

PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 9 of 2010

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\* 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 iii).

#### 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 iii).

#### 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 2010

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

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 2010

This table specifies the action the Committee has taken with respect to Bills that received comment in 2010 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

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. Appropriation Bill 2010; Appropriation (Parliament) Bill 2010; Appropriation (Special Offices) Bill 2010; State Revenue Legislation Amendment Bill 2010

9. The Committee has not identified any issues under s8A(1)(b) of the *Legislation Review Act 1987*

#### 2. Coastal Protection and Other Legislation Amendment Bill 2010

Issue: Procedural Fairness – Proposed Section 55L (6) – Schedule 1 [22] – Amendment of *Coastal Protection Act 1979* – Breach of coastal zone management plan - restraint:

18. The Committee notes that under the current section 55L (1), the Minister or a council may bring such proceedings in the Land and Environment Court for an order to remedy or restrain a breach of a coastal zone management plan.
19. The Committee will always be concerned about legislation that authorises administrative decision-making without providing for the right of those affected to bring proceedings before a court, such as to seek an order to remedy or restrain a breach of a coastal zone management plan.
20. Therefore, the Committee has concerns with regard to the proposed section 55L (6) of Schedule 1, and refers this to Parliament for consideration as to whether it may be an undue trespass on the right to procedural fairness by removing the current right existing under section 55L (1) to bring proceedings in the Land and Environment Court to seek an order to remedy or restrain a breach of a coastal zone management plan, which has been made by the State or a NSW Government agency.

Issue: Ill And Wide Defined Powers – Proposed Section 55ZG (1) – Resolution of disputes under Part 4C and this Part (Part D) – Schedule 1 [26]:

23. The Committee is concerned that if a dispute arises between a council and a Coastal Authority that is a Minister in relation to any function under the proposed Part 4C or Part 4D, the Minister may hold broad powers to direct the council as to the exercise of the function under these Parts. The Committee refers the proposed section 55ZG (1) of the new Part 4D of Schedule 1 [26] to Parliament for consideration as to whether it may make rights and obligations unduly dependent upon insufficiently defined administrative powers in the context of a dispute arising between a council and a Coastal Authority that is a Minister.



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

26. The Bill also provides for guidelines to be published by the Minister in relation to the preparation of draft coastal zone management plans. Therefore, this will likely involve appropriate administrative and transitional arrangements to be made. The Committee is of the view that there may be good reasons why such discretion for commencement by proclamation is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.

### **3. Courts Legislation Amendment Bill 2010**

**Issue: Denial Of Compensation – Proposed Section 26X (1) of Part 2A, Division 7 – Schedule 1.6 *Civil Liability Act 2002*, of Schedule 1 [3] of the Bill – Limitation on exemplary, punitive and aggravated damages against protected defendant in cases of vicarious liability – Amendment of *Civil Liability Act 2002*:**

27. The Committee notes that the proposed section 26X (1) will broaden the scope of where the court can no longer award exemplary or punitive damages or damages in the nature of aggravated damages in an action against a protected defendant who has been found vicariously liable for personal injury damages where the act or omission that caused the injury or death was a tort (not just negligence).

28. The Committee is of the view that the right to seek damages or compensation, including that of exemplary or punitive damages and aggravated damages, including in intentional torts such as assault, false imprisonment and defamation, and not just negligence, is an important personal right and that this right should not be removed or restricted by legislation unless there is a compelling public interest in doing so.

29. The Committee refers this amendment of the *Civil Liability Act 2002* by the insertion of the new section 26X (1) of the proposed Part 2A, Division 7, to Parliament for consideration as to whether removing the right to exemplary or punitive damages or aggravated damages in tort (not just negligence), where the protected defendant is vicariously liable, may trespass unduly on personal rights and liberties.

**Issue: Retrospectivity – Schedule 1 [3] – Schedule 2 - Savings and transitional provisions - Amendment of *Children (Criminal Proceedings) Act 1987* – Application of amendments to section 41:**

33. The Committee will always be concerned to identify the retrospective effects of legislation that may have an adverse impact on a person, particularly, on a young person or child. The Committee observes the right established by Article 15 of the *International Covenant on Civil and Political Rights* that a person not be subject to a heavier penalty than what was applicable at the time of the commission of the offence.

34. Therefore, the Committee is concerned that the rights and liberties of such young persons may be unduly trespassed. The Committee refers schedule 1 [3] on the savings and transitional provisions in relation to the retrospective application of amendments to section 41, through the proposed sections 41(1A) and (1B) of the *Children (Criminal Proceedings) Act 1987*, to Parliament for consideration.

**Issue: Retrospectivity – Schedule 1 [4] – Savings and transitional provisions - Amendment of *Civil Liability Act 2002* – Application of section 26X - schedule 1.6 *Civil Liability Act 2002* of Bill’s Schedule 1 [3] – Provision consequent on enactment of *Courts Legislation Amendment Act 2010*:**

36. Item [3] of the proposed amendments to the Act provides that a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages in an action against a protected defendant for the award of personal injury damages in respect of the death or injury of an offender in custody where the act or omission that caused the injury or death was the tort of a person for which the protected defendant was vicariously liable.
37. However, the Committee notes that Item [4] of the proposed amendments to the Act provides for the amendment to be made by item [3] to extend to certain proceedings commenced before the commencement of the amendment.
38. The Committee considers that the retrospective application of the amendments to the *Civil Liability Act 2002* through the insertion of section 26X and schedule 1 [4] with the provision consequent on enactment of this Bill, may adversely impact and unduly trespass on personal rights to seek exemplary or punitive damages or aggravated damages in tort where the protected defendant has been found to be vicariously liable. Accordingly, the Committee refers this to Parliament.

#### **4. Crimes (Sentencing Legislation) Amendment (Intensive Correction) Bill 2010**

**Issue: Privacy and Personal Integrity**

17. The Committee notes the mandatory conditions that offenders under an intensive correction order must adhere to and identifies that some of these conditions appear to adversely interfere with an offender’s privacy and personal integrity. Although the Committee recognises that, in totality, the intensive correction orders scheme is less affronting to personal rights and liberties than periodic detention, it is nonetheless incumbent on the Committee to identify these matters.
18. In any case, the Committee is concerned that the Bill confers onto the supervisors of offenders subject to intensive correction orders wide latitude in their management of an offender, without providing for appropriate guidelines to inform them of the suitability of their conduct. The Committee considers that, in the absence of such guidelines as a safeguard, the risk exists that a supervisor’s authority could be applied inappropriately. The Committee refers this matter to Parliament for its consideration.

**Issue: Denial of Review Rights**

22. The Committee recognises that this provision enables a fine defaulter, who would otherwise be committed to a period of imprisonment, the opportunity to convert their sentences into intensive correction orders. Despite this, the Committee is concerned by the finality of the decision by the Commissioner of Corrective Services and consequent lack of review rights. The Committee refers this matter to Parliament for its consideration.

**Issue: Closed Justice**

26. The Committee is always concerned about provisions that enable courts to conduct proceedings in the absence of the parties concerned and, in the absence of any compelling reasons otherwise, prefers that parties are afforded the opportunity to be present at proceedings in the interests of the transparency justice.

**Issue: Proclamation by Consent**

29. The Committee recognises the significant administrative arrangements that need to take place before this Bill can commence operation and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

**5. Fair Trading Amendment (Unfair Contract Terms) Bill 2010****Issue: Commencement by Proclamation**

13. The Committee recognises the difficulties in determining a commencement date for uniform legislation, as it is reliant on the actions of other jurisdictions. However, the Committee is aware that it is intended that the Bill commence operation on 1 July 2010 and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

**6. Industrial Relations Amendment (Public Sector Appeals) Bill 2010**

7. The Committee has not identified any issues under s8A(1)(b) of the *Legislation Review Act 1987*

**7. Macedonian Orthodox Church Property trust Bill 2010\***

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

21. Therefore, this will likely involve appropriate administrative and transitional arrangements to be made. The Committee is of the view that there may be good reasons why such discretion for commencement by proclamation is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.

## **8. Police Legislation Amendment (Recognised Law Enforcement Officers) Bill 2010**

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

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| <p><b>16. Therefore, this will likely involve appropriate administrative and transitional arrangements to be made. The Committee is of the view that there may be good reasons why such discretion for commencement by proclamation is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.</b></p> |
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## **9. Statue Law (Miscellaneous Provisions) Bill 2010**

**Issue: Retrospectivity**

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| <p><b>7. The Committee considers that, as no person is detrimentally affected by the retrospective operation of this amendment, this provision does not trespass on personal rights or liberties.</b></p> |
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## **10. Superannuation Legislation Amendment Bill 2010**

**Issue: Commencement by Proclamation**

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| <p><b>8. The Committee is generally concerned about commencement by proclamation. However, the Committee accepts the advice from the department that the commencement of the Act is contingent upon the drafting of the accompanying regulations.</b></p> |
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## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. APPROPRIATION BILL 2010; APPROPRIATION (PARLIAMENT) BILL 2010; APPROPRIATION (SPECIAL OFFICES) BILL 2010; STATE REVENUE LEGISLATION AMENDMENT BILL 2010

Date Introduced:	8 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Eric Roozendaal MLC
Portfolio:	Treasurer

## Purpose and Description

### Appropriation Bill 2010

1. This Bill seeks to appropriate various sums of money required for the recurrent services and capital works and services of the Government during the 2010 –2011 financial year.
2. The Bill relates to appropriations from the Consolidated Fund – the principal account of the Government for General Government transactions. The Consolidated Fund could be considered as the ‘pubic purse’ and largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.
3. The Bill for the 2010 – 2011 year contains an additional appropriation, which allocates revenue raised in connection with changes to gaming machine taxes to the Minister for Health for spending on health related services.
4. This Bill is cognate with the Appropriation (Parliament) Bill 2010, the Appropriation (Special Offices) Bill 2010 and the State Revenue Legislation Amendment Bill 2010, which have all been outlined below.

### Appropriation (Parliament) Bill 2010

5. The object of this Bill is to appropriate out of the Consolidated Fund sums for the recurrent services and capital works and services of the Legislature for the year 2010 – 2011.

## Appropriation (Special Offices) Bill 2010

6. The object of this Bill is to appropriate out of the Consolidated Fund sums for the recurrent services and capital works and services for the year 2010 – 2011 of the Independent Commission Against Corruption, the Ombudsman's Office, the New South Wales Electoral Commission and the Office of the Director of Public Prosecutions.

## State Revenue Legislation Amendment Bill 2010

7. This Bill makes miscellaneous amendments to State revenue and other legislation in relation to the Budget for the year 2010 – 2011.
8. The objects of the Bill are as follows:
  - (a) to amend the *Duties Act 1997* to extend the NSW Housing Construction Acceleration Plan, introduce a new duty concession scheme for new housing and introduce a number of new duty concessions and exemptions, as well as limiting others;
  - (b) to amend the *Gaming Machine Tax Act 2001* to change gaming machine tax rates for hoteliers from 1 July 2010 onwards;
  - (c) to amend the *Health Insurance Levies Act 1982* to update the list of authorised agents under that Act;
  - (d) to amend the *Insurance Protection Tax Act 2001* to abolish the tax under that Act from 1 July 2011;
  - (e) to amend the *Land Tax Management Act 1956* to enable further land tax reductions in certain circumstances, make further provision with respect to the classification of trusts as special trusts for land tax purposes and to enable a special disability trust to be treated as a concessional trust for land tax purposes;
  - (f) to amend the *Motor Vehicles Taxation Act 1988* to update the amounts of motor vehicle tax in line with CPI increases;
  - (g) to amend the *Payroll Tax Act 2008* to reduce rates of payroll tax, exempt wages paid or payable to an employee in respect of paternity leave from payroll tax and make further provision for rebates for apprentice / trainee wages;
  - (h) to amend the *Taxation Administration Act 1996* to clarify the assessment process for taxpayers who are jointly and severally liable for tax; and
  - (i) to make minor amendments to the *Unclaimed Money Act 1995*.

## Issues Considered by the Committee

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| <p><b>9. The Committee has not identified any issues under s8A(1)(b) of the <i>Legislation Review Act 1987</i></b></p> |
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***The Committee makes no further comment on this Bill.***

## 2. COASTAL PROTECTION AND OTHER LEGISLATION AMENDMENT BILL 2010

Date Introduced:	11 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Frank Sartor MP
Portfolio:	Climate Change and the Environment

### Purpose and Description

1. This Bill amends the *Coastal Protection Act 1979* and other legislation to deal with coastal erosion and projected sea level rise; and for other purposes.
2. It amends the *Coastal Protection Act* to allow landowners to place large sandbags or sand in specific and limited circumstances as emergency coastal protection works. Before these emergency works, landowners will need to obtain a certificate from an authorised officer of the council or the Department of Environment, Climate Change and Water, in order to ensure that emergency works comply with gazetted requirements, which will describe the localities where works can be placed and acceptable construction techniques.
3. A landowner will be able to place the emergency works for a period of up to six months, unless a development application is lodged for longer-term works, in which case the works can remain until the application is determined.
4. An authorised officer will also be able to issue an order to remove the works if they are causing erosion of neighbouring land, unreasonably limiting beach access, or pose a threat to public safety.
5. The Bill's amendments aim to improve order powers relating to illegal works on beaches, including new stop-work orders, increased penalties and improved compliance provisions.
6. This Bill will also establish a New South Wales coastal panel to provide the Minister with expert advice and to act as a consent authority for some long-term coastal protection works permissible under proposed amendments to the Infrastructure State Environmental Planning Policy. It will consist of experts nominated by State agencies and local government, with the chair appointed jointly by the Minister and the Local Government and Shires Associations of New South Wales.
7. Provisions require that consent may be provided only if erosion, beach access and ongoing maintenance of works are satisfactorily addressed. This Bill will facilitate only those works that protect property and beaches.
8. It also amends the *Local Government Act* to allow councils to levy a coastal protection service charge on landowners who have lawfully constructed long-term works such as seawalls. This aims to provide for maintenance of the works and mitigate any erosion impacts through activities such as the replacement of eroded beach sand.



## Background

9. According to the Agreement in Principle speech:

New South Wales coastal communities and local councils are facing difficult coastal erosion issues. Approximately 40 houses have been lost due to coastal erosion over recent decades. Some 200 houses at 15 erosion hotspots are currently exposed in the event of a significant coastal storm, with this number expected to increase with projected sea level rise. New South Wales has an established framework for managing coastal erosion risks under the Coastal Protection Act. This sees local councils, with Government support, prepare coastal zone management plans which inform land-use planning, development controls and coastal activities.

10. However, the *Coastal Protection Act* has not been reviewed for many years. Councils have also raised concerns about the adequacy of the exemptions from liability for coastal management under the *Local Government Act*.

11. To improve coastal management, a coastal erosion reform package was announced last October. The Agreement in Principle speech explained that:

The package improves consideration of coastal erosion in new development areas to avoid intensification of land-use in areas at risk from erosion. It also increases the management options available for councils and landowners to respond to erosion risks to established buildings and infrastructure. The Government's approach is to provide the tools needed to achieve appropriate balance between these two important goals. The overall package of reforms includes legislative amendments, new guidelines and additional support for councils to re-energise their planning processes. In relation to existing buildings, the reform package aims to achieve a reasonable balance between the concerns of beachfront landowners threatened by coastal erosion and the community's use and enjoyment of beaches.

12. The Agreement in Principle speech also outlined that:

A draft of the ministerial requirements for emergency works will be available for public comment on the department's website after this Bill has been passed by Parliament...Amendments to the Infrastructure State Environmental Planning Policy will be progressed following the passage of this Bill to complement its provisions, which will allow landowners to apply for development consent to construct long-term coastal protection works that will protect existing development from coastal erosion. This is necessary because some local environmental plans prohibit these works...The Bill is based on a philosophy of transparency of cost and beneficiary contribution. This will ensure that any approved works are properly maintained and impacts mitigated for the life of the works to protect against transferring erosion problems with benefiting landowners bearing the cost. This charge will be outside of ratepegging and will apply only to landowners who have voluntarily contributed to the cost of the works. It will also be possible for councils to participate with private landowners to share the costs and responsibilities for constructing and maintaining works. Again, this would apply only where each participating landowner agreed to do so...The Local Government Act amendments also improve the statutory exemptions for liability for councils and the State undertaking coastal management, based on advice from the Crown Solicitor. This will enable councils and agencies that properly fulfil their responsibilities to avoid the high costs and delay of unreasonable litigation.

