest* No. 1 of 2005); the State Revenue Legislation Further Amendment Bill 2004 (*Digest* No. 10 of 2004); the Sustainable Energy Development Repeal Bill 2004 and the Sydney Opera House Trust Amendment Bill 2004 (*Digest* No.10 of 2004).

- rights protected under international law, especially as set out in international human rights treaties ratified by Australia (eg, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CROC) and the Convention Against Torture (CAT));
- the decisions and comments of the principal international bodies monitoring these international human rights treaties (eg, UN Committees on Human Rights, Economic, Social and Cultural Rights, Women's Rights, Children's Rights and the Committee Against Torture);
- rights recognised in other comparable jurisdictions (eg, under the European Convention on Human Rights, South African and Canadian constitutions and the UK *Human Rights Act 1998*); and
- academic and public debate on the content of "rights".

2.6 Some rights recognised under international law, such as the privilege against self-incrimination, have longstanding traditions, pre-dating even the English common law.<sup>4</sup> Other rights are new to Australian law, and their scope and application are developing along with changes in society and technology, for example, the personal right to privacy.<sup>5</sup>

### **Issues arising in bills considered**

2.7 Two-thirds of the 132 bills reported on between 1 July 2004 and 30 June 2005 raised issues for the Committee's consideration under one or more of the grounds set out in s 8A of the Act.<sup>6</sup>

2.8 On some issues, the Committee has repeatedly referred the issue to Parliament or written to the responsible Minister or Private Member for reasons for the provision concerned. Often there was a significant overlap between the issues raised by the Committee in its consideration of bills (eg, strict liability offences and the presumption of innocence). Some of these issues are briefly discussed below.

### **Trespassing on personal rights and liberties (*Legislation Review Act 1987*, s 8A(1)(b)(i))**

#### ***Retrospectivity***

2.9 Retrospective application of legislation was the second most common issue identified by the Committee in the past year. It was an issue raised in 15% of all bills considered during the reporting period.<sup>7</sup>

2.10 The Committee considers that any retrospective provision that adversely affects a person trespasses on that person's right to be able to rely on the law at any given time. This is most serious when a law seeks to create new criminal offences with retroactive effect. Such legislation is contrary to a fundamental human right

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<sup>4</sup> See discussion on this issue below at paragraphs 2.25-2.30.

<sup>5</sup> See discussion on this issue below at paragraphs 2.34 and 2.35.

<sup>6</sup> In the 2003-2004 reporting period, 76% of the 143 bills commented on raised issues under s 8A of the Act.

<sup>7</sup> This issue was considered in 20 of the total of 132 bills considered from 1 July 2004 until 30 June 2005.

recognised in the ICCPR and each of the regional human rights conventions<sup>8</sup>. Article 15 of the ICCPR provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

2.11 Under the European Convention of Human Rights (ECHR), this right, which is in identical terms to Article 15, is considered so fundamental that it is one of the very few rights under that Convention that is non-derogable.<sup>9</sup> This means that there are *no* circumstances in which governments are permitted to withdraw protection of this right under that Convention.

2.12 The Committee considered 3 bills with retrospective effect in the area of criminal law.<sup>10</sup> The most serious example was the Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005. By removing rights of review and redetermination, the effect of this law was to impose a substantially harsher penalty on the affected offenders than their original “life sentence”. In its *Digest* No 6 of 2005, the Committee commented that:

The legislative regime...is in substance inconsistent with the human rights standards established by the [ICCPR], to which Australia is a party. Article 15 of the ICCPR provides that in no cases shall ‘a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed’.<sup>11</sup>

2.13 The Committee referred this concern to the Parliament.

2.14 Other retrospective legislation with which the Committee raised concerns included legislation that:

- removed the privilege against self-incrimination after a person had already given evidence (eg, Special Commission of Inquiry (James Hardie Records) Bill 2004);
- rendered void completed sales or contracts of sale (eg, Crown Lands (Prevention of Sales) Bill 2004);
- removed or limited compensation rights after the event (eg, Civil Liability Amendment (Offender Damages) Bill 2005); and
- changed rules for court proceedings where those proceedings had already commenced (eg, Civil Procedure Bill 2005).

<sup>8</sup> See *European Convention on Human Rights and Fundamental Freedoms 1950* (ECHR), Article 7; *African (Banjul) Charter On Human And Peoples' Rights 1981* (AfCHR), Article 7; and *American Convention on Human Rights 1969* (AmCHR), Article 9.

<sup>9</sup> On this point, see Article 7.1 of the ECHR & European Court of Human Rights Decisions in *R (on the application of Uttley) v Secretary of State for the Home Department* [2003] 1 WLR 2590; [2003] 4 All ER 891; *Welch v United Kingdom* (1995) 20 EHRR 247; and *Ibbotson v United Kingdom* [1999] Crim LR 153.

<sup>10</sup> Criminal Procedure Amendment (Evidence) Bill 2005 (*Digest* No. 3 of 2005), the Criminal Procedure Further Amendment (Evidence) Bill 2005 (*Digest* No. 4 of 2005) and the Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005).

<sup>11</sup> See, eg, *Gómez Casafranca v Peru*, UN Human Rights Committee decision 981/01. Article 15 is set apart from other due process rights, probably because it is a non-derogable right: S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Material and Commentary*, 2<sup>nd</sup> Ed, (Oxford), 2004, p.463.

