



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. CIVIL AND ADMINISTRATIVE TRIBUNAL BILL 2012

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

2. COURTS AND OTHER LEGISLATION FURTHER AMENDMENT BILL 2012

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

Freedom of expression and open justice

The Committee notes that the effect of proposed section 9A of the *Court Security Act 2005* is to prevent people broadcasting or posting on social media or other sections of the internet, matters that are taking place within a court. However, the Committee recognises that principles such as freedom of expression and open justice must be balanced against other principles, such as the right to a fair trial. In these circumstances, the Committee makes no further comment on this issue.

Privacy

The Committee notes that providing law enforcement agencies with access to applications to changes a name impacts on an individual's right to privacy. However, as the access is to be provided in the context of law enforcement agencies existing access to the Register maintained under the *Births, Deaths and Marriages Registration Act 1995*, the Committee makes no further comment on this issue.

The Committee notes that providing Juvenile Justice with the power to share and exchange information with the State Debt Recovery Office in relation to children's community services orders compromises affected children's right to privacy. However, as the purpose of the proposed section is to help reduce young offender's problems with outstanding fines by allowing them to work off the value of the fine through unpaid work, training or counselling, the Committee makes no further comment on this issue.

Retrospectivity

The Committee notes that the effect of the amendments to subsections 46A(1) and (2) of the *Births, Deaths and Marriages Registration Act 1995* is to provide law enforcement agencies not only with access to the Register regarding changes of names – but also with respect to any applications to change a name. Given that law enforcement agencies already have access to the Register, the Committee does not think it unreasonable that those agencies also be granted access to information relating to applications to change the Register. The Committee therefore makes no further comment in relation to this incidence of retrospectivity.

The Committee also notes that the effect of the inclusion of sections 28B of the *Children (Community Service Orders) Act 1987* section 39B of the *Children (Detention Centres) Act 1987* is to provide young offenders with options in relation to unpaid fines. As this provision benefits young offenders, the Committee makes no further comment in relation to this incidence of retrospectivity.

The Committee further notes that extending the proposed amendments to section 59 of the *Crimes (Appeal and Review) Act 2001* to include matters that have been commenced but not finally determined before the commencement of these proposed amendments may have an adverse impact on court participants who had sought legal advice based on the unamended section 59. However, the Committee notes that the amendments to section 59 are limited in substance to clarifying that where the Supreme Court has the power to hear an appeal in relation to costs order made by the Local Court against the prosecutor in any summary proceedings (section 56(1)(e) of the *Crimes (Appeal and Review) Act 2001*) the Supreme Court has the requisite power to set aside and make a new order or dismiss the appeal (section 59(2) *Crimes (Appeal and Review) Act 2001*). As the effect of this amendment is to clarify the law, the Committee makes no further comment in relation to this incidence of retrospectivity.

The Committee notes that whilst the new provisions relating to the Judges and Commissioners of the Land and Environment Court and Supreme Court commence retrospectively, they do so to enable those affected Judges and Commissioners to complete their current workload. As such, the Committee makes no further comment in relation to this incidence of retrospectivity.

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

Lack of clarity

The Committee notes that listing “any other Act that amends this Act” rather than listing the name of each of those amending Acts limits the clarity of Schedules outlined above. The Committee has a preference for the name of each Act being listed to avoid this lack of clarity. As the list relates to the regulation making power pertaining to provisions of a savings or transitional nature, and recognising that this amendment ensures that the Schedule is comprehensive, the Committee makes no further comment on this issue.

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

Commencement by proclamation

The Committee notes that schedule 1.8 of the Bill relates to the prohibition of unauthorised transmissions of court proceedings from courtrooms. The Attorney General indicated in his second reading speech that this was to provide sufficient time for the drafting of appropriate regulations. In these circumstances, the Committee makes no further comment.

3. CRIMES (CRIMINAL ORGANISATIONS CONTROL) AMENDMENT BILL 2012

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

Presumption of Innocence

The Committee notes that the broadening of the definition of serious criminal activity to include individuals who have neither been convicted nor charged with a serious indictable offence, and potentially placing control orders on these individuals, and breaches the presumption of innocence, as well freedom of association and movement, and the right to work. The Committee refers to Parliament whether this provision trespasses on personal rights and liberties.

Duration of Declaration

The proposal to extend the duration of a declaration from three to five years, with its attendant effects that control orders are placed on individuals who may have neither been

charged nor convicted of any serious indictable crime, may be considered a breach of the presumption of innocence, and pre-judicial punishment. The Committee refers this matter to Parliament for its consideration.

4. LAW ENFORCEMENT (CONTROLLED OPERATIONS) AMENDMENT BILL 2012

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

Surveillance

While the Bill proposed an extension of the class of individuals allowed to participate in covert surveillance operations, the Bill does not propose any new and additional powers. Given the limits of the extension, the Committee does not consider there to be a trespass of personal rights and liberties in this instance.

5. OMBUDSMAN AMENDMENT BILL 2012

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

Open Justice and Procedural Fairness

The Committee notes that providing the Ombudsman with the power to issue non-publication orders relating to his Inquiries has an impact on theory of open justice. Affected individuals may not have the opportunity to hear all of the evidence relating to them. This has a subsequent impact on procedural fairness as affected individuals are denied an opportunity to address the evidence before the Inquiry. Whilst the Committee acknowledges the inclusion of a public interest test in this clause, and notwithstanding the fact that the Ombudsman conducts Inquiries rather than exercising a judicial function, the Committee refers to Parliament whether non-publication orders affect an individual's right to open justice and procedural fairness.

Strict liability

The Committee always seeks to comment on offences that do not require *mens rea*. The Committee refers to Parliament whether including a strict liability offence in relation to publication of information relating to an Inquiry is reasonable in the circumstances.

Freedom of expression and association

The Committee notes that the effect of restricting what people may say to whom has an impact on their freedom of expression. The Committee also considers that meaningful freedom of association involves freedom of expression, and therefore considers any impact on freedom of expression to impact on freedom of association. As the regulations do not currently address this issue, nor are there any relevant guidelines from the Ombudsman, the Committee is unsure to what extent any proposed regulations or guidelines mitigate this concern. As such, the Committee refers to Parliament whether preventing individuals from disclosing the fact of a summons, or any of the content within that summons, unduly impacts an individual's freedom of expression and freedom of association.

Restriction of common law rights

The Committee notes that the effect of providing legal practitioners with protections and immunity is to restrict recourse that clients or affected individuals would otherwise have to the common law courts, particularly in relation to claims for compensation. However, given

that a similar protection is afforded barristers in the Supreme Court, and given the exception for gross negligence, the Committee makes no further comment on this issue.

Privilege against self incrimination

The Committee notes that compelling an individual to provide evidence or produce a document can impact on the privilege against self incrimination. However, as the proposed sub-section 80A(2) of the *Crime Commission Act 2012* is limited in scope to matters pertaining to the Crime Commission, the Committee considers that requiring officers to give evidence or produce documents relevant to their work at the Crime Commission is reasonable in the circumstances.

Retrospectivity

The Committee notes that the proposed clause 8 of schedule 4 of the *Crime Commission Act 2012* applies before the repeal of the *NSW Crime Commission Act 1985*, and thus applies retrospectively. However, section 29 of the repealed Act applied in a similar manner to the proposed operation of sections 80 and 80A and as such the Committee makes no further comment on this issue.

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

Matters in guidelines and regulations rather than principal legislation

As outlined above, the Committee is concerned that the proposed section 19C(1) unduly impacts on individual's freedom of expression and freedom of association. The Committee considers that all matters relating to such an impact should be properly included in the principal legislation, rather than in guidelines or the regulations. The Committee refers to Parliament whether this constitutes an inappropriate delegation of legislative power.

6. ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) AMENDMENT (CHILD SAFETY ON SCHOOL BUSES) BILL 2012*

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

7. SAINT JOHN'S COLLEGE AMENDMENT BILL 2012

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

8. SMALL BUSINESS COMMISSIONER BILL 2012

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

Privacy

Although this Bill provides for the exchange of information which could potentially include information of a personal nature, the Committee notes that restraints on the disclosure or receipt of personal information, as well as its low likelihood, are unlikely to adversely impact on privacy rights. As such, the Committee does not consider there to be a trespass on personal rights and liberties in this instance.

Freedom of Information

The Committee notes that this provision may appear to frustrate attempts by the Commissioner to ventilate views deemed in the public interest. However, the Committee also

notes that the Commissioner is not prevented from making reports that are critical of a government agency or person so long as the agency or person concerned has first had a right of reply, in itself a requirement of natural justice.

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

Commencement by Proclamation

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes the implementation of this Bill will require certain administrative arrangements before the Office can be established. In these circumstances, the Committee does not consider there to be an inappropriate delegation of legislative powers.

PART TWO - REGULATIONS

Part One - Bills

1. Civil and Administrative Tribunal Bill 2012

Date introduced	21 November 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Justice

PURPOSE AND DESCRIPTION

1. The object of the Bill is to establish a Civil and Administrative Tribunal of New South Wales (to be called NCAT) to replace various existing tribunals and to provide for its membership and functions.
2. On its establishment, NCAT is to replace major tribunals, including the Administrative Decisions Tribunal, the Consumer, Trader and Tenancy Tribunal, the Guardianship Tribunal, and each of the Tribunals established under section 165 of the *Health Practitioners Regulation National Law (NSW)*.
3. The NCAT will also replace a number of other, lesser-known tribunals, including the Victims Compensation Tribunal, the Local Government Pecuniary Interest and Disciplinary Tribunal, and each local land board constituted under the *Crown Lands Act 1989*.

BACKGROUND

4. In October, the Attorney General, Minister for Finance, and Minister for Fair Trading referred an Inquiry to the Legislative Council's Standing Committee on Law and Justice to consider opportunities to consolidate tribunals in New South Wales.
5. The Committee published its final report in March 2012. The report found that "stakeholders described the current tribunal system as complex and bewildering". To reduce this complexity, the Committee recommended that the Government pursue the establishment of a new tribunal to consolidate existing tribunals, where it is appropriate, to promote access to justice.
6. This Bill is the first stage in the process of abolishing the existing tribunals and transferring their functions to NCAT. The principal focus of this Bill is to provide for the establishment of NCAT. Substantive functions will be conferred on NCAT in the second stage in the process of abolishing the existing tribunals.
7. The second stage in the process of abolishing the existing tribunals, which will occur in 2013, will involve the enactment of legislation, to amend the proposed Act to add additional provisions concerning the constitution and functions of NCAT.

8. The Bill provides for NCAT to be established on 1 January 2014 or, if required, on a later date appointed by proclamation of the Governor. The Bill includes provisions that will enable the President of NCAT and other members to be appointed in anticipation of NCAT's establishment. The President, when appointed, will have the function of facilitating the establishment of NCAT.
9. The Bill will also enable the Rule Committee of NCAT to be constituted and to exercise its functions before the establishment of NCAT to develop Tribunal rules.

OUTLINE OF PROVISIONS

10. Clause 1 sets out the name (also called the short title) of the proposed Act.
11. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
12. Clause 3 sets out the object of the proposed Act.
13. Clause 4 defines certain terms and expressions used in the proposed Act. In particular, the term enabling legislation is defined to mean legislation (other than the proposed Act or any statutory rules made under the proposed Act) that: (a) provides for applications or appeals to be made to the Tribunal with respect to a specified matter or class of matters, or (b) otherwise enables the Tribunal to exercise functions with respect to a specified matter or class of matters.
14. Clause 5 provides that notes included in the proposed Act do not form part of the proposed Act.
15. Clause 6 defines what the term application to the Tribunal means for the purposes of the proposed Act.
16. Division 1 provides for the establishment of NCAT and its membership. NCAT will be established on 1 January 2014 or, if required, on a later date appointed by proclamation of the Governor (referred to in the proposed Act as the establishment day). The Division permits the President and other members of NCAT (including Division Heads) to be appointed before the establishment day to facilitate the process of establishing NCAT. Provision is also made for the Rule Committee of NCAT to be constituted before the establishment day to make Tribunal rules in anticipation of the establishment of NCAT. NCAT will consist of the following members: (a) the President (who must be a Judge of the Supreme Court), (b) Deputy Presidents, (c) principal members, (d) senior members, (e) general members.
17. Members (other than acting members) will be appointed as either term members or occasional members. A term member is a member who is appointed for a term. The President will be required to be appointed as a term member, as will each Division Head for the Divisions of the Tribunal. A term member may be appointed on a full-time or part-time basis. The President will be appointed on a full-time basis. An occasional member is a member who has been appointed to be a member for the purposes of specified proceedings before NCAT.
18. Division 2 provides that the functions of NCAT are to be allocated and exercised in the following Divisions of the Tribunal: (a) the Administrative and Equal Opportunity

Division, (b) the Consumer and Commercial Division, (c) the Occupational and Regulatory Division, (d) the Guardianship Division, (e) the Victims Support Division.

19. Division 2 provides for the assignment of members to these Divisions of the Tribunal and recognises that each Division of the Tribunal will have a Division Schedule. The Division Schedule for a Division of the Tribunal is the Schedule to the proposed Act that provides for the composition and functions of that Division. The provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and any other provisions of the proposed Act. A Division Head will be appointed for each Division of the Tribunal. The principal function of the Division Head of a Division of the Tribunal will be to direct the business of the Tribunal in that Division.
20. Division 2 also enables Division Lists to be created for Divisions of the Tribunal for the purposes of managing classes of proceedings in the Division. List Managers will be appointed to manage these Division Lists.
21. Division 3 sets out the functions of the President, the Division Heads and other members of NCAT (including functions that may be exercised by members who are appointed before the establishment day).
22. Division 4 provides for the appointment and functions of a Registrar, Deputy Registrars and other staff to assist the Tribunal in the exercise of its functions.
23. Division 5 provides for there to be a Rule Committee of NCAT to make Tribunal rules for NCAT to govern its practice and procedure. The President is also empowered to issue practice notes.
24. Division 6 provides that NCAT has such jurisdiction and functions as may be conferred or imposed on it by or under the proposed Act or any other legislation. Part 3 contains various provisions relating to the general operation of the proposed Act, including provisions relating to the following: (a) the application of the proposed Act to the Crown, (b) the authentication of documents of NCAT, (c) the giving of notices and lodgment of documents, (d) the making of regulations. The Part also makes amendments to the Judicial Officers Act 1986 that are consequential on the establishment of the office of the President of NCAT.
25. Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act, including provisions that provide for the abolition of the existing tribunals on the establishment day and the transfer of their members and functions to NCAT.
26. Schedule 2 contains additional provisions relating to members, including provisions concerning remuneration and the vacation of office.
27. Schedule 3 will be the location of the Division Schedule for the Administrative and Equal Opportunity Division of NCAT.
28. The Administrative and Equal Opportunity Division of NCAT will eventually be responsible for the exercise of certain functions of NCAT transferred from the Administrative Decisions Tribunal, including functions relating to the review of administrative decisions and equal opportunity matters (such as matters arising under anti-discrimination or community welfare legislation).