## The Bill

13. The object of this Bill is to make amendments to the *Coastal Protection Act 1979* (the **Principal Act**) and other legislation to deal with coastal erosion and projected sea level rise, including amendments relating to the following:

- (a) the improvement of the operation and enforcement of the Principal Act,
- (b) enabling landowners to place certain emergency coastal protection works (such as sandbags) on beaches and sand dunes to mitigate erosion in specified circumstances without obtaining development consent or other specified permissions,
- (c) enabling local councils to make and levy an annual charge for the provision of coastal protection services (such as services to maintain coastal protection works or to manage the impacts of such works) on rateable land that benefits from such services.

### 14. 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.

#### **Schedule 1 Amendment of *Coastal Protection Act 1979* No 13:**

**Schedule 1 [1]** amends section 3 of the Principal Act to provide for further objects of that Act, being to encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise and to promote beach amenity.

**Schedule 1 [2]** amends section 4 of the Principal Act to insert certain definitions for the purposes of that Act.

**Schedule 1 [3]** makes a law revision amendment to take account of a change in a departmental name.

**Schedule 1 [4]** inserts proposed section 4C into the Principal Act to provide which designated authorities may exercise certain powers in relation to land under the Principal Act (see proposed Part 4D in **Schedule 1 [26]**).

**Schedule 1 [5]** inserts proposed Parts 2 (proposed sections 6–11) and 2A (proposed sections 12 and 13) into the Principal Act. Proposed Part 2 deals with matters relating to the administration of that Act. More specifically, the proposed Part:

- (a) provides for the identification of Coastal Authorities (being the Minister administering the Principal Act (the **Minister**), the Minister administering the *Crown Lands Act 1989* and certain roads authorities, coastal local councils and other public authorities with land or responsibilities relating to coastal areas) who may exercise certain powers under the Principal Act (proposed section 6), and
- (b) provides for the appointment and functions of authorised officers by Coastal Authorities to enforce the Principal Act (proposed section 7), and
- (c) deals with identification cards for authorised officers and the delegation of functions by Coastal Authorities (proposed sections 8 and 9), and
- (d) provides that the investigative functions contained in Chapter 7 of the *Protection of the Environment Operations Act 1997* are conferred on authorised

## Coastal Protection and Other Legislation Amendment Bill 2010

officers for the purposes of exercising functions under the Principal Act (proposed section 10), and  
(e) creates certain offences relating to authorised officers and the exercise of their functions under the Principal Act (proposed section 11).

Proposed Part 2A establishes a NSW Coastal Panel. The Coastal Panel is to consist of 7 members appointed by the Minister of whom:

- (a) one is to be a person nominated by the Director-General of the Department of Environment, Climate Change and Water, and
- (b) one is to be a person nominated by the Director-General of the Department of Planning, and
- (c) three are to be nominated by the Local Government and Shires Associations, and
- (d) one is to be a person nominated by the Chief Executive of the Land and Property Management Authority, and
- (e) one is to be appointed by the Minister with the concurrence of the Local Government and Shires Associations.

The NSW Coastal Panel is to have the following functions (and may delegate those functions in certain circumstances):

- (a) to provide advice to the Minister on any matter referred to the Coastal Panel by the Minister relating to the coastal zone or otherwise in connection with the operation of the Principal Act,
- (b) such functions conferred or imposed on it by or under the *Environmental Planning and Assessment Act 1979* relating to the granting of development consent,
- (c) any other function conferred or imposed on it by or under the Principal Act, the *Environmental Planning and Assessment Act 1979* or any other Act.

Sections 38 and 39 of the Principal Act require that the Minister give concurrence to certain development or the granting of certain rights or consent in relation to such development in the coastal zone. **Schedule 1 [6] and [7]** amend sections 38 and 39 of the Principal Act to remove the requirement that certain public authorities obtain the Minister's concurrence twice in relation to the same development in the coastal zone. The amendments also provide that public authorities need not obtain such concurrence in relation to the carrying out of development for the placement or maintenance of emergency coastal protection works.

**Schedule 1 [10]** makes an amendment to provide that section 55 of the Principal Act (which relates to the carrying out of works under the *Public Works Act 1912*) does not authorise the Minister or the Governor to direct a specified person to carry out specified work.

**Schedule 1 [12]–[22]** make amendments relating to the making and enforcement of coastal zone management plans. More specifically, the amendments deal with the following:

- (a) directions to councils to make plans,
- (b) the matters to be included and not to be included in such plans,
- (c) matters relating to the guidelines for the preparation of plans,
- (d) providing that plans are to be certified rather than approved by the Minister,

- (e) clarifying that plans may be amended in whole or in part,
- (f) requiring plans to be published on the internet,
- (g) providing that the provisions relating to the enforcement of plans do not apply to the carrying out of work that is development for which consent has been granted, exempt development or development that does not need consent under the *Environmental Planning and Assessment Act 1979* or an approved project within the meaning of Part 3A of that Act.

**Schedule 1 [25]** inserts proposed new section 55M into Part 4B of the Principal Act. The proposed section provides that consent must not be granted under the *Environmental Planning and Assessment Act 1979* to development for the purpose of coastal protection works (that is, long term works such as seawalls) unless the consent authority is satisfied (by conditions imposed on the consent or otherwise) that satisfactory arrangements have been made for the following for the life of the works:

- (a) the restoration of a beach, or land adjacent to the beach not protected by the works, if any increased erosion of the beach or adjacent land is caused by the presence of the works,
- (b) the maintenance of the works.

Where the coastal protection works are constructed by or on behalf of landowners or jointly with a council or public authority, the arrangements are to secure adequate funding for the carrying out of any such restoration and maintenance, including by either or both of the following:

- (a) by legally binding obligations of all or any of the owners from time to time of the land protected by the works,
- (b) by payment to the relevant council of an annual charge for coastal protection services (within the meaning of the *Local Government Act 1993*). (See Schedule 2 below).

Such funding obligations of landowners are to include the percentage share of the total funding of each landowner.

**Schedule 1 [26]** inserts proposed Parts 4C and 4D into the Principal Act.

**Proposed Part 4C** (proposed sections 55O–55Z) deals with emergency coastal protection works (in general, emergency sand and sandbags placed on a beach or a sand dune to mitigate erosion). Proposed Division 1 of the Part contains proposed sections 55O–55S.

Proposed section 55O provides that a person does not require regulatory approval for emergency coastal protection works if the works are authorised by a certificate under proposed Division 2.

Proposed section 55P defines ***emergency coastal protection works*** to mean works comprising the placement of the following material on a beach, or a sand dune adjacent to a beach, to mitigate the effects of wave erosion on land:

- (a) sand, or fabric bags filled with sand, (other than sand taken from a beach or a sand dune adjacent to a beach),

- (b) other objects or material prescribed by the regulations under the Principal Act (other than rocks, concrete, construction waste or other debris).

Proposed section 55Q provides that the maximum period allowed for emergency coastal protection works is 6 months or such period as may be prescribed by the regulations under the Principal Act commencing on the placement of the works. Works cease to be emergency coastal protection works for the purposes of the Principal Act if the works remain in place for longer than the maximum period allowed for emergency coastal protection works. That period can be extended if at the expiry of that 6-month or other prescribed period, a development application under the *Environmental Planning and Assessment Act 1979* for consent to development for the purposes of coastal protection works on the same land (that is, long term works) is pending.

Proposed section 55R provides that emergency coastal protection works must be maintained by or on behalf of the landowner or occupier in accordance with the following requirements:

- (a) any requirements of the certificate under proposed Division 2 that authorises the works,
- (b) any requirements of an emergency action subplan (being part of the council's coastal zone management plan) that applies to the land concerned,
- (c) any requirements adopted by the Minister and published in the Gazette for the purposes of the proposed section,
- (d) any requirements specified in the regulations under the Principal Act for the purposes of the proposed section.

Proposed section 55S provides that a landowner or occupier may take advantage of the special provisions relating to emergency coastal protection works only once. Proposed Division 2 (proposed sections 55T–55V) provides for the issue by authorised officers of relevant councils and the Director-General of the Department of Environment, Climate Change and Water of certificates authorising the placement of emergency coastal protection works. (The function of issuing a certificate must be delegated to an emergency works authorised officer appointed for this purpose). A certificate under the proposed Division does not authorise the placement of emergency coastal protection works more than 2 years after it was issued. Councils and the Department of Environment, Climate Change and Water must notify each other of the issue of such certificates.

Proposed section 55X provides that a landowner or occupier of land must, at or about the time the emergency coastal protection works are to be placed on land, notify the relevant local council of the placing of the works and, if the works are or are about to be placed on public land in reliance on proposed section 55Z, notify the public authority that is the owner of, or has the care, control or management of, the land. The proposed section also enables a Coastal Authority that is a designated authority for public land on which a person has placed (or caused to be placed) emergency coastal protection works to order the person to move, alter or remove the works and restore the land if the Coastal Authority is of the opinion that the person did not take all practical measures:

- (a) to avoid placing those works on the public land, and
- (b) to avoid damage to assets and vegetation on the public land, and
- (c) to minimise risks to the public on the public land, and

(d) to maintain reasonable public access (including access by local and public authorities) to and through the beach concerned.

Proposed section 55ZE enables a Coastal Authority to recover the administrative costs of preparing and giving orders under the proposed Part. A person who is given an order under the proposed Part by a Coastal Authority must within 30 days pay a fee of \$320 (or such higher fee as may be prescribed by the regulations) to the Coastal Authority.

Proposed section 55ZF makes it an offence to fail to comply with an order under the proposed Part. The offence will carry a maximum penalty of 4,500 penalty units (currently \$495,000) and 400 penalty units (currently \$44,000) for each day the offence continues (in the case of a corporation) or 2,250 penalty units (currently \$247,500) and 200 penalty units (currently \$22,000) for each day the offence continues (in any other case). If a person does not comply with the requirements of an order within the time specified (whether that person has been convicted of an offence in respect of the order or not), the Coastal Authority concerned may, where the order required the doing of any act or thing, do the act or thing. Any costs incurred by the Coastal Authority doing that act or thing may then be recovered in a court as a debt due to the Coastal Authority.

Proposed section 55ZG provides for the resolution of disputes between Coastal Authorities.

Proposed section 55ZH provides that a successor in title to land protected by emergency coastal protection works may be the subject of orders under the proposed Part as if the successor in title were the original owner and also that orders given to their predecessor in title may be enforced against them. (See also **Schedule 3.2 [2]** regarding the notice that purchasers of land receive of emergency coastal protection works and orders under this proposed Part.)

**Schedule 1 [27]** amends section 56A of the Principal Act to make it clear that the Land and Environment Court may make an order under that section that a person remove or clean up material dumped following (as well as during) a beach erosion event.

**Schedule 1 [28]** amends section 58 (1) of the Principal Act to increase the maximum penalty for offences against the Principal Act for which a specific penalty is not provided to 4,500 penalty units (currently \$495,000) in the case of a corporation and 2,250 penalty units (currently \$247,500) in any other case. Currently that maximum penalty is 100 penalty units (currently \$11,000).

**Schedule 1 [29]** amends section 58 (2) of the Principal Act to increase the maximum penalty for offences against the regulations under the Principal Act to 400 penalty units (currently \$44,000) in the case of a corporation and 200 penalty units (currently \$22,000) in any other case. Currently that maximum penalty is 10 penalty units (currently \$1,100).

**Schedule 1 [30] and [31]** amend section 59 of the Principal Act to provide that proceedings for offences against proposed section 55Y or proposed Part 4D may be taken before the Land and Environment Court. Proceedings for other offences will continue to be taken before the Local Court.

Proposed section 64 provides that the Minister is to review Part 4C (Emergency coastal protection works) of the Principal Act to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives. The review is to be undertaken as soon as possible after the period of 2 years from the date of assent to the proposed Act and a report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.

Proposed section 65 provides that the Minister is to review the Principal Act to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives. The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to the proposed Act and a report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

### **Schedule 2 Amendment of *Local Government Act 1993* No 30:**

**Schedule 2 [1]** inserts proposed section 496B into the *Local Government Act 1993* to enable a council to make and levy an annual charge for the provision of coastal protection services for rateable land that benefits from the services. The charge may be levied if the services relate to coastal protection works that were jointly constructed (or are being constructed) by or on behalf of owners or occupiers, or previous owners or occupiers, of the land, and a public authority or a council and must be levied if the works were constructed (or are being constructed) solely by or on behalf of such private owners or occupiers of land. The Minister administering the Principal Act may issue guidelines relating to the making and levying of charges. A council is to have regard to any such guidelines when making and levying such charges. **Schedule 2 [2]** makes a consequential amendment.

**Schedule 2 [3]** inserts provisions into the *Local Government Act 1993* restricting the levying of the new coastal protection services charge under proposed section 496B. A charge may not be levied in relation to any coastal protection works that existed before the commencement of the proposed section without the consent of the owner of that land. Also, a charge may not be levied in relation to any coastal protection works if:

- (a) the maintenance of the works or the management of the impacts of the works (as appropriate) is a condition of an approval or consent under the *Environmental Planning and Assessment Act 1979* relating to the works, and
- (b) that maintenance or management work is not being carried out by or on behalf of the council.

**Schedule 2 [4]** inserts proposed sections 606A and 606B into the *Local Government Act 1993*. Proposed section 606A provides that a council must, on request, before new coastal protection works are constructed, give each person who would be liable to pay a coastal protection services charge under proposed section 496B an estimate of the person's liability for that charge for each of the following 5 years.

Proposed section 606B provides that a council must, on request, provide a person who is liable to pay an annual charge for coastal protection services with a report prepared by an independent person on the cost to the council of providing those services. If a council provides such a report, the council is to make the report available to all other persons liable to pay an annual charge in relation to the same services. A council is not required to provide a new report under the proposed section to a person if the council has in the previous 3 years provided or made available to the person such a report in relation to the same coastal protection services.

**Schedule 2 [5] and [6]** make amendments to section 733 of the *Local Government Act 1993* to extend the exemption from liability that a council possesses in relation to flood liable land and land in the coastal zone to the following things done in good faith by the council:

- (a) the preparation or making of a coastal zone management plan, or the giving of an order, under the Principal Act,
- (b) any thing done or omitted to be done regarding beach erosion or shoreline recession on Crown land or land owned or controlled by a council or a public authority,
- (c) the failure to upgrade flood mitigation works or coastal management works in response to projected or actual impacts of climate change,
- (d) the failure to undertake action to enforce the removal of illegal or unauthorised structures on Crown land or land owned or controlled by a council or a public authority that results in beach erosion,
- (e) the provision of information relating to climate change or sea level rise.

Section 733 (4) provides that, unless the contrary is proved, a council is taken to have acted in good faith for the purposes of section 733 if advice was furnished, or a thing was done or omitted to be done, substantially in accordance with the principles contained in a specified manual relating to the management of flood liable land or the management of the coastline identified by the Minister for Planning. **Schedule 2 [7]** provides that guidelines may also be adopted for this purpose.

**Schedule 2 [7]** inserts a number of definitions for the purposes of section 733, including a definition to make it clear that in that section references to the **coastal zone** include land that adjoins the tidal waters of the Hawkesbury River, Sydney Harbour and Botany Bay, and their tributaries.

**Schedule 2 [8]** provides that regulations may be made under the *Local Government Act 1993* relating to coastal protection services. For example, regulations may be made setting the minimum standards in carrying out such coastal protection services.

**Schedule 2 [10]** inserts new definitions into the Dictionary to the *Local Government Act 1993*, including the following:

**coastal protection service** which is defined to mean a service:

- (a) to maintain and repair coastal protection works, or
- (b) to manage the impacts of such works (such as changed or increased beach erosion elsewhere), but does not include a service that relates to emergency coastal protection works. **coastal protection works** which is defined to mean activities or works to reduce the impact of coastline hazards on land adjacent to tidal waters and includes seawalls, revetments, groynes and beach nourishment.

