



Legislation Review Committee

LEGISLATION REVIEW DIGEST

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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. CRIMES (SENTENCING PROCEDURE) AMENDMENT (PROVISIONAL SENTENCING FOR CHILDREN) BILL 2013

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

Effect of being in custody on court's assessment of matters relevant to sentencing

Notwithstanding that the Bill appears to encourage rehabilitation of child offenders, the Committee notes that an offender who has received a provisional sentence will be in custody when the court is carrying out progress reviews to determine whether to impose a final sentence. The Committee is concerned about any possible effects of detention on the matters that the court will be assessing as part of its progress reviews under sections 60E and 60F.

Delay in final sentencing

The Committee notes that under the proposed section 60H, an offender may have to wait up to five years from the date of their provisional sentence for their final sentence to be imposed. The Committee is concerned that this could lead to the perception of a delay in the offender receiving justice. While the Committee notes the potential for an offender's sentence to be reduced under the scheme, the Committee refers to Parliament whether possible delays in final sentencing would unduly trespass on the rights of the offender.

Retrospectivity

The Committee notes that the provisional sentencing scheme will operate retrospectively, so that offences committed before the commencement of the scheme could be dealt with under the scheme. However, because of how the scheme is intended to operate, the Committee does not make any further comments on this issue.

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

Insufficiently defined criteria

The Committee notes that at the time of imposing a provisional sentence, the court will not be in a position to assess all matters relevant to sentencing. The Committee also notes that the term of imprisonment imposed under a final sentence cannot exceed the term imposed under the provisional sentence. The Committee notes the intention of the legislation and therefore makes no further comment.

2. CRIMINAL PROCEDURE AMENDMENT (COURT COSTS LEVY) BILL 2013

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

Double punishment

Although this Bill provides that certain individuals convicted of certain offences are to pay a court costs levy – potentially viewed as a double punishment – given the relatively low cost of the levy, the fact that it is not applicable to those in certain financial hardships, and the

alternative payment options available, the Committee makes no further comment on this issue.

Retrospectivity

The Committee notes that this clause has a retrospective effect. However, the Committee notes that as the Court currently has the discretion to charge the \$83 levy, the retrospective act of requiring that such a charge be levied does not unduly trespass on personal rights or liberties.

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

Commencement by proclamation

The Committee notes that the Bill provides for the charging of a levy that the Court already has the discretion to charge. In these circumstances, the Committee makes no further comment on the commencement of the Bill by proclamation.

3. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT
(DISCIPLINARY PROCEEDINGS) BILL 2013

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

Right against self-incrimination

Notwithstanding the beneficial intent of the Bill to facilitate disciplinary proceedings against public officials who have engaged in corrupt conduct, the Committee notes that the amendments proposed by the Bill could impact upon an individual's right against self-incrimination. However, the Committee also notes that the information cannot be used against the individual in criminal proceedings.

4. LOCAL GOVERNMENT AMENDMENT (EARLY INTERVENTION) BILL 2013

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

Excessive Action

The Committee considers that the threat of criminal sanction by the Minister or Director-General to manage administrative issues within the Division of Local Government, and employees thereunder, may appear excessive, unwarranted and a trespass on personal rights and liberties. The Committee refers this matter to Parliament for its consideration.

Self-Incrimination

The Committee is concerned about the requirement of a person to disclose records, provide information, or give answers, notwithstanding that any disclosure may incriminate that person and be used against them in disciplinary action or proceedings relating to misconduct. The Committee refers these matters to Parliament for its consideration.

5. POWERS OF ATTORNEY AMENDMENT BILL 2013

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

Retrospectivity

The Committee notes the operation of new clauses with respect to review of revocations of existing powers of attorney by the Guardianship Tribunal, and the authority of substitute

attorneys under enduring powers of attorney, and that they apply to instruments executed before the commencement of these clauses.

Makes rights, liberties or obligations unduly dependent upon insufficiently

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

Henry VIII clause

The Committee is of the view that any functions outlined in legislation concerning the powers of the Executive should be clearly articulated and be scrutinised by the Parliament. The Committee therefore refers this incidence of allowing the regulations to amend the operations of an Act to Parliament for its consideration as to whether this constitutes an inappropriate delegation of legislative power.

Commencement by proclamation

The Committee notes that the Bill clarifies issues and simplifies the process of appointing an attorney. In these circumstances, the Committee makes no further comment on the commencement of the Bill by proclamation.

6. ROYAL COMMISSIONS AMENDMENT BILL 2013

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

PART TWO - REGULATIONS

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

Part One - Bills

1. Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Bill 2013

Date introduced	26 February 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Minister for Justice

PURPOSE AND DESCRIPTION

1. The object of the Bill is to enable the provisional sentencing of children who are convicted of murder.

BACKGROUND

2. In the case of *R v SLD* [2002] NSWSC 758, Justice Wood noted the limitations of normal sentencing principles when assessing the term of a sentence for a child convicted of murder. He indicated that alternative sentencing options may be appropriate in such circumstances.
3. Following on from Justice Wood's decision, in September 2009, the NSW Sentencing Council released a research report, *Provisional sentencing for children*. The report deals with the sentencing of children between 10 and 14 who commit serious crime. The report recommended that there should be a provisional sentencing scheme for children convicted of murder.
4. The Bill implements the NSW Sentencing Council's recommendation.

