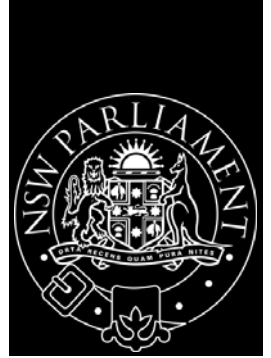


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 12 of 2008

28 October 2008

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TABLE OF CONTENTS

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	1
Guide to the <i>Legislation Review Digest</i>	2
Summary of Conclusions	1
Part One – Bills	1
SECTION A: Comment on Bills.....	1
1. Bible Society NSW (Corporate Conversion) Bill 2008.....	1
2. Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Bill 2008.....	7
3. Civil Liability Legislation Amendment Bill 2008.....	20
4. Fisheries Management and Planning Legislation Amendment (Shark Meshing) Bill 2008.....	30
5. Food Amendment (Trans Fatty Acids Eradication) Bill 2008*	34
6. Local Government Amendment (Legal Status) Bill 2008	38
7. Transport Administration Amendment (Rail and Ferry Transport Authorities) Bill 2008.....	41
Part Two – Regulations	47
SECTION A: Regulations for the special attention of Parliament under S 9(1)(B) of the <i>Legislation Review Act 1987</i>	47
Appendix 1: Index of Bills Reported on in 2008	50
Appendix 2: Index of Ministerial Correspondence on Bills	55
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008	56
Appendix 4: Index of correspondence on regulations reported on in 2008.....	60
* Denotes Private Member's Bill	

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FUNCTIONS OF THE LEGISLATION REVIEW 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.
- (3) 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 *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page 1).

Section B: 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.

Part Two – 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 is set out in s 9 of the *Legislation Review Act 1987* (see page 1).

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 Bills Reported on in 2008

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

Appendix 2: Index of Ministerial Correspondence on Bills for 2008

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 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2008

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.

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Bible Society NSW (Corporate Conversion) Bill 2008

Issue: Retrospectivity – Part 3, Clause 9

17. The Committee will always be concerned where provisions have retrospective effect that may adversely impact on personal rights. However, the Committee notes that the power in Clause 9 to make retrospective regulations cannot operate in a manner prejudicial to or impose any liabilities on, any person other than the State or one of its authorities. Therefore the Committee considers that the power in Clause 9 of the Bill to make regulations does not unduly trespass on individual rights or comprise an inappropriate delegation of legislative power under s 8A(1)(b)(iv) LRA.

Issue: Retrospectivity - Schedule 1.3[1] – Inserts proposed Section 3A into *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928*; Part 3, Clause 10.

20. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. However, in these circumstances, the Committee considers that it is unlikely that any person will be detrimentally affected by the proposed Section 3A of *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* and Clause 10 of the Bill. Accordingly, the Committee is of the view that these provisions do not unduly trespass on individual rights.

2. Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Bill 2008

Issue: Rights of Children; Freedom of Movement; Freedom of Association – Schedule 1 - Proposed section 48C(2) and section 48L

21. The Committee is concerned that the conduct restriction provisions set out in proposed section 48C(2) that may be ordered by the Court under proposed section 48L may unduly trespass on the rights and liberties of children. These provisions provide the power to prohibit or restrict a child from associating with specific kinds of people; frequenting or visiting specified places and may impose curfews. These provisions may unduly trespass on the rights to freedom of movement and association of children. Accordingly, the Committee refers the proposed sections 48C(2) and 48L to Parliament.

Issue: Presumption of Innocence; Excessive Punishment; Rights of Children - Schedule 1 - Proposed section 48G(1)(a), 48F(1)(a), 48L and 48P

23. The Committee is concerned that the imposition of suitability assessments and Youth Conduct Orders on children who have not yet been proven guilty of an offence by a Court may trespass unduly on their rights and liberties. Accordingly, it refers proposed sections 48G(1)(a), 48L and 48P to Parliament.

Issue: Rights of Children; Consent – Schedule 1 - Proposed Section 48F(1)(b); 48L

27. Although proposed section 48L(4) requires the Court to be satisfied that a child has been afforded the opportunity to seek legal advice in relation to a proposed order, the Committee has concerns regarding the impact of this provision on the rights and liberties of children. The Committee refers the matter to Parliament.

Issue: Excessive Punishment – Schedule 1 - Proposed section 48P – Non compliance with Youth Conduct Orders.

29. The Committee is concerned that proposed section 48P(2) unduly trespasses on the rights and liberties of young people and constitutes excessive punishment. It is also particularly concerned about the application of this provision to young people who have been charged with but not found guilty of a relevant offence and refers this provision to Parliament.

Issue: Excessive Punishment – Schedule 1 - Proposed section 48Q(4) – Revocation of Youth Conduct Orders

32. The Committee is concerned that proposed section 48Q(4) will result in the excessive punishment of a young person. It is also concerned that a young person who has failed to comply with a Youth Conduct Order may be subject to excessive punishment through the sentencing process. The Committee refers the provision to Parliament.

Issue: Rights of Children –Schedule 2 – Clauses 4 and 5 - Application of Youth Conduct Orders to young people in Campbelltown, Mount Druitt and New England Local Area Commands

Issue: Retrospectivity – Schedule 1[4]- Proposed Section 24 - Application of Part 4A to pre-commencement offences

38. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. The Committee notes that the provision in proposed section 24 will apply retrospectively to proceedings commenced prior to the enactment. Accordingly, the Committee refers the provision to Parliament.

Issue: Inappropriate delegation of legislative power – Schedule 1 - Proposed sections 48E and 48W – Regulations; Schedule 1 - Proposed section 48C(2)(g)

39. 39. The Committee is concerned proposed sections 48E and 48W provides for the making of regulations in a manner that is ill and widely defined. It considers that these matters should be dealt with by amending legislation rather than through the regulations. Further, proposed section 48C(2)(g), which provides that conduct restriction provisions may be such other kinds of provisions as may be prescribed by the regulations is ill and wide defined and refers this to the Parliament.
40. 41. The Committee is concerned that Schedule 2, Division 8 proposed Clause 25 enables the issuing of directions by the Director-General to influence the exercise of executive powers without any obligation for them to be tabled in Parliament and not subject to disallowance. Accordingly, the Committee refers the provision to Parliament.

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

42. 43. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

3. Civil Liability Legislation Amendment Bill 2008

Issue: Rule of Law – Schedule 1 [2] – proposed section 15 (3) – Damages for gratuitous attendant care services: general (Amendment of *Civil Liability Act 2002*); Schedule 2.1 [1] – proposed section 72 (2) – Maximum amount of damages for provision of certain home care services (Amendment of *Motor Accidents Act 1988*); Schedule 2.2 [1] – proposed section 128 (3) – Damages for economic loss – maximum amount for provision of certain attendant care services (Amendment of *Motor Accidents Compensation Act 1999*):

Issue: Retrospectivity – Schedule 1 [23] – proposed schedule 1, Part 11, clause 32 Restrictions on damages for gratuitous attendant care services (Amendment of *Civil Liability Act 2002*); Schedule 2.1 [3] – proposed schedule 4, Part 13, clause 36 Restrictions on compensation for home care services (Amendment of *Motor Accidents Act 1988*); Schedule 2.2 [3] – proposed schedule 5 – restrictions on compensation for attendant care services (Amendment of *Motor Accidents Compensation Act 1999*):

28. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. The Committee notes that these provisions will apply retrospectively to proceedings commenced before the commencement of the amendment.

29. The Committee considers that the retrospective application of the above provisions (proposed schedule 1, Part 11, clause 32; proposed schedule 4, Part 13, clause 36; and proposed schedule 5) may adversely impact and unduly trespass on personal rights such as making it harder for claimants by requiring them to pass both thresholds (rather than satisfying only one or the other threshold) to qualify for the recovery of damages for gratuitous attendant care services under the Civil Liability Act or for compensation for home care services under the Motor Accidents Act or for attendant care services under the Motor Accidents Compensation Act. Accordingly, the Committee refers this to Parliament.

**Issue: Retrospectivity – Schedule 1 [23] – proposed Schedule 1, Part 11 – clause 34
Vicarious liability of protected defendant:**

33. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. The Committee notes that these provisions will apply retrospectively to proceedings commenced before the commencement of the amendment.

34. The Committee considers that the retrospective application of the above provision (proposed Schedule 1, Part 11, clause 34) may adversely impact and unduly trespass on personal rights by retrospectively removing the right of offenders in custody to pursue common law action in relation to a claim in intentional tort since the proposed amendment extends to civil liability arising, and any award of damages in respect of such civil liability made (including any proceedings commenced but not any final determination that has already been made) before the commencement of the amendment. In accordance with these concerns, the Committee refers this to Parliament.

Issue: Denial of Compensation – Schedule 1 [8] – proposed Section 26L (6):

38. If a protected defendant has been found by a court or tribunal to be liable to pay damages to an offender in custody, the Committee expresses its concern that this liability could be suspended while the offender damages are held in a victim trust fund. Therefore, the Committee resolves to write to the Attorney General to seek further clarification as to the intent of this proposed section 26L (6).

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

40. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

4. Fisheries Management and Planning Legislation Amendment (Shark Meshing) Bill 2008

Issue: Clause 2 – Commencement of Schedule 1[4] by proclamation

11. Although there may be good reasons why such discretion is required, such as allowing time for joint management agreements to be completed, the Committee has concerns about commencement by Proclamation and asks Parliament to consider whether the commencement of Schedule 1[4] by proclamation, rather than on assent, is an inappropriate delegation of legislative power.

5. Food Amendment (Trans Fatty Acids Eradication) Bill 2008*

Issue: Strict Liability – Schedule 1[3] – proposed sections 23A, 23B and 23C

13. The Committee considers that the potential trespass on rights resulting from the strict liability provisions of the Bill have been substantially mitigated by the existence of the defences in proposed section 23B(3) and in proposed section 28(2) as well as by the supporting lead-in times for the commencement of the provisions. The potential severity of the monetary penalties for offences finds support on the basis of the assumed accuracy of the statements made in the Second Reading speech as to the material health hazards posed by trans fatty acids. The Committee has in the past taken the view that high monetary penalties in strict liability offences may find justification where an offence had serious public health consequences. The Committee also notes that penalties under the relevant provisions do not involve any terms of imprisonment. Accordingly, the Committee considers these provisions do not trespass unduly on the rights and liberties of those that may be charged with certain strict liability offences.

6. Local Government Amendment (Legal Status) Bill 2008

Issue: Matters that should be regarded by Parliament - Schedule 1 [4] – Matters to be taken to account by the Minister in deciding whether to grant consent to a council forming or acquiring a controlling interest in a corporation or other entity.

11. The Committee is concerned that delegating the criteria to regulation does not allow for proper Parliamentary scrutiny or ensure that adequate external consultation has been completed. However, as in this instance only pre-existing criteria will be enacted into regulation and, as such, no new burdens will be placed on councils and the process will be more transparent and provide more surety for councils in the future the Committee considers that there is no undue trespass.

7. Transport Administration Amendment (Rail and Ferry Transport Authorities) Bill 2008

Issue: Excludes review – Schedule 2.1 [5] and Schedule 4.1 [5] to amend Section 48 Review of decisions concerning service contracts:

13. The Committee notes that while the proposed Schedule 2.1 [5] and Schedule 4.1 [5] to amend Section 48 of the *Passenger Transport Act 1990* are very broad, and it could be said that rail services contracts and ferry service contracts appear to be unduly dependent on non-reviewable decisions, it is also noted that similar arrangements exist in relation to bus services contracts.

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

15. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

PART ONE – BILLS

SECTION A: COMMENT ON BILLS

1. BIBLE SOCIETY NSW (CORPORATE CONVERSION) BILL 2008

Date Introduced:	22 October 2008
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. David Campbell MP
Portfolio:	Transport

Purpose and Description

1. The object of the *Bible Society NSW (Corporate Conversion) Bill 2008* (the Bill) is to authorise The New South Wales Auxiliary of The British and Foreign Bible Society (the Society) to seek registration as a public company limited by guarantee under the *Corporations Act 2001* of the Commonwealth (the Corporations Act).
2. The Bill amends *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* to change the corporate name of the Society to “Bible Society NSW”. The Bill also updates the objects of the Society in preparation for its registration as a company under the Corporations Act.
3. The Bill provides for cessation of the operation and the repeal of *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* once the Society is registered as a company under the Corporations Act.
4. Schedule 1 of the Bill makes consequential amendments to the *Charitable Fundraising Regulation 2008*, *Subordinate Legislation Act 1989* and *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928*.

Background

5. The Society, trading as Bible Society New South Wales is a statutory corporation established under *The Bible Society's Act of 1878* as the New South Wales auxiliary of its parent in the United Kingdom (the British and Foreign Bible Society). *The Bible Society's Act of 1878* was subsequently replaced by the *New South Wales Auxiliary of the British and Foreign Bible Society Incorporation Act 1928*.
6. The main aims and functions of the Society are the distribution and promotion of the Holy Scriptures in every language and dialect throughout the world.
7. According to The Agreement in Principle Speech on 22 October 2008, the Society's current status as a body corporate under a New South Wales Act poses significant governance deficiencies. In the Agreement in Principle Speech on 22 October 2008, the objects and procedures for convening meetings and adopting new rules under the

New South Wales Auxiliary of the British and Foreign Bible Society Incorporation Act 1928 were described as “outdated, unduly onerous and difficult to amend”.

8. The Society held two extraordinary general meetings of its members in 2007 and 2008. At these extraordinary general meetings, the members agreed to convert the Society into a public company limited by guarantee and to change its name and update its objects. The members also approved a constitution for the new company.¹
9. A statutory corporation established by a New South Wales Act can apply to be registered as a company under Part 5B.1 of the Corporations Act, provided that the New South Wales law authorises the transfer of incorporation.
10. Other examples of this type of procedure are the corporate conversion of the Australian Gas Light Company (AGL) under the *AGL Corporate Conversion Act 2002* and the corporate conversion of the Royal Blind Society of New South Wales under the *Royal Blind Society (Corporate Conversion) Act 2003*.
11. Accordingly, the Government introduced the Bill to authorise the transfer of the Society from a statutory corporation to incorporation under the Corporations Act.
12. The Bill also proposes to change the name of the society from "The New South Wales Auxiliary of The British and Foreign Bible Society" to the "Bible Society New South Wales" through amendments to the *New South Wales Auxiliary of the British and Foreign Bible Society Incorporation Act 1928*. It also updates the objects in section 5 of the *New South Wales Auxiliary of the British and Foreign Bible Society Incorporation Act 1928*.
13. Subsequent to the introduction of this Bill and pursuant to Clause 5, of the Bill the Society will be able to apply to the Australian Securities and Investment Commission (ASIC) for registration as a public company limited by guarantee.

The Bill

14. Outline of Provisions

Part 1 Preliminary

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

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

Clause 3 sets out the objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act.

Part 2 Registration of Society as public company

Division 1 Authorisation to transfer incorporation

Clause 5 authorises the Society to apply to the Australian Securities and Investments Commission to be registered as a public company limited by guarantee pursuant to Part 5B.1 of the Corporations Act.