**Schedule 3 Amendment of other legislation.**

## Issues Considered by the Committee

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

**Issue: Procedural Fairness – Proposed Section 55L (6) – Schedule 1 [22] – Amendment of *Coastal Protection Act 1979* – Breach of coastal zone management plan - restraint:**

15. The current section 55L of the *Coastal Protection Act 1979* provides the following:



(1) The Minister or a council may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of a coastal zone management plan.

(2) If the Land and Environment Court is satisfied that a breach of a coastal zone management plan has been committed or that a breach of a coastal zone management plan will, unless restrained by an order of the Court, be committed, it may make such order as it thinks fit to remedy or restrain the breach.

(4) In this section, a breach of a coastal zone management plan means:

(a) a contravention of or failure to comply with a coastal zone management plan, and

(b) a threatened or apprehended contravention of or a threatened or apprehended failure to comply with a coastal zone management plan.

16. The Bill proposes to insert section 55L (5): This section does not apply to a breach of a coastal zone management plan that is an act or omission that is development for which consent has been granted, exempt development or development that does not need consent under the *Environmental Planning and Assessment Act 1979* or an approved project within the meaning of Part 3A of that Act.
17. The Bill also proposes to insert section 55L (6): Despite subsection (1), a council may not bring proceedings under this section to remedy or restrain a breach of a coastal zone management plan by the State or a NSW Government agency.

- 18. The Committee notes that under the current section 55L (1), the Minister or a council may bring such proceedings in the Land and Environment Court for an order to remedy or restrain a breach of a coastal zone management plan.**
- 19. The Committee will always be concerned about legislation that authorises administrative decision-making without providing for the right of those affected to bring proceedings before a court, such as to seek an order to remedy or restrain a breach of a coastal zone management plan.**
- 20. Therefore, the Committee has concerns with regard to the proposed section 55L (6) of Schedule 1, and refers this to Parliament for consideration as to whether it may be an undue trespass on the right to procedural fairness by removing the current right existing under section 55L (1) to bring proceedings in the Land and Environment Court to seek an order to remedy or restrain a breach of a coastal zone management plan, which has been made by the State or a NSW Government agency.**

### **Insufficiently defined administrative powers [s 8A(1)(b)(ii) LRA]**

#### **Issue: III And Wide Defined Powers – Proposed Section 55ZG (1) – Resolution of disputes under Part 4C and this Part (Part D) – Schedule 1 [26]:**

21. Proposed section 55ZG (1) reads: If a dispute arises between a council and a Coastal Authority that is a Minister in relation to the exercise of a function under Part 4C or this Part, the Minister may direct the council as to the exercise of the function.
22. Proposed Part 4C (proposed sections 55O–55Z) deals with emergency coastal protection works (in general, emergency sand and sandbags placed on a beach or a sand dune to mitigate erosion). Proposed Part 4D (proposed sections 55ZA-55ZH) deals with powers with respect to material and structures on beaches. This includes orders to remove certain materials and structures unlawfully placed on beaches; stop work orders relating to materials and structures unlawfully being placed on beaches; orders relating to emergency coastal protection works; failure to comply with orders; resolution of disputes under Part 4C and Part 4D; successors in title and emergency coastal protection works; and fees.

**23. The Committee is concerned that if a dispute arises between a council and a Coastal Authority that is a Minister in relation to any function under the proposed Part 4C or Part 4D, the Minister may hold broad powers to direct the council as to the exercise of the function under these Parts. The Committee refers the proposed section 55ZG (1) of the new Part 4D of Schedule 1 [26] to Parliament for consideration as to whether it may make rights and obligations unduly dependent upon insufficiently defined administrative powers in the context of a dispute arising between a a council and a Coastal Authority that is a Minister.**

### **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.**

24. 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.
25. However, the Committee also notes that the Agreement in Principle speech explained that:

A draft of the ministerial requirements for emergency works will be available for public comment on the department's website after this Bill has been passed by Parliament...Amendments to the Infrastructure State Environmental Planning Policy will be progressed following the passage of this Bill to complement its provisions, which will allow landowners to apply for development consent to construct long-term coastal protection works that will protect existing development from coastal erosion.

**26. The Bill also provides for guidelines to be published by the Minister in relation to the preparation of draft coastal zone management plans. Therefore, this will likely involve appropriate administrative and transitional arrangements to be made. The Committee is of the view that there may be good reasons why such discretion for commencement by proclamation is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.**

***The Committee makes no further comment on this Bill.***

## 3. COURTS LEGISLATION AMENDMENT BILL 2010

Date Introduced: 10 June 2010  
House Introduced: Legislative Council  
Minister Responsible: Hon John Hatzistergos MLC  
Portfolio: Attorney General

### Purpose and Description

1. This Bill amends certain Acts and a Regulation with respect to courts and tribunals and civil and criminal procedure.
2. In relation to the *Administrative Decisions Tribunal Act 1997*, item [1.1] in schedule 1 makes three amendments to the *Administrative Decisions Tribunal Act 1997*. Firstly, it amends section 24A to enable matters relating to cost and jurisdiction to be dealt with by a single judicial member of the tribunal at first instance, or by a single presidential member on appeal. Costs and jurisdictions are matters that frequently arise in proceedings that in the tribunal are currently dealt with by three-member panels. These matters are narrow questions and can be dealt with by a single judicial or presidential member.
3. Secondly, the Bill amends section 73 of the *Administrative Decisions Tribunal Act 1997*, which relates to the tribunal's power to dismiss an application if the applicant fails to appear. The amendment clarifies that there is a time limit of 28 days for applications for reinstatement of proceedings dismissed under section 73. This time limit can be extended with the tribunal's permission.
4. Thirdly, the Bill amends schedule 2, part 1, clause 3, which relates to the constitution of the panel of the tribunal's community services division to hear applications under the Community Services (Complaints, Review and Monitoring) Act 1993. It will remove the requirement that one of the members be a "practising legal practitioner" and replace it with "a judicial member". The current provision disqualifies some of the tribunal's senior members, including some judges and magistrates, as it requires that one of the panel members is a "practising legal practitioner". It also disqualifies experienced judicial members who do not hold a current practising certificate. By replacing "practising legal practitioner" with "judicial member", the provision becomes consistent with the rest of the *Administrative Decisions Tribunal Act*. It will remove the current restrictions on the tribunal's ability to empanel a three-member panel to hear applications under section 28. The amendments are supported by the President of the tribunal.
5. Schedule 1.2 amends section 65 of the *Children and Young Persons (Care and Protection) Act 1998* to support the increased use of alternative dispute resolution in care proceedings in the Children's Court. This is consistent with the recommendations arising from the Special Commission of Inquiry into Child Protection Services in New South Wales (the Wood inquiry). The Wood inquiry made a specific recommendation that alternative dispute resolution should be used more—

before and during care proceedings. The Government's response to the Wood inquiry supported this recommendation.

6. This Bill renames "preliminary conferences" in the Act to "dispute resolution conferences". The Bill will emphasise that the primary purpose of a dispute resolution conference is the resolution of disputes and that, specifically, the conference should provide the parties with the opportunity to agree on the action that should be taken in the best interests of the child. The confidentiality of the dispute resolution conference process is also guaranteed under the Bill. Schedule 1.3 makes a consequential amendment to the *Children and Young Persons (Care and Protection) Regulation 2000* to reflect the renaming of the "preliminary conference" to "dispute resolution conference".
7. Schedule 1.4 amends the *Children (Criminal Proceedings) Act 1987* to enable the Children's Court to call on an offender, on its own motion, who has failed to comply with a condition of a probation order, or a good behaviour bond, or a condition of an outcome plan determined at a conference. At present, the Children's Court can only deal with a breach by an offender of a previous court order when the police prosecutor or a Juvenile Justice officer brings it to the attention of the court. On receiving the information, the court can then issue a court attendance notice or an arrest warrant for that offender. The power for the court to call on an offender who fails to comply with a good behaviour bond exists in adult courts.
8. Schedule 1.5 amends section 6A of the *Children's Court Act 1987* to allow the President of the Children's Court to sit on the District Court. The President of the Children's Court must be a District Court judge. Under the current provisions, the President is prevented from sitting as a District Court judge while holding the office of the President of the Children's Court. It is intended that the President will sit on the District Court only in limited circumstances and, only where there is no adverse impact on the workload of the Children's Court. This amendment is supported by both the Chief Magistrate and the Chief Judge of the District Court.
9. Schedule 1.6 makes amendments to the *Civil Liability Act 2002*. Firstly, it amends part 2A to provide that, in an action against a protected defendant for the award of personal injury damages where the act or omission that caused the injury or death was a tort (whether or not negligence)—of a person for whose tort the protected defendant is vicariously liable, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages. Secondly, the Bill amends part 2A to allow a court to determine claims under part 2A "on the papers", without conducting a hearing. If the court is satisfied that the interests of justice require otherwise then a hearing will be held in the presence of parties. The intention for not holding a hearing is to minimise trauma and expense for victims. New section 26X is inserted.
10. Schedule 1.7 amends part 9 of the *Civil Procedure Act 2005* to allow proceedings to be transferred between the Supreme Court and the Industrial Court in appropriate circumstances. This amendment is identified by the Industrial Relations Commission to assist its transition to the Uniform Civil Rule regime which began in the Industrial Relations Commission earlier this year and also to assist in transferring the jurisdiction of the Chief Industrial Magistrate to the Industrial Court.

11. Schedule 1.8 amends schedule 1 of the *Criminal Procedure Act 1986* to increase the maximum property value for break and enter offences, dealt with summarily by the Local Court under chapter 5 of the *Criminal Procedure Act 1986*, from \$15,000 to \$60,000. The current limit has remained unchanged for more than 20 years. This issue was considered by the Sentencing Council as part of a reference the Government made in December 2010, asking the council to examine the merits of increasing the sentencing powers of the Local Court. The Sentencing Council recommended the increase, highlighting in its letter of support, that it will: ensure the continued disposal of appropriate break and enter offences in the Local Court, with the concomitant benefits in terms of the efficient allocation of resources. The Chief Magistrate and Chief Judge of the District Court also support the amendment.
12. Schedules 1.9 and 1.13 amend the *District Court Act 1973* and the *Local Court Act 2007* to allow a Chief Magistrate to hold a commission as a District Court judge. This will enable a District Court judge to be appointed as Chief Magistrate while continuing to hold a commission as a District Court judge. It will also enable anyone who has been appointed as Chief Magistrate to be appointed as a District Court judge. The provisions will enable a Chief Magistrate who is also a District Court judge to exercise the jurisdiction of the District Court if requested by the Chief Judge of the District Court, but not in relation to an appeal from any decision made by the Chief Magistrate in his or her capacity as a member of the Local Court.
13. Schedule 1.10 amends the *Industrial Relations Act 1996* to allow the President of the Industrial Court to authorise the Industrial Registrar or another officer to exercise criminal and non-civil functions. This is the second amendment requested by the Industrial Relations Commission to assist its transition to the Uniform Civil Rules regime.
14. Schedules 1.11 and 1.14 amend the *Land and Environment Court 1979* and the *Supreme Court Act 1970* respectively to allow Supreme Court judges to act as Land and Environment Court judges, and vice versa.
15. This will ensure greater flexibility in the operation of the courts and builds on provisions in the *Civil Procedure Act 2005* allowing the transfer of proceedings between the Land and Environment Court and the Supreme Court, as the circumstances require.
16. Schedule 1.12 makes two amendments to the *Legal Profession Act 2004*. The first amendment inserts a new section 302B to provide that the goods and services tax [GST] referable to the provision of legal services is to be taken into account when making or reviewing a determination of the legal costs payable for the provision of those services. This amendment aims to address the recent Court of Appeal decision in *Boyce v McIntyre*. It will extend to any application for the assessment of costs made, but not determined, before the commencement of the section. However, it will not extend to any application for a review of, or an appeal against, an assessment of costs by a costs assessor if it was determined by the costs assessor before the commencement. The Law Society of New South Wales and the New South Wales Bar Association have been consulted in the development of this amendment.
17. The second amendment in schedule 1.12 is the final amendment requested by the Industrial Relations Commission. It amends section 329 of the Act to allow for fixed costs in the Industrial Court for small claims matters. This is designed to limit

professional costs that can be recovered for small claims matters under the *Industrial Relations Act 1996*. This is to ensure that when the Chief Industrial Magistrate jurisdiction is transferred to the Industrial Court, parties will not be subject to a higher costs regime than previously existed in the Chief Industrial Magistrate jurisdiction.

18. Schedule 1.15 amends section 80 of the *Victims Support and Rehabilitation Act 1996* to correct an error in the formula used to adjust the victims compensation levy for increases in the consumer price index. The amendment will apply only to levies imposed after 1 July this year.

## Background

19. The purpose of this Bill is to make miscellaneous amendments to legislation affecting the operation of the courts and tribunals of New South Wales. It is part of the regular legislative review and monitoring program and will amend a number of Acts to improve the efficiency of the operation of courts and tribunals.
20. The Bill addresses issues relating to the smooth and effective running of courts and tribunals in New South Wales. According to the Second Reading speech, the amendments have been the subject of thorough consultation with key stakeholders, including the Chief Justice of the Supreme Court, the Chief Judge of the District Court, the Chief Magistrate, the President of the Industrial Relations Commission, the Law Society of New South Wales and the New South Wales Bar Association.

## The Bill

21. The object of this Bill is to make miscellaneous amendments to the following Acts and Regulation:
- (a) the *Administrative Decisions Tribunal Act 1997*,
  - (b) the *Children and Young Persons (Care and Protection) Act 1998*,
  - (c) the *Children and Young Persons (Care and Protection) Regulation 2000*,
  - (d) the *Children (Criminal Proceedings) Act 1987*,
  - (e) the *Children's Court Act 1987*,
  - (f) the *Civil Liability Act 2002*,
  - (g) the *Civil Procedure Act 2005*,
  - (h) the *Criminal Procedure Act 1986*,
  - (i) the *District Court Act 1973*,
  - (j) the *Industrial Relations Act 1996*,
  - (k) the *Land and Environment Court Act 1979*,
  - (l) the *Legal Profession Act 2004*,
  - (m) the *Local Court Act 2007*,
  - (n) the *Supreme Court Act 1970*,
  - (o) the *Victims Support and Rehabilitation Act 1996*.

## 22. 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 (with exceptions specified in Schedule 1 to the proposed Act) on the date of assent to the proposed Act.

**Clause 3** makes it clear that the explanatory notes contained in Schedule 1 do not form part of the proposed Act.

## Schedule 1 Amendment of Acts and Regulation:

Schedule 1 contains the amendments to various Acts and the Regulation referred to in the Overview.