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 Crimes (Sentencing Procedure) Act 1999 No 92

7. Schedule 1 [1] provides for a new scheme for the provisional sentencing of children who are convicted of murder.
8. The new scheme allows a court that imposes a sentence on an offender for the offence of murder to impose the sentence as a provisional sentence if:

- (a) the offender was less than 16 years of age when the offence was committed, and
 - (b) the offender is less than 18 years of age when the provisional sentence is imposed, and
 - (c) the sentence proposed to be imposed for the offence is or includes a term of imprisonment, and
 - (d) the court is of the opinion that it is not appropriate to impose an ordinary sentence on the offender because the information presently available does not permit a satisfactory assessment of whether the offender has or is likely to develop a serious personality or psychiatric disorder, or a serious cognitive impairment, such that the court cannot satisfactorily assess either or both of the following matters:
 - i whether the offender is likely to re-offend,
 - ii the offender's prospects of rehabilitation.
9. The court may have regard to a case plan or proposed case plan for the offender in deciding whether or not it is appropriate to impose a provisional sentence.
10. A provisional sentence is subject to periodic review and redetermination. That is, the provisional sentence is not the final sentence of the offender.
11. A court that imposes a provisional sentence is to conduct progress reviews of the offender's case, at least once every 2 years, for the purpose of deciding whether it is appropriate to impose a final sentence on the offender.
12. A court may, after conducting a progress review:
- (a) impose a final sentence on the offender, or
 - (b) decline to impose a final sentence on the offender.
13. A final sentence must be imposed no later than 5 years after the date the provisional sentence is imposed and at least one year before the end of the non-parole period for the provisional sentence.
14. Any term of imprisonment imposed under the final sentence is not to exceed the term of imprisonment imposed under the provisional sentence.
15. Both provisional sentences and final sentences are subject to appeal under the *Criminal Appeal Act 1912*. On appeal against a provisional sentence, a court may substitute a new provisional sentence or substitute a final sentence.
16. Schedule 1 [2] enables savings and transitional regulations to be made as a consequence of any Act that amends the *Crimes (Sentencing Procedure) Act 1999*.
17. Schedule 1 [3] extends the new provisional sentencing scheme to offences committed before the commencement of the scheme.

Schedule 2 Amendment of Criminal Appeal Act 1912 No 16

18. Schedule 2 makes a consequential amendment that ensures that both provisional and final sentences imposed under the new scheme can be appealed as a sentence under the *Criminal Appeal Act 1912*.

ISSUES CONSIDERED BY COMMITTEE

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

Effect of being in custody on court's assessment of matters relevant to sentencing

19. Schedule 1[1] of the Bill inserts a new section 60E into the *Crimes (Sentencing Procedure) Act 1999* which allows the court to carry out progress reviews of an offender's provisional sentence to determine whether it is appropriate to impose a final sentence.
20. Proposed section 60F sets out the information that the court may have regard to when carrying out a progress review.

Notwithstanding that the Bill appears to encourage rehabilitation of child offenders, the Committee notes that an offender who has received a provisional sentence will be in custody when the court is carrying out progress reviews to determine whether to impose a final sentence. The Committee is concerned about any possible effects of detention on the matters that the court will be assessing as part of its progress reviews under sections 60E and 60F.

Delay in final sentencing

21. Schedule 1[1] of the Bill inserts a new section 60H into the *Crimes (Sentencing Procedure) Act 1999*. Where a court has imposed a provisional sentence on an offender, the court must impose a final sentence within the timeframes set out in that section.

The Committee notes that under the proposed section 60H, an offender may have to wait up to five years from the date of their provisional sentence for their final sentence to be imposed. The Committee is concerned that this could lead to the perception of a delay in the offender receiving justice. While the Committee notes the potential for an offender's sentence to be reduced under the scheme, the Committee refers to Parliament whether possible delays in final sentencing would unduly trespass on the rights of the offender.

Retrospectivity

22. Schedule 1 [3] of the Bill amends Schedule 2 of the *Crimes (Sentencing Procedure) Act 1999* so that the new provisional sentencing scheme applies in respect of any sentence imposed after that scheme commences, including for offences committed before the scheme commences.

The Committee notes that the provisional sentencing scheme will operate retrospectively, so that offences committed before the commencement of the scheme could be dealt with under the scheme. However, because of how the scheme is intended to operate, the Committee does not make any further comments on this issue.

