

Hazardous Substances and New Organisms (Transitional Provisions and Controls) Amendment Bill

Government Bill

As reported from the Education and Science Committee

Commentary

Recommendation

The Education and Science Committee has examined the Hazardous Substances and New Organisms (Transitional Provisions and Controls) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The Hazardous Substances and New Organisms (Transitional Provisions and Controls) Amendment Bill is a Government bill that amends the Hazardous Substances and New Organisms Act 1996, the purpose of which is to protect communities and the environment from the adverse effects of hazardous substances.

The intent of the bill is to minimize costs to business and the Government and reduce barriers to innovation by:

- enabling the application of cost-effective controls to hazardous substances. This includes provision for imposing two new types of controls; permissions and licences.
- facilitating the transfer of hazardous substances from transitional controls to the controls under the Hazardous Substances and New Organisms Act by changing legal processes and constraints

- broadening the way exemptions work to provide for a smooth transition to HSNO Act controls.

This commentary focuses on the main issues raised during the hearing of evidence and the consideration phases.

Delegation of powers by the Environmental Risk Management Authority

New section 19(2)(h)(i), as inserted by clause 4, lists those persons to whom the Environmental Risk Management Authority may delegate powers to deal with applications for permissions or licences. We recommend an amendment to provide that the Authority may delegate these powers to any enforcement officer as defined in the Act. This will permit delegation to health protection officers who are HSNO enforcement officers, in recognition that these persons have the relevant experience and expertise to decide applications for permissions and licences.

Assignment of cost-effective controls

Section 77 of the Act attaches default controls to a substance and provides specified powers for the Authority to vary those controls on approval. The intent of clause 5, which inserts new section 77A, is to extend these powers to enable the Authority to vary default controls including assigning controls sourced from outside the HSNO control regulations in order that the Authority may choose the most effective or cost-effective option.

We recommend amendments to clause 5, new section 77A(4). For consistency we recommend this section be aligned with new section 77A(5), which defines 'other specified controls'. This clarifies that the 'other specified controls' that may be varied by the Authority are not confined to controls imposed under section 77. Further, we also recommend section 77A(4) be amended for clarification purposes. The proposed amendments make it explicit that the Authority must be satisfied that the control assigned is either more effective, more cost effective or more likely to achieve its intended purpose than the other specified controls.

Permission and licence controls are enforceable

The bill provides that the Authority may stipulate that permission for general or particular use of a substance must be gained, or that a

licence must be obtained in order to possess a substance. Clause 6, inserting new sections 95A and 95B, sets out conditions and guidelines to be followed in such circumstances. This is necessary due to the discretionary nature of the tests applied, and in order to provide a framework under which the administrative systems can be managed.

We recommend the insertion of new clauses 6A and 6B. This is to make it explicit that a breach of a condition imposed on a licence or permission is an offence that is subject to enforcement action.

Varying the controls for substances being transferred

There are approximately 80,000 existing hazardous substances, of which approximately 70,000 are notified toxic substances not currently controlled. These substances must be transferred prior to the expiry of the transitional provision of HSNO in June 2006.

To facilitate the transfer of these substances we recommend an amendment to new section 160B, as inserted by clause 10, to clarify that when a group of substances is transferred from the transitional regime to the HSNO regime controls can be varied as a group or varied for each individual substance. This is consistent with the existing provision in section 160 of the Act allowing for the transfer of groups of substances.

Technical amendments

We recommend a number of technical amendments to clause 11. These are to substitute references made in the Act to section 160(1)(a), which is being repealed by this bill, with reference to new section 160A and to section 160B where appropriate.

Transferring non-hazardous compressed gases

Substances that are not classified as intrinsically hazardous under the HSNO regime are however hazardous in their compressed gas form. This is because all compressed gases have a pressure hazard. While controls governing compressed gases (both hazardous and non-hazardous) are currently covered by the transitional regime, the Act does not make it explicit that non-hazardous compressed gases are also covered by the HSNO regime. This presents a potential loophole whereby the enforcement of regulations for non-hazardous compressed gases could be challenged under the HSNO regime.