¹ The Constitution of the Bible Society NSW at <http://www.biblesocietynsw.com.au/constitution>.

Division 2 Provisions consequent on transfer of incorporation of Society

Clause 6 refers to section 601BM Corporations Act, which provides that the registration of a body corporate as a company under Part 5B.1 Corporations Act does not:

- (a) create a new legal entity, or
- (b) affect the body's existing property, rights or obligations (except as against the members of the body in their capacity as members); or
- (c) render defective any legal proceedings by or against the body or its members.

The proposed section also provides for references to the Society in certain instruments to be read as if they included a reference to the Society after it is registered as a public company under the Corporations Act.

Clause 7 provides that the provisions of *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* and any rules made under the Act cease to have effect on the day that the Society is registered as a public company under the Corporations Act.

Clause 7(2) provides that Section 30 *Interpretation Act 1987* extends to rules that cease to have effect on the day that the Society is registered as a public company under the Corporations Act. Section 30 *Interpretation Act 1987* states that the repeal of an Act or statutory rule does not affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule or affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule.

The proposed clause also enables the Governor, by proclamation published in the Gazette, to repeal *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* and the rules made under it after the Society's registration as a company.

Clause 8 enables the regulations to invoke section 5F or 5G of the Corporations Act to avoid inconsistency between provisions of the proposed Act relating to the registered Society and the Corporations legislation of the Commonwealth.

Section 5F of the Corporations Act provides that if a State law declares a matter to be an excluded matter for the purposes of that section in relation to all or part of the Corporations legislation, the provisions of the Corporations legislation that are the subject of the declaration will not apply in relation to that matter in the State concerned.

Section 5G of the Corporations Act provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

Part 3 Miscellaneous

Clause 9 enables the Governor to make regulations for the purposes of the proposed Act (including regulations of a savings or transitional nature consequent on the enactment of the proposed Act).

Clause 10 ensures that the operation of the proposed Act will not result in a breach of contract or other instrument or any other civil liability.

Clause 11 provides that State tax is not payable in respect of matters relating to the registration of the Society as a company under the Corporations Act.

Clause 12 is a formal provision that gives effect to the amendments to the Acts and Regulation set out in Schedule 1.

Schedule 1 Amendment of other Legislation

Schedule 1.1 amends Clause 6 of the *Charitable Fundraising Regulation 2008* that is consequential on the change in the corporate name of the Society resulting from amendments made by Schedule 1.3.

Schedule 1.2 amends Schedule 4 of the *Subordinate Legislation Act 1989* to ensure that regulations made under the proposed Act are excluded instruments for the purposes of the *Subordinate Legislation Act 1989*. This means that the regulations will not be subject to the statutory rule-making requirements set out in the *Subordinate Legislation Act 1989*.

Schedule 1.3[1] amends *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* to change the corporate name of the Society to "Bible Society NSW". Schedule 1.3[1] inserts proposed Section 3A(2) into *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928*, which states that the alteration of the name and objects of the body corporate does not operate to:

- (a) create a new legal entity, or
- (b) to prejudice or affect the identity of that body or its continuity as a body corporate; or
- (c) to affect the property, or the rights and obligations, of the body, or
- (d) to render defective any legal proceedings by or against that body, and any legal proceedings that could have been continued or commenced by or against that body in its former corporate name may be continued or commenced by or against it in its new corporate name.

Schedule 1.3[2] of the Bill amends section 5 of the *New South Wales Auxiliary of the British and Foreign Bible Society Incorporation Act 1928* to provide that the objects of the body corporate are the advancement of the Christian faith by:

- (a) encouraging the wider circulation and use of the Holy Scriptures in every language and dialect throughout the world, and
- (b) co-operating with other Christian organisations or any other Bible Society or person for the attainment of these objects, and
- (c) acting as trustee and performing and discharging the duties and functions incidental to acting as trustee where this is incidental or conducive to the attainment of these objects, and
- (d) doing such other things as are incidental or conducive to the attainment of these objects.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]; and delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Retrospectivity – Part 3, Clause 9

15. Clause 9 of the Bill provides the Governor with power to make regulations and Clause 9(2) of the Bill provides that the regulations may contain provisions of a savings or transitional nature consequent on the enactment of the Act. Clause 9(3) of the Bill states that any such provision may, if the regulations so provide, take effect from the date of assent to this Act or a later date.

16. Clause 9(4) of the Bill continues to provide that, to the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

17. **The Committee will always be concerned where provisions have retrospective effect that may adversely impact on personal rights. However, the Committee notes that the power in Clause 9 to make retrospective regulations cannot operate in a manner prejudicial to or impose any liabilities on, any person other than the State or one of its authorities. Therefore the Committee considers that the power in Clause 9 of the Bill to make regulations does not unduly trespass on individual rights or comprise an inappropriate delegation of legislative power under s 8A(1)(b)(iv) LRA.**

Issue: Retrospectivity - Schedule 1.3[1] – Inserts proposed Section 3A into *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928*; Part 3, Clause 10.

18. The proposed Section 3A(2) in Schedule 1.3[1] to amend *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* reads that the alteration of the name and objects of the body corporate effected by the operation of the proposed section 3A(1) does not operate:
- (a) to create a new legal entity, or
 - (b) to prejudice or affect the identity of that body or its continuity as a body corporate, or
 - (c) to affect the property, or the rights and obligations, of the body, or
 - (d) to render defective any legal proceedings by or against that body, and any legal proceedings that could have been continued or commenced by or against that body in its former corporate name may be continued or commenced by or against it in its new corporate name.
19. The proposed section 3A(3) to amend *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* also reads that the operation of the proposed Section 3 is not to be regarded as:
- (a) a breach of contract or confidence or otherwise as a civil wrong, or
 - (b) a breach of any instrument (including, without limitation, any provision prohibiting, restricting or regulating the assignment or transfer of assets or liabilities), or
 - (c) an event of default under any contract or other instrument, or
 - (d) giving rise to any remedy by a party to a contract or other instrument, or as causing or permitting the termination of, or exercise of rights under, any contract or other instrument.

19. Part 3, Clause 10 of the Bill provides the same provisions as the proposed section 3A(3) above with regard to the operation of the proposed Bill.²

20. **The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. However, in these circumstances, the Committee considers that it is unlikely that any person will be detrimentally affected by the proposed Section 3A of *The New South Wales Auxiliary of The British and Foreign Bible Society Incorporation Act 1928* and Clause 10 of the Bill. Accordingly, the Committee is of the view that these provisions do not unduly trespass on individual rights.**

The Committee makes no further comment on this Bill.

² Note that Clause 6 of the Bill reads that Section 601BM Corporations Act makes provision for legal consequences of the registration of the body corporate as a company so that registration does not (a) create a new legal entity; or (b) affect the body's existing property, rights or obligations (except as against the members of the body in their capacity as members; or (c) render defective any legal proceedings by or against the body or its members.

2. CHILDREN (CRIMINAL PROCEEDINGS) AMENDMENT (YOUTH CONDUCT ORDERS) BILL 2008

Date Introduced:	23 October 2008
House Introduced:	Legislative Council
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Attorney General, Justice

Purpose and Description

1. The Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Bill 2008 (the Bill) amends the Children (Criminal Proceedings) Act 1987 and the Children (Criminal Proceedings) Regulation 2005 to provide for the establishment of a Youth Conduct Order Scheme for dealing with children who have been charged with (or pleaded guilty to or been found guilty of) offences covered by the Young Offenders Act 1997, but for whom the diversionary scheme created by the Young Offenders Act 1997 is not appropriate.

Background

2. The Bill inserts Part 4A into the *Children (Criminal Proceedings) Act 1987* to establish a Youth Conduct Order Scheme. Youth Conduct Orders place limits on the behaviour of a young person who has been engaging in anti-social behaviour and who has been charged with an anti-social offence. Youth Conduct Orders have the capacity to restrict the behaviour and movement of a young person and to direct them to perform certain tasks or activities identified as helpful in reducing the young person's risk of offending.
3. According to The Second Reading Speech on 23 October 2008: "Youth conduct orders provide a careful balance of law enforcement responses to the management of anti-social offences, together with social and family support for children and young people engaging in offending behaviour".
4. The Youth Conduct Orders Scheme will target young people aged 14 years to 18 years who have been charged with or convicted of anti-social offences.
5. Youth Conduct Orders will direct young people to participate in intensive early intervention programs based on coordinated case management from human services and justice agencies. The intensive case management intervention will help a young person to address some of the underlying causes of their offending, including issues such as truancy, drug and alcohol problems, mental illness and homelessness.
6. Young people participating in the scheme will also have access to programs run within the anti-social behaviour pilot project (ASB pilot project), launched in September 2006.

Under the project, government agencies will work together in a coordinated and responsive way to help young people.

7. The Youth Conduct Orders Scheme and the ASB pilot project will operate at the same time in the three pilot locations chosen for the Youth Conduct Orders Scheme, namely Campbelltown, Mount Druitt and New England Local Area Commands. The Second Reading Speech highlighted that an independent evaluation will be conducted of the pilot to ensure that the rights of young people are not unduly impacted upon.

The Process of Making A Youth Conduct Order

8. There are a number of steps in the process of making a Youth Conduct Order. A young person must have first been charged, have pleaded guilty to or been found guilty of a relevant offence. Proposed Section 48D provides that a relevant offence is a summary offence or an indictable offence that may be dealt with summarily under Chapter 5 of the *Criminal Procedure Act 1986*. Section 48D(2) provides a list of offences that are not relevant offences for the purposes of the proposed Part 4A.
9. A young person must meet the following eligibility criteria prescribed by proposed Clause 5, which amends the *Children (Criminal Proceedings) Regulation 2005*:
 - (a) that the young person was 14 years or older, but less than 18 years, at the time the offence was alleged to have been committed;
 - (b) the young person is under 19 years of age when it is proposed to make the youth conduct order;
 - (c) the young person permanently or temporarily resides in, or is a habitual visitor to, the area of the participating local area command, namely Campbelltown, Mount Druitt and New England Local Area Commands; and
 - (d) the Children's Court has not yet imposed a penalty on the person concerned for the offence.
10. Proposed Clause 7 provides that if the young person has been charged with the offence, the police are must consider a range of criteria to decide whether a young person is eligible and appropriate for referral for a Youth Conduct Order. If the young person is eligible, the police officer is required to produce a scheme participation approval that must be approved by a senior police office. The scheme participation approval must be presented to the Court with the brief.
11. Once the matter is before the courts, the Children's Court can make a suitability assessment order by its own accord or, on the application of the young person who has been charged with the relevant offence, a person on behalf of the young person, or any other person authorised by the regulation (such as the police). Prior to the making of an order, the young person must be given an opportunity to get legal advice, and have had sufficient information by the time of the hearing on the order to enable the young person to make an informed choice (where the young person has consented to being assessed i.e. has not pleaded guilty or been found guilty).
12. If the court decides to make a suitability assessment order, the criminal proceedings against the young person are suspended until a suitability assessment has been

- conducted. The young person may be placed on bail so a suitability assessment can be conducted and if the court decided not to make a suitability assessment order, the criminal proceedings will proceed in the usual manner.
13. Where a suitability assessment is ordered, the young person is referred to the case coordination group to be assessed for suitability to participate in the Youth Conduct Orders Scheme. The coordination group comprises senior representatives from health, justice and welfare agencies.
 14. The assessment must also be carried out in accordance with the scheme's directions issued by the Director General as set out in proposed Clause 25. If the coordination group decides that a young person is suitable to participate in the Youth Conduct Orders Scheme, it will prepare an interim youth conduct plan, which will contain recommendations on what conditions the court should impose on a young person when making an interim youth conduct orders, and this plan will be reported back to the Children's Court.
 15. The court, if it agrees that the young person is suitable, can place the young person on an interim youth conduct order that cannot exceed two months. During the two months the young person and his or her family, if appropriate, will be required to help prepare a final youth conduct plan.
 16. Once a final plan is completed it is to be provided to the Children's Court before the young person's next court appearance. At the next court hearing the court may impose a final conduct order that will require the young person to comply with the final conduct plan. This order can last no more than 12 months.
 17. If a young person fails to comply with an order, the court may administer a warning to the young person, take no action, or vary or revoke the order. However failure to comply with a youth conduct order is not a criminal offence.
 18. If a young person has substantially complied with an order and where there is no plea or finding of guilt, there is a presumption that the court will dismiss the offence and not record a conviction. Where there is a plea of guilty, or a finding of guilt and the young person has substantially complied with an order, the court will take this compliance into consideration before issuing any penalty.

The Bill

19. Outline of Provisions

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

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

Clause 3 is a formal provision that gives effect to the amendments to the *Children (Criminal Proceedings) Act 1987* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Children (Criminal Proceedings) Regulation 2005* set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced, the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Children (Criminal Proceedings) Act 1987

Establishment of the youth conduct order scheme

Schedule 1 [1] inserts a Part 4A in the *Children (Criminal Proceedings) Act 1987* (the Principal Act) to establish the youth conduct order scheme. The new Part contains the following provisions:

Division 1 Interpretation

The proposed Division includes the following provisions relating to the interpretation of the new Part:

- (a) a provision setting out the objects of the new Part (proposed section 48A);
- (b) provisions defining terms and expressions used in the new Part (proposed sections 48B–48D).

Proposed section 48B, among other things, defines the term ASB pilot project to mean the multi-agency intervention strategy known as the Anti-Social Behaviour Pilot Project that was established by the Government in September 2006. This pilot project is intended to continue to operate when the scheme commences operation.

The youth conduct order scheme operates in relation to relevant offences committed (or alleged to have been committed) by children. Proposed section 48D defines the term relevant offence to cover the same kinds of offences by children as are covered by the *Young Offenders Act 1997*.

Proposed section 48E enables the Governor to make regulations concerning eligibility criteria for participation in the scheme. The proposed section also enables the regulations to provide for the continued participation in the scheme of persons who committed relevant offences while they were children, but who have now become adults who are less than 21 years old.

Division 2 Overview of scheme

The proposed Division contains a summary of the operation of the scheme. The scheme will operate as follows:

(a) Child commits, or is alleged to have committed, a relevant offence

A child is charged with or has pleaded guilty to or been found guilty of a relevant offence.

(b) Referral of child for suitability assessment

The Children's Court may make a suitability assessment order under proposed section 48G in relation to such a child if satisfied of certain matters, including that it would not be appropriate for the child to be dealt with instead under the *Young Offenders Act 1997*.

The consent of the child will be required if the child has not yet pleaded guilty to or been found guilty of the relevant offence. The order operates to adjourn the criminal proceedings so that a suitability assessment can be carried out in relation to the child in accordance with the regulations.

(c) Children's Court makes youth conduct order

The Children's Court may make an interim youth conduct order or a final youth conduct order in respect of the child under proposed section 48L if satisfied of certain matters, including that the child has been assessed as being suitable for participation in the scheme following a suitability assessment.