- 2.15 Retrospectivity is provided for in different ways in legislation. One approach of concern to the Committee deems a provision or provisions of a bill to have commenced either on the date on which a Ministerial statement was made about the legislation proposed either in Parliament or to the press, or on the date the bill was introduced into Parliament, rather than a date on or after Parliament has passed the legislation. An example of this kind of retrospective legislation the Committee considered in the last year is the Civil Liability Amendment (Offender Damages) Bill 2004.<sup>12</sup>
- 2.16 The Senate Scrutiny of Bills Committee has noted that retrospective legislation of this nature:
- ...carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement. Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty...The legislation when introduced may differ in significant details from the terms of the announcement.<sup>13</sup>

### ***Strict liability offences***

- 2.17 This is the third most common issue identified by the Committee during the reporting period.
- 2.18 "Strict liability" offences do not require the prosecutor to prove a fault element. In other words, a person can commit such an offence without having meant to do so and whether or not they had any criminal intent.<sup>14</sup> These offences are often imposed for regulatory offences where there is a need to ensure persons take all reasonable steps to avoid the offence, eg, speeding or pollution offences.
- 2.19 Under the common law, it is presumed that the prosecution must prove fault (eg, intention, recklessness or negligence) in relation to the physical elements of a crime. As statutes may displace this presumption, it is a matter of interpretation whether the prosecution must prove fault if it is not so explicitly provided.
- 2.20 In its reports, the Committee has repeatedly expressed the view that strict liability should:
- be imposed only after careful consideration of all other options;
  - be subject to defences wherever possible where contravention appears reasonable; and
  - have only limited monetary penalties.<sup>15</sup>
- 2.21 In regard to penalties, the Committee notes that the Commonwealth Attorney General's Department has developed guidelines for the use of strict liability. These

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<sup>12</sup> See Committee's comments on these Bills in *Digests* No. 16 and 5 of 2004 respectively.

<sup>13</sup> Senate Scrutiny of Bills Committee, *Annual Report 1986-87*, pp 12-13.

<sup>14</sup> Section 6.1 of the Commonwealth Criminal Code defines strict liability offences.

<sup>15</sup> See Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+) Bill 2005 (*Digest* No. 3 of 2005) and the Criminal Procedure Further Amendment (Evidence) Bill 2005 (*Digest* No. 4 of 2005).

guidelines provide that penalties for such offences should not include imprisonment and be limited to a maximum of 60 penalty units (\$6,600 for an individual or \$33,000 for a body corporate).<sup>16</sup>

- 2.22 In 6 out of the 13 bills in which strict liability provisions received comment<sup>17</sup>, the Committee referred its concerns to Parliament or wrote to the Minister seeking clarification as to the rationale for their inclusion. Frequently, the principal issue of concern was the size of the penalty given the nature of the offence.

### ***Fair trial***

- 2.23 The Committee considered 19 bills that raised fair trial issues, including the right not to incriminate oneself, the right to be presumed innocent, equality before the law<sup>18</sup> and undue delay in criminal proceedings.<sup>19</sup>
- 2.24 Under the ICCPR and the regional human rights instruments, these rights are recognised as fundamental human rights and are widely recognised as vital to the delivery of a fair trial.<sup>20</sup> These and other fair trial rights are recognised under the common law.

### ***Self-incrimination/Right to silence***

- 2.25 The privilege against self-incrimination or the related “right to silence” continues to be an issue that concerns the Committee<sup>21</sup> and it was the fourth most common issue identified by the Committee during the reporting period.
- 2.26 The Committee commented on the issue of self-incrimination 8 times during the reporting period in relation to provisions in 7 different bills.<sup>22</sup> In 5 of these instances, the Committee wrote to the Minister seeking clarification of the reason for modifying or abrogating the right or referred the provision abrogating or modifying the right to Parliament.<sup>23</sup>

<sup>16</sup> Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002.

<sup>17</sup> Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+) Bill 2005 (*Digest* No. 3 of 2005); Criminal Procedure Further Amendment (Evidence) Bill 2005 and Protection of Agricultural Production (Right to Farm) Bill 2005 (*Digest* No. 4 of 2004); Gaming Machines Amendment Bill 2005 and State Revenue Legislation Amendment Bill 2005 (*Digest* No. 8 of 2005); Health Legislation Amendment (Complaints) Bill 2004 (*Digest* No.15 of 2004).

<sup>18</sup> Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005).

<sup>19</sup> Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005).

<sup>20</sup> In relation to equality before the law, see Articles 3, 16 and 26 of the ICCPR. In relation to undue delay in criminal proceedings see Articles 14(5) of the ICCPR and in relation to right to appeal a criminal conviction see Article 14(3)(c) of the ICCPR. These rights are also recognised in the regional human rights treaties referred to above at footnote 8.

<sup>21</sup> 6% of Bills in the reporting period raised this issue. This was a specific right that was the subject of comment in Legislation Review Committee, *Operation, Issues and Future Directions* September 2003-June 2004, Report No. 1, 24 June 2004, pp 5-6.

<sup>22</sup> Health Legislation Amendment (Complaints) Bill 2004, Jury Amendment Bill 2004 and Special Commission of Inquiry (James Hardie Records) Bill 2004 (*Digest* No. 15 of 2004); Legal Profession Bill 2004 (*Digest* No. 1 of 2005); Building Professionals Bill 2005 and Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 and Criminal Assets Recovery Amendment Bill 2005 (*Digest* No. 7 of 2005).

<sup>23</sup> Health Legislation Amendment (Complaints) Bill 2004 (*Digest* No. 15 of 2004); Legal Profession Bill 2004 (*Digest* No. 1 of 2005); Building Professionals Bill 2005, Criminal Assets Recovery Amendment Bill 2005 and

- 2.27 The principle that no one can be forced to accuse him or herself is recognised as a basic human right protecting personal freedom and human dignity.<sup>24</sup> For example, Article 14(3)(g) of the ICCPR states that a person has the right “[n]ot to be compelled to testify against himself or to confess guilt”. The privilege against self-incrimination is an attribute of the wider right to a fair trial protected by Article 14(1) of the ICCPR and, to some extent, by the common law.
- 2.28 The High Court has emphasised that the right to silence is a fundamental rule of law,<sup>25</sup> which has been described 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 which they played.<sup>26</sup>
- 2.29 While the Committee has often acknowledged compelling reasons in the public interest why persons should be compelled to answer questions, it has always been concerned to seek a clear and sufficient rationale for any use of such answers against the person giving them.
- 2.30 In relation to the Legal Profession Bill 2004, the Committee also raised the importance of legislation requiring that a person be aware of their right against self-incrimination in order to preserve it. That Bill required a person to object to giving an answer before any limits were placed on the use of that answer but did not require the person be informed of the right to object. The Attorney General agreed with the Committee’s concern. He informed the Committee that, as the relevant provision was a core uniform provision in the national Model Legal Profession Bill, the change necessary to accommodate the Committee’s concerns would have to be adopted in a textually uniform format and that he would refer the amendment to the National Legal Profession Joint Working Group.<sup>27</sup>

*Reversal of onus of proof/Presumption of innocence*

- 2.31 The Committee commented on these two issues, which are closely inter-related, 7 times during the reporting period in relation to provisions in 6 different bills.<sup>28</sup> On several occasions, the Committee referred this issue to Parliament for consideration during debate.
- 2.32 In its comments on these bills, the Committee stated its view that the principle that the prosecutor bears the onus of proving beyond reasonable doubt all the elements of a criminal offence against an accused person, consistent with the presumption of

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Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 (*Digest* No. 7 of 2005).

