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Unproclaimed legislation — the delegation of legislative power to the executive

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Introduction

A bill, having passed both houses of the NSW parliament and received the Governor's assent, does not necessarily come into immediate effect as a law. An assented bill is deemed to commence on the date of assent, 28 days after assent, or on a specified later date. Some bills however, through the commencement provision found in clause 2, specify that they are to commence on another day in a Governor's proclamation published in the *Government Gazette*. Commencement by proclamation, otherwise referred to as the proclamation device, allows a government to delay the operation of an act until administrative arrangements or delegated legislation are in place to allow the statute to operate. Although this may be administratively convenient, it confers a great power to the executive, effectively allowing the ministry to determine when, if ever, a law or part of a law duly passed by the parliament will have effect.¹ Some commentators, including a former NSW Auditor-General and a former Deputy Clerk of the Australian Senate, have argued that the proclamation device provides an executive, irrespective of political persuasion, the ability to create for itself a loophole whereby the legislative decisions of parliament can effectively be ignored.²

The NSW parliament

To examine the practical effects of the proclamation device, it is necessary to very briefly detail the composition of the NSW legislature and its two distinct houses: the Legislative Assembly, where members are elected via a preferential voting system, through which to gain a seat requires the support of at least half of an electorate following the distribution of preferences; and the Legislative Council, where members are elected through proportional representation, so that the number of seats won by a party is effectively proportionate to the number of votes received. The party or coalition of parties holding the majority of seats in the Legislative

Assembly forms government.³ The rationale for dividing the state's law making apparatus into two differently elected and constituted bodies is to safeguard the legislative process by preventing it from being the exclusive domain of any one political party. In other words, to ensure that a divergence of views and considerations, representative of the whole community, have a voice in shaping the laws that govern the state.⁴ If voting patterns in NSW are any guide, its citizens are against the complete control of their parliament by any one political faction. Since 1988, no political party or formal coalition has held a concurrent majority in both houses, meaning all governments have had their legislation subject to rigorous parliamentary scrutiny and debate. The proclamation device however, as this article will demonstrate, potentially challenges community trust in a diverse legislature when one notes the issue identified above — executives have the option of determining when, or even if, certain laws, otherwise already agreed upon by the parliament, can begin.

The passage of and assent to legislation

The law making process in NSW is similar to that of other Australian and westminster-style parliaments.⁵ Broadly a bill, once drafted, is introduced in one house where it must pass through four stages: introduction and first reading; second reading; consideration in committee of the whole (if required); and third reading. Bills are more often introduced in the Legislative Assembly because, for government bills, it is where a ruling party or coalition of parties has the majority required to pass a bill quickly if desired. It is also the house where the majority of ministers sit — currently 19 out of 22. The two houses have the same powers regarding bills aside from 'money bills' which must be introduced in the Legislative Assembly. If a bill passes the first house it moves to the second, which is typically the Legislative Council acting as a house of review, where it must again pass each stage. Amendments to bills are more likely to be introduced in the Legislative Council as there is a greater chance of them being agreed to. If a member, typically an opposition or crossbench member, wishes to amend a bill, the upper house examines it clause by clause and amendments may be proposed and voted on. If any amendments are successful the bill is amended to reflect the change. A bill having passed the Council returns to the Assembly. If a bill is returned with amendments, the Assembly will either agree to the amendments or exchange messages with the Legislative Council until the wording is agreed. In the event of a deadlock between the two houses a referendum, provided for by Section 5B of the *Constitution Act 1902*, may be used to ultimately resolve the issue.