An interim youth conduct order requires the child to participate in the preparation of a final conduct plan to be approved by the Children's Court when it makes a final youth conduct order. Such an order may have effect for a period not exceeding 2 months. While the order is in effect, the child will be required to comply with an interim conduct plan prepared in accordance with the regulations.

A final youth conduct order, on the other hand, requires the child to comply with the final conduct plan that the child has participated in preparing. Such an order may have effect for a period not exceeding 12 months. A conduct plan is a plan that provides for the kinds of conduct that a child must, or must not engage in while a youth conduct order is in effect with respect to the child.

While a youth conduct order (whether interim or final) is in effect, the Children's Court will not be required to make a finding as to a child's guilt (if there has not yet been a finding or a guilty plea) or to consider penalties for the offence (if there has been a finding of guilt or a guilty plea). Also, the Children's Court is taken to have dispensed with the requirement for bail for the relevant offence while the order is in effect.

(d) Child to comply with youth conduct order

A child who is subject to a youth conduct order (whether interim or final) must comply with the order. Proposed Division 6 makes provision for the enforcement of youth conduct orders. A failure to comply with a youth conduct order may result in the child being returned to the Children's Court for the Court to deal with the child. If a child complies with a final youth conduct order, the child's compliance will be taken into account when dealing with the child for the relevant offence concerned.

Division 3 Suitability assessments

The proposed Division provides for the referral of a child for an assessment as to the child's capacity and prospects to participate in the scheme (a suitability assessment).

Proposed section 48G provides that a child may be referred for a suitability assessment by an order made by the Children's Court (a suitability assessment order).

The Court may make such an order in respect of a child if:

- (a) the child has:
 - (i) pleaded guilty to, or been found guilty of, the relevant offence, or
 - (ii) in any other case—consented to the making of the order, and
- (b) the Court is satisfied that the child has been afforded an opportunity to seek advice on the proposed order from an Australian legal practitioner, and
- (c) in the case where the child has not pleaded guilty to, or has not yet been found guilty of, the relevant offence—the Court is satisfied that the child had sufficient information by the time of the hearing to enable the child to make an informed choice about whether to consent to the making of the order, and

- (d) the child has been granted an approval (a scheme participation approval) in accordance with the regulations for the potential participation of the child in the scheme unless the Court considers that it was not possible in the circumstances for the approval to be granted in time for the hearing.

Proposed section 48H provides that a suitability assessment is to be conducted in accordance with the regulations.

Proposed section 48I provides that bail may be granted to a child in relation to a relevant offence on condition that the child submit to a suitability assessment.

Division 4 Preparation of conduct plans

Proposed sections 48J and 48K provide for the preparation of interim and final conduct plans in accordance with the regulations for submission to the Children's Court for its consideration and approval when framing the terms of interim and final youth conduct orders. A conduct plan may contain only the kinds of provisions specified by proposed section 48C.

A youth conduct order cannot be made by the Children's Court unless an appropriate conduct plan has been submitted for the consideration and approval of the Court. An interim conduct plan needs to be submitted for an interim youth conduct order while a final conduct plan needs to be submitted for a final youth conduct order.

Division 5 Making of youth conduct orders

The proposed Division contains provisions relating to the making of, and reviews of and appeals against, youth conduct orders. Proposed section 48L enables the Children's Court to make interim and final youth conduct orders, subject to certain preconditions.

Proposed section 48M requires the Children's Court to explain to a child the child's obligations under a youth conduct order and the consequences of failing to comply with the obligations. Proposed section 48N enables the Children's Court to review a youth conduct order.

Proposed section 48O enables a child to appeal to the District Court, with the leave of the Court, against a youth conduct order made in respect of the child or against the variation or revocation of such an order.

Division 6 Enforcement of youth conduct orders

The proposed Division provides for the consequences of the revocation of youth conduct orders and of complying (or failing to comply) with such orders.

Proposed section 48P enables the Children's Court to require a child to appear before it if the child fails to comply with a youth conduct order. If satisfied that the child has failed to comply with an order, the Court may:

- (a) administer a warning to the child, or
- (b) decide to take no action with respect to the failure to comply, or
- (b) vary the order, or
- (d) revoke the order.

Proposed section 48Q provides for the consequences of the revocation of a youth conduct order. If the child concerned did not plead guilty to (or had not yet been found guilty of) a relevant offence before the order was made, the Court may proceed to determine whether the child is guilty and, if so, deal with the child under Division 4 of Part 3 of the Principal Act (which provides for the imposition of penalties for offences).

If the child pleaded guilty to (or was found guilty of) a relevant offence before the order was made, the Court may deal with the child under Division 4 of Part 3 of the Principal Act. In determining penalties, the Court will have to take into account the extent to which a child complied, or failed to comply, with a revoked youth conduct order.

Proposed section 48R deals with the consequences of a child successfully complying with a final youth conduct order for a relevant offence. If the child did not plead guilty to (or had not yet been found guilty of) a relevant offence before the order was made, the Court may dismiss the charge for the offence. If the child pleaded guilty to (or was found guilty of) a relevant offence before the order was made, the Court may deal with the child under Division 4 of Part 3 of the Principal Act having regard to the child's compliance with the order.

Division 7 Miscellaneous

The proposed Division contains the following provisions:

- (a) a provision that limits the use of certain evidence obtained as a consequence of participation in or assessment for the scheme or the ASB pilot project (proposed section 48S),
- (b) a provision that limits the disclosure of information obtained in connection with the scheme or the ASB pilot project (proposed section 48T),
- (c) a provision that enables information to be shared and exchanged between scheme administrators and other relevant agencies (proposed section 48U),
- (d) a provision that requires the destruction of photographs, finger-prints, palm-prints and other records relating to a child charged with a relevant offence where that charge is dismissed following the child's successful participation in the scheme (proposed section 48V),
- (e) a provision conferring a general regulation-making power in relation to the scheme (proposed section 48W),
- (f) a provision setting out the relationship between the new Part and other legislation and matters (proposed section 48X),
- (g) a provision that provides for the new Part to cease to have effect after the scheme has been in operation for 26 months or by such later day as may be prescribed by the regulations (proposed section 48Y).

Consequential amendments

Schedule 1 [2] makes a consequential amendment to section 50 of the Principal Act.

Savings and transitional provisions

Schedule 1 [3] amends clause 1 of Schedule 2 to the Principal Act to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [4] inserts a Part 15 in Schedule 2 to the Principal Act to provide that Part 4A (as inserted by the proposed Act) extends to relevant offences committed, or alleged to have been committed, by a child before the commencement of the Part, but only if the child is charged with the offence after that commencement.

Schedule 2 Amendment of Children (Criminal Proceedings) Regulation 2005

Schedule 2 [2] inserts a Part 2 in the *Children (Criminal Proceedings) Regulation 2005* (the Principal Regulation). The new Part contains the following provisions relating to the administration of the scheme:

- (a) interpretative provisions (clause 4);
- (b) prescribed eligibility criteria for participation in the scheme (clause 5);
- (b) the appointment of authorised scheme officers (clause 6);
- (d) provisions relating to the granting of scheme participation approvals (clause 7);
- (e) provisions relating to the referral of children for, and the conduct of, suitability assessments (clauses 8–10);
- (f) provisions relating to the preparation of interim and final conduct plans (clauses 11 and 12);
- (g) provisions relating to the making of applications in connection with youth conduct orders (clauses 13–17);
- (h) provisions relating to the preparation of compliance reports and scheme operation reports (clauses 18 and 19);
- (i) provisions for the establishment and functions of Case Coordination Senior Officers' Groups to conduct suitability assessments and administer the scheme (clauses 20–24);
- (j) a provision for the issue of scheme directions by the Director-General of the Department of Premier and Cabinet (clause 25);
- (k) a provision for the delegation of functions by the Director-General (clause 26);
- (l) provisions prescribing matters for the purposes of proposed sections 48O, 48T and 48U to be inserted in the *Children (Criminal Proceedings) Act 1987* by Schedule 1 [1] to the proposed Act (clauses 27 and 28).

The areas of operation of the scheme will be limited, at least initially, to the Campbelltown, Mount Druitt and New England Local Area Commands for the NSW Police Force. The eligibility criteria to be prescribed by clause 5 provide that one of the criteria is that a child permanently or temporarily resides in, or is a habitual visitor to, the area of one of these Commands. A police officer of or above the rank of Superintendent will be required to consent before a child can be granted a scheme participation approval.

The eligibility criteria prescribed by clause 5 also provide that a child must be aged 14 years or over but less than 18 years old at the time that the offence or alleged offence occurred, but less than 19 years old when it is first proposed to make a youth conduct order with respect to the child. Clause 5 also provides for the continued participation in the scheme of persons who are 18 years old or older (but less than 21 years old) in relation to relevant offences committed (or alleged to have been committed) by such persons while they were aged 14 years old or older (but less than 18 years old). A child will not be able to be admitted to the scheme after the scheme has been in operation for 12 months.

Schedule 2 [1] and [3] insert Part headings in the Principal Regulation consequent on the insertion of the new Part. **Schedule 2 [4]** renumbers certain existing clauses

of the Principal Regulation consequent on the insertion of the new Part.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

Issue: Rights of Children; Freedom of Movement; Freedom of Association – Schedule 1 - Proposed section 48C(2) and section 48L

20. According to Schedule 1, proposed section 48C, a youth conduct order may include both positive and negative conduct provisions. Positive conduct provisions may include attending or completing a course of study, meeting with health professionals or participating in recreational activities. However, negative conduct provisions in proposed section 48C(2) may include prohibiting a young person from associating with specific persons or kinds of persons, requiring a young person to reside in a specific place or requiring a young person to report to a specific person or body. The term “associate with” is defined in proposed section 48B to include being in company with or communicating with by any means (including post, facsimile, telephone, email or any other form of electronic communication).

21. **The Committee is concerned that the conduct restriction provisions set out in proposed section 48C(2) that may be ordered by the Court under proposed section 48L may unduly trespass on the rights and liberties of children³. These provisions provide the power to prohibit or restrict a child from associating with specific kinds of people; frequenting or visiting specified places and may impose curfews. These provisions may unduly trespass on the rights to freedom of movement and association of children. Accordingly, the Committee refers the proposed sections 48C(2) and 48L to Parliament.**

Issue: Presumption of Innocence; Excessive Punishment; Rights of Children - Schedule 1 - Proposed section 48G(1)(a), 48F(1)(a), 48L and 48P

22. According to Schedule 1, proposed section 48F(1)(a), a Youth Conduct Order may be relevant to a child who is charged with or has pleaded guilty to or been found guilty of a relevant offence, as defined by proposed section 48D. The Committee notes that a suitability assessment and subsequent Youth Conduct Order may be made in relation to a child who has not been found guilty of an offence. The relevant part of proposed section 48G reads that a suitability assessment order may be made by a Court if the child has (i) pleaded guilty to, or been found guilty of, the relevant offence or (ii) in any other case – consented to the making of the order in circumstances where the child is capable in law of giving such consent. Under proposed section 48L, a Youth Conduct Order may then subsequently be made (after a suitability assessment) in relation to a child who has not been found guilty of an offence (also referred to in proposed section 48F(1)(a)). Under proposed section 48P the Children’s Court may call upon a child to appear before Court merely if there is suspicion that the child has failed to comply with a youth conduct order.

³ Refer to United Nations Convention on the Rights of the Child (1989) and United Nations International Covenant on Civil and Political Rights (1966).

23. **The Committee is concerned that the imposition of suitability assessments and Youth Conduct Orders on children who have not yet been proven guilty of an offence by a Court may trespass unduly on their rights and liberties. Accordingly, it refers proposed sections 48G(1)(a), 48L and 48P to Parliament.**

Issue: Rights of Children; Consent – Schedule 1 - Proposed Section 48F(1)(b); 48L

24. The Committee notes that proposed section 48F(1)(b) provides the requirement for a child's consent in relation to referral for a suitability assessment as defined by proposed section 48B. Proposed section 48G(1)(c) also reads that a court may make an order to enable an assessment: "if the Court is satisfied that the child had sufficient information by the time of the hearing to enable the child to make an informed choice about whether to consent to the making of the order".
25. Proposed section 48G(2) provides that in determining whether a child has sufficient information to make an informed choice for the purpose of proposed section 48G(1)(c), the Children's Court is to have regard to (a) if a brief of evidence relating to the relevant offence was required to be served on the child—whether a brief was served within a reasonable time before the hearing of the application and contained sufficient information to enable the child to make an informed choice; and (b) if a brief of evidence was not served because it was not required—whether the child was nonetheless provided with sufficient information within a reasonable time before the hearing of the application to enable the child to make an informed choice.
26. After a suitability assessment is carried out a Youth Conduct Order is subsequently made pursuant to proposed section 48L. Proposed section 48L(4) requires the child to provide consent prior to the making of a Youth Conduct Order, however the Committee is concerned about the capacity of a child to provide consent in these circumstances.

27. **Although proposed section 48L(4) requires the Court to be satisfied that a child has been afforded the opportunity to seek legal advice in relation to a proposed order, the Committee has concerns regarding the impact of this provision on the rights and liberties of children. The Committee refers the matter to Parliament.**

Issue: Excessive Punishment – Schedule 1 - Proposed section 48P – Non compliance with Youth Conduct Orders.

28. Proposed section 48P provides the consequences of non-compliance with Youth Conduct Orders. Proposed section 48P(2) reads that if the child fails to appear, the Children's Court may take any action referred to in section 98 (1A) of the *Crimes (Sentencing Procedure) Act 1999* as if the child were an offender for the purposes of that subsection that had failed to appear. Section 98(1A) of the *Crimes (Sentencing Procedure) Act 1999* reads that if the offender fails to appear, the court may issue a warrant for the offender's arrest or authorise an authorised officer to issue a warrant for the offender's arrest. The Committee is concerned that the application of this provision unduly impacts on the rights and liberties of young people, particularly those who have not yet been found guilty of an offence.

29. **The Committee is concerned that proposed section 48P(2) unduly trespasses on the rights and liberties of young people and constitutes excessive punishment. It is also particularly concerned about the application of this provision to young people who have been charged with but not found guilty of a relevant offence and refers this provision to Parliament.**

Issue: Excessive Punishment – Schedule 1 - Proposed section 48Q(4) – Revocation of Youth Conduct Orders

30. In circumstances where a child has revoked a youth conduct order, proposed section 48Q(4) provides that with regards to a child who has pleaded guilty or was found guilty of a relevant offence, when determining the penalty to be imposed, the Court is to have regard to:
- (a) the fact of, and the circumstances surrounding, the child's failure to comply with the order (including the extent to which the child did comply with the order); and
 - (b) any report on the child's failure to comply with the youth
 - (c) conduct order prepared in accordance with the regulations for submission to the Court.
31. In the Second Reading Speech on 23 October 2008, it was noted that in determining the penalty to be imposed, the Court must take care not punish a young person for failing to comply with an order, but rather sentence the young person according to established sentencing principles.

