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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.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. ABORIGINAL LAND RIGHTS (GANDANGARA ESTATE) BILL 2004

Date Introduced:	14 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Andrew Refshauge MP
Portfolio:	Aboriginal Affairs

Pursuant to a suspension of standing and sessional orders, the Bill passed through all stages in the Legislative Assembly on 14 September 2004. Pursuant to s 8A(2) the Committee is not precluded from reporting on a Bill because the Bill has been passed by either House or has become an Act.

Purpose and Description

Overview of Bill

1. The Bill amends the *Aboriginal Land Rights Act 1983* (the Act) to validate the subdivision by the Gandangara Local Aboriginal Land Council (Gandangara LALC) of land known as the *Gandangara Estate at Barden Ridge, Menai, (the Estate)* and the subsequent sale (before the commencement of the amendment) of residential lots in the subdivision.

2. The Act imposes procedural requirements on dealings with land vested in Local Aboriginal Land Councils.

   Certain irregularities in complying with those requirements may have resulted in the subdivision and subsequent sale of residential lots in the Estate being in contravention of the Act and invalid.

3. The Bill resolves any such irregularities by deeming there to have been compliance with the relevant requirements of the Act in respect of the subdivision of the Estate and in respect of the sale of lots created before the commencement of the amendment.

4. The Bill also validates the subdivision and lot sales, as well as the exercise of functions by the Registrar-General.

Background

5. The Gandangara Estate is the development of a subdivision of land granted to the Gandangara LALC under the Act in 2000.

6. The Act imposes procedural obligations on local Aboriginal land councils for each of these various dealings and for validity of the eventual process of registering new titles with the Department of the Registrar-General [Part 2 Division 4].

7. The Act provides that non-compliance with its procedural requirements renders land dealings void [s 40(2)].

8. By the time the procedural irregularities in the development of the Estate were discovered, three transfers of title of lots in the Estate had been registered under the *Real Property Act 1900*.[1]

   Without the amending Bill the purchasers of lots in the estate will not have certainty of title.

9. The Bill limits the application of the amendments specifically to the validation of the plan of subdivision and the 20 completed sales of lots in the Gandangara Estate.

The Bill

10. The Bill inserts a new Part 6 into the Sch 4 to the Act to validate the subdivision by Gandangara LALC of the Estate and the subsequent sale of lots in the subdivision.

11. The Bill:

- defines *disposal*, which includes sale and other land dealings that are regulated under s 40B and 40D of the Act [proposed cl 35];
- deems there to have been compliance with s 40B and 40D of the Act in respect of any disposal of Estate land by Gandangara LALC before the commencement of the amendment, including the subdivision of that land, the creation of roads and easements by the subdivision, and the sale of lots created in the subdivision [proposed cl 36].[2]
- validates the subdivision and sales of lots that have occurred before the commencement of the amendment, and action by the Registrar-General to give effect to the subdivision and sales. The clause validates not only sales by Gandangara LALC but also subsequent sales by purchasers from Gandangara LALC [proposed cl 37];
- makes it clear that a certificate under an existing provision certifying as to compliance with s 40D can (but need not) be issued and is not required as a precondition to the exercise of functions by the Registrar-General [proposed cl 38]; and
- provides that the operation of the new provisions is not affected by a person having notice of any contravention of s 40B or 40D of the Act [proposed cl 39].

[1] Mr B J Gaudry MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 14 September 2004.

[2] Sections 40B and 40D of the *Aboriginal Land Rights Act 1983* require the approval of the NSW Aboriginal Land Council to authorise subdivision of the land and require a special resolution of the Gandangara LALC and the approval of the NSW Aboriginal Land Council to authorise its disposal.

12. The amendments made to the Act commence on assent [cl 2].

Issues Considered by the Committee

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

Retrospectivity: Clause 37

13. Proposed cl 37 validates the subdivision and sales of lots that have occurred before the commencement of the amendment, and action by the Registrar-General to give effect to the subdivision and sales.

14. The clause also validates subsequent sales by purchasers from Gandangara LALC.

15. The Committee is always concerned when any proposed Act has a retrospective application.

16. Given that the amendments to the Act aim to provide certainty of title for *bona fide* purchasers for value, the Committee is of the view that there is no trespass on individual rights.

The Committee makes no further comment on this Bill.

2. ANTI-DISCRIMINATION AMENDMENT (MISCELLANEOUS PROVISIONS) BILL 2004

Date Introduced:	16 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The objects of this Bill are:

   (a) to amend the *Anti-Discrimination Act 1977*:

      (i) to replace the provisions of Divisions 1, 2 and 3 of Part 9 of the Act which relate to the making and investigation of complaints of unlawful discrimination by the President of the Anti-Discrimination Board and to the review of the President's decisions by the Equal Opportunity Division of the Administrative Decisions Tribunal (Tribunal), and

      (ii) to make other miscellaneous amendments to the Act, and

   (b) to make related amendments to the *Administrative Decisions Legislation Amendment Act 1997*, the *Administrative Decisions Tribunal Act 1997*, the *Defamation Act 1974* and the *Freedom of Information Act 1989*.

Background

2. According to the Attorney General, this Bill is the Government's response to a number of recommendations made by the NSW Law Reform Commission in its 1999 Report No. 92 on the *Anti Discrimination Act 1977*.[3]

   The Government implemented some other recommendations made in that Report in 2000 in the *Anti Discrimination Amendment (Carers Responsibilities) Act.*

   According to the Attorney General, the Government will introduce a further package of amendments implementing the remainder of the Law Reform Commission's Report.[4]

3. The Attorney General said:

> Of the 161 recommendations in Report 92, this Bill addresses around 60 of these recommendations, most of which relate to the Anti-Discrimination Board's complaint handling procedures and the review of the President's decisions by the Administrative Decisions Tribunal.
>
> More recent consultations with the NSW Ombudsman and the current President of the [Anti Discrimination] Board... have resulted in the inclusion of other provisions in the

[3] The Bill relates to recommendations 101-161 of Report 92.

[4] The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly (Hansard), 16 September 2004.

Bill which will improve the capacity of the Board to handle complaints fairly and expeditiously.[5]

The Bill

Lodging of complaints

- In relation to the lodging of complaints, the Bill:
- allows a complaint to be made by an agent, or parent or legal guardian if the complainant lacks legal capacity [proposed s 87A];
- authorises the President to require the person to show that the complaint has been made with their consent, and require the agent to prove they have authority to act throughout the complaint handling process [proposed s 87A(2)];
- authorises the President to appoint another person to act on behalf of the person or to decline the complaint if satisfied that the agent is not acting in the best interests of the person on whose behalf they have made a complaint [proposed s 87A(3)];
- authorises the President to assist a person to make a complaint (eg where due to illiteracy, lack of English language skills, disability or cultural background) [proposed s 88A];
- allows a person to make a complaint even if they have made a complaint or taken proceedings in another jurisdiction, whether in NSW or elsewhere [proposed s 88B]; and
- allows for written complaints to be made in any form[6] [proposed s 89].

Complaint handling by the Anti Discrimination Board

4. In relation to the handling of complaints by the President of the Anti Discrimination Board, the Bill:
   - enables the President to decline a complaint *in part*[7] (or in whole) if certain criteria are met, *including*:
     - that no part of the conduct complained of could amount to a contravention of the Act;
     - that whole or part of the conduct complained of occurred more than 12 months before the complaint was made; and

[5] The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly (Hansard), 16 September 2004.

[6] All complaints must be made in writing.

[7] According to the Minister, in his second reading speech, this amendment "will address the situation which arose in the case of *Macdonald v Home Care Services of NSW* in which it was concluded that the President cannot decline 'part' of a complaint. This has caused practical difficulties where some part of a complaint may be capable of investigation for a contravention of the Act, even if some other parts are not." The Hon Bob Debus MP, Attorney General, Second Reading Speech.

- the President is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint [proposed s 89B].

5. The Bill also authorises the President to *require* a complainant, respondent or other person to produce information or documents [proposed s 90B], or in the case of a vilification complaint,[8] a copy or transcript of any broadcast that is the subject of the complaint [proposed s 90A].

   Currently, the President may only "request" the production of this material. The penalty for failing to comply with this requirement is a maximum of 50 penalty units [currently $5,500] for a corporation, or 10 penalty units [currently $1,100] in any other case.

   If a person fails to provide or supply the material, the President may refer the complaint to the Administrative Decisions Tribunal. Under current section 96, the Tribunal must investigate a complaint referred to it.

6. The Bill specifies that the President can attempt to conciliate a complaint at any stage after it has been accepted [proposed s 91A(4)]. For this purpose, the President can require the parties to appear before the President.

7. Unlike the current Act, the Bill allows a party to a conciliation agreement to apply to the Tribunal to have the agreement registered, if he or she believes another party has failed to comply with any part of it.

   Once registered, a conciliation agreement becomes an order of the Tribunal and enforceable by it [proposed s 91A].

8. Other amendments include:

   - elaborating on the grounds for declining of a complaint by the President. These include that the complaint is vexatious, that there is a more appropriate remedy, the respondent has taken appropriate steps to remedy or redress the conduct complained of, or it is not in the public interest to take any further action;
   - providing for the termination of complaints which have been withdrawn, abandoned, settled or resolved by agreement between the parties [proposed ss 92A-93]; and
   - allowing either party to request the President to refer a complaint to the Administrative Decisions Tribunal if it has not been resolved within 18 months. The President cannot refer the complaint it the complainant objects, but may terminate the complaint if satisfied that there is no reasonable prospect of a conciliated agreement [proposed s 93B].

[8] Proposed s 91 re-enacts current section 89B to require the President to refer a complaint to the Attorney General if the President considers that an offence may have been committed.

Hearings and appeals before the Administrative Decisions Tribunal

9. The Bill makes a number of amendments in relation to hearings of complaints by the Administrative Decisions Tribunal. For example, it provides for additional criteria to be applied by the Tribunal in determining whether to grant an application for leave to be represented by a third party in proceedings before it—

- whether both parties intend and are able to obtain representation;
- the complexity and importance of the proceedings to the parties and the public interest;
- the likely length of the proceedings; and
- the likely cost of representation compared to the financial benefit of the relief sought.

