



Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 50/55 – 25 February 2014



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2014, 61p 30 cm

Chair: Mr Stephen Bromhead MP

25 February 2014

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 50 of 55

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 50 of 55

The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Membership

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Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - i trespasses unduly on personal rights and liberties, or
 - ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - iv inappropriately delegates legislative powers, or
 - v insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- 2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

- 1 The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - i that the regulation trespasses unduly on personal rights and liberties,
 - ii that the regulation may have an adverse impact on the business community,
 - iii that the regulation may not have been within the general objects of the legislation under which it was made,
 - iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- 2 Further functions of the Committee are:
- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

Ministerial Correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

COMMENT ON REGULATIONS

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

Copies of Correspondence on Regulations

This part of the Digest contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

APPENDIX 1: INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the Digests in which reports on the Bill and correspondence appear.

APPENDIX 2: INDEX OF CORRESPONDENCE ON REGULATIONS REPORTED ON

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the Digests in which reports on the Regulation and correspondence appear.

Conclusions

PART ONE - BILLS

1. BAIL (CONSEQUENTIAL AMENDMENTS) BILL 2013

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

The Committee prefers legislation to commence on a fixed date or assent. However, according to the Attorney in his Second Reading Speech, the Act is to commence operation in May 2014. The Committee also notes that it has not identified any additional issues that may trespass on individual rights and liberties. As such, the Committee makes no further comment.

2. CHILD PROTECTION LEGISLATION AMENDMENT BILL 2013

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Right of children to be restored to family unit in appropriate circumstances

The Committee notes that the court has the discretion to make decisions outside of these timeframes and therefore makes no further comment.

Retrospectivity

Certain amendments affecting parent responsibility contracts will have retrospective effect. Some amendments may extend the duration of the contract in circumstances where the duration has been varied. However, the Committee notes that the Director General could only increase the duration of the contract with the agreement of the parties. Other amendments are unlikely to significantly impact on the contract parties. The Committee therefore makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

The Committee prefers legislation of this kind, which may impact on personal rights and liberties, to commence on a fixed date or assent.

3. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2013

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Interference with Privacy Rights

The Committee notes that the Bill exempts the *Surveillance Devices Act 2007* from operating in a prison's cell call alarm system and that this may be considered an interference with a prisoner's privacy. However, given the safety issues central to this recommendation, the Committee does not consider this amendment to be an undue interference of privacy in these circumstances.

Disclosure of Information

The Committee notes that the Bill enables the prohibition of disclosing information relating to the content of a report or document. The provision specifically provides that a non-disclosure is possible when it is in the public interest to do so and the public interest outweighs any procedural fairness that is to be denied by the non-disclosure. Despite this, the Committee is concerned at the likelihood that non-disclosure will compromise procedural fairness, including a right of reply, and prejudice an offender's right to a fair hearing or review. However, in the circumstances, the Committee makes no further comment.

Personal Integrity

The Committee notes that drug and alcohol testing on employees may be an interference with personal rights and liberties. However, given the significant trust placed in employees of correctional facilities and the duty of care they have to inmates, the Committee does not consider testing employees to be inappropriate in the circumstances provided by the Bill.

Retrospectivity

The Committee notes that the Bill validates retrospectively the deductions of remuneration earned by inmates in a work release program. Although the Committee generally expresses its concern at legislation with retrospective effect, the Committee also notes that the relevant provision simply gives statutory expression to a longstanding practice that is already underway with the consent of inmates. The Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

The Committee prefers legislation of this kind, which may impact on personal rights and liberties, to commence on a fixed date or assent.

4. CRIMES AND OTHER LEGISLATION AMENDMENT (ASSAULT AND INTOXICATION) BILL 2014; LIQUOR AMENDMENT BILL 2014

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Mandatory Sentencing

The Committee always notes when mandatory sentencing is proposed in legislation. Mandatory sentencing may lead to an unjust penalty, disproportionate to the offence committed. The Committee refers this matter to Parliament for its further consideration.

Privacy – Personal Integrity

The Committee notes that requiring a suspect to submit to a blood and urine sample may constitute an undue interference with personal integrity, especially when such a test may be used to upgrade charges against a person to one that may require a mandatory sentence of eight years upon conviction. Given the public interest in determining factors that gave rise to assault occasioning death, the Committee makes no further comment.

Civil Liability

The Committee appreciates the public interest in protecting sample takers from action pertaining to false imprisonment or assault when connected to the discharge of their duties. However, given the intrinsically medical nature of a blood and urine test, the Committee also recognises the need for sample takers to maintain a duty of care to detained individuals being

required to provide samples. In this respect, the exemption from civil liability provided by the Act may be too broad in scope. The Committee makes no further comment.

Excessive Penalties

The Committee notes the significant increase in penalties prescribed for offensive conduct or failure to comply with move on directions may be disproportionate to the offence committed. In particular, the penalty for the refusal of an intoxicated person otherwise acting lawfully to move on from a public place, may unduly infringe on his/her freedom of movement and on his or her rights and liberties more generally.. The Committee also notes \$1,100 is a significant amount for a police-issued fine, with no automatic requirement for a court to hear the matter. The Committee makes no further comment.

Privacy – Personal Data

The Committee notes that requiring patrons entering venues to have their ID scanned may be an interference with the patron’s privacy, but also notes that the venues are required to comply with appropriate privacy regulations. The Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Regulation-making Powers

The Committee notes the broad sweep of regulation-making powers afforded to the Minister for Tourism, including the ability to exclude certain classes of individuals from entering certain venues. The Committee also recognises the public interest in ensuring the safety and security of all patrons, as well as the interest in not allowing members and associates of criminal organisations from entering high-risk alcohol venues. The Committee makes no further comment.

5. MINING AMENDMENT (ICAC OPERATIONS JASPER AND ACACIA) BILL 2014

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Denial of Due Process

The Committee notes that the recommendations and findings of ICAC which form the basis for cancelling the exploration licences in respect of Doyles Creek, Mount Penny and Glendon Brook are subject to legal challenge and further threatened legal challenge. Cancelling the licences prior to the outcome of the legal proceedings may be premature. Nonetheless, having regard to the information that came to light as a result of ICAC investigations, the Parliament is entitled to form its own view about whether the licences should be cancelled. For this reason, the Committee makes no further comment.

Denial of Compensation

The Committee notes the exploration licences are cancelled under the Bill without compensation. The Committee further notes that these provisions relate only to licences that have been judged by Parliament to be linked with serious corruption. In these circumstances, the Committee does not consider the provisions to be unreasonable. The Committee makes no further comment.

Exclusion of State Liability

The Committee notes the Bill protects the State against liability in respect of the circumstances that led to the granting of the relevant exploration licences. It thereby abrogates certain

common law rights, including contractual rights. However, these provisions do not protect any individuals or companies who have engaged in deliberate wrongdoing. They are also consistent with the overall objects of the Bill to place the State, as nearly as possible, in the same position as it would have been had the licences not been granted; to protect the State against further loss or damage; and to restore public confidence in the allocation of the State's mineral resources. For these reasons, the Committee makes no further comment.

Increased Penalty

The Committee notes that the Bill requires licence holders to continue to report on prospecting activities despite cancellation of their licences, significantly increases penalties for failing to prepare or lodge such a report, and extends such penalties to corporations for the first time. The information contained in these reports may be useful for future mining purposes and therefore these provisions are important to achieving one of the objects of the Bill – ensuring that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land according to proper processes in the public interest. For this reason, the Committee makes no further comment.

Retrospectivity

The Committee will generally comment when provisions are drafted to have retrospective effect. This is because such provisions are contrary to the rule of law which allows people to order their affairs according to what the law is. Nonetheless, the Committee notes this retrospective provision does not include items of particular concern e.g. new offences or penalties. Similarly, in allowing disclosure of information for future mining purposes the provision is necessary to achieving one of the objects of the Bill - ensuring that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land according to proper processes in the public interest. For these reasons the provision is not unreasonable and the Committee makes no further comment.

6. MINING AND PETROLEUM LEGISLATION AMENDMENT (PUBLIC INTEREST) BILL 2013

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Denial of compensation

The Committee notes that mining rights and petroleum titles may be cancelled under the Bill without compensation. The Committee further notes that it is the intention of the Government to cancel such mining rights and petroleum titles only where the Independent Commission Against Corruption has determined that serious conduct has affected, in some essential respect, the granting of the mining right or petroleum title. In these circumstances, the Committee does not consider the provisions to be unreasonable and makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Ill-defined and wide powers

The Bill allows the Government to cancel mining rights and petroleum titles if in the public interest. However, “public interest” is not defined in the Bill. The Premier told Parliament that it is the intention of the Government to use this power only where the Independent Commission Against Corruption has determined that serious conduct has affected, in some

essential respect, the granting of such a right. The Committee would prefer for this qualification to have been included in the Bill. The Committee makes no further comment.

7. PROTECTION OF THE ENVIRONMENT OPERATIONS AMENDMENT (PROSECUTIONS) BILL 2013*

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

8. PUBLIC INTEREST DISCLOSURES AMENDMENT (EXTENSION OF PROTECTIONS) BILL 2013*

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Broadening of Offence and Increased Penalty

Schedule 1, item 33 of the Bill broadens the offence of taking detrimental action against a person in reprisal for a public interest disclosure to capture a broader range of behaviour, and increases the maximum penalty for the offence. As these changes are part of an overall scheme to encourage whistleblowing by mitigating the risk to whistleblowers, and as the increased penalty is not disproportionate in the circumstances, the Committee makes no further comment.

Shifting Onus of Proof

By requiring an accused person to disprove a presumption that he or she is guilty of an offence, schedule 1, item 33 of the Bill may violate a person's right to the presumption of innocence. Further, if the person is unable to disprove the presumption that he or she is guilty of the offence, the consequences are potentially serious. The person could be sentenced to a maximum of 3 years imprisonment. Nonetheless, the *Public Interest Disclosures Act 1994* already contains a similar provision to plug an evidentiary gap for the prosecution, once it has proved detrimental action took place, which may otherwise be insurmountable. For these reasons, the Committee makes no further comment.

Retrospectivity

The Committee generally comments when provisions in legislation are drafted to have retrospective effect. Such provisions can be contrary to the rule of law which allows people to order their affairs according to what the law is. In this case, the retrospective provision does not create a new offence or penalty but rather new protections for whistleblowers which may make reporting of a wider range of pre-existing wrongdoing more likely. Given no new offence or penalty is created, the Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Potential Commencement by Proclamation

The Committee prefers legislation of this kind, which impacts on rights and liberties, to commence on a fixed date or on assent, not by proclamation.

PART TWO – REGULATIONS

The Committee does not report on any Regulations in this Digest.

Part One - Bills

1. Bail (Consequential Amendments) Bill 2013

Date introduced	20 November 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Justice

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Bail Act 2013* for various purposes.
2. This includes, clarifying that a bail authority can decide who is an acceptable person to provide security for the grant of bail (in the same way as the bail authority can decide who is an acceptable person to give a character acknowledgment).
3. The Bill also expands the regulation-making powers conferred by the Act.
4. Lastly, the Bill makes other minor changes of a statute law revision nature.

BACKGROUND

5. The Government's new *Bail Act 2013* was passed by Parliament on 22 May 2013 and received assent on 27 May 2013. The Government intends the new Act to commence operation 12 months after its passage by Parliament in May 2014. The process of implementing the new legislation and preparing for its commencement is currently underway. As a result of that activity, some minor drafting issues with the new legislation have been identified, including the need to update references in other legislations, and this Bill addresses those issues.

OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.
7. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
8. Schedule 1 [1] and [2] make it clear that a bail authority, or an officer or court to whom a bail acknowledgment is given, has power to decide which person or persons, or class or description of persons, is an acceptable person to enter into a bail security agreement. A bail security agreement is an agreement under which a person agrees to forfeit a specified amount of money if a person granted bail fails to appear before a court in accordance with his or her bail acknowledgment. The amendments ensure that the powers of a bail authority to decide who is an acceptable person to provide bail

security mirror the powers of a bail authority to decide who is an acceptable person to give a character acknowledgment. This is consistent with current practice under the Bail Act 1978.

9. Schedule 1 [3] corrects a reference to an offence.
10. Schedule 1 [4] makes it clear that it is not necessary for a prosecutor to make a detention application to a court (an application for the refusal or revocation of bail in respect of a person) in order to oppose a release application (an application for the grant of bail) made by the accused person.
11. Schedule 1 [5] amends a provision that lists the powers of the Local Court and authorised justices to hear bail applications, to make it clear that an authorised justice has power to hear a variation application in relation to bail conditions imposed by a court if the bail conditions are reviewable by a justice, as contemplated by section 52 of the Bail Act 2013. Schedule 1 [6] permits a court to put in place a process that ensures that consideration is given to the return of bail money if an accused person is convicted or acquitted of an offence. This replaces a requirement that the court itself give consideration to the return of bail money when an accused person is convicted or acquitted of an offence. Accordingly, the amendment will permit a court to deal with the matter by referring it to a registrar or other court officer for consideration.
12. Schedule 1 [7] permits the regulations to make further provision for the return of bail money and bail security.
13. Schedule 1 [8] permits the regulations to make provision for the forms to be used for the purposes of the Bail Act 2013.
14. Schedule 2 amends the Acts specified in that Schedule as a consequence of the enactment of the Bail Act 2013 and the repeal of the Bail Act 1978.
15. The amendments continue the existing practice of permitting a bail decision to be made in respect of certain persons who are taken into State custody and are not charged with an offence (for example, a witness who fails to appear in proceedings before a court or a coroner, or a person who fails to provide a name and address to an enforcement officer). In such a case, the Bail Act 2013 will apply to the person in custody as if the person were accused of an offence. The amendments also make it clear who is permitted to make a bail decision in such cases and otherwise modify the operation of the Bail Act 2013 to accommodate a non-offence situation (as contemplated by clause 2 of Schedule 1 to the Act). See Schedule 2.2 [2], 2.8, 2.15 [4], [9] and [11], 2.23, 2.24, 2.27 and 2.29.
16. The Evidence Act 1995 states that the Evidence Act 1995 applies to proceedings relating to bail. An amendment to that Act makes it clear that the application of that Act is subject to certain provisions of the Bail Act 2013 that require bail decisions to be made having regard to any credible or trustworthy evidence or information, and for decisions to be made on the balance of probabilities. See Schedule 2.18 [1]. An amendment to the Intoxicated Persons (Sobering Up Centres Trial) Act 2013 makes it clear that a police officer is not required to make a bail decision in respect of an intoxicated person while the person is detained under that Act. See Schedule 2.21.

17. The other amendments in Schedule 2 update references to the Bail Act 1978 and to specific provisions of, or terminology used in, that Act, to reflect the appropriate provisions and terminology of the Bail Act 2013.

ISSUES CONSIDERED BY COMMITTEE

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

18. Clause 2 of the Bill states that the Act commences on a day or days to be appointed by proclamation.

The Committee prefers legislation to commence on a fixed date or assent. However, according to the Attorney in his Second Reading Speech, the Act is to commence operation in May 2014. The Committee also notes that it has not identified any additional issues that may trespass on individual rights and liberties. As such, the Committee makes no further comment.

2. Child Protection Legislation Amendment Bill 2013

Date introduced	21 November 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Pru Goward MP
Portfolio	Minister for Family and Community Services and Minister for Women

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Children and Young Persons (Care and Protection) Act 1998* (the **Principal Act**), the *Adoption Act 2000*, the *Child Protection (Working with Children) Act 2012* and other legislation to implement miscellaneous reforms relating to the protection of children and young persons that are intended to:
 - (a) promote good parenting and increase parental responsibility for children and young persons, and
 - (b) achieve greater permanency for children and young persons in out-of-home care, and
 - (c) modernise and create a more responsive and child focused system, and
 - (d) improve the transparency and accountability of child protection services.

BACKGROUND

2. In November 2012, the Minister for Family and Community Services released a discussion paper, *Child Protection Legislative Reform*, to the public for feedback. The discussion paper proposed 29 legislative and practice changes to improve the child protection system, reduce the number of children and young people at risk of significant harm and provide permanency and a 'home for life' for those children who cannot live at home safely.
3. Over 230 submissions were received in response to the discussion paper. The Department of Family and Community Services also co-ordinated face-to-face consultations across NSW.
4. The Bill has been developed in response to the feedback received through these processes.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Promotion of good parenting and increase of parental responsibility for children and young persons

Parent responsibility contracts

7. Schedule 1 [13]–[28] make a number of amendments to the Principal Act to expand the use, and increase the effectiveness, of parent responsibility contracts. The amendments:
 - (a) amend sections 38A, 38B and 38E of the Principal Act to enable the Director-General of the Department of Family and Community Services (the **Director-General**) to enter into a parent responsibility contract with an expectant parent whose unborn child has been the subject of a pre-natal report under section 25 of the Principal Act and that contains provisions aimed at improving the parenting skills of the prospective parent and reducing the likelihood that the child will be at risk of significant harm after birth, and
 - (b) amend section 38A (2) (e) of the Principal Act to extend the period during which a parent responsibility contract may be in force from 6 to 12 months after it is registered with the Children’s Court, and
 - (c) omit section 38E (4) of the Principal Act to remove the automatic presumption that a child or young person is in need of care and protection if a contract breach notice is filed in the Children’s Court.
8. Schedule 1 [9] and [38] are consequential amendments.

Parent capacity orders

9. Schedule 1 [65] inserts Part 3 (proposed sections 91A–91I) into Chapter 5 of the Principal Act to enable the Children’s Court to make a new form of order requiring a parent or primary care-giver of a child or young person to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills (a **parent capacity order**).
10. A parent capacity order will be able to be made on the application of the Director-General or on the Children’s Court’s own initiative if it finds that a prohibition order has been breached under proposed section 90A of the Principal Act. The Children’s Court may require the Director-General and the parent or primary care-giver concerned to attend a dispute resolution conference conducted by a Children’s Registrar so as to provide the parties with an opportunity to agree on action that should be taken to build or enhance the parenting skills of the parent or primary care-giver. The Children’s Court may make a parent capacity order if it is satisfied there is an identified deficiency in the parenting capacity of the parent or primary care-giver that has the potential to place the child or young person at risk of significant harm, that it is reasonable and practicable to require compliance with the order and that the parent or primary care-giver is unlikely to engage in the required program, service, course, therapy or treatment unless the order is made. The parties are able to make a parent capacity order by consent (proposed section 91F) and may seek its variation or revocation. Parties may also appeal on a question of law against the making of the order (proposed section 91I).

11. Schedule 1 [90] inserts Chapter 15A (proposed sections 244A–244C) into the Principal Act. Proposed section 244A defines **alternative dispute resolution** so as to encompass the different processes (such as family group conferencing) that may be used where the Act provides for use of alternative dispute resolution. Proposed section 244B limits the admissibility in proceedings in any court, tribunal or other body of anything said or done or any admission made during alternative dispute resolution. Proposed section 244C limits the circumstances in which a person who conducts or participates in alternative dispute resolution may disclose anything said or done or any admission made during the alternative dispute resolution to another person.
12. Schedule 1 [2], [10]–[12], [30]–[36], [66], [68] and [70] make amendments that are consequential on those made by Schedule 1 [65] and [90]. Schedule 1 [29] makes it clear that a parent capacity order is not a care order for the purposes of the Principal Act.

Achievement of greater permanency for children and young persons in out-of-home care

Permanent placement principles

13. Schedule 1 [5] and [6] amend sections 8 and 9, respectively, of the Principal Act and Schedule 1 [7] inserts proposed section 10A into that Act to provide for recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with permanent placement principles. Proposed section 10A (3) sets out the preferred hierarchy for permanent placements. Under the principles, the first preference is for a child or young person to be restored to the care of his or her parents, the second is for guardianship of a relative, kin or other suitable person, the third is (except in the case of Aboriginal and Torres Strait Islander children and young persons) for the child or young person to be adopted and only after these options prove to be impracticable, or not in the best interests of the child or young person, for the child or young person to be placed as a last preference, under the parental responsibility of the Minister. In the case of an Aboriginal or Torres Strait Islander child or young person, adoption is the last preference. The principles are intended (subject to sections 8 and 9 of the Principal Act) to guide all actions and decisions made under the Act regarding permanent placements. Schedule 1 [47] and [48] amend section 78A of the Principal Act to require the permanent placement principles to be taken into account in the making of permanency plans. Proposed section 79 (3) (Schedule 1 [49]) requires the Children’s Court to give particular consideration to the principles when making an order allocating parental responsibility.
14. Schedule 1 [53] amends section 83 (4) so that the Director-General must consider whether adoption is the preferred option for a child or young person in preparing a permanency plan for the placement of a child or young person for whom there is no realistic possibility of restoration to his or her parents.
15. Schedule 1 [1], [3],[4], [8], [54], [56] and [73] make consequential amendments to the Principal Act.

Out-of-home care

16. Schedule 1 [55] substitutes section 83 (5) of, and inserts proposed section 83 (5A) into, the Principal Act to require the Children’s Court to make a decision about the feasibility

of restoration within specified time frames unless it decides to defer the decision in the best interests of the child or young person.

17. Schedule 1 [80] substitutes section 153 (3) and inserts proposed section 153 (4) into the Principal Act to provide that a child or young person cannot be placed in out-of-home care with a relative or kin otherwise than by a court order for more than 2 years. Schedule 1 [79] is a consequential amendment.
18. Schedule 1 [81] amends section 155 of the Principal Act so that a designated agency will not be required to conduct a review under that section in relation to the out-of-home care arrangements of a child or young person who is in supported out-of-home care of a relative or kin pursuant to a court order in certain circumstances.

Allocation of parental responsibility and guardianship orders

19. Schedule 1 [49], [51] and [76]–[78] amend the Principal Act to clarify and enhance provisions of the Act relating to the allocation of parental responsibility.
20. Sections 79 and 81 are merged to provide a clearer system for the allocation of parental responsibility and provision is made for the making of guardianship orders by the Children’s Court allocating all aspects of parental responsibility for a child or young person in statutory out-of-home care or supported out-of-home care or who it has found is in need of care and protection to one or more persons, jointly, until the child reaches 18 years of age (proposed sections 79A–79C).
21. The Children’s Court may make such an order only if satisfied that there is no realistic possibility of the child or young person being restored to his or her parents, that the child or young person will be provided with a safe, nurturing, stable and secure environment, that, in the case of an Aboriginal or Torres Strait Islander child or young person, the principles set out in section 13 of the Principal Act are applied and that, if the child or young person is 12 or more years of age and capable of giving consent, the child or young person has consented. Proposed section 79C makes provision for financial assistance with respect to children and young persons who are the subject of guardianship orders. Schedule 1 [94] includes savings and transitional provisions deeming orders under section 79 (1) (a) (iii) to be guardianship orders and preserving arrangements for financial assistance for such authorised carers. Schedule 2.5 amends the *Guardianship Act 1987* to ensure there is no inconsistency between guardianship orders made under the Principal Act and guardianship orders made under that Act. Schedule 1 [74] amends section 135 to make it clear that a child or young person under a guardianship order is not in out-of-home care. Schedule 1 [40]–[43], [50], [52], [59] and [91] are consequential amendments.
22. Schedule 1 [76]–[78] repeal section 149 (which provides for the making of orders awarding sole parental responsibility for children and young persons for whom the Minister has parental responsibility to the authorised carers of the children or young persons in certain circumstances) and sections 149AA and 149A.