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

Insufficiently defined criteria

23. Schedule 1[1] of the Bill inserts a new section 60B into the *Crimes (Sentencing Procedure) Act 1999*. This section will empower the court to impose a provisional sentence in certain circumstances where, at the time of imposing the sentence, the court cannot satisfactorily assess whether the offender is likely to re-offend and/or the offender's prospects for rehabilitation.

The Committee notes that at the time of imposing a provisional sentence, the court will not be in a position to assess all matters relevant to sentencing. The Committee also notes that the term of imprisonment imposed under a final sentence cannot exceed the term imposed under the provisional sentence. The Committee notes the intention of the legislation and therefore makes no further comment.

2. Criminal Procedure Amendment (Court Costs Levy) Bill 2013

Date introduced	28 February 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:
 - (a) to amend the *Criminal Procedure Act 1986* to make certain accused persons found guilty of offences in summary proceedings before the Local Court automatically liable to pay a court costs levy. The levy will replace the present system under which the Local Court has the discretion to make an order that an accused person pay court costs if found guilty; and
 - (b) to amend the *Fines Act 1996* to provide that, for the purpose of that Act, a court costs levy is to be treated as a fine for the purposes of enforcement action; and
 - (c) to amend the *Children (Criminal Proceedings) Act 1987* merely to restate the current system that applies to criminal proceedings involving children, under which there is no automatic costs levy but the court has a discretion to make an order that an accused person who has been found guilty of an offence pay court costs.

BACKGROUND

2. There is currently a discretion which enables convicted defendants to be charged a statutory court costs levy. This Bill removes the discretion, except in circumstances where defendants would find it difficult to pay. Examples of such defendants include children and those defendants who receive sentences of imprisonment.
3. The current cost would be \$83.

OUTLINE OF PROVISIONS

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

Schedule 1 Amendment of Criminal Procedure Act 1986 No 209

6. Schedule 1 [1] inserts a new section in the provisions of the Criminal Procedure Act 1986 that deal with the awarding of costs in summary proceedings before the Local Court (including proceedings for indictable offences that are being dealt with summarily).

7. The proposed section provides for the imposition of a court costs levy (which is in addition to any pecuniary penalty) on persons dealt with in summary proceedings before the Local Court who are either convicted or are found guilty and made the subject of an order under section 10 of the Crimes (Sentencing Procedure) Act 1999.
8. The levy is to attach to each conviction or order and is to be of an amount prescribed by the regulations.
9. The court costs levy does not attach to the following convictions or orders:
 - (a) convictions resulting in a sentence of imprisonment (unless the sentence is a suspended sentence);
 - (b) orders under section 10 (1) (a) of the Crimes (Sentencing Procedure) Act 1999 (where a court finds a person guilty of an offence, but directs that the charge be dismissed) where the offence is not punishable by imprisonment;
 - (c) findings of guilt recorded in the Local Court subsequent to the making of an order under Division 4 of Part 3 of the Children (Criminal Proceedings) Act 1987 in relation to a traffic offence (where the offence is dealt with by the Local Court by virtue of section 210 of the Criminal Procedure Act 1986);
 - (d) convictions, or orders under section 10 of the Crimes (Sentencing Procedure) Act 1999, recorded in the Drug Court;
 - (e) convictions or orders that the regulations exempt from liability to pay the levy. In addition, a person who is under the age of 18 years is not liable to pay the court costs levy in respect of a conviction or order imposed by the Local Court if the Court directs that the person is exempt from the levy.
10. Schedule 1 [2] omits existing provisions about a court's discretion to make orders requiring an accused person to pay court costs as a consequence of the fact that the automatic court costs levy will replace discretionary orders relating to court costs (for courts other than the Children's Court). The existing provisions about the making of orders for professional costs are unaffected by the amendment.
11. Schedule 1 [3] and [4] make it clear that an existing provision about the award of professional costs to the prosecutor applies not only to convictions but extends to circumstances where an accused person is found guilty of an offence and an order is made under Division 4 of Part 3 of the Children (Criminal Proceedings) Act 1987.
12. Schedule 1 [5] provides for the making of savings and transitional provisions consequent on the proposed amendments to the Criminal Procedure Act 1986.
13. Schedule 1 [6] provides that the amendments made by Schedule 1 extend to proceedings commenced but not finally determined immediately before the commencement of the amendments.

Schedule 2 Consequential amendment of other Acts Amendment of Children (Criminal Proceedings) Act 1987 No 55

14. Schedule 2.1 [1] amends the Children (Criminal Proceedings) Act 1987 to provide that the court costs levy being created by the amendments to the Criminal Procedure Act 1986 does not apply to criminal proceedings before the Children's Court.
15. Schedule 2.1 [2] provides that the Children's Court may, at the end of summary proceedings in which an accused person is found guilty of an offence, order that the person pay court costs in addition to any pecuniary penalty imposed in respect of the same offence (so that the Children's Court can retain its existing discretion to do so).
16. Schedule 2.1 [3] and [4] make savings and transitional provisions.