32. **The Committee is concerned that proposed section 48Q(4) will result in the excessive punishment of a young person. It is also concerned that a young person who has failed to comply with a Youth Conduct Order may be subject to excessive punishment through the sentencing process. The Committee refers the provision to Parliament.**

Issue: Rights of Children –Schedule 2 – Clauses 4 and 5 - Application of Youth Conduct Orders to young people in Campbelltown, Mount Druitt and New England Local Area Commands

33. The eligibility criteria prescribed by proposed Clause 5(1)(c) to amend the Children (Criminal Proceedings) Regulation 2005 provides that one of the criteria is that a child permanently or temporarily resides in, or is a habitual visitor to, the area of one of the participating Local Area Commands. Proposed Clause 4 defines these commands as meaning any of the following areas designated by the Commissioner of Police as a Local Area Command for the NSW Police Force: the Campbelltown; Mount Druitt and New England Local Area Commands. The Committee is concerned that the proposed legislation applies to this specific geographic location and is particularly concerned that its application will disproportionately impact on minorities and disadvantaged young people who are located in these areas.

34. The Second Reading Speech on 23 October 2008 highlighted that an independent evaluation will be conducted of the Youth Conduct Orders Scheme and the ASB pilot project that will examine the impact on indigenous young people; whether the reports are being appropriately written and used; the interaction of the scheme and the Young Offenders Act; and whether the scheme is achieving its objectives.
35. Despite the provision for independent evaluation of the scheme, having regard to the application of similar types of schemes in other jurisdictions, the Committee is still concerned that the legislation will disproportionately impact certain minority groups in the geographic location of Campbelltown; Mount Druitt and New England local area commands.⁴
36. However, the Committee notes that in the Second Reading Speech the Attorney General stated that the scheme offers a unique opportunity to young people in the pilot area to participate in a diversionary scheme away from the criminal justice system.

Issue: Retrospectivity – Schedule 1[4]- Proposed Section 24 - Application of Part 4A to pre-commencement offences

37. Schedule 1 [4] inserts section 24 into the *Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Act 2008* to provide that Part 4A (as inserted by the proposed Act) extends to relevant offences committed, or alleged to have been committed, by a child before the commencement of the Part, but only if the child is charged with the offence after that commencement.

38. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. The Committee notes that the provision in proposed section 24 will apply retrospectively to proceedings commenced prior to the enactment. Accordingly, the Committee refers the provision to Parliament.

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

Issue: Inappropriate delegation of legislative power – Schedule 1 - Proposed sections 48E and 48W – Regulations; Schedule 1 - Proposed section 48C(2)(g)

39. 39. The Committee is concerned proposed sections 48E and 48W provides for the making of regulations in a manner that is ill and widely defined. It considers that these matters should be dealt with by amending legislation rather than through the regulations. Further, proposed section 48C(2)(g), which provides that conduct restriction provisions may be such other kinds of provisions as may be prescribed by the regulations is ill and wide defined and refers this to the Parliament.

⁴ See, for example: Youth Justice Board for England and Wales, Anti-social behaviour orders (2006) at <http://www.yjb.gov.uk/publications/Scripts/prodView.asp?idProduct=309&eP=>; Fitzroy Legal Service, A New (Legal) Threat to Public Space: The Rise and Rise of ASBO at <http://www.fitzroy-legal.org.au/files/A%20New%20Legal%20Threat.pdf>.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny [s 8A(1)(b)(v) LRA]

Issue: Enabling the issuing of directions to influence the exercise of executive powers without any obligation for them to be tabled in Parliament – Schedule 2 Division 8, Proposed Clause 25 to amend the *Amendment of Children (Criminal Proceedings) Regulation 2005*

40. Clause 25(1) reads that: “The Director-General may, by order published in the Gazette, issue directions, not inconsistent with this Part or the Act, for or with respect to any or all of the following matters”. It continues to list a range of matters that the Director-General may make orders with respect to. Clause 25(2) then provides that “The Director-General may from time to time amend, revoke or replace the scheme directions by further order published in the Gazette”.

40. **41. The Committee is concerned that Schedule 2, Division 8 proposed Clause 25 enables the issuing of directions by the Director-General to influence the exercise of executive powers without any obligation for them to be tabled in Parliament and not subject to disallowance. Accordingly, the Committee refers the provision to Parliament.**

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

41. 42. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

42. **43. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

3. CIVIL LIABILITY LEGISLATION AMENDMENT BILL 2008

Date Introduced:	22 October 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General, Justice

Purpose and Description

1. This Bill amends the *Civil Liability Act 2002* and other Acts to make further provision in respect of offender damages, victim claims, indexation of damages, and damages for gratuitous attendant care services.
2. This Bill aims to introduce improvements to make it easier for victims to make claims. It will increase the period within which a victim can make a claim from six months from the date the offender was awarded damages to 12 months. It will authorise the Commissioner of Police to provide information to the State about victims who may have a claim against the offender to make it easier for the State to identify and notify those victims of their potential right to claim against the offender.
3. The Bill prevents offenders from circumventing the provisions of the *Civil Liability Act 2002* by specifying that part 2A—the special provisions for offenders in custody, will also extend to a claim for an intentional tort for which the protected defendant is vicariously liable.
4. The amendment to section 26M extends the time within which victims may make a claim out of the trust fund from six months from the date the offender was awarded damages to 12 months.
5. The amendments to section 26N authorise the Commissioner of Police to provide a protected defendant with information that the protected defendant (Department of Corrective Services or certain other public sector defendant), may reasonably require for identifying and contacting persons who may have a victim claim and for determining whether a person appears to have a victim claim. Section 26N(1) currently provides that the protected defendant must, within 28 days after the award of damages to the offender, notify each person who appears to have a victim claim against the offender that he or she may be able to make a victim claim. The new section 26N (1A) will provide that the notice must be sent as far as practicable within 28 days after the award of damages. This will enable victims who are identified outside the 28-day period to be notified.
6. A new division 1A in part 2A of the Act, will impose duties on offenders who make a claim against a protected defendant to notify the protected defendant of the incident within six months of it occurring, and to provide information and documents reasonably requested by the protected defendant. Section 26BA requires that the notice must be in writing, must specify the date of the incident, must describe the incident, and must state that the incident may give rise to a claim against the protected defendant. Section

26BB requires that an offender making the claim must comply with any reasonable request by the protected defendant for certain information or documents that will enable the protected defendant to assess the merits of the claim and any liability and be able to make an informed settlement offer if appropriate.

7. These proposed requirements are modelled on parts 4.2 and 4.3 of the *Motor Accidents Compensation Act 1999*.
8. Section 26BD deals with the consequences of an offender failing to comply with the notification requirements. A protected defendant may apply to the court hearing the offender's damages claim to dismiss the proceedings on the grounds of a failure to comply with the requirements of sections 26BA or 26BB. The application must be made within two months after the statement of claim has been served on the protected defendant. If the court is not satisfied that sections 26BA or 26BB have been complied with, the court must dismiss the proceedings, unless there is a satisfactory explanation or reasonable excuse.
9. An offender is a vulnerable offender if the offender has a reasonable apprehension that his or her safety will be put at risk if he or she notifies the protected defendant or complies with the request for information and if as a result of the apprehension, the offender has applied to be placed in protective custody or transferred to another correctional facility. When an inmate is a vulnerable offender, they are not required to comply with sections 26BA or 26BB.
10. The Bill amends section 26B to provide that part 2A of the Act applies where the damages awarded to the offender are based on the vicarious liability of the protected defendant for the tort (whether or not negligence), was committed by another person. This ensures that part 2A applies where a claim is brought by an offender that an intentional tort was committed by a correctional officer, and the claim against the State is brought only on the grounds of the State's vicarious liability for the actions of its employees, and not on the grounds of any negligence by the State.
11. The Bill also provides that offender damages are to be held in trust by the Public Trustee rather than by the protected defendant.
12. Unrelated to the offender damages provisions, this Bill will also introduce some changes to the provisions of the *Civil Liability Act 2002*, the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* with respect to the availability of gratuitous care damages. Gratuitous care damages (referred to as *Griffiths v Kerkemeyer* damages include unpaid care by an injured worker's relative.

Background

13. According to the Second Reading speech:

The *Civil Liability Legislation Amendment Bill 2008* will make it easier for victims of crime to receive a share of damages awarded to prison inmates. While victims of an offence currently have a right to sue their offender for civil damages, in reality this is usually illusory. Most prison inmates do not have sufficient assets to pay any damages awarded. On occasions, however, prison inmates are awarded large compensation payments for claims made in respect of incidents arising while in custody. In 2005 the Government introduced legislation to ensure that if a prison inmate is awarded

compensation those damages are quarantined, enabling the damages to be used to satisfy claims made by the offender's victims. Under this scheme any damages awarded to an offender in respect of injuries incurred while that offender was in custody are now held in trust and used to satisfy claims made by victims of an offence committed by the offender. Any surplus remaining after victim claims are satisfied is then paid out to the offender. By freezing the damages in this way victims of the offender can be notified and given the opportunity to lodge claims in the knowledge that the offender will not be able to dissipate the award of damages to avoid a claim. The New South Wales scheme was the first scheme of its kind in Australia. Other jurisdictions have now followed suit. While the number of prison inmates awarded damages is relatively small, the Government wants to make sure their victims have a priority claim over these damages for their own injuries.

14. A new Part 2A—the special provisions for offenders in custody, will extend to a claim for an intentional tort for which the protected defendant is vicariously liable. As the *Civil Liability Act 2002* does not generally cover intentional torts, some inmates have avoided the operation of the *Civil Liability Act 2002* by pleading their claim in intentional tort and seeking to have it dealt with at common law. These amendments aim to close that loophole. This amendment also means that only claims against the person (who it is claimed actually committed an intentional tort) will be excluded from the Act.
15. In addition, the Attorney General and Minister for Justice intends to write to the rules committee of the District Court, to suggest that victim claims under part 2A of the Act be dealt with on the papers, unless oral evidence is required in the interests of justice in order to reduce trauma and expense for victims.
16. For many years, litigants and the courts have assumed that there was a two-thresholds test for gratuitous care damages: that care must be provided for at least six hours a week and for at least six consecutive months. The NSW Court of Appeal in the decision of *Harrison v Melhem* in May this year has ruled that is not the case. The court found that compensation could be claimed even if only one of the thresholds was met. The amendments of this Bill will ensure that claimants must demonstrate that the gratuitous care they have received has been provided for at least six hours per week for at least six consecutive months. According to the Second Reading speech, if the changes are not made, damages awards are likely to increase and with it insurance premiums.

The Bill

17. The object of this Bill is to amend the *Civil Liability Act 2002* (**the Act**) as follows:
 - (a) to require a person who may have a claim for damages against a **protected defendant** (the Department of Corrective Services and certain other public sector defendants) in respect of an injury to an offender in custody:
 - (i) to notify the protected defendant within 6 months of the incident that gives rise to the claim, and
 - (ii) to provide certain information about the incident to the protected defendant,
 - (b) to provide that Part 2A of the Act (Special provisions for offenders in custody) extends to a claim in relation to a tort for which the protected defendant is vicariously liable,

- (c) to make it clear that the general limitation on the Act's application to intentional acts does not interfere with the operation of Part 2A (in particular the operation of that Part in respect of victim claims that involve intentional acts),
- (d) to make changes to the system under which a victim of an offender can make a claim against damages awarded to the offender against a protected defendant, including:
 - (i) increasing the period within which a victim can make such a claim from 6 months from the date the offender was awarded damages to 12 months from that date, and
 - (ii) authorising the Commissioner of Police to provide information to the protected defendant about persons who may have a victim claim against the offender, and
 - (iii) replacing the requirement that the protected defendant must notify victims within 28 days after damages are awarded to the offender with a requirement that the notification be given as far as practicable within 28 days (so as to facilitate the notification of victims who are identified outside the 28-day period), and
 - (iv) providing that offender damages are to be held in trust by the Public Trustee (rather than the protected defendant),
- (e) other minor and miscellaneous amendments.

The Bill also amends the *Civil Liability Act 2002*, the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* to make it clear that damages are to be awarded for gratuitous attendant care services only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment overcomes the effect of the Court of Appeal decision in *Harrison v Melhem* [2008] NSWCA 67.

18. Outline of provisions

Schedule 1 Amendment of Civil Liability Act 2002 Offender damages claims

Schedule 1 [6] inserts new provisions into the Act in relation to claims for damages against a protected defendant in respect of injuries received by a person while the person was an offender in custody.

The amendments require the claimant to notify the protected defendant in writing of an incident that may give rise to a damages claim within 6 months of the incident.

The written notice must specify the date of the incident, describe the incident and state that the incident may give rise to a claim against the protected defendant.

The protected defendant will be entitled to request certain information and documents from the claimant that will enable the protected defendant to assess the merits of the claim and any liability and make a settlement offer where appropriate.

The claimant must comply with any reasonable request.

However, an offender is not required to comply with such a request for information if the offender is considered a **vulnerable offender**. An offender is considered a vulnerable offender if the offender has a reasonable apprehension that his or her safety will be put at risk if he or she notifies the protected defendant or complies with the request for information, and has applied to be placed in protective custody or transferred to another correctional facility. Once the offender has been either placed in protective custody or transferred, or if the offender's application is rejected or the offender declines to be placed in protective custody or transferred, the offender ceases to be considered a vulnerable offender and must comply with the protected defendant's request for information.

A protected defendant against whom court proceedings for offender damages have been commenced will be able to apply to the court to have the proceedings dismissed on the basis

that the claimant has not complied with the new requirements. Such an application must be made within 2 months of the statement of claim being served on the protective defendant. The court must dismiss the proceedings unless the claimant has a satisfactory explanation for his or her non-compliance with the requirements.

The amendments do not apply to a claim for damages if the incident giving rise to the claim occurred before the commencement of the amendments.

Victim claims against damages awarded to offenders

Currently, a protected defendant holds any personal injury damages awarded to an offender in trust (in a *victim trust fund*) and the Public Trustee holds that money on behalf of the protected defendant. **Schedule 1 [7]** provides that the Public Trustee itself will hold the damages in trust in a victim trust fund. **Schedule 1 [15]–[21]** make consequential amendments.

Schedule 1 [8] makes it clear that while offender damages are held in a victim trust fund, the liability of a protected defendant to pay those damages is suspended.

Schedule 1 [9] extends the period during which a victim can commence proceedings against an offender in respect of damages held in a victim trust fund from 6 months from the date the damages were awarded to the offender to 12 months from that date.

At present, the protected defendant must notify each person who may have a claim against an offender in respect of damages held in a victim trust fund and must do this within 28 days after the award of damages. **Schedule 1 [10]** removes the requirement to notify within 28 days and **Schedule 1 [12]** requires that the notification be sent as far as practicable within 28 days (without preventing persons from being notified outside that period).

Schedule 1 [14] authorises the Commissioner of Police to provide to the protected defendant information that the protected defendant may reasonably require to determine whether a person has a victim claim against an offender and to identify and contact any such victim.

Schedule 1 [11] and [13] make consequential amendments. The amendments relating to victim claims extend to a victim claim that arose before the commencement of the amendments.