29. Schedule 4 will be the location of the Division Schedule for the Consumer and Commercial Division of NCAT. The Consumer and Commercial Division of NCAT will eventually be responsible for the exercise of certain functions of NCAT that will be transferred from the Consumer, Trader and Tenancy Tribunal.
30. Schedule 5 will be the location of the Division Schedule for the Occupational and Regulatory Division of NCAT. The Occupational and Regulatory Division of NCAT will eventually be responsible for the exercise of certain functions of NCAT that will be transferred from various existing tribunals concerning the regulation of professions and occupations, including legal practitioners and health practitioners. The Schedule makes provision for the establishment of a specialist Health Practitioner Division List for the management of proceedings allocated to the Division that will arise under the Health Practitioner Regulation National Law (NSW) after the abolition of the existing health practitioner tribunals.
31. Schedule 6 will be the location of the Division Schedule for the Guardianship Division of NCAT. The Guardianship Division of NCAT will eventually be responsible for the exercise of certain functions of NCAT that will be transferred from the Guardianship Tribunal.
32. Schedule 7 will be the location of the Division Schedule for the Victims Support Division of the NCAT. The Victims Support Division of NCAT will eventually be responsible for the exercise of certain functions of NCAT that will be transferred from the Victims Compensation Tribunal.

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.

2. Courts and Other Legislation Further Amendment Bill 2012

Date introduced	21 November 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Minister for Justice

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- (a) to amend the *Births, Deaths and Marriages Registration Act 1995* to empower the Registrar of Births, Deaths and Marriages to allow officers of law enforcement agencies to have access to applications to register the change of a person's name and not just to completed changes of name entries in the Register (as at present),
- (b) to amend the *Children (Community Service Orders) Act 1987* and the *Children (Detention Centres) Act 1987* to allow the State Debt Recovery Office and the Juvenile Justice division of the Department of Attorney General and Justice to share certain limited information about young people in the juvenile justice system who have outstanding fines,
- (c) to amend the *Children's Court Act 1987* to omit the requirement for the President of the Children's Court to oversee, in accordance with the rules, the courses of training to be attended by Children's Magistrates and prospective Children's Magistrates, as there are currently no rules relating to such training,
- (d) to repeal Part 2A of the *Civil Procedure Act 2005* (which requires steps to be taken to resolve a dispute by agreement, or to clarify or narrow issues in dispute, before commencing court action, and is not yet in operation) and to omit a provision of the *Civil Procedure Regulation 2012* that relates to that Part,
- (e) to amend the *Court Security Act 2005* to prohibit the unauthorised use of any device (including a phone) to transmit sounds, images or information forming part of the proceedings of a court from a room or place where a court is sitting to a place outside that room or place,
- (f) to amend the *Crimes (Appeal and Review) Act 2001* to specify the ways in which the Supreme Court can determine an appeal by a prosecutor against an order for costs made by the Local Court against the prosecutor in any summary proceedings,
- (g) to amend the *Fines Act 1996* to allow for a delegate of the Director-General of the Department of Attorney General and Justice to approve the organisations that can sponsor applicants for work and development orders (that is, orders requiring a person to undertake unpaid work or training or counselling to satisfy a fine debt), as an alternative to approval by the Director-General, which is presently permissible,

- (h) to repeal the *Inebriates Act 1912* (since the *Drug and Alcohol Treatment Act 2007* now applies to the whole of the State, the *Inebriates Act 1912* has no remaining operation in relation to adults and the continued operation of the Act in relation to minors is not considered appropriate),
- (i) to amend uncommenced amendments of the *Jury Act 1977* to continue the current ineligibility of Australian lawyers to serve as jurors and the current right of people who care for a person who is sick, infirm or disabled to claim an exemption from serving on a jury,
- (j) to amend the *Land and Environment Court Act 1979* to provide that a Commissioner of the Land and Environment Court whose term of appointment has expired can complete or otherwise continue to deal with any matters relating to proceedings or conciliation conferences that have been heard or partly heard, or conducted or partly conducted, before the expiry of the Commissioner's term,
- (k) to amend the *NSW Trustee and Guardian Act 2009* to clarify that a provision that prohibits the NSW Trustee and Guardian from accepting a trust under a deed of arrangement only applies to deeds of arrangement for the benefit of creditors,
- (l) to amend the *Probate and Administration Act 1898* to provide for certain matters to be approved rather than prescribed by the rules,
- (m) to make minor amendments to standardise provisions about acting judicial officers, to update terminology, to omit references to the repealed *Inebriates Act 1912* and to deal with other matters of a statute law revision nature.

BACKGROUND

- 2. Periodically, the Attorney General and Minister for Justice introduces legislation to make miscellaneous amendments to legislation affecting the operation of courts in New South Wales, and amend other legislation administered by the Ministry.
- 3. This Bill is part of the Government's regular legislative review and monitoring programme and will amend a number of Acts with a view to improving the efficiency and operation of the courts as well as the operation of the agencies within the Department of Attorney General and Justice.

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, except for the amendments to the *Court Security Act 2005*, which commence on a day to be appointed by proclamation.
- 6. Clause 3 makes it clear that the explanatory notes contained in proposed Schedule 1 do not form part of the proposed Act.

Schedule 1 Amendment and repeal of legislation

7. Schedule 1 makes the amendments, and effects the repeal, described in the Purpose and Description. The amendments and repeal are explained in detail in the explanatory note set out in Schedule 1 that relates to the Act or Regulation concerned.

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of expression and open justice

8. Sub-schedule 1.8[1] inserts section 9A in the *Court Security Act 2005*. Section 9A provides that a person must not use any device to transmit sounds or images (or both) from a room or other place where a court is sitting.

The Committee notes that the effect of proposed section 9A of the *Court Security Act 2005* is to prevent people broadcasting or posting on social media or other sections of the internet, matters that are taking place within a court. However, the Committee recognises that principles such as freedom of expression and open justice must be balanced against other principles, such as the right to a fair trial. In these circumstances, the Committee makes no further comment on this issue.

Privacy

9. Sub-schedules 1.2[4] and [5] extend the current access that law enforcement agencies have to the Register maintained under the *Births, Deaths and Marriages Registration Act 1995*, to include access to any applications for changes of names.

The Committee notes that providing law enforcement agencies with access to applications to changes a name impacts on an individual's right to privacy. However, as the access is to be provided in the context of law enforcement agencies existing access to the Register maintained under the *Births, Deaths and Marriages Registration Act 1995*, the Committee makes no further comment on this issue.

10. Sub-schedule 1.3[2] inserts section 28B in the *Children (Community Services Orders) Act 1987*, which has the effect of providing the Director-General with the power to share or exchange information with the Director of the State Debt Recovery Office relating to children's community services orders. Sub-schedule 1.4[8] inserts section 39B in the *Children (Detention Centres) Act 1987*, which provides for similar information sharing between the Director-General and the State Debt Recovery Office.

The Committee notes that providing Juvenile Justice with the power to share and exchange information with the State Debt Recovery Office in relation to children's community services orders compromises affected children's right to privacy. However, as the purpose of the proposed section is to help reduce young offender's problems with outstanding fines by allowing them to work off the value of the fine through unpaid work, training or counselling, the Committee makes no further comment on this issue.

Retrospectivity

11. Sub-schedule 1.2[7] of the Bill outlines that subsections 46A(1) and (2) of the *Births, Deaths and Marriages Registration Act 1995*, as amended by sub-schedules 1.2[4] and 1.2[5], extend to information relating to applications made before the amendment of those subsections by this Bill.

The Committee notes that the effect of the amendments to subsections 46A(1) and (2) of the *Births, Deaths and Marriages Registration Act 1995* is to provide law enforcement agencies not only with access to the Register regarding changes of names – but also with respect to any applications to change a name. Given that law enforcement agencies already have access to the Register, the Committee does not think it unreasonable that those agencies also be granted access to information relating to applications to change the Register. The Committee therefore makes no further comment in relation to this incidence of retrospectivity.

12. Sub-schedule 1.3[4] of the Bill operates in a similar manner. This sub-schedule makes provision for the retrospective commencement of information sharing under the new section 28B of the *Children (Community Service Orders) Act 1987*. Sub-schedule 1.4[10] provides for the retrospective commencement of information sharing under the new section 39B of the *Children (Detention Centres) Act 1987*.