Amendment of Fines Act 1996 No 99

17. Schedule 2.2 amends the Fines Act 1996 to provide that, for the purposes of that Act, a court costs levy is to be treated as a fine imposed by the court by which the person liable to pay the levy was convicted or found guilty. This will allow enforcement action to be taken under that Act, including allowing the person liable to pay the court costs levy to access a range of alternative payment options available under that Act.

ISSUES CONSIDERED BY COMMITTEE

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

Double punishment

18. The object of the Bill is to amend the *Criminal Procedure Act 1986* to make certain accused persons found guilty of offences in summary proceedings before the Local Court automatically liable to pay a court costs levy. The levy will replace the present system under which the Local Court has the discretion to make an order that an accused person pay court costs if found guilty. The levy is not payable by children or in circumstances where a custodial sentence has been ordered.
19. The Committee notes that the payment of a levy by accused persons found guilty of offences could be viewed as double-punishment – requiring an individual to submit to the terms of their sentence and also pay a court costs levy. However, the Committee notes the following circumstances:
 - the levy is in the vicinity of \$83;
 - the levy only represents some of the costs incurred by the court;
 - the levy is not applied to individuals who would find it difficult to pay (those individuals who receive sentences of imprisonment, individuals before Children's Court and individual's before the Drug Court); and
 - individuals have a range of alternative payment options including payment by instalment, extension of time within which to pay and having the debt written off due to serious medical, domestic or financial problems and participating in the Work and Development Order scheme.

Although this Bill provides that certain individuals convicted of certain offences are to pay a court costs levy – potentially viewed as a double punishment – given the relatively low cost of the levy, the fact that it is not applicable to those in certain financial hardships, and the alternative payment options available, the Committee makes no further comment on this issue.

Retrospectivity

20. Schedule 1[6] inserts a new Part in Schedule 2 of the principal Act. The relevant clause provides that the amendments in the Bill extend to proceedings already commenced but not finally determined immediately before commencement of the amendments.

The Committee notes that this clause has a retrospective effect. However, the Committee notes that as the Court currently has the discretion to charge the \$83 levy, the retrospective act of requiring that such a charge be levied does not unduly trespass on personal rights or liberties.

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

Commencement by proclamation

21. The Bill commences on a day or days to be appointed by proclamation.

The Committee notes that the Bill provides for the charging of a levy that the Court already has the discretion to charge. In these circumstances, the Committee makes no further comment on the commencement of the Bill by proclamation.

3. Independent Commission Against Corruption Amendment (Disciplinary Proceedings) Bill 2013

Date introduced	28 February 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Barry O'Farrell MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The objects of the Bill are to amend the *Independent Commission Against Corruption Act 1988* to:
 - (a) allow employers of public officials to take disciplinary proceedings against staff who have been the subject of corruption findings by the Independent Commission Against Corruption, and
 - (b) make admissible to the employer self-incriminating and other evidence given to the Commission by the public official who is the subject of the corruption findings.

BACKGROUND

2. On 14 August 2008, the Commission wrote to the Committee on the Independent Commission Against Corruption proposing a number of amendments to the *Independent Commission Against Corruption Act 1988*, including amendments to allow evidence that is compulsorily obtained by the Commission to be later used in disciplinary proceedings against the individual. The Committee inquired into the matters raised by the Commission and, in September 2010, released its report, *Proposed amendments to the Independent Commission Against Corruption Act 1988*. The report made recommendations that the Act be amended to facilitate this issue.
3. At present, where a public official is found by the Commission to have engaged in corrupt conduct, the next step is for the public official's employer to carry out its own investigation to determine whether there has been misconduct. The Bill will allow the employer of the public official to rely on the Commission's investigation, rather than carrying out a separate misconduct investigation.

OUTLINE OF PROVISIONS

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

Schedule 1 Amendment of Independent Commission Against Corruption Act 1988 No 35

6. Schedule 1 [3] enables the employer of a public official to take disciplinary proceedings in connection with the employment of the official if the ICAC finds (in a report to Parliament) that the public official has engaged or attempted to engage in corrupt conduct. The person or body determining the disciplinary proceedings may take any disciplinary or other action that the person or body may otherwise take in disciplinary proceedings against the official but must give the public official an opportunity to make a submission in relation to any proposed action. Evidence given by the official in the ICAC proceedings is admissible in the disciplinary proceedings (and in any subsequent appeal or review) but such evidence does not become admissible in any other proceedings because it is so used.
7. Schedule 1 [1] enables statements of information or documents or other things produced to the ICAC by a public official, that tend to incriminate the official, to be used in disciplinary proceedings based on a finding of corrupt conduct (as referred to in the amendment made by Schedule 1 [3]) even if the public official has objected to the production on that basis.
8. Schedule 1 [2] enables answers made, or documents or other things produced, by a public official at a compulsory examination or public inquiry before the ICAC, that tend to incriminate the official, to be used in disciplinary proceedings based on a finding of corrupt conduct (as referred to in the amendment made by Schedule 1 [3]).