Application of Part 2A (Special provisions for offenders in custody)

Schedule 1 [1] makes it clear that the general limitation on the Act's application to intentional acts does not interfere with the specific operation of Part 2A of the Act.

This will remove any doubt about the operation of that Part in respect of victim claims (which involve intentional acts by the offender).

Schedule 1 [5] provides that Part 2A of the Act extends to awards of damages against a protected defendant in respect of the death of or personal injury to an offender in custody when the award is based on the vicarious liability of the protected defendant for the tort of some other person. Currently the Part is limited to claims arising from the negligence of the protected defendant.

Damages for gratuitous attendant care services

Schedule 1 [2] amends the Act in relation to damages for gratuitous attendant care services to make it clear that such damages are to be awarded only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment extends to liabilities that arose before the commencement of the amendment but does not apply to proceedings determined before that commencement.

Miscellaneous

The Act currently provides that an amount of damages determined under the Act is to be rounded to the nearest \$500. **Schedule 1 [3] and [4]** clarify that an amount of \$250 or \$750 is to be rounded up.

Savings and transitional provisions

Schedule 1 [22] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [23] inserts savings and transitional provisions consequent on the amendments.

Schedule 2 Amendment of other Acts

Schedule 2.1 [1] and 2.2 [1] amend the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* in relation to damages for gratuitous attendant care services to make it clear that such damages are to be awarded only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months.

Schedule 2.1 [2] and [3], and 2.2 [2] and [3] provide for the making of savings and transitional regulations consequent on the amendments and provide that the amendments extend to liabilities that arose before the commencement of the amendments but do not apply to proceedings that were determined before that commencement.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

Issue: Rule of Law – Schedule 1 [2] – proposed section 15 (3) – Damages for gratuitous attendant care services: general (Amendment of *Civil Liability Act 2002*); Schedule 2.1 [1] – proposed section 72 (2) – Maximum amount of damages for provision of certain home care services (Amendment of *Motor Accidents Act 1988*); Schedule 2.2 [1] – proposed section 128 (3) – Damages for economic loss – maximum amount for provision of certain attendant care services (Amendment of *Motor Accidents Compensation Act 1999*):

19. The proposed section 15 (3) to amend the *Civil Liability Act 2002* reads: Further, no damages may be awarded to a claimant for gratuitous attendant care services **unless** the services are provided (or to be provided): (a) for **at least** 6 hours per week, and (b) for **a period of at least 6 consecutive** months.
20. The current wording of the unamended section 15 (3) reads: Further, no damages may be awarded to a claimant for gratuitous attendant care services **if** the services are provided, or are to be provided: (a) for **less than** 6 hours per week, and (b) for **less than 6 months**.
21. The proposed section 72 (2) to amend the *Motor Accidents Act 1988* and the proposed section 128 (3) to amend the *Motor Accidents Compensation Act 1999*, similarly, read: Further, no compensation is to be awarded unless the services are provided (or to be provided): (a) for at least 6 hours per week, and (b) for a period of at least 6 consecutive months.
22. In *Harrison v Melhem* [2008] NSWCA 67, one of the issues concerned the recovery of damages for gratuitous domestic assistance under section 15 of the current Civil Liability Act. By a majority (Spigelman CJ and Mason P, Beazley JA and Giles JA agreeing; Basten JA dissenting), the NSW Court of Appeal overruled 2 of its own

earlier decisions⁵. The NSW Court of Appeal decision brings the interpretation of the NSW statutes into line and consistent with decisions in Queensland⁶ and Victoria⁷ with equivalent sections.

23. The NSW Court of Appeal in *Harrison v Melhem* held that section 15 (3) of the *Civil Liability Act 2002* only precludes recovery of damages for non-economic loss if both of its limbs are satisfied, where a claimant is provided gratuitous attendant care services for less than 6 hours per week and for less than 6 months. It determined that once a claimant satisfied **either** the severity / intensity threshold (6 hours per week) **or** the duration threshold (6 months period), the claimant will be entitled to recover damages for attendant care 'once and for all', subject to the other provisions of section 15 (per Spigelman CJ at paragraphs 18 to 20). Mason P (at paragraph 181) delivered the leading judgment, and interpreted the section as "a preclusion on the award of *Griffiths v Kerkemeyer* damages unless the plaintiff can overcome one of two thresholds, by showing **either** that the gratuitous services are provided for a long period (ie more than six months) **or** that the services are provided for a significant period of time (ie more than six hours per week)". In other words, the Court found that section 15 (3) precludes an award of gratuitous attendant care damages unless the claimant can overcome one of the two thresholds.
24. The Court of Appeal also determined that in order to satisfy the 6 month threshold, the 6 months must run together as a single 6 month period. Therefore, section 15 (3) is not to be applied as if the period can be disaggregated; the 6 months are required to run together as a 6 month period and cannot be broken down into a series of lesser periods (per Mason P at 181 and Spigelman CJ at 20).
25. In the Bill's explanatory note and overview, this Bill amends the above Acts "to make it clear that damages are to be awarded for gratuitous attendant care services only if the services are provided (or to be provided) for at least 6 hours per week and for at least 6 consecutive months. The amendment overcomes the effect of the Court of Appeal decision in *Harrison v Melhem* [2008] NSWCA 67".

Issue: Retrospectivity – Schedule 1 [23] – proposed schedule 1, Part 11, clause 32 Restrictions on damages for gratuitous attendant care services (Amendment of *Civil Liability Act 2002*); Schedule 2.1 [3] – proposed schedule 4, Part 13, clause 36 Restrictions on compensation for home care services (Amendment of *Motor Accidents Act 1988*); Schedule 2.2 [3] – proposed schedule 5 – restrictions on compensation for attendant care services (Amendment of *Motor Accidents Compensation Act 1999*):

26. The above provisions are consequential on the amendments which extend to liabilities that arose before the commencement of the amendments but do not apply to proceedings that had already been determined before the commencement of the amendments.
27. The amendments in relation to damages for gratuitous attendant care services where damages are to be awarded only if the claimant meets both of the thresholds such that services are provided (or to be provided) for at least 6 hours per week and for at least

⁵ The cases overruled were: *Roads & Traffic Authority v McGregor* [2005] NSWCA 388 and *Geaghan v d'Aubert* [2002] NSWCA 260.

⁶ *Grice v Queensland* [2005] QCA 272.

⁷ *Alcoa Portland Aluminium P/L v Victoria WorkCover Authority* [2007] VSCA 210.

6 consecutive months would extend to liabilities that arose before the amendment, and would also extend to proceedings that commenced before the amendment even though it does not apply to proceedings already determined before that commencement. This is also the situation proposed to apply to the relevant amendments in relation to compensation for home care services under the Motor Accidents Act and compensation for attendant care services under the Motor Accidents Compensation Act.

28. **The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. The Committee notes that these provisions will apply retrospectively to proceedings commenced before the commencement of the amendment.**
29. **The Committee considers that the retrospective application of the above provisions (proposed schedule 1, Part 11, clause 32; proposed schedule 4, Part 13, clause 36; and proposed schedule 5) may adversely impact and unduly trespass on personal rights such as making it harder for claimants by requiring them to pass both thresholds (rather than satisfying only one or the other threshold) to qualify for the recovery of damages for gratuitous attendant care services under the Civil Liability Act or for compensation for home care services under the Motor Accidents Act or for attendant care services under the Motor Accidents Compensation Act. Accordingly, the Committee refers this to Parliament.**

**Issue: Retrospectivity – Schedule 1 [23] – proposed Schedule 1, Part 11 – clause 34
Vicarious liability of protected defendant:**

30. The amendment made by this Bill to section 26B extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of the amendment, but not so as to affect any final determination of legal proceedings made by a court or tribunal before the commencement of the amendment.
31. Under the current Civil Liability Act, section 26A defines protected defendant as each of the following:
- (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*) and its servants,
 - (b) a Government department and members of staff of a Government department,
 - (c) a public health organisation (within the meaning of the *Health Services Act 1997*) and members of staff a public health organisation,
 - (d) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions,
 - (e) a management company or submanagement company (within the meaning of the *Crimes (Administration of Sentences) Act 1999*) and members of staff of such a company.

32. The Bill amends section 26B to provide that part 2A of the Act applies where the damages awarded to the offender are based on the vicarious liability of the protected defendant for the tort (whether or not negligence), was committed by another person. This means the new Part 2A—the special provisions for offenders in custody, will extend to a claim for an intentional tort for which the protected defendant is vicariously liable. At present, the Civil Liability Act does not generally cover intentional torts, therefore, offenders in custody have the choice to seek common law action by pleading their claim in intentional tort and seeking to have it dealt with at common law.

33. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person. The Committee notes that these provisions will apply retrospectively to proceedings commenced before the commencement of the amendment.

34. The Committee considers that the retrospective application of the above provision (proposed Schedule 1, Part 11, clause 34) may adversely impact and unduly trespass on personal rights by retrospectively removing the right of offenders in custody to pursue common law action in relation to a claim in intentional tort since the proposed amendment extends to civil liability arising, and any award of damages in respect of such civil liability made (including any proceedings commenced but not any final determination that has already been made) before the commencement of the amendment. In accordance with these concerns, the Committee refers this to Parliament.

Issue: Denial of Compensation – Schedule 1 [8] – proposed Section 26L (6):

35. The proposed section reads: 26L (6) While offender damages are held in a victim trust fund, the liability of a protected defendant to pay those damages is suspended.

36. The Bill provides that offender damages are to be held in trust by the Public Trustee rather than by the protected defendant.

37. The Committee notes the background information of the current legislative scheme. In 2005 the Government introduced legislation to ensure that if a prison inmate is awarded compensation, then those damages are quarantined so as to enable the damages to be used to satisfy claims made by the offender's victims. Therefore, any damages awarded to an offender in respect of injuries incurred while that offender was in custody are now held in trust and used to satisfy claims made by victims of an offence committed by the offender. Any surplus remaining after victim claims is then paid out to the offender.

38. If a protected defendant has been found by a court or tribunal to be liable to pay damages to an offender in custody, the Committee expresses its concern that this liability could be suspended while the offender damages are held in a victim trust fund. Therefore, the Committee resolves to write to the Attorney General to seek further clarification as to the intent of this proposed section 26L (6).

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

39. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

40. **Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

4. FISHERIES MANAGEMENT AND PLANNING LEGISLATION AMENDMENT (SHARK MESHING) BILL 2008

Date Introduced:	22 October 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Ian Macdonald MLC
Portfolio:	Minister for Primary Industries

Purpose and Description

1. The purpose of this Bill is to amend the *Fisheries Management Act 1994* to remove shark meshing from the list of designated fishing activities in Schedule 1A to that Act. Shark meshing is the placing of nets around beaches or other waters, carried out by the Minister administering the *Fisheries Management Act 1994*, to protect the public from sharks. As this is a designated fishing activity it would normally require an environmental assessment in accordance with Division 5 of Part 5 of the *Environmental Planning and Assessment Act 1979*. This Division provides a special regime for the environmental assessment of designated fishing activities. However the *Environmental Planning and Assessment Regulation 2000* contains a provision exempting shark meshing from Part 5. That exemption expires on 31 December 2008, but will be extended under this Bill until 1 April 2009.
2. The Bill will also amend the *Environmental Planning and Assessment Act 1979* to provide that shark meshing is not subject to assessment and regulation under that Act if it is the subject of both a joint management agreement under the *Fisheries Management Act 1994* and a joint management agreement under the *Threatened Species Conservation Act 1995* and is not a designated fishing activity.
3. A joint management agreement under the *Fisheries Management Act 1994* and a joint management agreement under the *Threatened Species Conservation Act 1995* may be combined into a single document if both agreements deal with the same subject-matter.
4. The Minister administering the *Fisheries Management Act 1994* may enter into such agreements with one or more public authorities for the management, control, regulation or restriction of an action that is jeopardising the survival of a threatened species, population or ecological community.
5. Schedule 1[2] inserts proposed section 220ZFB into the *Fisheries Management Act 1994* to provide that it is a defence to a prosecution for an offence against Part 2, Part 7 or Division 4 of Part 7A of that Act, or the regulations under those provisions, if the act or omission constituting the offence was authorised by and done in accordance with, a joint management agreement entered into under that Act.

Background

6. In her Agreement in Principle speech, Ms Lylea McMahon MP, Parliamentary Secretary, on behalf of the Hon Verity Firth MP, said the current shark meshing (bather protection) program was subject to complex and costly environmental assessments. These arise from requirements under the *Environmental Planning and Assessment Act 1979* and the *Fisheries Management Act 1994*. Under this legislation a fishery management strategy, an environmental impact statement and a species impact statement for the program must be completed by 31 December 2008, which is the date the current regulatory arrangement expires.
7. The Parliamentary Secretary said that the Department of Primary Industries has estimated that these requirements would take up to two years to complete and would cost \$1 million. She said that without these assessments, the shark meshing program would not be able to continue. Agencies with responsibilities under the relevant legislation have developed a more streamlined environmental and impact assessment process. The Department of Primary Industries, the Department of Planning of the Department of Environment and Climate Change have all worked cooperatively to enable this new process to be developed. Instead of the existing costly assessment requirements, joint management agreements have been developed under the existing provisions of the *Fisheries Management Act 1994* and the *Threatened Species Conservation Act 1995*. The Parliamentary Secretary said that the objective of the agreements is to ensure that the shark meshing program is managed in a manner that does not jeopardise the survival of threatened species, populations and ecological communities.
8. The joint management agreements have been developed in conjunction with an environmental assessment of the impact of the program. The joint management agreements and the associated management plans and draft environmental assessment will be placed on public exhibition before being finalised. The Parliamentary Secretary said that there were concerns about the impact of shark meshing on marine species such as whales, grey nurse sharks, turtles and dolphins. She said the shark meshing program is designed to prevent dangerous sharks from establishing territories along popular beaches. Measures are in place to minimise harm to non - target species. She said these include setting nets on the seabed to reduce the risk to sea birds and fitting all nets with acoustic devices to deter whales and dolphins. During the whale migration season between May and August shark meshing is removed. The new arrangements are intended to provide a balance between providing an important safety measure and having a reduced impact on marine species.

The Bill

9. Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act, with the exception of Schedule 1 [4] which commences on a day appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to *the Fisheries Management Act 1994* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the planning legislation set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Fisheries Management Act 1994

Amendments relating to shark meshing

Schedule 1 [4] amends Schedule 1A to the *Fisheries Management Act 1994* to remove shark meshing carried out by the Minister administering that Act from the list of designated fishing activities. The result of the amendment is that such shark meshing will no longer be a designated fishing activity to which Division 5 of Part 5 of the *Environmental Planning and Assessment Act 1979* applies. That Division provides a special regime for the environmental assessment of designated fishing activities. See proposed section 115RA of that Division (to be inserted by Schedule 2.1 [3]) which provides for certain shark meshing to be generally exempt from the operation of the *Environmental Planning and Assessment Act 1979*.