To close this loophole we recommend amendments to the Schedule, as set out in clause 11. The amendments, to sections 99 and 140(1)(c), specify that the application of the relevant controls, including the power to make controls under regulations, relates to all compressed gases whether they are intrinsically hazardous or not.

We also recommend amendments to clause 10, new sections 160A and 160B, to further facilitate the transfer process. The insertion of a new subsection (4A) into section 160A removes a number of obligations for transferring gases that are not intrinsically hazardous. It removes the requirement to specify a hazard classification for a non-hazardous gas before it can be transferred, in recognition that there is no suitable classification under the Act. It also lifts the requirement for an approval when the gas is not intrinsically hazardous, as the approval process requires the substance to be hazardous. Further, it clarifies that the controls prescribed for compressed gases under section 140(1)(c) apply unless varied under section 160B.

Matters outside the scope of the bill

Hazardous Substances Control Regulations

Two submitters were of the view that the existing HSNO Control Regulations, which were promulgated in July 2001, require a major overhaul to correct technical errors, overlaps, gaps, inconsistencies and conflicts.

The importance of completing the HSNO Control Regulations and improving the existing regulations has been recognised by the Hazardous Substances Strategy. In consultation with the industry, the strategy has identified a number of errors and workability issues in the regulations and will be addressing the question of their user friendliness in the public discussion paper to be released in March 2004.

We note that significant amendments to regulations are planned for 2004. Regulations required to allow the transfer of single component dangerous goods are planned for April, and those to enable the transfer of pesticides and some animal remedies in July. Further amendments are planned for later in the year to make minor updates

necessary to reflect the final version of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS).¹

There are three outstanding hazardous substance control regulations: tank wagons, compressed gases and stationary containers. Regulations for tank wagons and compressed gases are currently being drafted and are expected to be in force in March 2004. It is anticipated that controls for stationary containers will be imposed by the Authority rather than by way of regulations. This is in order to allow the controls to be in place before the transfer of single component dangerous goods in April 2004.

Disposal of ‘onerous property’ under the Companies Act

We have concerns regarding the ability of company liquidators to abandon hazardous materials without any apparent liability. Under the Companies Act a company liquidator can disclaim ‘onerous property’ as part of the process of company liquidation. There appears to be no identifiable agency responsible for overseeing payment for management, disposal, or site decontamination, and no monitoring of how the material is be stored and handled.

The Ministry of the Environment states it intends to consider the issues around liability for orphaned hazardous materials and orphaned contaminated sites in late 2004, and that rectifying the situation may involve amendment to several Acts. We are pleased to note the ministry is currently running a joint work programme with regional councils to collect and safely dispose of waste or unwanted pesticides, and is also taking a preventive approach aimed at forestalling the accumulation of hazardous stock piles such as waste tyres and waste oil.

¹ The GHS, which is designed to make available a globally harmonized hazard classification and compatible labeling system, including material safety data sheets and easily understandable symbols, was jointly developed by the Organisation for Economic Co-operation and Development (OECD), the International Labour Organisation (ILO) and the United Nations Committee of Experts on Transport of Dangerous Goods (UN-CETDG). It was presented to the UN Economic and Social Council (ECOSOC) and published in late 2003.

Appendix

Committee process

The Hazardous Substances and New Organisms (Transitional Provisions and Controls) Amendment Bill was referred to the committee on 18 November 2003. The closing date for submissions was 16 January 2004. We received and considered 12 submissions, of which we heard 6. Hearing of evidence took 1 hour and 28 minutes and consideration took 2 hours and 28 minutes.

We received advice from the Ministry for the Environment.

Committee membership

Hon Brian Donnelly (Chairperson)

Jill Pettis (Deputy Chairperson)

Donna Awatere Huata

Dr Ashraf Choudhary

Hon Bill English

Dr Wayne Mapp

Bernie Ogilvy

Lynne Pillay

H V Ross Robertson

Deborah Coddington (non-voting member)

Metiria Turei (non-voting member)

**Hazardous Substances and New
Organisms (Transitional Provisions
and Controls) Amendment**

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (unanimous)

Subject to this Act,

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

Hon Marian Hobbs

Hazardous Substances and New Organisms (Transitional Provisions and Controls) Amendment Bill

Government Bill

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6	New sections 95A and 95B inserted		
	<i>Permissions and licences</i>		
	95A Permissions		
	95B Licences		
			Schedule
			Other amendments to principal Act

The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Hazardous Substances and New Organisms (Transitional Provisions and Controls) Amendment Act **2003**.
- (2) In this Act, the Hazardous Substances and New Organisms Act 1996 is called "the principal Act".

