

PARLIAMENT OF NEW SOUTH WALES



# **Legislation Review Committee**

## LEGISLATION REVIEW DIGEST

---

No 3 of 2004

---

8 March 2004

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Assembly. Legislation Review Committee.**

Legislation Review Digest, Legislation Review Committee, parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2004, 54 p; 30cm

Chair: Barry Collier MP

8 March 2004

ISSN 1448-6954

1. Legislation Review Committee—New South Wales
2. Legislation Review Digest No 3 of 2004

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; no. 3 of 2004

## TABLE OF CONTENTS

Membership & Staff .....	ii
Functions of the Legislation Review Committee.....	iii
<b>Part One – Bills.....</b>	<b>5</b>
<b>SECTION A: Comment on Bills.....</b>	<b>5</b>
1. Crimes Legislation Amendment Bill 2004 .....	5
2. Cross Border Commission Bill 2004* .....	13
3. Food Legislation Amendment Bill 2004.....	16
4. Partnership Amendment (Venture Capital Funds) Bill 2004 .....	21
5. Police Amendment (Crime Reduction and Reporting) Bill 2004 * .....	31
6. Retirement Villages Amendment Bill 2004.....	33
<b>SECTION B: Responses to Previous Digests .....</b>	<b>38</b>
7. Ministerial Correspondence — Privacy and Personal Information Protection Amendment Bill 2003.....	38
8. Ministerial Correspondence — Registered Clubs Amendment Bill 2003 .....	41
9. Ministerial Correspondence—Strata Schemes Management Amendment Bill 2003 ..	44
<b>Part Two – Regulations .....</b>	<b>47</b>
<b>SECTION A: Regulations about which the Committee is Seeking Further Information.....</b>	<b>47</b>
Appendix 1: Index of Bills Reported on in 2004.....	48
Appendix 2: Index of Ministerial Correspondence on Bills from September 2003 .....	49
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004.....	51
* Denotes Private Member's Bill	

## MEMBERSHIP & STAFF

### Chairman

**Barry Collier MP, Member for Miranda**

### Vice Chairman

**Marianne Saliba MP, Member for Illawarra**

### Members

**Shelley Hancock MP, Member for South Coast**

**Don Harwin MLC**

**Virginia Judge MP, Member for Strathfield**

**Peter Primrose MLC**

**Russell Turner MP, Member for Orange**

**Peter Wong MLC**

### Staff

Russell Keith, Committee Manager

Indira Rosenthal, Project Officer

Mel Keenan, Project Officer

Rachel Dart, Committee Officer

Cathy Brown, Assistant Committee Officer

### Panel of Legal Advisers

The Committee retains a panel of legal advisers to provide advice on Bills as required.

Professor Phillip Bates

Mr Simon Bronitt

Dr Steven Churches

Dr Anne Cossins

Professor David Farrier

Mr John Garnsey QC

Associate Professor Luke McNamara

Ms Rachel Pepper

Mr Rohan Price

Ms Diane Skapinker

Ms Jennifer Stuckey-Clarke

Professor George Williams

### Contact Details

Legislation Review Committee

Legislative Assembly

Parliament House

Macquarie Street

Sydney NSW 2000

### Telephone

02 9230 3418

### Facsimile

02 9230 3052

### Email

[legislation.review@parliament.nsw.gov.au](mailto:legislation.review@parliament.nsw.gov.au)

### URL

[www.parliament.nsw.gov.au/lrc/digests](http://www.parliament.nsw.gov.au/lrc/digests)

## 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. CRIMES LEGISLATION AMENDMENT BILL 2004

Date Introduced: 27 February 2004  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Bob Debus MP  
Portfolio: Attorney General

#### Purpose and Description

1. The Bill's object is to make miscellaneous amendments to the following Acts:
  - (a) the *Child Protection (Offenders Registration) Act 2000*;
  - (b) the *Children (Criminal Proceedings) Act 1987*;
  - (c) the *Costs in Criminal Cases Act 1967*;
  - (d) the *Crimes Act 1900*;
  - (e) the *Crimes (Sentencing Procedure) Act 1999*;
  - (f) the *Criminal Appeal Act 1912*;
  - (g) the *Mental Health Act 1990*; and
  - (h) the *Summary Offences Act 1988*.

#### Background

2. According to the second reading speech, the Bill makes a number of miscellaneous amendments to the criminal law and procedures that are designed to improve the administration of the criminal justice system. The Bill's range of amendments to the criminal law are necessary for the continuing development of an efficient and equitable criminal justice system in New South Wales.<sup>1</sup>

#### The Bill

##### *Child Protection (Offenders Registration) Act 2000*

3. As a result of the new Part 3B of the *Summary Offences Act 1988* [see below], the Bill makes a consequential amendment to the *Child (Protection Offenders Registration) Act 2000*. The amendment includes the new indecent filming offence as a *registrable offence* on the Child Protection Register [proposed s 3(1)(d1)].

---

<sup>1</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

Crimes Legislation Amendment Bill 2004

4. This amendment provides that the offence of filming a child for indecent purposes is to be a ***Class 2 offence*** for the purposes of the *Child Protection (Offenders Registration) Act 2000*.

Consequently, the registration procedures and reporting obligations under that Act will apply to persons found guilty of filming a child for indecent purposes.<sup>2</sup>

***Children (Criminal Proceedings) Act 1987***

5. Section 11(1) of the *Children (Criminal Proceedings) Act 1987* [CCPA] currently prohibits the publication or broadcasting of the name of any child who appears as a witness in criminal proceedings.<sup>3</sup>
6. The Bill amends s 11 of the CCPA to clarify that the protections provided by that section apply to deceased child victims, and to extend the protection to the siblings of victims, in circumstances where both they and the victim were children at the time the offence was committed [proposed s 11(1)(d)].
7. The second reading speech noted that this amendment:
- closes a gap to cover situations where the victim of the offence is a deceased child and extends that protection to include the siblings of child victims, including deceased child victims, in order to minimise the trauma to the family of the deceased.<sup>4</sup>

***Costs in Criminal Cases Act 1967***

8. The Bill amends s 2 of the *Costs in Criminal Cases Act 1967* [Criminal Costs Act] to ensure that a certificate for the payment of a defendant's costs can be given in relation to the defendant in a *special hearing* conducted under s 19 of the *Mental*

---

<sup>2</sup> Thus, a person convicted of a an offence against Part 3B of the *Summary Offences Act 1988* involving a child will be subject to the reporting requirements of the *Child (Protection Offenders Registration) Act 2000*:

- (a) for 8 years:
- (i) if the finding of guilt relates to a single Class 2 offence; or
  - (ii) if the registrable person has at the same time or at any earlier time been found guilty of another Class 2 offence, being an offence arising from the same incident as the primary offence; or
- (b) for 12 years, if the registrable person has at the same time or at any earlier time been found guilty of another Class 2 offence, where the other offence is not an offence arising from the same incident: s 14 of the *Child (Protection Offenders Registration) Act 2000*.

<sup>3</sup> This currently includes:

- (a) any person who:
- (i) appears as a witness before a court in any criminal proceedings, or to whom any criminal proceedings relate, and
  - (ii) was a child when the offence to which the proceedings relate was committed;
- (b) any person who is mentioned in any criminal proceedings in relation to something that occurred when the person was a child; and
- (c) any person who is otherwise involved in any criminal proceedings and was a child when the person was so involved: s 11(1) of the *Children (Criminal Proceedings) Act 1987*.

<sup>4</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.



*Health (Criminal Procedure) Act 1990* as can otherwise be given in relation to the defendant in criminal proceedings generally.<sup>5</sup>

9. Currently, s 2 of the Criminal Costs Act provides that a Court or judicial officer in any *proceedings* relating to any offence, whether punishable summarily or upon indictment, may grant to a defendant a certificate, where:
  - (a) after the commencement of a trial in the proceedings, a defendant is acquitted or discharged in relation to the offence concerned, or a direction is given by the Director of Public Prosecutions that no further proceedings be taken; or
  - (b) on appeal, the conviction of the defendant is quashed and:
    - (i) the defendant is discharged as to the indictment upon which he or she was convicted; or
    - (ii) the information or complaint upon which the defendant was convicted is dismissed.
10. Such a certificate states that if the prosecution had, prior to proceeding, been in possession of all the relevant evidence, it would *not* have been reasonable to institute the proceedings, and that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances [s 3].
11. Consequently, a person to whom a certificate has been granted under the Act may apply to the Director-General of the Attorney General's Department for payment from the Consolidated Fund of costs incurred in the proceedings to which the certificate relates [s 4(1)].<sup>6</sup>
12. Section 2(3) of the Criminal Costs Act provides that a trial, in relation to *proceedings*, includes preliminary proceedings that form part of the trial, for example, a *voir dire*.<sup>7</sup>
13. According to the Bill's second reading speech, it is unclear whether s 2(3) currently applies to applications made in respect of a special hearing.<sup>8</sup>

Special hearings are held for defendants who have been found unfit to be tried according to standard criminal procedure. Defence advocates tend to encounter particular difficulties in to obtaining instructions from their clients.

---

<sup>5</sup> Section 19(1) of the *Mental Health (Criminal Procedure) Act 1990* provides that the Attorney General may direct that a special hearing be conducted in respect of an offence with which a person is charged, for the purpose of ensuring, despite the unfitness of the person to be tried in accordance with the normal procedures, that the person is acquitted, unless it can be proved to the requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to that offence.

<sup>6</sup> The Director-General may then, if of the opinion that the circumstances of the case justify the making of a payment to the applicant, determine the amount of costs that should be paid to the applicant: s 4(2) of the *Costs in Criminal Cases Act 1967*.

<sup>7</sup> A *voir dire* is preliminary examination of a witness by the judge in which the witness is required to "speak the truth" to any questions asked of them. If incompetency appears, the witness is rejected e.g. on the grounds of insanity.

<sup>8</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

Crimes Legislation Amendment Bill 2004

14. The amendment to s 2(3) specifically provides that a special hearing conducted under s 19 of the *Mental Health (Criminal Procedure) Act 1990* is a “trial” for which a certificate for costs may be sought, when the applicant has been acquitted, or where the court has not reached a verdict.