Orders made by the Tribunal

10. The Bill adds to the list of powers of the Tribunal to make orders and other decisions.

Proposed section 108(2)(d) provides that the Tribunal may order the respondent to publish an apology or a retraction (or both) in respect of the matter that is the subject of the complaint. The Tribunal can direct the time, form, extent and manner of publication of the apology or retraction.

In addition, the Tribunal may extend an order made under section 108 to include conduct of the respondent that affects persons other than the complainant if the Tribunal considers such an extension appropriate [proposed s 108(3)].

11. The Tribunal may order the respondent to pay the complainant damages not exceeding $40,000 for failing to comply with certain orders of the Tribunal made under section 108 [proposed s 108(7)].

12. Under proposed section 113, the President may, in the public interest, take steps to enforce an order of the Tribunal on behalf of a complainant, with the complainant's consent.

13. The current penalty for non-compliance with a non-monetary order of the Tribunal is a fine of $5,500 for a corporation or $1,100 for an individual [section 116].

The Bill provides for the enforcement of non-monetary orders as a judgment of the Supreme Court.

Proposed section 114 provides that the Registrar may certify the making of an order. A certificate of the Registrar that is filed in the Supreme Court operates as a judgment of that Court.

Miscellaneous amendments to the Anti Discrimination Act

14. Proposed subsection 119(2) allows the Board to enter into agreements and to receive payments for services or materials it provides while exercising its functions.

15. The Bill adds a new regulation making power to section 127, allowing for regulations to be made for or with respect to

> making complaints, amending complaints, dealing with complaints, declining complaints and terminating complaints [Sched 1[7]].

16. The Bill extends the operation of the disability discrimination provisions. It adds to the characteristics that generally appertain to a person with a disability, and therefore may form a ground of discrimination, the fact that the person:

- has with them a palliative or therapeutic device, or other mechanical equipment, which provides assistance to alleviate the disability; or
- is accompanied by an interpreter, a reader, an assistant or a carer who assists them with their disability [Sched 2[1]].

According to the Minister:

> This amendment is designed to bring NSW into line with the definitions of 'disability' contained in the federal *disability discrimination Act 1992.*[9]

Codes of practice

17. The Bill also provides that the Board may develop and promote non binding codes of practice providing guidance as to the kinds of activity in a specified area of conduct may involve or constitute a contravention of the Act [proposed s 120A].

Secrecy

18. According to the Attorney General,

> Currently, information acquired or held by the Board about a complaint, other than information that is protected from disclosure under section 94, may be subpoenaed by a court or may be subject to a request for production pursuant to the *Freedom of Information Act 1989*.
>
> The Board has reported that its documents are regularly subpoenaed in relation to proceedings in other jurisdictions. It has limited grounds on which to oppose production under existing laws.
>
> The result is that the current law fails to recognise the importance of ensuring confidentiality for persons lodging complaints. There is a risk, albeit a small one, that details of a complaint could be disclosed by officers of the board to the media, a relative or a prospective employer without sanction.
>
> Most other equal opportunity jurisdictions in Australia have provisions in place to govern the actions of public officers in relation to personal information contained in the complaint and acquired during its investigation.[10]

19. Proposed section 124A provides for a new secrecy provision requiring all past and current members or officers of the Board or President not to make a record, disclose

[9] The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly (Hansard), 16 September 2004.

[10] The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly (Hansard), 16 September 2004.

or communicate to any person, either directly or indirectly, any information concerning the affairs of any person that has been obtained in the course of exercising their functions under the Act.

20. There are three exceptions to this rule. Information of this kind can be disclosed if:

(i) it is already publicly available;

(ii) the disclosure is authorised or required under another Act; or

(iii) if the President certifies in writing that it is necessary to in the public interest to disclose such information to the Minister.

Savings and transitional provisions

21. Schedule 2[6] inserts new clauses 14-16 in Schedule 1 of the Act. Proposed clause 14 provides that the amendments in the Bill "extend to anything commenced to be done but not completed before the commencement of the amendment, except as provided by clauses 15 and 16.

22. Proposed clause 15 states that section 113 of the Act which this Bill repeals, continues to operate in its current form in relation to proceedings before the Tribunal that are not finally determined before the Bill commences.

Section 113 sets out the orders the Tribunal may make in relation to a complaint. This section is remade as section 108 in the Bill.

The effect of clause 15, is that the current section 113 will continue to apply to any proceedings before the Tribunal that are not completed by the time the new section 108 commences.

23. Proposed clause 16 provides that proposed section 112, which allows for interest to be charged on orders for damages, does *not* apply to proceedings before the Tribunal that are still ongoing at the time the proposed section commences.

This means that any orders for damages made in proceedings that are begun but not finalised by the time the proposed section 112 commences, will *not* accrue interest.

Amendment to the *FOI Act 1989*

24. The Bill amends the *FOI Act* to exempt the President of the Board from its operation in relation to the President's complaint handling, investigative and reporting functions while the complaint is in the course of being dealt with by the President.

25. According to the Attorney General:

> This puts the President of the Board on a par with other New South Wales Government agencies with similar complaint handling and reporting functions, such as the Independent Commission Against Corruption and the Ombudsman's Office.[11]

[11] The Hon Bob Debus MP, Attorney General, Second Reading Speech, Legislative Assembly (Hansard), 16 September 2004.

Issues Considered by the Committee

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

Issue: Schedule 2, Clause 6 – Retrospective operation of amendments

26. Schedule 2[6] inserts new clauses 14-16 in Schedule 1 of the Act. Proposed clause 14 applies the amendments in the Bill retrospectively. It provides that the amendments in the Bill "extend to anything commenced to be done but not completed before the commencement of the amendment, except as provided by clauses 15 and 16.

27. Proposed clause 15 states that section 113, which sets out the orders the Tribunal may make, continues to operate in its current form in relation to proceedings before the Tribunal that are not finally determined before the Bill commences.

28. Clause 16 provides that proposed section 112, which allows for interest to be charged on orders for damages, does *not* apply to proceedings before the Tribunal that are still ongoing at the time the proposed section commences.

29. The Committee will always comment on retrospective provisions that have an adverse impact on personal rights.

30. However, the Committee considers that none of the provisions that are retrospectively applied will adversely impact on any person.

31. The Committee is of the view that, in this case, the retrospective operation of the Bill does not adversely affect the rights of individuals who may be parties to a complaint under the Act.

32. For this reason the Committee considers that the retrospective application of the Bill does not trespass on personal rights.

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

Issue: Clause 2 – Commencement by proclamation

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

The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act or part of the Act at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

34. The Minister's office has advised the Committee that the Bill is commencing on proclamation to allow time to conduct an education campaign about the changes under the Bill.

35. Educational materials are currently being prepared and the Minister's office anticipates that the Bill should be commenced within a few weeks of assent.

The Committee makes no further comment on this Bill.

3. CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT AMENDMENT (UNIFORM CLASSIFICATION) BILL 2004

Date Introduced:	16 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (the Principal Act) to implement uniform classification categories for films and computer games consequent on amendments to the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth (Commonwealth Act).

Background

2. The Attorney General noted the following in the second reading speech:

> In 2000 censorship Ministers agreed to a combined review of the Guidelines for the Classification of Films and Videotapes and the Guidelines for the Classification of Computer Games. A combined review was thought necessary to deal with issues then arising from the convergence of media in digital recordings…
>
> The [resulting] guidelines contained merged classification guidelines for films and computer games, although the terms used to describe each classification category were still different for films and computer games. These new guidelines came into effect in March 2003. To support the new guidelines, it was recognised that legislative change was required to enable a consistent set of classification symbols and descriptors for films and computer games.
>
> In March this year, State, Territory and Commonwealth censorship Ministers agreed to amendments to the classification descriptors in the [Commonwealth Act]…and to consequential amendments to State and Territory classification enforcement legislation. In May this year, the Commonwealth passed the Classification (Publications, Films and Computer Games) Amendment Act 2004. The Commonwealth amendments make the descriptors for film and computer game classifications in the Commonwealth Act consistent. This complements the Guidelines for the Classification of Films and Computer Games previously agreed to by censorship Ministers.
>
> The proposed amendments will achieve a number of objectives: they will enhance community awareness of the computer games classification scheme through the use of the well-known and understood classification types for films; they will enhance the distinction between the advisory and legally restricted classifications—through the inclusion of age descriptors on the restricted classifications only; and they will address the confusion regarding the difference between the current M and MA classifications. Research by the Office of Film and Literature Classification indicates

> that less than half of the population is aware of the computer games classification scheme. Renaming the computer games classifications to mirror the well-known film classifications will assist parents in choosing games for their children.
>
> It is important to note that the change to the names of the classification types ***does not affect the type of material that is permitted within each classification***. The type of material that is permitted within each classification is assessed by the Classification Board and the Classification Review Board using the criteria set out in the National Classification Code and the guidelines. The bill responds to community demands for a simple, commonsense system that is the same across all classified products.[12] (Emphasis added).

3. As set out in the second reading speech, the main objectives of the Bill are to:

- enhance community awareness of the computer games classification scheme through the use of the well-known and understood classification types for films;
- enhance the distinction between the advisory and legally restricted classifications through the inclusion of age descriptors on the restricted classifications only; and
- address the confusion regarding the difference between the current M and MA classifications.

The Bill

4. The Commonwealth Act provides for the replacement of existing classifications for films and computer games with new classifications. The amendments in the Bill are consequential on the new classifications under the Commonwealth Act [**see Annexure A**].

   As noted above, changes relate to the names of classifications only and do not affect the type of material that is permitted within each classification.

5. The new classifications are as follows:

Previous classification for films	Previous classification for computer games	New classifications for films and computer games
G	G	G
PG	G (8+)	PG
M	M (15+)	M
MA	MA (15+)	MA (15+)
R	N/A	R (18+) Films only
X	N/A	X (18+) Films only
RC	RC	RC

6. The Bill amends the Principal Act by removing references to old classifications and replacing them with the appropriate new classifications.

[12] Hon R J Debus, Attorney General, Legislative Assembly *Hansard*, 16 September 2004.

7. Accordingly:

   - references to computer game classifications of G (8+), M (15+) and MA (15+) are replaced by PG, M and MA 15+ respectively; and
   - references to film classifications of MA, R and X are replaced by MA 15+, R 18+ and X 18+ respectively [Sch 1 [4] – [31]].

8. Schedule 1 [33] inserts saving and transitional provisions consequent on the amendments made by the proposed Act, including provision for the application of existing classifications to offences committed *before* the commencement of the proposed Act.

