Partnership Law Bill Exposure Draft: Comments on submissions		
PCO and MBIE released an exposure draft Bill between 4 May and 15 June 2018 and sought submissions from the public, the legal community and other interested organisations. We received submissions from: 1 Peter Watts QC (**PW**) 2 Chapman Tripp (**CT**) 3 John McLean (**JM**)		
General issues/comments		
Whether changes are of minor effect within the meaning of s31(2)(i) of the Legislation Act 2012?	**CT**: The submitter agrees that changes in Schedule 2 (clauses 11, 18, 28, 34, 35, 8(2), 44(1)(a), 44(3), 70, 71, 72(2), 74(a), 75(1)(b)(i), 76, 77(4), and (5), 80, 81(2)(b), and 82(1)) amount to minor amendments within s31(2)(i). The submitter thinks, subject to the comments in Schedules to their submission, there is not any reason why the amendments should not be made. The submitter suggests further changes to be included in schedule 2. **JM**: The submitter considers that the proposed Bill goes beyond what subpart 3 of Part 2 of the Legislation Act contemplates can be a "revision Bill". He also considers that there should be a new	We address the submitter's suggestions for further Schedule 2 changes in the clause analysis. Regarding the comments about the Bill's scope, before a revision Bill can be introduced, 4 eminent lawyers who are appointed as revision certifiers under the Legislation Act 2012 must certify that the revision powers were exercised appropriately and there were no changes to the substantive effect of the law. The Attorney-General tables this certificate in the House at the time that the Bill is introduced. Policy changes are outside a revision Bill's scope. These will be dealt with by the administering agency in future reforms as priorities allow.

	Partnership Act that is more than a revision Act - to address "considerable deficiencies" in the 1908 Act e.g. the “default” that a partnership dissolves on the death of a partnership/Fundamental uncertainties about whether some business relationships are even partnerships e.g. joint ventures. He suggests consulting Webb or Tony Malloy on whether the Partnership Act needs a substantive review.	
Binding the Crown	**CT**: The submitter said it could see no justification to imply an intention to bind the Crown. The submitter considers that the Partnership Law Act should bind the Crown, which would be consistent with other legal entity legislation including the Companies Act 1993, the Limited Partnerships Act 2008, and the Charitable Trusts Act 1957. However, to include an express provision that the Act binds the Crown would be more than a “minor amendment” and therefore should be addressed in a reform Bill. While the Crown should ultimately be bound by the Act and doing so would provide consistency across legal entity legislation, there could be unanticipated consequences if the amendment affected existing legal relationships between the Crown and other parties.	We comment on this matter in the clause analysis for clause 9.
Transitional arrangements	**CT**: The submitter thinks the new Act should apply to all partnerships formed after the date	We comment on this matter in the clause analysis for clause 2 and clause 1 of Schedule 1.

	of enactment, and 18 months following that date with respect to existing partnerships. While we agree that this is a revision Bill and therefore there should be no major disruptions to existing partnerships, the wide ranging nature of partnerships and the broad abilities to contract out of the Act means that there is a potential risk of unintended consequences of even minor changes for existing partnerships. An 18-month lead-in time for any existing partnerships would allow time for those partnerships to consider and update their arrangements and documents where necessary.	
Use of examples	**CT**: The submitter thinks more examples are not necessary, and would not make the Bill more accessible or readable.	The examples in clauses 35 and 39 were complicated. We reconsidered their use in this Bill and omitted them. We also omitted section 7 about the status of examples.
Clause analysis		
Clause no. in exposure draft (Cl in Bill as introduced)	**Submission**	**Comment** **Change/No change**
2 (Commencement) (Cl 2)	**CT**: The submitter thinks that the new Act should apply to all partnerships formed after the date of enactment, and 18 months following that date with respect to existing partnerships.	We think a 6-month lead in period is appropriate as the Bill makes no substantive amendments. This approach is consistent with the Contract and Commercial Law Act 2017.

	While agreeing this is a revision Bill and therefore there should be no major disruptions to existing partnerships, the submitter thinks the wide-ranging nature of partnerships and the broad abilities to contract out of the Act means there is a potential risk of unintended consequences of even minor changes for existing partnerships. An 18-month lead in time for any existing partnerships would allow time for those partnerships to consider and update their arrangements and documents where necessary.	Under clause 2 in Schedule 1, references in a document to the Partnership Act 1908 are to be treated as references to the new Act. **No change**.
9 (Act binds the Crown)	**CT**: The submitter does not see any justification to imply an intention to bind the Crown (ie that the Act's purpose must be wholly frustrated unless the Crown were bound). The submitter thinks the new Act should bind the Crown as this approach would be consistent with other legal entity legislation eg Companies Act 1993, Limited Partnerships Act 2008, Charitable Trusts Act 1957. However, the submitter thinks this would be more than a minor amendment and therefore should be addressed in a reform Bill. There could be unanticipated consequences if the amendment affected existing legal relationships between the Crown and other parties.	The Bill cannot, as a revision Bill, change the substantive legal effect of the 1908 Act. As there is no express statement currently in the 1908 Act and some uncertainty about the legal position as to whether the Act impliedly binds the Crown, we think silence is the best way to preserve the legal effect of the current Act. **Change**: We have omitted clause 9.