In terms of the procedures for assent, the relevant provisions are found in section 8A of the *Constitution Act 1902*; and standing orders 239 of the Legislative Assembly and 160 of the Legislative Council respectively. The provisions relating to the commencement of Acts can be found in section 23 (1) of the *Interpretation Act 1987*. Section 8A of the *Constitution Act 1902* provides that every bill having passed the Legislative Assembly and the Legislative Council shall be presented to the Governor for royal assent and that once assented to will become an act of the

legislature. The standing orders of both houses require the Clerks to certify the bill before being presented to the Governor for assent. The Governor, having assented to the bill, will forward a message to both houses notifying assent.⁶ The *Interpretation Act 1987* specifies that a bill once assented to will commence 28 days after assent, the date of assent, a specified later date, or on another day through a Governor's proclamation.⁷ A proclamation is made at the request of the relevant minister within the Executive.⁸ As with the passage of the bills, the procedures for assent in NSW are broadly similar to that of other Australian jurisdictions, although there is a difference regarding the commencement of legislation by proclamation. All states and territories, as well as the Commonwealth, provide that legislation can commence by proclamation. However, some jurisdictions also have provisions whereby, if an act or section of an act is left unproclaimed for a specified period, it will automatically come into effect, whereas other jurisdictions such as NSW have no such provision, meaning legislation can remain unproclaimed indefinitely. The jurisdictions where acts commence by proclamation, however, come into effect automatically if they remain unproclaimed for a specific period are: Victoria (12 months), South Australia (two years), the Australian Capital Territory (six months) and the Commonwealth of Australia (six months or 12 months, with the period specified in each individual Act).⁹ In Queensland, acts which are to commence by proclamation come into effect the day after the first anniversary of their passage unless within one year of the date of assent a regulation is issued to extend the period before commencement to no more than two years.¹⁰ The Commonwealth previously operated without a system for the automatic commencement for unproclaimed Acts but, as noted by *Odgers' Australian Senate Practice*, in the late 1980s adopted an automatic commencement provision 'following criticism of the misuse of the power to proclaim legislation',¹¹ the criticism being '... concern over delays in proclaiming Acts and the reasons given for those delays... (observations) that legislation stated by ministers to be urgent at the time of its passage through the Senate was often not proclaimed for months or years after assent'.¹² Standing Order 139 (2) of the Australian Senate also requires a list to be tabled annually, detailing all provisions of acts which are to commence by proclamation but have not been proclaimed, together with reasons for their non-proclamation and a timetable for their operation.¹³ *The Annotated Standing Orders of the Australian Senate* notes that, since the requirement for the tabling of an unproclaimed list was first adopted in 1988, the number of Acts with unproclaimed provision(s) has diminished.¹⁴

The legislative will of the parliament versus the executive

The power to enact legislation is the primary function of parliament. If the legislative decisions of the parliament can be overridden by the executive using the proclamation device, then it could be reasonably argued, as A.C. Harris — a former NSW Auditor-General — did by saying '... the balance of power between the Executive Government [and the Parliament] has departed measurably from the balance inherent in the theory of parliamentary democracy.'¹⁵ The problem of unproclaimed legislation was brought to the attention of the NSW parliament in 1990 on the motion of a crossbench member of the Legislative Council, the Hon

Elisabeth Kirkby of the Australian Democrats. Ms Kirkby's motion, modelled on Standing Order 139 (2) of the senate, required a list of unproclaimed legislation to be tabled in the house every six months together with a statement of the reasons for their non-proclamation and the proposed proclamation dates.¹⁶ In moving the motion, Ms Kirkby argued it would provide a vital oversight function for the parliament and make the Executive more accountable.¹⁷ The motion was agreed to, although no return was provided in response to the house's order because the parliament was prorogued on 6 February 1991.¹⁸