Adoption of children in out-of-home care

23. The Bill makes a number of amendments to the Principal Act and the *Adoption Act 2000* to simplify the processes for the adoption of children and young persons in out-of-home care and enable more expeditious permanent placement of children and young persons.

24. Schedule 1 [75] amends section 137 of the Principal Act to enable a regulatory framework to be established for dual authorisation of authorised carers and prospective adoptive parents.
25. Schedule 1 [88] and [89] amend section 181 to confer functions on the Children's Guardian of accrediting adoption service providers under the *Adoption Act 2000* and monitoring the carrying out of their responsibilities and those of the Director-General with respect to the provision of adoption services under that Act.
26. Schedule 2.1 amends the *Adoption Act 2000* as follows:
 - (a) to provide for the Children's Guardian to accredit non-government organisations to provide adoption services and to monitor the carrying out of their responsibilities and those of the Director-General with respect to adoption services under that Act (proposed section 12, Schedule 2.1 [5]),
 - (b) to establish a framework that will enable organisations providing services in relation to both out-of-home care and adoption to be accredited through a single process and to be subject to integrated standards in accordance with the regulations (proposed section 13, Schedule 2.1 [5]),
 - (c) by establishing a framework for simplified procedures to enable the authorised carers of a child who is in out-of-home care to be invited to apply to adopt the child and to be assessed as suitable to adopt the child (Schedule 2.1 [9]),
 - (d) to enable a birth parent who has not consented to the adoption of a child to be given the opportunity to participate in the development of, and agree to, the adoption plan for the child and to the review of such a plan (Schedule 2.1 [10]),
 - (e) to ensure that prospective adoptive parents cannot be assessed to be suitable to adopt a child unless they (and adult persons residing with them) have a working with children check clearance under the *Child Protection (Working with Children) Act 2012* (Schedule 2.1 [8]).
27. Schedule 2.2 amends the *Child Protection (Working with Children) Act 2012* to require prospective adoptive parents and prospective guardians under proposed section 79A of the Principal Act, and adults residing with them, to obtain a working with children check clearance of the volunteer class in certain circumstances.

Modernise and provide a more child focused system

Supervision orders

28. Schedule 1 [44]–[46] amend section 76 of the Principal Act to enable the Children's Court to make a supervision order under that section for a longer period than 12 months (but not exceeding 24 months) if it is satisfied of special circumstances warranting the making of an order of that length and it is appropriate to do so.

Contact orders

29. Schedule 1 [57] and [58] amend section 86 of the Principal Act to provide for more flexibility concerning the persons who may seek a contact order and for use of alternative dispute resolution regarding contact arrangements. Schedule 1 [38] is a consequential amendment.

30. Schedule 1 [60] inserts proposed section 86 (6) into the Principal Act to limit the duration of initial contact orders (where there is no realistic possibility of restoration of a child or young person to his or her parents) to a maximum period of 12 months.
31. Schedule 1 [61] inserts proposed section 86A into the Principal Act to enable a contact order to be varied in the light of a change in circumstances since the contact order was last made or varied by agreement of the parties to the proceedings in which the contact order was made who are affected by the variation.
32. Schedule 1 [62] amends section 90 of the Principal Act to require an applicant for rescission or variation of a care order to notify affected parties (subject to any order of the Children's Court).

Prohibition orders

33. Schedule 1 [63] amends section 90A of the Principal Act to enable the Children's Court to make prohibition orders during care proceedings prohibiting any persons, including persons who are not parties to the proceedings, from doing anything that could be done by a parent in carrying out his or her parental responsibility.
34. Schedule 1 [64] amends section 90A to enable parties to care proceedings in which a prohibition order is made to notify the Children's Court of alleged breaches of the prohibition order and to confer on the Children's Court powers to make orders if it determines a breach has occurred. The powers conferred include power to make a parent capacity order under proposed Part 3 of Chapter 5 (see Schedule 1 [65]).

Reporting requirements

35. Schedule 1 [71] and [72] amend section 122 of the Principal Act to clarify mandatory reporting requirements under that section so that they will not apply to friends or relatives who provide residential accommodation to a child living away from home without parental permission in specified circumstances.

Special medical treatment

36. Schedule 1 [84]–[86] amend section 175 of the Principal Act to provide that the prescription of drugs of addiction and treatment that does not comply with certain national health ethical guidelines is special medical treatment under the Principal Act and to enable the grant of exemptions in specified circumstances.
37. Schedule 1 [87] inserts proposed section 177A into the Principal Act to enable regulations to be made for or with respect to the procedures to be followed by the designated agency having supervisory responsibility for a child or young person in out-of-home care in authorising, consenting to or monitoring the physical, psychological, psychiatric or other medical examinations, treatment and control of the behaviour of the child or young person under Chapter 9 of the Principal Act.

Exchange of information

38. Schedule 1 [92] enables bodies and classes of bodies and organisations in addition to those specified in section 248 (6) to be prescribed for the purpose of Chapter 16A of the Principal Act. Chapter 16A provides for the exchange of information and co-ordination of services to children and young persons by prescribed bodies, authorises them to

exchange relevant information and protects the confidentiality of information exchanged.

Improving transparency and accountability

39. Schedule 1 [67] amends section 105 of the Principal Act to make it clear that the provisions of that section prohibiting the publication of names and identifying information concerning children and young persons extend to publication on the internet.
40. Schedule 1 [83] inserts section 172A into the Principal Act to require the Director-General to report to the Minister annually with respect to the deaths of children and young persons in specified circumstances. The Minister is required to table a copy of the report in Parliament as soon as practicable after it is made.

Miscellaneous

41. Schedule 1 [37] inserts section 67A to make it clear that the Children's Court may make consecutive care orders.
42. Schedule 1 [69] amends section 116 to better reflect current practice with respect to notification of applications for orders for alternative parenting plans.
43. Schedule 1 [82] amends section 161 to enable the regulations to prescribe additional circumstances in which financial assistance may be provided under that section.
44. Schedule 1 [93] amends Schedule 3 to the Principal Act to enable the making of savings and transitional regulations.
45. Schedule 2.3 repeals the uncommenced provisions of the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009*. Those provisions are superseded by the proposed amendments described above relating to contact orders and alternative dispute resolution.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Right of children to be restored to family unit in appropriate circumstances

46. Schedule 1 [55] of the Bill proposes to amend section 83 of the *Children and Young Persons (Care and Protection) Act 1998* to introduce set timeframes for the Children's Court to decide whether or not there is a realistic possibility of restoring a child to his or her parents. For children less than two years, the timeframe will be within six months after the Children's Court makes the interim order. For children two years or older, the timeframe will be within 12 months after the Children's Court makes the interim order.

The Committee notes that the court has the discretion to make decisions outside of these timeframes and therefore makes no further comment.

Retrospectivity

47. Schedule 1 clause [94] of the Bill provides that, with respect to parent responsibility contracts, some amendments made to sections 38A to 38E of the *Children and Young*

Persons (Care and Protection) Act 1998 extend to contracts that are in force immediately before the commencement of those amendments.

Certain amendments affecting parent responsibility contracts will have retrospective effect. Some amendments may extend the duration of the contract in circumstances where the duration has been varied. However, the Committee notes that the Director General could only increase the duration of the contract with the agreement of the parties. Other amendments are unlikely to significantly impact on the contract parties. The Committee therefore makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

48. Clause 2 of the Bill states that the Act commences on a day or days to be appointed by proclamation.

The Committee prefers legislation of this kind, which may impact on personal rights and liberties, to commence on a fixed date or assent.

3. Crimes (Administration of Sentences) Amendment Bill 2013

Date introduced	20 November 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Justice

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make miscellaneous amendments to the *Crimes (Administration of Sentences) Act 1999* as follows:
2. To require remuneration earned by inmates as participants in external work release programs to be paid directly to the Commissioner of Corrective Services (the Commissioner) on behalf of the inmates.
3. To expressly authorise the Commissioner to deduct from such remuneration an amount to contribute towards the costs of such programs and of the inmates imprisonment, and to validate past deductions.
4. To reframe the basis on which the Commissioner may make segregated custody directions.
5. To provide for the recording of conversations made over inmate cell call alarms systems in correctional centres.
6. To protect persons involved in community service work from civil liability in relation to community service work performed by offenders while residing in premises declared to be residential facilities under the principal Act (residential facilities).
7. To impose a statutory condition as to supervision on parole orders made on the basis of exceptional extenuating circumstances.
8. To enable a parole order made on the basis of exceptional extenuating circumstances to be revoked if the circumstances cease to exist.
9. To make the time at which the State Parole Authority (the Parole Authority) may consider parole to avoid manifest injustice for an offender whose parole has been revoked the same as it is for an offender whose parole has been refused.
10. To make warrants issued by the Parole Authority that commit offenders to correctional centres effective on their signing by the Secretary of the Parole Authority.
11. To enable a judicial member of the Parole Authority or of the Serious Offenders Review Council to prohibit the disclosure of information about the content of a report or other document the disclosure of which has been prohibited under the principal Act.

12. To extend the classes of offenders who may be accommodated in residential facilities.
13. To provide for the testing of correctional centre staff employed at correctional centres managed by private contractors for alcohol and prohibited drugs.
14. To enable the Secretary of the Parole Authority to act as a non-judicial members for the purposes of constituting a quorum of the Authority in urgent circumstances.
15. To make other amendments of a consequential, ancillary or minor nature.
16. The Bill also amends the *Crimes (Administration of Sentences) Regulation 2008*, to enable the Commissioner to authorise the operation of a biometric identification system in any correctional centre.
17. Lastly, the Bill amends the *Fines Act 1996*, to authorise the Commissioner to deduct victims support levies payable by offenders, from remuneration earned by the offenders on external work release programs, and to validate past deductions.

BACKGROUND

18. This Bill makes a number of miscellaneous amendments to the *Crimes (Administration of Sentences) Act 1999* to improve the administration of sentences in New South Wales. These amendments concern a broad sweep of matters and affect numerous pieces of legislation.

OUTLINE OF PROVISIONS

19. Clause 1 sets out the name (also called the short title) of the proposed Act.
20. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
21. **Remuneration earned from external work release programs**

Corrective Services NSW administers external work release programs under which eligible inmates may work in paid employment in the community during their sentences, in accordance with a local leave permit issued under the principal Act.

Schedule 1 [1] makes provision with respect to remuneration earned by an inmate as a participant in such a program. Under proposed section 7A, such remuneration is to be paid by the employer to the Commissioner on behalf of the inmate. From such remuneration, the Commissioner may deduct an amount to contribute towards the costs of administering the external work release program, expenses related to the inmate's participation in the program (such as travel fares) and the costs of the inmate's imprisonment during the period in which such remuneration is earned. Any deducted amounts are to be calculated in accordance with the directions of the Minister for Justice. Schedule 1 [3] makes a consequential amendment. Schedule 1 [24] inserts a provision to validate any deductions from remuneration earned by an inmate as a participant in an external work release program that were made before the commencement of proposed section 7A (2), if such deductions would have been validly made had they been made on or after the commencement of that provision.

22. **Segregated custody directions**

Schedule 1 [2] modifies the basis on which the Commissioner may direct that an inmate be held in segregated custody, so that the Commissioner may make such a direction if of the opinion that the segregation is necessary to secure the safety of others or the security of or good order and discipline within a correctional centre (rather than if of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to such safety or security or good order and discipline).

23. Recording of conversations made over cell call alarm systems

Section 7 of the Surveillance Devices Act 2007 makes it an offence (with specified exceptions) for a person to knowingly install, use or cause to be used, or to maintain, a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party or to record a private conversation to which the person is a party. Schedule 1 [4] provides for an exemption from that section to allow conversations made through cell call alarm systems in correctional centres to be recorded.