9. Schedule 1 [32] allows further savings and transitional provisions to be made by regulation.

Issues Considered by the Committee

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

Exceptions to the Act by Regulation: Schedule 1[33]

10. Proposed cl 10(2) of Sch 4 to the Principal Act provides that *unless the regulations otherwise provide*, if a film or computer game was classified prior to the commencement of Sch 1 to the Commonwealth amending Act:

    (a) a person does *not* commit an offence under s 15 (3) or 34 (4) of the Principal Act by selling the film or computer game in a container, wrapping or casing that displays a marking indicating the equivalent former classification of the film or computer game; and

    (b) a person does *not* commit an offence under s 43 (2) of the Principal Act by publishing an advertisement for the film or computer game that indicates the equivalent former classification of the film or computer game.

    The relevant sections of the Principal Act deal with the proper display of classification markings. They each have a maximum penalty of 50 penalty units ($5,500) for an individual or 100 penalty units ($11,000) for a corporation.

11. The amendments provide that the display of a film or computer game with the equivalent former classification does not constitute an offence under the Principal Act. However, the Bill provides that subsequent Regulations may make this an offence.[13]

12. There are currently no regulations made under the Principal Act.

[13] Although proposed cl 10(1) to Sch 4 of the Principal Act provides that an amendment made by the State amending Act to that Act or any other Act extends to a film or computer game classified before the commencement of the amendment, this would appear to merely re-classify existing films or computer games.

13. The Committee has written to the Attorney General seeking clarification as to the circumstances in which such Regulations may make it an offence to indicate the equivalent former classification of a film or computer game.

The Committee makes no further comment on this Bill.

Annexure A

- RC- **Films** that:
  - depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified;
  - depict in a way that is likely to cause offence to a reasonable adult , a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity); or
  - promote, incite or instruct in matters of crime or violence.
- X- Films (except RC films) that:
  - contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and
  - are unsuitable for a minor to see
- R- Films (except RC films and X films) that are unsuitable for a minor to see.
- MA- Films (except RC films, X films and R films) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing by persons under 15.
- M- Films (except RC films, X films, R films, MA films) that cannot be recommended for viewing by persons who are under 15 years.
- PG- Films (except RC films, R films, X films, MA films and M films) that cannot be recommended for viewing by persons who are under 15 without the guidance of their parents or guardians.
- G- All other films.
- RC- **Computer games** that:
  - depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified;
  - depict in a way that is likely to cause offence to a reasonable adult a minor who is, or who appears to be, under 16 (whether or not engaged in sexual activity);
  - promote, incite or instruct in matters of crime or violence; or
  - are unsuitable for a minor to see or play.

- MA (15+)- Computer games (except RC computer games) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing or playing by persons under 15.
- M (15+)- Computer games (except RC and MA (15+) computer games) that cannot be recommended for viewing or playing by persons who are under 15.
- G (8+)- Computer games (except RC, MA (15+) and M (15+) computer games) that cannot be recommended for viewing or playing by persons who are under 8.
- G- All other computer games.

4. POLICE INTEGRITY COMMISSION AMENDMENT BILL 2004

Date Introduced:	16 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon J A Watkins MP
Portfolio:	Police

Purpose and Description

1. The Bill amends the *Police Integrity Commission Act 1996* (the PIC Act) to:

   - apply the provisions of s 331 and s 332 of the *Crimes Act 1900* (Crimes Act)[14] to proceedings for an offence under s 107 of the PIC Act (*False or misleading evidence*), so as to enable a jury to convict a person who has made conflicting statements of which at least one must be false and so as to deny a person a right of acquittal merely because a false or misleading statement is contained in a document that contains a technical defect;
   - enable the Police Integrity Commission (PIC) to communicate information to the Commissioner of Police (the Commissioner), and to other persons or bodies, on the understanding that the information is confidential;
   - replace a requirement for the PIC Commissioner to obtain the Minister's concurrence when authorising a police officer to exercise any investigative, surveillance or enforcement functions under or for the purposes of the PIC Act with a requirement for the PIC Commissioner to notify the PIC Inspector of the granting of the authorization;
   - enable PIC to dispose of certain documents and things (being documents and things seized for the purposes of its investigations) in accordance with the directions of a Local Court;
   - provide for the service of documents by fax and by e-mail;
   - confirm the independent and accountable nature of PIC; and
   - provide for a further review of the PIC Act at the end of 5 years from the date of assent to the proposed Act.

2. The Bill also amends the *Police Act 1990* so as to require the Commissioner to consult with PIC or the Ombudsman, as the case requires, before taking management or disciplinary action against a police officer who is the subject of a complaint being dealt with by either of those bodies.

3. The Bill also makes consequential amendments to the *New South Wales Crime Commission Act 1985*.

[14] Section 331 deals with contradictory statements on oath; s 332 deals with certain technical defects: the *Crimes Act 1900*.

Background

4. In the second reading speech the Minister noted that the reforms in this Bill are the result of the statutory review of the PIC Act:

> the review found that the Act, and the PIC in giving effect to its provisions, has proved effective in detecting, investigating and preventing police corruption and other serious police misconduct…
>
> …the review did identify a number of potential improvements to the legislation.[15]

5. According to the Minister:

> The Bill proposes to give greater prominence to PIC's independence and accountability.
>
> The amendments recognise that PIC's independence from the NSW Police is not commonly understood in the broader community and, given the importance of this distinction, specifically acknowledges this independence by clarifying the principal objects of the Act.[16]

The Bill

False or misleading evidence

6. Section 107 of the PIC Act creates an offence of giving false or misleading evidence at a hearing before PIC.[17]

   This is analogous to s 330 of the Crimes Act, which deals with false or misleading evidence that does *not* amount to perjury.[18]

7. According to the Minister, courts have held that, where a person makes conflicting statements when providing evidence to PIC or the PIC Inspector, the prosecution must specify which of the two items of inconsistent evidence is false. This is based on the requirements for a charge of perjury at common law.[19]

   This presents a difficultly in obtaining a conviction under s 107 for giving false statement of evidence under the existing arrangements, as it is often not possible to know which statement is false.

8. The Bill amends s 107 to provide that s 331 and s 332 of the Crimes Act apply to proceedings for an offence under s 107 in the same way as to proceedings for an offence under s 330 of that Act [proposed s 107(2)].

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[15] Hon J A Watkins MP, Minister for Police, Legislative Assembly *Hansard*, 16 September 2004.

[16] Hon J A Watkins MP, Minister for Police, Legislative Assembly *Hansard*, 16 September 2004.

[17] A person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence. Maximum penalty is 200 penalty units (currently $22,000) or imprisonment for 5 years, or both: s 107 of the *Police Integrity Commission Act 1996*. See also s 87 of the *Independent Commission Against Corruption Act 1988*.

[18] A person who makes on oath any false statement knowing the statement to be false or not believing it to be true, if it is not perjury, is liable to imprisonment for 5 years: s 330 of the *Crimes Act 1900*.

[19] The point was raised in the District Court in *R v Giovannone*, 10 May 2001, and was thought by PIC to be potentially problematic in future prosecutions.

9. Pursuant to amended s 107:

- a jury may find a person guilty of an offence under s 107 with respect to the making of conflicting statements of which one (but the jury cannot determine which) must have been made by the person in the knowledge that it was false [see s 331 of the Crimes Act]; and.
- a person may not be acquitted merely because a false or misleading statement is contained in an affidavit or other document in respect of which there is a technical defect [see s 332 of the Crimes Act].

Communication of information from PIC to Commissioner of Police and other bodies

10. Sections 77 and 83 of the PIC Act provide that information communicated by PIC in the context of a referral of matters from it to the Commissioner or some other person or body is automatically subject to the secrecy provisions of s 56 of that Act.[20]

[20] Section 56(1) of the Police Integrity Commission Act 1996 applies to:
(a) a person who is or was an officer of the Commission;
(b) a person who is or was an officer of the Inspector;
(c) a person who is or was a legal practitioner appointed to assist the Commission or who is or was a person who assists, or performs services for or on behalf of, such a legal practitioner in the exercise of the legal practitioner's functions as counsel to the Commission, and
(d) a person or body referred to in s 15 (6), 18 (4), 77 (5) or 83 (6), and
(e) an authorised person referred to in s 18A.

(2) A person to whom this section applies must not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act:
(a) make a record of any information, or
(b) divulge or communicate to any person any information,
being information acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act. Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

(3) A person to whom this section applies cannot be required:
(a) to produce in any court any document or other thing that has come into the person's possession, custody or control by reason of, or in the course of, the exercise of the person's functions under this Act, or
(b) to divulge or communicate to any court any matter or thing that has come to the person's notice in the exercise of the person's functions under this Act,
except for the purposes of a prosecution, disciplinary proceedings or proceedings under Division 1A or 1C of Part 9 of the Police Act 1990, arising out of an investigation conducted by the Commission in the exercise of its functions.

(4) Despite this section, a person to whom this section applies may divulge any such information:
(a) for the purposes of and in accordance with this Act;
(b) for the purposes of:
(i) a prosecution;
(ii) disciplinary proceedings;
(iii) the making of an order under section 173 or 181D of the Police Act 1990; or
(iv) proceedings under Division 1A or 1C of Part 9 of that Act, arising out of an investigation conducted by the Commission in the exercise of its functions; or
(c) in accordance with a direction of the Commissioner or Inspector, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest; or
(d) to any prescribed authority or person.

(5) An authority or person to whom information is divulged under subsection (4), and any person or employee under the control of that authority or person, is subject to the same rights, privileges, obligations and liabilities under subsections (2) and (3) in respect of that information as if he or she were a person to whom this section applies and had acquired the information in the exercise of functions under this Act.

(6) In this section:

11. Section 18 of the PIC Act, which also deals with the communication of information by PIC to other bodies, invokes the secrecy provisions *only* if information is communicated on the understanding that it is confidential.

12. The Bill amends s 77(5) and 83(6) of the PIC Act to impose a similar qualification on the communication of information under those sections [Sch 1 [3] & [4]].

Protocols for exercise by police of investigative, surveillance or enforcement functions

13. Currently, s 142(1) of the PIC Act prohibits a police officer from exercising investigative, surveillance or enforcement functions under or for the purposes of the Act unless he or she is authorised to do so by the PIC Commissioner, and requires the PIC Commissioner to obtain the Minister's concurrence to any such authorisation.