## Issues Considered by the Committee

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

**Issue: Denial Of Compensation – Proposed Section 26X (1) of Part 2A, Division 7 – Schedule 1.6 *Civil Liability Act 2002*, of Schedule 1 [3] of the Bill – Limitation on exemplary, punitive and aggravated damages against protected defendant in cases of vicarious liability – Amendment of *Civil Liability Act 2002*:**

23. Proposed section 26X (1) reads: In an action against a protected defendant for the award of personal injury damages where the act or omission that caused the injury or death was a tort (whether or not negligence) of a person for whose tort the protected defendant is vicariously liable, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.
24. Currently, section 21 of the *Civil Liability Act 2002* provides that a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages in an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence.
25. Under the definitions of section 26A of the *Civil Liability Act 2002*, a “protected defendant” means 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 of 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 CAS Act) and members of staff of such a company.
26. The legal dictionary meaning of exemplary damages or punitive damages includes “damages over and above compensatory damages, awarded to a plaintiff as a mark of disapproval of the defendant’s outrageous conduct”.<sup>1</sup> The legal dictionary meaning of aggravated damages includes “damages awarded when the conduct of the defendant or the surrounding circumstances increase the injury to the plaintiff by

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<sup>1</sup> The CCH Macquarie Concise Dictionary Of Modern Law, Macquarie University, NSW.



subjecting him or her to particular humiliation or distress (usually in intentional torts such as assault, false imprisonment, and defamation)".<sup>2</sup>

27. **The Committee notes that the proposed section 26X (1) will broaden the scope of where the court can no longer award exemplary or punitive damages or damages in the nature of aggravated damages in an action against a protected defendant who has been found vicariously liable for personal injury damages where the act or omission that caused the injury or death was a tort (not just negligence).**
28. **The Committee is of the view that the right to seek damages or compensation, including that of exemplary or punitive damages and aggravated damages, including in intentional torts such as assault, false imprisonment and defamation, and not just negligence, is an important personal right and that this right should not be removed or restricted by legislation unless there is a compelling public interest in doing so.**
29. **The Committee refers this amendment of the *Civil Liability Act 2002* by the insertion of the new section 26X (1) of the proposed Part 2A, Division 7, to Parliament for consideration as to whether removing the right to exemplary or punitive damages or aggravated damages in tort (not just negligence), where the protected defendant is vicariously liable, may trespass unduly on personal rights and liberties.**

**Issue: Retrospectivity – Schedule 1 [3] – Schedule 2 - Savings and transitional provisions - Amendment of *Children (Criminal Proceedings) Act 1987* – Application of amendments to section 41:**

30. Under schedule 1 [3] of the Bill, the insertion of schedule 2 (savings and transitional provisions) relates to the application of amendments to section 41 of the *Children (Criminal Proceedings) Act 1987*, where the amendments made to section 41 by the *Courts Legislation Amendment Act 2010* extend to a failure of a person of the kind referred to in section 41 (1A) (as inserted by that Act) occurring before the commencement of the amendments.
31. Schedule 1 [1] of the Bill (schedule 1.4 amendments) proposed to amend the *Children (Criminal Proceedings) Act 1987* to enable the Children's Court and the Local Court to call, of the Court's own motion, on a person to appear before the Court if it suspects that the person has failed to comply with a good behaviour bond or a condition of probation or outcome plan determined under the *Young Offenders Act 1997*. Schedule 1 [3] of the Bill inserts a transitional provision to enable the Children's Court and the Local Court to use the new power to call on a person to appear before the Court in relation to failures occurring before the commencement of the amendments proposed to be made by schedule 1 [1].
32. The Committee notes that currently, the Children's Court can only deal with a breach by an offender of a previous court order when the police prosecutor or a Juvenile Justice officer brings it to the attention of the court. On receiving the information, the Court can then issue a court attendance notice or an arrest warrant for that offender.

<sup>2</sup> The CCH Macquarie Concise Dictionary Of Modern Law, Macquarie University, NSW.

However, schedule 1.4 (of the Bill's schedule 1 [1]), amends the *Children (Criminal Proceedings) Act 1987* in order to enable the Children's Court to call on an offender, on its own motion, who has failed to comply with a condition of a probation order, or a good behaviour bond, or a condition of an outcome plan determined at a conference.

33. **The Committee will always be concerned to identify the retrospective effects of legislation that may have an adverse impact on a person, particularly, on a young person or child. The Committee observes the right established by Article 15 of the *International Covenant on Civil and Political Rights* that a person not be subject to a heavier penalty than what was applicable at the time of the commission of the offence.**
34. **Therefore, the Committee is concerned that the rights and liberties of such young persons may be unduly trespassed. The Committee refers schedule 1 [3] on the savings and transitional provisions in relation to the retrospective application of amendments to section 41, through the proposed sections 41(1A) and (1B) of the *Children (Criminal Proceedings) Act 1987*, to Parliament for consideration.**

**Issue: Retrospectivity – Schedule 1 [4] – Savings and transitional provisions - Amendment of *Civil Liability Act 2002* – Application of section 26X - schedule 1.6 *Civil Liability Act 2002* of Bill's Schedule 1 [3] – Provision consequent on enactment of *Courts Legislation Amendment Act 2010*:**

35. Under schedule 1 [4] of the Bill, the insertion of schedule 1 (savings and transitional provisions) relates to the application of section 26X of the *Civil Liability Act 2002*, where: Section 26X (as inserted by the *Courts Legislation Amendment Act 2010*) extends to civil liability arising, and any award of damages in respect of such civil liability made, before the commencement of the section, but not so as to affect any final determination of legal proceedings made by a court or tribunal before the commencement of the section.

36. **Item [3] of the proposed amendments to the Act provides that a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages in an action against a protected defendant for the award of personal injury damages in respect of the death or injury of an offender in custody where the act or omission that caused the injury or death was the tort of a person for which the protected defendant was vicariously liable.**
37. **However, the Committee notes that Item [4] of the proposed amendments to the Act provides for the amendment to be made by item [3] to extend to certain proceedings commenced before the commencement of the amendment.**
38. **The Committee considers that the retrospective application of the amendments to the *Civil Liability Act 2002* through the insertion of section 26X and schedule 1 [4] with the provision consequent on enactment of this Bill, may adversely impact and unduly trespass on personal rights to seek exemplary or punitive damages or aggravated damages in tort where the protected defendant has been found to be vicariously liable. Accordingly, the Committee refers this to Parliament.**

***The Committee makes no further comment on this Bill.***

## 4. CRIMES (SENTENCING LEGISLATION) AMENDMENT (INTENSIVE CORRECTION) BILL 2010

Date Introduced:	10 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Attorney General

### Purpose and Description

1. The object of this Bill is to introduce intensive correction orders as a community-based sentencing option in New South Wales and to abolish periodic detention orders. The Bill is based on recommendations contained in the New South Wales Sentencing Council's report *Review of Periodic Detention* published in December 2007.
2. The Bill amends the Crimes (Sentencing Procedure) Act 1999, the Crimes (Administration of Sentences) Act 1999, the Crimes (Sentencing Procedure) Regulation 2005 and the Crimes (Administration of Sentences) Regulation 2008 and makes consequential amendments to other Acts.

### Background

3. On 4 June 2007, the Attorney General asked the New South Wales Sentencing Council to undertake a review of periodic detention.
4. In its terms of reference, the Sentencing Council was asked to look at a number of issues, including the extent to which periodic detention is used, its advantages and disadvantages, and whether there are better alternatives to periodic detention orders.
5. The council received submissions from 26 organisations and individuals, including members of the judiciary, groups such as the Law Society of New South Wales, various government agencies, local councils and representatives of victims of crime. The council also issued 260 community consultation letters addressed to a range of other smaller community organisations, receiving a further 72 responses.
6. The council delivered its report in December 2007, recommending the abolition of periodic detention and its replacement with a new community-based order. The Sentencing Council identified various reasons for this recommendation, including a lack of consistency in sentencing, high failure rate of offenders in completing their orders, relatively high recidivism rates of those who have completed periodic detention and the relatively small number of periodic detention orders made.
7. In addition, the council noted that periodic detention provided no case management, therapeutic or rehabilitative support for offenders. It found that the introduction of a community-based order would have the benefit of enabling offenders to participate in

rehabilitative or educational programs. The council further noted that several submissions had highlighted the negative impact of periodic detention in relation to employment and further duties, with suggestions that alternative community-based sanctions could have less of an impact in terms of dislocation.

8. In response to the Council's recommendations, the Government again went to public consultation with a possible model for the new order. Submissions were again received from a large number of different organisations and individuals, including members of the judiciary, legal associations, government agencies and community groups.

## 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 a day or days to be appointed by proclamation.

### **Schedule 1 Amendment of *Crimes (Sentencing Procedure) Act 1999 No 92***

#### **Sentencing procedures for intensive correction orders**

**Schedule 1 [16]** repeals Part 5 of the *Crimes (Sentencing Procedure) Act 1999* which sets out the sentencing procedures for periodic detention and inserts a new Part 5 that establishes procedures for intensive correction orders. **Schedule 1 [6]** abolishes the power of a court to make periodic detention orders and **Schedule 1 [8]** gives a court that has sentenced an offender to imprisonment for less than 2 years the power to make an intensive correction order. If the court makes such an order, the court is not to set a non-parole period for the sentence.

Under proposed Part 5, an intensive correction order can be made only if the court is satisfied that:

- (a) the offender is of or above the age of 18 years, and
- (b) the offender is a suitable person to serve the sentence by way of intensive correction in the community, and
- (c) it is appropriate in all the circumstances, and
- (d) the offender has signed an undertaking to comply with the offender's obligations under the intensive correction order.

Before imposing a sentence of imprisonment on an offender, the court may refer the offender to the Commissioner of Corrective Services (the **Commissioner**) for assessment as to the suitability of the offender for an intensive correction order. A court is not to make such a referral unless it is satisfied that no sentence other than imprisonment is appropriate and that the sentence is likely to be 2 years or less. When deciding whether or not to make an intensive correction order, the court must consider the assessment report of the offender and any evidence from the Commissioner that the court considers necessary. An order can be made only if the assessment report states that the offender is a suitable person to serve the sentence by way of an intensive correction order. If a court declines to make an order, despite an assessment report that states that the offender is suitable, the court must give reasons to the offender. Intensive correction orders will not be available for offenders

## Crimes (Sentencing Legislation) Amendment (Intensive Correction) Bill 2010

sentenced to imprisonment for certain sexual offences. When making an intensive correction order, a court must specify a date no later than 21 days after the order was made on which the order will commence and must explain to the offender his or her obligations under the order and the consequences of non-compliance.

The Sentencing Council is to conduct a review of the new provisions relating to intensive correction orders in the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* (and any related regulations made under those Acts) after 5 years and the review is to be tabled in Parliament.

**Schedule 1 [17]** provides that an offender who has been referred for an assessment for an intensive correction order is not to be referred for assessment for home detention in relation to the same sentence of imprisonment unless the court has decided not to make an intensive correction order with respect to that sentence.

### Consequential amendments and savings provisions

**Schedule 1 [9]** provides that the Local Court cannot make an intensive correction order with respect to an offender who is not present at court. **Schedule 1 [5]** provides that Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (Sentencing procedures for imprisonment) applies to intensive correction orders, as was the case for periodic detention orders. **Schedule 1 [14]** provides that the provision in Part 4 that requires a court that has sentenced an offender to imprisonment to issue a warrant for the committal of the offender to a correctional centre does not apply to an offender who is sentenced to an intensive correction order (in the same way as it did not apply to an offender sentenced to periodic detention). **Schedule 1 [15]** enables a court to revoke an intensive correction order if an offender fails to have his or her photograph and fingerprints taken after the offender has been sentenced by the court (as was the case for periodic detention orders).

**Schedule 1 [18]** gives power to a court that is revoking a good behaviour bond imposed as part of a suspended sentence to order that the offender serve the remainder of the sentence under an intensive correction order (rather than in periodic detention as is currently the case). **Schedule 1 [19]** makes a consequential amendment.

**Schedule 1 [4]** omits definitions related to periodic detention and **Schedule 1 [3]** inserts definitions related to intensive correction orders. **Schedule 1 [1] and [10]–[13]** remove redundant references to periodic detention. **Schedule 1 [7]** renumbers a section and **Schedule 1 [2]** corrects a corresponding cross-reference.

**Schedule 1 [20]** enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

**Schedule 1 [21]** inserts a savings provision which ensures existing periodic detention orders remain in force and continue to operate once the proposed Act has commenced.

### Schedule 2 Amendment of *Crimes (Administration of Sentences) Act 1999* No 93

#### Imprisonment by way of intensive correction in the community

**Schedule 2 [9]** repeals Part 3 of the *Crimes (Administration of Sentences) Act 1999* (the **CAS Act**) which applied to those offenders who had been sentenced to imprisonment by

way of periodic detention and included provisions relating to the general obligations of offenders, the administration of periodic detention orders and offences relating to periodic detention. Proposed Part 3 applies to those offenders who have been sentenced to imprisonment by way of intensive correction in the community. Proposed Division 1 of Part 3 sets out the conditions governing intensive correction orders, which include conditions prescribed by the regulations (see Schedule 4 [1]) and additional conditions imposed by the court. An offender who is subject to an intensive correction order must comply with all requirements under proposed Part 3 and the regulations and with any conditions imposed on the order.

**Permission for non-compliance with work or reporting requirements** Proposed Division 2 of Part 3 provides that an offender who is subject to a requirement to work or to report may apply to the Commissioner for permission to not comply with that requirement, before the time the requirement is due to be complied with. The Commissioner may grant such a permission for health reasons, compassionate grounds or for any reason the Commissioner thinks fit. The Commissioner may order the offender to make up for any work, activity or program that the offender was given permission to avoid and may apply to the sentencing court to extend the period of the offender's intensive correction order for that purpose. The court may extend the offender's order for as long as the court considers necessary and appropriate (for a maximum period of 6 months).

If the Commissioner refuses to grant an offender permission to not comply with a work or reporting requirement, the offender may apply to the Intensive Correction Orders Management Committee (**ICO Management Committee**) for a review of the matter. The Commissioner is not bound by a recommendation of the ICO Management Committee and if the Commissioner does not grant permission to the offender after the review, the offender may apply to the Parole Authority, who may direct that the Commissioner grant permission.

### **Breach of intensive correction orders**

Under proposed Division 3 of Part 3, if an offender breaches an intensive correction order, the Commissioner may impose a sanction (that is, a formal warning or a more stringent application of the conditions of the order) or take no action. The Commissioner may also decide to refer the breach to the Parole Authority because of the serious nature of the breach. The Parole Authority may impose a sanction (that is, a formal warning or a more stringent application of the conditions of the order) on an offender who has breached his or her order, may impose a period of up to 7 days of home detention or may revoke the order. If the Commissioner believes that an offender has breached his or her order or that there is a serious and immediate risk that the offender will leave New South Wales, harm another person or commit an offence, the Commissioner may apply urgently to the Parole Authority for an interim suspension of an offender's intensive correction order. A judicial member of the Parole Authority may suspend the order (during which time the order has no effect) and may issue a warrant for the offender's arrest. An interim suspension order in respect of an offender who is in custody lasts for 28 days. If the offender is not in custody when the suspension order is made, the order ends 28 days after the offender is taken into custody.

### **Revocation and reinstatement of intensive correction orders by Parole Authority**

**Schedule 2 [13]** repeals provisions relating to revocation and reinstatement of periodic detention orders by the Parole Authority and provides instead for the functions of the Parole Authority in relation to intensive correction orders. Under proposed Division 1 of Part 7, the

Parole Authority may conduct an inquiry if it has reason to suspect an offender has failed to comply with the offender's obligation under an intensive correction order. The Parole Authority may revoke an intensive correction order if it is satisfied that the offender has failed to comply with any obligations, is unable to comply as a result of a material change in the offender's circumstances, if the offender fails to appear before the Parole Authority when called on to do so or if the offender has applied for the order to be revoked. The Parole Authority may also revoke an intensive correction order on the recommendation of the Commissioner if health reasons or compassionate grounds justify its revocation. An offender who has had his or her intensive correction order revoked may apply to the Parole Authority to have the order reinstated once the offender has served 1 month of full-time imprisonment.

The Parole Authority may make an order directing that an offender who has had his or her intensive correction order revoked serve the remainder of the sentence by way of home detention instead of full-time imprisonment and may make an order releasing the offender from custody while an assessment for home detention is carried out and before deciding whether or not the offender is suitable for home detention. If the Parole Authority decides to make a home detention order, it may include in the order conditions that prohibit or restrict the offender from associating with a specified person or visiting a specified place.

**Schedule 2 [32]** provides that when the Parole Authority revokes an intensive correction order, it must also revoke any other intensive correction order to which the offender is subject (including any order that is yet to come into force).

**Schedule 2 [12], [14]–[31] and [33]–[39]** make amendments resulting from the abolition of periodic detention and the Parole Authority's new functions in relation to the administration of intensive correction orders, including in connection with post-revocation procedures, applications to the Supreme Court for review of Parole Authority decisions and miscellaneous matters.

### **ICO Management Committee**

Under proposed section 92 (as inserted by Schedule 2 [9]), the Commissioner is to establish a committee called the Intensive Correction Orders Management Committee, that will consist of not less than 5 members, being officers of Corrective Services NSW appointed by the Commissioner. The functions of the ICO

Management Committee include providing advice and recommendations in connection with the case management of offenders and other functions as directed by the Commissioner or otherwise conferred on the ICO Management Committee under the CAS Act. **Schedule 2 [66]** sets out the ICO Management Committee's procedures.