The Committee also notes that the effect of the inclusion of sections 28B of the *Children (Community Service Orders) Act 1987* section 39B of the *Children (Detention Centres) Act 1987* is to provide young offenders with options in relation to unpaid fines. As this provision benefits young offenders, the Committee makes no further comment in relation to this incidence of retrospectivity.

13. Sub-schedule 1.9[3] provides that the amendments made to section 59 of the *Crimes (Appeal and Review) Act 2001* extend to an appeal that was commenced but not finally determined before the commencement of the amendment.

The Committee further notes that extending the proposed amendments to section 59 of the *Crimes (Appeal and Review) Act 2001* to include matters that have been commenced but not finally determined before the commencement of these proposed amendments may have an adverse impact on court participants who had sought legal advice based on the unamended section 59. However, the Committee notes that the amendments to section 59 are limited in substance to clarifying that where the Supreme Court has the power to hear an appeal in relation to costs order made by the Local Court against the prosecutor in any summary proceedings (section 56(1)(e) of the *Crimes (Appeal and Review) Act 2001*) the Supreme Court has the requisite power to set aside and make a new order or dismiss the appeal (section 59(2) *Crimes (Appeal and Review) Act 2001*). As the effect of this amendment is to clarify the law, the Committee makes no further comment in relation to this incidence of retrospectivity.

14. Sub-schedule 1.15[4] provides that the new provisions of the *Land and Environment Court Act 1979* inserted by the Bill at sub-schedules 1.15[1]-[3] have retrospective effect. These provisions provide for Judges of that Court to complete their current work

as an Acting Judge after the expiration of that person's appointment as Judge. It makes similar arrangements for Commissioners and Acting Commissioners of that Court. Sub-schedule 1.18[5] extends provisions that relate to additional Judges of Appeal or acting Judges retrospectively.

The Committee notes that whilst the new provisions relating to the Judges and Commissioners of the Land and Environment Court and Supreme Court commence retrospectively, they do so to enable those affected Judges and Commissioners to complete their current workload. As such, the Committee makes no further comment in relation to this incidence of retrospectivity.

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

Lack of clarity

15. Schedule 3 of the *Births, Deaths and Marriages Registration Act 1995* outlines that the regulations may contain provisions of a savings or transitional nature consequent on the enactment of a list of Acts. Schedule 1.2[6] of this Bill inserts at the end of that list of Acts "any other Act that amends this Act".
16. Similarly, schedule 1 of the *Children (Detention Centres) Act 1987* provides that the regulations may contain provisions of a savings or transitional nature consequent on the enactment of a list of Acts. Schedule 1.4[9] inserts at the end of that list of Acts "any other Act that amends this Act".
17. Again, schedule 1 of the *Crimes (Appeal and Review) Act 2001* provides that the regulations may contain provisions of a savings or transitional nature consequent on the enactment of a list of Acts. Schedule 1.9[2] inserts at the end of that list of Acts "any other Act that amends this Act".
18. Furthermore, sub-schedule 1.10[3] provides for the insertion of Schedule 4 in the *Drug and Alcohol Treatment Act 2007*. This Schedule outlines at clause 1(1) that "the regulations may contain provisions of a savings or transitional nature consequent on the enactment of any Act that amends this Act."
19. In the same way, the fourth schedule of the *Supreme Court Act 1970* provides at clause 1(2) that the regulations may contain provisions of a savings or transitional nature consequent on the enactment of a list of Acts. Schedule 1.18[4] of this Bill amends that list to include "any other Act that amends this Act."

The Committee notes that listing "any other Act that amends this Act" rather than listing the name of each of those amending Acts limits the clarity of Schedules outlined above. The Committee has a preference for the name of each Act being listed to avoid this lack of clarity. As the list relates to the regulation making power pertaining to provisions of a savings or transitional nature, and recognising that this amendment ensures that the Schedule is comprehensive, the Committee makes no further comment on this issue.

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

Commencement by proclamation

20. The Bill commences on the date assent, with the exception of schedule 1.8, which is to commence on a day to be appointed by proclamation.

The Committee notes that schedule 1.8 of the Bill relates to the prohibition of unauthorised transmissions of court proceedings from courtrooms. The Attorney General indicated in his second reading speech that this was to provide sufficient time for the drafting of appropriate regulations. In these circumstances, the Committee makes no further comment.

3. Crimes (Criminal Organisations Control) Amendment Bill 2012

Date introduced	22 November 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Justice

PURPOSE AND DESCRIPTION

1. The *Crimes (Criminal Organisations Control) Act 2012 (CCOC Act)* provides that an eligible Judge of the Supreme Court may, on the application of the Commissioner of Police, declare an organisation to be subject to the Act if its members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk of public safety and order in New South Wales.
2. As a consequence of the declaration of organisations, the Supreme Court has jurisdiction to make a control order against a member of the organisation that prevents the person from associating with other controlled members of the organisation and from holding a number of statutory authorities, such as firearms and liquor licences.
3. The object of this Bill is to amend the CCOC Act to provide for the recognition and enforcement, in New South Wales, of comparable declarations and orders made in other States and Territories in relation to criminal organisations and their members.
4. In addition, the object of this Bill is to elaborate on the facts about which an eligible Judge must be satisfied before making such a declaration, and providing reasons for the decision, as well as conferring additional powers with respect to the examination of submissions concerning applications for declarations, and the protections and immunities attached to the makings of such submissions.
5. The Bill also redefines serious criminal activity so that it is consistent within the meaning of the *Criminal Assets Recovery Act 1990*.
6. Lastly, the Bill provides for declarations to be in force for five years, an increase from the current three years.

BACKGROUND

7. At the April 2012 meeting of the Standing Committee on Law and Justice, the majority of Ministers agreed that it would be desirable to pursue a nationally consistent approach to criminal organisation legislation.
8. This Bill provides for mutual recognition of declarations and order for the control of members of criminal organisations that are made in other States and Territories. This Bill was prompted by concerns that criminal organisations could escape the

consequences of a control order or declaration by shifting their activities to another jurisdiction.

9. The Government is aware that the Queensland organised crime legislation is currently being challenged in the High Court by the Gold Coast chapter of the Finks Motorcycle Club. The High Court's decision may have implications for legislation of this kind. The Government has advised that it will not progress this Bill through the House until the High Court has handed down its decisions.

OUTLINE OF PROVISIONS

10. Clause 1 sets out the name (also called the short title) of the proposed Act.
11. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
12. Schedule 1 [17] inserts proposed Part 3A into the CCOC Act to achieve the object described in paragraph (a) of the Overview above. Schedule 1 [1] contains a consequential amendment. The proposed Part provides for a Supreme Court Registrar to register declarations and orders made in other States and Territories in relation to criminal organisations and their members. An interstate declaration is treated on registration as if it were a declaration under section 9 of the CCOC Act. Accordingly, control orders may be made under the CCOC Act with respect to members of that organisation in New South Wales. An interstate control order may be registered in New South Wales with such adaptations or modifications as the Supreme Court considers are necessary or desirable for its effective operation in New South Wales. The registered interstate control order will operate in New South Wales as if it were a control order made under Part 3 of the CCOC Act and can be enforced accordingly.
13. Schedule 1 [6] and [8]–[11] amend section 9 of the CCOC Act to achieve the object described in paragraph (b) of the Overview above. The amendments will make it clear that the eligible Judge need only be satisfied that members of an organisation in New South Wales associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, not members wherever the organisation has a presence. Schedule 1 [7] amends section 9 to make it clear that it is not sufficient for the eligible Judge to be satisfied that the organisation represents a risk to public safety and order in New South Wales—the eligible Judge must be satisfied that the continued existence of the organisation represents such a risk.
14. Schedule 1 [13] and [14] contain consequential amendments.
15. Schedule 1 [12] amends section 11 of the CCOC Act to achieve the object described in paragraph (g) of the Overview above.
16. Schedule 1 [15] amends section 13 of, and Schedule 1 [16] inserts proposed section 20A into, the CCOC Act to achieve the object described in paragraph (c) of the Overview above.
17. Section 3 of the CCOC Act defines serious criminal activity by reference (among other things) to the obtaining of material benefits from conduct constituting a serious indictable offence and committing a serious violence offence. Schedule 1 [2] and [3] redefine serious criminal activity to achieve the object described in paragraph (d) of the

Overview above by reference instead to the definition of serious criminal offence in section 6 of the Criminal Assets Recovery Act 1990 and omit the definition of serious violence offence. The amendments will ensure, for example, that serious offences that do not necessarily involve material benefits and offences involving violence punishable by 5 or more years' imprisonment (not only 10 years' or more) are covered by the definition.