<sup>24</sup> The historical origins and modern rationale of the privilege are explored in High Court of Australia case *EPA v Caltex* (1993) 178 CLR 447.

<sup>25</sup> *Pavic v Swaffield* (1998) 192 CLR 159.

<sup>26</sup> *R v Petty* (1991) 173 CLR 95 at 95. Nonetheless, the Court has noted that it is not a right against *incrimination*, simply against *self-incrimination*: *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 393, per Gibbs CJ, Mason and Dawson JJ.

<sup>27</sup> See report on this Bill in *Digest* No. 1 of 2005 & correspondence with the Attorney General in *Digest* No. 5 of 2005.

<sup>28</sup> Crimes Legislation Amendment (Terrorism) Bill 2004 (*Digest* No. 10 of 2004); Registered Clubs Legislation Amendment Bill 2004, Threatened Species Legislation Amendment Bill 2004, Home Building Amendment Bill 2004 (*Digest* No. 11 of 2004); Rural Workers Accommodation Amendment Bill 2005 (*Digest* No. 7 of 2005) and Terrorism Legislation Amendment (Warrants) Bill 2005 (*Digest* No. 8 of 2005).

innocence, is a key principle of the Australian criminal justice system and a fundamental human right.<sup>29</sup> This right should not be derogated from, including by reversing the onus of proof, especially if a person faces imprisonment for a conviction,<sup>30</sup> unless there are very clear and highly compelling public interest justifications for doing so.

- 2.33 The Committee further noted that when it was deemed necessary that a defendant bear the burden of disproving an element of an offence or establishing a defence, normally this should be no more than an *evidential* burden (ie, the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist).<sup>31</sup>

### **Privacy**

- 2.34 The Committee commented on the right to privacy in relation to 7 bills during the reporting period.<sup>32</sup> The increasing volume of personal data collected by government agencies, together with technological advances for storing and using that data and new means of publication, have the potential to trespass on this important right.
- 2.35 In 5 instances, the Committee referred the provision raising privacy issues to Parliament or wrote to the sponsoring Member seeking an explanation of the provision.

### **Rule of law**

- 2.36 The Committee also considered 4 bills that raised issues related to the rule of law. These issues included:
- retrospectively removing privileged communications such as lawyer client communications;<sup>33</sup>
  - overturning a judicial decision;<sup>34</sup> and
  - detaining a person without them first having committed an offence.<sup>35</sup>
- 2.37 The rule of law embodies a set of principles for “legal restraint and fairness in the use of government power”.<sup>36</sup> Certainty, consistency and stability in law are vital elements of the rule of law. The “rule of law” can be variously defined as:
- the principle that every member of a society, even a ruler, must follow the law;
  - a legal system in which rules are clear, well-understood, and fairly enforced;

<sup>29</sup> See for example, article 11(1), Universal Declaration of Human Rights and Article 14(2) of the ICCPR, to which Australia became a party in 1980. Also, see Article 6(2) of the ECHR.

<sup>30</sup> Crimes Legislation Amendment (Terrorism) Bill 2004 and the Sydney Opera House Trust Amendment Bill 2004 (*Digest* No. 10 of 2004).

<sup>31</sup> *Legislation Review Digest* No. 10 of 2004, pp 32 - 36.

<sup>32</sup> Child Protection (Offenders Registration) Amendment Bill 2004 (*Digest* No. 10 of 2004); State Records Amendment Bill 2004 (*Digest* No. 13 of 2004); Crimes (Administration of Sentences) Amendment (Parole) Bill 2004 (*Digest* No. 15 of 2004); Home Building Amendment Bill 2004 (*Digest* No. 16 of 2004); Law Enforcement (Powers and Responsibilities) Amendment (In-car video systems) Bill 2004 (*Digest* No. 1 of 2005); State Revenue Legislation Amendment Bill 2005 and Terrorism Legislation Amendment (Warrants) Bill 2005 (*Digest* No. 8 of 2005).

<sup>33</sup> Special Commission of Inquiry (James Hardie Records) Bill 2004 and Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004

<sup>34</sup> Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005

<sup>35</sup> Child Protection (Offenders Registration) Amendment Bill 2004.

<sup>36</sup> G de Q Walker, *The Rule of Law* (1988), p 3.

- the doctrine that all people are equal before the law, and that the government is subject to the law;
- the absence of arbitrary executive power; and
- the belief that there is a universal standard of justice, equality and impartiality, against which all governments and governmental actions may be measured.

2.38 In its consideration of the Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005,<sup>37</sup> the Committee made a number of comments relating to the rule of law, including:

- that regular changes in the rules relating to criminal punishment, particularly where the changes appear to be prompted by political expediency in relation to specific controversies concerning particular individuals, risk undermining confidence in the integrity of the law and the legal system;
- so-called *ad hominem* legislation infringes a person's right to expect, in accordance with the rule of law and the separation of powers, that laws will be general in nature and not apply only to one person, and will not usurp judicial power;
- the separation of the legislative and judicial powers, while not an explicit requirement of the Constitution of New South Wales, is an important protection against political interference in personal rights, particularly in relation to criminal matters and is, therefore, a key rule of law principle; and
- laws the purpose of which is to ensure a person's ongoing imprisonment is a trespass on the person's right to have his rights determined by an independent arbiter according to the rule of law.