Amended provisions remain unproclaimed

Following Ms Kirkby's motion, six years passed before unproclaimed legislation was again considered by the parliament. The reason for unproclaimed legislation coming to the parliament's attention on this occasion was due to the failure of the executive to commence an opposition amendment to a bill that had been agreed to in the Legislative Council. On 23 May 1996, the Legislative Council in committee of the whole agreed to an amendment proposed by the then opposition to clause 322 of the *Industrial Relations Bill 1996*.¹⁹ The amendment had the effect of providing individual contract drivers the same enterprise bargaining rights as employees and employee organisations in the carrier driver industry.²⁰ The amendment, although opposed in principle by the government, was agreed to on the voices;²¹ the bill was sent to the Assembly for concurrence where it was agreed to without amendment and, ultimately, assented to by the Governor.²² The act was subsequently proclaimed to commence on 2 September 1996, however, the proclamation excluded subsection 322 (3) and schedule 5.4, with subsection 322 (3) being the aforementioned opposition amendment agreed to in the Legislative Council.²³ On 22 October 1996, the leader of the liberal/national opposition in the Legislative Council, the Hon John Hannaford, moved to censure the labor Attorney General and Minister for Industrial Relations, the Hon Jeff Shaw, for failing to proclaim the commencement of subsection 322 (3) and schedule 5.4. The motion was successfully amended by crossbench member the Hon Ian Cohen of the Greens to express concern that subsection 322 (3) and schedule 5.4 had not commenced and also to require the Attorney General, on the second sitting day of each month, to table a list of all legislation not proclaimed 90 days after assent. Mr Cohen argued that although in some instances non-proclamation could be justified on policy and administrative grounds it:

... needs to be a priority of government to proclaim amendments that are passed by the Parliament. We need a power within the Parliament that maintains a certain degree of responsibility on the part of the Executive Government. It is extremely important that the Executive does not deliberately thumb its nose at the Parliament. It is also extremely important that there be appropriate accountability.²⁴

The first list of unproclaimed legislation was presented on 13 November 1996.²⁵ The requirement was subsequently re-adopted in later sessional orders before being incorporated in the current standing orders in 2004, as standing order 160 (2).²⁶ Regarding subsection 322 (3) of the *Industrial Relations Act 1996* it was ultimately

proclaimed to commence on 14 February 1997,²⁷ while schedule 5.4 never commenced and was repealed by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1996*.

On 16 November 1999, a similar issue occurred. In this instance, the Legislative Council debated a motion of the Hon John Jobling who moved that the Special Minister of State and Assistant Treasurer, the Hon John Della Bosca, attend in his place at the table of the house to explain his failure to act should section 61 (6) of the *Motor Accidents Compensation Act 1999* remain unproclaimed by a certain date.²⁸ The provision referred to in Mr Jobling's motion concerned an amendment that had been moved by an independent member of the crossbench, the Hon Helen Sham-Ho, to the *Motor Accidents Compensation Bill 1999* during the committee of the whole stage on 29 June 1999. The amendment, which had been agreed to on the voices with little debate, provided legal rights of appeal to motor accident victims in instances of disputed medical assessments between claimants and insurers where it could be established that the decision-making process used to make the assessment had been unfair. When she moved her amendment, Ms Sham-Ho, stated it was not her intention for it to allow the courts to have hearings as to the merits of any case, given that the bill's objectives were to minimise the legal costs associated with claims and for motor vehicle accidents to be regarded as a medical problem not a legal one.²⁹ The bill subsequently passed all stages, receiving the Governor's assent on 8 July 1999, and by 10 September 1999 all provisions except section 61 (6) had been proclaimed to commence.³⁰ Speaking to Mr Jobling's motion, Mr Della Bosca referred to an article in *Caveat*, a journal produced by the Law Society of NSW, which stated that Ms Sham-Ho's amendment was the result of Society lobbying and that its effect was not what had been advanced during the committee of the whole debate, rather it was a provision that would give the courts 'an unaffected discretion to review medical assessors' assessments and to replace them with their own assessment'.³¹ Mr Della Bosca then hypothesised that Society had protected its interest in maintaining the legal costs associated with motor vehicle accidents, given section 61 (6) had provided lawyers the means to 'completely misstep the new medical assessments system and suborn the will of the House and the Parliament'.³² Mr Della Bosca advised the house that he had written to Ms Sham-Ho to explain why section 61 (6) had been unproclaimed and then foreshadowed that he would be amending the Act to '... make it absolutely clear that the right of the court to make a substituted assessment is limited to circumstances where the original assessment is set aside on the grounds of procedural unfairness and substantial injustice'.³³ Debate on Mr Jobling's attempt to have Mr Della Bosca attend the house was adjourned on the motion of Rev the Hon Fred Nile on division (Ayes, 24/Noes, 11).³⁴ Mr Jobling ultimately withdrew the motion and it was discharged from the Notice Paper on 28 February 2001.³⁵ The *Motor Accidents Compensation Amendment (Medical Assessments) Bill 2000*, which gave effect to Mr Della Bosca's promise that a court would not have an unfettered power to reject a certificate given by a medical assessor, was introduced into the Legislative Council on 3 May 2000. The bill subsequently passed the parliament on 31 May 2000 and,

while it was not subject to a rigorous debate, it is worth noting the comments made by a crossbench member the Hon Dr Arthur Chesterfield-Evans, Australian Democrats, who stated:

I must confess I was angry that such legislation has not been proclaimed. In a sense, this bill is an alternative to the proclamation of an amendment that was debated and passed in this House previously, which I think is a bad situation...people I have spoken to in the upper ranks of the legal profession were absolutely unaware that large amounts of legislation remain unproclaimed. Many people still believe that the function of the Governor in proclaiming legislation is almost a ceremonial function once Parliament has debated legislation and made a decision. This legislation is living proof that unproclaimed legislation can be changed.³⁶

The Legislation Review Committee

In addition to the requirement for governments to table the unproclaimed legislation list, the Legislation Review Committee (the Committee) provides further oversight through reviewing all legislation brought before the NSW parliament. The Committee's functions regarding bills are outlined in Section 8A of the *Legislation Review Act 1987* which requires, among other things, it report to the parliament as to whether a bill by express words or otherwise includes an inappropriate delegation of legislative power. To that the end the Committee will always note where the commencement of an act is delegated to the executive, once passed by the legislature.³⁷ The Committee will also note where administrative requirements necessitate that the bill commence by proclamation and thereby does not constitute an inappropriate delegation of legislative powers. In some instances the Committee has also written to the relevant minister seeking advice as to the likely commencement date of an act.³⁸

Possible further reforms

In 2010, the NSW parliament established the Joint Select Committee on Parliamentary Procedure to inquire into reform proposals for the Commonwealth House of Representatives stemming from the *Agreement for a Better Parliament: Parliamentary Reform*, which followed the 2010 Federal Election and the return of a minority Labor Government.³⁹ Recognising that the Assembly and the Council are differently constituted houses with very different processes and procedures, the Joint Select Committee resolved to divide into two separate working groups comprising members of the respective houses.⁴⁰ Each working group considered the reform proposals identified in the *Agreement for a Better Parliament: Parliamentary Reform* relevant to their particular House.⁴¹ One of the many parliamentary processes and procedures considered by the Joint Select Committee in its report was the commencement of legislation. The Council working group made several observations concerning the commencement of legislation, namely:

The failure of some bills to include a provision specifying a date of commencement has led in some instances to delay in the proclamation of certain pieces of legislation...[T]here have also been instances where the Executive Government has not proclaimed amendments made to a bill in the Council, even though the amendments were subsequently agreed to by the Assembly and assented to by the Governor...[S]uch a position effectively places the Executive Government above the Parliament in law making. It is an inappropriate delegation of power from the Parliament to the Executive Government.⁴²

To address its concerns regarding the provision for the commencement of legislation, the Legislative Council working group made two recommendations. The first was that the government 'include in the list of unproclaimed legislation tabled in the Legislative Council under standing order 160 (2) reasons why the legislation has not been proclaimed'⁴³ and, secondly, that it 'adopt a commencement provision in all bills whereby if the act is to commence by proclamation, but has not commenced within 6 or 12 months after assent, it commences automatically'.⁴⁴ To support its recommendations the Council working group argued that the commencement of legislation by proclamation was an inappropriate delegation of legislative power to the Executive Government.⁴⁵ Despite the working group adopting the above recommendations, its counterpart in the Assembly argued:

The Legislative Assembly notes the concerns raised by the Members of the Legislative Council that this arrangement [the commencement provision] effectively places the Executive Government above the Parliament in law making. However, the view of the Legislative Assembly Members is that there may be some difficulties in providing a commencement date for all pieces of legislation at the time it passes the House. It was noted that the flexibility in commencement by proclamation allowed the Government to delay the commencement of the operation of a law until administrative arrangements or regulations were in place for the law to operate effectively and that this was often necessary.⁴⁶

What is highlighted in the Joint Select Committee's report is a tension between achieving administrative convenience for the executive and recognising the autonomy of the parliament to make and amend laws.