Amendments relating to joint management agreements

Schedule 1 [2] inserts proposed section 220ZFB into the *Fisheries Management Act 1994* to provide that it is a defence to a prosecution for an offence against Part 2, Part 7 or Division 4 of Part 7A of that Act, or the regulations under those provisions, if the act or omission constituting the offence was authorised by, and done in accordance with, a joint management agreement entered into under that Act. The Minister administering that Act may enter into such agreements with one or more public authorities for the management, control, regulation or restriction of an action that is jeopardising the survival of a threatened species, population or ecological community.

Schedule 1 [3] amends section 221W of the *Fisheries Management Act 1994* to enable a joint management agreement under that Act and a joint management agreement under the *Threatened Species Conservation Act 1995* to be combined into a single document if they both deal with the same subject-matter.

Other amendments

Schedule 1 [1] amends the definition of public authority in section 4 (1) of the *Fisheries Management Act 1994* to clarify that it includes a Government Department.

Schedule 1 [5] enables savings and transitional regulations to be made consequent on the amendment of the *Fisheries Management Act 1994* by the proposed Act.

Schedule 2 Amendment of planning legislation

Amendment of Environmental Planning and Assessment Act 1979

Schedule 2.1 [1] amends the *Environmental Planning and Assessment Act 1979* to include a definition of shark meshing in Division 5 of Part 5 of that Act. Shark meshing is defined as the placing of nets around beaches or other waters to protect the public from sharks. **Schedule 2.1 [2]** makes a consequential amendment. **Schedule 2.1 [3]** inserts proposed section 115RA into the *Environmental Planning and Assessment Act 1979* which applies to shark meshing that is the subject of both a joint management agreement under the *Fisheries Management Act 1994* and a joint management agreement under the *Threatened Species Conservation Act 1995*, but that is not listed in Schedule 1A to the *Fisheries Management Act 1994* as a designated fishing activity. The proposed section provides that such shark meshing

cannot be declared to be a project under Part 3A of the *Environmental Planning and Assessment Act 1979*, cannot be made subject to a requirement for development consent under Part 4 of that Act and is not an activity to which Part 5 of that Act (other than the proposed section) applies. The proposed section also provides that such shark meshing cannot be prohibited or regulated by an environmental planning instrument.

Schedule 2.1 [4] enables savings and transitional regulations to be made consequent on the amendment of the *Environmental Planning and Assessment Act 1979* by the proposed Act.

Amendment of Environmental Planning and Assessment Regulation 2000

Schedule 2.2 substitutes clause 244B of the *Environmental Planning and Assessment Regulation 2000*. That clause currently exempts from the definition of **activity** in Part 5 of the *Environmental Planning and Assessment Act 1979* shark meshing carried out by the Minister administering the *Fisheries Management Act 1994* and fishing activities carried out pursuant to fisheries approvals issued or renewed for a period of not more than 12 months, but only until 31 December 2008. Proposed clause 244B extends the exemption for those activities until 1 April 2009.

Issues Considered by the Committee

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 – Commencement of Schedule 1[4] by proclamation

10. The Committee notes that Schedule 1[4] of the proposed Act is to commence on a day to be appointed by proclamation. This may delegate to the government the power to commence this provision on whatever day it chooses or not at all.

11. **Although there may be good reasons why such discretion is required, such as allowing time for joint management agreements to be completed, the Committee has concerns about commencement by Proclamation and asks Parliament to consider whether the commencement of Schedule 1[4] by proclamation, rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

5. FOOD AMENDMENT (TRANS FATTY ACIDS ERADICATION) BILL 2008*

Date Introduced: 23 October 2008
House Introduced: Legislative Council
Minister Responsible: Hon Dr. John Kay MLC
Portfolio:

Purpose and Description

1. The purpose of this Bill is to require the compulsory labelling of packaged food products containing artificially produced trans fatty acids and the provision of warnings of the presence of trans fat in prepared food on menus at restaurants and signs at fast food outlets. Controls also extend to home delivery food businesses. At the expiration to two years the Bill seeks to place a statewide ban on the sale of products containing trans fatty acids.
2. *Trans fatty acids* are defined in proposed section 10 to mean unsaturated fatty acids that contain one or more isolated or non-conjugated double bonds in a trans-configuration. The definition specifically excludes when trans fatty acids occurring naturally in food. Proposed section 23A creates an offence of selling or advertising for sale packaged food that contains trans fatty acids unless the food indicates the presence of those acids in the statement of ingredients required by the Food Standards Code and separately lists those acids in the nutrition information panel required by the Food Standards Code and is labelled with a warning that consumption of trans fatty acids is a health hazard. This section contains a 12-month exemption from the Commonwealth legislation relating to the mutual recognition of goods. The proposed section has effect from three months after its commencement and ceases to have effect on the commencement of proposed section 23C.
3. A further central provision of the Bill is proposed section 23B which creates an offence for a person in charge of a restaurant to fail to produce information relating to the presence of trans fatty acids in food for sale and warnings of the danger of trans fatty acids by means of signs or a menu. The proposed section creates a similar offence in relation to home delivered food where a menu is provided for the food. The proposed section has effect than three months after its commencement, and like proposed section 23A, ceases to have effect on the commencement of proposed section 23C.
4. Proposed section 23C makes it an offence for a person to handle food intended for sale in a manner that causes the presence of trans fatty acids in the food. The proposed section also prohibits the sale of food containing trans fatty acids. This section also contains a 12-month exemption from the Commonwealth legislation relating to the mutual recognition of goods. It is important to note that this section does not have effect until two years after its commencement.
5. Under the Bill the Minister for Primary Industries and the Minister for Health are to use their best endeavours to ensure that a proposed resolution for the amendment of the Food Standards Code of the Commonwealth is listed for consideration by the Australia

and New Zealand Food Regulation Ministerial Council. That proposed resolution is to be to the effect that the Food Standards Code be amended to require the labelling of packaged food intended for sale in Australia containing trans fatty acids to include a statement that the food contains trans fatty acids and that the consumption of trans fatty acids is a health hazard. Those Ministers are to support the proposals for the amendment of the Code and are to make representations to the Commonwealth Government for prohibiting the importation of food into Australia that does not comply with those proposals.

Background

6. Dr. John Kay MLC in his Second Reading speech on this Bill in the Legislative Council states that trans fats are proven agents of heart disease and that for every use of synthetic fats there are healthy unsaturated substitutes. In support of the Bill he states that eating trans fats dramatically increases the risk of coronary heart disease and that there is no safe level of trans fats in the diet and that eradication will almost certainly save lives. He reports that trans fats have a double impact on health. Consumption not only increases the concentration of bad, or high density, cholesterols but also decreases the concentration of good, or low density, cholesterols. In both actions, he said, it exacerbates the risk of cardiovascular disease, which is a serious threat to public health and longevity.
7. He reports that Food Standards Australia and New Zealand estimates that thousands of tonnes of trans fats are consumed in Australia each year with approximately 2500 tonnes consumed in food from take away food outlets alone. He said that although trans fats are probably present in lower concentrations in the diet of the average Australian than in some other countries, many Australians still consume large amounts of certain take away foods that are rich in the synthetic fatty acid and that minority is likely to be exposed to levels that are substantially increasing the risk of heart disease.
8. Dr. Kay said that although it is difficult to accurately estimate the impact on life expectancy, extrapolating from United States data in a study published in the New England Journal of Medicine in April 2006 suggests that somewhere between 2000 and 6800 Australians die each year because of the unnecessary presence of artificial trans fats in their diets.

The Bill

9. Outline of provisions

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

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

Clause 3 is a formal provision that gives effect to the amendments to the Principal Act set out in Schedule 1.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Schedule 1 [2] inserts proposed section 10 into the Principal Act which defines trans fatty acids. The definition excludes trans fatty acids occurring naturally in food.

Schedule 1 [1] makes a consequential amendment.

Schedule 1 [3] inserts proposed Division 2A into Part 2 of the Principal Act containing proposed sections 23A, 23B and 23C. Proposed section 23A creates an offence of selling or advertising for sale packaged food that contains trans fatty acids unless the food indicates the presence of those acids in the statement of ingredients required by the Food Standards Code and separately lists those acids in the nutrition information panel required by the Food Standards Code and is labelled with a warning that consumption of trans fatty acids is a health hazard. The proposed section also contains a 12-month exemption from the Commonwealth legislation relating to the mutual recognition of goods. The proposed section has effect from 3 months after its commencement and ceases to have effect on the commencement of proposed section 23C.

Proposed section 23B creates an offence for a person in charge of a restaurant (which includes a take away food business) to fail to provide information relating to the presence of trans fatty acids in food for sale and warnings of the danger of trans fatty acids, by means of signs or a menu. The proposed section also creates a similar offence in relation to home delivered food where a menu is provided for the food. The proposed section has effect from 3 months after its commencement and ceases to have effect on the commencement of proposed section 23C.

Proposed section 23C makes it an offence for a person to handle food intended for sale in a manner that causes the presence of trans fatty acids in the food. The proposed section also prohibits the sale of food containing trans fatty acids. The proposed section also contains a 12-month exemption from the Commonwealth legislation relating to the mutual recognition of goods. The proposed section has effect from 2 years after its commencement.

Schedule 1 [4] contains a consequential amendment to section 28 of the Principal Act.

Schedule 1 [5] inserts proposed section 133I into the Principal Act to require the Minister for Primary Industries and the Minister for Health to use their best endeavours to ensure that a proposed resolution for the amendment of the Food Standards Code of the Commonwealth is listed for consideration by the Australia and New Zealand Food Regulation Ministerial Council. The amendment of that Code would have the effect of including the same requirements as to labelling, and the prohibition on sale, of foods containing trans fatty acids as are contained in proposed sections 23A and 23C, including the same time frame for their operation.

Proposed section 133I also requires those Ministers to support the proposals for amendment of the Food Standards Code and to make representations to the Commonwealth Government for prohibiting the importation of food into Australia that does not comply with those proposals.

Schedule 1 [6] amends Schedule 2 to the Principal Act to enable regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

Issue: Strict Liability – Schedule 1[3] – proposed sections 23A, 23B and 23C

10. These proposed sections provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the offender intended to commit the offence and may be seen as contrary to the right to the presumption of innocence.

11. However, the Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider the impact of the offence on the community, the penalty that may be imposed and the availability of any defences or safeguards.
12. The strict liability provisions in the Bill relate to the labelling of packaged food containing trans fatty acids (proposed section 23A); the requirement to indicate to the customers of restaurants and prospective purchasers from take away food shops and home delivered food businesses the presence of artificially produced trans fatty acids (proposed section 23B) and the prohibition on sale and handing of food containing trans fatty acids (proposed section 23C). Each of these provisions carries a maximum penalty of 500 penalty units in the case of an individual and 2500 penalty units in the case of a corporation.
13. **The Committee considers that the potential trespass on rights resulting from the strict liability provisions of the Bill have been substantially mitigated by the existence of the defences in proposed section 23B(3) and in proposed section 28(2) as well as by the supporting lead-in times for the commencement of the provisions. The potential severity of the monetary penalties for offences finds support on the basis of the assumed accuracy of the statements made in the Second Reading speech as to the material health hazards posed by trans fatty acids. The Committee has in the past taken the view that high monetary penalties in strict liability offences may find justification where an offence had serious public health consequences. The Committee also notes that penalties under the relevant provisions do not involve any terms of imprisonment. Accordingly, the Committee considers these provisions do not trespass unduly on the rights and liberties of those that may be charged with certain strict liability offences.**

The Committee makes no further comment on this Bill.

6. LOCAL GOVERNMENT AMENDMENT (LEGAL STATUS) BILL 2008

Date Introduced:	22 October 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Barbara Perry MP
Portfolio:	Local Government

Purpose and Description

1. The purpose of the Bill is to amend the *Local Government Act 1993*:
 - a) To convert the status of local and county councils from their existing status as bodies corporate to the status of bodies politic of the State with the legal capacity and powers of an individual, and
 - b) To provide that a person who is appointed to an employment position at a council on a temporary basis while the holder of the position is on parental leave may continue in that position for a period of up to 24 months (instead of the existing upper limit of 12 months applicable to other temporary appointments), and
 - c) To include a regulation-making power to specify the matters to be taken into account by the Minister in granting consent to a council forming or acquiring a controlling interest in a corporation or other entity, and the conditions of such a consent.
2. The Bill also enacts transitional provisions that convert existing local and county councils from being bodies corporate to being bodies politic of the State. The transitional provisions make it clear that the conversion of status does not affect the continuity of status of a council and does not constitute a new legal entity.
3. As a result of their conversion of status, local and county councils will not be constitutional corporations for the purposes of laws of the Commonwealth (including workplace relations laws).

Background

4. The Bill implements two reforms for local government employees. Firstly, it removes them from under the Commonwealth Workchoices industrial relations system. At the present their status is unclear. Secondly, it allows councils to appoint temporary employees for up to two years to fill positions when permanent council staff are on parental leave. Currently, the *Local Government Act 1993* states that a person cannot continue in such a position longer than 12 months.
5. The Queensland Government has already enacted similar provisions to bring their council workers under State industrial relations legislation. The New South Wales Department of Local Government issued a circular to all councils inviting comment and

of the 65 councils and one county council that responded only two objected to the proposal. The united Services Union also supports the Bill.

6. Laws that apply to corporations will continue to apply to councils as if they were bodies corporate. Councils will continue to have a seal for the execution of documents and may sue and be sued in its council name. Councils also will continue to be subject to any statutory penalties and fees that may be imposed on bodies corporate.
7. The Bill also seeks to make it mandatory for the minister for local Government to consider certain criteria in granting requests by councils to form corporations or other entities. To achieve this the Bill proposes a new regulation-making power to be included in section 358 of the Act. These regulations will be based on the administrative criteria previously developed by the Department of Local Government and applied by Ministers.

The Bill

8. Outline of Provisions

Schedule 1 [1] provides that a local council is a body politic of the State with perpetual succession and the legal capacity and powers of an individual. The amendment also provides that a council is not a body corporate (including a corporation).

Schedule 1 [5] makes the same amendment for county councils.

Schedule 1 [2] and [6] make consequential amendments to provisions that state the names of local and county councils.

Schedule 1 [3] makes the amendment referred to in paragraph (b) of the Overview above.

Schedule 1 [4] provides for the making of regulations with respect to the matters to be taken into account by the Minister in deciding whether to grant consent to a council forming or acquiring a controlling interest in a corporation or other entity. The amendment extends to county councils because of section 400 of the Act.

Schedule 1 [7] inserts a savings and transitional regulation-making power.

Schedule 1 [8] provides the following transitional arrangements for the amendments:

- (a) existing local and county councils will have their status converted from that of a body corporate to that of a body politic of the State but the conversion of status will not affect the continuity of an existing local or county council and will not create a new legal entity,
- (b) the amendment concerning the maximum period of appointment for temporary employees will extend to existing appointments.

Issues Considered by the Committee

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Matters that should be regarded by Parliament - Schedule 1 [4] – Matters to be taken to account by the Minister in deciding whether to grant consent to a council forming or acquiring a controlling interest in a corporation or other entity.

9. The Committee considers that ideally the criteria used for granting or refusing consent should be included in the legislation itself as is done in other cases such as Part 6 of the *Local Government Act 1993* which outlines the requirements to be met for councils seeking approval to engage in Public Private Partnerships.