14. The Bill amends s 142 to replace the requirement for the PIC Commissioner to obtain the Minister's concurrence with a requirement for the PIC Commissioner to notify the PIC Inspector of the granting of the authorisation [proposed s 142(1A)].

    This amendment reinforces the independence of PIC, whilst at the same time ensure that channels of communication remain open with the with PIC Inspector.

15. In evidence to the Joint Parliamentary Committee on the Ombudsman and PIC, the PIC Inspector stated that there have been:

> some recent operations where an urgent need has arisen to engage a police officer in the exercise of investigative or surveillance functions on behalf of the Commission. That is not to say that the Minister has not been forthcoming with his concurrence but in cases of urgency it cannot be guaranteed that the Minister will be available to consider the matter, given the parliamentary and other commitments that he may have. As well, there are matters of operational security. It must be acknowledged that once sensitive information about a Commission investigation leaves the Commission's walls control over the information is lost. Consequently it cannot be guaranteed that the Commission's investigation will not be jeopardised.[21]

Disposal of evidence

16. Section 47 of the PIC Act provides for the seizure of documents and things for the purpose of PIC investigations, and for their return when they are no longer needed.

17. The Bill amends s 47 so as to allow PIC to seek directions from a Local Court as to the disposal of such documents and things in circumstances where nobody is entitled to, or wants to, have possession of them [proposed s 47(3)].

court includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

produce includes permit access to.

[21] Transcript of the Report of Proceedings before Committee on the Office of the Ombudsman and the Police Integrity Commission: Sixth General Meeting with the Inspector of the Police Integrity Commission, p 7.

18. The Minister noted that this change is required due to the PIC's current inability to dispose of items which are prima facie illegal, dating back to the Wood Royal Commission, including drugs and child pornography.[22]

Service by fax and e-mail

19. Section 139 of the PIC Act allows documents to be served on a person personally, or by delivery or post to the person's business or residential address.

20. The Bill amends s 139 so as to permit service by fax or e-mail to any person who *indicates* that fax or e-mail is an available means of communication for that person, and so as to provide that service of a faxed copy of a document has the same effect as service of the document that was faxed [proposed s 139(2) &(3)].

Confirmation of independent and accountable nature of PIC

21. Section 3(a) of the PIC Act currently provides that a principal object of the Act is to:

> establish a body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct.

22. The Bill amends s 3(a) so as to make it clear that the body is intended to be both ***independent and accountable*** [Sch 1[1]].

Further review of PIC Act

23. Section 146 of the PIC Act provides for the review of the Act at the end of 5 years from its date of assent.

24. The Bill amends s 146 to provide that:

> [a] further such review is to be undertaken as soon as practicable after the period of 5 years from the date of assent to the *Police Integrity Commission Amendment Act 2004* [proposed s 146(2A)].

Amendment of other Acts

New South Wales Crime Commission Act 1985

25. The Bill makes similar amendments to the *New South Wales Crime Commission Act 1985* as are made to s 47 and s 107 of the PIC Act in relation to the disposal of evidence no longer needed, and proceedings for offences of giving false or misleading evidence [proposed s 12(3A) & 20(5)].

Police Act 1990

26. The Bill amends s 173 of the *Police Act 1990* so as to require the Commissioner to consult with PIC or the Ombudsman, as the case requires, before taking management or disciplinary action against a police officer who is the subject of a complaint being dealt with by either of those bodies [proposed s 173(4A) & (4B)].

[22] Hon J A Watkins MP, Minister for Police, Legislative Assembly *Hansard*, 16 September 2004.

27. Failure to comply with this requirement will not affect the validity of any such action.[23]

28. These amendments would appear to be the result of concerns raised by the Ombudsman's office in its 2002-2003 *Annual Report* and its August 2002 Special Report, *Improving the management of complaints: Assessing police performance in complaint management*.[24]

Issues Considered by the Committee

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

Clause 2: Commencement by proclamation

29. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.

30. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act, or parts of the Act, at all.

31. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

32. The Minister's office has advised the Committee that the Bill is commencing on proclamation to allow lead in time for the PIC to make any procedural or process changes that are necessary as a result of amendments to the Act.

33. The Minister's office further advises that they anticipate that this process should be completed within a month of the Bill receiving assent.

The Committee makes no further comment on this Bill.

[23] The Bill also corrects a typographical mistake in s 207A of the *Police Act 1990*: Schedule 2.2[2] to the *Police Integrity Commission Amendment Bill* 2004.

[24] *Annual Report* 2002-2003, p 73-75; and *Improving the management of complaints: Assessing police performance in complaint management*, p 20-21.

5. STOCK MEDICINES AMENDMENT BILL 2004

Date Introduced:	16 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Primary Industries

Purpose and Description

1. The object of this Bill is to amend the *Stock Medicines Act 1989* (the Act):

   (a) to specify the objects of the Act, and

   (b) to impose further safeguards in relation to the use of stock medicines on major food producing species, and

   (c) to define ***major food producing species*** as cattle, sheep, pigs or chickens or any other species prescribed by the regulations, and

   (d) to enable a person to use a stock medicine intended for a major food producing species on stock of some other food producing species so long as certain requirements are complied with, and

   (e) to ensure that relevant instructions are given to the owner or person in charge of stock in relation to the treatment of the stock with a stock medicine, and

   (f) to remove certain offences relating to the use of unregistered stock medicines on animals that are not of a food producing species, and

   (g) to ensure that records are kept by veterinary surgeons of certain treatments or prescriptions relating to stock medicines, and

   (h) to remove offences relating to the advertising of stock medicines, and

   (i) to extend the grounds on which orders may be made under the Act prohibiting or regulating the use of a stock medicine or recalling a stock medicine, and

   (j) to repeal provisions of the Act the operation of which is currently suspended under the *Agricultural and Veterinary Chemicals (New South Wales) Regulation 2000* because those provisions are covered by Commonwealth law, and

   (k) to enable penalty notices to be issued for offences against the Act or the regulations, and

   (l) to make other miscellaneous amendments.

2. The Bill also makes consequential amendments to several Acts.

Background

3. The *Stock Medicines Act 1989* is intended to ensure that:

   - animal products consumed by humans are not contaminated with stock medicines;

- trade in animal products is not affected by residues; and
- stock medicines are used appropriately and to best effect.[25]

4. According to the Minister, the Bill amends the Act for two main reasons:

> The first is to comply with national competition policy requirements for the adoption of agreed national controls over the use of veterinary chemicals. This covers all the proposed amendments dealing with the use of stock medicines and keeping records, plus the removal of the advertising provisions.
>
> The second is to implement recommendations arising from the State review. These are the new objects for the Act and the repeal of obsolete provisions to improve the effectiveness of the legislation.[26]

5. The Minister further noted that:

> New South Wales is tied to the National Registration Scheme for agricultural and veterinary chemical products. The *Agricultural and Veterinary Chemicals (New south Wales) Act 1994* applies the Commonwealth's *Agricultural and Veterinary Chemicals Code Act 1995* as a law of New South Wales. The Commonwealth's law is commonly referred to as the Agvet code.[27]

The Bill

6. The Bill replaces certain provisions regarding use of unregistered stock medicines, the use of stock medicines contrary to the label and the prescription or supply of stock medicines by a veterinary surgeon [Sch 1[13]].

7. These changes:

- remove the offence of using an unregistered stock medicine on stock that is not a member of a food producing species [current s 38];[28]
- prevent a veterinary surgeon from prescribing or supplying an unregistered stock medicine for use on stock that is *not* a member of a food producing species unless the stock medicine complies with certain requirements [proposed section 39C (3)];
- enable a veterinary surgeon to prescribe the use of an unregistered stock medicine on a particular animal [proposed sections 39A (1) and (3)(a) and 39C (2)];
- prevent a veterinary surgeon from prescribing the use of a registered stock medicine in a manner that is contrary to certain use instructions unless it is for the purpose of treating a particular animal or in accordance with a permit or order under the Act [proposed sections 39A (2) and (3) and 39C (2)];
- allow a person who is not a veterinary surgeon to use a registered medicine intended for a major food producing species on another food producing species

[25] The Honourable David Campbell MP, *Legislative Assembly Hansard*, 16 September 2004.
[26] The Honourable David Campbell MP, *Legislative Assembly Hansard*, 16 September 2004.
[27] The Honourable David Campbell MP, *Legislative Assembly Hansard*, 16 September 2004.
[28] This will allow owners of companion animals to use unregistered stock medicines on their animals [The Honourable David Campbell MP, *Legislative Assembly Hansard*, 16 September 2004].

in accordance with certain use instructions [proposed sections 39 (2) and 39B (3)];

- require a veterinary surgeon to provide written instructions with specified information to the owner of stock [proposed section 39D] and to keep written records when prescribing certain stock medicines or when using them contrary to the use instructions [proposed section 39E];
- require a person using a stock medicine on stock of a food producing species to provide the person in charge of the stock written instructions on how to identify the stock on which the medicine was used and the use instructions for the medicine [proposed section 39F];
- prohibit a veterinary surgeon prescribing an unregistered stock medicine or the use of a registered stock medicine in a manner contrary to the use instructions if to do so would result in the stock or products from the stock containing chemical residues in contravention of the Commonwealth Food Standards Code [proposed section 40];
- require the owner or person in charge of stock of a food producing species that has been treated with medicine to inform any person buying the stock of any relevant withholding period applying to the stock [sch 1[14]]; and
- make it an offence to fail to deal with a stock medicine in accordance with a notice that has been issued under s 55 of the Agvet Code [proposed section 41A].

8. The Bill also expands the grounds on which the Director-General of the Department of Primary Industries may make orders prohibiting or regulating the use of a stock medicine or requiring its recall.

Issues Considered by the Committee

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

Strict liability offences

9. The Bill creates a number of strict liability offences[29] with significant monetary penalties:

- using an unregistered stock medicine without authorisation (there is a defence of not knowing, or having reasonable grounds for suspecting, that the medicine was unregistered [s 42]) — 200 penalty units ($22,000), or 400 penalty units ($44,000) for a corporation [proposed s 38];
- using a registered stock medicine contrary to its use instructions without authorisation — 200 penalty units ($22,000), or 400 penalty units ($44,000) for a corporation [proposed s 39];
- a veterinary surgeon prescribing or supplying stock medicines contrary to the Act — 100 penalty units ($11,000) [proposed s 39C];

[29] Strict liability offences do not have a requirement that the prosecution prove that the accused had the intention to commit the crime (*mens rea*).