2.39 The Committee takes the view that respect for the rule of law is crucial to respect for, and enforcement of, personal rights and liberties. The Universal Declaration of Human Rights expressly recognises the relationship between the rule of law and the protection of human rights and that recognition is also implicit in the Australian Constitution.<sup>38</sup>

### ***Other issues regarding trespass of rights and liberties***

2.40 Other issues on which the Committee repeatedly commented during the reporting period included:

- broad search and seizure powers [5 bills];<sup>39</sup>
- the denial of compensation rights [3 bills];<sup>40</sup>

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<sup>37</sup> Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005).

<sup>38</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>39</sup> Nurses and Midwives Amendment (Performance Assessment) Bill 2004 (*Digest* No. 15 of 2004); Legal Profession Bill 2004 (*Digest* No. 1 of 2005); Building Professionals Bill 2005 (*Digest* No. 6 of 2005); Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 (*Digest* No. 7 of 2005); Terrorism Legislation Amendment (Warrants) Bill 2005 (*Digest* No. 8 of 2005).

<sup>40</sup> Smoke-free Environmental Amendment Bill 2004 (*Digest* No. 15 of 2004); Civil Liability Amendment (Food Donations) Bill 2004 (*Digest* No. 1 of 2005); Passenger Transport Amendment (Maintenance of Bus Service) Bill 2005 (*Digest* No. 8 of 2005).



- excessive punishment [2 bills];<sup>41</sup>
- access to Government information (eg, restriction of the Freedom of Information legislation) [2 bills];<sup>42</sup> and
- insufficient protection of children’s rights [2 bills].<sup>43</sup>

### **Insufficiently defined administrative powers (*Legislation Review Act 1987, s 8A(1)(b)(ii)*)**

2.41 The Committee drew attention to the lack of criteria the Director-General was to apply when implementing step-in arrangements for bus contracts under the Passenger Transport Amendment (Maintenance Of Bus Service) Bill 2005.

2.42 The Committee also commented on 4 bills that conferred administrative powers with the potential to significantly trespass on personal rights and liberties but which provided little or no criteria as to whom such powers could be given.<sup>44</sup> Such powers included requiring information and records, entering and searching premises, detaining vehicles, and the imposition of fines.

### **Non-reviewable decisions (*Legislation Review Act 1987, s 8A(1)(b)(iii)*)**

2.43 The Committee commented on 6 bills removing or modifying judicial review rights<sup>45</sup> and 2 bills excluding merits review.<sup>46</sup>

### **Delegation & Parliamentary scrutiny of legislative power (*Legislation Review Act 1987, s 8A(1)(b)(iv & v)*)**

#### ***Delayed Commencement***

2.44 The issue on which the Committee commented most frequently was commencement of bills by proclamation.<sup>47</sup> Providing for a bill to commence on a date or dates to be proclaimed delegates to the executive the power to determine when (and therefore whether) an Act has, or parts of an Act have, legal effect.

<sup>41</sup> Child Protection (Offenders Registration) Amendment Bill 2004 (*Digest* No. 10 of 2004); Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005).

<sup>42</sup> State Records Amendment Bill 2004 (*Digest* No. 13 Of 2004); Local Govt Amendment Bill 2005 (*Digest* No. 8 of 2005).

<sup>43</sup> Juvenile Offenders Legislation Amendment Bill 2004 (*Digest* No. 17 of 2004); Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005).

<sup>44</sup> Threatened Species Legislation Amendment Bill 2004 (*Digest* No. 11 of 2004); Stock Medicines Amendment Bill 2004 (*Digest* No. 12 of 2004); Road Transport (General) Bill 2004 (*Digest* No. 1 of 2005); Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 (*Digest* No. 7 of 2005).

<sup>45</sup> Threatened Species Legislation Amendment Bill 2004 (*Digest* No. 11 of 2004); Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004 (*Digest* No. 1 of 2005); Criminal Appeal Amendment (Jury Verdicts) Bill 2004 (*Digest* No. 3 of 2005); Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005 (*Digest* No. 6 of 2005); Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 (*Digest* No. 7 of 2005); Passenger Transport Amendment (Maintenance of Bus Service) Bill 2005 (*Digest* No. 8 of 2005).

<sup>46</sup> Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004 (*Digest* No. 1 of 2005); Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 (*Digest* No. 7 of 2005).

<sup>47</sup> The Committee raised this issue with respect to 42 bills during the reporting period.

2.45 While the Committee remains of the view that any open discretion to commence an Act should be justified, in prioritising its efforts, it resolved in April 2005 to comment on such provisions only when there is an issue of particular concern.

***Other issues regarding the delegation of legislative powers***

2.46 Some of the bills the Committee considered over the last year included significant regulation-making powers. In some instances, the Committee was concerned that the breadth of the regulation making power may not ensure a proper level of parliamentary oversight and control for significant legislative provisions.

2.47 For example, in its consideration of the Redfern-Waterloo Authority Bill 2005,<sup>48</sup> the Committee commented that the Bill provided for the making of regulations that can amend, omit, alter or entirely replace a fundamental component of the legislative scheme. The Committee considered that this may be an undue delegation of legislative power and referred the question to the Parliament.

2.48 In other examples, the Committee decided that the delegation of legislative power was not undue.<sup>49</sup>

2.49 The Committee also commented on the following delegations of legislative power:

- so-called “Henry VIII” clauses (which allow an Act to be amended by regulation) [6 bills];<sup>50</sup>
- providing for taxes or levies to be determined by the executive [4 bills];<sup>51</sup>
- other matters which should be regulated by Parliament, such as key statutory definitions or the persons or bodies to which an Act is to apply [2 bills];<sup>52</sup> and
- the issue of guidelines with legislative force by the executive without any obligation for these guidelines to be tabled in Parliament or to be made subject to disallowance [2 bills].<sup>53</sup>

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<sup>48</sup> See *Digest* No. 16 of 2004.

<sup>49</sup> See for example, the Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005 (*Digest* No. 6 of 2005) and the Legal Profession Bill 2005 (*Digest* No. 8 of 2005).

<sup>50</sup> Redfern-Waterloo Authority Bill 2004 (*Digest* No. 16 of 2004); Water Efficiency Labelling and Standards (New South Wales) Bill 2005 (*Digest* No. 3 of 2005); Civil Procedure Bill 2005 (*Digest* No. 5 of 2005); Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005 (*Digest* No. 6 of 2005); Drug Misuse and Trafficking Amendment Bill 2005 and Legal Profession Amendment Bill 2005 (*Digest* No. 8 of 2005).