Commencement provision usage rates

In order to consider how the commencement provision has been used in NSW, all bills introduced parliament in the years 2001, 2007 and 2011 were examined. The three years were selected to provide a sample of three years with distinct intervals since the attempted censure of the Attorney General and Minister for Industrial Relations. From this analysis, it was evident that the commencement provision was used in six ways, namely bills were to commence: by proclamation; on the date of assent; on a specified date; with some provisions on the date of assent and other provisions on later specified dates; with some provisions on the date of assent and other provisions by proclamation; and with some provisions by proclamation and others on later specified dates. The table below shows the frequency of which each

of the six identified commencement types were used. The data shows that for the years 2001 and 2007 more bills commenced by proclamation than any other means, while in 2011 more bills commenced on the date of assent. When the bills for the three years are totalled almost half (48.8%) were to commence by proclamation, however it should also be noted that the number of bills commencing by proclamation is trending downward with the respective percentages being 65.7% in 2001 and 31.5% in 2011. This change can be explained due to an increasing percentage of bills commencing on the date of assent, but could also be partly due to the fact that 2011 was a relatively small sample given it was an election year in which the parliament was prorogued for almost six months.

Categories for the commencement of legislation:	2001	2007	2011	Total
Proclamation	86 (65.7%)	39 (39.4%)	23 (31.5%)	148 (48.8%)
Date of assent	16 (12.2%)	36 (36.3%)	37 (50.7%)	89 (29.4%)
On a specified date	17 (13%)	9 (9.1%)	7 (9.6%)	33 (10.9%)
With some provisions on the date of assent and other provisions on later specified dates	8 (6.1%)	3 (3%)	N/A	11 (3.6%)
With some provisions on the date of assent and other provisions by proclamation	2 (1.5%)	8 (8.1%)	4 (5.5%)	14 (4.6%)
With some provisions by proclamation and others on later specified dates	2 (1.5%)	4 (4.1%)	2 (2.7%)	8 (2.7%)
Total	131	99	73	303

Following the analysis of commencement provision usage rates, the paper also examined the unproclaimed legislation list to identify whether the number of acts with unproclaimed provision(s) also appeared to be declining. Three unproclaimed lists, tabled in 1997, 2003, and 2012, were selected to provide a sample with three distinct intervals covering the sixteen years since the list was first tabled. As at 16 October 2012, there were 79 acts with unproclaimed provision(s) on the list of unproclaimed legislation.⁴⁷ This figure is lower than the comparable numbers for 2 December 1997 and 11 November 2003 where there were 104 and 96 Acts with unproclaimed provision(s) respectively. Consistent with use of the proclamation device trending downward, the number of acts with unproclaimed provision(s) on the list of unproclaimed legislation is also getting smaller. Without being privy to the deliberations of the executive and the Parliamentary Counsel's office regarding legislative drafting, one can only speculate as to why the number of acts on the unproclaimed legislation list has decreased. It could be that the attempted censure of

the industrial relations minister — which ultimately led to the requirement for governments to table the unproclaimed legislation list — together with the ongoing work of the Legislation Review Committee and the 2010 report of the Joint Select Committee on Parliamentary Procedure, has kept the parliament wary of the possibility that the proclamation device is being abused. Whatever the reason, it would appear difficult to argue that increased oversight has not had an impact on minimising any potential misuse of the power to proclaim legislation. The other point to make is that, with the number of bills using the proclamation device declining, it is clear that — while the power to commence legislation by proclamation remains — the use of this power is not escalating out of control.

Moving to other areas of interest on the unproclaimed legislation list, there are currently no recorded acts with provision(s) amended in the committee of the whole stage in the Legislative Council that are yet to come into effect. The most recent example of an act to have been on the list for a significant period, with unproclaimed provisions amended by the Legislative Council, was the *Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Act 2008* which had been on the list for close to four years before being repealed by schedule 4.3 of the *Crimes Legislation Amendment Act 2012* on 24 September 2012.⁴⁸ The following table lists the categories under which the acts with unproclaimed provision(s) fall.⁴⁹ The numbers are spread across a variety of policy areas indicating that commencement by proclamation is not limited to any one portfolio, rather it is something that applies to the many areas where governments legislate.