10. The Committee believes that delegating the criteria to regulation does not allow for proper Parliamentary scrutiny or ensure that adequate external consultation has been completed. However, in this instance the Minister already possesses and exercises his/her administrative power in accordance with the existing internal criteria to be enacted into regulation. As such, enactment of this criteria into regulation does not impose a new evidentiary burden on councils and will at least make the process more transparent and provide more surety for councils in the future.

11. **The Committee is concerned that delegating the criteria to regulation does not allow for proper Parliamentary scrutiny or ensure that adequate external consultation has been completed. However, as in this instance only pre-existing criteria will be enacted into regulation and, as such, no new burdens will be placed on councils and the process will be more transparent and provide more surety for councils in the future the Committee considers that there is no undue trespass.**

The Committee makes no further comment on this Bill.

7. TRANSPORT ADMINISTRATION AMENDMENT (RAIL AND FERRY TRANSPORT AUTHORITIES) BILL 2008

Date Introduced:	23 October 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Transport

Purpose and Description

1. This Bill amends the *Transport Administration Act 1988*, the *Passenger Transport Act 1990* and other Acts with respect to the corporate structure of Rail Corporation New South Wales and Sydney Ferries and the provision and regulation of rail passenger services and ferry services.
2. The Bill reorganises the corporate structure of the existing rail and ferry agencies so that they become statutory authorities. The corporate names of RailCorp and Sydney Ferries Corporation will be retained. There will be a board for each authority and members will be appointed with the necessary skills and experience.
3. In line with the recommendations made by Mr Bret Walker SC in his 2007 report on the Special Commission of Inquiry into Sydney Ferries, this Bill will allow the Government to put arrangements that are similar to the current bus service contracts in place for ferry services. It creates a similar framework for contracting passenger rail services.
4. It provides for the establishment of contracts that will stipulate what is expected of the rail and ferry authorities in terms of service levels, service alterations, performance standards, regular service reviews, community consultation and complaints handling.
5. As recommended in the Walker's report, the Bill will also provide the maximum fares for contracted ferry services (whether operated by Sydney Ferries or a private sector operator) to be regulated. The Independent Pricing and Regulatory Tribunal will be the determining authority. Similar provisions govern fares for contracted passenger rail services.

Background

6. According to the Agreement in Principle speech:

We need transport agencies that can effectively run safe and reliable services that the people of New South Wales expect and, importantly, deserve. We also need our transport agencies to be ultimately accountable to the people of New South Wales through their elected representatives. The Government is introducing this legislation to change the corporate structure of RailCorp and Sydney Ferries to make that happen. Under the current model, the Government does not have sufficient control over the operations of rail or ferry services. Even a matter of urgency or public safety requires a

written direction to the board and otherwise requires following a slow and cumbersome process. This legislation will give the Government the ability to direct the management of RailCorp and Sydney Ferries in the delivery of one of our State's vital public services, to ensure that the Government can deliver on its policy directions for public transport. State-owned corporations work well in some areas. They have worked well in the utilities and ports sectors and have allowed government organisations in these industries to be commercially focused in a competitive environment in which we expect to see dividends. However, public transport services in New South Wales are heavily reliant on government funding and do not operate in a competitive market—they are essential public services not profit-making enterprises....It has become clear that public transport services cannot be effectively managed under a system in which the delivery agency is a state-owned corporation, reporting to an independent board and not the accountable Minister. Even privately operated transport service providers have contracts with Government that provide for far greater accountability than the model that currently applies to government-owned rail and ferry services.

7. The 2007 report on the Special Commission of Inquiry into Sydney Ferries by Mr Bret Walker SC highlighted the problems of the governance model that is currently used in the management of Sydney Ferries' services and is also used for RailCorp. He commented in the report that the state-owned corporation governance model limits the Government's control over the delivery of these services. The 2007 report pointed out the need for an effective contracting system to specify and regulate the provision of public transport. The Independent Pricing and Regulatory Tribunal's draft report, "Improving CityRail's accountability and incentives through stronger governance arrangements" also supports the need for an effective contracting regime.

The Bill

8. The objects of this Bill are to amend the Transport Administration Act 1988, the Passenger Transport Act 1990 and the State Owned Corporations Act 1989 as follows:
 - (a) to change Rail Corporation New South Wales (***RailCorp***) and Sydney Ferries from State owned corporations to statutory corporations having management structures and accountabilities similar to the State Transit Authority,
 - (b) to require RailCorp to enter into rail services contracts with the Director-General of the Ministry of Transport (the ***Director-General***) as to the rail services (including rail passenger services) provided by it,
 - (c) to provide for new service contract provisions for regular ferry services (including ferry services operated by Sydney Ferries), while retaining the service contract provisions for existing regular ferry services,
 - (d) to make other minor consequential amendments, including provisions of a savings and transitional nature.

The Bill also makes a consequential amendment to the *Independent Pricing and Regulatory Tribunal Act 1992*.

9. Outline of provisions

Schedule 1 Amendments relating to constitution of RailCorp including amendments to the *Transport Administration Act 1988 No 109* as set out in Schedule 1.1 and amendments to the *State Owned Corporations Act 1989 No 134* as set out in Schedule 1.2.

Schedule 1.1 *Transport Administration Act 1988 No 109*:

- To extend provisions contained in that Act that relate to transport authorities that are not State owned corporations to RailCorp.
- To insert a provision declaring RailCorp to be a NSW Government Agency which has the effect of making RailCorp a statutory body representing the Crown.
- To amend section 10 of the *Transport Administration Act 1988* to confer on RailCorp functions relating to land acquisition, engines and other plant and equipment, the making of contracts and arrangements for works and services and other matters and the appointment of agents. These functions reflect the functions conferred on the State Transit Authority and include functions that were formerly conferred on RailCorp under the *State Owned Corporations Act 1989*.
- To insert proposed section 11A into the *Transport Administration Act* to make RailCorp's power to sell, lease or otherwise dispose of land subject to Ministerial approval in certain circumstances, including any lease for a term exceeding 5 years. This reflects the restrictions currently imposed on the State Transit Authority.
- To substitute the existing management structure that is suitable for a State owned corporation with a new management structure that is suitable for a statutory corporation that is not such a corporation.
- To amend section 29 of the *Transport Administration Act* to remove the State Transit Authority's right to seek a review of Ministerial directions that may involve a significant financial loss to the Authority where the direction involves urgency or public safety and the Treasurer has been consulted. The amendment makes the provisions that will apply to RailCorp, the Authority and Sydney Ferries consistent.
- To amend section 56 of the *Transport Administration Act* to exclude RailCorp from provisions applicable to other transport authorities whose staff are employed in the Government Service.
- To enable RailCorp to fix the salary, wages and conditions of its staff, retains existing appeal rights under the *Transport Appeal Boards Act 1980* and excludes RailCorp staff from the Government Service.
- To amend section 86 of the *Transport Administration Act* to enable the Minister to direct that RailCorp, or any other Authority within the meaning of that Act, is bound by a pricing policy approved by the Minister.
- To enable the Minister to direct that RailCorp, or any other Authority within the meaning of that Act, may issue free or concession travel passes even though such travel is not fully subsidised by the Government.
- To enable the Minister for Transport to transfer, by order, members of staff of RailCorp or the Independent Transport Safety and Reliability Regulator to the Ministry of Transport.
- To enable staff transferred to the Ministry of Transport to retain existing terms and conditions of employment (subject to regulations) and to count previous service with RailCorp or the Independent Transport Safety and Reliability Regulator as service with the Ministry of Transport.

Schedule 1.2 amends Schedule 5 to the SOC Act to remove RailCorp from the list of State owned corporations under that Act.

Schedule 2 Amendments relating to rail passenger services including amendments to the *Passenger Transport Act 1990 No 39* as set out in Schedule 2.1 and amendments to the *Transport Administration Act 1988 No 109* as set out in Schedule 2.2.

Schedule 2.1 Passenger Transport Act 1990 No 39:

- To insert definitions of ***rail passenger service*** and ***rail services contract***.

- To include the provision of rail services contracts in the objects of that Act.
- To insert Division 4 (proposed sections 28K and 28L) of Part 3 into the *Passenger Transport Act*. (a) provides that rail services (rail passenger services, bus services (other than regular passenger services), rail infrastructure owner functions, the provision of access and network control services) provided by RailCorp are to be subject to terms and conditions in a contract between RailCorp and the Director-General. The contract term is to be for not more than 8 years and may be renewed from time to time (proposed section 28K), and (b) requires the rail services contract to set out performance standards (proposed section 28L).
- To amend section 48 of the *Passenger Transport Act* to exclude RailCorp from being able to seek a review of a decision by the Director-General concerning a rail services contract (this is consistent with the situation applying in relation to regular bus services contracts).
- To enable the Director-General to enter into an information sharing agreement with the WorkCover Authority about rail passenger services.
- To amend Schedule 3 to the *Passenger Transport Act* to provide that RailCorp is not required to comply with the requirements relating to rail services contracts until it enters into such a contract and provides that the provision ceases to have effect after 2 years or such later day as may be prescribed by the regulations.

Schedule 2.2 Transport Administration Act 1988 No 109:

To enable the Director-General to delegate his or her functions under the *Passenger Transport Act*.

Schedule 3 Amendments relating to constitution of Sydney Ferries including amendments to the *Transport Administration Act 1988 No 108* as set out in Schedule 3.1 and amendments to the *State Owned Corporations Act 1989 No 134* as set out in Schedule 3.2.

Schedule 3.1 Transport Administration Act 1988 No 109:

- To amend section 3 of the *Transport Administration Act* to extend provisions contained in that Act that relate to transport authorities that are not State owned corporations to Sydney Ferries.
- To insert a provision declaring Sydney Ferries to be a NSW Government Agency which has the effect of making Sydney Ferries a statutory body representing the Crown.
- To amend section 35E of the *Transport Administration Act* to confer on Sydney Ferries functions relating to land acquisition, engines and other plant and equipment, the making of contracts and arrangements for works and services and other matters and the appointment of agents. These functions reflect the functions conferred on the State Transit Authority and include functions that were formerly conferred on Sydney Ferries under the SOC Act.
- To insert proposed section 35EA into the *Transport Administration Act* to make Sydney Ferries' power to sell, lease or otherwise dispose of land subject to Ministerial approval in certain circumstances, including any lease for a term exceeding 5 years. This reflects the restrictions currently imposed on the State Transit Authority.
- To substitute the existing management structure that is suitable for a State owned corporation with a new management structure that is suitable for a statutory corporation that is not such a corporation.
- To exclude Sydney Ferries from provisions applicable to transport authorities whose staff are employed in the Government Service.

- To enable Sydney Ferries to fix the salary, wages and conditions of its staff, retains existing appeal rights under the *Transport Appeal Boards Act 1980* and excludes Sydney Ferries staff from the Government Service.
- To apply all of the miscellaneous provisions in Division 4 of Part 9 of that Act to Sydney Ferries (currently the Division only partly applies). The effect of this is to apply additional provisions relating to seals, contracts and a provision that validates actions done by a transport authority in contravention of a Ministerial direction.

Schedule 3.2 State Owned Corporations Act 1989 No 134:

To amend Schedule 5 to the SOC Act to remove Sydney Ferries from the list of State owned corporations under that Act.

Schedule 4 Amendments relating to ferry passenger services including amendments to the *Passenger Transport Act 1990 No 39* as set out in Schedule 4.1 and amendments to the *Independent Pricing and Regulatory Tribunal Act 1992 No 39* as set out in Schedule 4.2.

Schedule 4.1 Passenger Transport Act 1990 No 39:

- To insert a definition of **ferry service contract**.
- To insert proposed Division 1A (proposed sections 16AA–16AE) of Part 3 of the Passenger Transport Act. The proposed Division replaces the existing service contract regime for regular ferry services. The proposed Division:
 - (a) provides additional provisions for contracts relating to regular passenger services provided by ferry (**ferry service contracts**), including that the contract term is to be for not more than 8 years and may be renewed from time to time (proposed sections 16AB and 16AC), and
 - (b) extends the provision precluding contracts that create competing services to preclude such contracts under proposed Division 1A, if they affect existing contracts (proposed section 16AB), and (c) requires a ferry service contract to set out performance standards (proposed section 16AD), and (d) enables the contract to provide (as an essential term) that ferry fares are not to exceed the maximum fare determined from time to time by the Independent Pricing and Regulatory Tribunal and provides for such determinations. (proposed section 16AE). If such a provision is included in the contract, the provisions enabling Sydney Ferries to make orders about fares under the *Transport Administration Act* do not apply.
- To substitute section 16A of the *Passenger Transport Act* to prohibit new contracts from being entered into under the current service contract provisions relating to ferries. Contracts may be renewed under those provisions.
- To amend section 48 of the *Passenger Transport Act* to exclude ferry operators from being able to seek a review of a decision by the Director-General concerning a ferry service contract (this is consistent with the situation applying in relation to regular bus service contracts).
- To amend Schedule 3 to the *Passenger Transport Act* to provide that Sydney Ferries is not required to comply with the new requirements relating to ferry service contracts until it enters into such a contract and provides that the provision ceases to have effect after 2 years or such later day as may be prescribed by the regulations.

Schedule 4.2 Independent Pricing and Regulatory Tribunal Act 1992 No 39:

Schedule 4.2 makes an amendment to Schedule 1 to the *Independent Pricing and Regulatory Tribunal Act 1992* consequent on the amendment made by **Schedule 4.1 [2]**.

Issues Considered by the Committee

Non-reviewable decisions [s 8A(1)(b)(iii) LRA]

Issue: Excludes review – Schedule 2.1 [5] and Schedule 4.1 [5] to amend Section 48 Review of decisions concerning service contracts:

10. These amend Section 48 of the *Passenger Transport Act* to exclude RailCorp and to exclude ferry operators from being able to seek a review of a decision by the Director-General concerning a rail services contract or a ferry service contract respectively. This exclusion of review is already applied in relation to regular bus services contract.
11. The current Section 48 (1) reads: The holder of a service contract who is aggrieved by any decision of the Director-General: (a) with respect to the variation, suspension, cancellation, renewal or transfer of the contract, or (b) that affects the holder's exclusive rights under the contract, may request the Director-General to cause the decision to be reviewed under this Division.
12. The Committee notes that in some instances policy considerations may determine that a review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review, unless there is a strong public interest in doing so.

13. **The Committee notes that while the proposed Schedule 2.1 [5] and Schedule 4.1 [5] to amend Section 48 of the *Passenger Transport Act 1990* are very broad, and it could be said that rail services contracts and ferry service contracts appear to be unduly dependent on non-reviewable decisions, it is also noted that similar arrangements exist in relation to bus services contracts.**

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

14. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

15. **Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

PART TWO – REGULATIONS

SECTION A: REGULATIONS FOR THE SPECIAL ATTENTION OF PARLIAMENT UNDER S 9(1)(B) OF THE *LEGISLATION REVIEW ACT 1987*

Outline of the Regulation/Issues

Companion Animals Regulation 2008

Recommendation

That the Committee:

- 1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to review and report to Parliament on the Regulation; and
- 2) write to the Minister for Local Government to draw her attention to the need to assess the administrative costs to Local Councils and to the Department of Local Government of the regulatory proposal in accordance with the requirements of Schedule 2 (Provisions applying to regulatory impact statements) of the *Subordinate Legislation Act 1989*.