<sup>51</sup> Agricultural Livestock (Disease Control Funding) Amendment Bill 2004 (*Digest* No. 10 of 2004); Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004 and Road Transport (General) Bill 2004 (*Digest* No. 1 of 2005); Energy Administration Amendment (Water and Energy Savings) Bill 2005 (*Digest* No. 5 of 2005).

<sup>52</sup> Classification (Publications, Films and Computer Games) Enforcement Amendment (Uniform Classification) Bill 2004 (*Digest* No. 12 of 2004); Energy Administration Amendment (Water and Energy Savings) Bill 2005 (*Digest* No. 5 of 2005).

<sup>53</sup> Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004 (*Digest* No. 1 of 2005); Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 (*Digest* No. 7 of 2005).

## Chapter Three - Scrutiny of Regulations

### Regulations considered

- 3.1 During the reporting period, the Committee considered 282 regulations.<sup>54</sup> Of these, 60 were the subject of more detailed analysis by the Committee, leading to follow-up action on 20 regulations. During the period, such action took the form of writing to the responsible Minister seeking clarification or explanation of the issues of concern or amendment of the legislation. In some instances, the Committee's correspondence refers to issues raised by interested groups.<sup>55</sup> All correspondence was subsequently published in the *Digest*.
- 3.2 The Committee did not recommend the disallowance of any regulation or draw the special attention of Parliament to any regulation during the reporting period.

### Issues arising in regulations considered

- 3.3 Issues which the Committee raised in relation to regulations included:
- trespasses on the right to privacy (5 regulations);<sup>56</sup>
  - excessive punishment (2 regulations);<sup>57</sup>
  - limitation or removal of review of administrative decisions on the merits (1 regulation);<sup>58</sup>
  - objective of the regulation could have been reached by more effective means (3 regulations);<sup>59</sup>
  - form or intention of regulation requires elucidation (5 regulations);<sup>60</sup> and
  - adverse impact on business (3 regulations).<sup>61</sup>

<sup>54</sup> This compares with 480 regulations considered by the Committee over the 14-month period between May 2003 and 30 June 2004.

<sup>55</sup> For example, see correspondence about this Regulation in *Digest* No. 12 of 2004, pp 32-49.

<sup>56</sup> Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003 (*Digests* Nos. 13 and 17 of 2004), Crimes (Administration of Sentences) Amendment (Testing of Correctional Staff) Regulation 2004 (*Digest* No. 17 of 2004), Stock Diseases (General) Regulation 2004 (*Digest* No. 1 of 2005), Passenger Transport (Drug and Alcohol Testing) Regulation 2004 (*Digest* No. 2 of 2005) and Institute of Teachers Regulation 2005 (*Digest* No. 7 of 2005).

<sup>57</sup> Sydney Olympic Park Amendment Regulation 2004 (*Digest* No. 1 of 2005) and the Centennial Park and Moore Park Trust Regulation 2004 (*Digest* No. 5 of 2005).

<sup>58</sup> Occupational Health and Safety Amendment (Transitional) Regulation 2004 (*Digest* No. 6 of 2005).

<sup>59</sup> Environmental Planning and Assessment Amendment (Building Sustainability Index: BASIX) Regulation 2004 (*Digest* No. 17 of 2004), Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004 (*Digest* No. 1 of 2005) and Passenger Transport (Drug and Alcohol Testing) Regulation 2004 (*Digest* No. 2 of 2005).

<sup>60</sup> Children's Services Regulation 2004 (*Digest* No. 12 of 2004), Architects Regulation 2004 (*Digest* No. 1 of 2005), Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004 (*Digest* No. 1 of 2005), Forestry Regulation (*Digest* No. 1 of 2005) and Passenger Transport (Drug and Alcohol Testing) Regulation 2004 (*Digest* No. 2 of 2005).

<sup>61</sup> Environmental Planning and Assessment Amendment (Building Sustainability Index: BASIX) Regulation 2004 (*Digest* No. 17 of 2004), Architects Regulation 2004 (*Digest* No. 1 of 2005) and Stock Diseases (General) Regulation 2004 (*Digest* No. 1 of 2005).

- requirements of the *Subordinate Legislation Act 1989* not followed when making the relevant regulation or submitting required regulatory impact documentation to the Committee (9 regulations).<sup>62</sup>
- 3.4 Some of the comments made by the Committee in relation to these issues echoed comments made on the same issues in the Committee's consideration of bills, for example in relation to privacy rights and the removal or modification of appeal rights.
- 3.5 A number of regulations raised several of the issues on which the Committee may comment under section 9 of the Act. For example, in its consideration of the Centennial Park and Moore Park Trust Regulation 2004,<sup>63</sup> the Committee raised the following issues:
- the Regulation provides for excessive punishment that is disproportionate to the seriousness of the offences under the Regulation and which are inconsistent with penalties for similar offences under other legislation;<sup>64</sup>
  - in an analysis of costs and benefits in a Regulatory Impact Statement, a fine is, in economic terms, a transfer and is not accompanied by a contribution to production and so, in itself, provides no net benefit to the community;
  - that the purpose of a Regulatory Impact Statement is to determine net community benefits rather than the benefit to any particular agency; and
  - the Regulation is inconsistent with, or is outside, the general objects of the Act under which the Regulation is made.
- 3.6 In another example, the Committee raised concerns regarding whether the Children's Services Regulation 2004:<sup>65</sup>
- would have a serious and adverse affect on business;
  - was inconsistent with the objectives, and conflicted with provisions, of the Act under which it is made; and
  - had been the subject of sufficient public consultation as required under the *Subordinate Legislation Act 1989*.

