

Passed by both Houses



New South Wales

Criminal Case Conferencing Trial Bill 2008

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

Legislative Council
2008

Clerk of the Parliaments



New South Wales

Criminal Case Conferencing Trial Bill 2008

Act No , 2008

An Act to provide for a trial scheme of compulsory pre-committal conferences and codification of sentence discounts for guilty pleas; and for other purposes.

Clause 1 Criminal Case Conferencing Trial Bill 2008

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Criminal Case Conferencing Trial Act 2008*.

2 Commencement

This Act commences on the date of assent.

3 Definitions

(1) In this Act:

committal proceedings means proceedings for the purpose of deciding whether a person charged with an indictable offence should be committed for trial or sentence.

compulsory conference means a compulsory conference under Part 3.

compulsory conference certificate means a certificate complying with section 12.

indictable offence does not include an indictable offence being dealt with summarily.

pre-conference disclosure certificate means a certificate complying with section 9.

sentencing court, in relation to an accused person who is found guilty of or pleads guilty to an offence, means the court imposing a penalty in respect of the offence and includes a court hearing an appeal against a sentence imposed in respect of the offence.

(2) Notes included in this Act do not form part of this Act.

Part 2 Application of provisions of this Act

4 Proceedings to which Act applies

- (1) This Act applies to proceedings in relation to an indictable offence if, and only if, committal proceedings in respect of the offence will be heard in the Local Court sitting at the Downing Centre, Sydney and Central, Sydney.
- (2) The regulations may extend the application of this Act to such proceedings in other courts or courts sitting at other places or may apply this Act to such proceedings in other courts or courts sitting at other places rather than as provided by subsection (1).
- (3) Despite subsections (1) and (2), this Act extends to such proceedings that have been transferred to another court if the compulsory conference steps referred to in section 7 (1) (a) and (b) have been completed before the transfer.

5 Duration of trial scheme

This Act applies only to proceedings in respect of an indictable offence for which a court attendance notice was filed on or after 1 May 2008 but before 1 May 2009 (or before such later date as may be prescribed by the regulations) irrespective of whether the offence was committed before or after 1 May 2008.

Part 3 Compulsory conferences

Note. This Part requires an accused person's legal representative and the prosecution to participate in a compulsory conference in relation to an offence before the accused person is committed for trial for the offence except in certain circumstances (for example, where the accused person enters, or agrees in writing to enter, a guilty plea before a conference is held or if the offence is an offence for which a compulsory conference is not required to be held under the Part). The Part sets out various requirements concerning the holding of such a conference. A compulsory conference certificate must be prepared after the holding of a conference that certifies various matters agreed to by the parties at the conference (including, for example, an offer by the accused person to plead guilty to an offence that he or she had been charged with before the conference or an offer by the accused person to plead guilty to an alternative offence to the offence that he or she has been charged with). The certificate may be used by a sentencing court in limited circumstances to verify matters such as an offer to plead guilty to a specific offence.

6 Compulsory conference

- (1) A compulsory conference must be held in accordance with this Part in relation to an indictable offence unless:
 - (a) the offence:
 - (i) is an offence to which section 16 does not apply, or
 - (ii) is any other offence prescribed by the regulations, or
 - (b) the accused person pleads guilty to the offence before a pre-conference disclosure certificate in relation to the offence is filed in accordance with section 9, or
 - (c) the accused person pleads guilty, or agrees in writing to plead guilty, to the offence before the date and time set down under section 7 (2) for the holding of the conference, or
 - (d) the accused person has no legal representative, or
 - (e) the prosecution is not conducted by the Director of Public Prosecutions, or
 - (f) a Magistrate makes an order under subsection (5) that the compulsory conference need not be held.
- (2) A compulsory conference in relation to an offence may not be held unless the prosecution:
 - (a) has served (or caused to be served) on the accused person or the accused person's legal representative a copy of a brief of evidence in relation to the offence that complies with section 8, and
 - (b) has served (or caused to be served) on the accused person or the accused person's legal representative a copy of the pre-conference disclosure certificate in relation to the offence, and

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- (c) has filed the pre-conference disclosure certificate with a Local Court.