***Crimes Act 1900***

15. The Bill amends s 52A of the *Crimes Act 1900* [the Crimes Act] so as to extend the range of circumstances that can give rise to an offence of *dangerous driving occasioning death or grievous bodily harm*.
16. A person is guilty of the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle:
- (a) under the influence of intoxicating liquor or of a drug; or
  - (b) at a speed dangerous to another person or persons; or
  - (c) in a manner dangerous to another person or persons [s 52A(1)].
17. A person convicted of an offence under s 52A(1) is liable to imprisonment for 10 years.
18. Currently, under s 52A(5), *impact* includes the following:
- (a) the vehicle overturning or leaving a road while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise);
  - (b) an impact between any object and the vehicle while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise);
  - (c) an impact between the person and the vehicle;
  - (d) the impact of the vehicle with another vehicle or an object in, on or near which the person is at the time of the impact;
  - (e) an impact with anything on, or attached to, the vehicle; or
  - (f) an impact with anything that is in motion through falling from the vehicle.
19. The Bill adds the following to the definition of impact under s 52A(5):
- (g) the person falling from the vehicle, or being thrown or ejected from the vehicle, while being conveyed in or on the vehicle (whether as a passenger or otherwise); and
  - (h) an impact between any object (including the ground) and the person, as a consequence of the person (or any part of the person) being or protruding outside the vehicle, while the person is being conveyed in or on the vehicle (whether as a passenger or otherwise).
20. The Bill amends s 52B in similar terms, so as to extend the range of circumstances that can give rise to an offence of dangerous *navigation occasioning death or grievous bodily harm*.

21. It is still a defence to a charge under s 52A or s 52B when the death or serious injury is in no way attributable to the manner of driving or navigating.<sup>9</sup>
22. The Bill also amends s 80A of the Crimes Act to create separate offences of:
  - sexual assault by forced self-manipulation [amended s 80A(2)]; and
  - sexual assault by forced self-manipulation in circumstances of aggravation [proposed s 80(2A)].
23. ***Circumstances of aggravation*** are defined in proposed s 80A in the same terms as apply to other sexual assaults.<sup>10</sup>

***Crimes (Sentencing Procedure) Act 1999***

24. In 2002, an amendment to the *Crimes (Sentencing Procedure) Act 1999* [CSPA] established the New South Wales Sentencing Council.
25. Currently, under s 100J(1) of the CSPA, the Sentencing Council has the following functions:
  - (a) advising and consulting with the Attorney General in relation to offences suitable for standard non-parole periods, and their proposed length;
  - (b) advising and consulting with the Attorney General in relation to offences suitable for guideline judgments, and the submissions to be made by the Attorney General on an application for a guideline judgment;
  - (c) monitoring, and reporting annually to the Attorney General on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments; and
  - (d) at the request of the Attorney General, preparing research papers or reports on particular subjects in connection with sentencing.
26. The Bill amends the CSPA to enable the Sentencing Council to advise and consult with the Minister administering that Act [currently the Attorney General] in relation to:
  - *all* matters that are suitable for guideline judgments by the Court of Criminal Appeal, not simply offences [proposed s 100J(1)(b)(i)]; and

---

<sup>9</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004. The defence is contained in s 52A(8) and s 52B(8) of the *Crimes Act 1900* respectively.

<sup>10</sup> *Circumstance of aggravation* means circumstances in which:

- (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby; or
- (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument; or
- (c) the alleged offender is in the company of another person or persons, or
- (d) the alleged victim is under the age of 16 years; or
- (e) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or
- (f) the alleged victim has a serious physical disability; or
- (g) the alleged victim has a serious intellectual disability: proposed s 80A of the *Crimes Act 1900*.

Crimes Legislation Amendment Bill 2004

- submissions to be made by the Minister in guideline proceedings generally, not only submissions concerning applications for guideline judgments [proposed s 100(1)(b)(ii)].<sup>11</sup>

27. Despite the expanded application of s 100J(1)(b), the Attorney General retains the power to determine whether, and to what extent, the Sentencing Council's advice will be adopted and implemented.<sup>12</sup>

***Criminal Appeal Act 1912***

28. The Bill amends the *Criminal Appeal Act 1912*, to allow the Court of Criminal Appeal to make the same kinds of order with respect to an appellant whom it finds not guilty by reason of mental illness, as a trial court may make under s 39 of the *Mental Health (Criminal Procedure) Act 1990* in respect of a person whom a jury finds not guilty for that reason.

29. Under s 39 of the *Mental Health (Criminal Procedure) Act 1990*, where a jury returns a special verdict that the accused person is not guilty by reason of mental illness, the court may order that the person be detained in such place and in such manner as the court thinks fit until released by due process of law, or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the court considers appropriate.<sup>13</sup>

30. Currently, s 7(4) of the *Criminal Appeal Act 1912* states that if, on appeal, it appears to the court that, although the appellant committed the act or made the omission charged, the appellant was mentally ill, so as not to be legally responsible for the his or her relevant actions, the court may quash the trial conviction and sentence, and order that the appellant be detained in strict custody as the court thinks fit until released by due process of law.

31. The Bill amends s 7(4) to empower the Court of Criminal Appeal to make any such order - *including* an order releasing the appellant from custody, either unconditionally or subject to conditions - as the court considers appropriate.

---

<sup>11</sup> Guideline judgments are issued by the New South Wales Court of Criminal Appeal for trial judges, to establish principles and indicate a range of appropriate penalties for particular offences. The aim is to ensure consistency in sentencing practices for particular offences, eg, dangerous driving causing death or grievous bodily harm: see *R v Jurisic* (1998) 45 NSWLR 209. On guideline judgments generally, see K Warner, "The role of guideline judgments in the law and order debate in Australia", 2003, 27 *Criminal Law Journal* at 8.

<sup>12</sup> See, eg, Hon A R Abadee, Chairperson of the Sentencing Council, *The New South Wales Sentencing Council*, paper given to the 2003 Local Courts Annual Conference: [www.lawlink.nsw.gov.au/lawlink/scouncil/scouncil.nsf/files/LocalCourtsConference.doc/\\$FILE/LocalCourtsConference.doc](http://www.lawlink.nsw.gov.au/lawlink/scouncil/scouncil.nsf/files/LocalCourtsConference.doc/$FILE/LocalCourtsConference.doc).

<sup>13</sup> Section 39 was amended by the *Crimes Legislation Amendment Act 2003* specifically to override the decision in *R v Stephens*, [1999] NSWSC 811, where Justice Levine held that the use of the word "detain" in that section meant that the court must order the detention of the person in some form of secure custody, that is, either a jail or a hospital. The amendment allowed a court to make orders, for example, in the same terms as bail conditions with which the person may have complied for the duration of the trial: Hon J Hatzisergos MLC, Minister for Justice, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 25 June 2003.

***Mental Health Act 1990***

32. The Bill amends the *Mental Health Act 1990* to extend the power of review conferred on the Mental Health Review Tribunal by s 81 of the *Mental Health Act 1990* to persons who are *conditionally released* under s 39 of the *Mental Health (Criminal Procedure) Act 1990* or s 7 of the *Criminal Appeal Act 1912*, rather than only those persons who are ordered under those provisions to be *detained* in custody.<sup>14</sup>
33. The Bill also extends s 101 of the *Mental Health Act 1990* - which provides for the termination of the classification as a *forensic patient* of a person found not guilty by reason of mental illness - and the definition of forensic patient in the Dictionary to the *Mental Health Act 1990*, to include a reference to persons released under the amended s 39 of the *Mental Health (Criminal Procedure) Act 1990* or s 7 of the *Criminal Appeal Act 1912*.<sup>15</sup>

***Summary Offences Act 1988***

34. The Bill inserts a new Part 3B into the *Summary Offences Act 1988*. The new Part contains two offences:
- filming for indecent purposes [proposed s 21G]; and
  - installing a device to facilitate filming for indecent purposes [proposed s 21H].
35. The maximum penalty for both offences is 100 penalty units [currently \$11,000] or imprisonment for 2 years, or both.
36. The second reading speech noted that the Bill is a response to:
- a number of recent troubling cases concerning persons using modern surveillance devices in an untoward manner. Because of the use of modern technology and the fact that filming often takes place in the perpetrator's own home there is no relevant offence on the statute book to deal with this serious invasion of privacy for indecent purposes.<sup>16</sup>
37. *Filming for indecent purposes* involves filming, for one's own or someone else's sexual arousal or sexual gratification, some other person who is undressed, or is using the

---

<sup>14</sup> Pursuant to s 81(2) of the *Mental Health Act 1990*, the Mental Health Tribunal must, as soon as practicable after the making of any such order, review the person's case and, as soon as practicable after the review, make a recommendation to the Minister:

(a) as to the person's detention, care or treatment, or

(b) if the Tribunal is satisfied, on the evidence available to it, that the safety of the person or any member of the public will not be seriously endangered by the person's release, as to the person's release (either unconditionally or subject to conditions).

<sup>15</sup> Pursuant to Sch 2 to the *Mental Health Act 1990*, *forensic patient* means:

(a) a person who is detained in a hospital, prison or other place pursuant to an order under s 10 (3)(c), 14, 17 (3), 25, 27 or 39 of the *Mental Health (Criminal Procedure) Act 1990* or s 7(4) of the *Criminal Appeal Act 1912* (including that subsection as applied by s 5AA (5) of that Act), or

(b) a person who is detained in a hospital pending the person's committal for trial for an offence or pending the person's trial for an offence, or

(c) a person who has been transferred to a hospital while serving a sentence of imprisonment and who has not been classified by the Tribunal as a continued treatment patient.

<sup>16</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

Crimes Legislation Amendment Bill 2004

toilet or engaged in a private sexual act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.<sup>17</sup>

38. The amendment is a response to a case in which a man secretly set up a video camera in his bathroom and recorded his flatmate showering and using the toilet. After making a full confession, the man was charged with committing an act of indecency.
39. However, a magistrate found that there was insufficient evidence that the accused had committed any act of indecency “towards” his flatmate. As such, he had not done anything which constituted an offence at that time.<sup>18</sup>
40. The Bill leaves to the Courts the interpretation of gravity of each factual situation on a case-by-case basis:

In order to be serious enough to warrant a criminal conviction the “state of undress”, together with the accompanying behaviour on the part of the accused, should constitute a serious invasion of privacy. The level of undress that meets the requisite degree of criminality is a matter appropriately left to the courts to determine in all the circumstances of a particular case. Ultimately the proof of this offence will rely heavily on the type of images or recordings made and the locations in which the cameras are set up.<sup>19</sup>

## Issues Considered by the Committee

41. The Committee did not identify any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

---

<sup>17</sup> Explanatory note to Schedule 8 to the *Crimes Legislation Amendment Bill 2004*.