18. Schedule 1 [5] inserts proposed sections 8A and 8B into the CCOC Act to achieve the object described in paragraph (e) of the Overview above. An eligible Judge is given powers to summon persons and require them to answer questions on oath or affirmation and produce documents, and the power to report various matters to the Supreme Court that may be dealt with as if they were a contempt of that Court. Schedule 1 [4] and [18] amend sections 8 and 34, respectively, of the CCOC Act to achieve the object described in paragraph (f) of the Overview above.

Schedule 1 [19] contains an amendment by way of statute law revision.

ISSUES CONSIDERED BY COMMITTEE

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

Presumption of Innocence

19. Clause [2] of the Bill proposes to remove the existing definition of serious criminal activity, and replace it with a different standard.
20. Specifically, the existing standard provides that serious criminal activity means committing a serious violence offence or engaging in conduct that would constitute a serious indictable offence. Meanwhile, the proposed standard would provide that a serious criminal activity means committing a serious criminal offence within section 6 of the *Criminal Assets Recovery Act 1990*, or obtaining material benefits from conduct that constitutes any such offence. Importantly, the new provision will further provide that the new definition of serious criminal activity is to apply regardless of whether any person has been charged or convicted of any such offence.
21. The Committee notes that the threshold for determining what constitutes a serious criminal offence will be lowered by the proposed definition, and any broadening of the definition of serious criminal activity will potentially capture a wider field of people. As the effect of a declaration extends to the control orders of members of the declared organisation, this affects members' ability to associate with other members of the declared organisation, engage in recruiting activities, and prohibits them from engaging in certain prescribed activities, including working in certain industries. The State's fettering of these activities may be seen to be interfering with individual liberties of freedom of association and movement, and the right to work.
22. The Committee is particularly concerned by the provision that an individual does not need to be convicted of, or even charged with, an offence under the new definition.
23. To this end, the Committee considers the widening of the definition breaches the presumption of innocence, insofar that it places pre-judicial penalties on individuals neither charged nor convicted of any offence. As foreshadowed by the Attorney General, this Bill may encounter constitutional issues given its Queensland equivalent has been challenged in the High Court.

24. This Committee made a series of comments on the principal Bill when it came before Parliament in early 2012, and the predecessor Committee similarly made comments on the *Crimes (Criminal Organisations Control) Act 2009* before that legislation was invalidated by the High Court.
25. The Committee reiterates the comments already made on both these pieces of legislation, and refers to Parliament whether the burdens on the presumption of innocence and attendant de facto penalties on controlled members of declared organisations, constitutes a trespass on personal rights and liberties.

The Committee notes that the broadening of the definition of serious criminal activity to include individuals who have neither been convicted nor charged with a serious indictable offence, and potentially placing control orders on these individuals, and breaches the presumption of innocence, as well freedom of association and movement, and the right to work. The Committee refers to Parliament whether this provision trespasses on personal rights and liberties.

Duration of Declaration

26. Clause [12] provides that the duration that a declaration can remain in force is to increase from three years to five years.
27. As the Bill proposes to extend the duration of the declaration from three to five years, it follows that the effect of being a controlled member of a declared organisation, and the restrictions imposed on that person, would also be extended.
28. As previously noted, given that these orders can be imposed on individuals who have neither been convicted nor charged with an offence, the Committee notes that these control orders could potentially have a punitive impact on individuals who have not committed any crime. This may be considered a breach of the presumption of innocence, and pre-judicial punishment.

The proposal to extend the duration of a declaration from three to five years, with its attendant effects that control orders are placed on individuals who may have neither been charged nor convicted of any serious indictable crime, may be considered a breach of the presumption of innocence, and pre-judicial punishment. The Committee refers this matter to Parliament for its consideration.

4. Law Enforcement (Controlled Operations) Amendment Bill 2012

Date introduced	21 November 2012
House introduced	Legislative Council
Minister responsible	The Hon. Michael Gallacher MLC
Portfolio	Police

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Law Enforcement (Controlled Operations) Act 1997* to provide for a secondary law enforcement officer to exercise the functions of a principal law enforcement officer in authorised controlled operations whenever the principal law enforcement officer is unavailable.
2. The Bill also seeks to amend the *Surveillance Devices Act 2007* to permit the use of listening devices by authorised civilian participants in authorised controlled operations that include civilian participants.

BACKGROUND

3. This Bill gives effect to recommendations made in the recently tabled '*Report on the Review of the Law Enforcement (Controlled Operations) Act 1997*' prepared by the Ministry for Police and Emergency Services. The Review considered practical difficulties with the execution of covert search operations in certain circumstances. A total of two recommendations were made, which have been identified as the two main purposes of this Bill.

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.
6. Schedule 1 [3] requires an application for authority to conduct a controlled operation to nominate a principal law enforcement officer and a secondary law enforcement officer for the proposed operation. A controlled operation is an operation conducted for the purpose of obtaining evidence of or frustrating criminal activity or corrupt conduct and that may involve an activity that would otherwise be unlawful.
7. Schedule 1 [4] requires such an authority to identify the principal law enforcement officer and the secondary law enforcement officer for the operation. The principal law enforcement officer is to conduct, and to have responsibility for, the operation. The secondary law enforcement officer is to conduct, and to have responsibility for, the operation whenever the principal law enforcement officer is unavailable to do so.
8. Schedule 1 [1], [2] and [5]–[11] make consequential amendments.

9. Schedule 1 [12] enables regulations of a savings and transitional nature to be made consequent on the enactment of the proposed Act.
10. Schedule 2 makes consequential amendments to the Law Enforcement (Controlled Operations) Regulation 2012.
11. Schedule 3 amends the Surveillance Devices Act 2007 to permit the use of a listening device to record or monitor a private conversation where a party to the conversation is a civilian participant in an authorised controlled operation and the listening device is being used by that participant or another participant in the operation.

ISSUES CONSIDERED BY COMMITTEE

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

Surveillance

12. This Bill proposes an extension of covert operations to include both secondary law enforcement officers and authorised civilian officers as individuals allowed to participate in covert surveillance operations. While this broadens the field of allowable individuals to participate in cover search operations, it does not broaden the scope of the power of covert operations.
13. Given the limited and strictly defined extent of the changes, and the fact that the Bill does not afford any new and additional powers, the Committee does not consider there to be a trespass on personal rights and liberties in this instance.

While the Bill proposed an extension of the class of individuals allowed to participate in covert surveillance operations, the Bill does not propose any new and additional powers. Given the limits of the extension, the Committee does not consider there to be a trespass of personal rights and liberties in this instance.