24. Civil liability protection in respect of certain community service work

Schedule 1 [5] and [6] extend (by extending relevant definitions) the general provisions of the principal Act dealing with the carrying out of community service work by offenders so that they apply also in relation to community service work performed by offenders residing in residential facilities, pursuant to a condition to which such residency is subject. In particular, the general provisions protect a person involved in community service work from civil liability towards third parties for acts and omissions of the offender performing the work, and towards the offender performing the work for acts and omissions of the person so involved (that liability being assumed instead by the Crown). The general provisions also impose restrictions on the community service work that may be performed and when it may be required to be performed, require offenders to disclose to the Commissioner any special medical, physical or mental condition, and authorise the Commissioner to settle claims against the Crown that arise under the provisions.

25. Parole orders in exceptional extenuating circumstances

Schedule 1 [8] imposes a statutory condition on parole orders made on the grounds that the offender is dying or because of exceptional extenuating circumstances, that requires the offender to be subject to supervision for the whole period the parole order is in force. Schedule 1 [7] makes a consequential amendment. Schedule 1 [12] enables the Parole Authority to revoke a parole order made on the grounds that the offender is dying or because of exceptional extenuating circumstances if satisfied those grounds or circumstances no longer exist.

26. Consideration of parole so as to avoid manifest injustice

Schedule 1 [9] makes the time at which the Parole Authority may consider parole to avoid manifest injustice for an offender whose parole has been revoked the same as it is for an offender whose parole has been refused, being at any time after the date on which the offender first becomes eligible for release on parole. (Currently, because an offender's parole eligibility date (as defined in the principal Act) determines the time for consideration, an offender whose parole has been revoked cannot be considered for parole to avoid manifest injustice until 12 months after revocation whereas an offender

whose parole has been refused may be considered at any time after the date on which the offender first becomes eligible for release on parole.) Schedule 1 [10] and [11] make consequential amendments.

27. Signing of warrants committing offenders to correctional centres

Schedule 1 [13] and [14] make warrants issued by the Parole Authority that commit offenders to correctional centres effective on their signing by the Secretary of the Parole Authority rather than by a judicial member of the Parole Authority. However, as soon as practicable after the signing of a warrant by the Secretary, it is to be countersigned by a judicial member of the Parole Authority.

28. Security of certain information

The principal Act enables a judicial member of the Parole Authority or of the Serious Offenders Review Council to prohibit the disclosure under the principal Act of a report or document if the judicial member considers that the disclosure may adversely affect the security, discipline or good order of a correctional centre, endanger a person, jeopardise the conduct of any lawful investigation, prejudice the public interest, adversely affect the supervision of any offender who has been released on parole or disclose the contents of any offender's medical, psychiatric or psychological report. Schedule 1 [15] and [16] enable a judicial member of the Parole Authority or of the Serious Offenders Review Council to prohibit the disclosure under the principal Act of any information relating to the content of a report or document the disclosure of which is so prohibited, but only if the judicial member considers that non-disclosure of the information is necessary in the public interest and that the public interest outweighs any right to procedural fairness that may be denied by non-disclosure of the information.

29. Accommodation of offenders in residential facilities

Schedule 1 [20] extends the classes of offenders who may be accommodated in residential facilities so as to include offenders who are subject to an extended or interim supervision order, a home detention order or an intensive correction order, or offenders in community custody (Stage 3) who are subject to a community supervision order. Schedule 1 [18] and [19] make consequential amendments.

30. Alcohol and drug testing of staff at privately managed correctional centres

Schedule 1 [21] requires operators of privately managed correctional centres (whether management companies or submanagement companies) to prepare and implement a program, approved by the Commissioner, for the testing of their correctional centre staff for alcohol and prohibited drugs, and to ensure that staff are not under the influence of alcohol or prohibited drugs when on duty, or when present at their place of work and about to go on duty. The item also enables the Commissioner to direct an operator to require its correctional centre staff to undergo testing for alcohol and prohibited drugs in accordance with the operator's approved testing program or in accordance with the testing regime provided for in the principal Act for correctional officers and other persons employed by Corrective Services NSW.

31. Constitution of quorum of Parole Authority

32. Schedule 1 [22] allows the Secretary of the Parole Authority to act as a non-judicial member of the Authority for the purposes of constituting a quorum for a meeting of the Authority and for the purposes of the meeting if the judicial member who is to preside considers it necessary because of the urgency of the business to be considered, and the lack of ready availability of any other non-judicial member to constitute a quorum. The Secretary has all the functions of, and is taken to be, a non-judicial member while so acting.
33. **Other amendments**
- Schedule 1 [17] makes an amendment in the nature of statute law revision. Schedule 1 [23] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act or any other Act that amends the principal Act. Schedule 1 [24] inserts (in addition to the validating provision referred to above) provisions of a savings or transitional nature consequent on the amendments made by Schedule 1 [2], [5], [6], [8], [9], [12]–[16] and [20].
34. Amendments to **The Fines Act 1996** provides for the enforcement of victims support levies that are payable by inmates, by means of attachment of the inmates' prison earnings (being payments made to inmates by the Commissioner under the Crimes (Administration of Sentences) Act 1999 for work done and other purposes). Schedule 2 [1] extends the definition of prison earnings to include remuneration earned by inmates as participants in external work release programs. Schedule 2 [2] inserts provisions to validate any deductions from such remuneration for the purposes of enforcing a victims support levy (or its predecessor, a compensation levy) that were made before the commencement of the amendments made to the Fines Act 1996 by the proposed Act, if such deductions would have been validly made had the Fines Act 1996 as so amended then been in force. The item also validates the enforcement of the levies concerned by means of those deductions.
35. Amendments to the **Crimes (Administration of Sentences) Regulation 2008** enables the Commissioner to authorise the operation of a biometric identification system only in correctional centres in which high security, extreme high security or extreme high risk restricted inmates are accommodated or in which inmates are received before they are classified. Schedule 3 [4] removes these restrictions to enable the Commissioner to authorise the operation of a biometric identification system in any correctional centre. Schedule 3 [1]–[3] make amendments consequential on the amendment made by Schedule 1 [8].

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Interference with Privacy Rights

36. Cl [4] of the Bill proposes to exclude the operation of the *Surveillance Devices Act 2007* to ensure that it does not apply to the installation, use or maintenance of a listening device to record conversations made through a cell call alarm system in a correctional centre. A cell call alarm system is a communication system designed to enable inmates to notify staff of emergencies while locked in their cells.

37. The Committee notes that further surveillance of inmates, including the recording of conversations, may be considered an interference with their privacy rights that are already curtailed.
38. The Committee also appreciates that the furthering of surveillance to extend to cell call alarm systems is in response to a specific recommendation from a deputy State coroner's recommendation that recordings be retained in cases where inmates use the facility in an emergency situation.

The Committee notes that the Bill exempts the *Surveillance Devices Act 2007* from operating in a prison's cell call alarm system and that this may be considered an interference with a prisoner's privacy. However, given the safety issues central to this recommendation, the Committee does not consider this amendment to be an undue interference of privacy in these circumstances.

Disclosure of Information

39. Cl [15] and [16] enable a judicial member of the State Parole Authority or of the Serious Offenders Review Council to prohibit the disclosure of any information relating to the content of a report or document. This provision further provides that non-disclosure of the information is allowable when in the public interest and that the public interest outweighs any right to procedural fairness that may be denied by the non-disclosure of the information.
40. The Committee understands that this provision has been drafted with reference to the sensitive criminal information that State Parole Authority and Serious Offenders Review Council may receive about the activities of offenders and their associates.
41. The Committee appreciates the need to remain discreet about disclosing information of this nature. However, the Committee is also mindful of provisions that further restrict information to offenders that will likely compromise procedural fairness, including a right of reply, and may prejudice their right to a fair hearing or review.

The Committee notes that the Bill enables the prohibition of disclosing information relating to the content of a report or document. The provision specifically provides that a non-disclosure is possible when it is in the public interest to do so and the public interest outweighs any procedural fairness that is to be denied by the non-disclosure. Despite this, the Committee is concerned at the likelihood that non-disclosure will compromise procedural fairness, including a right of reply, and prejudice an offender's right to a fair hearing or review. However, in the circumstances, the Committee makes no further comment.

Personal Integrity

42. Cl [21] provides for testing of correctional centre staff for alcohol and prohibited drugs. In particular, the provision requires operators of privately managed correctional centres to prepare and implement a program approved by the Commissioner for the testing of their correctional centre staff for alcohol and prohibited drugs.
43. The Committee notes that drug and alcohol testing can be an invasive and personal procedure that can interfere with an individual's personal integrity, especially in

circumstances where the individual concerned is required to submit to the testing, or face disciplinary action or employment dismissal.

44. The Committee also recognises the significant trust placed in employees of correctional facilities to act at all times in an appropriate and responsible manner when supervising and being in direct control of inmates. As such, the Committee understands that methods of accountability must be established to protect inmates against potential misconduct by correctional facility staff.

The Committee notes that drug and alcohol testing on employees may be an interference with personal rights and liberties. However, given the significant trust placed in employees of correctional facilities and the duty of care they have to inmates, the Committee does not consider testing employees to be inappropriate in the circumstances provided by the Bill.

Retrospectivity

45. Cl [24] validates any deductions from remuneration earned by an inmate as a participant in an external work release program that was made before the commencement of proposed section 7A(1) if such deductions would have been validly made had they been made on or after the commencement of that provision. These deductions are used to defray the cost of the inmate's imprisonment and participation in the work release program.
46. The Committee generally expresses its concern at provisions in legislation that validate actions by Government with retrospective effect, as they are often unfair on individuals affected by these actions.
47. However, the Committee is aware that this program is already in operation and deductions made from remuneration earned have been made with the consent of the inmate as part of participating in the program. The proposed amendments simply give statutory expression to this longstanding practice.

The Committee notes that the Bill validates retrospectively the deductions of remuneration earned by inmates in a work release program. Although the Committee generally expresses its concern at legislation with retrospective effect, the Committee also notes that the relevant provision simply gives statutory expression to a longstanding practice that is already underway with the consent of inmates. The Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

48. Clause 2 of the Bill states that the Act commences on a day or days to be appointed by proclamation.

The Committee prefers legislation of this kind, which may impact on personal rights and liberties, to commence on a fixed date or assent.

4. Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014; Liquor Amendment Bill 2014

Date introduced	30 January 2014
House introduced	Legislative Assembly
Minister responsible	The Hon. Barry O'Farrell MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The purpose of the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 is to create a separate offence (with a maximum penalty of imprisonment for 20 years) where an assault by intentionally hitting a person causes death (without the necessity to prove that the death was reasonably foreseeable and whether the person was killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault).
2. The Bill also creates an aggravated form of that separate offence by increasing the maximum penalty for the offence to imprisonment for 25 years if the offence was committed by an adult accused when intoxicated (whether under the influence of alcohol, a drug or other substance). This provision also requires the courts to impose a minimum sentence of imprisonment for 8 years on a person guilty of that aggravated intoxication offence.
3. The Bill authorises a police officer to require a breath test or a breath analysis, or require the provision of a blood or urine sample, after arresting an offender for the aggravated intoxication offence of assault causing death (or for any other offence that may lead to a charge for such an aggravated intoxication offence if the victim dies) for the purpose of confirming whether the offender had consumed or taken alcohol, a drug or other intoxicating substance before the alleged offence and the likely amount consumed or taken.
4. The Bill prevents self-induced intoxication being taken into account as a mitigating factor in determining the appropriate sentence for any offence. Further, it declares various anabolic and androgenic steroids to be narcotic drugs subject to the same maximum penalties for trafficking and possession as applies to other narcotic drugs.
5. The Bill increases the penalty notice fines for the following conduct anywhere in the State:
 - (i) offensive conduct or language in public place or school (increased from \$200 and \$150 to \$500),
 - (ii) failure of intoxicated person in a public place to comply with move on direction (increased from \$200 to \$1,100).