### **Regulations**

Proposed section 93 (as inserted by Schedule 2 [9]) is a power to make regulations for or with respect to various matters, including:

- (a) the mandatory conditions to be imposed on an intensive correction order by a sentencing court and the additional conditions that may be imposed,
- (b) the manner in which an offender's failure to comply with an intensive correction order may be dealt with,
- (c) the management, administration and supervision of intensive correction orders,
- (d) drug and alcohol testing and medical examinations of offenders,

- (e) the day-to-day routine of offenders, including the performance of work or engagement in an activity or intervention,
- (f) the functions of officers of Corrective Services NSW in relation to offenders.

### **Consequential amendments and savings provisions**

**Schedule 2 [56]** provides that a compliance and monitoring officer (who may be a correctional officer, a probation and parole officer or any member of staff of Corrective Services NSW) may exercise functions associated with the administration of an intensive correction order. **Schedule 2 [58]** provides that the provisions of Part 13 of the CAS Act that relate to the transport of offenders and custody of offenders while in transit apply to an offender who has been sentenced to an intensive correction order but who has not yet been served with notice of the order (as they did to a person who was sentenced to periodic detention). **Schedule 2 [8], [10], [59] and [61]–[63]** replace references to periodic detention orders with references to intensive correction orders in provisions relating to community service work, unlawful absences from custody, the service of notices under the Act and evidentiary certificates.

**Schedule 2 [40]–[55]** contain amendments resulting from the abolition of periodic detention centres. **Schedule 2 [1], [3], [4], [7], [11], [57], [60] and [65]** omit redundant references to periodic detention centres, periodic detention, periodic detention orders and periodic detainees. **Schedule 2 [2]** omits the definition of *detention period* which was used in relation to periodic detention and **Schedule 2 [6]** inserts definitions relevant to intensive correction orders. **Schedule 2 [5]** updates a cross-reference to the *Crimes (Sentencing Procedure) Act 1999*.

**Schedule 2 [67]** enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

**Schedule 2 [68]** inserts a savings provision that provides that a periodic detention order that is in force at the time the amendments commence will remain in force and continue to operate after the amendments commence in the same way as it did before the amendments.

### **Schedule 3 Amendment of Crimes (Sentencing Procedure) Regulation 2005**

**Schedule 3** repeals Part 3 of the *Crimes (Sentencing Procedure) Regulation 2005* that related to sentencing procedures for periodic detention orders and inserts a new Part 3 that contains provisions relating to sentencing procedures for intensive correction orders. The new Part sets out the matters that must be addressed in an assessment report of an offender, including the likelihood that the offender will re-offend, risks to the community if the offender is in the community, proposed living arrangements for the offender, the offender's drug and alcohol issues, the offender's physical and mental health and the availability of resources to address the offender's offending behaviour. In addition, an officer preparing a report about an offender who is homeless is required to make all reasonable efforts to find suitable accommodation for the offender. If a child under 18 years would be living with the offender, the assessment report must address the effect on the child. The proposed Part also provides that intensive correction orders and offender undertakings must be in the approved form.



**Schedule 4 Amendment of Crimes (Administration of Sentences) Regulation 2008**

**Schedule 4 [1]** omits Chapter 3 of the *Crimes (Administration of Sentences) Regulation 2008* which dealt with administration procedures, periodic detention centre and work site routines, leaves of absence and other matters in relation to periodic detention. Proposed new Chapter 3 provides for the administration of intensive correction orders, and sets out the mandatory conditions for intensive correction orders, including requirements that the offender do as follows:

- (a) be of good behaviour and not commit any offences,
- (b) reside at approved premises,
- (c) not leave the State or Australia without permission,
- (d) receive visits by a supervisor at the offender's home,
- (e) authorise his or her medical practitioner, therapist or counsellor to provide information about the offender to a supervisor,
- (f) not use prohibited drugs, obtain drugs unlawfully or abuse drugs lawfully obtained,
- (g) submit to breath testing, urinalysis or other alcohol and drug testing,
- (h) not possess or have in his or her control any firearm or other offensive weapon,
- (i) submit to surveillance or monitoring (including electronic surveillance or monitoring) and not tamper with, damage or disable surveillance or monitoring equipment,
- (j) undertake at least 32 hours of community service work each month,
- (k) engage in activities to address his or her offending behaviour.

**Schedule 4 [2]–[7] and [10]** omit redundant references to periodic detention centres and periodic detention orders in provisions relating to parole. **Schedule 4 [9], [11], [12] and [14]** replace references to periodic detention orders and periodic detainees with references to intensive correction orders and intensive correction offenders in provisions relating to parole. **Schedule 4 [13]** omits a Schedule that contains offences against periodic detention discipline. **Schedule 4 [15]–[19]** are consequential amendments to terms used in the Dictionary to the Regulation. **Schedule 4 [8]** updates a cross-reference.

**Schedule 5 Amendment of other Acts Amendment of Fines Act 1996 No 99**

**Schedule 5.10** amends the *Fines Act 1996* to repeal provisions that allow a fine defaulter who is committed to a correctional centre after having failed to comply with a community service order to serve a period of imprisonment by way of periodic detention. **Schedule 5.10 [3]** instead provides that such a person will be able to apply to the Commissioner for an order that he or she may serve the period of imprisonment under an intensive correction order. The eligibility criteria and requirements for service and notice of the orders are similar to the provisions that applied for periodic detention.

**Schedule 5.10 [1], [2] and [4]–[8]** are consequential amendments that remove provisions relating to imprisonment by way of periodic detention.

**Schedule 5.10 [9]** enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

**Schedule 5.10 [10]** contains a savings provision which provides that existing provisions in the *Fines Act 1996* relating to periodic detention will continue to operate in respect of existing periodic detention orders and any pending applications by a fine defaulter to serve the period of imprisonment by way of periodic detention are to be dealt with under the existing provisions, as if the proposed Act had not been enacted.

### **Amendment of other Acts**

**Schedule 5.1–5.9, 5.11 and 5.12** amend various other Acts as a consequence of the abolition of periodic detention as a sentencing option and the introduction of intensive correction orders.

## **Issues Considered by the Committee**

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

#### **Issue: Privacy and Personal Integrity**

10. Proposed Chapter 3 of the *Amendment of Crimes (Administration of Sentences) Regulation 2008* at Schedule 4 of the Bill provides a list of seventeen mandatory conditions to be imposed by a sentencing court when making an intensive correction order.
11. Some of the stipulated conditions appear to adversely impact an offender's privacy, such as a condition that an offender must authorise his or her medical practitioner to release otherwise confidential information to a supervisor (cl 175(g)) or that an offender submit to surveillance or monitoring as a supervisor may direct (cl 175(l)).
12. Other conditions appear to adversely interfere with the personal integrity of an offender, such as a condition that an offender submit to breath testing, urinalysis or other medically approved test procedures for detecting alcohol or drug use (cl 175(j)) or a condition that requires an offender to comply with any direction given by a supervisor that requires the offender to remain at a specified place during specified hours (cl 175(m)).
13. The Committee recognises that an intensive correction order is designed to enable offenders to partake in an option that does not involve a period of detention. In this respect, the intensive correction order scheme is less affronting, in totality, to the privacy and personal integrity of offenders when compared to the conditions set on individuals committed to a correctional facility.
14. However, it is incumbent upon the Committee to identify potential powers in proposed legislation that adversely interfere with the privacy or personal integrity of individuals, including offenders, and draw this to the Parliament's attention. To this end, the Committee notes those conditions provided for under the proposed amendment that would trespass on the rights and liberties of offenders subject to an intensive correction order.
15. In any case, the Committee is concerned that the proposed amendment bestows on designated supervisors significant latitude in their management of an offender under their direction. In particular, the Committee notes that, despite stipulating the conditions required of an offender – and conversely, the authority of a supervisor – in

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an intensive correction order, the proposed amendment does not provide for guidelines in relation to the circumstances in which these conditions can be actioned. For example, although a supervisor can require an offender to submit to a urinalysis, this might not be an appropriate action for an offender subject to an intensive correction order for defaulting on their speeding fines.

16. In this respect, the Committee would have considered it preferable if the drafting of guidelines had been provided for in legislation that inform supervisors of the suitability of their conduct with respect to the authority conferred to them by the Bill. The Committee considers that, in the absence of such guidelines as a safeguard, the risk exists that a supervisor's authority could be applied inappropriately.

**17. The Committee notes the mandatory conditions that offenders under an intensive correction order must adhere to and identifies that some of these conditions appear to adversely interfere with an offender's privacy and personal integrity. Although the Committee recognises that, in totality, the intensive correction orders scheme is less affronting to personal rights and liberties than periodic detention, it is nonetheless incumbent on the Committee to identify these matters.**

**18. In any case, the Committee is concerned that the Bill confers onto the supervisors of offenders subject to intensive correction orders wide latitude in their management of an offender, without providing for appropriate guidelines to inform them of the suitability of their conduct. The Committee considers that, in the absence of such guidelines as a safeguard, the risk exists that a supervisor's authority could be applied inappropriately. The Committee refers this matter to Parliament for its consideration.**

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

#### Issue: Denial of Review Rights

19. The proposed provision to amend section 89(1) of the *Fines Act 1996* under Schedule 5 of this Bill provides that a fine defaulter who is committed to a correctional centre can apply to the Commissioner of Corrective Services for an order that the fine defaulter's period of imprisonment be served under an intensive correction order. Section 89(5) further provides that the decision whether or not to grant an application under Section 89 is at the discretion of the Commissioner of Corrective Services, and no appeal lies against a decision not to grant an application in a particular case.
20. The Committee recognises that this provision enables a fine defaulter, who would otherwise be committed to a period of detention, the opportunity to convert their sentence into an intensive correction order, which would generally be regarded as more favourable for the offender. However, the Committee is concerned by the inability for a fine defaulter to appeal against an unfavourable decision. It is generally the position of the Committee that appropriate avenues be afforded to applicants to challenge an administrative decision, such as a decision by the Commissioner of Corrective Services.

21. The existence of an appeals process to review the decisions made at first instance is an important feature of administrative law to ensure that the merits of a matter have been correctly adjudicated and that stipulated processes have been properly adhered to.

**22. The Committee recognises that this provision enables a fine defaulter, who would otherwise be committed to a period of imprisonment, the opportunity to convert their sentences into intensive correction orders. Despite this, the Committee is concerned by the finality of the decision by the Commissioner of Corrective Services and consequent lack of review rights. The Committee refers this matter to Parliament for its consideration.**

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

#### **Issue: Closed Justice**

23. The proposed provision to amend section 81(6) of the *Crimes (Administration of Sentences) Act 1999* under Schedule 2 of this Bill provides that applications by the Commissioner of Corrective Services to have additional conditions imposed on an offender under an intensive correction order may be held with or without the parties being present and in open court or in the absence of the public.
24. The Committee is concerned that this provision bestows upon the courts the discretion to deny parties – particularly offenders – from participating in proceedings that may lead to an outcome to their detriment.
25. The Committee is always concerned about provisions that enable courts to conduct proceedings in the absence of the parties concerned and, in the absence of any compelling reasons otherwise, prefers that parties are afforded the opportunity to be present at proceedings in the interests of the transparency of justice.

**26. The Committee is always concerned about provisions that enable courts to conduct proceedings in the absence of the parties concerned and, in the absence of any compelling reasons otherwise, prefers that parties are afforded the opportunity to be present at proceedings in the interests of the transparency justice.**

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

#### **Issue: Proclamation by Consent**

27. 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.
28. However, the Committee recognises that this Bill deals with the introduction of a new scheme concerning rehabilitative justice and appreciates that significant administrative arrangements need to take place before the Bill can commence operation. For example, the Committee notes the new procedures need to be drafted, that new staff may need to be trained and forms and policies need to be approved. Given this, the Committee does not consider the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

**29. The Committee recognises the significant administrative arrangements that need to take place before this Bill can commence operation and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**

***The Committee makes no further comment on this Bill.***

## 5. FAIR TRADING AMENDMENT (UNFAIR CONTRACT TERMS) BILL 2010

Date Introduced:	10 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Virginia Judge MP
Portfolio:	Fair Trading

### Purpose and Description

1. The object of this Bill is to amend the *Fair Trading Act 1987* to enact provisions concerning unfair contract terms that will eventually form part of the new Australian Consumer Law when it commences.
2. In addition, this Bill seeks to make consequential amendments to the *Contracts Review Act 1980*.

### Background

3. In August 2006, the Legislative Council Standing Committee on Law and Justice was asked to inquire into the incidence and impact of unfair terms in consumer contracts. The Committee recommended that New South Wales enact laws modelled on those introduced in Victoria in 2003 but also noted that inquiry participants expressed a preference for a national scheme.
4. A subsequent Productivity Commission report on Australia's consumer policy framework strongly supported the inclusion of an unfair contract terms provision in a new national consumer law.
5. In October 2008, the Council of Australian Governments (COAG) agreed to a new consumer policy framework in the context of its broader agenda for regulatory reform and commitment to a seamless national economy.
6. The Ministerial Council on Consumer Affairs developed the new framework, drawing on recommendations made by the Productivity Commission. Central to this plan was the development of a single, national consumer law.
7. Australian Consumer Law has since been developed with the agreement of all Australian jurisdictions. The Commonwealth is lead legislator and the States and Territories will subsequently mirror the model laws in their own jurisdictions. As per an intergovernmental agreement signed in July 2009, enforcement and administration of the Australian Consumer Law will be shared between the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC) and State and Territory fair trading agencies.
8. Implementation of the law will take place in two stages. The first tranche concerning unfair contract terms, and to be effected by this Bill, is due to commence nationally on 1 July 2010. The second tranche is due to commence on 1 January 2011 and will

comprise the remainder of Australian Consumer Law, including national product safety provisions and new consumer guarantees.

9. As noted, this Bill mainly relates to unfair contract terms. According to the Agreement in Principle Speech, the focus of consumer law until now has tended to be on 'procedural unfairness, and looking at the circumstances surrounding the formation of a contract that may have involved unfairness. By contrast, the current Bill focuses on substantive unfairness – circumstances where unfairness results from the actual wording of contract terms unduly favouring the supplier or disadvantaging the consumer'.

## The Bill

### 10. 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.

### Schedule 1 Amendment of *Fair Trading Act 1987 No 68*

#### Unfair contract term provisions from Australian Consumer Law

**Schedule 1 [1]** inserts proposed Part 5G in the *Fair Trading Act 1987* containing provisions drawn from the new Australian Consumer Law relating to unfair terms in consumer contracts that are standard form contracts. A **consumer contract** is a contract for the supply of goods or services (or for a sale or grant of an interest in land in trade or commerce) to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

The proposed Part contains the following provisions:

- (a) Proposed section 60ZC defines certain terms that are used in the proposed Part.
- (b) Proposed section 60ZD provides that an unfair term in a consumer contract that is a standard form contract is void, although the contract continues to bind the parties if it is capable of operating without the unfair term. If a contract claim in relation to a consumer contract containing such an unfair term is brought before a court or tribunal (such as the Consumer, Trader and Tenancy Tribunal) having jurisdiction to deal with the claim, the court or tribunal will be required to treat the term as being void.
- (c) Proposed section 60ZE provides that a term is unfair if:
  - (i) it would cause a significant imbalance in the parties' rights and obligations arising under the contract, and
  - (ii) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and
  - (iii) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (d) Proposed section 60ZF gives examples of terms that may be unfair.

(e) Proposed section 60ZG makes it clear that a term is not to be treated as being unfair to the extent that it defines the main subject matter of the contract, sets an upfront price payable under the contract or is a term required by a Commonwealth, State or Territory law.

(f) Proposed section 60ZH provides that if a party to proceedings alleges that a contract is a standard form contract, it is to be presumed to be such a contract unless another party to the proceedings proves otherwise. The proposed section also sets out factors that a court or tribunal must take into account in determining whether a contract is a standard form contract.

(g) Proposed section 60ZI provides for the proposed Part not to apply to certain kinds of marine contracts or to the constitutions of companies, managed investment schemes and other bodies.