- a veterinary surgeon failing to provide the required written instructions when prescribing medicines or restricted substances for food producing species — 200 penalty units ($22,000) [proposed s 39D];
- a veterinary surgeon failing to keep the required records when prescribing medicines or restricted substances for food producing species — 100 penalty units ($11,000) [proposed s 39E];
- a person failing to provide instructions regarding stock treated by stock medicines — 100 penalty units ($11,000), or 200 penalty units ($22,000) for a corporation [proposed s 39F];
- a veterinary surgeon varying use instructions in a manner resulting in chemical residues at a level that contravenes the Food Standards Code — 200 penalty unites ($22,000) [proposed s 40];
- an owner or person in charge of stock failing to inform a purchaser of a relevant withholding period (there is a defence of not knowing, or having reasonable grounds for suspecting, that the stock concerned had been treated with a stock medicine and that the relevant withholding period had not expired) — 200 penalty units ($22,000), or 400 penalty units ($44,000) for a corporation [proposed s 40A];
- breaching a withholding period (there is a defence of not knowing the stock had been treated with a stock medicine) — 200 penalty units ($22,000), or 400 penalty units ($44,000) for a corporation [proposed s 40B]; and
- failing to deal with a stock medicine in accordance with a known notice under section 55 of the Agvet Code — 200 penalty units ($22,000), or 400 penalty units ($44,000) for a corporation [proposed s 41A].

10. The Committee notes that these offences apply to situations where the objects of the Act require that persons be attentive to whether their actions comply with an Act.

    Further, where an element of the offence may not be in the knowledge of a defendant, a defence of not knowing, or having reasonable grounds for suspecting, is provided.

11. The Bill also replaces the offence of *wilfully* contravening an order of the Minister under section 46 (relating to supply and use bans and recall orders) with the stricter provision that a person "must not, without reasonable excuse, contravene an order under this section" [proposed s 46(6)].

12. In relation to this change, the Minister noted:

> At present, a person must be shown to have intended to break the law and this can be impossible to prove. Instead it is proposed that they be expected to comply with it simply because they know about its existence.[30]

13. The Committee notes that criminal intent is normally required to be proved by the prosecution as an element of an offence. It therefore considers that strict liability offences should only be made when clearly in the public interest and that the severity of punishment should reflect the lack of criminal intent.

[30] The Honourable David Campbell MP, *Legislative Assembly Hansard*, 16 September 2004.

14. Given the objects of the Act, the need for persons dealing with stock of a food producing species to be attentive to compliance with controls on using stock medicines, and the proportionality of the penalty to the offence, the Committee does not consider that these strict liability offences trespass unduly on personal rights and liberties.

Retrospective procedural changes: Proposed Schedule 2, Part 5, Clause 19

15. Proposed Schedule 2, Part 5, Clause 19 states that:

> The amendment of section 60 by the *Stock Medicines Amendment Act 2004* extends to offences committed before the commencement of the amendment but does not affect any proceedings commenced before that commencement and not finally determined at that commencement.

16. The Bill makes two amendments to s 60:

- changing the maximum penalty which can be imposed in proceedings in the Local Court from 50 to 100 penalty units [sch 1[32]]; and
- omitting the requirement that proceedings for an offence may be taken and prosecuted only by a person authorised by the Minister [sch 1[33]].

17. These amendments apply to proceedings which began after the Bill commenced for *offences committed before the Bill's commencement*.

However, the changes are procedural in nature only and do not affect any substantive rights of any person or any proceedings currently underway.

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

Definition of authorised officers: Proposed s 60A

18. Proposed s 60A enables *authorised officers* to issue penalty notices for prescribed offences under the Act or its Regulations.

19. In the section:

> ***authorised officer*** means a person authorised in writing by the Director-General as an authorised officer for the purposes of this section and includes a police officer.

20. The Committee has previously expressed the view that, when legislation bestows on persons administrative powers that can significantly affect personal rights, it should include appropriate limits as to who may be authorised to exercise those powers.[31]

This may include restricting the exercise of those powers to a defined group of persons or persons holding a specified office or rank or possessing some qualification or attribute.

21. The monetary penalties under the Act are currently up to $22,000 for an individual, or $44,000 for a corporation. The fines to be imposed by penalty notices are to be prescribed by regulation, but may be up to the maximum penalty provided in the Act.

[31] Eg, *Legislation Review Digest No 4 of 2003*, 27 October 2003, at 30-31.

22. The Committee considers that the power to impose such significant fines should be given only to a person of appropriate responsibility and with sufficient accountability for their actions.

23. In commenting on a Bill which would allow "a person authorised in writing by the Minister to be an officer" under the Commonwealth *Migration Act 1958*, the Senate Scrutiny of Bills Committee commented:

> The Committee often draws attention to provisions which delegate power to anyone who fits the all-embracing description of 'a person'. ... As a general rule, the Committee would prefer that potential appointees be required to have some qualifications or attributes before they are eligible for appointment.[32]

24. The Committee has written to the Minister to seek his advice as to why there are no requirements regarding the qualifications or attributes of persons who may be authorised for the purposes of proposed section 60A.

25. The Committee refers to Parliament the question of whether a discretion to appoint authorised persons without such requirements makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

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

Commencement by proclamation: Clause 2

26. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act, or parts of the Act, at all.

27. The Minister's office has informed the Committee of two reasons for delaying provisions of the Bill:

- the provisions repealing advertising controls will not be proclaimed until appropriate alternative legislation is in place at the Commonwealth level in accordance with the Galbally Review (the national review of drugs, poisons and controlled substances);[33] and
- to allow time for the making of recommendations regarding things to be prescribed, including types or species of stock for the purposes of the definitions of "food producing species" and "major food producing species", penalty notice offences and details about records to be kept by veterinary surgeons under section 39E.

The Committee makes no further comment on this Bill.

[32] Senate Scrutiny of Bills Committee, *Alert Digest No 6 of 1999.*

[33] The Bill repeals these controls in line with a direction from the National Competition Council. See also The Honourable David Campbell MP, *Legislative Assembly Hansard*, 16 September 2004.

Part Two – Regulations

SECTION A: REGULATIONS ABOUT WHICH THE COMMITTEE IS SEEKING FURTHER INFORMATION

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04 30/04/04	01/04/04
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 12/09/03	29/08/03 11/03/04
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	05/03/04	957	30/04/04	
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	15/06/04
Road Transport (General) Amendment (Interlock Devices) Regulation 2003	29/08/03	8610	13/02/04 01/06/04	13/05/04

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Children's Services Regulation 2004 • Letter to the Minister for Community Services dated 10 September; • Letter to Child Care NSW dated 10 September; • Letter from the Minister for Community Services dated 14 September; • Letter from Child Care NSW dated 14 September; • Letter from the Minister for Community Services dated 16 September; and • Letter to the Minister for Community Services dated 16 September.	21/05/04 p. 2925

6. CHILDREN'S SERVICES REGULATION 2004

Gazette reference:	21/05/2004, page 2925
Commencement:	30/09/2004
Minister:	The Hon Carmel Tebbutt MLC
Portfolio	Community Services

Background

1. In December 2002, the Department of Community Services (DoCS) produced for consultation a Regulatory Impact Statement on the draft *Children's Services Regulation 2002*. Submissions on the draft Regulation were still being received by DoCS as late as July 2003.

2. In a letter to the Committee of 10 May 2004, the Minister for Community Services advised that the final round of consultation with peak children's services groups regarding the *Children's Service Regulation 2004* (the 2004 Regulation) had begun on 20 April 2004 and that the new Regulation would be tabled in the near future.

3. On 21 May 2004, the 2004 Regulation was gazetted, to commence on 30 September 2004.

4. In the course of considering the 2004 Regulation, the Committee was informed by Child Care New South Wales of a number of concerns it had with the 2004 Regulation as drafted.

5. The Committee considered these concerns, and concluded that they fell within the ambit of the Committee's responsibilities under s 9 of the *Legislation Review Act 1987*. The Committee then raised these concerns with the Minister by letter dated 10 September 2004.

   Being aware that ongoing discussions had been occurring between the Minister and Child Care New South Wales, the Committee also wrote to Child Care New South Wales to clarify what issues it considered unresolved following those discussions.

6. The Minister responded to the Committee's concerns with a letter dated 14 September 2004 and a supplementary facsimile on 15 September 2004.

Committee's response

7. The Committee consider the Minister's response at its meeting of 16 September 2004 and resolved to:

   (i) thank the Minister for her prompt reply;

(ii) recommend to the Minister that the Regulation be amended to remove any uncertainties which the Minister proposed to clarify by administrative means; and

(iii) publish the following correspondence (copies follow):

- the Committee's letter to the Minister dated 10 September ;
- the Committee's letter to Child Care NSW dated 10 September;
- the Minister's letter to the Committee dated 14 September;
- Child Care NSW's letter to the Committee dated 14 September;
- the Minister's letter to the Committee dated 16 September 2004; and
- the Committee's letter to the Minister dated 16 September.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

10 September 2004

File ref: LRC745

The Hon Carmel Tebbutt MLC
Minister for Community Services
Level 25
9 Castlereagh Street
SYDNEY NSW 2000

Attn: Paul Murphy
Facsimile 9228 5366

Dear Minister

Children's Services Regulation 2004

Pursuant to its responsibilities under s 9 of the *Legislation Review Act 1987*, the Committee has considered the above Regulation, which is to come into effect on 30 September 2004.

The Committee wishes to raise with you the following concerns, arising from its consideration of the Regulation:

- Under the *Children's Services Regulation 2004* (the 2004 Regulation), centres can only exceed the percentage limit of school age children (10% or 20%) if they use different "**areas** and amenities" and are attended to by different staff, while under the *Centre Based and Mobile Child Care Services Regulation 1996* (the 1996 Regulation) the percentage limit could be exceeded if separate "**facilities** and staff" were provided.

  It appears that this change will require centres which currently provide separate facilities and staff to school age children within the same area as pre-school children to reduce their number of school-age children to within the relevant percentage limit.