Act Category	Number
Social and Community Services	7
Resources and Energy	4
Uniform Legislation	9
Regulatory	11
The Environment	9
Industrial and Workplace Relations/Occupational Health & Safety	11
Public Utilities and Infrastructure	2
Consumer Protection/Fair Trading	4
Local Government	1
Law and Order	11
Health	6
Transport	2
Planning	2
Total	79

The oldest act on the list of 16 October 2012 is the *Miscellaneous Acts (Disability Services and Guardianship) Repeal and Amendment Act 1987*. Section 3 of that act is unproclaimed and if proclaimed would repeal the *Youth and Community Services Act 1973*.⁵⁰ There are three acts, introduced prior to the current coalition government's term beginning May 2011, on the list where the entire act remains unproclaimed. These are: the *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act 2009*, the *Court Information Act 2010*, and the *Public Health Act 2010*. One of the wholly unproclaimed Acts, the *Court Information Act 2010*, was introduced by the then labor government to promote open justice in the state's courtrooms by establishing a new system of access to information held by the courts that balanced the competing considerations of open justice and individual privacy.⁵¹ When introduced, the then Parliamentary Secretary for Justice noted that the bill was the product of an extensive and comprehensive consultation process undertaken by the Attorney General's department and had been broadly supported by a number of stakeholders including the NSW Chief Justice.⁵² While another act of the former government on the list, the *Mine Health and Safety Act 2004*, legislation designed to secure the health, safety and welfare of persons in connection with mines, has left a clause, which would prevent a mine operator from providing a financial benefit or incentive to a person to discourage reporting of a health or safety matter, unproclaimed.⁵³ The clause was trumpeted as an important element of the bill by then Minister for Mineral Resources during his second reading speech⁵⁴ and was also strongly supported by the then shadow minister,⁵⁵ yet eight years after the bill was assented to the clause remains unproclaimed.

In both instances, the above acts had the support of the majority of members in both houses and passed unamended without lengthy or hostile debate. Promoting open justice and increasing mine safety are both laudable policy objectives, so one must ask if a bill receives broad support, is intended to benefit the state and passes through the parliament quickly to become law, should it not commence as soon as practicably possible if there are no justifiable reasons for delay?

Conclusion

As mentioned in the introduction, the proclamation device allows a government to delay the operation of an act until administrative arrangements or delegated legislation are in place to allow the statute to operate. The issue here is not the administrative convenience this affords but the reality that this effectively allows an executive to determine when, or even if, a law duly passed by the NSW parliament will have effect. Writing about the commencement of legislation by proclamation in the 1980s, Ms Anne Lynch, a former Deputy Clerk of the Australian Senate, argued that:

1. what, in effect, the Parliament is doing is delegating its most important function, that of legislating, to the executive to implement the will of the people as expressed through its parliamentary representatives. Thus, in practical terms,

- it places in the hands of the bureaucracy an enormous power to gainsay or even override the wishes of the people;
2. if legislation is passed without a time limit set on its implementation, it provides encouragement because there is no pressure to have structures and administrative details in place by a defined date to the bureaucracy to be tardy in implementing schemes determined by Parliament;
 3. it can be a method of window dressing, so that the executive can declare that an Act of Parliament has been passed in order to help a disadvantaged group within a community without ever having to mention that there is no intention to implement the proposals contained therein because of, for example, a lack of money;
 4. it can also be used as an instrument of blackmail for example, ‘we will pass this legislation, but will not bring it into effect until you, the citizen, behave in a particular way which we do not like’; and
 5. finally, and in my view most significantly, the failure to proclaim a law whether in whole or, as now more frequently and insidiously occurs, in part leaves those with a need to be concerned about what the law is in a state of constant indecision and doubt. It is, one might have thought, reasonable to expect that the law is known to operate as a result of its passage through all three constituent parts of the Parliament; that is, by passage of a bill through the House of Representatives and the Senate and Assent by the Governor-General. This together with a known date of operation alone gives certainty to the law.⁵⁶

The Commonwealth parliament has since addressed the issues identified by Ms Lynch through its adoption of an automatic commencement provision.