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Part 1

Preliminary provisions

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

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3 Purpose

The purpose of this Act is—

- (a) to facilitate the smooth transfer of hazardous substances from transitional controls to the appropriate control regime under the principal Act; and
- (b) to enable the Authority to assign cost-effective controls to hazardous substances.

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Part 2

Amendments to principal Act and related provisions

4 Delegation by Authority

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Section 19(2) of the principal Act is amended by adding the following paragraphs:

“(h) the power to decide any application for any permission or licence under Part VI, or the revocation of any permission or licence under that Part, to—

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“(i) any employee of the Ministry of Agriculture and Forestry, any Medical Officer of Health (as defined in section 2(1) of the Health Act 1956), or any employee of any person specified in section 97, or any enforcement officer, with relevant experience in the subject matter of the application or the permission or licence; or

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“(ii) if there is no employee or enforcement officer with the relevant experience, any other person with the relevant experience, whether or not that person is a member of the Authority:

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“(i) the power to decide any application for any licence under Part VI, or the revocation of any licence under that Part, to any test certifier approved under section 84.”

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5 New section 77A inserted

The principal Act is amended by inserting, after section 77, the following section:

- “77A **Authority’s power to impose controls and vary specified controls**
- “(1) The Authority may, at the time it approves a substance for any purpose under this Act, impose as controls under this section any obligations and restrictions that the Authority thinks fit. 5
- “(2) Without limiting anything in **subsection (1)**, the Authority may,—
- “(a) in approving a substance, specify as a control under this section an obligation to obtain a permission under **section 95A** for general or particular use of the substance: 10
- “(b) in approving a substance, specify as a control under this section an obligation to obtain a licence under **section 95B** for possession of the substance.
- “(3) Obligations and restrictions imposed under this section are controls for the purposes of this Act, and such controls may— 15
- “(a) be additional to other specified controls; or
- “(b) vary other specified controls; or
- “(c) be in substitution for other specified controls; or
- “(d) combine other specified controls; or 20
- “(e) delete other specified controls.
- “(4) Before imposing a control under this section, the Authority must *(consider) be satisfied that, against (the) any other specified controls that apply to the substance (under section 77),—* 25
- “(a) *(the effect of) the proposed control is more effective in terms of its effect on the management, use, and risks of the substance; (and) or*
- “(b) *(whether) the proposed control is more cost-effective in terms of its effect on the management, use, and risks of the substance; (and) or* 30
- “(c) *(whether) the proposed control is more likely to achieve its purpose.*
- “(5) In this section, **other specified controls** means controls imposed by or under any other section of this Act, and includes controls imposed by regulations made under this Act.” 35

6 New sections 95A and 95B inserted

The principal Act is amended by inserting, after section 95, the following heading and sections:

“Permissions and licences

- “95A Permissions** 5
- “(1) This section applies if the Authority approves a substance subject to an obligation referred to in **section 77A(2)(a)** (namely that, before using the substance, a person must obtain a prior permission under this section for the general or particular use of the substance). 10
- “(2) An application for a permission under this section must be made in a form approved by the Authority, and must be accompanied by the appropriate charge (if any) fixed under section 21.
- “(3) In considering an application, the Authority must consider— 15
- “(a) the adverse effects involved in the use or uses of the substance to which the application relates; and
- “(b) the conditions (if any) that it thinks should be imposed as part of the permission.
- “(4) The Authority may grant a permission subject to any conditions it may specify in the permission that are consistent with the approval of the substance. 20
- “(5) The holder of a permission granted under this section is authorised to use the substance specified in the permission in accordance with the approval of the substance and the holder’s permission. 25
- “(6) A permission granted under this section must be in writing and in a form approved by the Authority.
- “(7) The Authority may, at any time by notice in writing to the holder of a permission granted under this section,— 30
- “(a) add or delete any conditions, or otherwise vary any conditions:
- “(b) revoke a permission granted to the holder under this section.
- “95B Licences** 35
- “(1) This section applies if the Authority approves a substance subject to an obligation referred to in **section 77A(2)(b)** (namely,