ISSUES CONSIDERED BY COMMITTEE

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

Right against self-incrimination

9. The effect of the Bill is to amend the *Independent Commission Against Corruption Act 1988* so that information that tends to incriminate a public official who is under investigation by the Commission could, in certain circumstances, later be used against the public official in disciplinary proceedings by their employer.

Notwithstanding the beneficial intent of the Bill to facilitate disciplinary proceedings against public officials who have engaged in corrupt conduct, the Committee notes that the amendments proposed by the Bill could impact upon an individual's right against self-incrimination. However, the Committee also notes that the information cannot be used against the individual in criminal proceedings.

4. Local Government Amendment (Early Intervention) Bill 2013

Date introduced	26 February 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Donald Page MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Local Government Act 1993* to enable either the Minister for Local Government or the Director-General of the Department of Premier and Cabinet to direct a council, councillor or general manager to provide information or documents about the council, its operations or its activities.
2. The Bill also proposes to enable the Minister to issue an order (a performance improvement order) to a council that directs certain actions to be taken to improve the performance of the council, and require councils to report on compliance with that order. The amendments also facilitate the appointment of temporary advisors to assist councils in their compliance obligations.
3. Lastly, the Bill provides that councils can be suspended for a period up to three months if the Minister is of the opinion that the appointment of an interim administrator is necessary to improve or restore the proper and effective functioning of a council.

BACKGROUND

4. This Bill has been prompted by concerns that there are limited means to correct poor performing or dysfunctional councils, other than to dismiss the entire council, and that the existing measures to do so are cumbersome and expensive, such as the current practice of holding a public inquiry before a council is dismissed. There have been more than 10 public inquiries into the performance of local councils, which has led to the dismissal of some councils and appointment of administrators. This Bill is to provide for interim or less serious measures, to improve council performance.

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, or on the date of commencement of the *Local Government Amendment (Conduct) Act 2012* (1 March 2013), whichever is the later.
7. Under the amendments, the Minister will be able to issue a performance improvement order to a council if the Minister reasonably considers that action must be taken to improve the performance of the council. Actions to improve the performance of a council include any actions that the Minister considers necessary to improve or restore

the proper or effective functioning of the council. The order may also require actions to be taken by individual councillors. The Minister must generally give a council notice of his or her intention to issue a performance improvement order and there will be a consultation period of not less than 21 days during which the council may make submissions to the Minister and the Minister must have regard to any submissions received during that time. The Minister may also appoint a temporary adviser to assist the council in complying with a performance improvement order. The council, councillors and members of staff of the council must co-operate with the adviser. A council will be required to provide the Minister with a report on its compliance with the order. See Schedule 1 [41], proposed Part 6 of Chapter 13.

Temporary suspension of council

8. Under the amendments, the Minister may, by order published in the Gazette, suspend a council for a period (initially for up to 3 months, with a possible extension of a further 3 months) if the Minister reasonably believes that the appointment of an interim administrator is necessary to improve or restore the proper or effective functioning of the council. The Minister must appoint one or more interim administrators to exercise all the functions of the council during the suspension period. The Minister must generally give a council notice of his or her intention to suspend the council and there will be a consultation period of not less than 14 days during which the council may make submissions to the Minister and the Minister must have regard to any submissions received during that time. An interim administrator is to give the Minister a written report about his or her administration of the council and the report is to include recommendations in relation to improving or restoring the proper and effective functioning of the council. Elections are not held while a council is suspended. See Schedule 1 [41], proposed Part 7 of Chapter 13. Schedule 1 [21] is a consequential amendment.

Public inquiries

9. Schedule 1 [41] inserts proposed Part 8 into Chapter 13 of the principal Act. Proposed Part 8 re-enacts an existing provision that enables the Governor or the Minister to appoint one or more commissioners to hold a public inquiry into a council, a councillor or a member of staff of a council in relation to the carrying out of the provisions of the principal Act. In addition, the amendments provide that:
 - (a) the expenses of such a public inquiry are to be borne by the council concerned in certain circumstances, and
 - (b) the Minister may suspend a council, and appoint an interim administrator, if a public inquiry is held or to be held in relation to the council (the suspension has effect until it is terminated by the Minister or the council is dismissed), and
 - (c) the Minister may issue a performance improvement order in respect of a council in response to the results of a public inquiry in relation to the council.

Currently the Governor may only dismiss a council if a public inquiry has been held and if the Minister recommends the dismissal after considering the results of the public inquiry.

10. There have been no fewer than 10 public inquiries in recent years,
11. Schedule 1 [10] enables the Minister to recommend that the Governor dismiss a council after considering the results of the public inquiry or, if the Minister issues a performance improvement order in response to the results of the inquiry, after having considered whether the council has complied with the order.
12. Schedule 1 [3], [9], [13], [48], [49] and [54] are consequential amendments.