Unproclaimed legislation was first debated in the NSW Legislative Council in 1990 and nothing was achieved of any practical effect to address the situation. It was not until the attempted censure in 1996 over the failure to commence parts of the *Industrial Relations Act 1996*, that the Legislative Council adopted a mechanism to provide any formal oversight to laws commencing by proclamation — the unproclaimed legislation list. The requirement for governments on the second sitting day of each month, to table a list of all legislation not proclaimed 90 days after assent, has since been incorporated in the Legislative Council’s standing orders while further oversight has been provided by the Legislation Review Committee. Further, both the number of bills commencing by proclamation and acts with unproclaimed provision(s) have trended downward showing that the proclamation device has been used less frequently. Despite this progress, the executive still has the capacity to create a loophole through which it can ignore the legislative decisions of parliament. To support parliamentary democracy in NSW, and to better enable the parliament to hold the executive to account, it is easy to make a case in support of the recommendations made by the Legislative Council working group on the Joint Select Committee on Parliamentary Procedure regarding unproclaimed legislation. Namely, that the government include in the list of

unproclaimed legislation reasons as to why the legislation has not been proclaimed, and adopt a commencement provision in all bills whereby if the act is to commence by proclamation, but has not commenced within 6 or 12 months after assent, it commences automatically.⁵⁷ If adopted, these recommendations would have two effects: first, the administrative convenience afforded to the executive, by allowing a reasonable period of time to delay the operation of an act until administrative arrangements or delegated legislation are in place to allow the statute to operate, would be maintained; secondly, the parliament's most important function, democratically elected parliamentary representatives implementing the will of the people by developing legislation, would be undoubtedly strengthened. ▲

References

- ¹ Lovelock and Evans, 2008, *New South Wales Legislative Council Practice*, the Federation Press, Leichardt, p 391.
- ² Harris, 1997, 'Accountability and the New South Wales Parliament', *Canberra Bulletin of Public Administration*, No. 83, p 72, and Lynch, 13 May 1987, 'Proclamation of Acts — When...How...If?', *The House Magazine*, p 5.
- ³ Lovelock and Evans, 2008, op. cit, pp 12–13.
- ⁴ *Ibid*, p 13.
- ⁵ For further information see: Lovelock and Evans, 2008, op. cit, 'The Legislative Process' pp 340–92.
- ⁶ Lovelock and Evans, 2008, op. cit, p 389.
- ⁷ *Interpretation Act 1987* (NSW), s 23(1)(a)(b) and (c).
- ⁸ For an example see: <http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2012-531.pdf>, retrieved 31 October 2012.
- ⁹ *Interpretation Act 1984* (Vic), s 10(a); *Acts Interpretation Act 1915* (SA), s 7(5); *Legislation Act 2001* (ACT), s 79; and *Odgers' Australian Senate Practice*, 2012, 13th edn, Evans and Laing (eds), p. 341.
- ¹⁰ *Acts Interpretation Act 1954* (QLD), s 15(DA).
- ¹¹ Evans and Laing (eds), 2012, op. cit., p 341.
- ¹² *Ibid*, p 340.
- ¹³ Laing (eds), *Annotated Standing Orders of the Australian Senate*, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/aso/sol39, retrieved 31 October 2012.
- ¹⁴ *Ibid*, p 424.
- ¹⁵ Harris, op. cit, p 73.
- ¹⁶ *LC Minutes* (11/10/1990) 463.
- ¹⁷ *LC Debates* (11/10/1990) 8225.
- ¹⁸ Evans and Lovelock, 2008, op. cit, p 486, and *Journal of the Legislative Council, Minutes of Proceedings, 1990–1991*, 181, p 755.
- ¹⁹ *LC Debates* (23/5/1996) 1429.
- ²⁰ *LC Debates* (23/5/1996) 1429.
- ²¹ *LC Debates* (23/5/1996) 1427–29.