5. Ombudsman Amendment Bill 2012

Date introduced	20 November 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Barry O'Farrell MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The Bill was passed by the Legislative Assembly without amendment on 20 November 2012 and passed the Legislative Council unamended on 21 November 2012. The Bill received assent on 26 November 2012.
2. The objects of this Bill are as follows:
 - (a) to provide for the Ombudsman to appoint an Australian legal practitioner to assist the Ombudsman in an inquiry;
 - (b) to enable the Ombudsman to restrict the publication of evidence or information provided to an inquiry and to prohibit the publication of evidence or information provided to an Ombudsman's inquiry and the disclosure of information about a summons by the Ombudsman;
 - (c) to enable the Ombudsman to require officers of the Crime Commission or the Police Integrity Commission to give evidence or produce documents in connection with investigations of matters referred to the Ombudsman by the Inspector of the Police Integrity Commission or the Inspector of the Crime Commission; and
 - (d) to clarify the operation of transitional provisions relating to the application of secrecy provisions to information obtained under the repealed *New South Wales Crime Commission Act 1985*.

BACKGROUND

3. In 2003, the NSW Police Force established an internal inquiry, codenamed Strike Force Emblems, to investigate certain matters arising out of Operation Florida. Operation Florida was a joint operation of the Crime Commission, the Police Force and the Police Integrity Commission. The Strike Force Emblems Report was provided to the Police Minister, and has not been made public.
4. In 2012, the Police Minister referred the Strike Force Emblems Report to the Inspector of the Police Integrity Commission to ascertain whether the report should be made public. During the course of the Inspector's review, he received a number of complaints and submissions in relation to the report. The NSW Ombudsman also received complaints concerning matters arising from the report.
5. During the second reading speech, the Attorney General noted that Ombudsman is the appropriate independent body to comprehensively review these matters. This Bill has

been introduced to ensure the Ombudsman has the appropriate powers to complete his review.

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 Ombudsman Act 1974 No 68

8. Schedule 1 [1] provides for the Ombudsman to appoint an Australian legal practitioner to assist the Ombudsman for the purposes of an inquiry.
9. Schedule 1 [2] inserts proposed sections 19A–19C. Proposed section 19A enables the Ombudsman to direct that certain matters relating to an inquiry not be published, including evidence given before an inquiry, the contents of something produced to the Ombudsman and information that might identify a person who has given evidence or whether a person has given evidence to an inquiry. A direction can only be given if the Ombudsman is satisfied that it is necessary or desirable in the public interest. Proposed section 19B prohibits a person who was present at an Ombudsman’s inquiry from publishing evidence or a document given at the inquiry unless the publication is to the Ombudsman, an officer of the Ombudsman or an Australian legal practitioner assisting the Ombudsman or is permitted by the Ombudsman. Proposed section 19C prohibits a person who is required by a summons to produce a document or thing to the Ombudsman or to give evidence from disclosing information about the summons if it is likely to prejudice the investigation to which it relates.
10. Schedule 1 [3] provides that an Australian legal practitioner assisting the Ombudsman or representing a person at an inquiry held by the Ombudsman has the same protection and immunity as a barrister has in appearing for a party to proceedings in the Supreme Court.
11. Schedule 1 [4] enables regulations containing savings and transitional provisions to be made as a consequence of any Act amending the *Ombudsman Act 1974*.

Schedule 2 Amendment of Crime Commission Act 2012 No 66

12. Schedule 2 [1] requires the Inspector of the Crime Commission to specify in writing the terms of any referral by the Inspector of a matter to another public authority or public official for consideration or action.
13. Schedule 2 [2] inserts proposed section 80A. The proposed section contains an exception to the general secrecy provisions of the Crime Commission Act 2012 and enables the Commissioner for the Crime Commission, and any officer of the Commission, to furnish information and give evidence to the Ombudsman about matters arising from the exercise of Crime Commission functions. However, the Ombudsman will only be able to compel such information to be given in connection with a matter that has been referred to the Ombudsman for investigation by the Inspector of the Crime Commission or the Inspector of the Police Integrity Commission.

14. Schedule 2 [3] makes it clear that the secrecy provisions of the Crime Commission Act 2012, and the provision inserted by Schedule 1 [2] apply to information obtained, and things done, under the former New South Wales Crime Commission Act 1985.

Schedule 3 Amendment of Police Integrity Commission Act 1996 No 28

15. Schedule 3 [1] amends the exception to the general secrecy provisions of the *Police Integrity Commission Act 1996* which permits the Commissioner for the Police Integrity Commission and any officer of the Police Integrity Commission to provide information to, and give evidence before, the Ombudsman. The Ombudsman will only be able to compel the provision of information or evidence in connection with a matter that has been referred to the Ombudsman for investigation by the Inspector of the Police Integrity Commission or the Inspector of the Crime Commission.
16. Schedule 3 [2] requires the Inspector of the Police Integrity Commission to specify in writing the terms of any referral by the Inspector of a matter to another agency for consideration or action.

ISSUES CONSIDERED BY COMMITTEE

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

Open Justice and Procedural Fairness

17. Sub-schedule 1[2] of the Bill provides that the Ombudsman may direct that evidence given to the Inquiry, including the fact that any person has given or may be about to give evidence before an Inquiry, must not be published.

The Committee notes that providing the Ombudsman with the power to issue non-publication orders relating to his Inquiries has an impact on theory of open justice. Affected individuals may not have the opportunity to hear all of the evidence relating to them. This has a subsequent impact on procedural fairness as affected individuals are denied an opportunity to address the evidence before the Inquiry. Whilst the Committee acknowledges the inclusion of a public interest test in this clause, and notwithstanding the fact that the Ombudsman conducts Inquiries rather than exercising a judicial function, the Committee refers to Parliament whether non-publication orders affect an individual's right to open justice and procedural fairness.

Strict liability

18. Sub-schedule 1[2] outlines that a person must not make a publication in contravention of a direction given under section 19A, as well as providing that a person who was present at an inquiry must not publish any evidence given before the inquiry. The maximum penalty is 50 penalty units or imprisonment for 12 months or both.

The Committee always seeks to comment on offences that do not require *mens rea*. The Committee refers to Parliament whether including a strict liability offence in relation to publication of information relating to an Inquiry is reasonable in the circumstances.

Freedom of expression and association

19. Sub-schedule 1[2] provides that a person who is require by the Ombudsman by a summons issued under section 19(2) of the principal Act to give evidence or to produce

a document must not disclose any information about the summons if the summons specified that information about the summons must not be disclosed. The sub-schedule provides an exception in relation to employees, legal advice or if the disclosure is made in accordance with guidelines issued by the Ombudsman or in accordance with the regulations.

The Committee notes that the effect of restricting what people may say to whom has an impact on their freedom of expression. The Committee also considers that meaningful freedom of association involves freedom of expression, and therefore considers any impact on freedom of expression to impact on freedom of association. As the regulations do not currently address this issue, nor are there any relevant guidelines from the Ombudsman, the Committee is unsure to what extent any proposed regulations or guidelines mitigate this concern. As such, the Committee refers to Parliament whether preventing individuals from disclosing the fact of a summons, or any of the content within that summons, unduly impacts an individual's freedom of expression and freedom of association.

Restriction of common law rights

20. Sub-schedule 1[3] of the Bill provides that an Australian legal practitioner assisting the Ombudsman or representing a person at an inquiry held by the Ombudsman has the same protection and immunity as a barrister has in appearing for a party in proceedings before the Supreme Court.

The Committee notes that the effect of providing legal practitioners with protections and immunity is to restrict recourse that clients or affected individuals would otherwise have to the common law courts, particularly in relation to claims for compensation. However, given that a similar protection is afforded barristers in the Supreme Court, and given the exception for gross negligence, the Committee makes no further comment on this issue.

Privilege against self incrimination

21. Sub-schedule 2[2] of the Bill provides that the Crime Commissioner, or any officer of the Crime Commission, can be compelled to give evidence before the Ombudsman or produce a document in respect of information if the evidence or document is relevant to a matter referred to the Ombudsman by the Inspector of the Crime Commission or the Inspector of the Police Integrity Commission.