Grounds for comment

Personal rights/liberties	
Business impact	
Objects/spirit of Act	
Alternatives/effectiveness	Alternatives to the regulatory proposal were examined in the Regulatory Impact Statement (RIS)
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	<p>This regulation is a principal statutory rule, which means that an RIS was required under the <i>Subordinate Legislation Act 1989</i> prior to the making of the rule.</p> <p>The RIS concluded that in comparison to the base case (the do-nothing option) the benefits of the Regulation exceed the costs. Alternative options were considered but the regulation was the preferred option.</p> <p>16. The RIS (which was prepared for the Department of Local Government) states that the payment of fees for registration of companion animals provides funds to councils and the Department for operations under the Act, and it reinforces the concept</p>

	<p>that ownership of animals is associated with responsibility.</p> <p>The RIS (at page 17) states that although it is good practice to set regulatory fees at a level that reflects the cost of administering the legislation that it has not been possible to obtain estimates of the resource costs incurred by Councils in meeting their responsibilities under the Act, nor of the costs to the Department in its broader role.</p> <p>The identification of these costs is required by Schedule 2 (Provisions applying to Regulatory Impact Statements) of the <i>Subordinate Legislation Act</i>. The absence of data on these costs weakens the reliability of the conclusion in the RIS that the benefits of the proposed regulation exceed its costs. These costs should be assessed by the Department to support future reviews of regulatory fees.</p> <p>A central requirement of the Regulation is that animals be identified by means of a microchip. The major cost to the animal owner is the identification process. The RIS estimates that the resource cost is \$30 per animal. This occurs once in the animal's life. Given the large number of stray animals each year and the high proportion that are reunited with their owners by means of the microchip the cost is considered to be outweighed by the benefits.</p> <p>The Act requires dangerous dogs to be kept in enclosures when on their owner's property. The Regulation prescribes the requirements for these enclosures. The cost of an enclosure is estimated to be approximately \$2000. This represents an annual cost of \$900,000 in aggregate for NSW. The RIS states that there are a large number of dog attacks each year and research shows that a major factor in these attacks is the escape of a dog from its home.</p> <p>The RIS concludes that, since ownership of a dangerous dog is not encouraged by society, the cost to the owner is not excessive given the need to keep the risk to members of the public and to their animals at an acceptable</p>
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	level. 17.
Other	
Persons contacted	

Explanatory Note

The object of this Regulation is to remake the Companion Animals Regulation 1999, which is repealed on 1 September 2008 by section 10 (2) of the Subordinate Legislation Act 1989.

This Regulation provides for the following matters:

- (a) permanent identification of companion animals,
- (b) the registration of companion animals,
- (c) the regulation of dangerous or restricted dogs,
- (d) various miscellaneous matters such as the prescription of penalty notice offences.

This Regulation is made under the Companion Animals Act 1998, in particular the various provisions referred to in this Regulation and section 96 (the general regulation-making power).

Comment

1. The RIS states that the proposed Regulation is largely a continuation of the existing regulation with some relatively minor amendments to achieve clearer wording and the updating of references. The object of the proposed Regulation is to assist the Act in achieving its aims of supporting the enjoyment of companion animals by owners while protecting the safety and amenity of members of the public, through provisions that facilitate the operation of the Act in a well-designed manner.
2. The Committee was provided with a schedule summarising the issues raised in the 25 public submissions and the response of the Department of Local Government to those submissions. The submissions produced only minor changes to the proposed Regulation. Many of these submissions related to matters affecting the Act rather than the Regulation.

Appendix 1: Index of Bills Reported on in 2008

	Digest Number
Administrative Decisions Tribunal Amendment Bill 2008	11
Adoption Amendment Bill 2008	11
Appropriation Bill 2008	8
Appropriation (Budget Variations) Bill 2008	6
Appropriation (Parliament) Bill 2008	8
Appropriation (Special Offices) Bill 2008	8
Auditor-General (Supplementary Powers) Bill 2008	9
Australian Jockey Club Bill 2008	7
Bible Society NSW (Corporate Conversion) Bill 2008	12
Board of Adult and Community Education Repeal Bill 2008	5
Building Professionals Amendment Bill 2008	7
Callan Park Trust Bill 2008*	11
Child Protection (Offenders Registration) Amendment Bill 2008	10
Children and Young Persons (Care and Protection) Amendment (Body Piercing and Tattooing) Bill 2008	7
Children (Criminal Proceedings) Amendment Bill 2008	8
Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Bill 2008	12
Children (Detention Centres) Amendment Bill 2008	8
Civil Liability Legislation Amendment Bill 2008	12
Classification (Publications, Films and Computer Games) Enforcement Amendment (Advertising) Bill 2008	11
Clean Coal Administration Bill 2008	5
Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2008	8
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	5
Contaminated Land Management Amendment Bill 2008	10

	Digest Number
Conveyancing Amendment (Mortgages) Bill 2007*	1
Courts and Crimes Legislation Amendment Bill 2008	8
Crimes Amendment (Cognitive Impairment – Sexual Offences) Bill 2008	10
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Crimes Amendment (Rock Throwing) Bill 2008	6
Crimes (Administration of Sentences) Legislation Amendment Bill 2008	5
Crimes (Forensic Procedures) Amendment Bill 2008	9
Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008	9
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008	10
Criminal Case Conferencing Trial Bill 2008	4
Dangerous Goods (Road and Rail Transport) Bill 2008	10
Dividing Fences and Other Legislation Amendment Bill 2008	5
Education Amendment Bill 2008	4
Election Funding Amendment (Political Donations and Expenditure) Bill 2008	9
Electricity Industry Restructuring Bill 2008	8
Electricity Industry Restructuring Bill 2008 (No 2)	10
Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008	10
Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*	2
Environmental Planning and Assessment Amendment Bill 2008	7
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	4
Exotic Diseases of Animals Amendment Bill 2008	8
Fair Trading Amendment (Mandatory Funeral Industry Code) Bill 2008*	5
Filming Related Legislation Amendment Bill 2008	8
Fines Amendment Bill 2008	4

	Digest Number
Firearms Amendment Bill 2008*	8
First State Superannuation Amendment Bill 2008	7
Fisheries Management and Planning Legislation Amendment (Shark Meshing) Bill 2008	12
Food Amendment (Public Information on Offences) Bill 2008	2
Food Amendment (Trans Fatty Acids Eradication) Bill 2008*	12
Gaming Machines Amendment (Temporary Freeze) Bill 2008	2
Gas Supply Amendment Bill 2008	4
Growth Centres (Development Corporations) Amendment Bill 2008	4
Health Services Amendment (Mandatory Background Checks of Medical Practitioners) Bill 2008*	9
Hemp Industry Bill 2008	6
Higher Education Amendment Bill 2008	5
Home Building Amendment Bill 2008	10
Housing Amendment (Tenant Fraud) Bill 2008	4
Human Tissue Amendment (Children in Care of State) Bill 2008	7
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008*	8
Jury Amendment Bill 2008	7
Justices of the Peace Amendment Bill 2008	5
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property Bill) 2008	10
Local Government Amendment (Election Date) Bill 2008	2
Local Government Amendment (Elections) Bill 2008	4
Local Government Amendment (Legal Status) Bill 2008	12
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008	9
Marine Parks Amendment Bill 2007	1
Marine Safety Amendment Bill 2008	8

	Digest Number
Medical Practice Amendment Bill 2008	6
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	10
Mining Amendment Bill 2008	3
Mining Amendment (Improvements on Land) Bill 2008	11
Miscellaneous Acts Amendment Bill 2008	6
National Gas (New South Wales) Bill 2008	5
National Parks and Wildlife (Leacock Regional Park) Bill 2008	3
Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008*	3
Peak Oil Response Plan Bill 2008*	6
Police Integrity Commission Amendment (Crime Commission) Bill 2008	9
Port Macquarie-Hastings Council Election Bill 2008*	5
Ports and Maritime Administration Amendment (Port Competition and Co-ordination) Bill 2008	11
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008*	8
Public Health (Tobacco) Bill 2008	11
Public Sector Employment Management Amendment Bill 2008	4
Rail Safety Bill 2008	11
Retirement Villages Amendment Bill 2008	10
Road Transport (Driver Licensing) Amendment (Demerit Points System) Bill 2008	11
Road Transport Legislation Amendment Bill 2008	9
Road Transport Legislation Amendment (Car Hoons) Bill 2008	2
Shop Trading Bill 2008	8
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	3
Snowy Mountains Cloud Seeding Trial Amendment (Extension) Bill 2008	6
Sporting Venues Authorities Bill 2008	6

	Digest Number
State Arms, Symbols and Emblems Amendment (Black Opal) Bill 2008	5
State Emergency and Rescue Management Amendment (Botany Emergency Works) Bill 2008	5
State Revenue Legislation Amendment Bill 2008	4
State Revenue and Other Legislation Amendment (Budget) Bill 2008	8
Statute Law (Miscellaneous Provisions) Bill 2008	8
Strata Management Legislation Amendment Bill 2008	7
Succession Amendment (Family Provision) Bill 2008	10
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	6
Superannuation Administration Amendment Bill 2008	4
TAFE (Freezing of Fees) Bill 2007*	1
Thoroughbred Racing Amendment Bill 2008	9
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	9
Totalizator Amendment Bill 2008	2
Tow Truck Industry Amendment Bill 2008	10
Transport Administration Amendment (Rail and Ferry Transport Authorities) Bill 2008	12
Vexatious Proceedings Bill 2008	10
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	5
Water (Commonwealth Powers) Bill 2008	11
Water Management Amendment Bill 2008	11
Western and Crown Lands Amendment (Special Purpose Leases) Bill 2008	8
Workers Compensation Amendment Bill 2008	5
Workers Compensation Legislation Amendment (Financial Provisions) Bill 2008	8

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1	
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08			10
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08			9
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning				8
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2	
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1	
Water Management Amendment Bill 2008	Minister for Water	28/10/08			12

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Administrative Decisions Tribunal Amendment Bill 2008				N, R	
Adoption Amendment Bill 2008	N, R	N, R		N	
Bible Society NSW (Corporate Conversion) Bill 2008	N				
Board of Adult and Community Education Repeal Bill 2008	N, R				
Building Professionals Amendment Bill 2008	N, R			N, R	
Callan Park Trust Bill 2008	N				
Child Protection (Offenders Registration) Amendment Bill 2008	N				
Children (Criminal Proceedings) Amendment Bill 2008	N			N, R	
Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Bill 2008	N, R			N, R	
Civil Liability Legislation Amendment Bill 2008	N, R, C			N, R	
Classification (Publications, Films and Computer Games) Enforcement Amendment (Advertising) Bill 2008				N	
Coal and Oil Shale Workers (Superannuation) Amendment Bill 2008	N				
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	N, R			N	
Contaminated Land Management Amendment Bill 2008	N, R			N, R	
Courts and Crimes Legislation Amendment Bill 2008	N				
Crimes Amendment (Cognitive Impairment – Sexual Offences) Bill 2008				R	
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Crimes Amendment (Rock Throwing) Bill 2008	N, R			N, R	
Crimes (Administration of Sentences) Legislation Amendment Bill 2008			N		
Crimes (Forensic Procedures) Amendment Bill 2008	N, C				
Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008	N, R		N, R		

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008				R	
Criminal Case Conferencing Trial Bill 2008	N, R				
Dangerous Goods (Road and Rail Transport) Bill 2008	N			R	
Dividing Fences and Other Legislation Amendment Bill 2008				N, R	
Education Amendment Bill 2008	N, R				
Election Funding Amendment (Political Donations and Expenditure) Bill 2008				N, R	
Electricity Industry Restructuring Bill 2008	N, R	N, R		N, R	
Electricity Industry Restructuring Bill 2008 (No 2)	N, R	N, R		R	
Environmental Planning and Assessment Amendment Bill 2008	N, R	N, R	N, R	N, R	N, R
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	N, R	N, R			
Filming Related Legislation Amendment Bill 2008				N, R	
Fisheries Management and Planning Legislation Amendment (Shark Meshing) Bill 2008				N, R	
Food Amendment (Public Information on Offences) Bill 2008				R	
Food Amendment (Trans Fatty Acids Eradication) Bill 2008*	N				
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Hemp Industry Bill 2008	N, R		N, R	N, R	
Home Building Amendment Bill 2008	N		N, R		
Housing Amendment (Tenant Fraud) Bill 2008	N, R	R			
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008	N				
Jury Amendment Bill 2008	N				
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Bill 2008				R	
Local Government Amendment (Legal Status) Bill 2008				N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008				N, R	
Marine Safety Amendment Bill 2008				N, R	
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	N			R	
Medical Practice Amendment Bill 2008	N, R			N, R	
Mining Amendment Bill 2008	N				
Mining Amendment (Improvements on Land) Bill 2008	N, R				
Miscellaneous Act Amendment (Same Sex Relationships) Bill 2008	N			N, R	
National Gas (New South Wales) Bill 2008					N
Police Integrity Commission Amendment (Crime Commission) Bill 2008	N		N		
Ports and Maritime Administration Amendment (Port Competition and Co-ordination) Bill 2008				N, R	
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008		N, R		N, R	
Public Health (Tobacco) Bill 2008	N			N, R	
Public Sector Employment and Management Amendment Bill 2008	R				
Rail Safety Bill 2008	N			N, R	
Retirement Villages Amendment Bill 2008	N			R	
Road Transport Legislation Amendment Bill 2008	N			N, R	
Road Transport (Driver Licensing) Amendment (Demerit Points System) Bill 2008				N, R	
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				
Sporting Venues Authorities Bill 2008	N				
State Emergency and Rescue Management Amendment (Botany Emergency Works Bill 2008	N				
State Revenue Legislation Amendment Bill 2008	N, R				
Statute Law (Miscellaneous Provisions) Bill 2008	N			N, R	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Strata Management Legislation Amendment Bill 2008				N, R	
Succession Amendment (Family Provision) Bill 2008				R	
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	N, R			N, R	
Thoroughbred Racing Amendment Bill 2008			N, R	N, R	
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	N				
Tow Truck Industry Amendment Bill 2008	N			R	
Transport Administration Amendment (Rail and Ferry Transport Authorities) Bill 2008			N, R	N, R	
Vexatious Proceedings Bill 2008	N			R	
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	N, R				
Water (Commonwealth Powers) Bill 2008	N				
Water Management Amendment Bill 2008	N, R			N, R	
Western Crown Lands Amendment (Special Purpose Leases) Bill 2008		N, R			
Workers Compensation Amendment Bill 2008	N, R				

Key

- R Issue referred to Parliament
- C Correspondence with Minister/Member
- N Issue Note

Appendix 4: Index of correspondence on regulations reported on in 2008

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08		10
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10