### **Enforcement and remedies in relation to unfair contract terms**

**Schedule 1 [4]** inserts proposed section 64B in the *Fair Trading Act 1987* to enable the Director-General or, with leave, a party to a consumer contract that is a standard form contract to apply to the Supreme Court for a declaration that a term in contracts of that kind is unfair.

**Schedule 1 [3]** amends section 62 of the *Fair Trading Act 1987* to make it clear that a contravention of proposed Part 5G does not constitute an offence. **Schedule 1 [2]** amends section 61 of the Act to make it clear a reference in Part 6 of the Act (in which sections 61 and 62 are located) to a contravention of proposed Part 5G is read as a reference to a party to a consumer contract applying or relying on a term of the contract that has been declared to be unfair by the Supreme Court in an application made under proposed section 64B.

**Schedule 1 [5]–[13]** amend Part 6 (Enforcement and remedies) of the *Fair Trading Act 1987* to enable the Director-General and certain other persons to obtain certain other remedies in the event that a party to a consumer contract seeks to apply or rely on a term of the contract that has been declared to be unfair by the Supreme Court in an application made under proposed section 64B.

**Schedule 1 [14]** amends section 86A of the *Fair Trading Act 1987* to make it clear that the Minister or the Director-General may issue public warnings under that section in relation to business practices involving the use of terms in consumer contracts that are standard form contracts that are or may be unfair.

**Schedule 1 [15]** makes an amendment to section 89 of the *Fair Trading Act 1987* that is consequential on the amendments made to the *Contracts Review Act 1980* by Schedule 2.

### **Savings and transitional provisions**

**Schedule 1 [16]** amends Schedule 5 to the *Fair Trading Act 1987* to insert provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [17]** amends clause 12 of Schedule 5 to the *Fair Trading Act 1987* to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

### **Schedule 2 Consequential amendment of *Contracts Review Act 1980* No 16**



**Schedule 2** amends the *Contracts Review Act 1980* to make it clear that the provisions of that Act are not limited or restricted by, and do not limit or restrict the operation of, the provisions of proposed Part 5G of the *Fair Trading Act 1987* (as inserted by Schedule 1 [1])

## Issues Considered by the Committee

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

#### Issue: Commencement by Proclamation

11. 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.
12. However, the Committee recognises that this Bill is part of a federatively cooperative exercise that seeks to enact uniform legislation across nine different jurisdictions and commence nationwide operation on a common date. In this respect, enactment of this Bill is contingent on the readiness of other jurisdictions. In any case, according to the Agreement in Principle speech, it is intended that the Bill commence operation on 1 July 2010 in accordance with the agreed start date of the nationwide scheme.
13. **The Committee recognises the difficulties in determining a commencement date for uniform legislation, as it is reliant on the actions of other jurisdictions. However, the Committee is aware that it is intended that the Bill commence operation on 1 July 2010 and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**

*The Committee makes no further comment on this Bill.*

## 6. INDUSTRIAL RELATIONS AMENDMENT (PUBLIC SECTOR APPEALS) BILL 2010

Date Introduced:	10 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Paul Lynch MP
Portfolio:	Industrial Relations

### Purpose and Description

1. The objects of this Bill are:
  - (a) to amend the *Industrial Relations Act 1996* (the **IR Act**) to provide for the Industrial Relations Commission (the **Commission**) to review decisions concerning the promotion and discipline of public sector employees instead of the Government and Related Employees Appeal Tribunal, and
  - (b) to consequentially repeal the *Government and Related Employees Appeal Tribunal Act 1980* (the **GREAT Act**) and the regulation made under that Act, and
  - (c) to amend the *Transport Appeal Boards Act 1980* and the *Industrial Relations Act 1996* to provide for the President of the Commission to review decisions concerning the promotion and discipline of officers and employees of the State Transit Authority, Sydney Ferries, the Roads and Traffic Authority and RailCorp instead of Transport Appeal Boards, and
  - (d) to make consequential amendments to various other Acts and a regulation.

### Background

2. According to the Agreement in Principle speech this Bill “the establishment of the national industrial relations system for the private sector has created an opportunity for the New South Wales Government to implement a number of practical administrative changes to streamline the public sector appeals process and facilitate a more efficient use of existing resources.
3. The purpose and intent of this amendment legislation is to transfer the jurisdiction of the Government and Related Employee Appeals Tribunal [GREAT] to the Industrial Relations Commission of New South Wales—the Commission—and to confer the functions of the Transport Appeal Boards [TAB] on to the President of the commission. This shift forms part of a broader strategy implemented by the New South Wales Government to consolidate public sector employment matters within a single, specialist tribunal. “
4. The Bill similarly makes amendments relating to the Transport Appeal Boards [TAB]. The TAB determines appeals lodged by public sector employees in relation to disciplinary and promotion decisions made by public sector transport authorities, such as the State Transit Authority, Sydney Ferries, the Roads and Traffic Authority and RailCorp. Currently appeals lodged under the Transport Appeal Boards Act are required to be heard by a tripartite panel comprising the chairperson or a vice chairperson, an authorised representative of the employing transport authority and a

nominated member of the relevant union. The Bill will amend the Act to abolish the positions of chairperson and vice-chairperson and remove the requirement to constitute a three-person panel. Instead, the president of the commission will be authorised to hear and determine appeals. The president may delegate these functions to another member of the commission.

5. According to the Minister “Folding the GREAT and TAB functions within the commission will deliver a number of new administrative efficiencies by ensuring greater consistency in the administration and conduct of all proceedings, eliminating an unnecessary duplication of services and will guarantee optimum use of government resources and infrastructure.”

## The Bill

### 6. 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 1 July 2010.

**Clause 3** repeals the *Government and Related Employees Appeal Tribunal Act 1980*, the *Government and Related Employees Appeal Tribunal (Education Ancillary Staff) Amendment Act 1987* and the *Government and Related Employees Appeal Tribunal Regulation 2005*.

#### **Schedule 1 Amendment of *Industrial Relations Act 1996 No 17***

**Schedule 1 [1]** inserts a new Part 7 (sections 91–100H) into Chapter 2 of the IR Act.

New section 91 defines terms and expressions for the purposes of new Part 7. The definitions of public sector employee and public sector employer are substantially the same as the definitions of employee and employer in section 4 (1) of the GREAT Act. Some changes have been made to update the definitions in line with recent amendments to the *Public Sector Employment and Management Act 2002*.

New section 92 excludes public sector employees who (because of industrial agreements or other arrangements) are currently unable to appeal to the Government and Related Employees Appeal Tribunal from the application of the new Part 7 and provides for the exclusion of public sector employees from the application of that Part 7 after the commencement of the section by industrial agreements made or approved by the Commission.

New sections 93–100B are substantially the same as sections 19–26, 28 and 29 of the GREAT Act. They specify the grounds on which public sector employees to which new Part 7 applies may appeal against decisions relating to their promotion and discipline and outline the procedures relating to giving notice of, and lodging, appeals.

New sections 100C and 100D are substantially the same as sections 48 and 48A, respectively, of the GREAT Act. They specify the general powers that will be able to be exercised by the Commission in relation to the determination of appeals under new Part 7. The procedures for hearing of appeals currently contained in Part 4 of the GREAT Act are largely replaced by provisions of the IR Act governing proceedings of the Commission (see in particular sections 162 and 163 of the IR Act). However, new sections 100E and 100F require the Commission to endeavour to settle disciplinary appeals by conciliation. Section 100E is substantially the same as section 36A of the GREAT Act. New section 100G (1) requires an employer to present the employer’s case in a disciplinary appeal at least 7 days before any hearing of the appeal. New section 100G (2) and (3) require the employer’s case

to be presented first at the hearing of an appeal. Section 100G (2) and (3) are substantially the same as section 42 of the GREAT Act.

New section 100H requires promotion appeals to be heard informally, subject to the rules of the Commission and any practice notes. It specifies the persons entitled to be present and prevents those persons from being represented by an Australian legal practitioner, agent or otherwise. Schedule 1 [4] makes a consequential amendment.

**Schedule 1 [6]** amends section 185 of the IR Act to enable the making of rules of the Commission with respect to the giving of evidence in appeals under new Part 7 by persons having specialised knowledge of matters relevant to promotion or disciplinary appeals.

**Schedule 1 [3]** amends section 166 of the IR Act so that parties in proceedings under new Part 7 may only be represented by an Australian legal practitioner or industrial agent with the leave of the Commission.

**Schedule 1 [5]** amends section 181 of the IR Act so that costs will not be able to be awarded in proceedings under new Part 7.

**Schedule 1 [7] and [8]** amend sections 185 and 185A, respectively, of the IR Act as a consequence of the amendments to the Transport Appeal Boards Act 1980 made by Schedule 2. They extend the powers to make rules of the Commission and for the President of the Commission to issue practice notes with respect to promotion and disciplinary appeals under that Act.

**Schedule 1 [9]** inserts new section 197B to enable appeals on questions of law to the Full Bench of the Commission in Court Session against any decision of the Commission in proceedings under new Part 7. Schedule 1 [2] makes a consequential amendment to section 153.

**Schedule 1 [10] and [11]** are consequential amendments.

**Schedule 1 [12] and [13]** amend Schedule 4 to the IR Act to enable the making of savings and transitional regulations and to make savings provisions.

### **Schedule 2 Amendment of *Transport Appeal Boards Act 1980* No 104**

**Schedule 2** amends the *Transport Appeal Boards Act 1980* (the Boards Act) to achieve the object described in paragraph (c) of the Overview above.

Under the Boards Act as amended, the grounds on which officers and employees of the State Transit Authority, Sydney Ferries, the Roads and Traffic Authority and RailCorp may appeal against decisions relating to their promotion and discipline will remain the same and the entitlement to be present at formal hearings is retained (new section 11A as inserted by

**Schedule 2 [12]**). However, the functions in relation to appeals currently exercised by a Transport Appeal Board consisting of a Chairperson and 2 other members will instead be exercised by the President of the Commission (or another member of the Commission to whom the President has delegated this function) (**Schedule 2 [8] and [13]**).

**Schedule 2 [2]** enables regulations to be made to exclude the application of the Boards Act to persons or classes of persons prescribed by the regulations.

**Schedule 2 [6]** provides for the Industrial Registrar under the IR Act to be the secretary of the transport appeal boards.

**Schedule 2 [9]–[11]** replace the procedures for hearing of appeals currently contained in the Boards Act with the provisions contained in the IR Act governing proceedings of the Commission (see in particular sections 162 and 163 of the IR Act).

**Schedule 2 [17]** provides that costs cannot be awarded in appeal proceedings under the Boards Act.

**Schedule 2 [20]** provides for appeals against decisions of boards on questions of law to the Full Bench of the Commission.

**Schedule 2 [3], [5], [12], [14]–[16], [18], [19] and [21]–[27]** make consequential amendments.

**Schedule 2 [28] and [29] amend Schedule 2** to the Boards Act to enable the making of savings and transitional regulations and to make savings provisions.

**Schedule 2 [1], [4] and [7]** are amendments by way of statute law revision.

### **Schedule 3 Amendment of other Acts and regulation**

**Schedule 3** contains consequential amendments to various Acts and a regulation.

## **Issues Considered by the Committee**

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| <p>7. The Committee has not identified any issues under s8A(1)(b) of the <i>Legislation Review Act 1987</i></p> |
|---|

*The Committee makes no further comment on this Bill.*

## 7. MACEDONIAN ORTHODOX CHURCH PROPERTY TRUST BILL 2010\*

Date Introduced:	10 June 2010
House Introduced:	Legislative Council
Minister Responsible:	Reverend the Hon Fred Nile MLC
Portfolio:	Christian Democratic Party (Fred Nile Group)

### Purpose and Description

1. This Bill seeks to constitute as a corporation the Macedonian Orthodox Church Property Trust, to specify the Trust's functions, to provide for the vesting of certain property in the Trust; and for other purposes.
2. The objective of this Bill is to constitute a statutory corporation to hold property for the Macedonian Orthodox Church Diocese of Australia and New Zealand, to specify the functions of that statutory corporation and to vest in the statutory corporation property held in trust for the benefit of the church.
3. The Bill deals only with establishing a corporate trustee and the holding by it of the property of the church and the administration of that property.
4. It will provide for the creation of a statutory trust to be known as the Macedonian Orthodox Church Property Trust, in clause 5 (1). The trust will have power to hold property throughout Australia in accordance with clause 4, and will vest in it certain powers in relation to dealings with property and investment of funds in accordance with clauses 7 and 10.
5. The Bill empowers the holding of the property by the trust, the blending of the trust funds, and the variation of trusts pursuant to clauses 11 and 12. The trust may make arrangements with a church of another denomination concerning the use of trust property in accordance with clause 13, and may be appointed the executor or administrator of an estate under clause 15.
6. The membership of the trust in clause 5 (2) reflects the composition of the Diocesan Committee of Trustees, pursuant to its statute. The Bill follows the governance of the church, in relation to matters regarding the assets of the church, and the utilisation of property assets by the church will be subject to civil and canonical accountability required by its statute.
7. It will vest four diocesan properties in the trust pursuant to clause 17. Those properties are currently held by the bishop, the deputy bishop, and other clerics as trustees on appointment by the Diocesan Committee of Trustees. They hold those properties as trustees until the enactment of a property trust Bill.
8. This Bill will not affect any automatic vesting, mandatory or compulsory transfers of any other properties to the trust, whether the properties are held by parishes of the church or otherwise. For example, a number of parishes hold parish property in the

name of individual parish members, or in other legal structures. Properties held in such way will not be automatically transferred into the trust when it is created. The Bill provides a mechanism for any property to be transferred to the trust at a later stage, after the Bill takes effect, but only after the consent of both a current trustee wishing to transfer property in the trust, and the consent of the Metropolitan to the transfer. This is provided for in clause 19.

9. Clause 20 deals with the circumstances of such later transfer, if the consent of all current trustees cannot be obtained because of absence, or death, in which case the Metropolitan can consent on their behalf, provided that the procedure in clause 20 is followed.
10. Clause 18 provides for vesting in the trust of property that is acquired after the date that the Bill comes into effect when a gift, disposition or a trust of property is made or declared, for or on behalf of the church, or to the bishop or another person on behalf of the church, to ensure that such gifts, dispositions or trust property do not fail because of the Bill.
11. Division 2 of part 3 provides provisions relating to the requirement for relevant registration authorities to record the transfer of interests in land that are necessary as a result of the vesting or transfers of property under clauses 17, 19, or 20.
12. The Bill has standard provisions stating that vesting of property under part 3 of is not a dutiable transaction for the purposes of the *Duties Act 1997*, and provides exemption from stamp duty for such transfers.

## Background

13. The establishment of a corporate trustee will make it possible for property of the church in the diocese to be held by a single body, and overcome the difficulties in having several trustee bodies acting for the church and ensure a succession of trustees.
14. The Second Reading speech explained:

...the need for the Bill arises because the church seeks to vest its property in a single corporate body that is able, in perpetuity, to hold property on behalf of the church, its parishes and institutions. The concern is that when the property is vested in trustees, incorporated associations or companies, there is no accountability to the church. Further, there is concern that, should there be a failure to appoint future trustees, or a failure to comply with the requirements of legislation regulating a corporate body, the interests of the church may be adversely affected and property lost to the church. It is possible also that where property is held by a corporate body, the interests of the church may be adversely affected by the actions of its members.
15. Accordingly, the property trust will be a body corporate with perpetual succession. It will enable the property of the church to be held by the trust to overcome the problems associated with certain properties currently being held by individual trustees and for whom successors have to be appointed.
16. The Second Reading speech also explained that:

The Bill is similar in content to other church property trust legislation passed by various Australian parliaments, including State parliaments, and has been prepared in

accordance with the New South Wales Government's policy of assisting churches to better administer their temporal affairs. However, the further importance of this legislation is that it provides a facility by which the Parliament can assist the church to put at rest any feeling of misconception as to who has any entitlement to property. This has been at the heart of problems within the community.

## The Bill

17. The objects of this Bill are as follows:

- (a) to constitute a statutory corporation to hold property on behalf of the Macedonian Orthodox Church,
- (b) to specify the functions of the statutory corporation,
- (c) to provide for certain property held in trust for the Church to vest in the statutory corporation on the date it is established,
- (d) to provide for the vesting in the statutory corporation of property given to, or receivable or recoverable by, the Church in the future,
- (e) to provide for other property held in trust for the Church to be transferred and vest in the statutory corporation, if the current trustees and the Metropolitan consent or if the current trustees are deceased, absent or under a legal disability and the Metropolitan consents on their behalf.