The Committee notes that compelling an individual to provide evidence or produce a document can impact on the privilege against self incrimination. However, as the proposed sub-section 80A(2) of the *Crime Commission Act 2012* is limited in scope to matters pertaining to the Crime Commission, the Committee considers that requiring officers to give evidence or produce documents relevant to their work at the Crime Commission is reasonable in the circumstances.

Retrospectivity

22. Sub-schedule 2[3] of the Bill replaces clause 8 of schedule 4 of the *Crime Commission Act 2012*, noting that sections 80 and 80A of the *Crime Commission Act* are taken to have applied before the repeal *NSW Crime Commission Act 1985*.

The Committee notes that the proposed clause 8 of schedule 4 of the *Crime Commission Act 2012* applies before the repeal of the *NSW Crime Commission Act 1985*, and thus applies retrospectively. However, section 29 of the repealed Act applied in a similar manner to the proposed operation of sections 80 and 80A and as such the Committee makes no further comment on this issue.

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

Matters in guidelines and regulations rather than principal legislation

23. As noted above, sub-schedule provides an exception to the proposed prohibition under section 19C(1) that a person who issued with a summons to give evidence must not disclose the fact of the summons or information outlined within that summons if the summons specified that information about the summons must not be disclosed. The exception relates to disclosures made in accordance with guidelines issued by the Ombudsman or in accordance with the regulations.
24. The Committee notes that at the time of reporting there are no relevant guidelines or regulations.

As outlined above, the Committee is concerned that the proposed section 19C(1) unduly impacts on individual's freedom of expression and freedom of association. The Committee considers that all matters relating to such an impact should be properly included in the principal legislation, rather than in guidelines or the regulations. The Committee refers to Parliament whether this constitutes an inappropriate delegation of legislative power.

6. Road Transport (Safety and Traffic Management) Amendment (Child Safety on School Buses) Bill 2012*

Date introduced	22 November 2012
House introduced	Legislative Council
Member with carriage	The Hon. Cate Faehrmann MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to ensure that, from the first day of Term 3 of the 2013 school year, passengers on any bus being used for the purpose of carrying school children will not be permitted to stand while the bus is moving (in the case of a bus travelling on an unsealed road or on a road with a speed limit of 80 kilometres per hour or higher that is outside the areas of Sydney, Newcastle, Central Coast, Blue Mountains and Wollongong), and
 - (b) to require, from 2018, the fitting of seatbelts (in accordance with the relevant Australian Design Rules) on buses that are used solely or principally for the purpose of carrying school children in rural and regional areas, and
 - (c) to require the Minister to prepare and publicise a School Student Code of Conduct that sets out the rights and obligations of school students who travel on school bus journeys.

BACKGROUND

2. According to the Member with carriage of the Bill, the Hon. Cate Faehrmann MLC:

The Bill's purpose is to improve school bus safety in regional and rural New South Wales by implementing key recommendations of the School Bus Safety Advisory Committee, which was established by the Government in April 2011 to examine the safe transportation of children in rural and regional New South Wales. The objects ... include a phase in of mandatory school bus seatbelts and an end to standing on buses on non-urban roads.

OUTLINE OF PROVISIONS

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

Schedule 1 Amendment of Road Transport (Safety and Traffic Management) Act 1999 No 20

5. Schedule 1 [1] inserts a new Part 5A (Child safety on school buses) in the Road Transport (Safety and Traffic Management) Act 1999 with the following provisions:

Proposed Part 5A Child safety on school buses

Division 1 Preliminary

6. Proposed section 70A defines words and expressions used in the proposed Part.
7. School bus journey is defined to mean a journey in which a bus is used primarily to carry school children to or from school, a school excursion, a school sporting trip or an organised extra-curricular activity. Rural or regional school bus journey is defined as any school bus journey in which, at any time during that journey, the bus travels outside the areas of Sydney, Newcastle, Central Coast, Blue Mountains and Wollongong and non-urban road is defined as an unsealed dirt road or a road with a speed limit of 80 kilometres per hour or higher that is outside the areas of Sydney, Newcastle, Central Coast, Blue Mountains and Wollongong.

Division 2 No standing on school bus journeys

8. Proposed section 70B provides that the proposed sections prohibiting standing on school bus journeys take effect on 15 July 2013 (the first day of Term 3 of the 2013 school year).
9. Proposed section 70C requires the driver of a bus that is being used on a school bus journey on a non-urban road to ensure that there are enough seats on the bus for all passengers, and thus that no passenger needs to stand.
10. Proposed section 70D requires the driver of a bus that is being used on a school bus journey on a non-urban road to take all reasonable steps to ensure that no passenger on board the bus is standing at any time when the bus is moving.

Division 3 Seatbelts required on rural or regional school buses

11. Proposed section 70E provides that the proposed sections about seatbelts take effect on 1 January 2018.
12. Proposed section 70F requires seats, seat anchorages, seatbelts and accessories on a bus that is used solely or principally for the purpose of school bus journeys, and that is being used on a rural or regional school bus journey, to comply with certain Australian Design Rules. Those Rules currently specify requirements for seatbelts, seats and anchorages, make provision for protecting occupants from impact with seat backs and accessories on seats, and make seatbelts and other safety features compulsory for coaches, but allow "route service omnibuses" and buses with a seat height of less than one metre to operate without complying with those requirements.
13. Proposed section 70G requires the operator of a bus that is used solely or principally for the purpose of school bus journeys and that is being used on a rural or regional school bus journey to display signs stating that a seatbelt must be worn when the bus is moving or to take other steps to make school children aware of the requirement to wear seatbelts.

14. Proposed section 70H requires the operator of a bus that is used solely or principally for the purpose of school bus journeys and that is being used on a rural or regional school bus journey to take all reasonable steps to ensure that every school child on the bus is wearing a seatbelt that is appropriately adjusted and fastened at any time when the bus is moving.

Division 4 School Student Code of Conduct

15. Proposed section 70I requires the Minister to prepare and publicise a School Student Code of Conduct that sets out the rights and obligations of school students who travel on school bus journeys.
16. Proposed section 70J specifies the minimum contents of a School Student Code of Conduct.
17. Schedule 1 [2] provides for the making of savings and transitional regulations consequent on the amendment of the Road Transport (Safety and Traffic Management) Act 1999.

Schedule 2 Amendment of other instruments

18. Schedule 2 [1] makes it clear that proposed Part A of the Road Transport (Safety and Traffic Management) Act 1999 overrides clause 89 (Passengers to be notified of requirement to use seatbelts in buses) of the Passenger Transport Regulation 2007.
19. Schedule 2 [2] makes it clear that proposed Part 5A of the Road Transport (Safety and Traffic Management) Act 1999 overrides provisions of the Road Rules 2008 that create exemptions from the obligation to wear seatbelts.

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.

7. Saint John's College Amendment Bill 2012

Date introduced	20 November 2012
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 *Saint John's College Act 1857* to enable the Roman Catholic Archbishop of Sydney (in consultation with the Vice-Chancellor of the University of Sydney) to appoint clerical and lay persons to fill the resultant vacancies on the Council for terms of up to 3 years to enable the Council to govern the College.

BACKGROUND

2. The Council of Saint John's College has been rendered inoperative as a result of a lack of a quorum following the resignation of its fellows following much publicised student discipline issues at the college.

OUTLINE OF PROVISIONS

3. Clause 1 sets out the name (also called the short title) of the proposed Act.
4. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
5. Schedule 1 contains amendments to the Saint John's College Act to achieve the object described in the Overview above.

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. Small Business Commissioner Bill 2012

Date introduced	20 November 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Katrina Hodgkinson MP
Portfolio	Minister for Small Business

PURPOSE AND DESCRIPTION

1. The object of this Bill is to create the Office of Small Business Commissioner, and to specify the objectives and functions of that office.
2. It is intended that the Commissioner's objectives will be to deal with issues concerning small businesses in a neutral and independent manner, and to provide a central point of contact for small businesses to make complaints about their commercial dealings with other business, together with their dealings with government agencies.
3. The Commissioner's functions will include investigating complaints made by or on behalf of small businesses, providing low cost alternative dispute resolution services, and making representations or taking action on behalf of small businesses.
4. The Commissioner will have the power to require any person or government agency to provide such information (or answers to questions) relating to the person's or agency's dealings with small business as the Commissioner.