Note. Section 7 contains requirements concerning the time at which a compulsory conference must be held, the service of briefs of evidence and pre-conference disclosure certificates and other compulsory conference steps.

- (3) The purpose of the compulsory conference is to determine whether there is any offence or are any offences to which the accused person is willing to plead guilty and any other matters referred to in section 12 (3) on which the accused person and the prosecution are able to reach agreement.
- (4) Evidence of anything said between the parties, or of any admission made, during a compulsory conference or during negotiations after the conference concerning a plea to be made by the accused person is not admissible in any proceedings before a court, tribunal or body, except as provided by section 13.
- (5) A Magistrate may, on application by the accused person or the prosecution, order that a compulsory conference need not be held in relation to an offence if the Magistrate is satisfied that exceptional circumstances exist that would make it impossible or impracticable to hold the conference or that it would be highly unlikely that the holding of the conference would achieve the purpose referred to in subsection (3).
- (6) The Magistrate is to make a record of the reasons for making the order.

7 Compulsory conference timetable

- (1) For the purposes of this section, the *compulsory conference steps* are the following steps taken with respect to a compulsory conference between the legal representative of an accused person and the prosecution:
- (a) service of a copy of a brief of evidence complying with section 8 on the accused person or the accused person's legal representative,
 - (b) service of a copy of a pre-conference disclosure certificate complying with section 9 on the accused person or the accused person's legal representative,
 - (c) filing of the pre-conference disclosure certificate,
 - (d) the holding of the compulsory conference,
 - (e) filing of a compulsory conference certificate.
- (2) The date and time set for the holding of the compulsory conference must be before the date and time set down under section 60 of the *Criminal*

Procedure Act 1986 for the taking of prosecution evidence in any committal proceedings with respect to the offence.

- (3) If a compulsory conference is required to be held in relation to an offence in respect of which a court attendance notice was issued:
- (a) section 60 (1) of the *Criminal Procedure Act 1986* is to be read as requiring the Magistrate, on the date on which the pre-conference disclosure certificate relating to the offence or offences is tendered (or at such later time or times as the Magistrate determines), to set the matters specified in paragraphs (a) and (b) of that subsection, and
 - (b) section 60 (1) (a) of that Act is to be read as not applying to written statements and copies of any proposed exhibits identified in the statements (or a notice relating to the inspection of them) previously served in accordance with section 8 (3) of this Act.
- (4) The dates by which copies of the brief of evidence and pre-conference disclosure certificate are to be served in relation to an offence are to be set by a Magistrate in accordance with this section:
- (a) except as provided by paragraph (b), on the date on which the court attendance notice is filed in respect of the offence or at such later time or times as the Magistrate determines, or
 - (b) if the offence is an offence in relation to which an election is made in accordance with Chapter 5 of the *Criminal Procedure Act 1986* to deal with the offence on indictment—at the time the election is made or at such later time or times as the Magistrate determines.
- (5) The compulsory conference steps are to be taken in accordance with a timetable fixed by a Magistrate in accordance with any relevant practice directions of the Chief Magistrate.
- (6) A registrar may exercise the Magistrate's functions under subsection (5).
- (7) A compulsory conference step may be taken after the date and time or period fixed with the leave of a Magistrate, if the Magistrate is satisfied that special circumstances exist.

8 Brief of evidence

- (1) The brief of evidence relating to an offence or offences to be the subject of a compulsory conference is (subject to subsection (2)) to consist of documents regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence or offences and is to include:

- (a) any written statements taken from persons the prosecutor intends to call to give evidence in proceedings for the offence or offences, and
 - (b) copies of any document or other thing identified in such a written statement as a proposed exhibit or advice as to where any such document or thing may be inspected.
- (2) A copy of the brief of evidence is to comply with any other requirement applicable to it that is prescribed by the regulations.
 - (3) The brief of evidence is to be served (or caused to be served) by the prosecution on the accused person or the accused person's legal representative in accordance with the timetable set under section 7.
 - (4) Service of a copy of a brief of evidence for the purposes of this Part does not (except as otherwise provided by this Act) affect any other requirement under the *Criminal Procedure Act 1986* to serve a brief of evidence or written statement on the accused person.