- Under the 2004 Regulation, the total number of school-age and pre-school children at a centre that is subject to percentage limits must not exceed the number of pre-school children for which the centre is licensed (ie, a total number equal to 100% of the licensed places), while the 1996

Regulation provided that school-age children must not exceed by more than 10% the licensed places at the service (ie, a total number equal to 110% of the licensed places).

It appears that this change will require affected centres to reduce the number of total places available to within the number of places licensed for pre-school children.

- The addition in the 2004 Regulation of a requirement that, if a service is being provided to a group of children who are not all of the same age bracket, the staff ratio prescribed for the youngest child in the group is to be applied to the whole group is likely to mean that a centre which has children from a number of age brackets within the same area must apply the staff ratio for the youngest child to all those children.

  Such a provision could increase the number of staff required for some centres and create a disincentive for providing for younger children.

- The requirement in cl 7(3) that council approval be obtained prior to applying for DoCS approval may unreasonably delay establishing new centres.

- As drafted, the requirement in cl 46 for safety glazing of glass does not appear to include doors with glass starting above 0.75 metres.

- The requirement in cl 53(4) placing restrictions on trainees which do not apply to untrained staff creates a disincentive for training.

- The requirement in cl 63 for licensees to enrol school-age children appears to directly conflict with the definition of *children's service* in s 200(1) of the *Children and Young Persons (Care and Protection) Act 1998*, which expressly excludes school-age children.

- Schedule 2 cl 4(1)(c) appears to convey an unfettered discretion to set space requirements for certain licensees.

The Committee notes that if such policy changes are to be adopted then adequate consideration needs to given to, and consequent provision made regarding, any reduction in the number of places which would result.

The Committee therefore seeks clarification from you as to the operation of the above provisions.

The Committee also seeks an explanation of any changes from previous policy and detail of any consultations which took place in regard to those changes.

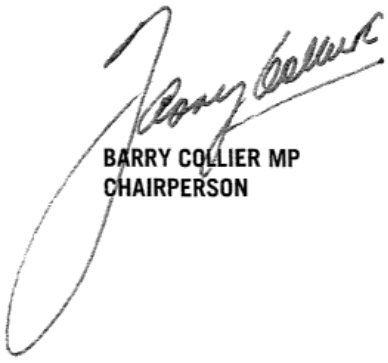
Finally, the Committee notes that the disallowance period for the Regulation concludes in the two Houses on 21 and 22 September respectively. The Committee may therefore require a protective notice of motion to disallow the regulation to

preserve its jurisdiction if it cannot conclude its consideration of the Regulation by 21 September 2004.

I would therefore be grateful if I could receive a written response to each of these issues by 4.00 pm Tuesday 14 September 2004 at the latest.

I have also attached for your information copies of representations on this Regulation the Committee has received from Child Care New South Wales.

Yours sincerely



BARRY COLLIER MP
CHAIRPERSON

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

10 September 2004

File ref: LRC745

Mr Vic Laurence
President
Child Care New South Wales
PO Box 660
PARRAMATTA 2124

By facsimile: 9687 9066

Dear Mr Laurence

Children's Services Regulation 2004

Thank you for your letters dated 31 August 2004 and 8 September 2004.

I understand that further consultation has taken place with the Department of Community Services. Could you please identify in writing any issues that remain outstanding following those discussions?

I would be grateful if you could fax your reply to 9230 3052 by 4.00 pm on Tuesday 14 September 2004 at the latest.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

The Hon Carmel Tebbutt MLC
Minister for Community Services
Minister for Ageing
Minister for Disability Services
Minister for Youth

14 September 2004

RECEIVED
14 SEP 2004
LEGISLATION REVIEW COMMITTEE

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier

I refer to your letter of 10 September 2004 concerning the Children's Services Regulation 2004 and seeking advice on a range of matters that have been raised by Child Care NSW. I offer the following advice in relation to the issues detailed in your letter.

Care of school aged children

I note that the Committee perceives that there is a reduction in the number of school aged children that can be present on licensed premises under the 2004 Regulation. I can clarify that this is not the case.

The legal requirement under the 1996 Regulation was always that services were subject to a maximum number of children as specified on the face of the licence. The ability to take up to 10% of children as school aged children (if there were no separate facilities for school aged children) operated within this maximum limit. Even where there were separate facilities the maximum licence capacity still applied. Thus, the 1996 Regulation never envisaged that licensed facilities would operate at 110% of their capacity and this has been consistently communicated to licence holders. It is however known that some operators have interpreted the Regulations as allowing them to operate up to 10% above their licence limit and that a reversal of this arrangement would impose undue impacts on service availability.

The new regulation is framed in such a way that it enables the Department to work constructively with operators to manage their services for school aged children more effectively and without losing places. Specifically, it enables the following implementation arrangements to apply for those existing services whose number of school aged children has exceeded their licence limit.

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Telephone: (02) 9228 5360 Facsimile: (02) 9228 5366

Where existing services have already secured exemptions from the upper licence limits under the existing Act and Regulations, these exemptions will continue to operate under the savings and transitional provisions of the 2004 Regulation. For services that do not have an exemption, but who have separate facilities for school aged children and need to operate above their existing licence limit to enable continuation of these services, the Department of Community Services will negotiate a variation to the upper licence limit for the premises (up to the maximum number of 90 children allowed under Clause 58). The variation would mean that the maximum number of places for long day care and preschool services (and the standards applying to those services) will remain the same, but that there will be an agreed level of additional licence capacity which can be utilised for Out of School Hours Care. This approach will also apply where a current exemption expires. Where the maximum number of children attending is expected to be more than 90, approval is available for more children to attend under Clause 58(1). These implementation proposals have been acknowledged by service providers as an approach that will avoid loss of services for school aged children.

In relation to those services that do not have separate facilities for school aged children and who wish to co-mingle the younger and older children, two things should be noted. Firstly, the 2004 regulation actually provides additional capacity to provide up to 20% (as opposed to 10%) of places for school aged children, where the ages of the school aged children are Year one or Kindergarten age. Secondly, there is no material change in the requirements relating to the separate staff and facilities, although it is agreed that there is a change in wording which is intended to more clearly express the pre-existing requirements.

I note the suggestion that a requirement in clause 63 for licensees to enroll school-age children conflicts with the definition of children's service in section 200(1) of the *Children and Young Persons (Care and Protection) Act 1998*, which excludes school-aged children. The elements of the Regulation that relate to school aged children are based on firm legal advice that it is both appropriate and legally sound to address management of anything that has a bearing on the safety and well being of pre-school children. Guarding against an imbalance between younger and older children and ensuring effective management of the interaction between the different age groupings is consistent with this.

In summary, the Regulation is framed so as to enable licensed services to provide care for school aged children as well as younger children to a level that will not cause a negative impact on the quality of services for the younger long day care and preschool children.

Supervision of mixed age groups – Clauses 53 and 61

It has been stressed in discussions on the Regulation that there is no requirement in the Regulation to increase staffing requirements where several groups are brought together for a particular purpose and there is no intention that the Department of Community Services would interpret the requirements otherwise.

The Regulation clearly defines "group" in terms of supervision, not in relation to ad hoc gatherings. It continues the arrangement that applies under the 1996 Regulation whereby different groups can be in the same room without creating a single large group with different staffing requirements. The 1996 Regulation also required staff: child ratios to be "maintained at all times", so that very young children in a mixed age group would continue to be staffed at the same level as if they were in a single age group. The 2004 Regulation does not change this policy intent.

I note that Child Care NSW has cited to you the example of a 28-place centre where children of mixed ages were brought together in a single room for an activity. Under both the 1996 and 2004 Regulations, it is not the 28 who have to be staffed at the ratio applicable to the youngest child, only the group in which the youngest child is being supervised. In this scenario, 2 staff could be responsible for 20 of the children aged 3-5, and one staff for the remaining 8 children. This does not require any more staff than under the 1996 Regulation.

That said, I acknowledge that the provisions are complex and that there are different interpretations that some have placed on them. I have therefore asked the Department to ensure that information and training material on the Regulation is very clear as to how this provision is to be interpreted and applied, using case examples.

Requiring council approval before licence application - Clause 7(3)

This provision of the 2004 Regulation seeks to carry forward an existing requirement for licence applications. Under both the 1996 and 2004 Regulations, an application is required to be in the approved form, including all necessary supporting documentation. Under the 1996 Regulation, detailed building plans were required and in practice licensees were required to have these plans approved by the local council before they were submitted to the Department for consideration. The reason for this is that some elements of both Regulations can be resolved through the local council approval process and do not need to be revisited in the licensing process. Compliance with building codes is an example.

It is important to note that this ongoing approach avoids the risk that the scarce resources of the Department of Community Services would be utilised in assessing applications for services that may never receive local government approval.

The 2004 Regulation seeks to assist applicants by clearly setting out the supporting documentation that needs to be submitted with an application. The Regulatory Impact Statement noted that "the net effect [of this requirement] on timing may be negligible".

Safety glass - Clause 46

You have pointed out that the requirement for safety glazing does not include doors with glass starting above 0.75 metres. This is correct and there is no reason to require this. The Regulation requires both centre-based and home-based services to fit safety glass to the standards required in the Building Code of

Australia or in shatterproof form, or to place a barrier that will prevent a child from falling against the glass, where the glass is lower than 0.75 metres. If there is no glass at or below 0.75 metres height, then there is a greatly reduced likelihood of a small child being able to fall against or through it.

Trainees - Clause 53(4)

I note your concern that clause 53(4) creates a disincentive for training. I understand that the specific concern is that if there are times during the day when there are only two staff available, such as when the centre is due to close, neither of them may be a trainee.

The intention of Clause 53(4) is that for the purpose of determining child to staff ratios (and only for that purpose) the majority of primary contact staff must not be trainees. This is to ensure that trainees at a child care centre are appropriately supported by qualified staff, to maintain the quality of service to children. It is certainly not intended that this provision preclude a trainee from being one of two staff present at either end of the day. This point will be clearly emphasised in operational directions and in information provided to service providers.

Space requirements – Schedule 2 Clause 4(1)(c)

In relation to the impression that Schedule 2 clause 4(1)(c) provides an unfettered discretion to set space requirements for certain licensees, I can confirm that this is not the case.