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<sup>62</sup> Environmental Planning and Assessment Amendment (Building Sustainability Index: BASIX) Regulation 2004 (*Digest* No. 17 of 2004), Architects Regulation 2004 (*Digest* No. 1 of 2005) and Centennial Park and Moore Park Trust Regulation 2005 (*Digest* No. 5 of 2005). Overdue Regulation Impact Statements on six regulations were the subject of correspondence to the responsible Member: Dental Practice Regulation 2004, Election Funding Regulation 2004, Game and Feral Animal Control Regulation 2004, Sporting Injuries Insurance Regulation 2004, Wild Dog Destruction Regulation 2004 and the Zoological Parks Regulation 2004. On 3 December 2004, the Premier wrote to the Committee to advise that he will take steps to remind all Ministers of the time limits that apply for the provision of these documents to the Committee.

<sup>63</sup> Correspondence on this Regulation between the Committee and the sponsoring Minister to date was published in *Digest* No. 5 of 2004, pp 40-44.

<sup>64</sup> For example, clauses 16(n) and 18(b) of the *Centennial Park and Moore Park Trust Regulation 2004* imposes a 10 penalty unit maximum fine (\$1,100) for depositing or throwing any article or substance into any lake, pond, stream or ornamental water, or bathing, wading, washing or swimming in any lake, pond, stream or ornamental water (other than the fountain located in the Centennial Park Café forecourt). In contrast, s 7 of the *Summary Offences Act 1988* imposes only a maximum penalty of 4 penalty units (\$440) for damaging, entering or causing any foreign material to enter, a fountain.

<sup>65</sup> Correspondence between the Committee, Child Care NSW and the sponsoring Minister on this Regulation was published in *Digest* No. 12 of 2004.

## Chapter Four - Operational issues

### Membership of Committee

- 4.1 During the year the composition of the Committee changed as follows.
- 4.2 Mr Barry Collier MP (Chairman) resigned as Chairman and left the Committee on 22 September 2004. Ms Marianne Saliba MP (Vice-Chairman) acted as Chairman from that day until 26 October 2004, when she left the Committee.
- 4.3 Mr Peter Primrose MLC was elected as Chairman and Ms Virginia Judge MP was elected as Vice-chairman on 26 October 2004. Ms Linda Burney MP joined the Committee on 22 September 2004 and Ms Noreen Hay MP joined the Committee on 26 October 2004.

### Operational Issues

#### Time allowed for consideration of bills

- 4.4 Last year, the Committee reported that one of the most significant challenges it faced was the timeframe within which it can consider bills.<sup>66</sup> This remains a significant challenge for the Committee.
- 4.5 The Legislative Assembly's Standing Order 198(11) and the Legislative Council's Standing Order 137(3) require only a 5 clear day adjournment of the debate after the mover's second reading speech. The five-day period includes weekends.
- 4.6 To allow its reports on bills to be available to Members in time for the second reading debate, the Committee tables its *Digests* at or before the commencement of the Tuesday sitting. To meet this deadline, briefing papers on bills for such meetings need to be completed by Monday at the latest. This leaves the Committee with very little time for full consideration of bills, especially in consecutive sitting weeks.
- 4.7 Other Australian Parliaments follow a different procedure. As reported last year, the Queensland Parliament extended its second reading adjournment period from six to 11 sitting days after a 1998 report from its bills scrutiny committee indicating that the six day period was not workable.<sup>67</sup> In Victoria, debate on bills introduced into the Legislative Assembly is usually adjourned for two weeks. This is also the general practice in the Victorian Legislative Council.<sup>68</sup> The practice of the Federal Parliament is normally to adjourn bills to the next period of sittings, which is usually one or two months later.
- 4.8 The practice in the United Kingdom is to have at least two weekends between printing and second reading, and in New Zealand to adjourn bills for 6 months. These jurisdictions also provide for expedited procedures when a bill needs to be passed urgently.

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<sup>66</sup> Legislation Review Committee, *Operation, Issue and Future Directions September 2003-June 2004*, Report No. 1, 24 June 2004, p 8.

<sup>67</sup> Queensland Scrutiny of Bills Committee, *The scrutiny of bills within a restrictive timetable*, Report No. 7, tabled 18 March 1998, <<http://www.parliament.qld.gov.au/view/committees/documents/SLC/reports/slcr07.pdf>> (accessed 28 July 2005).

<sup>68</sup> See Victorian Scrutiny of Acts and Regulations Committee, <<http://www.parliament.vic.gov.au/sarc/role.htm>> (accessed 28 July 2005). The Western Australian Legislation Committee does not scrutinise all bills, only those referred to it by the Legislative Council.

Operational issues

- 4.9 The Committee remains of the view that amending Legislative Assembly Standing Order 198 and Legislative Council Standing Order 137, or sessional orders, to provide for a longer adjournment period for the second reading debate would greatly assist the Committee in fulfilling its scrutiny function under the Act. It would also assist Members who would benefit both from the longer period in which to consider bills and the more detailed consideration the Committee would be able to give to bills in its reports to Parliament.
- 4.10 The Committee notes that, as a general rule, legislation was introduced earlier in each sitting week than over the previous year. This made it easier for the Committee to consider and report to Parliament in time for second reading debates. However, the Committee also notes that a large number of bills have tended to be introduced near the very end of sittings. For example, over the course of the first 5 sitting weeks in 2005, 28 bills were introduced. In the final 3 sitting weeks before the winter recess, 40 bills were introduced. This end of sittings rush to introduce legislation makes it very difficult for the Committee to fulfil its scrutiny function under the Act.

**Protective disallowance**

- 4.11 Last year the Committee reported on the use of “protective disallowance” motions to ensure that it had sufficient time to consider fully regulations subject to disallowance as required under section 9 of the Act.<sup>69</sup>
- 4.12 Regulations are subject to disallowance in each House for 15 sitting days after the regulation is tabled in that House. If a notice of motion to disallow a regulation is given during that time, the 15-day period is extended until the notice of motion is dealt with by the House or withdrawn.
- 4.13 When considering regulations, the 15-day period can be quite arbitrary. Most importantly, it means that the Committee has the least time for considering regulations when the Parliament is sitting frequently. This is also the time when the Committee is most occupied with the consideration of bills.
- 4.14 Section 9 of the Act was amended by the *Statute Law Miscellaneous Provisions Act 2005*, which received Royal Assent on 1 July 2005. This amendment clarifies that the Committee may consider and make reports to Parliament on a regulation that has ceased to be subject to disallowance if the Committee has, during the disallowance period, resolved to review and report on the regulation.<sup>70</sup> This clarification removes the need for a protective notice of motion to disallow a regulation merely to extend the time over which the Committee can collect evidence on the regulation.
- 4.15 The Committee notes that occasions may still arise where a protective notice of motion to disallow a regulation may be required to preserve the Parliament’s ability to disallow a regulation. This could occur if, for example, the Committee is considering recommending the disallowance of a regulation but is waiting for a response to its concerns prior to completing its report to the Parliament.