9 Pre-conference disclosure certificate

- (1) A pre-conference disclosure certificate is a document prepared by the prosecution before the holding of a compulsory conference with the accused person's legal representative that:
 - (a) sets out the offence or offences (including any back up or related offences within the meaning of section 165 of the *Criminal Procedure Act 1986*) with which the accused person has been charged, and
 - (b) certifies that:
 - (i) a copy of a brief of evidence referred to in section 8 is in the possession of the prosecution, and
 - (ii) the prosecution has disclosed all material in its possession that is of relevance to the matters on which agreement is to be sought at the compulsory conference, and
 - (c) confirms that the prosecution considers the evidence is capable of establishing the elements of the offence or offences charged, and
 - (d) indicates whether the prosecution has excluded any such offence from the operation of section 16 under section 18.

Note. Section 16 contains provisions relating to sentence discounts for benefits associated with guilty pleas.

- (2) A copy of the pre-conference disclosure certificate is to be served (or caused to be served) by the prosecution on the accused person or the accused person's legal representative in accordance with the timetable set under section 7.
- (3) A pre-conference disclosure certificate is conclusive evidence of the matters certified in it in any proceedings in a Local Court with respect to the offences set out in it and the completeness and accuracy of the matters may not be challenged in any manner in such proceedings.
- (4) A pre-conference disclosure certificate is to be in the form approved for the time being by the Director-General of the Attorney General's Department.
- (5) The pre-conference disclosure certificate is to be filed with a Local Court in accordance with the timetable fixed under section 7.
- (6) A pre-conference disclosure certificate must be signed by or on behalf of the Director of Public Prosecutions.
- (7) Nothing in this section affects any immunity that applies by law to the disclosure of any information, document or other thing, including, for example, legal professional or client legal privilege, public interest immunity and sexual assault communications privilege under Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986*.

10 Explanation of accused person's rights

- (1) When the Magistrate sets a timeframe for the holding of a compulsory conference, the Magistrate must give to the accused person a statement in writing that explains:
 - (a) the effect of this Part and the accused person's rights in relation to this Part, and
 - (b) the effect of sections 16–18 of this Act and the accused person's rights under those sections.

Note. Sections 16–18 of this Act set out the sentence discounts that a court must or may allow for a guilty plea in relation to certain indictable offences.
- (2) The statement must be in the form of words prescribed by the regulations.

11 Persons who are to be present at compulsory conference

- (1) The following persons must (subject to this section) be present during a compulsory conference:
 - (a) an officer of the Office of the Director of Public Prosecutions representing the prosecution,
 - (b) the accused person's legal representative.

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- (2) A requirement under this section that a person be present for the purposes of a compulsory conference is taken to be satisfied if the person is present or available by way of an audio visual link or telephone.
 - (3) The accused person's legal representative is to obtain the accused person's written instructions concerning the matters referred to in section 12 (3) before participating in the compulsory conference unless it is reasonably practicable to obtain those instructions in person, by audio visual link or by telephone during the conference.
 - (4) If the accused person has been charged jointly with any other person with the offence concerned, a separate compulsory conference is to be held for each co-accused. However, a joint compulsory conference may be held for two or more such co-accused, with the consent of the prosecution and each of the co-accused concerned.
 - (5) A joint compulsory conference may be held only if the requirements of sections 6 and 10 have been complied with for each co-accused.
 - (6) The regulations may make provision for or with respect to the use of audio visual links for the purposes of compulsory conferences.
 - (7) In this section, *audio visual link* means facilities (including closed circuit television) that enable audio and visual communication between persons at different places.