- ²² *LC Minutes* (5/6/1996) 199; and *LC Minutes* (17/6/1996) 210.
- ²³ *LC Debates* (22/10/1996) 5094.
- ²⁴ *LC Debates* (22/10/1996) 5118–19.
- ²⁵ *LC Minutes* (13/11/1996) 442.
- ²⁶ Lovelock and Evans, 2008, op. cit, p 486.
- ²⁷ *Government Gazette No 18* of 14 February 1997, p 545.
- ²⁸ *LC Minutes* (16/11/1990) 219–20.
- ²⁹ *LC Debates* (29/6/1999) 1551.
- ³⁰ See historical notes for the *Motor Accidents Compensation Act 1991* available at NSW Legislation: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+41+1999+cd+0+N>, retrieved 4 December 2012.
- ³¹ *LC Debates* (16/11/1999) 2821.
- ³² *LC Debates* (16/11/1999) 2821.
- ³³ *LC Debates* (16/11/1999) 2821.
- ³⁴ *LC Debates* (16/11/1999) 2824.
- ³⁵ *LC Minutes* (28/2/2001) 854.
- ³⁶ *LC Debates* (24/5/2000) 5647.
- ³⁷ The Legislation Review Committee is a current joint statutory committee, established 8 May 2003, and re-established 22 June 2011. The Legislation Review Committee has two broad functions: to scrutinise all bills introduced to Parliament; and all regulations subject to disallowance according to the criteria set out in those sections.
- ³⁸ New South Wales Parliament, Legislation Review Committee, 2003, Report No 2, *Legislation Review Digest*, p 3.
- ³⁹ New South Wales Parliament, Joint Select Committee on Parliamentary Procedure, 2010, Report No 1, *Reforms to parliamentary processes and procedures*, p xi.
- ⁴⁰ *Ibid* p 1.
- ⁴¹ *Ibid* p 1.
- ⁴² *Ibid* p 58.
- ⁴³ *Ibid* p 58.
- ⁴⁴ *Ibid* p 59.
- ⁴⁵ *Ibid* p 59.
- ⁴⁶ *ibid*, p.26.
- ⁴⁷ The list can be accessed at [http://www.parliament.nsw.gov.au/prod/lc/lctabdoc.nsf/AllTabledPapers?SearchView&query=\(unproclaimed*\)&searchorder=4](http://www.parliament.nsw.gov.au/prod/lc/lctabdoc.nsf/AllTabledPapers?SearchView&query=(unproclaimed*)&searchorder=4), accessed 31 October 2012.
- ⁴⁸ NSW Legislation, *Crimes Legislation Amendment Act 2012*, <http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2012%20AND%20no%3D67&nohits=y>, retrieved 31 October 2012.
- ⁴⁹ Please note that the above categories are deliberately broad so as to provide scope in which to identify patterns concerning acts with unproclaimed provision (s). The Acts above have also been categorised subject to the author’s interpretation.
- ⁵⁰ NSW Legislation, *Miscellaneous Acts (Disability Services and Guardianship) Repeal and Amendment Act 1987*, <http://www.legislation.nsw.gov.au/sessionalview/sessional/act/1987-262.pdf>, retrieved 31 October 2012.

⁵¹ *LA Debates* (19/3/10) 21774.

⁵² *LA Debates* (19/3/10) 21774.

⁵³ See historical notes for the *Mine Health and Safety Act 2004* available at NSW Legislation: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+74+2004+cd+0+N>, retrieved 31 October 2012.

⁵⁴ *LA Debates* (7/5/04) 8637.

⁵⁵ *LA Debates* (14/5/04) 9088.

⁵⁶ Lynch, 1988, 'Legislation by Proclamation Parliamentary Nightmare, Bureaucratic Dream', *Papers on Parliament No. 2*, Department of the Senate, Parliament House, Canberra, p 6.

⁵⁷ New South Wales Parliament, Joint Select Committee on Parliamentary Procedure, 2010, *op. cit.*, pp 59–69.