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<sup>69</sup> Legislation Review Committee, *Operation, Issue and Future Directions September 2003-June 2004*, Report No. 1, 24 June 2004, p 9.

<sup>70</sup> The Committee had recommended an amendment to this effect in its report *Operation, Issues and Future Directions September 2003-June 2004*, Report No. 1, 24 June 2004, pp 9-10. The Committee published correspondence between itself and the Premier in relation to the review of regulations in *Digest* No. 11 of 2004, pp 41- 48.

4.16 The Committee notes again that a “protective notice of motion to disallow” is a device that has long and often been used by the Senate Regulations and Ordinances Committee. As noted in *Odgers Australian Senate Practice*:

The Standing Committee on Regulations and Ordinances follows a practice of giving notices of motions to disallow regulations or other subordinate legislation within the prescribed period, and then withdrawing the notices after correspondence with the responsible minister satisfies the committee’s concerns.<sup>71</sup>

4.17 The giving of such a notice in no way reflects a view of the Member giving the notice, or of the Committee as a whole, that the regulation in question should be disallowed. It is merely a device to keep alive the Parliament’s ability to disallow a regulation once it has received the Committee’s final report on the regulation concerned.

### Improvements to the Legislation Review Digest

4.18 The Committee made several changes to the structure of the *Digest* and added some new sections. From 29 April 2005, each *Digest* has included a guide on how to use it and a summary of conclusions. The Committee hopes that these improvements will assist Members and it welcomes any further suggestions on ways to make the *Digest* more user-friendly.

4.19 Over the last year, the Committee has also focused its energies on improving knowledge and dissemination of the *Digest*, including through electronic means. In addition to providing all Members with a copy, the *Digest* is disseminated in hardcopy to 63 recipients, including key media organisations, scrutiny of bills committees in other jurisdictions, libraries, representatives of community organisations and members of the community. The *Digest* is also disseminated electronically to 55 recipients. Each *Digest* is also available on the Committee’s website.

### Discussion Papers

4.20 The experience of the Committee reviewing bills to date has revealed a number of issues that arise repeatedly and which warrant further and detailed consideration. These include:

- the right to silence and the presumption of innocence;
- the onus of proof;
- strict and absolute liability for offences;
- the delegation of administrative powers;
- the delegation of legislative powers;
- commencement;
- merits review and judicial review;
- the right to privacy; and
- the rule of law.

4.21 In addition to identifying the points of principle involved, how best to respond to such issues depends on an understanding of how the relevant provision operate in New South Wales law and society and of the values held by the community. To better

<sup>71</sup> Harry Evans (ed), *Odgers’ Australian Senate Practice*, 11<sup>th</sup> ed., Commonwealth of Australia, 2004, p 336.

Operational issues

inform the Committee of such matters, the Committee has decided to produce occasional discussion papers. The Committee will seek comment from the Government, Members of Parliament and the public with a view to developing more clearly defined standards by which to test legislative proposals.



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## Chapter Five - Statistics

5.1 The following statistics relate to the Committee during the 2004-05 reporting period.

5.2 During the reporting period, the Committee has:

- met 17 times;
- reported on 132 bills in 16 tabled *Legislation Review Digests*;
- commented on 88 bills (ie, two-thirds of all introduced bills) under the criteria in s 8A of the *Legislation Review Act 1987*;
- written to Ministers or Members for clarification or justification of issues that relate to the s 8A criteria in relation to 30 bills;
- referred 47 issues in 33 bills that relate to s 8A criteria to Parliament for its consideration; and
- had its *Digest* reports referred to 52 times by Members in the course of Parliamentary debate in relation to 32 bills.

5.3 The Committee has also:

- considered 282 regulations subject to disallowance, including 60 regulations that were the subject of detailed analysis;
- considered 27 proposed postponements of the automatic repeal of a regulation; and
- published correspondence relating to 20 regulations raising issues under s 9 of the Act.

## Chapter Six - Outcomes

- 6.1 The function of the Committee is to assist the Parliament's consideration of bills and regulations in the terms set out in sections 8A and 9 of the Act. Indicators of the Committee's effectiveness in this regard include the influence the Committee has on debate and the changes to bills, regulations or administrative practices that result from the Committee's reports and correspondence. Ultimately, however, the effectiveness of the Committee largely rests on the extent to which it encourages the thorough consideration of the issues under its terms of reference in the preparation of bills and regulations.
- 6.2 In the reporting period, Members used the Committee's *Digests* in a variety of ways. Sponsoring Ministers and Government Members referred to the *Digest* in discussing issues raised by bills and in commending bills to Parliament.<sup>72</sup> In some instances, Members endorsed the Committee's comments in the course of expressing support for a bill or indicating that they would not be opposing its passage.<sup>73</sup> With respect to some bills, Members referred to issues of concern as reported in the *Digest* and requested the sponsoring Minister or Member to answer those concerns in debate.<sup>74</sup>
- 6.3 Two Bills were amended in the Legislative Council in explicit response to the Committee's reports and were passed by both Houses, as amended. One amendment was made to a strict liability offence in the Health Legislation Amendment (Complaints) Bill 2004.<sup>75</sup> The other amendment was made to a commencement provision in the Motor Accidents Legislation Amendment Bill 2004.<sup>76</sup>
- 6.4 The Attorney General agreed on improvements that could be made to the NSW *Legal Profession Act 2004* to better protect the privilege against self-incrimination in response to the Committee's concerns.<sup>77</sup> Privacy concerns raised in relation to another bill resulted in the Attorney General acknowledging those concerns and advising that they would be explicitly dealt with in guidelines.<sup>78</sup>
- 6.5 Privacy and other concerns raised in response to the Committee's scrutiny of regulations led to some Ministerial commitments to review particular provisions in those regulations. For example, in response to the Committee's concern about the

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<sup>72</sup> See, for example, comments made by the Hon R J Debus, MP, Attorney General, on the Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005 (Legislative Assembly *Hansard*, 24 May 2005).