12 Compulsory conference certificate

- (1) The prosecution and a legal representative who acted on the accused person's behalf at the conference must complete a compulsory conference certificate after a compulsory conference.
- (2) The compulsory conference certificate is to be signed by the prosecution and the accused person before it is filed in accordance with subsection (4).
- (3) The compulsory conference certificate is to certify as to the following matters:
 - (a) the offence or offences (including any back up or related offences within the meaning of section 165 of the *Criminal Procedure Act 1986*) with which the accused person had been charged before the conference and for which the prosecution will seek committal of the accused person for trial or sentence,
 - (b) any alternative offences to those referred to in paragraph (a) discussed at the compulsory conference,
 - (c) any of the offences referred to in paragraph (a) or (b) to which the accused person has offered to plead guilty,

- (d) whether the accused person or the prosecution has accepted or rejected any such offers,
 - (e) if the accused person has offered to plead guilty to any offence and the offer has been accepted by the prosecution—details of the agreed facts on the basis of which the accused person has offered to plead guilty and details of facts (if any) in dispute,
 - (f) any additional offences with which the accused person has been charged to which the accused person has offered to plead guilty and agreed to ask the court to take into account under section 33 of the *Crimes (Sentencing Procedure) Act 1999*,
 - (g) if the accused person considers the brief of evidence provided inadequate information to enable the accused person to assess the prosecution's case—details of the inadequacy.
- (4) The prosecution is to file the compulsory conference certificate in a sealed envelope with a Local Court in accordance with the timetable set under section 7.
- (5) The compulsory conference certificate may, on application, be amended after it has been filed and before the accused person is committed for trial or sentence with the consent of, and in the presence of, the prosecution and the accused person or his or her legal representative.
- (6) A requirement under this section for a compulsory conference certificate to be signed is satisfied if the document:
- (a) is authenticated by means of a facsimile of the relevant signature, or
 - (b) is authenticated in some other manner in accordance with rules of court under the *Criminal Procedure Act 1986*.

13 Effect of compulsory conference certificate

- (1) Except as provided by this section, a compulsory conference certificate that has been filed, or a copy of such a compulsory conference certificate, is not admissible in any proceedings before any court, tribunal or body and such a certificate and any of its contents:
- (a) are not to be disclosed to any person other than the prosecution, a police officer, the accused person or the accused person's legal representative, the victim of the offence concerned or a member of the victim's immediate family (within the meaning of the *Victims Support and Rehabilitation Act 1996*), and
 - (b) cannot be required to be produced under a subpoena issued in any proceedings before any court, tribunal or body.

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- (2) A compulsory conference certificate, or copy of a compulsory conference certificate, is admissible in any proceedings in a sentencing court for the purpose set out in section 17 (7) and is evidence of the matters certified in it.
 - (3) A compulsory conference certificate, or copy of a compulsory conference certificate, and the contents of such a certificate may be disclosed for the purposes of a proceeding referred to in subsection (2).
 - (4) A sentencing court must refuse to admit evidence of any compulsory conference certificate if any provisions of this Part with respect to the holding of the compulsory conference concerned or the preparation of the certificate have not been complied with unless it is satisfied that there was a good and proper reason for the failure to comply with the provision concerned and that it is in the interests of justice to admit the evidence.
 - (5) A person who discloses the contents of a compulsory conference certificate, or copy of a compulsory conference certificate, in contravention of subsection (1) is guilty of an offence.
Maximum penalty (subsection (5)): 20 penalty units.

14 Certain matters not taken to be pre-trial disclosures

The disclosure of any information during or in relation to a compulsory conference is not, for the purposes of section 22A of the *Crimes (Sentencing Procedure) Act 1999*, a pre-trial disclosure.

Note. Section 22A of the *Crimes (Sentencing Procedure) Act 1999* enables a court to impose a lesser penalty than it would otherwise impose on an offender who was tried on indictment, having regard to the degree to which the defence made pre-trial disclosures.