6. Meanwhile, the object of the Liquor Amendment Bill 2014 is to amend the Liquor Act 2007 (the Principal Act) and the Liquor Regulation 2008 (the Principal Regulation) to enable the regulations to declare areas to be prescribed precincts and to impose regulatory conditions on licensed premises within those precincts.
7. This Bill also declares such an area in the Sydney CBD (to be called the Sydney CBD Entertainment precinct) and to impose such conditions on certain licensed premises in it and extends the current freeze on the grant of hotel, club and certain other licences in respect of certain premises in the Sydney area to two years after the date of assent.
8. The Bill enables periodic licence fees to be levied for licences under the Principal Act, and precludes bottle shops and other take-away of alcohol for consumption venues from trading anywhere in New South Wales after 10 pm.
9. Lastly, the Bill suspends the operation of the Responsible Service of Alcohol online training course trial.
10. The Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 and the Liquor Amendment Bill 2014 are cognate with each other. These Bills were introduced into Parliament on 30 January 2014, passed on the same day, and were assented the next day. These Bills have been enacted and are currently in force.

BACKGROUND

11. These Bills have been introduced in response to strong community concern following a number of high-profile, alcohol-related assaults in NSW, particularly in the Kings Cross precinct. According to the Premier in his Second Reading Speech:

There is no single or simple cure-all for those problems, but I am confident that these reforms will make a significant difference in tackling drug and alcohol-fuelled violence on our streets.

OUTLINE OF PROVISIONS

Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014

12. Clause 1 sets out the name (also called the short title) of the proposed Act.
13. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act, except for Schedule 5.
14. Schedule 1 [1] defines *intoxication* by reference to Part 11A of the Act, namely intoxication because of the influence of alcohol, a drug or any other substance.
15. Schedule 1 [2] inserts proposed section 25A into the Act to create the separate offence of assault causing death, and the aggravated offence when the offender is intoxicated, as referred to in paragraphs (a) and (b) of the Overview. The proposed section provides a defence to the aggravated intoxication offence if the intoxication was not self-induced or if the accused had a significant cognitive impairment. The proposed section also makes evidentiary provisions in proceedings for the offence, including a conclusive presumption of intoxication if the accused has more than 0.15 concentration of alcohol following a breath or blood sample analysis.

16. Schedule 1 [2] also inserts proposed section 25B into the Act to require the imposition of a minimum sentence of imprisonment for 8 years for the aggravated intoxication offence as referred to in paragraph (c) of the Overview.
17. Schedule 1 [3] and [4] amend section 428E of the Act as a consequence of the creation of the proposed offence of assault causing death and, in particular, to provide that evidence of self-induced intoxication cannot be used by the offender to establish that he or she did not have the requisite intent to commit the offence.
18. Schedule 1 [5] provides for a review of the operation of the amendments made by the proposed Act within 3 years after the date of assent.
19. Schedule 2 inserts proposed Division 4 into Part 10 of the Act to confer on police officers the breath testing, breath analysis powers and blood or urine sampling powers referred to in paragraph (d) of the Overview.
20. Schedule 3 [1]–[3] amend section 21A of the Act to prevent self-induced intoxication being taken into account as a mitigating factor in sentencing as referred to in paragraph (e) of the Overview.
21. Schedule 3 [4] inserts a transitional provision into Schedule 2 to the Act to extend the above amendments to existing offences and proceedings (unless the court has already convicted the offender or the offender has already entered a plea of guilty).
22. Schedule 4 amends Schedule 1 to the Act to declare the various steroids as narcotic drugs as referred to in paragraph (f) of the Overview.
23. Schedule 5 amends the Regulation to increase penalty notice fines as referred to in paragraph (g) of the Overview. The Schedule amends the Act to increase consequentially maximum court fines for the move on offence so it is greater than the penalty notice fine.
24. Schedule 6.1 amends the *Crimes (Domestic and Personal Violence) Act 2007* to make the proposed new offence of assault causing death a “personal violence offence” for the purposes of that Act.
25. Schedule 6.2 amends the *Crimes (Sentencing Procedure) Act 1999* to exclude home detention as a sentencing option for the proposed new offence of assault causing death.

Liquor Amendment Bill 2014

26. Clause 1 sets out the name (also called the short title) of the proposed Act.
27. Clause 2 provides for the commencement of the proposed Act.
28. Schedule 1 [28] inserts proposed Division 4 into Part 6 (Miscellaneous offences and regulatory controls) of the Principal Act to achieve the object described in paragraph (a) of the Overview.
29. Proposed section 116C enables the regulations to declare land (other than land in the existing Kings Cross precinct) described in the regulations to be a prescribed precinct for the purposes of the Principal Act.

30. Proposed section 116I authorises the regulations to impose specific licence conditions relating to premises in a prescribed precinct. The conditions that may be prescribed include matters such as prohibiting or restricting the use of glass containers on licensed premises, excluding specified classes of persons from licensed premises and various measures relating to the responsible service of alcohol and public safety. Breach of such a condition may be prescribed as a prescribed offence for the purposes of 3 strike disciplinary action (Schedule 1 [29]).
31. Proposed sections 116D–116H enable the making of banning orders and make provision for an ID scanner system and patron ID scanning along the lines of provisions of the Principal Act making provision for these matters in the Kings Cross precinct. However, temporary banning orders will be able to be made both in the Kings Cross precinct and in a prescribed precinct to prohibit a person from entering or remaining in licensed premises not only in the precinct in which the orders are made but also in a specified adjacent precinct.
32. Schedule 1 [1], [2], [19], [22]–[27] and [29]–[32] make consequential amendments, including amendments to make provisions applicable in the Kings Cross precinct comparable to those to apply in a prescribed precinct (for example, failure to comply with a long-term banning order will incur a maximum penalty of 100 (instead of 50) penalty units).
33. **Schedule 1 [10]–[13]** amend the Principal Act and **Schedule 2 [16]** amends the Principal Regulation to achieve the object described in paragraph (c) of the Overview above.
34. **Schedule 1 [18]** inserts proposed Division 2A into Part 4 (Licensing procedures and related matters) of the Principal Act to achieve the object described in paragraph (d) of the Overview above.
35. **Proposed section 58A** provides that a periodic licence fee is payable for each licence. It applies while the licence is in force or under suspension. The periodic licence fee is payable in the amounts and on the due dates prescribed by the regulations under the Principal Act. The regulations may also deal with the time for payment of the fees (including payment of different elements of the fee at different times), penalties for late payment of the fees, the circumstances in which such a fee, or a proportion of such a fee, may be re-assessed, waived or refunded and information to be provided to the Director-General of the Department of Trade and Investment, Regional Infrastructure and Services (the **Director-General**) for the purpose of calculating such a fee. A periodic licence fee (or an element of a periodic licence fee) is to be determined by reference to matters including, but not limited to the following:
 - (a) the location of the relevant licensed premises,
 - (b) the trading hours of the licensed premises,
 - (c) the patron capacity of the licensed premises,
 - (d) offences committed at or in relation to the licensed premises,
 - (e) compliance by the licensee with the requirements of the Principal Act or any other Act with respect to the licensed premises,
 - (f) the number of packaged liquor licences held by the same person, or in which the same person (other than a financial institution) is interested in the business, or profits of the business, carried on under the licences, or both.

36. **Proposed section 58B** provides for a scheme of automatic suspension and cancellation of licences for late payment or non-payment of periodic licence fees. If the periodic licence fee payable for a licence has not been paid before the expiration of 28 days after the due date for payment, the licence is suspended. If, during the period of 28 days after the licence has been suspended, the periodic licence fee is paid, the suspension is lifted. However, if the periodic licence fee payable for the licence is not paid before the expiration of that 28 day period, the licence is cancelled.
37. **Proposed section 58C** provides for a scheme for the reinstatement of such cancelled licences.
38. **Schedule 1 [15]–[17]** make consequential amendments to enable a licensee to apply to the Director-General to impose conditions on a licence including, but not limited to, conditions prohibiting the sale or supply of liquor on the licensed premises before 10 am or after 11 pm (or both) and conditions restricting the trading hours of, and public access to the licensed premises.
39. **Schedule 1 [3]–[9] and [14]** amend the Principal Act to achieve the object described in paragraph (e) of the Overview above.
40. **Schedule 1 [20] and [21]** amend the Principal Act so that it will not be an offence under sections 103 and 104, respectively, to keep bar areas open for purposes permitted by the regulations (other than sale or supply of liquor) during shut down or cessation of service of alcohol periods or for a person to be in a bar during such a period.
41. **Schedule 1 [33]** enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.
42. **Schedule 1 [34]** inserts savings and transitional provisions. **Proposed clause 47** provides for review of the lock out provisions and cessation of service at 3 am provisions proposed to be inserted in the Principal Regulation as soon as possible after the end of the period of 2 years following the date of assent to the proposed Act.
43. **Schedule 1 [35]** amends Schedule 4 to the Principal Act so that the lock out period under clause 3 of that Schedule applying to declared premises to which a level 1 licence relates will commence at 1.30 am (instead of 2 am).
44. **Schedule 2 [15] and [17]** amend the Principal Regulation to achieve the object described in paragraph (b) of the Overview above. **Proposed clause 53V** and **Schedule 1A** declare an area to be a prescribed precinct called the “Sydney CBD Entertainment precinct”. **Proposed Division 2 of Part 5B** sets out the special licence conditions applicable to licensed premises in the precinct. The special licence conditions require a “lock out” of patrons after 1.30 am and cessation of service of alcohol at 3 am on certain licensed premises. Provision is also made for the giving of exemptions.
45. **Schedule 2 [2]** inserts proposed clause 3A into the Principal Regulation to enable the Director-General to declare high risk day periods in respect of specified licensed premises. Proposed clause 53X (4) (**Schedule 2 [15]**) enables provisions of Division 2 of proposed Part 5B to be applied to licensed premises to which they would otherwise not apply on such a day. **Schedule 2 [6]** amends clause 49A of the Principal Regulation to achieve the object described in paragraph (f) of the Overview above.

46. **Schedule 2 [1], [3]–[5] and [7]–[13]** make consequential amendments and amendments to update provisions applicable to the Kings Cross precinct and to extend the new lock out provisions and cessation of liquor sales provisions to that precinct.
47. **Schedule 2 [14]** adds the names of the organisations “Brothers for Life” and “Outlaws” to the list of names set out in clause 53K of the Principal Regulation that if displayed by a person requires exclusion of the person from certain licensed premises.
48. **Schedule 3.1** amends the *Gaming and Liquor Administration Act 2007* to make a consequential amendment providing for review of decisions declaring premises to be a high risk venue under proposed section 116B of the Principal Act (**Schedule 1 [28]**).
49. **Schedule 3.2** amends the *Gaming Machines Regulation 2010* to make a consequential amendment to enable approved gaming machines in a hotel to continue to be operated during the period after 3 am in which the Principal Act requires there to be a cessation of liquor sales.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Mandatory Sentencing

50. Section 25B(1) of the *Crimes and Other Legislation (Assault and Intoxication) Act 2014* provides that a court is required to impose a sentence of imprisonment of not less than eight years upon a person guilty of assault causing death when the that person is intoxicated. Courts are required to impose this sentence at a minimum, unless the assault is authorised or excused by law under section 25A(1), or the sentence is commuted under prerogative of mercy under section 25B(4).
51. The Committee is concerned whenever mandatory sentences are imposed.