## 18. 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 a day to be appointed by proclamation.

**Clause 3** defines terms used in the proposed Act. Among the terms defined are **Church**, **Trust** and **trust property**. **Church** is defined as the Macedonian Orthodox Church, Diocese of Australia and New Zealand with its seat in Melbourne, being an integral part of the Macedonian Orthodox Church with its seat in Skopje, Macedonia, a hierarchical religious body whose leader, overseer and shepherd is the Archbishop of Ohrid and Macedonia.

**Clause 4** makes it clear that it is the intention of the Parliament that the operation of the Act should, as far as possible, include operation in relation to property and things situated outside the territorial limits of the State.

### Part 2 Constitution and functions of Trust:

**Clause 5** provides for the Macedonian Orthodox Church Property Trust (referred to in the proposed Act as the **Trust**) to be established as a corporation. The Trust is to consist of trustees comprising the Metropolitan (who presides over meetings of the Trust), the Deputy Bishop, a representative from the monasteries of the Church who is appointed by the Metropolitan, the Diocesan Secretary, the deputy president of the Diocesan Assembly and 3 lay persons and 2 clerics of the Church, each being current members of the Diocesan Ruling Committee, who are appointed by the Metropolitan.

**Clause 6** specifies the procedure of the Trust.

**Clause 7** specifies the functions of the Trust. These include:

- (a) buying, holding and selling Church property, and
- (b) acquiring property by gift or by devise or bequest, and
- (c) borrowing money for Church purposes.



**Clause 8** empowers the Trust to make by-laws.

**Clause 9** enables the Trust to hold or acquire property alone or jointly.

**Clause 10** provides for the investment of funds by the Trust.

**Clause 11** enables the Trust to invest, as one fund, money held for different purposes.

**Clause 12** empowers the Trust to make advances from its trust funds, and specifies how such advances may be made.

**Clause 13** enables the Trust to make arrangements with a church of another denomination concerning the use of trust property.

**Clause 14** enables the Trust to vary the terms of a trust if it has become impossible or inexpedient to carry out those terms.

**Clause 15** enables the Trust to be the executor or administrator of an estate in which the Church has a beneficial interest. The clause will also enable the Trust to accept appointment as trustee of property held for the Church's benefit.

**Clause 16** authorises the Trust to act on behalf of the Church in settling the compensation payable in the event that any trust property is compulsorily acquired.

### **Part 3 Vesting of property in Trust:**

#### **Division 1 Vesting of property in Trust:**

**Clause 17** provides for the vesting in the Trust, on the date of commencement, of all property and rights held on trust for the Church by Bishop Petar Karevski, Father Jovica Simonovski and Father Tone Gulev, including the property listed in the clause.

**Clause 18** provides for the vesting in the Trust of property acquired after the date of commencement.

**Clause 19** provides for the later vesting of other property, if the current trustees and the Metropolitan consent.

**Clause 20** provides for the later vesting of other property that is held on trust, if the Metropolitan is unable to obtain the consent of all current trustees and consents on their behalf.

#### **Division 2 Provisions relating to vesting of property:**

**Clause 21** requires registration authorities to record the transfer of interests in land that are necessary as a result of the operation of the proposed Part.

**Clause 22** provides that the vesting of property in the Trust by the proposed Part does not affect any reservation, mortgage, charge, encumbrance, lien or lease that affected the property or any trust on which the property was held, immediately before the vesting of the property.

**Clause 23** provides that, when property vests in the Trust in accordance with proposed section 17, 19 or 20 the rights, liabilities and obligations of the former trustees in relation to the property will become the rights, liabilities and obligations of the Trust.

**Clause 24** provides that certain gifts, dispositions and trusts of property do not fail but take effect on or after the date of commencement, as gifts, dispositions and trusts in favour of the Trust.

#### **Division 3 Payment of duty not required:**

**Clause 25** provides that duty under the *Duties Act 1997* is not chargeable in respect of, or in connection with, a conveyance to the Trust of property from a person or body that holds that property for or on behalf of any parish or community of the Church.

#### **Part 4 Miscellaneous:**

**Clause 26** provides for the custody and use of the seal of the Trust.

**Clause 27** provides for the execution on behalf of the Trust of deeds and instruments required by law to be in writing and for the entering into of oral contracts on its behalf.

**Clause 28** enables the Trust to appoint agents to execute documents on its behalf.

**Clause 29** enables the Trust to certify that it holds property on trust for the Church.

**Clause 30** provides that, if a person obtains a receipt for money paid to the Trust, the person will not be liable if the money is lost or misapplied or is not applied.

**Clause 31** is intended to remove the need for a person involved in a property dealing with the Trust to inquire whether the Trust has power to deal with property and will protect the person even if the person had notice that the Trust had no such power.

**Clause 32** entitles members of the Trust and others to be indemnified out of trust property against liability for certain things done by them in good faith concerning the property.

**Clause 33** provides for the service of documents on the Trust.

### **Issues Considered by the Committee**

#### **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.**

19. The Committee notes that the proposed Act is to commence on a day 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.

20. However, the Committee also notes that the Second Reading speech explained that this Bill:

...will vest four diocesan properties in the trust pursuant to clause 17. Those properties are currently held by the bishop, the deputy bishop, and other clerics as trustees on appointment by the Diocesan Committee of Trustees. They hold those properties as trustees until the enactment of...Bill...The Bill provides a mechanism for any property to be transferred to the trust at a later stage, after the Bill takes effect, but only after the consent of both a current trustee wishing to transfer property in the trust, and the consent of the Metropolitan to the transfer. This is provided for in clause 19.

**21. Therefore, this will likely involve appropriate administrative and transitional arrangements to be made. The Committee is of the view that there may be good reasons why such discretion for commencement by proclamation is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.**

***The Committee makes no further comment on this Bill.***

## 8. POLICE LEGISLATION AMENDMENT (RECOGNISED LAW ENFORCEMENT OFFICERS) BILL 2010

Date Introduced:	10 June 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Police

### Purpose and Description

1. This Bill amends the *Police Act 1990* to make provision with respect to the exercise of police powers by police officers of other jurisdictions; and for other purposes.
2. This Bill seeks to address issues that affect one category of special constables—sworn police officers from other jurisdictions. To enable them to carry out their duties, it clarifies that this class of special constables may be appointed as recognised law enforcement officers in New South Wales. This aims to benefit those police involved in cross-border operations as the Bill clarifies any uncertainty surrounding the validity of special constable authorisations when such operations are conducted.
3. Schedule 1 contains various amendments to the *Police Act 1990*. A new part 10B will be introduced into the Act to enable the Commissioner of Police to appoint members of any Australian jurisdiction as recognised law enforcement officers in New South Wales. These appointments may be subject to certain conditions and will be in force for a period to be determined by the Commissioner. For example, interstate police may be granted temporary powers or appointments confined to the duration of a particular investigation, such as six to 12 months, while those police officers assigned to border areas or who undertake frequent interstate work may be appointed for an unspecified period—for example, for the period the officer remains at a border station. If an officer ceases to be a member of the police force of their jurisdiction, they cease to be a recognised law enforcement officer by operation of the law contained in this Bill.
4. The Bill also gives the Commissioner the ability to suspend or revoke a person's appointment as a recognised law enforcement officer if the Commissioner is of the opinion that the person is not a suitable person to be recognised as such.
5. The appointment of a person as a recognised law enforcement officer in New South Wales affords them all the functions, powers, immunities, liabilities and responsibilities that a police officer of the rank of constable has. This includes the power a constable has in the *Law Enforcement (Powers and Responsibilities) Act 2002*, known as LEPR.
6. Under the *Law Enforcement (Powers and Responsibilities) Act*, key police powers such as powers of arrest, search and seizure, and the power to request identification can be exercised only by police officers. With this Bill, references to a police officer in

any other Act or statutory instrument will be taken to include a reference to a recognised law enforcement officer. This includes references in the *Law Enforcement (Powers and Responsibilities) Act* and division 8 A of part 3 of the *Crimes Act 1900*, which relates to assaults and other actions against police and other law enforcement officers.

7. Schedule 2 formalises the new arrangements through the repeal of section 101 (1A) (a) of the *Police (Special Provisions) Act 1901*, which relates to the appointment of police officers from other jurisdictions.

## Background

8. This Bill seeks to amend the *Police Act 1990* to enable police officers from other jurisdictions to be recognised as law enforcement officers in New South Wales.
9. Under the current *Police (Special Provisions) Act 1901*, these officers are referred to as special constables. Dating back to the early nineteenth century, special constables were first established to deal with civic disturbances at a time when the New South Wales Police Force was still in its infancy. At present, there are three types of special constables: serving police officers from other jurisdictions; New South Wales Police Force employees who perform security or protective-type duties, such as those seen in and around New South Wales Parliament House; and employees from other law enforcement or New South Wales Government agencies, such as the RSPCA and local councils.
10. Special constables are not sworn New South Wales Police Force officers. The majority of these special constables are police officers from other jurisdictions, and it is only this category of special constable that this Bill will deal with.
11. According to the Agreement in Principle speech:

The remaining classes of special constable are not affected by the Bill. The New South Wales Government will be working with these sectors to develop longer-term proposals commensurate with their needs. In doing so, the remaining provisions of the *Police (Special Provisions) Act 1901* will stay in effect until a resolution is reached.

## The Bill

12. The objects of this Bill are:
  - (a) to repeal the provisions of the *Police (Special Provisions) Act 1901* that allow the appointment of police officers from other Australian jurisdictions as special constables, and
  - (b) to amend the *Police Act 1990* to include provisions for the appointment by the Commissioner of Police of police officers from other Australian jurisdictions as recognised law enforcement officers, and
  - (c) to confer functions on recognised law enforcement officers that are similar to those exercised by New South Wales police officers of the rank of constable.

### 13. 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.

**Schedule 1 Amendment of *Police Act 1990* No 47:**

**Schedule 1 [2]** inserts into the Act proposed Part 10B which contains proposed sections 207B–207E.

Proposed section 207B provides for the appointment by the Commissioner of Police of police officers of other Australian jurisdictions as recognised law enforcement officers. The Commissioner must be satisfied before appointing a person as a recognised law enforcement officer that the person will be subject to an appropriate disciplinary system in exercising his or her functions.

Proposed section 207C enables the Commissioner of Police to vary or revoke the appointment of a recognised law enforcement officer.

Proposed section 207D requires a person to take the oath or make the affirmation of office in accordance with the regulations before exercising any functions as a recognised law enforcement officer.

Proposed section 207E confers on recognised law enforcement officers the functions (including powers, immunities, liabilities and responsibilities) of a police officer of the rank of constable appointed under the Act. The proposed section specifically applies and disapplies certain provisions of Acts and statutory instruments that apply to police officers in relation to recognised law enforcement officers. The proposed section also enables the regulations to declare provisions that are to apply or not apply to recognised law enforcement officers and to apply provisions with prescribed modifications.

**Schedule 1 [1]** makes a consequential amendment.

**Schedule 1 [3]** amends Schedule 4 to the Act to enable regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

**Schedule 1 [4]** amends Schedule 4 to the Act to provide that police officers of other jurisdictions appointed as special constables under section 101 (1A) (a) of the *Police (Special Provisions) Act 1901* cease to hold that office on the repeal of that paragraph by Schedule 2 to the proposed Act.

**Schedule 2 Amendment of *Police (Special Provisions) Act 1901* No 5:**

**Schedule 2 [1]** amends section 101 of the *Police (Special Provisions) Act 1901* to remove the provision which enables the appointment of police officers of other Australian jurisdictions as special constables. **Schedule 2 [2]** makes a consequential amendment.

**Issues Considered by the Committee****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.

15. However, the Committee also notes that the Agreement in Principle speech explained that this Bill:

...will be of particular benefit to those police involved in cross-border operations as the Bill seeks to rectify any uncertainty surrounding the validity of special constable authorisations when these operations are underway...A new part 10B will be introduced into the Act to enable the Commissioner of Police to appoint members of any Australian jurisdiction as recognised law enforcement officers in New South Wales.

- 16. Therefore, this will likely involve appropriate administrative and transitional arrangements to be made. The Committee is of the view that there may be good reasons why such discretion for commencement by proclamation is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.**

*The Committee makes no further comment on this Bill.*

## 9. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2010

Date Introduced: 11 June 2010  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Kristina Keneally MP  
Portfolio: Premier

### Purpose and Description

1. The objects of this Bill are:
  - (a) to make minor amendment to various Acts and instruments (Schedule 1);
  - (b) to amend certain other Acts and instruments, largely minor and technical in nature, for the purpose of effecting statute law revision (Schedule 2);
  - (c) to repeal an Act and provisions of Acts and instruments that are deemed to be redundant or have no practical utility (Schedule 3); and
  - (d) to make other provisions of a consequential or ancillary nature (Schedule 4).
2. Schedule 1 makes substantive amendments to the:
  - (a) *Guardianship Act 1987* by helping streamline the process for service of applications and notices under the Act;
  - (b) *Fisheries Management Act 1994* by clarifying that the term 'premises' includes boats for the purposes of a provision of the Act that allows the Minister to require the owner or occupier of premises within a quarantine area to take certain action as a consequence of the area's quarantine status;
  - (c) *Ombudsman Act 1974* by extending to the Office of Information Commissioner certain provisions that are ancillary to the Joint Parliamentary Committee's current power under the Act to veto proposed appointments to that office. The provisions concerned require the Joint Committee to take evidence relating to such proposed appointments in private and to protect its deliberations from being improperly disclosed;
  - (d) *Children and Young Persons (Care and Protection) Act 1998* by confirming that the parents of a child or young person subject to an application for a care order are to be served with a copy of any report supporting the application, in addition to the application, and any other supporting documentation;

- (e) *Public Finance and Audit Act 1983* by clarifying that a controlled entity of a statutory body or government agency is required to have separate financial reports that are prepared and audited in accordance with the same general auditing requirements as apply to statutory bodies and government agencies under the Act;
- (f) *Commission for Children and Young People Act 1998* by clarifying that as a review of the Act already commenced in March 2010, a further review does not need to commence in December 2010 that would otherwise be required by the Act;
- (g) *Australian Museum trust Act 1975* by clarifying that the Australian Museum Trust has the capacity to engage in commercial activities and to exercise its powers, authorities, duties and functions outside of New South Wales; and
- (h) *Real Property Act 1900* by removing the requirements that the date of birth of any proprietor of an estate or interest that the Register General knows to be a minor be recorded in the folio of the register for land.

## Background

3. This Bill continues the established statute law revision program that deals with only minor amendments to legislation.

## The Bill

### 4. 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.

**Clause 3** provides for the repeal of the amendments made by the proposed Act after he amendments have commenced. Once the amendments have commenced, those provisions will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending provision does not affect the amendments made by that provision.

**Clause 4** makes it clear that the explanatory notes contained in the Schedules do not form part of the proposed Act.

### Schedule 1 Minor amendments

**Schedule 1** makes amendments to the following Acts and instruments:

*Aboriginal Land Rights Act 1983* No 42

*Adoption Act 2000* No 75

*Animal Research Act 1985* No 123

*Annual Reports (Departments) Act 1985* No 156

*Annual Reports (Statutory Bodies) Act 1984* No 87

*Associations Incorporation Act 2009* No 7

*Australian Museum Trust Act 1975* No 95

*Children and Young Persons (Care and Protection) Act 1998* No 157



*Commission for Children and Young People Act 1998* No 146  
*Dairy Industry Act 2000* No 54  
*Environmental Planning and Assessment Act 1979* No 203  
*Fines Act 1996* No 99  
*Fines Regulation 2005*  
*Fisheries Management Act 1994* No 38  
*Guardianship Act 1987* No 257  
*Lake Illawarra Authority Act 1987* No 285  
*Licensing and Registration (Uniform Procedures) Act 2002* No 28  
*Local Government Act 1993* No 30  
*Mental Health Act 2007* No 8  
*Ombudsman Act 1974* No 68  
*Public Finance and Audit Act 1983* No 152  
*Public Reserves Management Fund Act 1987* No 179  
*Real Property Act 1900* No 25  
*Retirement Villages Act 1999* No 81  
*Strata Schemes Management Act 1996* No 138  
*Strata Schemes Management Regulation 2005*  
Explanatory note page 3  
Statute Law (Miscellaneous Provisions) Bill 2010  
Explanatory note  
*Subordinate Legislation Act 1989* No 146  
*Sydney Opera House Trust Act 1961* No 9  
*Workers Compensation Act 1987* No 70

The amendments to each Act and instrument are explained in detail in the explanatory note relating to the Act or instrument concerned set out in Schedule 1.