Schedule 2, clause 4 (1) (c) must be read together with Schedule 2, clause (4) (1) (a)-(c) and in sequence. Sub-clause 4(1)(a) states that an existing license is not subject to the space requirements of clause 30 either during or after the transition period. Subclause 4(1)(b) says that during the transition period the space requirements that apply are those that applied immediately before 30 September 2004. Subclause 4(1)(c) says that the space requirements will appear on the license when it is next made in the case of a further license, or immediately in the case of a new license. Subclause 4(1)(c) is subject to subclause (1)(a).

The practical effect is that (with the exception of sleeping area requirements for those under 2's which are the subject of separate amendments in the body of the regulation) space requirements in licenses remain as set down in the license immediately before commencement of the new regulation.

Consultation and analysis

Please be assured that the Regulation has been subject to extensive consultation and impact analysis and that it has been refined where this has been necessary to avoid unintended and unwanted consequences.

Following the release of a draft Regulation and Regulatory Impact Statement in 2002, further analysis was carried out on those provisions that were perceived to have the potential to impact on the availability of services. This additional analysis was also made available to service providers for review and comment. All written comments and submissions on the Regulation were considered in further

development of the Regulation (and were forwarded to the Legislation Review Committee in June 2004). Indeed, it is as a result of result of this further analysis and discussion with service providers that the Government took the step of modifying its proposals in relation to staff:child ratios, on the basis that there would have been an unacceptable adverse impact on the availability of child care places.

I am satisfied that the terms of the Regulation strike a sound balance between the need to ensure that children's services are safe and developmentally appropriate and the need to avoid adverse impacts on the availability of child care in NSW. I trust that this advice addresses the questions of the Committee.

Yours sincerely

Carmel Tebbutt

Carmel Tebbutt
Minister for Community Services
Minister for Disability Services
Minister for Youth

Child Care
New South Wales

14th September, 2004

Mr B. Collier, MP
Chairman
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

By Facsimile: (02) 9230 3052

RECEIVED
14 SEP 2004
LEGISLATION REVIEW
COMMITTEE

Dear Sir

Children's Services Regulation, 2004

Thank you for your letter received by facsimile on 10 September asking us to identify any issues remaining outstanding following the further consultation with the Minister's Office that has occurred since our earlier letters to the Committee.

We are pleased to advise that the Minister has now proposed a new basis for addressing our concerns about the potential loss of Outside School Hours places. The Minister is proposing that our difficulties be resolved by jointly developing a mechanism for recognising 'non-regulated' school-aged children on the licence for the regulated prior-to-school children. This approach will also help to overcome the problem DoCS are apparently trying to solve; that is, to remove a *perception* that DoCS is currently allowing more children to be present at a centre than is allowed under the childcare licence.

The Minister's proposal is in her letter of 9 September; a copy is enclosed.

Child Care New South Wales advised the Minister's Office on 10 September that the new proposal is acceptable in principle, subject to Child Care New South Wales being able to assure its members that they will be treated properly in the negotiations to identify how many school-aged children ought be recognised on their licence. We are now working on the details with the Minister's Office. Child Care New South Wales will of course want to preserve our member's position in the meantime and, with that in mind, we are exploring the option of securing the tabling of a Notice of Intention to Disallow which, as you will know, has to be done within the 15 sitting day period. That approach will hopefully secure enough time between now and the end of the month to resolve outstanding issues.

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ABN: 60 277 501 947

Child Care New South Wales' position is that we will accept the new proposal, provided we can be satisfied by 'on-the-record' undertakings from the Minister about the fairness and the subsequent enforceability of the process for establishing the numbers of school-aged children to be recognised on the licence.

The Committee may want to revisit the structural and legislative issues we raised in our earlier letters on Outside School Hours Services, particularly concerning the licensing of school-aged children. We have been advised that the Minister is not proposing to vary any of the current proposals. It has also been made clear to us the Minister is not proposing that the school-aged children be regulated as such, merely that their number at particular centres be recorded on the licence so that all parties have greater certainty. This seems like a neat solution. School-aged children will not be regulated, and centres will continue to supply such services subject to largely the same quantitative and qualitative criteria that currently apply, assuming of course that that *is* the approach DoCS will adopt. In the light of the new policy stance, there is no reason for DoCS to squeeze school-aged children out of centres.

For its part, Child Care New South Wales will accept a degree of interim uncertainty in the regulations, providing we receive written confirmation from DoCS in respect of two things:

1. Confirmation that DoCS will not interpret the new regulations in the manner described in their letter to us of 30 June. In other words, we seek *express* confirmation of the new policy stance implicit in the Minister's letter to us of 9 September, whereby current numbers of school-aged children are going to be incorporated in to the number shown on the licence, even though they are not to be otherwise regulated. Ministerial staff have confirmed that this new policy negates the need for DoCS to take a narrow view about "premises", as opposed to the required degree of separation in facilities and staffing.

2. We will need details of how our members will be protected during the negotiation phase, remembering that the proposals, as worded, will leave open the legislative basis for DoCS to once again decide to interpret the proposals as described in their 30 June letter. Although the Minister's letter of 9 September together with the written confirmation contemplated in 1. above will go some way to reducing such likelihood, Child Care New South Wales does not want to be criticized later down the track for not doing everything possible to manage this risk. Might the Legislation Review Committee be able to play some sort of facilitation role in this context?

Child Care New South Wales will urgently pursue these matters with the Minister.

Our second major regulatory concern was about the staffing impact of Cl. 53(3). In this regard, the Minister disputes our interpretation of Cl. 53 but says, in any event, it is not the *intended* meaning, and is *not the way the law will be interpreted* and administered by DoCS.

That advice is of course welcome news. Once again though, DoCS are asking the sector to agree to what is essentially an administrative solution pending later amendment of the regulations.

Child Care New South Wales is, again, willing to accept a degree of uncertainty for the sake of harmonious relations. Once again, however, we are nervous that the administrative solution may unravel, leaving in place a regulation 53(3) that is patently not consistent with what DoCS claim is its intention.

Child Care New South Wales' view is that, on balance, a combination of the Minister's letters, the draft Operational Directions set out in Attachment 1 to the Minister's letter of 9 September 2004, and Child Care New South Wales' and other childcare bodies ongoing involvement with negotiation and monitoring are a reasonable basis on which Child Care New South Wales can regard 53(3) as resolved for practical purposes.

Child Care New South Wales would nevertheless welcome any oversight role the Legislation Review Committee may be able to play in this respect as well.

We have raised several other areas of concern with the Legislation Review Committee. As you will see from the Minister's letter of 9 September, most of these matters seem to be on their way to resolution. Once again, the Minister and DoCS want the sector to trust DoCS to resolve these problems administratively rather than by correcting the deficiencies in the proposed regulations at this stage.

This can not be the smartest way to create sound regulation but, once again, Child Care New South Wales would be willing to resolve the ensuing legal uncertainties over the next twelve months or so, so long as we can get reasonably secure undertakings, on the record, built around the proposals in the Minister's letter of 9 September. Child Care New South Wales will work with all parties over the next week or so to put in place a workable framework before 30 September. If that can be achieved, there would then be no need to call on for debate any Notice of Intention.

There is one further issue worth noting here. Child Care New South Wales has not had any response from the Minister about our concerns with the effectiveness of the proposed existing-use rights mechanism set out in our letter to the Committee on 8 September.

On the strength of her letter of 9 September, it seems fair to assume the Minister will want to explore an administrative approach, rather than deferring the regulations for long enough to do it legislatively. We are sympathetic to the Minister's position, and are willing to explore how this can be achieved. Presumably it will be possible to agree on-the-record undertakings that provide interim protection to our members while legislative measures are negotiated and then implemented.

This letter refers to a possible facilitation or oversight role for the Legislation Review Committee. What we have in mind here is for the Committee to consider our claims and, if so minded, then report to the Parliament in such a way as to record both the 'problems' and the 'solutions'. A carefully constructed Report of the Committee could, in other words, give our members some further protection against possible unfair administrative action during the time needed to reflect the yet to be fully crafted amendments in the legislation.

May I take this opportunity to acknowledge the effort put in by the Committee's secretariat; your staff have been both professional and accessible.

Yours faithfully

Vic Laurence
President

Encl: Letter from The Hon C. Tebbutt, MLC.
Minister for Community Services to Child Care
New South Wales – dated 9 September 2004

Page 4

The Hon Carmel Tebbutt MLC
Minister for Community Services
Minister for Ageing
Minister for Disability Services
Minister for Youth

16 September 2004

RECEIVED
16 SEP 2004
LEGISLATION REVIEW COMMITTEE

Mr Barry Collier MP
Member for Miranda
Chairman of the Legislative Review Committee
Parliament House
SYDNEY 2000

Dear Mr Collier,

I write to provide you and your committee with supplementary advice for trainees and untrained staff.

It is understood that a residual concern is that clause 53(4) creates a disincentive for training, in that it may create a situation in which an unqualified person is permitted to do more in a service than a trainee.

An explicit goal of the 2004 Regulation is to promote opportunities for trainees to be more involved as primary contact staff. It does this by removing the restriction that was imposed in the 1996 Regulation (whereby a person who is at a service as a formal part of studies at an educational institution was not able to be counted as primary contact staff) subject to a protection that the majority of the staff who form the basis of determining child staff ratios must be more knowledgeable and experienced than trainees.

The 2004 Regulation establishes minimum qualification requirements based on the numbers and ages of children at a service. For example, if there are 30 or more children at the service, one staff member must have a formal Early Childhood Teaching qualification. If there are children under two, one of the primary carers must have a relevant nursing or child care diploma qualification. In addition, all services must have at least one person in attendance with a first aid qualification.

Quite separate from these minimum requirements the child:staff ratios for primary contact staff apply. Once the minimum qualification requirement is met, the Regulation requires that other staff counted for the purposes of meeting the ratios must have relevant knowledge and experience, unless they are a trainee in which case they will not require experience. Clause 51(2) of the Regulation, which sets out the knowledge and experience required for all primary contact staff, specifically provides that trainees are not required to have experience in working with children. The requirement for knowledge and experience is such that even though a person is not qualified, they will still have a higher level of skill in dealing with the care and development of children than a trainee.

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The exception for trainees aims to encourage trainees by ensuring that their lack of experience will not prevent them from obtaining work in child care centres. It also encourages children's services to provide trainees with relevant experience while they pursue their studies because it allows them to count these trainees as primary contact staff for the first time.

Because trainees do not have the depth of experience of either the formally qualified persons or those employed for their knowledge and experience, the limitation of clause 53(4) applies (that is, the majority of staff must be either qualified or experienced and therefore the majority cannot be trainees). It must be noted that this limitation applies only for the purposes of determining child to staff ratios.