<sup>18</sup> *Police v Palmer*, 29 August 2002, Downing Centre Local Court before Reiss SM. See, eg, *Sydney Morning Herald*, 29 August 2002. [www.smh.com.au/articles/2002/08/29/1030508098844.html](http://www.smh.com.au/articles/2002/08/29/1030508098844.html).

<sup>19</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

## 2. CROSS BORDER COMMISSION BILL 2004\*

Date Introduced: 26 February 2004  
House Introduced: Legislative Assembly  
Member Responsible: Mr Donald Page MP  
Portfolio: Private Member's Bill

### Purpose and Description

1. The object of this Bill is to constitute the Cross-Border Commission of New South Wales.
2. The Bill also makes consequential amendments to the *Public Sector Employment and Management Act 2002*.

### Background

3. In his second reading speech, the Member stated  
“at present any consideration of cross-border issues is undertaken on an ad hoc basis by a couple of officers in the Premier’s Department under the umbrella of the Regional Communities Consultative Council.  
... [T]he bill provides for a more thorough and effective resolution of cross-border issues”.
4. The Member also referred to some of the issues that the cross-border communities face and which the Cross-Border Commission would tackle. These include differing rates for payroll tax between the states bordering NSW and NSW, daylight saving, workers compensation laws and a lack of reciprocal ambulance agreements.
5. He stated that the different state and territory laws governing these and other matters reduces the competitiveness of, and is very costly for, businesses located and trading in cross-border regions.<sup>20</sup> Communities in these regions are also greatly inconvenienced by the inconsistency between the different jurisdictions.
6. The Member introduced a similar Bill in 2000, which was defeated in the Legislative Assembly.

### The Bill

#### Definitions

7. Clause 3 defines certain terms, including “*border region*”, which means:
  - (a) a region that is partly in New South Wales and partly outside New South Wales;  
or

---

<sup>20</sup> Mr Page states that this extra cost can run into millions of dollars a year for business.

- (b) a region that is wholly in New South Wales and near the border of New South Wales and another State or Territory.

### **Constitution of the Cross Border Commission**

- 8. Clause 4 establishes the Cross Border Commission of New South Wales, which is to have between 5 and 9 members. These include the Chairperson and between 4 and 8 part-time members appointed by the Premier.

The part-time members are to be residents of New South Wales who, in the opinion of the Premier, are suitably qualified to represent various interests in relation to border communities. These interests relate to consumers, business, farmers and local government [clause 4(3)].

A person cannot be a part-time member if he or she is a member of the Parliament of New South Wales or of the Commonwealth.

- 9. Under the Bill, the Chairperson is appointed by the Governor on the recommendation of the Premier after consultation by the Premier with the Leader of the Opposition in the Legislative Assembly (or, if the Opposition comprises 2 or more recognised political parties, the leaders of those parties).
- 10. The Bill enables staff to be employed under Chapter 2 of the *Public Sector Employment and Management Act 2002* to assist the Commission (clause 7). The Commission may also use staff or facilities of a government department or a public or local authority and may engage consultants.

### **Functions of the Commission**

- 11. The functions of the Commission are:
  - (a) to invite members of a border community to make submissions to the Commission in relation to matters affecting that community;
  - (b) to conduct inquiries into such matters affecting border communities as are referred to it by the Premier or as the Commission considers appropriate;
  - (c) to identify issues affecting border communities and to make recommendations to the Premier regarding such issues;
  - (d) to prepare an annual report for tabling in Parliament in relation to the results of its inquiries into matters affecting border communities, and in relation to any action taken by the Government as a consequence of any recommendations referred to in paragraph (c); and
  - (e) other functions conferred or imposed on the Commission by or under any other Act or law.

### **Annual Report and Review of Commission after 5 years**

- 12. The Commission must prepare an annual report, which the Premier is to table in each House of Parliament.
- 13. The Premier must also conduct a review of the functions of the Commission and its effectiveness 5 years after the commencement of the proposed Act. The Premier must report the outcome of the review to each House of Parliament.



### **Miscellaneous**

14. The Commission, a member of the Commission, or a person acting under the direction of the Commission, will not be subject to any action, liability, claim or demand, if they were acting in good faith for the purpose of executing an Act (including the proposed Act) [clause 10].
15. Schedule 1 contains provisions relating to the constitution and procedure of the Commission, including terms of office of members, voting and quorum for meetings.
16. Schedule 2 makes consequential amendments to the *Public Sector Employment and Management Act 2002*.
17. The Bill commences on the date of assent.

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

18. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

### 3. FOOD LEGISLATION AMENDMENT BILL 2004

Date Introduced:	27 February 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Agriculture and Fisheries

#### Purpose and Description

1. The object of this Bill is to repeal the *Food Production (Safety) Act 1998* and to provide for the matters currently dealt with by that Act to be transferred to the *Food Act 2003*.
2. The Bill amends the *Food Act 2003* (the *Principal Act*):
  - (a) to establish the NSW Food Authority (which will replace Safe Food Production NSW), and
  - (b) to extend the operation of that Act to primary food production, and
  - (c) to transfer to that Act the provisions of the *Food Production (Safety) Act 1998* enabling the establishment of food safety schemes by regulation, and
  - (d) to make other miscellaneous amendments as a consequence of the transfer of those provisions.
3. The Bill also amends the *Meat Industry Act 1978* to repeal the provisions relating to the Meat Industry Consultative Council as that Council will be re-established under the *Food Act 2003*, and to remove obsolete provisions.

#### Background

4. The second reading speech<sup>21</sup> stated that this Bill implements the key recommendation of the review of the NSW food regulatory system conducted during 2002 by the Hon John Kerin<sup>22</sup> to merge SafeFood with the food regulatory staff and resources of NSW Health to form the NSW Food Authority.

The Bill does this by repealing the *Food Production (Safety) Act 1998* and transferring relevant provisions to the *Food Act 2003*, establishing the NSW Food Authority, and providing for staff transfer and related issues.

The second reading speech explained that the key to the approach taken in this legislation is the food safety scheme mechanism currently contained in Part 4 of the *Food Production (Safety) Act*.

---

<sup>21</sup> Mr Neville Newell, Parliamentary Secretary, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 February 2004.

<sup>22</sup> Mr Kerin's report was publicly released in December 2002.

Food safety schemes can be tailored to particular industries or sectors and will be prescribed by regulation. The schemes may include preventive requirements such as food safety programs, arrangements for auditing of these programs, licensing of food businesses, and associated fees and charges.

The schemes are based on scientific assessment of food safety risks and implement national standards such as the Food Standards Code where applicable.

Over the past 5 years, SafeFood has introduced food safety schemes covering the dairy, meat and seafood industries, and schemes for selected plant products sectors and eggs are being developed.

5. The Parliamentary Secretary stated in his second reading speech that by transferring the food safety scheme provisions to the *Food Act*, the schemes will now “be available to cover food businesses anywhere in the supply chain.”<sup>23</sup>

Existing food safety scheme regulations will be preserved as if they were made under the *Food Act*. The food safety scheme provisions will replace current *Food Act* provisions which deal with licensing of food businesses, food safety programs, and auditing requirements.

6. The Parliamentary Secretary also stated that the functions of the Food Authority would include all the functions now exercised by the “regulatory authority” under the Food Act (ie, the Director-General of the Department of Health) plus the functions of SafeFood under the *Food Production (Safety) Act*, which is repealed under this Bill.
7. In the second reading speech, the Parliamentary Secretary said that for the primary produce and seafood industries currently covered by SafeFood, the Bill makes no significant change to the regulatory and consultative arrangements established over the past 5 years under the *Food Production (Safety) Act*.

The farm sector will continue to be exempt from the *Food Act* requirements to comply with the Food Safety Standards in Part 3 of the Food Standards Code, unless compliance is specifically required by a food safety scheme regulation.

Similarly, licensing requirements will only apply to farmers, or any other food business, if provided by a food safety scheme. This is the same as the current position under the Food Production (Safety) Act.

8. The Parliamentary Secretary stated that “this Bill will establish the first through-chain food regulatory agency in Australia.”<sup>24</sup>

---

<sup>23</sup> Mr Neville Newell, Parliamentary Secretary, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 February 2004.

<sup>24</sup> Mr Neville Newell, Parliamentary Secretary, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 February 2004.

## The Bill

### NSW Food Authority

9. The Bill establishes the NSW Food Authority as a body corporate to replace the regulatory authority under the Principal Act (currently the Director-General of the Department of Health) [schedule 1[21].

The NSW Food Authority will have the functions currently exercised by the regulatory authority. These are set out in proposed section 108.

The Food Authority is generally subject to the control and direction of the Minister [proposed section 109].

10. The Bill inserts proposed section 136A into the Principal Act to enable the Food Authority to provide information to a member of staff of the Department of Health or of a public health organisation if it is necessary for the carrying out of functions by the member of staff under the *Public Health Act 1991* [schedule 1[24].

Similarly, staff may provide such information to the Food Authority to enable it to carry out its functions under the Principal Act.

### Food safety schemes

11. Sections 102–107 of the *Food Act*, which deal with the registration of food businesses, are replaced with provisions that relate to food safety schemes<sup>25</sup> and are currently contained in Part 4 of the *Food Production (Safety) Act* [schedule 1, clause 20].
12. The Bill enables regulations to be made prescribing food safety schemes. The regulation-making power covers a broad range of matters including:
- regulating the handling and sale of food, including the temperatures at which food must be kept;
  - setting up licensing schemes in relation to the handling and sale of food;
  - requiring the preparation and implementation of food safety programs to ensure that food safety schemes are being complied with;
  - requiring the preparation of plans in the event of the need for a recall of any food; and
  - designating the persons responsible for compliance with obligations under a safety scheme.
13. The regulations may also extend to anything intended as animal food, but only for the purposes of ensuring the safe handling of food for human consumption.
14. Industry consultation is required to be undertaken before the establishment of a food safety scheme and provides that the provisions of the *Subordinate Legislation Act 1989* relating to the preparation of regulatory impact statements for principal

---

<sup>25</sup> Food safety schemes are prescribed by regulation and regulate the safe handling etcetera of food.

statutory rules and consultation on those statements are to apply to regulations establishing food safety schemes [s.103].