The Committee always notes when mandatory sentencing is proposed in legislation. Mandatory sentencing may lead to an unjust penalty, disproportionate to the offence committed. The Committee refers this matter to Parliament for its further consideration.

Privacy – Personal Integrity

52. Section 138G of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that blood and urine sample may be taken where a police officer has a reasonable belief that the person is under the influence of a substance other than alcohol, if the person has been detained in connection with an assault occasioning death.
53. The Committee notes that blood and alcohol testing are invasive procedures which may, in some circumstances, constitute an undue interference with the individual’s privacy and sense of personal integrity. This may be exacerbated when considering that taking a blood and urine sample is solely for the purposes of determining intoxication, which could be used to upgrade charges against the individual to one that requires a minimum sentence of eight years upon conviction.
54. However, the Committee appreciates the gravity of the offence central to the requirement in which a suspect must provide a blood and urine sample, and the overall public interest in determining the factors that gave rise to the assault occasioning death.

The Committee notes that requiring a suspect to submit to a blood and urine sample may constitute an undue interference with personal integrity, especially when such a test may be used to upgrade charges against a person to one that may require a mandatory sentence of eight years upon conviction. Given the public interest in determining factors that gave rise to assault occasioning death, the Committee makes no further comment.

Civil Liability

55. Section 138G(5)(e) of the *Law Enforcement (Powers and Responsibilities) Act 2002* provide for protection from liability of authorised sample takers in relation to the taking of blood or urine samples.

The Committee appreciates the public interest in protecting sample takers from action pertaining to false imprisonment or assault when connected to the discharge of their duties. However, given the intrinsically medical nature of a blood and urine test, the Committee also recognises the need for sample takers to maintain a duty of care to detained individuals being required to provide samples. In this respect, the exemption from civil liability provided by the Act may be too broad in scope. The Committee makes no further comment.

Excessive Penalties

56. Section 9 of the *Summary Offences Act 1988* and Schedule 3 of the *Criminal Procedure Regulation 2010* provide for various increases in the fines for certain conduct. In particular, the provisions respectively increase the fine for offensive conduct or language in a public place or school from between \$150 and \$200, to \$500, and a failure of an intoxicated person in a public place to comply with a move on direction from \$200 to \$1,100. This is a significant amount for a police-issued fine, with no automatic requirement for a court to hear the matter.

The Committee notes the significant increase in penalties prescribed for offensive conduct or failure to comply with move on directions may be disproportionate to the offence committed. In particular, the penalty for the refusal of an intoxicated person otherwise acting lawfully to move on from a public place, may unduly infringe on his/her freedom of movement and on his or her rights and liberties more generally.. The Committee also notes \$1,100 is a significant amount for a police-issued fine, with no automatic requirement for a court to hear the matter. The Committee makes no further comment.

Privacy – Personal Data

57. Sections 116D and 116E provide for prescribed precinct scanner systems to be operable in high risk venues, and that ID scanning of patrons entering the premises is a condition of the venue's license.
58. The Committee notes that requiring patron to produce photo identification, which will be subsequently scanned and recorded, may be an interference with that person's privacy. The Committee notes the potential for misuse of the individual's personal data.
59. However, the Committee also notes that under section 116E(4), it is a condition of the license for a high risk venue that the licensee acts in accordance with the principles of the *Privacy Act 1988*. This involves complying with the requirements of that Act with

respect to the protection of any personal information recorded by a patron ID scanner operating in the venue.

The Committee notes that requiring patrons entering venues to have their ID scanned may be an interference with the patron’s privacy, but also notes that the venues are required to comply with appropriate privacy regulations. The Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Regulation-making Powers

60. Section 116I of the *Liquor Act 2014* provides that the regulations may prescribe conditions to which licence relating to premises situation in a prescribed precinct is subject. These regulations may include requiring the exclusion from licensed premises of persons of a specified class (including articles of clothing or accessories they are wearing), as well as prohibited patrons from entering licensed premises at certain times.

The Committee notes the broad sweep of regulation-making powers afforded to the Minister for Tourism, including the ability to exclude certain classes of individuals from entering certain venues. The Committee also recognises the public interest in ensuring the safety and security of all patrons, as well as the interest in not allowing members and associates of criminal organisations from entering high-risk alcohol venues. The Committee makes no further comment.

5. Mining Amendment (ICAC Operations Jasper and Acacia) Bill 2014

Date introduced	30 January 2014
House introduced	Legislative Council
Minister responsible	The Hon. Duncan Gay MLC
Portfolio	Minister for Roads and Ports

PURPOSE AND DESCRIPTION

1. It is proposed that the Parliament, being satisfied because of information that has come to light as a result of investigations and proceedings of the Independent Commission Against Corruption (ICAC) known as Operation Jasper and Operation Acacia, that the grant of certain exploration licences, and the decisions and processes that culminated in the grant of those licences, were tainted by serious corruption (the tainted processes), and recognising the exceptional nature of the circumstances, enact this Bill for the following purposes:
 - (a) restoring public confidence in the allocation of the State's valuable mineral resources,
 - (b) promoting integrity in public administration above all other considerations, including financial considerations, and deterring future corruption,
 - (c) placing the State, as nearly as possible, in the same position as it would have been had those licences not been granted, recognising that it is not practicable in the circumstances to achieve, through financial adjustments or otherwise, an alternative outcome in relation to the licences based on what would have happened had the relevant licences been granted pursuant to processes other than the tainted processes.
2. To those ends, the object of this Bill is to amend the Mining Act 1992 (the principal Act) as follows:
 - (a) to cancel the relevant licences and ensure that the tainted processes have no continuing impact and cannot affect any future processes (such as for the grant of further authorities) in respect of the relevant land,
 - (b) to ensure that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land according to proper processes in the public interest,
 - (c) to ensure that no person (whether or not personally implicated in any wrongdoing) may derive any further direct or indirect financial benefit from the tainted processes,

(d) to protect the State against the potential for further loss or damage and claims for compensation, without precluding actions for personal liability against individuals, including public officials, who have been implicated in the tainted processes and have not acted honestly and in good faith.

3. The exploration licences that are cancelled by the proposed Act are as follows:

(a) exploration licence number 7270 dated 15 December 2008,

(b) exploration licence number 7405 dated 21 October 2009,

(c) exploration licence number 7406 dated 21 October 2009.

BACKGROUND

4. In his Second Reading Speech to Parliament, when the Bill reached the Legislative Assembly, the Hon. Barry O'Farrell MP, Premier, stated that the Bill will cancel mining exploration licences in respect of Doyles Creek, Mount Penny and Glendon Brook.

5. The cancellation of the licences was recommended by ICAC following its findings of corrupt conduct against various individuals including a former NSW Minister and a number of officers from companies involved. Mr O'Farrell indicated to Parliament that having considered information about the course of events that led to the exploration licences being granted (which came to light as a result of ICAC investigations and proceedings), the Government formed the view that the licences and the processes that led to them being granted are tainted by serious corruption.

6. Mr O'Farrell further informed Parliament that the aim of cancelling the licences is to place the State as nearly as possible in the situation it would have been in had those licences not been granted.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.

8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Principal amendment of Mining Act 1992 No 29

9. The principal amendment is set out in Schedule 1. It inserts proposed Schedule 6A (proposed clauses 1–16) in the principal Act.

10. Clause 1 provides that the proposed Schedule has effect despite any other provision of the principal Act or the Environmental Planning and Assessment Act 1979 (the Planning Act).

11. Clause 2 defines expressions used in the proposed Schedule. In particular:

(a) relevant land means the exploration area of a relevant licence or any part of the exploration area of a relevant licence, and

(b) relevant licence means an exploration licence referred to in the Overview (that is, a licence this is cancelled by the proposed Act).

12. Clause 3 provides for the purposes and objects of the proposed Act, similar to the Overview.
13. Clause 4 cancels the relevant licences.
14. Clause 5 makes void certain applications made, and other actions taken, under the principal Act and the Planning Act in connection with the relevant licences and relevant land.
15. Clause 6 provides for the refund of certain fees.
16. Clause 7 provides that compensation is not payable by or on behalf of the State:
 - (a) because of the enactment or operation of proposed Schedule 6A, the proposed Act or any Act that amends proposed Schedule 6A, or
 - (b) because of any direct or indirect consequence of any such enactment or operation (including any conduct under the authority of any such enactment), or
 - (c) because of any conduct relating to any such enactment or operation.
17. Clause 8 absolves the State, and employees of the State acting honestly and in good faith, from liability for conduct before the cancellation date in relation to a relevant licence or mining on relevant land (whether occurring before or after the grant of a relevant licence).
18. Clause 9 continues the obligation of a holder of a relevant licence to provide a report under section 163C of the principal Act (reports on prospecting activities).
19. Clause 10 makes provision for the obtaining of exploration information and records of exploration information.
20. Clause 11 provides for the use and disclosure of information obtained in respect of relevant licences or relevant land.
21. Clause 12 makes it clear that the former holder of a relevant licence is required to clear away mining plant as provided for by section 245 of the principal Act.
22. Clause 13 continues the operation of certain conditions of relevant licences (principally
23. conditions relating to the rehabilitation, remediation or repair of land, disturbed areas or utilities, the giving and maintaining of security and reporting).
24. Clause 14 requires security deposits provided under a relevant licence to be maintained until a determination is made as to whether further rehabilitation is required and conditions of licences have been fulfilled.
25. Clause 15 provides for the effect of the cancellation of the relevant licences on access arrangements.
26. Clause 16 prevents the making of any application for consent or approval under the Planning Act to development on the relevant land for the purposes of mining or

prospecting, except by a person who is the holder of an authority that is in force in relation to the relevant land.

Schedule 2 Further amendment of Mining Act 1992 No 29

27. Schedule 2 [1] increases the penalty for the offence of failing to prepare or lodge a report in accordance with section 163C of the principal Act.
28. Schedule 2 [3] makes the section 163C offence an offence that is to be dealt with summarily before the Land and Environment Court.
29. Schedule 2 [4] provides for savings and transitional matters.
30. Schedule 2 [5] inserts a definition of former holder of an authorisation in the principal Act.
31. Schedule 2 [2] is a consequential amendment.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Denial of Due Process

32. Clause 4 of the Bill cancels three mining exploration licences on the basis of information that has come to light as a result of investigations and proceedings of ICAC that the grant of the licences and the decisions and processes that resulted in the grant of those licences, were tainted by serious corruption.
33. However, Mr O'Farrell indicated in his Second Reading Speech to Parliament that ICAC's corruption findings are now the subject of threatened or current legal challenge and that the jurisdiction of ICAC to recommend cancellation of the licences is also being challenged.

The Committee notes that the recommendations and findings of ICAC which form the basis for cancelling the exploration licences in respect of Doyles Creek, Mount Penny and Glendon Brook are subject to legal challenge and further threatened legal challenge. Cancelling the licences prior to the outcome of the legal proceedings may be premature. Nonetheless, having regard to the information that came to light as a result of ICAC investigations, the Parliament is entitled to form its own view about whether the licences should be cancelled. For this reason, the Committee makes no further comment.

Denial of Compensation

34. Clause 7 of the Bill provides that compensation is not payable in respect of the exploration licences that are cancelled under the Bill.

The Committee notes the exploration licences are cancelled under the Bill without compensation. The Committee further notes that these provisions relate only to licences that have been judged by Parliament to be linked with serious corruption. In these circumstances, the Committee does not consider the provisions to be unreasonable. The Committee makes no further comment.

Exclusion of State Liability

35. Clause 8 of the Bill absolves the State, and employees of the State acting honestly and in good faith, from liability for conduct before the cancellation date in relation to a relevant exploration licence or mining on relevant land, whether occurring before or after the grant of a relevant licence.