- that a person must obtain a licence under this section before possessing the substance).
- “(2) An application for a licence under this section must—
- “(a) be made in a form prescribed by regulations referred to in **subsection (4)** or (in the absence of such regulations) in a form determined by the Authority; and
 - “(b) be accompanied by the appropriate charge (if any) fixed under section 21.
- “(3) The Authority—
- “(a) must grant a licence under this section if satisfied that the applicant—
 - “(i) is a fit and proper person to possess the substance concerned; and
 - “(ii) meets the relevant test certification requirements that apply to the substance under section 82; and
 - “(b) may make the licence subject to any conditions it may specify in the licence{; *and*}.
- “(4) Regulations made under section 76 or section 140, or both, may (without limitation)—
- “(a) specify the criteria the Authority must consider in determining whether the applicant is a fit and proper person;
 - “(b) specify any other matters that the Authority may consider in determining whether to grant a licence under this section;
 - “(c) prescribe the form of an application for a licence under this section;
 - “(d) provide for the variation of licences under this section and provide for their revocation;
 - “(e) provide for any other matters necessary for the administration of licences under this section.
- “(5) The holder of a licence granted under this section is authorised to possess the substance specified in the licence in accordance with the approval of the substance and the holder’s licence.”

New (unanimous)

6A Offences

Section 109(1) of the principal Act is amended by inserting, after paragraph (e), the following paragraph:

New (unanimous)

“(ea) fails to comply with a condition on a licence or permission granted under **section 95A** or **section 95B**; or”.

6B Penalties

Section 114(1) of the principal Act is amended by inserting, after the words “or paragraph (e)”, the words “or **paragraph (ea)**”. 5

7 Appeals

Section 125 of the principal Act is amended by inserting, after subsection (1), the following subsection:

- “(1A) A person may appeal to the District Court against— 10
- “(a) a decision of the Authority, under **section 95A**,—
- “(i) about the terms and conditions of a permission held by the person; or
- “(ii) declining to grant the person a permission or revoking a permission held by the person; or 15
- “(b) a decision of the Authority, under **section 95B**,—
- “(i) about the terms and conditions of a licence held by the person; or
- “(ii) declining to grant the person a licence or revoking a licence held by the person.” 20

8 New section 142A inserted

The principal Act is amended by inserting, after section 142, the following section:

- “142A **Exemptions from approval requirements**
- “(1) Without limiting sections 160 and **160A**, the Authority may, 25
- from time to time, grant exemptions from any controls that would otherwise attach to a substance on its approval by the Authority under Part V.
- “(2) The Authority may grant an exemption under **subsection (1)** only if satisfied that— 30
- “(a) the adverse effects of the substance are being adequately managed; and
- “(b) the relevant requirements under Parts XI to XVI continue to apply.

- “(3) An exemption under **subsection (1)** may—
- “(a) be granted to or in respect of 1 or more of the following:
 - “(i) any person or persons:
 - “(ii) any premises or class of premises:
 - “(iii) any substance or group of substances: 5
 - “(b) be expressed to apply either particularly or generally.
- “(4) The Authority must notify an exemption granted under **subsection (1)** by—
- “(a) specifying the effect, period, and conditions of the exemption in a public notice; and 10
 - “(b) if the exemption is granted to a person or in respect of any facility, notifying the person or the manager of the facility of the exemption.
- “(5) The Authority may determine the form of public notices and other notifications under **subsection (4)**. 15
- “(6) This section expires on the expiry of Parts XI to XVI and the Seventh Schedule in accordance with section 152, but exemptions granted under **subsection (1)** that have effect immediately before this section expires continue to have effect according to their tenor.” 20