15. Offences are created for, among other things, contraventions of food safety schemes and the licensing requirements of food safety schemes. The penalty is 500 penalty units for an individual (currently \$55,000) and 2,500 penalty units in the case of a corporation (currently \$275,000).<sup>26</sup>
16. The Food Authority must also undertake industry consultation on the continuing operation or the proposed amendment of a food safety scheme [s. 105].

### **Extension of Principal Act to primary food production**

17. The Principal Act<sup>27</sup> provides that provisions of the Act relating to the issuing of improvement notices to food businesses and prohibition orders, the auditing of food businesses, the registration of food businesses<sup>28</sup> and inspection and seizure powers<sup>29</sup> do not apply to primary food production.

The Bill repeals this section of the Act with the effect that most of the provisions of the Principal Act now will apply to primary food production.<sup>30</sup>

### **Miscellaneous**

18. The Bill allows the Food Authority to authorise a member of staff of the Food Authority as a food safety auditor for the purposes of the Principal Act if the member of staff is appropriately qualified [schedule 1, clause 14]. The current provisions that enable any other natural person to apply for approval to be a food safety auditor remain unchanged.
19. Section 100 is amended to increase the penalty for a corporation that fails to notify the appropriate enforcement agency in advance of the carrying on of a food business [schedule 1, clause 17].

The penalty is increased from 1,200 penalty units (currently \$13,200) to 2,500 penalty units (currently \$275,000).<sup>31</sup>

20. The Principal Act<sup>32</sup> is amended to extend the protection from personal liability for certain persons carrying out functions under the Act to members of consultative bodies that may be consulted in relation to food safety schemes under the Act

---

<sup>26</sup> These offences are currently contained in section 92 of the Principal Act, which is repealed and re-enacted in proposed section 104.

<sup>27</sup> See section 10, *Food Act*.

<sup>28</sup> These provisions are contained in Parts 5, 7 and 8.

<sup>29</sup> These provisions are contained in Parts 4 & 6. They do not apply except in relation to enabling an investigation and prosecution of offences against the Principal Act and the making and enforcement of emergency orders under the Principal Act. Exemption from Parts 4 and 6 is due to the fact that these matters are largely covered by the *Food Production (Safety) Act* (repealed by this Bill).

<sup>30</sup> However, some of the penalty provisions do not apply to primary food production. For example, the conducting a food business without giving written notice to the appropriate enforcement agency.

<sup>31</sup> The penalty for an individual is unchanged at 500 penalty units (currently \$55,000).

<sup>32</sup> See section 134, *Food Act*.

Food Legislation Amendment Bill 2004

[schedule 1, clause 23]. This is currently provided for in section 60 of the *Food Production (Safety) Act*, which is repealed by this Bill.

21. Schedule 2 makes a number of consequential amendments to various Acts and regulations. In particular, it repeals provisions of the *Meat Industry Act 1978* dealing with the Meat Industry Consultative Council. It is intended that the Council be re-established under the *Food Act*.
22. The Bill commences on proclamation.

## **Issues Considered by the Committee**

### **Issue: Clause 2 – Commencement by proclamation**

23. 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 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.

24. The Minister's office has advised the Committee that the delay in commencement is necessary to finalise the administrative arrangements for the establishment of the new agency. They also advised that the Minister has publicly committed to stakeholders that the new agency will be up and running and the legislation in place by March or April 2004.

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

## 4. PARTNERSHIP AMENDMENT (VENTURE CAPITAL FUNDS) BILL 2004

Date Introduced: 27 February 2004  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Bob Debus MP  
Portfolio: Attorney General

### Purpose and Description

1. The Parliamentary Secretary set out the purpose of the Bill as follows:

This bill amends the Partnership Act 1892 to allow for a new form of corporate entity, the Incorporated Limited Partnership, for use as a structure for venture capital investment funds. This will align New South Wales with the dominant position structure internationally in respect of venture capital investment funds. Research conducted by the Australian Venture Capital Association Limited indicates that New South Wales will financially benefit from these reforms. Introducing this structure to complement the Commonwealth's recent venture capital tax reforms, it is anticipated that more than \$1 billion will be invested in Australian growth companies, \$350 million will be added to Australian gross domestic product and \$120 million to net exports each year.

Through incorporated limited partnerships, New South Wales will be able to more readily attract both domestic and foreign capital for investment in New South Wales growth companies. Venture capital is an important source of funds for start-up companies, expanding businesses and restructuring businesses. By its nature, venture capital investment is high risk as it provides funding to companies at difficult stages in their development and, consequently, at stages where there is the greatest risk of failure. The venture capital process attempts to prevent this failure by working with the management of investee companies through the growth phase. This applies in key areas of economic activity that often require years of research and development before investors may see returns. Medical technology and biotechnology are two such activities. In fact, the joint New South Wales, Queensland and Victorian "Australian Biotechnology Alliance" project is likely to benefit from an enhanced venture capital investment regime.<sup>33</sup>

2. At present, the *Partnership Act 1892* [the Act] provides for two forms of partnerships - common law partnerships and limited partnerships. The Bill amends the Act to provide for a new form of partnership, an *incorporated limited partnership* [ILP].
3. Unlike common law partnerships and limited partnerships, an ILP is a separate legal entity from its partners. Like a limited partnership, it has *general partners* who manage the business of the partnership and *limited partners* who contribute investment capital to, but do not manage, the business.

---

<sup>33</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

Partnership Amendment (Venture Capital Funds) Bill 2004

4. The liability of the limited partners for the debts and obligations and other liabilities of the partnership is accordingly limited, in a similar manner to the limited liability of a shareholder in a company.
5. A limited partner has no liability for the liabilities of an ILP, nor of a general partner. However, this freedom from liability does *not* extend to:
  - a contribution of capital or property made by a limited partner to the ILP being used; or
  - an obligation of a limited partner to contribute capital or property to the ILP being enforced by any person to whom the obligation is owed.
6. Partnerships with the proposed structure are typically used for international venture capital investment. The Bill will enable individuals, corporations and partnerships engaged in certain venture capital projects in Australia to form such ILPs by being registered under the amended Act.

## Background

7. The Bill is a complex piece of legislation, due to the fact that it creates a new form of corporate entity.
8. The introduction of the ILP is intended to complement the recent Commonwealth venture capital tax legislation, the *Taxation Laws Amendment (Venture Capital) Act 2002* (Cth) [the Venture Capital Act].
9. The Commonwealth's tax reforms apply to three forms of limited partnership:
  - *venture capital limited partnerships* [VCLP], which are limited partnerships investing directly in companies;
  - *Australian venture capital funds of funds* [AFOF], which diversify investment risk by investing across a range of venture capital limited partnerships; and
  - *venture capital management partnerships*, which, under the *Income Tax Assessment Act 1936* (Cth) [the Tax Act], can only be involved in the management of these other bodies.<sup>34</sup>
10. The ILP, created by the amendment to the Act, addresses the issue of liability and provides a structure that is internationally preferred for venture capital investment.

## The Bill

### Formation and registration of incorporated limited partnerships

11. The Bill provides for the formation of an ILP by entry in a Register of Limited and Incorporated Limited Partnerships. Currently the Registrar is the Director-General of the Department of Commerce, pursuant to Part 3 of the Act [proposed s 50A].

---

<sup>34</sup> See Parliament of Australia, Parliamentary Library, *Bills Digest No. 78, 2002-03, Taxation Laws Amendment (Venture Capital) Bill 2002*.



12. An application for registration as an ILP may be made by an existing partnership (or limited partnership) or by any individuals, corporations or partnerships proposing to be partners in the proposed ILP in a number of specified circumstances [proposed s 53D]. Essentially:
- the partnership is registered, or the proposed partnership intends to apply for registration, as a VCLP or an AFOF under the Venture Capital Act; or
  - the partnership is recognized, or intends to meet the requirements for recognition, as a venture capital management partnership within the meaning of s 94D(3) of the Tax Act [proposed s 53D(3)].
13. An ILP must have at least one general partner but not more than 20, and at least one limited partner [proposed s 51]. The general partners are responsible for the management of the partnership, while limited partners are investors.<sup>35</sup>

### **Nature and powers of an incorporated limited partnership**

14. An ILP:
- is a body corporate with legal personality separate from the partners in it and with perpetual succession; and
  - may have a common seal; and
  - may sue and be sued, in its firm-name [proposed s 53(1)].
15. An ILP has (subject to any limitation imposed by the partnership agreement) all the legal power and capacity of an individual and also of a body corporate to carry on the business of the partnership, whether within or outside New South Wales, or outside Australia [proposed s 53A].
16. References in the Act to a partnership or firm that is an ILP are references to the ***separate legal entity that is distinct from the persons or partnerships that constitute it*** [proposed s 1B(2) and s 1C].
17. As such, an ILP has rights and liabilities that are distinct from those of the partners in it, whether limited or general.<sup>36</sup>
18. The Bill consequentially amends the definition of *partnership* in s 1(1) of the Act [Sch 1[4]].
19. The Bill includes assumptions that a person is entitled to make when dealing with an ILP [proposed s 73C and s 73D]. These include an assumption that the ILP has title to property, and that a person acting on behalf of the ILP has complied with the terms of the partnership agreement.<sup>37</sup>

---

<sup>35</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

<sup>36</sup> Accordingly, much of the existing law of partnership has no application to incorporated limited partnerships, the partners in an incorporated limited partnership, or to the relationship between an incorporated limited partnership and its partners. See paragraph 23 below.

<sup>37</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

**Relationship of partners of incorporated limited partnership to each other and to the partnership**

20. A written partnership agreement is a pre-requisite for an ILP [proposed s 53B(1)]. Rights and duties between the partners must be set out in the partnership agreement, which has effect as a contract between the ILP and the partners.<sup>38</sup>
21. The partnership agreement operates also as a contract between the ILP and each partner. The interests of the partners in the ILP and their rights and duties in relation to the partnership are, subject to the Act, to be determined in accordance with this agreement [proposed s 53B(2)].<sup>39</sup>
22. A partnership agreement may provide that a limited partner or as otherwise agreed by the partners can bind a limited partner.<sup>40</sup> However, the intent of the Bill is that generally a limited partner is *not* an agent of a general partner, another limited partner, or of the ILP, and cannot be bound by the representations of any other party to the ILP [s 53C(1)].
23. Similarly, a limited partner is not (subject to proposed s 67A) a proper party to a suit by or against the ILP [s 53(6)].