15 Practice directions

- (1) The Chief Magistrate may give such directions as the Chief Magistrate considers appropriate in connection with the practice and procedure to be followed in proceedings relating to the taking of any compulsory conference steps within the meaning of section 7 (1).
- (2) A practice direction given under this section that is inconsistent with this Act or the regulations does not apply to the extent of the inconsistency.

Part 4 Sentences—guilty pleas

16 Sentencing for certain indictable offences taking into account guilty plea

- (1) In passing sentence for an indictable offence on an offender who has pleaded guilty, a sentencing court:
 - (a) must indicate to the offender, and make a record of, the penalty it would have imposed but for the guilty plea, and
 - (b) must allow a discount on the sentence for the guilty plea in accordance with section 17 (1) and may allow a discount in accordance with section 17 (2) or (4).
- (2) A discount for a guilty plea, in relation to an offence, means a discount for:
 - (a) the saving in resources and time that would otherwise be expended in a trial for the offence but for the guilty plea, and
 - (b) the avoidance of the additional trauma to the victim that might be caused by a trial for the offence, and
 - (c) the contrition that the sentencing court considers that the offender demonstrates by pleading guilty, and
 - (d) any other benefit associated with or demonstrated by the guilty plea.
- (3) Despite subsection (1), a sentencing court must not allow any discount for a guilty plea in the case of a sentence of life imprisonment.
- (4) This section does not apply to an offence excluded from the application of this section by section 18.
- (5) Subsection (1) (a) does not limit any other requirement that a court has, apart from that paragraph, to record the reasons for its decisions.
- (6) The failure of a court to comply with subsection (1) (a) does not invalidate any sentence imposed by the court.
- (7) This section does not affect or limit any mitigating factor other than a guilty plea that a court may take account of in determining the appropriate sentence for an offence.
- (8) Sections 21A (3) (k) and 22 of the *Crimes (Sentencing Procedure) Act 1999* do not apply to the passing of a sentence to which this section applies.
- (9) A discount for a guilty plea is not to exceed the applicable limits provided in section 17.

17 Discount for guilty plea

- (1) If an offender pleaded guilty to an offence at any time before being committed for sentence, the sentencing court must allow a discount for the guilty plea calculated as follows:
 - (a) if the court imposes a sentence of imprisonment for a term—a term that is 25% less than the term the court would otherwise have imposed,
 - (b) if the court imposes a fine—a fine that is 25% less than the fine the court would otherwise have imposed,
 - (c) if the court makes a community service order directing the performance of community service work for a specified number of hours—work for 25% less than the number of hours the court would otherwise have ordered to be performed,
 - (d) if the court imposes a good behaviour bond for a term—a bond for 25% less than the term the court would otherwise have imposed.
- (2) If an offender pleaded guilty to an offence at any time after being committed for trial, the sentencing court may allow a discount for the guilty plea of up to 12.5% less than the term, fine, work or bond that it would otherwise have imposed.
- (3) However, when calculating the appropriate discount for the purposes of subsection (2), the court may only allow a discount that is proportionate to the remaining benefit of the guilty plea as determined by reference to the matters set out in section 16 (2).
- (4) A sentencing court may allow a discount under this section for a guilty plea that is greater than that referred to in subsection (2) (but not greater than that referred to in subsection (1)) if an offender has pleaded guilty to an offence after being committed for trial and the court is satisfied that substantial grounds exist as referred to in subsection (5) for allowing a greater discount.
- (5) For the purposes of subsection (4), substantial grounds exist for allowing a greater discount if:
 - (a) the compulsory conference certificate in relation to the offence records an offer by the offender to plead guilty to an alternative offence set out in the compulsory conference certificate that was refused by the prosecutor at any time before committal for trial and the offender was subsequently found guilty of that alternative offence, or
 - (b) the compulsory conference certificate records an offer by the offender to plead guilty to an alternative offence that was refused

- by the prosecutor at any time before committal for trial and accepted by the prosecutor after committal for trial, or
- (c) the offer to plead guilty to an alternative offence is made for the first time, and accepted, after committal for trial and the offender had no reasonable opportunity to offer to plead guilty to such an offence before the committal, or
 - (d) the offender was found unfit to be tried for the offence concerned after being committed for trial and pleaded guilty to the offence when he or she was subsequently found fit to be tried.
- (6) The burden of establishing the matters referred to in subsection (5) lies on the offender and must be proved on the balance of probabilities.
 - (7) The sentencing court may, for the purpose only of resolving any issue concerning the matters agreed to by parties at, or after, any compulsory conference held in respect of the offence to which the offender has pleaded guilty, or of making a determination in relation to any matter referred to in subsection (5), take into account the compulsory conference certificate relating to the conference.