Yours sincerely,

Carmel Tebbutt MLC
Minister for Community Services
Minister for Ageing
Minister for Disability Services
Minister for Youth.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

16 September 2004

File ref: LRC745

The Hon Carmel Tebbutt MLC
Minister for Community Services
Level 25
9 Castlereagh Street
SYDNEY NSW 2000

Attn: Paul Murphy
Facsimile 9228 5366

Dear Minister

Children's Services Regulation 2004

Thank you for your letter of 14 September providing advice on the above regulation. The Committee appreciates your prompt response.

Having considered your advice and correspondence from Child Care NSW, the Committee considers that your suggested responses generally provide practical resolutions to the concerns raised.

However, the Committee is of the view that there continues to be some uncertainty regarding the correct interpretation of certain provisions in both the *Centre Based and Mobile Child Care Services Regulation (No 2) 1996* and the *Children's Services Regulation 2004.*

While the measures you propose to take should prevent the adverse consequences that could have otherwise arisen, the Committee considers it is preferable that the rights and obligations of child care centre operators be based upon clearly drafted laws.

The Committee therefore recommends that the Regulation be amended to remove any uncertainties you propose to clarify by administrative means.

In keeping with established practice, the Committee has resolved to publish correspondence with you as well as with Child Care New South Wales.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (General) Amendment (Licence Suspension) Bill 2004	9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1,7
Rural Communities Impacts Bill 2004*	11
Snowy Mountains Cloud Seeding Trial Bill 2004	5
Save Orange Grove Bill 2004*	11
State Revenue Legislation Amendment Bill 2004	7
State Revenue Legislation Further Amendment Bill 2004	10
State Water Corporation Bill 2004	8
Statute Law (Miscellaneous Provisions) Bill 2004	9
Stock Diseases Amendment (Artificial Breeding) Bill 2004	6,8
Stock Diseases Amendment (False Information) Bill 2004	4,9
Stock Medicines Amendment Bill 2004	12
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
Sustainable Energy Development Repeal Bill 2004	10
Sydney Opera House Trust Amendment Bill 2004	10
The Synod of Eastern Australia Property Amendment Bill 2004	2
Thoroughbred Racing Legislation Amendment Bill 2004	4,6
Threatened Species Legislation Amendment Bill 2004	11
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	6
Wool, Hide and Skin Dealers Bill 2004	2
Workers Compensation Legislation Amendment Bill 2004	9

Appendix 2: Index of Ministerial Correspondence on Bills in 2004

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Child Protection (Offenders Registration) Bill 2004	Minister for Police	27/08/04			10
Classification (Publications, Films and Computer Games) Enforcement Amendment (Uniform Classification) Bill 2004	Attorney General	21/09/04			12
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Civil Liability Amendment (Offender Damages) Bill 2004	Minister for Justice	26/03/04	13/04/04		5,7
Commercial Agents and Private Inquiry Agents Bill 2004	Minister for Police	18/06/04	29/07/04		9,10
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03	19/03/04	4	5
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03	19/03/04	7	5
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Filming Approval Bill 2004	Minister for the Environment	11/05/04	12/05/04		7,8
Greyhound and Harness Racing Administration Bill 2004	Minister for Gaming and Racing	11/05/04	31/05/04		7,9
Lord Howe Island Amendment Bill 2003	Attorney General/ Premier	13/02/04	Premier 13/07/04		1,10[34]
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04	23/03/04		1,5
Mine Health and Safety Bill 2004	Minister for Mineral Resources	28/05/04	09/06/04		8,9
Mining Amendment (Miscellaneous Provisions) Bill 2004	Minister for Mineral Resources	30/04/04	17/05/04		6,8
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1

[34] Published under the title "Commencement of Acts."

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04	23/03/04		3,5
Passenger Transport Amendment (Bus Reform) Bill 2004	Minister for Transport Services	28/05/04 18/06/04	17/06/04		8,9
Police Amendment (Senior Executive Transfers) Bill 2004	Minister for Police	18/06/04	21/07/04		9,10
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	05/04/04		4,6
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04	23/03/04		1,5
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04			9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04	05/05/04		1,7
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Stock Diseases Amendment (Artificial Breeding) Bill 2004	Minister for Agriculture and Fisheries	30/04/04	21/05/04		6,8
Stock Diseases Amendment (False Information) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	28/05/04		4,9
Stock Medicines Amendment Bill 2004	Minister for Primary Industries	21/09/04			12
Strata Schemes Management Amendment Bill 2003	Minister for Fair Trading	13/02/04	27/02/04		1,3
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04	18/03/04		1,5
Thoroughbred Racing Legislation Amendment Bill 2004	Minister for Gaming Racing	16/03/04	07/04/04		4,6
Threatened Species Legislation Amendment Bill 2004	Minister for the Environment	27/08/04			11
Water Management Amendment Bill 2004	Minister for Natural Resources	28/05/04			8

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Aboriginal Land Rights (Gandangara Estate) Bill 2004	N				
Administrative Decisions Tribunal Amendment Bill 2004				N	
Agricultural Livestock (Disease Control Funding) Amendment Bill 2004				N	
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Anti Discrimination Amendment (Miscellaneous Provisions) Bill 2004	N			N	
Bail Amendment (Terrorism) Act 2004	N				
Botany Bay National Park (Helicopter Base Relocation) Bill 2004				N	
Child Protection (Offenders Prohibition Orders) Bill 2004	N			C	
Child Protection (Offenders Registration) Bill 2004	N,C			C	
Classification (Publications, Films and Computer Games) Enforcement Amendment (Uniform Classification) Bill 2004				C	
Civil Liability Amendment (Offender Damages) Bill 2004	R			C	
Commercial Agents and Private Inquiry Agents Bill 2004	R			C	
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Compulsory Drug Treatment Correctional Centre Bill 2004	N			N	
Courts Legislation Amendment Bill 2004				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Crimes Amendment (Child Neglect) Bill 2004				N	
Crimes Legislation Amendment (Terrorism) Bill 2004	N				
Crimes (Administration of Sentences) Bill 2004	N			N	
Crimes (Interstate Transfer of Community Based Sentences) Bill 2004				N	
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Criminal Procedure (Sexual Offence Evidence) Bill 2004	N				
Crown Lands (Prevention of Sales) Bill 2004*	N, R				
Education Amendment (Non-Government Schools Registration) Bill 2004				N	
Electricity (Consumer Safety) Bill 2003	N, R				C
Fair Trading Amendment Bill 2004				N	
Filming Approval Bill 2004				C	
Fines Amendment Bill 2004				N	
Fisheries Management Amendment Bill 2004				N	
Food Legislation Amendment Bill 2004				N	
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Greyhound and Harness Racing Administration Bill 2004			R, C	N	
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	N		R		
Health Legislation Amendment Bill 2004	N			N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Institute of Teacher Bill 2004				N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Liquor Amendment (Parliamentary Precincts) Bill 2004				N	
Local Government Amendment (Council and Employee Security) Bill 2004	N			N	
Local Government Amendment (Discipline) Bill 2004				N	
Mine Health and Safety Bill 2004	N, R	N	C	N, R	
Mining Amendment (Miscellaneous Provisions) Bill 2004	C, R			N	
National Parks and Wildlife Amendment (Jenolan Caves Reserve Trust) Bill 2004	N				
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Parliamentary Electorates and Elections Amendment (Prohibition on Voting Rights by Criminals) Bill 2004*	R				
Partnership Amendment (Venture Capital Funds) Bill 2004	C			C	
Passenger Transport Amendment (Bus Reform) Bill 2004	N, R		N, C, R	N	
Police Amendment (Senior Executive Transfers) Bill 2004				C	
Police Integrity Commission Amendment Bill 2004				N	
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004				C	
Professional Standards Amendment Bill 2004				N	
Public Lotteries Legislation Amendment Bill 2004				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Regional Development Bill 2004				N	
Registered Clubs Legislation Amendment Bill 2004	N				
Residential Tenancies (Public Housing) Bill 2004	N			N	
Retail Leases Amendment Bill 2004				N	
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N, C				
Road Transport (General) Amendment (Licence Suspension) Bill 2004	N	C	R		
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	
Save Orange Grove Bill 2004*	R				
Snowy Mountains Cloud Seeding Trial Bill 2004				N	
State Revenue Legislation Further Amendment Bill 2004	N				
State Water Corporation Bill 2004				N	
Stock Diseases Amendment (Artificial Breeding) Bill 2004	C, R			N	N
Stock Diseases Amendment (False Information) Bill 2004	C			C	
Stock Medicines Amendment Bill 2004	N	R, C		N	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	
Sydney Opera House Trust Amendment Bill 2004	N				
Thoroughbred Racing Legislation Amendment Bill 2004				C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Threatened Species Legislation Amendment Bill 2004	N,R		N	N	R,C
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	R			N	
Wool, Hide and Skin Dealers Bill 2004				N	
Workers Compensation Legislation Amendment Bill 2004	N			N	

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2004

Regulation	Minister/Correspondent	Letter sent	Reply	Digest Number
Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 & Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	Minister for Community Services	13/02/04	21/04/04	1,7
Children's Services Regulation 2004	Minister for Community Services	10/09/04 16/09/04	14/09/04 16/09/04	12
Consultation on Regulations	Premier/Acting Premier	05/03/04	15/06/04	9
Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003	Attorney General	07/11/03	03/12/03	1
Determination of Regulatory Fee Increases	Premier	24/10/03	18/03/04	5
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	Minister Assisting the Minister for Infrastructure and Planning (Planning Administration)	05/03/04 30/04/04	01/04/04 01/06/04	6,9
Landlord and Tenant (Rental Bonds) Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Occupational Health and Safety Amendment (Accreditation and Certification) Regulation 2003	Minister for Commerce	26/03/04 30/04/04	15/04/04 05/05/04	6,7
Pawnbrokers and Second-hand Dealers Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Radiation Control Regulation 2003	Minister for the Environment	24/10/03	23/01/04	1
Review of Regulations	Premier	18/12/03 27/08/04 01/09/04	12/07/04 20/08/04	11
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	Minister for Roads	13/02/04	15/06/04	9
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Privacy Commissioner	24/10/03	27/11/03	1
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Minister for Roads	13/02/04 01/06/04	20/05/04	1,8