**Limitation of liability of partners in incorporated limited partnerships for the liabilities of the partnership**

24. The second reading speech highlighted the fact that, as ILPs are a new form of corporate entity, they do not generally fall within the scope of the current law relating to partnerships in New South Wales:

Principles associated with [existing] partnerships, such as joint and several liability, mutual agency and beneficial ownership of partnership assets, do not readily apply to a partnership that is a separate legal entity. To overcome this, proposed section 1C of the bill states the general law of partnership does not apply to incorporated limited partnerships, except as provided by the Act. An incorporated limited partnership will be a separate legal entity and for the purposes of the Corporations Act 2001, a body corporate. Therefore, in most cases, the firm will be subject to those provisions of the Corporations Act relating to bodies corporate, such as directors' duties and the prohibition on disqualified persons being involved in management.<sup>41</sup>

---

<sup>38</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

<sup>39</sup> The amendments to s 5–18 of the *Partnership Act 1892* made by Sch 1 [8] - [36] to the *Partnership Amendment (Venture Capital Funds) Bill 2004* describe the liability of the general partners in an incorporated limited partnership. They include amendments to ensure that the persons authorised to do an act or execute an instrument for an incorporated limited partnership do not generally include a limited partner and that the general partners are jointly liable with the incorporated limited partnership for its liabilities but that such liability is limited to that which the incorporated limited partnership cannot satisfy or as otherwise provided by the partnership agreement.

<sup>40</sup> Generally, neither a general partner, the ILP, nor an officer, employee, agent or representative of the ILP can bind a limited partner. Any such agreement purporting to bind a limited partner is also subject to proposed s 67A.

<sup>41</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

25. The Bill inserts a new definition of *liability* into s 49 of the Act. This includes any debt, obligation or other liability of any kind, wherever and however incurred [Sch 1 [53]].
26. A limited partner is not responsible for the liabilities of the ILP, nor those of a general partner, but not so as to prevent the satisfaction of such liabilities by the contributions of capital or property by limited partners, or by the enforcement of the obligation to so contribute [proposed s 66A(1)].
27. The limitation on liability is qualified, in that a limited partner must not take part in the management of the ILP [proposed s 67A].
28. A limited partner who *does* take part in the management of the ILP may be liable for acts taken by that partner which cause loss or injury to a third party, if the third party reasonably believed the limited partner was a general partner. However, that partner's liability is limited to any liability incurred as a direct result of such acts, and to liability that would be incurred if the partner were in fact a general partner.
29. A limited partner is not to be regarded as taking part in the management of the business of the ILP merely because the partner engages in specified acts: these are referred to as the ***safe harbour provisions*** [proposed s 67A(3)(a)-(k)].<sup>42</sup>

---

<sup>42</sup> A limited partner in an incorporated limited partnership is not to be regarded as taking part in the management of the business of the partnership merely because the limited partner or a person acting on behalf of the limited partner:

- (a) is an employee of or an independent contractor engaged by the partnership, a general partner in the partnership or an associate of the general partner, or is an officer of a general partner that is a body corporate or of an associate of a general partner that is a body corporate; or
- (b) gives advice to, or on behalf of, the partnership or a general partner in the partnership or an associate of such a general partner in the proper exercise of functions arising from the engagement of the limited partner, or a person acting on behalf of the limited partner, in a professional capacity or arising from business dealings between the limited partner, or a person acting on behalf of the limited partner, and the partnership or a general partner or an associate of the general partner; or
- (c) gives a guarantee or indemnity in respect of any liability of the partnership or of a general partner in the partnership or an associate of the general partner; or
- (d) takes any action, or participates in any action taken by any other limited partner in the partnership, for the purpose of enforcing the rights, or safeguarding the interests, of the limited partner as a limited partner; or
- (e) if permitted by the partnership agreement:
  - (i) calls, requisitions, convenes, chairs, participates in, postpones, adjourns or makes a record of a meeting of the partners or of the limited partners or of any of them, or
  - (ii) requisitions, signs or otherwise passes, approves, disapproves or amends any resolution (whether at a meeting, in writing or otherwise) of the partners or of the limited partners or of any of them, including without limitation by formulating, moving, proposing, supporting, opposing, speaking to or voting on any such resolution; or
- (f) exercises a power conferred on the limited partner by subsection (4) or has, or exercises, any right to:
  - (i) have access to and inspect the books or records of the partnership or copy any of them, or
  - (ii) examine the state or prospects of the business of the partnership or advise, or consult with, other partners in relation to such matters; or
- (g) gives advice to, or consults with, or is or acts as an officer, director, security holder, partner, agent, representative, employee of or independent contractor engaged by an associate of the partnership, or
- (h) is or acts as a lender to, or fiduciary for, an associate of the partnership; or
- (i) to the extent authorised by the partnership agreement, participates on, or has or exercises any right to appoint one or more persons to, or remove one or more persons from, or to nominate one or more

Partnership Amendment (Venture Capital Funds) Bill 2004

30. The acts specified include those that a limited partner in a limited partnership may currently do under proposed s 67 of the Act without being considered to be taking part in the management of the business of the limited partnership.

However, these acts are expanded and enhanced to recognise the active role that limited partners in an ILP may play in overseeing the investments of the partnership and in advising and assisting the investees. For example, a limited partner may give advice to, consult or act as an officer or director of an associate of the ILP with whom the ILP invests, and may participate in committees dealing with requests from general partners for consent to do various things [proposed s 67A(3)(g)].<sup>43</sup>

**Liability for partnerships formed under corresponding laws and for acts or omissions outside the State**

31. The limitation on the liability of a limited partner in an ILP conferred by or under the Act extends to liability incurred outside the State [proposed s 66C].
32. Similarly, the limitation of liability of partners in ILPs formed under the law of *another jurisdiction* for liabilities incurred in the State is recognized in the Bill, provided that the law substantially corresponds to the provisions of the Act relating to ILPs, or is declared to be a corresponding law by the Governor [proposed s 66D].

---

persons for such appointment to or removal from, a committee which considers, approves of, consents to or disapproves of any one or more of the following proposals from a general partner:

- (i) a proposal involving a material change in the nature of the business of the partnership (including a change in, or departure from, any investment guidelines, policies or conditions relating to the business of the partnership),
  - (ii) a proposal for the adoption of a method for valuing some or all of the assets of the partnership (including a change to, replacement of or variation from such a method),
  - (iii) a proposal for an extension or reduction in the period in which, under the partnership agreement, investments (or certain types of investments) can be made by the partnership, or for any approval or disapproval of investments that the partnership does not otherwise have a right to make,
  - (iv) a proposal relating to any actual or potential transaction or other matter involving any actual or potential conflict of interest,
  - (v) a proposal relating to any actual or potential transaction, contract, arrangement or understanding between one or more of the partners, or their associates, and the general partner, the partnership or any associate of the general partner or of the partnership,
  - (vi) a proposal for the delegation, waiver, release or variation of an authority, right, duty or obligation of the general partner,
  - (vii) a proposal for the appointment or approval under the partnership agreement of any person as a senior executive of the general partner or of an associate of the general partner; or
- (j) nominates, selects, investigates, evaluates or negotiates with any person in connection with the removal or replacement of a general partner, or participates on a committee which proposes, considers, approves of, consents to or disapproves of any nomination, selection, appointment, change in control or ownership, suspension, replacement or removal of a general partner or an associate of a general partner, or
- (k) takes any action, or participates in any action taken by any other limited partner, for the purpose of registering or maintaining the registration of the partnership or a general partner in the partnership under Part 2 of the *Venture Capital Act 2002* of the Commonwealth as a VCLP or an AFOF within the meaning of that Act.

<sup>43</sup> Proposed s 67(6) of the *Partnerships Act 1892* emphasises that s 67A(3) of that Act is not an exhaustive list of actions that may be taken that do not amount to taking part in the management of a business: Sch 1[89] to the *Partnership Amendment (Venture Capital Funds) Bill 2004*.

**Winding up of incorporated limited partnerships**

33. An ILP may be wound up voluntarily or if required to be wound up by the Registrar [proposed Sch 1[2]].
34. The Registrar may require an incorporated limited partnership to be wound up on various grounds. For example, the Registrar may require an ILP to be wound up if the Commonwealth revokes its registration as a VCLP or an AFOF, or if it fails to be registered or within two years after registration as an ILP under the Act [proposed Sch 1[3]].

**Issues Considered by the Committee****Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]****Rights of third parties against ILPs: Proposed s 15(2), s 53C(6) & s 67A(2)****Admissions and representations by limited partners concerning the partnership made in the ordinary course of its business**

35. The Bill limits the use that can be made in evidence of admissions or representations by limited partners.
36. Proposed s 15(2) provides:

An admission or representation made by any general partner in a limited partnership or incorporated limited partnership concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm [ie, the ILP].
37. There does not seem to be any reason in principle why an admission or representation made by a *limited* partner should not also be evidence against the limited partnership or ILP. This type of provision would not extend nor affect the provisions of the Bill limiting the liabilities of limited partners or ILPs, or the general scheme of the Bill.
38. The Committee notes that, if s 15(2) were extended to apply to limited partners, it would still only apply to representations or admissions that were made “concerning the partnership affairs, and in the ordinary course of its business”.
39. The Committee also notes that s 53C allows for limited partners to be agents of a partnership by agreement. The status of representations and admissions made by limited partners as agents of the partnership is not clear to the Committee.

40. **The Committee has written to the Attorney General to seek his advice as to whether a representation or admission made by a limited partner acting as an agent of a partnership is evidence against the firm.**

**Restriction on joining limited partners to proceedings against partnerships**

41. The Bill also limits the right of a third party to bring proceedings against a limited partner:

Partnership Amendment (Venture Capital Funds) Bill 2004

A limited partner, in the capacity of limited partner, is not a proper party to any proceeding commenced in a court or tribunal by or against the incorporated limited partnership, other than a proceeding commenced by the incorporated limited partnership against the limited partner or by the limited partner against the incorporated limited partnership [proposed s 53C(6)].

42. It is likely that a third party may wish to bring proceedings against both an incorporated limited partnership, *and* a limited partner allegedly guilty of individual wrongdoing, because of an overlapping factual basis for the claims against each.
43. Proposed s 53C(6) may result in procedural complications, and argument, which unfairly inhibit the right of a third party to bring actions in the *same set of legal proceedings* against both an incorporated limited partnership and a limited partner.