Effect of suspension of council and councillors

13. If a council is suspended under the new provisions, the councillors will not be entitled, during the suspension period, to exercise any functions of the civic office or to receive any fee or remuneration, to receive expenses or to use council facilities.
14. Schedule 1 [42]–[44] ensure that whenever a councillor is suspended under the principal Act the councillor is not entitled to expenses or to the use of council facilities.
15. Schedule 1 [7] and [8] provide that a council must not pay any expenses to councillors during any suspension period.
16. Schedule 1 [19] makes it clear that a holder of civic office is not disqualified from being re-elected merely because the holder, or the council, is suspended.

Investigation of councils

17. Schedule 1 [26] provides that the Director-General may, at the request of the Minister or on the Director-General's own initiative, conduct an investigation into any aspect of a council or of its work and activities. Currently, the principal Act provides that the Director-General may authorise a Departmental representative to conduct such an investigation.
18. Schedule 1 [32] requires the Director-General to report to the Minister on the results of any such investigation.
19. Schedule 1 [34] and [35] expand the power of the Director-General to recover the expenses incurred in respect of an investigation to include the expenses of investigations relating to recurring problems with the administration of a council that have been the subject of previous Ministerial intervention (such as the issue of a performance improvement order or the temporary suspension of the council). Schedule 1 [25], [27]–[31], [33] and [46] are consequential amendments.
20. Schedule 1 [24] extends the power of the Minister and the Director-General to direct a council to provide information about the council or its operations or activities so that the Minister or the Director-General may direct a council, a councillor or the general manager of a council to provide information or documents. Failure to comply with such a direction is an offence under the principal Act with a maximum penalty of 20 penalty units (currently, \$2,200).

21. Schedule 1 [36] provides protection from self-incrimination for persons answering questions or providing information as directed by the Minister or the Director-General.
22. Schedule 1 [37]–[40] are consequential amendments that transfer existing functions relating to surcharging (currently conferred on Departmental representatives) to the Director-General. The Director-General can delegate the functions.

Appointment of administrators

23. Schedule 1 [2] and [12] make it clear that more than one administrator may be appointed in respect of a council at the same time. Schedule 1 [1], [4], [5] and [14]–[18] are consequential amendments.

Other amendments

24. Schedule 1 [41] (proposed Part 9 of Chapter 13) and [45] permit any orders, notices or documents required to be served on a council or a person by the Minister or the Director-General under the proposed provisions, or in relation to misconduct investigations and proceedings under Chapter 14 of the principal Act, to be served by email in certain circumstances.
25. Schedule 1 [50] enables a delegate of the Director-General of the Department of Premier and Cabinet to subdelegate to any member of staff of the Department any function delegated by the Director-General if authorised in writing to do so by the Director-General.
26. Schedule 1 [22] makes it clear that the usual quorum for a council meeting does not apply in the case of a council subject to a performance improvement order that contains directions by the Minister as to the quorum for council meetings.
27. Schedule 1 [11] provides that a reference in the principal Act to the dismissal of a council is a reference to a declaration by the Governor that all civic offices in relation to the council are vacant. Schedule 1 [20] is a consequential amendment.
28. Schedule 1 [6], [23] and [47] are minor consequential amendments.
29. Schedule 1 [53] contains consequential amendments to expressions defined in the Dictionary.
30. Schedule 1 [51] contains a savings provision that is consequent on the enactment of the *Local Government Amendment (Conduct) Act 2012*. That Act updated references to the Minister for Land and Water Conservation in sections 57–66 of the principal Act to the Minister for Primary Industries. However, administrative changes orders in effect before the amendment required the functions of the Minister for Land and Water Conservation under those sections to be exercised, in some specific cases, by a Minister other than the Minister for Primary Industries. The amendment makes it clear that the update to those sections does not affect the operation of any such order.
31. Schedule 1 [52] contains savings and transitional provisions consequent on the proposed amendments.

Schedule 2 Amendment of other legislation

32. Schedule 2.1 updates a cross-reference in the *Environmental Planning and Assessment Act 1979* as a consequence of the amendments to the principal Act relating to public inquiries.
33. Schedule 2.2 amends the *Government Information (Public Access) Regulation 2009* to provide that performance improvement orders given to a council are open access information and are required to be made publicly available.

ISSUES CONSIDERED BY COMMITTEE

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

Excessive Action

34. Clauses 24 and 29 provide that a councillor or general manager of a council must provide documents or information concerning the council, its operations or its activities as the Minister or Director-General specifies in an order. Failure to provide documents or information as requested constitutes an offence. Similarly, failure for a councillor or general manager of a council to appear before the Director-General at a specified time and place, or give evidence as required, or provide access as requested, also constitutes offence. Both offences attract a maximum penalty of 20 penalty units.

The Committee considers that the threat of criminal sanction by the Minister or Director-General to manage administrative issues within the Division of Local Government, and employees thereunder, may appear excessive, unwarranted and a trespass on personal rights and liberties. The Committee refers this matter to Parliament for its consideration.