9 Exemptions from regulations

- (1) The heading to section 154 of the principal Act is amended by adding the words “**and provisions of Parts XI to XVI**”.
- (2) Section 154 of the principal Act is amended by adding the following subsections: 25
- “(4) Without limiting the provisions of subsection (1), the Authority may from time to time grant exemptions from any requirements prescribed by any provision of Parts XI to XVI that apply to any substance or group of substances.
- “(5) The Authority may grant an exemption under **subsection (4)** 30 only if satisfied that the risks of the substance or group of substances are being adequately managed.
- “(6) Subsection (3), with the necessary modifications, applies to exemptions granted under **subsection (4)**.
- “(7) The Authority must notify an exemption granted under sub- 35 section (1) or **subsection (4)** in relation to a substance by—
- “(a) specifying the effect, period, and conditions of the exemption in a public notice; and

“(b) if the exemption is granted to a person or in respect of any facility, notifying the person or the manager of the facility of the exemption.	
“(8) The Authority may determine the form of public notices and other notifications under subsection (7) .”	5
10 New sections 160A and 160B inserted	
The principal Act is amended by inserting, after section 160, the following sections:	
“160A Notices of transfer relating to transitional matters	
“(1) The Authority may from time to time, by notice in the <i>Gazette</i> , issue a notice of transfer relating to a certain substance or group of substances that are lawfully used for any purpose or purposes.	10
“(2) A notice of transfer may do 1 or more of the following:	
“(a) provide that the substance or group of substances are no longer subject to the provisions of Parts XI to XVI:	15
“(b) deem the substance or group of substances to have been assessed and approved by the Authority under section 29 for the purpose or purposes specified in the notice:	
“(c) deem the substance or group of substances to have the hazard classifications specified in the notice.	20
“(3) In every notice of transfer under this section, the Authority must specify 1 or more hazard classifications (as prescribed by regulations made under section 74) for each substance or group of substances concerned after considering the intrinsic properties and degree of hazard of the substance or group of substances.	25
“(4) Unless varied under section 160B , the controls prescribed for each substance or group of substances (as so classified) apply to the substance or group of substances.	30
New (unanimous)	
“(4A) However, if the substance is a compressed gas and the properties of the gas that is compressed are not intrinsically hazardous,—	
“(a) an approval under this Act is not required for the compressed gas; and	35

New (unanimous)

- “(b) the requirement in **subsection (3)** to specify a hazard classification does not apply to the compressed gas; and
- “(c) **subsection (5)(a)** applies as if, for the words ‘hazardous substances’, there were substituted the words ‘compressed gases’; and 5
- “(d) unless varied under **section 160B**, the relevant controls in regulations made under section 140(1)(c) apply to the compressed gas.
- “(5) Before issuing a notice of transfer under this section, the Authority must— 10
- “(a) consider the best international practices and standards for the safe management of hazardous substances; and
- “(b) do everything reasonably practicable on its part to advise all persons, who in its opinion may be affected by the notice of transfer, of the proposed terms of the notice of transfer; and 15
- “(c) give those persons a reasonable opportunity to make submissions and comments to the Authority on the proposed terms of the notice of transfer; and
- “(d) consider all submissions and comments received. 20
- “(6) Section 141A, with the necessary modifications, applies for the purposes of a notice of transfer under this section.
- “(7) A notice of transfer under this section is a regulation for the purposes of the Regulations (Disallowance) Act 1989, but is not a regulation for the purposes of the Acts and Regulations Publication Act 1989. 25
- “160B Controls may be imposed for purposes of notice of transfer**
- “(1) Before giving a notice of transfer under **section 160A**, the Authority may exercise the powers conferred by **subsection (2)** to enable it to address the risks that the Authority considers relevant. 30

**Hazardous Substances and New
Organisms (Transitional Provisions and
Controls) Amendment**

Part 2 cl 10

Struck out (unanimous)

“(2) For the purpose of **subsection (1)**, the provisions of sections 77 and **77A** are deemed to be incorporated in this section and, subject to **subsection (4)**, apply with the necessary modifications.