The Committee notes the Bill protects the State against liability in respect of the circumstances that led to the granting of the relevant exploration licences. It thereby abrogates certain common law rights, including contractual rights. However, these provisions do not protect any individuals or companies who have engaged in deliberate wrongdoing. They are also consistent with the overall objects of the Bill to place the State, as nearly as possible, in the same position as it would have been had the licences not been granted; to protect the State against further loss or damage; and to restore public confidence in the allocation of the State's mineral resources. For these reasons, the Committee makes no further comment.

Increased Penalty

36. Schedule 1, item 9 of the Bill provides licence holders must continue to report on prospecting activities carried out despite the cancellation of the relevant licences under the Bill. In addition, schedule 2, item 1 of the Bill increases the maximum penalty for an individual for the offence of failing to prepare or lodge a report of prospecting activity from a \$1,100 fine to a \$22,000 fine; and a further \$2,200 fine for each day that the offence continues. It also provides a new maximum penalty for a corporation found guilty of the offence – a \$110,000 fine and a further penalty of \$11,000 for each day that the offence continues.

The Committee notes that the Bill requires licence holders to continue to report on prospecting activities despite cancellation of their licences, significantly increases penalties for failing to prepare or lodge such a report, and extends such penalties to corporations for the first time. The information contained in these reports may be useful for future mining purposes and therefore these provisions are important to achieving one of the objects of the Bill – ensuring that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land according to proper processes in the public interest. For this reason, the Committee makes no further comment.

Retrospectivity

37. Schedule 1, item 11 of the Bill provides for the use and disclosure of information obtained in respect of relevant licences or relevant land and provides that clause 58 of the *Mining Regulation* (which provides reports lodged are to be kept confidential), does not apply in respect of this information even if the information was lodged before the commencement of the Bill.

The Committee will generally comment when provisions are drafted to have retrospective effect. This is because such provisions are contrary to the rule of law which allows people to order their affairs according to what the law is. Nonetheless, the Committee notes this retrospective provision does not include items of particular concern e.g. new offences or penalties. Similarly, in allowing

disclosure of information for future mining purposes the provision is necessary to achieving one of the objects of the Bill - ensuring that the State has the opportunity, if considered appropriate in the future, to allocate mining and prospecting rights in respect of the relevant land according to proper processes in the public interest. For these reasons the provision is not unreasonable and the Committee makes no further comment.

6. Mining and Petroleum Legislation Amendment (Public Interest) Bill 2013

Date introduced	21 November 2013
House introduced	Legislative Assembly
Minister responsible	The Hon Barry O'Farrell MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make the public interest a ground (in addition to other grounds) for making any of the following decisions relating to mining or petroleum rights or titles:
 - (a) a decision to refuse to grant, renew or transfer a mining or petroleum right or title,
 - (b) a decision to refuse a tender for a mining right or title,
 - (c) a decision to cancel a mining or petroleum right or title, or to suspend operations under a mining or petroleum right or title (in whole or in part),
 - (d) a decision to restrict operations under a mining or petroleum right or title by the imposition or variation of conditions of the right or title.
2. The Bill will extend to pending applications for mining or petroleum rights or titles.

BACKGROUND

3. This Bill follows the release of three reports of the Independent Commission Against Corruption (ICAC) concerning corrupt conduct in relation to the granting of mining rights at Doyles Creek and Mount Penny. A fourth and final ICAC report is expected which will address what action should be taken by the NSW Government in respect to the findings of corrupt conduct including what, if any, amendments to legislation should be made.
4. The Government was hoping the fourth and final report would be released before the Parliament recess however this did not occur. In order to be prepared for any action the Government may be required to take over the recess, this Bill was introduced.
5. The Bill amends the mining and petroleum legislation to provide the NSW Government with a specific power to cancel or refuse to renew a licence or other mining title. In his second reading speech to Parliament the Premier stated that the Government only intends to use this special power where ICAC has determined that serious conduct has affected, in some essential respect, the grant of a licence or the licence holder.

OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.

7. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Mining Act 1992 No 29

8. Schedule 1 gives effect to the Overview above with respect to the Mining Act 1992.

Schedule 2 Amendment of Petroleum (Onshore) Act 1991 No 84

9. Schedule 2 gives effect to the Overview above with respect to the Petroleum (Onshore) Act 1991

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Denial of compensation

10. Schedule 1, section 380A(2) of the Bill provides compensation is not payable in respect of a mining right cancelled under the Bill. Similarly, Schedule 2, section 24A(2) of the Bill provides compensation is not payable in respect of a petroleum title cancelled under the Bill.

The Committee notes that mining rights and petroleum titles may be cancelled under the Bill without compensation. The Committee further notes that it is the intention of the Government to cancel such mining rights and petroleum titles only where the Independent Commission Against Corruption has determined that serious conduct has affected, in some essential respect, the granting of the mining right or petroleum title. In these circumstances, the Committee does not consider the provisions to be unreasonable and makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Ill-defined and wide powers

11. Schedule 1 of the Bill provides the Government with power to cancel or refuse to renew a mining right if it is in the public interest. Similarly, schedule 2 of the Bill provides the Government with power to cancel or refuse to renew a petroleum title if it is in the public interest. "Public interest" is not defined in the Bill.

The Bill allows the Government to cancel mining rights and petroleum titles if in the public interest. However, "public interest" is not defined in the Bill. The Premier told Parliament that it is the intention of the Government to use this power only where the Independent Commission Against Corruption has determined that serious conduct has affected, in some essential respect, the granting of such a right. The Committee would prefer for this qualification to have been included in the Bill. The Committee makes no further comment.

7. Protection of the Environment Operations Amendment (Prosecutions) Bill 2013*

Date introduced	21 November 2013
House introduced	Legislative Assembly
Member responsible	Mr Ron Hoenig
Portfolio	N/A

PURPOSE AND DESCRIPTION

1. The object of this Bill is to transfer the power to prosecute serious environmental offences from the Environment Protection Authority to the Director of Public Prosecutions and the Attorney General. That object is achieved by:
 - (a) requiring the Environment Protection Authority to inform the Director of Public Prosecutions if, as a result of the Authority's investigations, there is a prima facie case in relation to a serious environmental offence, and
 - (b) providing that serious environmental offences can be prosecuted only by the Director of Public Prosecutions or the Attorney General.

BACKGROUND

2. In his Second Reading Speech, Mr Hoenig told Parliament that the intention of the Bill is to separate the investigative functions and prosecutorial functions of the Environment Protection Authority as laid out in the *Protection of the Environment Operations Act 1997* in respect of tier one offences. Tier one offences are the most serious offences provided for under the Act.
3. While the investigative functions would stay with the Environmental Protection Authority, the Bill seeks to amend the Act to transfer standing to initiate prosecutions for tier one offences to the Director of Public Prosecutions and the Attorney General.
4. Mr Hoenig indicated that the impetus for the Bill is a case where the Environment Protection Authority took civil action against a person suspected of dumping asbestos where criminal action could have been taken.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Protection of the Environment Operations Act 1997 No 156

7. Schedule 1 [1] requires the Environment Protection Authority to inform the Director of Public Prosecutions if, as a result of the Authority's investigations, there is a prima facie case in relation to a serious environmental offence (a tier 1 offence under Part 5.2 of the Protection of the Environment Operations Act 1997). Should the Authority not be able to determine whether or not a serious environmental offence has been committed, the proposed amendment requires the Authority to advise the Director of Public Prosecutions of that fact. The Director will determine the appropriate offence for which an alleged offender is to be prosecuted and is empowered to commence proceedings (in the case of a tier 1 offence).
8. Schedule 1 [2] provides that tier 1 offences can be prosecuted only by the Director of Public Prosecutions or the Attorney General.
9. Schedule 1 [3] and [4] make consequential amendments, so that existing provisions about who may institute proceedings for offences apply only to offences that are not tier 1 offences.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

8. Public Interest Disclosures Amendment (Extension of Protections) Bill 2013*

Date introduced	21 November 2013
House introduced	Legislative Assembly
Member responsible	The Hon. Paul Lynch MP
Portfolio	N/A

PURPOSE AND DESCRIPTION

1. The object of this Bill is to extend the protections from adverse consequences that the Public Interest Disclosures Act 1994 provides for those persons who make disclosures in the public interest about public sector wrongdoing. This is achieved by:
 - (a) extending those protections to all persons making disclosures (and removing the current limitation that only public officials can be protected), and
 - (b) expanding the type of public sector wrongdoing about which a person can make a disclosure and be protected from adverse consequences, and extending the requirements to investigate and deal with disclosures about such wrongdoing, so as to include the following:
 - (i) scientific misconduct by public authorities or their officers,
 - (ii) acts or omissions of public authorities or their officers that create risks to the environment (including the carrying on of activities in an environmentally unsatisfactory manner),
 - (iii) acts or omissions of public authorities or their officers that create risks to public health or safety (or both), and
 - (c) extending the circumstances in which a public interest disclosure made directly to a journalist or member of Parliament will be protected, so as to include circumstances when a person could not first report to any other investigating authority or body (as is currently required), and
 - (d) further protecting those who make public interest disclosures against detrimental action being taken or threatened against them:
 - (i) by making it an offence whenever detrimental action is taken or threatened against a person for reasons that include reprisal for the fact that the person made a disclosure (and not only when the detrimental action was taken substantially in reprisal for making of the disclosure, as at present), and
 - (ii) similarly, by allowing civil remedies for compensation to be pursued for damages for any loss, damage or injury suffered as a result of detrimental action taken or threatened for reasons that include reprisal for the making of a

disclosure (and not only when the detrimental action was taken substantially in reprisal for the detrimental action, as at present), and

(iii) by allowing those civil remedies to be pursued in the Industrial Relations Commission.

BACKGROUND

2. In his second reading speech to Parliament, Mr Lynch stated that whistleblowing is the public interest reporting of illegal, immoral and illegitimate wrongdoing by public officials. It is essential to the identification of specific instances of wrongdoing and to the identification of systemic organisational issues and cultures, and to ensuring efficient and effective governmental structures in the future.
3. The legislative protection of whistleblowers in NSW began with the *Protected Disclosures Act 1994*. Mr Lynch told Parliament that since then much has changed. For example, a national research project “Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Australia’s Public Sector” has been conducted by Commonwealth, NSW, Queensland and Western Australian public agencies. In addition, in 2008 a book called *Whistleblowing in the Australian Public Sector* edited by Professor A.J. Brown, Project leader of Whistling While they Work, has been published. Similarly, following the Dreyfus report and the Wilkie Bill on whistleblowing, legislation in the Commonwealth and Australian Capital Territory has expanded the types of protection available for whistleblowers considerably beyond that introduced in NSW in 1994.
4. The Bill draws on these developments to extend protections for whistleblowers in NSW.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act 3 months after the date of assent to the proposed Act, unless it is commenced sooner by proclamation.

Schedule 1 Amendment of Public Interest Disclosures Act 1994 No 92

Extension of protections from adverse consequences to disclosures made by persons who are not public officials

7. Schedule 1 [1] amends the long title of the Act to reflect its extension (by other amendments made by Schedule 1) so as to protect the disclosures of all persons, and not just public officials.
8. Schedule 1 [18] makes it clear that any person may make a disclosure that may be protected by the Act, whether or not the person is a public official. The amendment also provides that a disclosure may be protected by the Act even if it is made anonymously.
9. Schedule 1 [11], [15]–[17], [19], [20], [22]–[24], [28]–[30] and [37]–[40] make consequential amendments to reflect the extension of the Act to the disclosures of all persons.