18 Excluded offences

- (1) Section 16 does not apply to:
 - (a) an offence under a law of the Commonwealth, unless the regulations otherwise provide in the case of a particular offence or class of offences, or
 - (b) an offence that is an offence excluded from the operation of that section by the prosecutor in accordance with this section.
- (2) A prosecutor may exclude an offence from the operation of section 16 by a notice in writing tendered at the time the pre-conference disclosure certificate in relation to the offence is filed in accordance with section 9 or at such other time as is prescribed by the regulations.
- (3) The prosecutor may exclude an offence only if satisfied that:
 - (a) the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met by imposition of a penalty with no allowance for discount under section 16, and
 - (b) it is highly probable that a reasonable jury, properly instructed, would convict the accused person of the offence.
- (4) A notice under subsection (2) must be signed by or on behalf of the Director of Public Prosecutions.

- (5) If the prosecutor excludes an offence, the sentencing court is to take into account the reasons why the prosecutor excluded the offence when passing sentence on the offender.
- (6) Regulations may be made for or with respect to the exclusion of offences under this section.

Part 5 Relationship of this Act with other Acts

19 Relationship with Criminal Procedure Act 1986 and Crimes (Sentencing Procedure) Act 1999

- (1) Except as otherwise provided by this Act, the regulations or rules of court referred to in subsection (2), this Act does not affect the application of the *Criminal Procedure Act 1986* and the *Crimes (Sentencing Procedure) Act 1999* to proceedings for offences to which this Act applies.
- (2) Rules of court (not inconsistent with this Act or the regulations) may be made under the *Criminal Procedure Act 1986* for the purposes of this Act. This subsection does not limit the rule-making powers conferred by the *Criminal Procedure Act 1986*.

20 Relationship with Bail Act 1978

- (1) Without limiting section 6 of the *Bail Act 1978*, bail may be granted under that section to an accused person in respect of the period between the person's first appearance before a court in or in connection with proceedings for an offence and the holding of a compulsory conference in relation to the offence.
- (2) Without limiting section 36 of the *Bail Act 1978*, bail may be granted subject to a condition imposed under that section that the accused person enter into an agreement to be available for the purposes of a compulsory conference.

Part 6 Miscellaneous

21 Memorandum of understanding between NSW Police Force and the Director of Public Prosecutions

- (1) The Director of Public Prosecutions may enter into a memorandum of understanding with the Commissioner of Police in relation to requests for advice by police officers to the Director on any matter that could be the subject of a compulsory conference.
- (2) The memorandum of understanding may be amended, revoked or replaced from time to time.
- (3) Police functions and functions of the Office of the Director of Public Prosecutions must, as far as practicable, be exercised in conformity with the memorandum of understanding. However, a failure to comply with this subsection does not itself invalidate anything done or omitted to be done by a police officer or any officer (within the meaning of the *Director of Public Prosecutions Act 1986*).

22 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may make provision for or with respect to:
 - (a) the application of any provision (with or without modification) of the *Crimes (Sentencing Procedure) Act 1999* or the *Criminal Procedure Act 1986* to proceedings for offences to which this Act applies, and
 - (b) the practice or procedure to be followed to give effect to this Act, and
 - (c) the service of documents for the purposes of this Act.
- (3) In this section, **modification** includes addition, exception, omission or substitution.

23 Savings, transitional and other provisions

Schedule 1 has effect.

Schedule 1 Savings, transitional and other provisions

(Section 23)

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.