New (unanimous)

“(2) For the purpose of **subsection (1)**, the provisions of sections 77 and **77A** are deemed to be incorporated in this section and, subject to **subsection (4)**, apply—

“(a) with the necessary modifications; and

“(b) as if every reference in those sections to ‘substance’ included a group of substances.

“(3) Before varying or deleting any controls for the purpose of **subsection (1)**, the Authority must consider the effects of the variation or deletion on all users and in doing so must have regard to the desirability of controlling (*hazardous*) substances consistently for all users.

“(4) **Section 77A(4)** does not apply for the purpose of **subsection (1)** if—

“(a) the control being varied on transfer relates to a previous management practice; or

“(b) the control being deleted on transfer existed under Parts XI to XVI but did not apply to the substance concerned, or did not exist under those Parts.”

11 Other amendments to principal Act

The principal Act is amended in the manner set out in the **Schedule**.

Schedule
Other amendments to principal Act

s 11

Section 2(1)

Omit from the definition of **place of work** the expression “(2A)” and substitute the expression “(3)”.

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Section 20(2)(e)

Add the words “, including any associated permissions granted under **section 95A** and any associated licences granted under **section 95B**”.

New (unanimous)

Section 62(4)

Omit the expression “160(1)(a)” and substitute the expression “**160A**”.

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Section 77

Insert, after subsection (2):

“(2A) If regulations referred to in subsection (2)(a) are made, then, unless the Authority otherwise determines, the regulations do not affect any variations made by the Authority under subsections (3) to (5) before the commencement of the regulations.”

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Section 82(1)

Insert, after paragraph (a):

“(aa) any approval granted by the Authority under this Act; or”.

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New (unanimous)

Section 99

Add:

“(4) In this section, **hazardous substance** includes compressed gases, whether intrinsically hazardous or not.”

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Section 140

Add to subsection (1)(c) the words “, whether intrinsically hazardous or not”.

New (unanimous)

Section 140—continued

Add:

“(5) Regulations made under subsection (1)(c) may prescribe or provide for controls on any compressed gases, whether or not the properties of any gas that is compressed are intrinsically hazardous, and those compressed gases must all be treated as hazardous substances for the purposes of Part VII regardless of their properties.”

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Section 142

Omit from subsection (2) the words “any regulations made under this Act” and substitute the words “with regulations and notices of transfer made under this Act”.

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Omit from subsection (3) the words “this Act or regulations made under this Act” and substitute the words “or under this Act”.

Section 152

Insert, after subsection (3):

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“(3A) In the case of regulations made under section 160(1)(a), subsection (3) of this section applies despite the repeal of section 160(1)(a), (2), and (3) by **section 11** of the **Hazardous Substances and New Organisms (Transitional Provisions and Controls) Amendment Act 2003**.

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“(3B) Notices of transfer made under **section 160A** continue in force following the expiry of Parts XI to XVI and the Seventh Schedule.”

New (unanimous)

Section 154(1)

Insert, after the expression “section 160”, the words “or **section 160A**”.

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Section 160

Repeal subsections (1)(a), (2), and (3).

New (unanimous)

Section 164(3)

Omit the words “section 160(1)(a) or (c) of this Act” and substitute the words “section 160(1)(c) or **section 160A**”.

Section 180(1)(b)

Omit the words “section 160(1)(a) or (c) of this Act” and substitute the words “section 160(1)(c) or **section 160A**”. 5

Section 183(2)(c)

Insert, after the expression “section 160”, the words “or **section 160A or section 160B**”.

Section 184(3A)

Omit the expression “160(1)(a)” and substitute the expression “**160A**”. 10

Section 184(4)

Omit the words “section 160(1)(a) or (c) of this Act” and substitute the words “section 160(1)(c) or **section 160A**”. 15

Section 210(2)

Omit the words “section 160(1)(a) or (c) of this Act” and substitute the words “section 160(1)(c) or **section 160A**”.

Section 224(2)

Omit the words “section 160(1)(a) or (c) of this Act” and substitute the words “section 160(1)(c) or **section 160A**”. 20

Legislative history

6 November 2003

Introduction (Bill 84–1)

18 November 2003

First reading and referral to Education and Science
Committee