<sup>73</sup> See, for example, comments made by the Hon Chris Hartcher, Shadow Minister for Industrial Relations on the Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005 (Legislative Assembly *Hansard*, 24 May 2005). See also comments made by Mr Andrew Tink MP, Shadow Attorney General and the response by the Hon R J Debus MP, Attorney General, on the Classification (Publications, Films and Computer Games) Enforcement Amendment (Uniform Classification) Bill 2004 (Legislative Assembly *Hansard*, 20 October 2004).

<sup>74</sup> For recent examples, see the debate on the Building Professionals Bill 2005 reported on in *Digest* No. 7 of 2005 (Legislative Assembly *Hansard*, 8 June 2005) and the debate on the Local Government Amendment Bill 2005 reported on in *Digest* No. 8 of 2005 (Legislative Council *Hansard*, 22 June 2005).

<sup>75</sup> This amendment was moved by the Hon John Della Bosca MLC and stated to be in response to the Committee's report in *Digest* No. 15 of 2004 (Legislative Council *Hansard*, 17 November 2004).

<sup>76</sup> The Hon John Della Bosca MLC noted, in moving this amendment, that this "adresse[d] the concerns raised by the Legislation Review Committee in its assessment of the bill" (Legislative Council *Hansard*, 21 September 2004).

<sup>77</sup> See *Digest* No. 5 of 2005, pp 23-28 and discussion of this issue above in Chapter 2, paragraphs 2.25-2.30.

<sup>78</sup> See Crimes (Administration of Sentences) Amendment (Parole) Bill 2004 (*Digest* No. 16 of 2004). In response to the Committee's concerns with this Bill, the Attorney General advised that he would require the Chairperson of the Parole Authority to include privacy as a matter to be covered by guidelines to be prepared under the Bill (see *Digest* No. 17 of 2004, pp 30-34).

breadth and vagueness of the information disclosure provisions on privacy rights under the Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003, the Parliamentary Secretary for Roads advised that the Roads and Traffic Authority would amend the relevant provision “to specify the class of person to whom information must be provided”.<sup>79</sup>

- 6.6 In other instances, sponsoring Ministers have agreed to take executive action in response to the Committee’s concerns about the impact of regulations on personal rights. For instance, Ministers have advised that they will initiate reviews on the impact of a regulation on a particular group of rights holders<sup>80</sup> or will modify information collection procedures.<sup>81</sup>
- 6.7 In other ways, the practice of the Committee is affecting parliamentary and administrative practice. Increasingly, second reading speeches state that consideration has been given to a bill’s impact in light of the section 8A criteria for scrutiny that the Committee uses.<sup>82</sup>

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<sup>79</sup> Correspondence on this regulation was published in *Digest* No. 13 of 2004, pp 38-39 and *Digest* No. 17 of 2004, pp 45-46.

<sup>80</sup> See correspondence on the *Forestry Regulation 2004* (*Digest* No. 1 of 2005), in relation to which the Committee expressed concern about the impact on private property rights of leaseholders in forestry areas.

<sup>81</sup> See correspondence on the *Institute of Teachers Regulation 2005* published in *Digest* No 7 of 2005, pp 76-79.

<sup>82</sup> For example, the second reading speeches for the Gambling (Two-up) Amendment Bill 2005 (Legislative Assembly *Hansard*, 25 May 2005) and the Gaming Machines Amendment Bill 2005 (Legislative Assembly *Hansard*, 9 June 2005) respectively.

## Chapter Seven - Other activities of the Committee

### Study Tour

- 7.1 The Legislation Review Committee sent a delegation to South Africa, the United Kingdom and Strasbourg (Council of Europe) from 3 to 18 July 2005 to examine the promotion of human rights through the law in those jurisdictions. The delegation comprised Mr Barry Collier MP, then the Chair of the Committee, and Mr Russell Turner MP. The Committee Manager, Mr Russell Keith, accompanied them. The findings and details of this study tour are in the Committee's Report No 2, *Study Tour Report: Human Rights and the Law in: South Africa, United Kingdom and the Council of Europe*, which was tabled on 18 February 2005.

### Conferences

- 7.2 The Chairman, the Hon Peter Primrose MLC, gave a paper to the "Legislative Scrutiny in a Time of Rights Awareness", Ninth Australasian and Pacific Conference on Delegated Legislation and Sixth Australasian and Pacific Conference on the Scrutiny of Bills, held in Canberra, 2-4 March 2005. Due to the concurrent sitting of the Legislative Council, the paper was presented on the Chairman's behalf by the Committee Manager.

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## Chapter Eight - Conclusion

- 8.1 Since the commencement of its review of bills function in September 2003, the Legislation Review Committee has achieved a significant output in terms of the number of bills considered, *Digests* produced, and the number of meetings held. It has also developed a highly effective and timely process by which it considers the large volume of legislation introduced and reports its findings to the Parliament in time for the second reading debate.
- 8.2 While the impact of the Committee's work is difficult to measure, there are encouraging signs that its work is having an impact on debate on bills with Members frequently referring to, or quoting from, reports on bills in its *Digests*. This indicates that the *Digest* is being used by Members to help inform the debate in both Houses.
- 8.3 In addition, as described in chapter 6 above, on a number of occasions Ministers have accepted the comments of the Committee and have amended their legislation accordingly or have indicated their intention to take administrative action to meet the Committee's concerns.
- 8.4 In the coming year, the Committee hopes to continue to advance its understanding of the issues on which it comments to better enable the Parliament to determine when a bill might trespass unduly on personal rights and liberties. It also hopes to influence sponsoring Ministers and their departments and the legislative drafters to consider the human rights impact of legislation at the policy formulation and drafting stages.
- 8.5 Finally, in fulfilling its scrutiny function under the Act, the Committee hopes to continue to be of assistance to Members in their consideration of bills and regulations, improve the quality of NSW legislation and raise awareness of, and respect for, fundamental human rights.