**44. The Committee has written to the Attorney General to seek his advice as to why the procedural restriction in proposed section 53C(6) is needed, given the provisions elsewhere in the Bill protecting limited partners from liability and its potential impact on the rights of third parties to bring proceedings.**

**Wrongful acts or omissions of limited partners**

45. The Bill prohibits a limited partner in an incorporated limited partnership from taking part in the management of the business of the partnership, but exposes the limited partner to liability, if the limited partner does in fact take part in the management [proposed 67A].
46. Proposed s 67A(2) provides:
- (2) If:
    - (a) as a direct result of any wrongful act or omission of a limited partner in taking part in the management of the business of an incorporated limited partnership the limited partner causes any loss or injury to any person other than a partner in the partnership (a *third party*), and
    - (b) at the time of the act or omission the third party had reasonable grounds to believe that the limited partner was a general partner in the partnership, the limited partner is liable for the loss or injury to the same extent that the limited partner would have been liable if the limited partner were in fact a general partner in the partnership.
47. Pursuant to proposed s 67A(2), a third party must prove there were reasonable grounds for belief that the limited partner was a general partner in the partnership, in order to be compensated for loss *directly* caused by a *wrongful* act or omission of a limited partner.
48. As it is the limited partner's wrongdoing that causes the loss, rather than the belief of the third party, it is not clear to the Committee why grounds for the third party believing the limited partner was a general partner must be proved.
49. Proposed s 67A(2)(b) does not extend liability to the limited partner's fellow partners, but makes only the limited partner's liability unlimited in the case of individual wrongdoing.

50. Further, as noted above, there are lengthy protective provisions stating what is *not* to be regarded as a limited partner's taking part in the management of the business of the partnership [proposed s 67A(3)]. These protective provisions are themselves widened by the definition of "associate" of the partnership in proposed s 67B(1)(b) and (c).<sup>44</sup>
51. The Bill aims to attract long-term economic investment by providing a structure that allows investors to access Australian markets and invest in small, innovative enterprises, thereby ensuring that Australian initiatives are developed and commercialised within Australia and, in particular, New South Wales.<sup>45</sup>
52. The Bill's second reading speech stressed that the legislative structure of an ILP is an acknowledgement that venture capital investment is high risk undertaking, as it provides funding to companies at difficult stages in their development and, consequently, at stages where there is the greatest risk of failure.
53. Having regard to the need for flexibility in an ILP, the Parliamentary Secretary referred to proposed 67A in the following terms:
- These [*safe harbour*] provisions essentially allow a limited partner to oversee their investment, assist the growth of the enterprise and ensure that the incorporated limited partnership is being managed effectively. A limited partner who breaches this provision and engages in wrongful conduct will be personally liable for loss or injury caused directly to a third party as a result of that conduct where that third party reasonably believed that the limited partner was a general partner.<sup>46</sup>
54. With respect to the exposure of limited partners in an ILP, the Bill's second reading speech specifically noted that:
- [t]he bill provides that limited partners should have protection against involuntary entanglement in legal actions against the incorporated limited partnership. It also recognises that while limited partners have an active role in overseeing and assisting the investments of the partnership, and in ensuring that the incorporated limited partnership is being managed effectively, this role should not, of itself, expose the

<sup>44</sup> Proposed s 67B(1)(b) and (c) provide that a reference to an *associate of a limited partner* includes a reference to:

- (i) if the limited partner is a partnership, a partner in that partnership (a ***partner in the limited partner***; and
  - (ii) any person who has an interest in the limited partner or in any partner in the limited partner, whether as security holder, trustee, responsible entity, manager, custodian, sub-custodian, nominee, administrator, executor, legal personal representative, beneficiary or otherwise;
  - (iii) if the limited partner or a partner in the limited partner or a person covered by subparagraph (ii) is a body corporate, a related body corporate of that body corporate;
  - (iv) a director, officer, employee, agent, representative or security holder of the limited partner or of any partner in the limited partner or of a person covered by subparagraph (ii) or (iii); and
- (c) a reference to an *associate of an incorporated limited partnership* includes a reference to:
- (i) any person or partnership in which the incorporated limited partnership has an interest, whether as security holder or otherwise, and
  - (ii) if a person or partnership covered by subparagraph (i) is a body corporate, a related body corporate of that body corporate.

<sup>45</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

<sup>46</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.

Partnership Amendment (Venture Capital Funds) Bill 2004

limited partner to liability. Providing that a limited partner stays inside the safe harbour provisions in the bill, their liability will remain limited.<sup>47</sup>

55. It is nonetheless unclear to the Committee why a limited partner's liability should be dependent on the belief of third parties in circumstances where the limited partner has wrongfully gone beyond the role of a limited partner in taking part in the management of the business of the partnership.

**56. The Committee has written to the Attorney General to seek his advice as to the reasons for restricting a third party's right to recover compensation for loss directly caused by a limited partner's wrongful act or omission in taking part in the management of the business of the incorporated limited partnership to circumstances where the third party had reasonable grounds for believing the limited partner was a general partner.**

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

**Commencement by proclamation: Clause 2**

57. The ensuing Act is to commence on a day or days to be appointed by proclamation.
58. 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 at all.
59. While there may be good reasons why such a discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

**60. The Committee has written to the Attorney General to seek his advice as to why the ensuing Act is to commence on proclamation.**

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

---

<sup>47</sup> Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 27 February 2004.



## 5. POLICE AMENDMENT (CRIME REDUCTION AND REPORTING) BILL 2004 \*

Date Introduced: 19 February 2004  
House Introduced: Legislative Assembly  
Member Responsible: Mr Peter Debnam MP  
Portfolio: Private Member's Bill

### Purpose and Description

1. The Bill's objects are:
  - (a) to amend the *Police Act 1990* [the Act] to include as part of the functions of NSW Police the reduction of crime and the active encouragement of the reporting of all crime and incidents of public disorder in New South Wales; and
  - (b) to include those matters in the performance criteria contained in the contract of employment or any associated performance agreement between the Commissioner of Police and the Minister for Police.
2. The Bill is a Private Member's Bill.

### Background

3. According to the Member's second reading speech:

The objects of the Police Amendment (Crime Reduction and Reporting) Bill are, first, to amend the Police Act 1990 to include as part of the functions of NSW Police the reduction of crime and the active encouragement of the reporting of all crime and incidents of public disorder in New South Wales and, second, to include those matters in the performance criteria contained in the contract of employment or any associated performance agreement between the Commissioner of Police and the Minister for Police.<sup>48</sup>

### The Bill

4. Section 6 of the Act defines the "Mission and functions of NSW Police".
5. The Bill amends s 6(3) of the Act by adding "reduction" after "prevention" in paragraph (a) of the definition of *police services*, so that s 6(3)(a) reads:

Police services includes services by way of prevention, reduction and detection of crime...[Sch 1[1]].
6. The Bill also amends s 6(3) by adding proposed s 6(3)(c1), which amends the definition of "police services" to include "actively encouraging the reporting of all crime and incidents of public disorder in New South Wales" [Sch 1[2]].

---

<sup>48</sup> Mr P J Debnam MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 19 February 2004.

Police Amendment (Crime Reduction and Reporting) Bill 2004 \*

7. Section 27(1) of the Act provides that the employment of the Commissioner is to be governed by a contract of employment between the Commissioner and the Minister.<sup>49</sup>
8. The Bill inserts new s 27(3) – (5). Proposed s 27(3) provides that:

The performance criteria contained in the contract of employment between the Commissioner and the Minister, or any associated performance agreement, must require the Commissioner to do the following:

  - (a) reduce crime,
  - (b) actively encourage the reporting of all crime and incidents of public disorder in New South Wales [Sch 1[3]].
9. The balance of the proposed amendments to s 27 of the *Police Act 1990* are as follows:
  - (4) Any contract of employment between the Commissioner and the Minister, and any associated performance agreement, in force on the commencement of this subsection is taken to include the requirements referred to in subsection (3) and may be amended accordingly.
  - (5) Nothing in subsection (3) or (4) limits any other provision of this section or any other matter that may be included in performance criteria in the contract of employment or any associated performance agreement [Sch 1[3]].

## Issues Considered by the Committee

10. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

---

<sup>49</sup> Sections 41–47, 59 and 61 (relating to employment and remuneration of executive officers) apply to the Commissioner in the same way as they apply to an executive officer. However, in the application of those sections a reference to the Commissioner is to be read as a reference to the Minister: s 27(2) of the *Police Act 1990*.

Therefore, reading s 27 with s 42 of the *Police Act 1990*, the matters to be dealt with in a contract of employment between the Commissioner and the Minister include the following:

- (a) the duties of the Commissioner's position (including performance criteria for the purpose of reviews of the Commissioner's performance);
- (b) the monetary remuneration and employment benefits for the Commissioner; and
- (c) any election by the Commissioner to retain a right of return to the public sector under s 52.

## 6. RETIREMENT VILLAGES AMENDMENT BILL 2004

Date Introduced: 25 February 2004  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Reba Meagher MP  
Portfolio: Fair Trading

### Purpose and Description

1. The Bill's object is to amend the *Retirement Villages Act 1999* [the Act] to:
  - provide for the circumstances in which the statement of approved expenditure in relation to a retirement village may be amended in order to authorise further expenditure;
  - make it clear that any liability to pay recurrent charges for personal services (except for those already provided) ceases, in the case of a resident who has moved out or died, when the resident moves out or when the operator of the retirement village is notified of the resident's death;
  - clarify the Act's operation in relation to the assignment of residence contracts and the rights of residents or former occupants to sublet premises;
  - bring forward the due date for the review of the Act; and
  - make other miscellaneous amendments of a minor or machinery nature.

### Background

2. More than 700 retirement villages currently operate in New South Wales, accommodating around 40,000 residents, or approximately 3% of the New South Wales aged population.<sup>50</sup>
3. According to the Bill's second reading speech, the Act was originally introduced in 1999 following extensive consultation and a review of the regulatory environment, which at that time consisted mainly of an industry code of practice:

The Act represented the most significant reform to the regulation of the industry since retirement villages first began in New South Wales in the 1950s. Certain reforms to update and improve the Act are now being proposed for introduction. The main purpose of the bill is to address a number of legislative interpretations in recent judicial decisions and to bring forward the statutory review of the Act.<sup>51</sup>

### The Bill

4. Section 117(1) of the Act currently provides that:

---

<sup>50</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

<sup>51</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

Retirement Villages Amendment Bill 2004

[t]he operator [of a retirement village] may seek the consent of the residents to an amendment to the statement of approved expenditure if unforeseen requirements for expenditure arise.