Self-Incrimination

35. One of the primary aims of the Bill is to provide a requirement that councillors and general managers must provide information, disclose records, or give answers to the Minister or Director-General with respect to the council, its operation and activities.
36. Proposed section 434C(1) provides that a person is not excused from a requirement to provide records or information or to answer a question on the grounds that the record, information or answer might incriminate the person or make the person liable to a penalty. Although section 434C(2) provides that any information disclosed or answer provided is not admissible in evidence against the person in criminal proceedings if the person objected that it may incriminate that person (excluding for offences related to failing to comply with the Bill, or providing false or misleading information), section 434C(4) simultaneously provides that any record provided in compliance with the Bill is not *inadmissible* in evidence against that person.
37. Proposed section 434C(3) provides that, notwithstanding any objection, any answer or information provided by a person can still be used against that person for the purposes of taking administrative disciplinary action, or proceedings against that person relating to misconduct. The Committee notes that despite any privilege against self-incrimination that exists for certain criminal proceedings, disciplinary action can still be taken to the detriment of that person, as well as subsequent proceedings relating to misconduct.

The Committee is concerned about the requirement of a person to disclose records, provide information, or give answers, notwithstanding that any disclosure may incriminate that person and be used against them in disciplinary action or proceedings relating to misconduct. The Committee refers these matters to Parliament for its consideration.

5. Powers of Attorney Amendment Bill 2013

Date introduced	27 February 2013
House introduced	Legislative Council
Minister responsible	The Hon. Greg Pearce MLC
Portfolio	Finance and Services

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Powers of Attorney Act 2003 (the Principal Act) as follows:
 - (a) to make specific provision for the appointment by principals of substitute attorneys (being persons who may act as attorney under the power of attorney during certain vacancies in the office of a specified attorney);
 - (b) to remove the prescribed form for a power of attorney from the Principal Act and enable such forms to be prescribed by the regulations made under the Principal Act;
 - (c) to give the Guardianship Tribunal the power to review the revocation of an enduring power of attorney;
 - (d) to allow a person who appoints two or more persons as joint attorneys under a power of attorney to provide for the continuation of the power of attorney where the office of one or more of the attorneys becomes vacant (currently, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant); and
 - (e) to make other consequential amendments and insert savings and transitional provisions.

BACKGROUND

2. Following a review, it was found that users of the prescribed form for the appointment of a power of attorney found that form to be confusing. This Bill proposes an amendment that separates the form into two forms: one for general powers of attorney and one for enduring powers. The prescribed form will be moved from the Act to the Regulation.
3. Other changes include amending the Act to allow some flexibility in the manner of appointing joint attorneys, providing clarity to this process and to the process of nominating substitute attorneys.

OUTLINE OF PROVISIONS

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

5. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Powers of Attorney Act 2003 No 53

6. Schedule 1 [3] inserts a provision to enable the making of regulations prescribing the form that may be used to create a power of attorney that, once duly executed, is a *prescribed power of attorney* for the purposes of the Principal Act.
7. Schedule 1 [17] removes the current form for a power of attorney from the Principal Act and Schedule 1 [1], [2] and [4]–[6] make consequential amendments.
8. Schedule 1 [7] makes it clear that an enduring power of attorney does not confer any authority on a substitute attorney until the substitute attorney has accepted the appointment by signing the instrument creating the power.
9. Schedule 1 [8] gives the Guardianship Tribunal (in addition to the Supreme Court) jurisdiction to deal with an application for review of a revocation of an enduring power of attorney. Schedule 1 [14] makes specific provision for the orders that may be made following such review (including orders declaring that the power of attorney remains valid despite a purported revocation).
10. Schedule 1 [9]–[13] make consequential amendments.
11. Schedule 1 [15] provides for the appointment by principals of substitute attorneys (to act as attorney under a power of attorney during a vacancy in the office of a specified attorney) or during a vacancy of a kind specified in the instrument creating the power of attorney.
12. Schedule 1 [19] makes it clear that this amendment does not affect the validity of the previous appointment of a substitute attorney.
13. Schedule 1 [16] allows a person who appoints two or more persons as joint attorneys under a power of attorney to provide for the continuation of the power of attorney where the office of one or more of the attorneys becomes vacant so long as:
 - (a) the power of attorney provides for that continuation, and
 - (b) at least one of the attorneys or a substitute attorney remains in office.
14. Schedule 1 [18] enables the making of regulations of a savings or transitional nature consequent on the enactment of the amending Act (or any other Act that amends the Principal Act).
15. Schedule 1 [19] inserts savings and transitional provisions.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

16. Schedule 1[19] inserts a new Part 4 in Schedule 5 of the principal Act. Clause 7 of Part 4 provides for the review of revocations of existing powers of attorney by the Guardianship Tribunal whilst clause 8 provides an authority to substitute attorneys under enduring powers of attorney. These powers extend to instruments executed before the commencement of these clauses.