## **Schedule 2 Amendments by way of statute law revision**

**Schedule 2** amends certain Acts and instruments for the purpose of effecting statute law revision.

The amendments to each Act and instrument are explained in detail in the explanatory note relating to the Act or instrument concerned set out in Schedule 2.

## **Schedule 3 Repeals**

**Schedule 3** repeals an Act and provisions of Acts and instruments.

Clause 1 of the Schedule repeals an Act and provisions of instruments that are redundant.

Clause 2 of the Schedule repeals provisions of Acts that contain only amendments that have commenced or that are redundant.

Section 30 (2) of the *Interpretation Act 1987* ensures that the repeal of an Act or statutory rule does not affect the operation of any savings, transitional or validation provision contained in the Act or statutory rule, and that the repeal of an amending Act does not affect any amendment made by the Act. Section 5 (6) of the *Interpretation Act 1987* provides that the provisions of section 30 that apply to a statutory rule also apply to an environmental planning instrument.

The Acts or instruments that were amended by the Act and provisions of Acts and instruments being repealed are available electronically on the NSW legislation website at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

#### **Schedule 4 General savings, transitional and other provisions**

**Schedule 4** contains savings, transitional and other provisions of general effect. The Schedule includes a provision allowing the Governor, by proclamation, to revoke the repeal of any Act or instrument or the provision of any Act or instrument repealed by the proposed Act or any of the other statute law revision Acts listed.

The purpose of each provision is explained in detail in the explanatory note relating to the provision concerned set out in the Schedule.

### **Issues Considered by the Committee**

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

##### **Issue: Retrospectivity**

5. Schedule 1.29 seeks to amend the *Workers Compensation Act 1987* to clarify that any reference to the Compensation Court in certain subsections of the aforementioned Act is to be read as a reference to the District Court.
6. This amendment is deemed to have commenced on 1 January 2004, the date that the jurisdiction of the Compensation Court to hear matters was conferred to the District Court and the same date that the Compensation Court was abolished.
7. **The Committee considers that, as no person is detrimentally affected by the retrospective operation of this amendment, this provision does not trespass on personal rights or liberties.**

***The Committee makes no further comment on this Bill.***

# 10. SUPERANNUATION LEGISLATION AMENDMENT BILL 2010

Date Introduced:	11 June 2010
House Introduced:	Legislative assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Finance

## Purpose and Description

1. The object of this Bill is to amend various public sector superannuation Acts as follows:
  - (a) to enable the SAS Trustee Corporation (STC) to reduce benefits under public sector defined benefit superannuation schemes if STC has been required to pay additional tax on superannuation contributions because the member or contributor concerned has failed to provide his or her tax file number to STC,
  - (b) to update existing provisions enabling certain death benefits to be increased after being previously reduced to offset contributions tax liabilities,
  - (c) to enable former contributors to the State Authorities Superannuation Fund to retain their benefits in that Fund after the benefits become payable,
  - (d) to provide for the effect on additional benefits cover under the State Authorities Superannuation Scheme for ambulance officers who are covered for death or incapacity benefits under an award,
  - (e) to make other consequential amendments and to provide for savings and transitional provisions consequent on the Bill.

## Background

2. Firstly the Bill amends the Police Superannuation Scheme, State Authorities Superannuation Scheme, State Authorities Superannuation Non-contributory Scheme and State Superannuation Scheme. According to the Agreement in Principle Speech, the trustee of the schemes, the SAS Trustee Corporation [STC], requested the amendment to address the tax levied by the Commonwealth on superannuation funds for members who have not supplied their tax file numbers.
3. The Commonwealth does not impose this tax on the individual member. The additional tax of 31.5 per cent is borne by the superannuation fund itself. The extra tax is levied on the employer contributions, including salary sacrifice contributions, made on behalf of the relevant member. The tax is on top of the usual 15 per cent levied on these contributions. While it is relatively straightforward for accumulation funds to deduct the additional tax from the accounts of members who have not supplied their tax file numbers, it is more complex for defined benefit schemes such as the closed New South Wales schemes in question. The proposed amendments

have been developed in consultation with the STC. Consistent with the treatment of other taxes, the additional tax liability will be recovered by reducing the benefits of the relevant members. While the measure enables the STC to better manage the tax, the major aim of the proposal is to provide an incentive to encourage members to submit their tax file numbers and, where permitted by the Commonwealth, mitigate the effect of this tax on their benefits.

4. Currently deferred benefits must be paid out or transferred out of SASS when the former member reaches the retirement age of 58. The transfer is automatically to First State Super when the former member fails to nominate payment or transfer to another complying superannuation fund. Affected former members are unhappy with the current compulsory transfer. Under the proposed amendments, they will no longer have to leave the fund with which they have a longstanding association. Former members will be able to elect to retain their deferred benefits in SASS past the age of 58. Alternatively, they may still voluntarily transfer their benefits to First State Super or another complying scheme of their choice. Members may also still elect payment of their SASS benefit subject to Commonwealth superannuation regulation. Previously transferred former members will not be able to return to SASS.
5. The last amendment, involving SASS only, facilitates death and disability award arrangements for New South Wales ambulance officers. The award was negotiated to provide benefits for ambulance officers in the event of death and incapacity. The SASS additional benefit cover arrangements predate the making of the award. Consistent with the award, the bill will enable the regulations to provide ambulance officers with an opportunity to elect to opt out of their SASS additional benefit cover. They will then become fully covered by the award arrangements in the event of death and total and permanent incapacity. Members will recall that similar amendments were passed for firefighters and police officers, who are members of SASS, in relation to death and disability arrangements in their award.

## The Bill

**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.

### Restoration of certain death benefits

**Schedules 1 [1] and [2], 2 [1] and [2], 3 [1] and [2] and 4 [1] and [2]** amend the *Police Regulation (Superannuation) Act 1906*, the *State Authorities Non-contributory Superannuation Act 1987*, the *State Authorities Superannuation Act 1987* and the *Superannuation Act 1916* to update references to Commonwealth legislation that enables STC to claim a tax deduction if certain death benefits, previously reduced because of tax liabilities, are restored. The amendments also provide that the amount of the increase in the benefits is to be the amount determined by STC, after obtaining actuarial advice, as the amount of increase necessary to obtain the deduction.

### Reduction of benefits for additional tax on contributions

**Schedules 1 [5], 2 [3], 3 [3] and 4 [4]** amend the *Police Regulation (Superannuation) Act 1906*, the *State Authorities Non-contributory Superannuation Act 1987*, the *State Authorities*

*Superannuation Act 1987* and the *Superannuation Act 1916* to enable STC to reduce benefits payable in respect of employees and contributors and former employees and contributors under those Acts. The benefits are to be reduced by the amount of any no-TFN tax liability incurred by STC for the employer-financed portion of the benefits (including any salary sacrifice contributions). The no-TFN tax liability is the difference between the general rate of tax payable on employer contributions by STC and the higher rate payable on employer contributions for employees if information about their tax file numbers is not provided. STC is to determine the amount after obtaining actuarial advice. The lump sum benefit payable under the *State Authorities Non-contributory Superannuation Act 1987* may also be reduced to offset the liability.

**Schedules 1 [3] and [4] and 4 [3] and [5]** make consequential amendments to those Acts.

### **Retention of benefits in State Authorities Superannuation Fund**

**Schedule 3 [5]** amends the *State Authorities Superannuation Act 1987* to enable a person who reaches the retirement age for the State Authorities Superannuation Scheme and who has a benefit deferred or preserved in the State Authorities Superannuation Fund to elect to retain the benefit in the Fund. Currently, any such person is required to be paid the benefit or have it paid to the First State Superannuation Fund or another complying superannuation fund.

**Schedule 3 [4], [6] and [7]** make consequential amendments.

### **Death or incapacity benefits for ambulance officers**

**Schedule 3 [8]** inserts proposed Part 5E (sections 46AL–46AN) into the *State Authorities Superannuation Act 1987*. The proposed Part provides for regulations to be made as to the effect on coverage for the additional benefit (payable on death before early retirement age or on total and permanent invalidity before early retirement age) of a contributor or former contributor who is covered for a death or incapacity benefit under an ambulance officers award. The regulations may be inconsistent with provisions of the Act if this is necessary for compliance with or giving effect to the ambulance officers award.

### **Savings and transitional provisions**

**Schedules 1 [6], 2 [4], 3 [9] and 4 [6]** amend the *Police Regulation (Superannuation) Act 1906*, the *State Authorities Non-contributory Superannuation Act 1987*, the *State Authorities Superannuation Act 1987* and the *Superannuation Act 1916* to enable regulations to be made containing savings and transitional provisions consequent on the enactment of the proposed Act.

## **Issues Considered by the Committee**

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

#### **Issue: Commencement by Proclamation**

6. 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.

7. The Committee has received advice from the department that the Bill cannot be commenced until the regulations are drafted on advice obtained from Parliamentary Counsel. Further consultation with the STC is required prior to this occurring.

**8. The Committee is generally concerned about commencement by proclamation. However, the Committee accepts the advice from the department that the commencement of the Act is contingent upon the drafting of the accompanying regulations.**

*The Committee makes no further comment on this Bill.*

## Appendix 1: Index of Bills Reported on in 2010

	Digest Number
Appropriation Bill 2010	9
Appropriation (Parliament) Bill 2010	9
Appropriation (Special Offices) Bill 2010	9
Banana Industry Repeal Bill 2010	8
Building and Construction Industry Long Service Payments Amendment Bill 2009	1
Carers Recognition Bill 2010*	3
Carers Recognition Bill 2010*	5
Carers (Recognition) Bill 2010	5
Casino Control Amendment Bill 2010	2
Charter of Budget Honesty Amendment (Independent Election Costings) Bill 2010*	5
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	4
Coal Mine Health and Safety Amendment Bill 2010	4
Coastal Protection and Other Legislation Amendment Bill 2010	9
Community Relations Commission and Principles of Multiculturalism Amendment Bill 2010	8
Companion Animals Amendment (Dogs in Outside Eating Areas) Bill 2010*	4
Companion Animals Amendment (Outdoor Dining Areas) Bill 2010	5
Court Information Bill 2010	4
Courts Legislation Amendment Bill 2010	9
Credit (Commonwealth Powers) Bill 2010	2
Crimes (Administration of Sentences) Amendment Bill 2010	2
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010	9
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	3
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	4
Crimes Amendment (Police Pursuits) Bill 2010	2
Electricity and Gas Supply Legislation Amendment (Retail Price Disclosures and Comparisons) Bill 2010	8
Environmental Planning and Assessment Amendment (Development Consents) Bill 2010	5
Fair Trading Amendment (Unfair Contract Terms) Bill 2010	9
Firearms Legislation Amendment Bill 2010*	8
Gas Supply Amendment Bill 2009	1

	Digest Number
Health Legislation Amendment Bill 2010	8
Housing Amendment (Community Housing Providers) Bill 2009	1
Industrial Relations Amendment (Public Sector Appeals) Bill 2010	9
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009	1
Jury Amendment Bill 2010	8
Macedonian Orthodox Church Property Trust Bill 2010*	9
Marine Parks Amendment (Moratorium) Bill 2010*	8
Mining and Petroleum Legislation Amendment (Land Access) Bill 2010	5
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010	2
National Park Estate (Riverina Red Gum Reservations) Bill 2010	5
National Parks and Wildlife Amendment Bill 2010	2
National Parks and Wildlife Amendment (Visitors and Tourists) Bill 2010	8
NSW Self Insurance Corporation Amendment (Home Warranty Insurance) Bill 2010	5
Paediatric Patient Oversight (Vanessa's Law) Bill 2010*	5
Parliamentary Electorates and Elections Amendment Bill 2010	4
Police Legislation Amendment (Recognised Law Enforcement Officers) Bill 2010	9
Registrar-General Legislation (Amendment and Repeal) Bill 2010	4
Relationships Register Bill 2010	5
Residential Tenancies Bill 2010	8
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010	4
State Emergency Service Amendment (Volunteer Consultative Council) Bill 2010	5
State Revenue Legislation Amendment Bill 2010	9
State Senate Bill 2010	2
Statute Law (Miscellaneous Provisions) Bill 2010	9
Superannuation Legislation Amendment Bill 2010	9
Sydney Olympic Park Authority Amendment Bill 2009	1
Trees (Dispute Between Neighbours) Amendment Bill 2010	5
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	3
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)	4
Weapons and Firearms Legislation Amendment Bill 2010	4
Workers Compensation Amendment (Commission Members) Bill 2010	2



## Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1			
Casino Control Amendment Bill 2010	Minister for Gaming and Racing and Attorney General	08/03/10	18/03/10				2, 5
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	03/12/08		10	1	
Credit (Commonwealth Powers)	Minister for Fair Trading	08/03/10					2
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15		
Crimes (Administration of Sentences) Amendment Bill 2009	Minister for Corrective Services	08/08/09				10	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	06/02/09		9		
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1		2	
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		12/06/08		8		
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7			
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13		
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	05/01/09		14	2	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1		2	
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2			

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
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	15/12/08		12	2	

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Building and Construction Long Service Payments Amendment Bill 2009				N	
Casino Control Amendment Bill 2010	N, R, C		N, R		
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	N				
Coal Mine Health and Safety Amendment Bill 2010	N, R			N, R	
Coastal Protection and Other Legislation Amendment Bill 2010	N, R	N, R		N	
Court Information Bill 2010	N, R			N	
Courts Legislation Amendment Bill 2010	N, R				
Credit (Commonwealth Powers) Bill 2010	N, R, C			N, R, C	
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010	N, R		N, R	N	
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	N			N	
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	N, R				
Crimes Amendment (Police Pursuits) Bill 2010	N, R				
Electricity and Gas Supply Legislation Amendment (Retail Price Disclosures and Comparisons) Bill 2010				N	
Environment Planning and Assessment Amendment (Development Consents) Bill 2010			N, R		
Fair Trading Amendment (Unfair Contract Terms) Bill 2010				N	
Gas Supply Amendment Bill 2009				N	
Health Legislation Amendment Bill 2010	N, R			N, R	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Housing Amendment (Community Housing Providers) Bill 2009	N				
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment 2009				N	
Jury Amendment Bill 2010	N, R			N	
Macedonian Orthodox Church Property Trust Bill 2010*				N	
Mining and Petroleum Legislation Amendment (Land Access) Bill 2010	N, R				
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010				N	N
National Parks and Wildlife Amendment Bill 2010	N, R			N, R	
National Parks and Wildlife Amendment (Visitors and Tourists) Bill 2010				N	
NSW Self Insurance Corporation Amendment (Home Warranty Insurance) Bill 2010	N, R			N	
Police Legislation Amendment (Recognised Law Enforcement Officers) Bill 2010				N	
Relationships Register Bill 2010	N			N	
Residential Tenancies Bill 2010	N, R			N, R	
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010				N, R	
Statute Law (Miscellaneous Provisions) Bill 2010	N				
Superannuation Legislation Amendment Bill 2010				N	
Sydney Olympic Park Authority Amendment Bill 2009	N, R			N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	N			N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)				N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Weapons and Firearms Legislation Amendment Bill 2010	N, R			N	

Key

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

## Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009	Digest 2010
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12		
Criminal Procedure Amendment (Local Court Process Reforms) Regulation 2010	Attorney General	23/02/10	28/04/10			1, 5
Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009	Minister for Primary Industries	23/11/09	11/01/10		16	1
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2	
Retirement Villages Regulation 2009	Minister for Fair Trading	22/02/10				1, 8
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10		