BACKGROUND

5. This Bill is designed to provide support and services to small businesses, which constitute 96% of all businesses, or 680,000 individual businesses in New South Wales, providing employment for around 50% of the New South Wales workforce.
6. The inaugural NSW Small Business Commissioner, Ms Yasmin King, was appointed by the Government in 2011.

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 a day or days to be appointed by proclamation.
9. Clause 3 defines certain words and expressions used in the proposed Act.
10. Clause 4 provides for the appointment of a Small Business Commissioner by the Governor on the recommendation of the Minister.
11. Clause 5 provides that the Commissioner is subject to the control and direction of the Minister in the exercise of the Commissioner's functions, except in relation to certain matters (including the Commissioner's reporting functions).

12. Clause 6 specifies the maximum term of office of the Commissioner (5 years) and provides that the office is a full-time one.
13. Clause 7 provides for the remuneration of the Commissioner.
14. Clause 8 specifies when the office of Commissioner becomes vacant.
15. Clause 9 provides that the Governor may, on the recommendation of the Minister, remove the Commissioner from office for incompetence, incapacity or misbehaviour.
16. Clause 10 provides for the filling of any vacancy in the office of Commissioner.
17. Clause 11 provides for the appointment of an acting Commissioner.
18. Clause 12 provides for the appointment of staff of the Commissioner.
19. Clause 13 specifies the objectives of the Commissioner, which include dealing with issues concerning the small business sector in a neutral and independent manner, providing a central point of contact for small businesses to make certain complaints, encouraging government agencies and larger businesses to enter into productive working relationships with small businesses, facilitating the resolution of disputes involving small businesses, facilitating and encouraging the fair treatment of small businesses, promoting a fair operating environment in which small businesses can flourish and identifying and supporting measures to reduce the administrative burden for small businesses.
20. Clause 14 specifies the general functions of the Commissioner, which include receiving and dealing with complaints made by or on behalf of small businesses investigating complaints, providing low cost alternative dispute resolution services for small businesses and making representations or taking action on behalf of small businesses, whether at the Commissioner's own initiative or at the request of a small business.
21. Clause 15 provides that the Commissioner may only deal with a complaint made by or on behalf of a small business if satisfied that the subject-matter of the complaint relates to the unfair treatment of, or an unfair practice involving, the small business or that it is in the public interest to deal with the complaint.
22. Clause 16 authorises the Commissioner to require any person or government agency to provide information relating to the person's or agency's dealings with small businesses that the Commissioner reasonably requires for the purposes of any investigation by the Commissioner under the proposed Act.
23. Clause 17 provides for the Commissioner to certify the outcome of any application made to the Commissioner for assistance in resolving a complaint or other dispute involving a small business.
24. Clause 18 provides that, if the Commissioner makes a finding that a person or body has persistently engaged in anti-competitive practices that are in contravention of any law and that adversely affect the small business sector, the Commissioner may refer the finding to the Director-General of the Department of Finance and Services.

25. Clause 19 provides for the Commissioner to enter into information sharing arrangements with government agencies, holders of statutory offices or certain other persons or bodies for the purposes of sharing or exchanging any information that is held by the Commissioner or the agency, office holder or other person or body.
26. Clause 20 provides that the Commissioner is to act in an informal manner as far as possible and according to the substantial merits of the case without undue regard to technicalities. The Commissioner may determine the procedures to be followed in exercising the Commissioner's functions under the proposed Act.
27. Clause 21 provides that the Commissioner may engage the services of any person for the purpose of getting expert assistance.
28. Clause 22 provides for the Commissioner to delegate the exercise of any function of the Commissioner to any member of staff of the Commissioner or any person authorised by the regulations.
29. Clause 23 requires the Commissioner to prepare an annual report to Parliament on the Commissioner's work and activities.
30. Clause 24 provides for the preparation of a special report to Parliament on any matter relating to the functions of the Commissioner.
31. Clause 25 requires the Commissioner, before furnishing a report to Parliament, to provide a draft report to the Minister and any government agency or person criticised in the report and to consider any submissions that are made by the Minister or the government agency or person concerned.
32. Clause 26 specifies the procedure for reports to Parliament.
33. Clause 27 provides for the proposed Act to bind the Crown.
34. Clause 28 provides for the grant of injunctions to stop interference with any investigation conducted by the Commissioner.
35. Clause 29 provides that the Commissioner, a member of the Commissioner's staff or a person acting under the direction of the Commissioner is not personally liable for acts done in good faith for the purpose of exercising a function under the proposed Act or any other Act.
36. Clause 30 enables the Governor to make regulations for the purposes of the proposed Act.
37. Clause 31 repeals the Small Business Development Corporation Act 1984.
38. Clause 32 provides for the review of the proposed Act in 5 years from the date of assent to the proposed Act.
39. Schedule 1 Amendment of Acts
40. Schedule 1.1 provides for information relating to complaint handling, dispute resolution or the investigative and reporting functions of the office of Small Business Commissioner

to be excluded information for the purposes of the Government Information (Public Access) Act 2009.

41. Schedule 1.2 includes the Small Business Commissioner in the list of public offices to which the Statutory and Other Offices Remuneration Act 1975 applies.

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

Privacy

42. Section 19 of the Bill will allow the Commissioner to exchange information with certain designated agencies, enabling the Commissioner to request and receive information that is held by the other party to the arrangement, as well as disclosing information to the other party. This could include information of a personal nature, potentially compromising an individual's right to privacy.
43. However, the Committee notes that the disclosure or receipt of information must be to or from a 'relevant agency', which is limited to a government agency, the holder of a statutory office, or any other person or body prescribed by the regulations. In this respect, information cannot be exchanged freely and widely without temperance.
44. Further, the Committee notes that the information to be exchanged must be limited to information that assists in the exercise of the functions of the Commissioner or of the relevant agency concerned, again placing controls on the exchange of information.
45. Lastly, the Committee notes that when information is exchanged, the likelihood that the information disclosed would be of a personal nature is low, and more likely to be of a commercial nature.

Although this Bill provides for the exchange of information which could potentially include information of a personal nature, the Committee notes that restraints on the disclosure or receipt of personal information, as well as its low likelihood, are unlikely to adversely impact on privacy rights. As such, the Committee does not consider there to be a trespass on personal rights and liberties in this instance.

Freedom of Information

46. Section 26(2) of the Bill provides that the Commissioner must not make a report to Parliament that is either expressly or impliedly critical of a government agency or any person unless the Commissioner has given the agency or person concerned the opportunity to make submissions, either orally or in writing, in relation to the matter.
47. The Committee notes that this provision may appear to frustrate attempts by the Commissioner to ventilate matters deemed to be in the public interest, and that this may adversely affect the public's right to know of such matters.
48. However, the Committee also notes that the Commissioner is not prevented from reporting on any such matters per se, but must merely enable the agency or person subject to the criticism a right of reply, in itself a requirement of natural justice.

The Committee notes that this provision may appear to frustrate attempts by the Commissioner to ventilate views deemed in the public interest. However,

the Committee also notes that the Commissioner is not prevented from making reports that are critical of a government agency or person so long as the agency or person concerned has first had a right of reply, in itself a requirement of natural justice.

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

Commencement by Proclamation

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes the implementation of this Bill will require certain administrative arrangements before the Office can be established. In these circumstances, the Committee does not consider there to be an inappropriate delegation of legislative powers.

Part Two - Regulations

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

Appendix One – Index of Ministerial Correspondence on Bills

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.