The Committee notes the operation of new clauses with respect to review of revocations of existing powers of attorney by the Guardianship Tribunal, and the authority of substitute attorneys under enduring powers of attorney, and that they apply to instruments executed before the commencement of these clauses.

Makes rights, liberties or obligations unduly dependent upon insufficiently Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Henry VIII clause

17. Schedule 1[4] of the Bill amends the principal Act to provide that the regulations may replace or amend Schedule 3 of the principal Act. Schedule 3 outlines a number of the authorities that the attorney has, including the authority of the attorney to confer benefits to the attorney themselves.

The Committee is of the view that any functions outlined in legislation concerning the powers of the Executive should be clearly articulated and be scrutinised by the Parliament. The Committee therefore refers this incidence of allowing the regulations to amend the operations of an Act to Parliament for its consideration as to whether this constitutes an inappropriate delegation of legislative power.

Commencement by proclamation

18. The Bill commences on a day or days to be appointed by proclamation.

The Committee notes that the Bill clarifies issues and simplifies the process of appointing an attorney. In these circumstances, the Committee makes no further comment on the commencement of the Bill by proclamation.

6. Royal Commissions Amendment Bill 2013

Date introduced	28 February 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 amend the *Royal Commissions Act 1923* to give the chairperson of a Royal Commission under the NSW Act similar powers to those to be given to the chairperson of a Royal Commission under the equivalent Commonwealth Act.
2. The Bill also amends the Act to ensure that a person who provides material voluntarily for the purposes of an inquiry has the same protections as a witness appearing before the Royal Commission.
3. Lastly, the Bill proposes to make the legal qualification necessary for a chairperson or sole commissioner to exercise special powers under the Act the same as those that apply for a person to be appointed as the Commissioner of a Special Commission of Inquiry or to other standing commissions such as the Independent Commission Against Corruption.

BACKGROUND

4. On 11 January 2013, the Commonwealth Government established a Royal Commission into institutional responses to child sexual abuse, with six commissioners. The NSW Government established an equivalent Royal Commission with the same commissioners under the *Royal Commissions Act 1923* of New South Wales to provide legal support for the operation of the Royal Commission. Under amendments to the *Royal Commissions Act 1902* of the Commonwealth, the chairperson of a Royal Commission is to be given power to authorise one or more of the commissioners to hold separate and concurrent hearings and exercise other powers of the Royal Commission.
5. The terms of reference recognise the seriousness of child sexual abuse and provide the Royal Commission with the scope to look at any public, private or non-government organisation involved with children including those that are no longer operations. The NSW Government has supported the Commonwealth-initiated Royal Commission, and this Bill facilitates the support and cooperation of New South Wales government agencies.

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.
8. Schedule 1 [1] amends the definition of a royal commission under the Act and Schedule 1 [3] inserts proposed section 5A into the Act, with respect to the commissioners of a Royal Commission who may sit for the purposes of an inquiry. In addition to the existing provision with respect to a sole commissioner or all or a quorum of the commissioners, the amendments enable any of the following to sit for the purposes of any part of an inquiry:

(a) the chairperson of the commission,

(b) one or more commissioners authorised by the chairperson to sit for the purposes of that part of the inquiry.

A commissioner or commissioners so authorised may sit concurrently for the purposes of the inquiry, and exercise relevant powers of the chairperson under the Act with respect to a separate sitting.

9. Schedule 1 [2] makes a consequential amendment to the definition of chairperson for the purposes of Division 2 of Part 2 of the Act.
10. Schedule 1 [4] amends section 11 of the Act to ensure that a person who provides material voluntarily for the purposes of an inquiry has the same protections as a witness appearing before the Royal Commission.
11. Schedule 1 [5] substitutes section 15 of the Act with respect to the legal qualifications necessary for a chairperson or sole commissioner to exercise special powers under the Act. The qualified persons authorised to exercise those special powers are:

(a) a Judge of the Supreme Court of New South Wales or of any other State or Territory, a Judge of the Federal Court of Australia or a Justice of the High Court of Australia, or Royal Commissions Amendment Bill 2013

(b) a former Judge or Justice of any such court, or

(c) a person qualified to be appointed as a Judge or Justice of any such court (but only if the Governor declares that the person may exercise the special powers). The substituted section enables the exercise of the special powers by a member of a commission who is a qualified person and who has been authorised to do so by the chairperson.

12. Schedule 1 [6] inserts proposed Schedule 1 into the Act. The Schedule provides that the amendments made by the proposed Act extend to the New South Wales Royal Commission into institutional responses to child sexual abuse. The proposed Schedule also enables regulations under the Act to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act or any other Act that amends the Royal Commissions Act 1923.
13. Schedule 2 amends section 17 of the Act to ensure that a person who provides material voluntarily for the purposes of an inquiry has the same protections as a witness appearing before the Special Commission.

14. Schedule 1 [6] includes provisions that ensure that this proposed amendment extends to the New South Wales Special Commission of Inquiry into the police investigation of matters concerning alleged child sexual abuse established on 21 November 2012.

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.

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.