5. The Bill amends the Act to provide that, if the residents of a retirement village do *not* consent to the statement of approved expenditure (ie the village budget) being amended by the operator, the operator may apply to the Consumer, Trader and Tenancy Tribunal [the Tribunal] for an order approving the proposed amendment [new s 117].

This amendment is a response to a decision of the Tribunal in *Dennison Investments v Beauty Point Retirement Resort Residents Committee*, in which consideration was given as to what constitutes “unforeseen circumstances”. The Tribunal found that if an individual operator simply underestimated the cost of certain items or forgot about the need for expenditure in certain areas, an amendment to the expenditure statement could be approved by the Tribunal, against the wishes of a resident.<sup>52</sup>

6. The Minister noted that this was contrary to the object of the Act, which was to institute transparent and accountable processes, and to curb the inclination of some operators to overspend on discretionary items.<sup>53</sup>
7. Under the amended s 117, the Tribunal may, in the case of an amendment that relates to further expenditure, approve the amendment *only* if there is an urgent need for the further expenditure, and the expenditure was not reasonably foreseeable when the statement of approved expenditure was initially approved.<sup>54</sup>

### Assignment of lease

8. Currently, in some retirement villages, when a resident dies or vacates, the existing lease is surrendered and a new lease entered into with the incoming resident. However, at other villages the contract gives the resident the right to assign the remaining portion of the lease to the new resident.
9. The issue is whether termination of the contract nullifies assignment rights, given that payment to an outgoing resident or to their estate is usually dependent on the assignment of the lease. If the lease cannot be assigned there is a potential for residents in these situations to lose significant amounts of money.<sup>55</sup>
10. In a recent decision, the Supreme Court of New South Wales held that as executors of an estate did not fall within the definition of “owner” or “resident” under the Act, they did not have a right to sub-let a deceased’s former premises in a retirement village. Acting Justice Cripps stated:

---

<sup>52</sup> *Dennison Investments v Beauty Point Retirement Resort Residents Committee* [2002] NSWCTTT 13 (20 March 2002).

<sup>53</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

<sup>54</sup> In the case of an amendment that relates to further expenditure, the Tribunal is not to make an order under s 117(3) unless the Tribunal is satisfied that there is an urgent need for the further expenditure; and that the further expenditure was not reasonably foreseeable when the statement of proposed expenditure was approved under s 116: new s 117(4) of the *Retirement Villages Act 1990*.

<sup>55</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

I have come to the above conclusions with reluctance because, as it would seem to me, the interpretation contended for by the defendants and adopted by the Tribunal is one that more generally accords with the policy of the legislation and the mischief to which it was directed. But however that may be in my opinion [the executors] were not relevantly a “resident” within the meaning of s 174.<sup>56</sup>

11. In the second reading speech, the Minister noted that:

In a practical sense leases have continued to be assigned since the Act began, but there has been doubt as to the legality of this practice. The amendment that the Government is now proposing will remove any uncertainty and restore the original intention of the parties when entering into an assignable lease...

Under the Act, residents who are owners are given the right to let or sub-let the premises on a temporary basis for up to three years. Units in retirement villages can be difficult to sell. Being able to rent out the unit allows the former resident, or their estate, to receive rent to help pay ongoing costs until the unit is sold. This measure assists in expanding the supply of suitable and affordable rental housing for seniors.<sup>57</sup>

12. Accordingly, the Bill provides that an assignable lease does not terminate when the resident dies or moves out, but rather is assigned to the incoming resident [amended s 129].
13. Thus, a contract will no longer be terminated on death or vacation of a resident, but will continue on until the end of the original lease. Only the outgoing resident's right to occupy the premises will terminate upon the assignment of the lease.
14. The existing powers of the Tribunal to terminate an assignable lease in certain situations will not be affected by this amendment.

#### Definition of “owner”

15. The Bill clarifies the extended meaning of owner for the purposes of Part 10 of the Act, which deals with the vacation of premises.
16. The Bill inserts a new s 150(1)(b), so that a reference to an “owner” in Part 10 is taken to include a person:
- who does not own the premises but whose residence contract:
  - (i) is in the form of a registered long-term lease, and
  - (ii) includes a provision that entitles the resident or former occupant to at least 50% of any capital gains in respect of the premises [Sch 1[5]].<sup>58</sup>
17. The definition of “permanent vacation” of residential premises in s 8 of the Act is consequentially amended, so that 8(d) will read:

<sup>56</sup> *Dennison Investments v Consumer Trader and Tenancy Tribunal of New South Wales* [2003] NSWCC 259 (3 April 2003) paragraph 31. Section 174(1) provides that a resident of residential premises in a retirement village may let (or, in the case of a resident referred to in s 150(1)(b), sublet) the premises under a residential tenancy agreement in accordance with the Act.

<sup>57</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

<sup>58</sup> For the purpose of subsection (1) (b), **registered long-term lease** means a lease registered under the *Real Property Act 1900* that either has a term of at least 50 years (inclusive of any option to renew), or is for the life of the lessee: proposed s 150(3) of the *Retirement Villages Act 1990*.

Retirement Villages Amendment Bill 2004

For the purposes of this Act, a person is taken to have *permanently vacated* residential premises in a retirement village when:

...

- (d) if the person owns the premises or is taken to be a resident of the premises by the operation of section 4 (2) *or is taken to be an owner because of section 150(1)(b)*—the person dies or moves out of the premises.<sup>59</sup>

### Recurrent charges

- 18. The Bill provides that the liability to pay recurrent charges for personal services provided by the operator of a retirement village (eg, meals, cleaning and laundry services) ceases, in the case of a resident who has moved out or died, as from the date the resident moved out or as from the date on which the operator is notified of the resident's death [proposed s 151(1) & (1A)].<sup>60</sup>

- 19. The Minister noted that:

[m]any operators, particularly those in the not-for-profit sector, already have a practice of not billing for personal services for residents who move out or pass away...The Government agrees with this position [and] intends to amend the Act to provide that in a situation where a resident has passed away or moved out, all charges for personal services cease immediately, that is, from the date the resident moves out or from when the operator is notified of the resident's death. This amendment will remove a financial burden from those residents who leave or the estates of deceased residents.<sup>61</sup>

### Review of the Act

- 20. Currently, the Act must be reviewed five years from the date of assent [s 208]. As the Act received the Royal Assent on 3 December 1999, the review would not practically take place until early 2005.
- 21. The Bill provides for the review of the Act to be brought forward to as soon as possible after the date of assent to the proposed Act [amended s 208(2) & (3)].
- 22. In the Bill's second reading speech, the Minister noted that:

...changes are now required to provide greater protection to residents and those contemplating moving into a retirement village. It is argued that there are certain unfair and inequitable practices within the industry that should be further addressed. The complexity of contracts, the standard of village management, excessive fee increases, and who should be responsible for the cost of repairs are some of the issues raised more frequently by consumers.

All those involved in the industry agree that it would be beneficial for the review to be brought forward. Bringing the review forward would provide residents, village operators

---

<sup>59</sup> Emphasis added.

<sup>60</sup> Accordingly, s 151(3), which provided that for the purposes of s 151, a resident or former occupant is taken *not* to be absent from the village if the resident or former occupant lets or sublets the residential premises concerned, is deleted: Sch 1[9] to the *Retirement Villages Amendment Bill 2004*.

<sup>61</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

and other interested parties the opportunity to comment on the legislation as soon as possible.<sup>62</sup>

23. The Minister stated that the Government intends to bring forward the review to commence upon assent being given to the proposed amendments. A report on the outcome of the review is to be tabled within 12 months from that date.<sup>63</sup> Accordingly, the amending provisions of the Bill commence on assent.
24. The Bill is to commence on assent.

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

25. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.

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

---

<sup>62</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

<sup>63</sup> Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 February 2004.

## SECTION B: RESPONSES TO PREVIOUS DIGESTS

# 7. MINISTERIAL CORRESPONDENCE — PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT BILL 2003

Date Introduced: 17 October 2003  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Bob Debus MP  
Portfolio: Attorney General

### Background

1. The Committee reported on this Bill in the Legislation Review Digest Number 4 of 27 October 2003. This Bill transfers the functions of the Privacy Commissioner to the Ombudsman and consequently abolishes Privacy NSW.
2. On October 24 2003, the Committee wrote to the Attorney General for advice as to why the Bill was to commence on proclamation.

### Attorney General's Response

3. By letter dated 26 February 2004, the Attorney General advised that should the Bill pass Parliament there would be a number of administrative matters that will need to be arranged before the transfer can take place. Further, Ombudsman and the Privacy Commissioner cannot make any of these arrangements until such time as Parliament passes the Bill.

### Committee's Response

- |   |
|---|
| 4. The Committee thanks the Attorney General for his reply. |
|---|

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





PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref: LRC459

The Hon B Debus MP  
Attorney General  
Level 36 Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Attorney

**Privacy and Personal Information Protection Amendment Bill 2003**

The Committee has considered this Bill under s 8A of the *Legislation Review Act 1987* and notes that it is to commence by proclamation.

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

We would appreciate it if you would advise us why it is necessary for this Bill to commence on proclamation, and indicate a time frame within which the Act will commence after assent.

Yours sincerely

A handwritten signature in black ink, appearing to read "Barry Collier".

Barry Collier MP  
Chairperson



ATTORNEY GENERAL

RECEIVED

26 FEB 2004

LEGISLATION REVIEW  
COMMITTEE

The Hon Barry Collier, MP  
Chairperson  
Legislation Review Committee  
NSW Parliament  
Macquarie St  
SYDNEY NSW 2000

25 FEB 2004

Dear Mr Collier

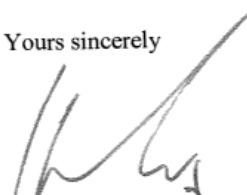
I refer to your recent request for advice concerning the provisions of the *Privacy and Personal Information Protection Amendment Bill 2003* that provide for commencement on proclamation.

This Bill proposes the transfer of the functions of the Privacy Commissioner to the Ombudsman. As a consequence, the Privacy Commissioner and his office, Privacy NSW, are abolished.

Accordingly, should the Bill pass the Parliament in its current form, it would be necessary to ensure that all relevant administrative arrangements are in place to implement the transfer before the legislation can be commenced. For example, arrangements would need to be made to ensure the transfer and availability of staff.