Extension of possible subject matter of protected disclosures to include those about scientific misconduct or environmental, public health or public safety risks

10. Schedule 1 [2] amends the long title of the Act to reflect the extension of the Act (by other amendments made by Schedule 1 [4], [25] and [27]) to disclosures that a public authority or any officer of a public authority:
 - (a) is or has been involved in scientific misconduct, or
 - (b) is or has been involved in conduct or inaction that results in a danger to the environment or results in, or increases, a risk of danger to the environment (including by carrying on an activity in an environmentally unsatisfactory manner), or
 - (c) is or has been involved in conduct or inaction that results in a danger to public health or safety (or both) or results in, or increases, a risk of danger to public health or safety (or both).
11. Schedule 1 [3] amends the object of the Act to reflect that the Act is no longer limited to corruption, maladministration, waste and contraventions relating to access to information and disclosure of pecuniary interests, but extends to disclosures about scientific misconduct and environmental, public health and public safety risks.
12. Schedule 1 [4] provides that scientific misconduct is an aspect of corrupt conduct.
13. Schedule 1 [6] and [10] insert definitions relating to the extension of the Act to disclosures about scientific misconduct and environmental, public health or public safety risks.
14. Schedule 1 [7]–[9] update definitions as a consequence of the roles created for the Environment Protection Authority by the extension of the Act to environmental risks.
15. Schedule 1 [12], [26] and [37]–[39] are consequential on the extension of the Act to disclosures about environmental risks.
16. Schedule 1 [13] and [14] provide for the representation of the Environment Protection Authority on the Public Interest Disclosures Steering Committee as a consequence of the role created for the Environment Protection Authority by the extension of the Act to disclosures about environmental risks.
17. Schedule 1 [25] provides for disclosures to be protected if they are made to the Ombudsman and disclose that a public authority, or any officer of a public authority acting, or purporting to act, in his or her official capacity, is or has been involved in conduct or inaction that results in a danger to public health or safety (or both) or results in, or increases, a risk of danger to public health or safety (or both).
18. Schedule 1 [27] provides for disclosures to be protected if they are made to the Environment Protection Authority and disclose that a public authority, or any officer of a public authority acting, or purporting to act, in his or her official capacity, is or has been involved in conduct or inaction that results in a danger to the environment or results in, or increases, a risk of danger to the environment (including by carrying on an activity in an environmentally unsatisfactory manner).

19. Schedule 2.8 and 2.11 amend the Ombudsman Act 1974 and the Protection of the Environment Operations Act 1997 to provide for the investigation of those complaints by the Ombudsman and Environment Protection Authority, respectively.

Extension of circumstances in which disclosures to members of Parliament or journalists will be protected

20. Schedule 1 [32] extends the circumstances in which a person can make a protected disclosure to a member of Parliament or journalist. The amended provision will also provide protection where a disclosure is made directly to a member of Parliament or journalist in circumstances where there is significant risk of detrimental action to the person making the disclosure if a disclosure is made as elsewhere provided by the Act and where it would be unreasonable in all the circumstances for the person to make a disclosure to another person under the Act, which is currently a requirement if such a disclosure is to be protected.
21. Schedule 1 [21] makes a consequential amendment.

Extension of protections from detrimental action taken or threatened in reprisal for making a protected disclosure

22. Schedule 1 [33] extends the existing offence for taking detrimental action against a person substantially in reprisal for the person making a public interest disclosure so that it also applies if reprisal for the disclosure was one of several reasons for taking detrimental action, that is, even if it was not the main reason. The amendment also extends the offence to include threatening detrimental action.
23. Schedule 1 [34] extends the existing provision about taking disciplinary action against a public official for taking detrimental action against a person substantially in reprisal for the person making a public interest disclosure so that it also applies if reprisal for the disclosure was one of the reasons for taking or threatening detrimental action in reprisal, that is, even if it was not the main reason. The amendment also extends the provision to include disciplinary action for threatening detrimental action.
24. Schedule 1 [5] moves the definition of detrimental action, so that it applies more broadly to the whole Act.
25. Schedule 1 [31] and [36] make amendments that are consequential on the fact that the prohibitions on taking or threatening detrimental action will apply even if the disclosure was not the main reason for detrimental action being taken or threatened.

Extension of right to compensation for loss, damage or injury arising from detrimental action taken or threatened in reprisal for making a protected disclosure

26. Schedule 1 [35] allows civil remedies to be pursued in the Industrial Relations Commission rather than other civil courts for loss, damage or injury suffered as a result of detrimental action taken or threatened in reprisal, or partly in reprisal, for the making of a public interest disclosure (and not only when the disclosure was substantially in reprisal for the taking of the detrimental action in reprisal, as at present).

Savings and transitional provisions

27. Schedule 1 [41] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other legislation

Amendment of Defamation Act 2005 No 77

28. Schedule 2.1 [1] is consequential on the amendment made by Schedule 1 [18], extending protections to public interest disclosures made by all persons (not only public officials).
29. Schedule 2.1 [2] is consequential on the amendments made by Schedule 1 [4] and other provisions of Schedule 1 that extend protections in relation to public interest disclosures to those about scientific misconduct (by extending the definition of corrupt conduct).

Amendment of Education (School Administrative and Support Staff) Act 1987 No 240

30. Schedule 2.2 is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if it is not taken or threatened substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.

Amendment of Government Sector Employment Act 2013 No 40

31. Schedule 2.3 is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if it is not taken or threatened substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.

Amendment of Health Services Regulation 2013

32. Schedule 2.4 is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if it is not taken or threatened substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.

Amendment of Independent Commission Against Corruption Act 1988 No 35

33. Schedule 2.5 [1] makes it clear that corrupt conduct includes scientific misconduct.
34. Schedule 2.5 [2] is consequential on the amendments made by Schedule 1 [18] and [23] that any person, and not only a public official, can be protected in relation to a public interest disclosure about the conduct of the Independent Commission Against Corruption, an officer or former officer of the Commission or an officer of the Inspector of the Independent Commission Against Corruption.

Amendment of Industrial Relations Act 1996 No 17

35. Schedule 2.6 [1] is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if it is not taken or threatened substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.
36. Schedule 2.6 [2] is consequential on the amendments made by Schedule 1 [33] and [34] and confers jurisdiction on the Industrial Relations Commission in Court Session to hear

proceedings under section 20A of the Public Interest Disclosures Act 1994 (as proposed to be amended by Schedule 1 [35]).

Amendment of Local Government Act 1993 No 30

37. Schedule 2.7 is consequential on the amendments made by Schedule 1 [18] and [23] that any person, and not only a public official, can be protected in relation to a public interest disclosure about certain local government matters.

Amendment of Ombudsman Act 1974 No 68

38. Schedule 2.8 provides for the making of complaints about risks to public health and safety to the Ombudsman and for the investigation of those complaints.

Amendment of Police Act 1990 No 47

39. Schedule 2.9 is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if it is not taken or threatened substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.

Amendment of Police Integrity Commission Act 1996 No 28

40. Schedule 2.10 is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if is not taken substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.

Amendment of Protection of the Environment Operations Act 1997 No 156

41. Schedule 2.11 provides for the making of complaints about risks to the environment to the Environment Protection Authority and for the investigation of those complaints.

Amendment of Public Finance and Audit Act 1983 No 152

42. Schedule 2.12 is consequential on the amendment made by Schedule 1 [18] and [23] that any person, and not only a public official, can be protected in relation to a public interest disclosure concerning serious and substantial waste of public money.

Amendment of Public Sector Employment and Management Act 2002 No 43

43. Schedule 2.13 is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if it is not taken or threatened substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.

Amendment of Teaching Service Act 1980 No 23

44. Schedule 2.14 is consequential on the amendments made by Schedule 1 [33] and [34] that prohibit detrimental action even if it is not taken or threatened substantially in reprisal for making a public interest disclosure, but in circumstances where reprisal for making the disclosure is one of the reasons for taking or threatening the detrimental action.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Broadening of Offence and Increased Penalty

45. Schedule 1, item 33 of the Bill broadens the offence of taking detrimental action against a person in reprisal for a public interest disclosure. Currently, the offence is made out if the making of the disclosure was the substantial reason for the detrimental action to be taken. Under item 33, the offence occurs whenever detrimental action is taken or threatened against a person for reasons that include the fact that the person made a disclosure. In addition, the maximum penalty for the offence is increased from 100 penalty units or 2 years imprisonment or both, to 100 penalty units or 3 years imprisonment or both.

Schedule 1, item 33 of the Bill broadens the offence of taking detrimental action against a person in reprisal for a public interest disclosure to capture a broader range of behaviour, and increases the maximum penalty for the offence. As these changes are part of an overall scheme to encourage whistleblowing by mitigating the risk to whistleblowers, and as the increased penalty is not disproportionate in the circumstances, the Committee makes no further comment.

Shifting Onus of Proof

46. Schedule 1, item 33 of the Bill provides that in any proceedings for the offence of taking or threatening detrimental action against a person in reprisal for a public interest disclosure, the onus is on the defendant to prove that the detrimental action shown to be taken or threatened against a person was not taken or threatened in reprisal for the other person making a public interest disclosure.

By requiring an accused person to disprove a presumption that he or she is guilty of an offence, schedule 1, item 33 of the Bill may violate a person's right to the presumption of innocence. Further, if the person is unable to disprove the presumption that he or she is guilty of the offence, the consequences are potentially serious. The person could be sentenced to a maximum of 3 years imprisonment. Nonetheless, the *Public Interest Disclosures Act 1994* already contains a similar provision to plug an evidentiary gap for the prosecution, once it has proved detrimental action took place, which may otherwise be insurmountable. For these reasons, the Committee makes no further comment.

Retrospectivity

47. The Bill broadens categories of wrongdoing in the public sector about which whistle blowers can make disclosures and, in certain circumstances, be protected from adverse consequences. Schedule 1, item 41 of the Bill provides this is the case even if the disclosures are made about conduct or activities engaged in before commencement of the amending Act. The Bill also protects for the first time disclosures made by persons who are not public officials, and item 41 provides this is the case even if the disclosures are made about conduct or activities engaged in, or about matters arising, before commencement of the amending Act.

The Committee generally comments when provisions in legislation are drafted to have retrospective effect. Such provisions can be contrary to the rule of law which allows people to order their affairs according to what the law is. In this case, the retrospective provision does not create a new offence or penalty but rather new protections for whistleblowers which may make reporting of a wider range of pre-existing wrongdoing more likely. Given no new offence or penalty is created, the Committee makes no further comment.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Potential Commencement by Proclamation

48. Clause 2 of the Bill provides that the Bill commences on the date that is 3 months after the date of assent, unless commenced sooner by proclamation.

The Committee prefers legislation of this kind, which impacts on rights and liberties, to commence on a fixed date or on assent, not by proclamation.

Part Two – Regulations

The Committee does not report on any Regulations in this Digest.

Appendix One – Index of Ministerial Correspondence on Bills

The Committee does not report on any Ministerial Correspondence on Bills in this Digest.

Appendix Two – Index of Correspondence on Regulations on which the Committee has reported

1. In Digest 9/55, the Committee reported on the Work Health and Safety (Savings and Transitional) Regulation 2011, and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 17 April 2012 which addresses to the Committee's satisfaction the issues raised.
2. In Digest 12/55, the Committee reported on the Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.
3. In Digest 16/55, the Committee reported on the Home Building Amendment (Threshold for Home Warrant Insurance) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.
4. In Digest 12/55, the Committee reported on the Local Government (General) Amendment (Election Procedures) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 21 June 2012 which addresses to the Committee's satisfaction the issues raised.
5. In Digest 15/55, the Committee reported on the Police Amendment (Death and Disability) Regulation 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 9 July 2012 which addresses to the Committee's satisfaction the issues raised.
6. On 8 May 2012 the Committee wrote to the Attorney General in relation to James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Statutory Recovery Claims) Regulation 2012. The Committee was in receipt of a response from the Attorney General dated 10 August 2012 which addressed to the Committee's satisfaction the issues raised. Further information in relation to this can be found in Digest 23/55.