As you would appreciate, the Ombudsman and Privacy NSW could not take steps to implement these arrangements prior to the Bill passing through Parliament. Some flexibility in the commencement date would therefore be required to ensure that the appropriate arrangements are in place to effect a seamless transfer of functions.

Yours sincerely

  
**BOB DEBUS**

## 8. MINISTERIAL CORRESPONDENCE — REGISTERED CLUBS AMENDMENT BILL 2003

Date Introduced: 14 November 2003  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Grant McBride MP  
Portfolio: Gaming and Racing

### Background

1. The Committee reported on this Bill in Legislation Review Digest number 7 of December 2003.
2. This Bill was to commence on proclamation. The Committee was advised by the Minister's office that regulations needed to be made before commencement. The Committee wrote to the Minister on 28 November 2003 asking for advice as to the likely timeframe in which these regulations would be made.

### Minster's Reply

3. The Minister advised that drafting instructions for the regulations have been given to Parliamentary Counsel for drafting. He is advised that the regulations should be completed by late February, with the Act being proclaimed in early March.
4. The Minister also advised that it was not necessary to make regulations for Division 6 of the Bill, which pertains to inquiries relating to registered clubs. Therefore, it was decided to proclaim this Division separately. Accordingly, Executive Council approved proclamation of this Division on 11 February 2004, with the matter gazetted on 13 February 2004.

### Committee's Response

- |   |
|---|
| 5. The Committee thanks the Minister for his reply. |
|---|

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



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

---

28 November 2003

The Hon Grant McBride MP  
Minister for Gaming and Racing  
Level 13 55 Hunter Street  
Sydney NSW 2000

Dear Minister

**REGISTERED CLUBS AMENDMENT BILL 2003**

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 7 of 2003*.

The Committee notes that this Bill commences on a day or days to be proclaimed.

The Committee understands from your office that regulations must be prepared before this Bill can commence.

The Committee seeks your advice as to the likely timeframe within which these regulations will be made and the Act proclaimed.

Yours sincerely

A handwritten signature in black ink, appearing to read "Barry Collier".

**BARRY COLLIER MP  
CHAIRPERSON**

Ministerial Correspondence — Registered Clubs Amendment Bill 2003



Minister for Gaming and Racing

RML 04/0183  
Dept Ref 04/00160

25 FEB 2004

Mr Barry Collier MP  
Chairperson  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

RECEIVED

26 FEB 2004

LEGISLATION REVIEW  
COMMITTEE

Dear Mr Collier

Thank you for your correspondence of 28 November 2003, regarding the *Registered Clubs Amendment Bill 2003* and the development of its concomitant regulations. Please accept my apologies for the lengthy delay in dealing with your request.

The regulations relating to the legislation outlined are being prepared in consultation with key stakeholders, ie. the NSW Clubs Task Force, representing ClubsNSW, various industry associations, unions and Departmental officers.

The drafting instructions for these regulations have been forwarded to Parliamentary Counsel for their consideration and appropriate drafting. I am advised that the regulations should be completed by late February, with the Act being proclaimed in early March, 2003.

I note, for your interest, that Division 6 of the *Registered Clubs Amendment Bill 2003*, which pertains to inquiries relating to registered clubs, did not require the making of regulations. Therefore, it was decided, following existing procedures, to separately proclaim this section of the Bill. Accordingly, Executive Council approved proclamation on 11 February 2004, with the matter being gazetted on 13 February, 2004.

I hope the above information meets your requirements.

Yours sincerely



Grant McBride, MP  
Minister for Gaming and Racing

Level 13, 55 Hunter Street, Sydney 2000, NSW Australia  
Telephone: (02) 9237 2555 • Facsimile: (02) 9237 2500 • Email: mindgr@dgr.nsw.gov.au

## 9. MINISTERIAL CORRESPONDENCE—STRATA SCHEMES MANAGEMENT AMENDMENT BILL 2003

Date Introduced: 4 December 2003  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Reba Meagher MP  
Portfolio: Fair Trading

### Background

1. The Committee reported on the *Strata Schemes Management Amendment Bill 2003* in Legislation Review Digest No 1 of 16 February 2004.
2. The Committee noted that the Bill allowed regulations to exclude *any* class of strata scheme from the alternative dispute resolution provisions of the *Strata Schemes Management Act 1996*, while the reasons for such exclusions provided by the Minister appeared to only relate to large strata schemes.
3. On 24 February 2004, the Committee wrote to the Minister seeking her clarification as to the need to be able to make such regulations in regards to any class of strata scheme rather than only large strata schemes.

### Minister's Reply

4. In a reply dated 27 February 2004 (below), the Minister confirmed that it is only certain larger size schemes that are ever likely to be excluded from the dispute resolution provisions of the Act. The Minister stated:

there is certainly no intention to ever exclude small and medium sized residential schemes as these are the very schemes that the dispute resolution mechanism was designed to assist.

### Committee's Response

- |   |
|---|
| 5. The Committee thanks the Minister for her reply. |
|---|

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

Ministerial Correspondence—Strata Schemes Management Amendment Bill 2003



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

13 February 2004

Our Ref:LRC540/CP3793

The Hon Reba Meagher MP  
Minister for Fair Trading  
Level 37, Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Minister

**Strata Schemes Management Amendment Bill 2003**

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 1 of 2004*.

The Committee noted that proposed s 123(2), which allows regulations to be made to exclude classes of strata schemes from Chapter 5 of the Act, conveys a very significant legislative power. However, your explanation in your second reading speech of the reasons for this power appear to relate only to large strata schemes.

The Committee therefore seeks your clarification as to the need to be able to make regulations under proposed s 123(2) in regards to any class of strata scheme rather than only large strata schemes.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Collier', written over a large, stylized loop.

**BARRY COLLIER MP  
CHAIRPERSON**



Minister for Fair Trading  
Minister Assisting the Minister for Commerce

M0 M04/755

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



Dear Mr Collier

I refer to your correspondence of 13 February 2004 regarding the Committee's consideration of the Strata Schemes Management Amendment Bill 2003. I have noted the Committee's comments in the Legislation Review Digest No 1 of 2004.

You have sought clarification as to the reason for the provision in the Bill for regulations to be made to exclude any class of premises from the dispute resolution provisions of the *Strata Schemes Management Act 1996* and why the new provision does not only apply to large schemes.

You are correct in your understanding that it is only certain larger size schemes that are ever likely to be excluded from the dispute resolution provisions of the Act. Concerns have arisen that it may be inappropriate that parties to complex disputes that emerge in large commercial strata schemes should have access to a relatively inexpensive and informal mechanism designed primarily for residential schemes.

Strata scheme complexes have been developed for a range of purposes including residential, commercial, mixed use, industrial and hotel use. There is no class of strata scheme that is specifically targeted for exclusion from the dispute resolution provisions at present and the Bill merely provides adequate flexibility should the need arise in the future. There is certainly no intention to ever exclude small and medium sized residential schemes as these are the very schemes that the dispute resolution mechanism was designed to assist.

I trust this information clarifies the situation.

Yours sincerely

Reba Meagher MP  
Minister

27 FEB 2004

Level 37, Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Phone: 02 9228 3555  
Fax: 02 9228 3585  
Email: [rmeagher@meagher.minister.nsw.gov.au](mailto:rmeagher@meagher.minister.nsw.gov.au)



## Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 16/09/03	
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04	

## Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	2
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Crimes Legislation Amendment Bill 2004	3
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Cross-Border Commission Bill 2004	3
Education Amendment (Non-Government Schools Registration) Bill 2004	2
Electricity (Consumer Safety) Bill 2003	1,2
Food Legislation Amendment Bill 2004	3
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	2
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
National Competition Policy Amendment (Commonwealth Financial Penalties) Bill 2004	2
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Partnership Amendment (Venture Capital Funds) Bill 2004	3
Police Amendment (Crime Reduction and Reporting) Bill 2004	3
Public Lotteries Legislation Amendment Bill 2004	2
Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
The Synod of Eastern Australia Property Amendment Bill 2004	2
Wool, Hide and Skin Dealers Bill 2004	2

## Appendix 2: Index of Ministerial Correspondence on Bills from September 2003

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Child Protection Legislation Amendment Bill 2003	Minister for Community Services	12/09/03	07/11/03	2,5	
Powers of Attorney Bill 2003	Attorney General	12/09/03	07/10/03	2,4	
Gaming Machines Amendment (Miscellaneous) Bill 2003	Minister for Gaming and Racing	10/10/03	26/11/03	3,7	
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03		4	
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Sydney Water Amendment (Water Restrictions) Bill 2003	Minister for Energy and Utilities	24/10/03	27/10/03	4,5	
Coroners Amendment Bill 2003	Attorney General	07/11/03	27/11/03	5,7	
Courts Legislation Amendment Bill 2003	Attorney General	07/11/03	25/11/03	5,7	
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003	Premier	07/11/03	27/11/03	5,7	
Lord Howe Island Amendment Bill 2003	Minister for the Environment	07/11/03	28/11/03	5	1
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Transport Legislation Amendment (Safety and Reliability) Bill 2003	Minister for Transport Services	07/11/03	21/11/03	5,7	
Veterinary Practice Bill 2003	Minister for Agriculture and Fisheries	07/11/03	03/11/03	5	1
Catchment Management Authorities Bill 2003; Natural Resources Bill 2003 and Native Vegetation Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03		6	
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03		6	
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1
Transport Administration Amendment (Rail Agencies) Bill 2003	Minister for Transport Services	18/11/03		6	

<b>Bill</b>	<b>Minister/Member</b>	<b>Letter sent</b>	<b>Reply</b>	<b>Digests 2003</b>	<b>Digest 2004</b>
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
Bail Amendment (Firearms and Property Offences) Bill 2003	Attorney General	28/11/03	12/01/04	7	1
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03		7	
Local Government Amendment Bill 2003	Minister for Local Government	28/11/03		7	
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04			1
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04			1
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04			1
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			1
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04			3

## 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
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Education Amendment (Non-Government Schools Registration) Bill 2004				N	
Electricity (Consumer Safety) Bill 2003	N,R				C
Food Legislation Amendment Bill 2004				N	
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Partnership Amendment (Venture Capital Funds) Bill 2004	C			C	
Public Lotteries Legislation Amendment Bill 2004				N	
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N,C				
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Wool, Hide and Skin Dealers Bill 2004				N	

**Key**

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