11 (Relationships that are not partnerships) (Cl 9)	**PW**: The submitter notes this clause seeks to clarify that the Bill does not cover limited partnerships, and asks why the Limited Partnerships Act 2008 did not exclude Part 1 of the 1908 Act. He thinks that if this is an oversight, it should be done now. The submitter notes that this change is listed in Schedule 2 so any change will not affect existing limited partnerships.	(*LexisNexis) Wells' Limited Partnerships Handbook 2008* paragraph 1.1.2, footnote 4: "It was certainly the view of the officials drafting the legislation, and the authors, that the Partnership Act does not apply to limited partnerships. In our view the effect of the Limited Partnerships Act is to exclude the Partnership Act merely by establishing a separate legal entity, as this is itself anathema to the concept of a partnership…. Generally, the clauses in the Partnership Act clash with those of the Limited Partnerships Act to the point that they must be intended to be overridden by the latter." We reconsidered whether this change should be listed in Schedule 2. It merely clarifies the existing law in section 4(2) of the 1908 Act. **Change**: We have omitted clause 11 from the list in Schedule 2, and noted the clarification in the Bill's explanatory note.
17 (Where receiving profits or payments does not make person partner or liable as partner) (Cl 15)	**CT**: The submitter recommends that "servant" be replaced with "employee or contractor" as a minor amendment within s31(2)(i). The submitter thinks the legal technical meaning of "employee" makes it too narrow a concept to replace "servant" in the modern context. The submitter notes that given the legal obligations surrounding employees, people may be engaged by partnerships as independent contractors. The term "servant" could in the modern context be interpreted broadly to cover both employees and contractors, and therefore an amendment of this nature should be classified as a minor amendment within s31(2)(i). The submitter considers this is consistent with recent updates to workplace safety legislation where the	The term "servant" is updated to "employee" in sub-clause (1)(b). Today there are different ways of remunerating people. Some independent contractors do the usual work of employees. However, there are a range of different contracting models. Considerable policy work would be required to distinguish clearly between those contractors who are in substance "employees" and those truly independent contractors. There is a risk that the change may inadvertently substantively change the law. We did not consider the change suggested by the submitter to be minor.

	form of a person's engagement with an entity is no longer the driving factor for the duties owed to that person. Recognising contracts as a modern replacement for "servants' is consistent with this substance over form approach.	**No change**.
17 (Where receiving profits or payments does not make person partner or liable as partner) (Cl 15)	**PW**: The submitter thinks sub-clause (4) (ie the need for a written contract) is consistent with the 1908 Act.	There is some uncertainty about the meaning of the proviso. We agree with the submitter that sub-clause (4) best preserves the legal effect of the proviso. **No change**.
18 (What happens if borrower or buyer is insolvent) (Cl 16)	**PW**: The submitter comments that the issue of the liquidation of incorporated partnerships is vexed and needs further thought. There is not much Commonwealth case law on whether liquidation is to be analogized to bankruptcy in partnership statutes. *Clark v Libra Developments Ltd* [2007] 2 NZLR 709 [204] C/A held removal of company from official register didn't dissolve partnership of which the company was a member (even though until restored the removed company ceased to exist.) *Anderson Group v Davies* [2001] NSWSC 356 held liquidation of a corporate partner at least a voluntary one didn't dissolve the partnership.	We agree with the submission that this issue needs further thought. Bankruptcy and liquidation appear to be similar processes that apply when an individual or a business is insolvent. However, whether the processes are analogous is not straightforward. A bankrupt person's assets vest in the Official Assignee, but if a corporate partner goes into receivership they are not divested of their property. We disagree with the other submitter that this is merely a matter of updating equivalent terminology as a minor change under section 31(2)(i).

	CT: The submitter agrees that the minor (s31(2)(i)) amendments to cl 18 are consistent with Parliament's intent. "Given corporates can be partners, the proposed amendment simply updates the legislation to include entity specific terminology".	The court is able to order the dissolution of a partnership with a corporate partner under clause 74(f) (now clause 72(f)) on the grounds that dissolution would be "just and equitable". **Change**: We have removed the text in square brackets in sub-clause (1)(a) "or has been put into liquidation" and the corresponding item in Schedule 2.
18 (Cl 16)	**PW**: The submitter thinks this issue needs further thought. He is not sure that he agrees with Webb that section 6 of the 1908 Act does not prejudice a collateral security. He considers that it is not obvious that if lenders whose loan returns vary with profits are to be subordinated that they should still be able to enforce mortgages or other securities.	In view of the submission, we think a conservative approach is appropriate. **No change**: We removed the corresponding item in Schedule 2.
20 (Power of partner to bind firm) 23 (Partner using credit of firm for private purposes) (Cl 18, cl 21)	**CT**: The submitter suggests aligning the references in clause 20 ("for carrying on in the usual way") and clause 23 ("ordinary course of business") with "for carrying on the firm's ordinary course of business".	We disagree that an alignment of wording is needed. **No change**.
26 (Misapplication of money or property received for or in custody of firm)	**PW:** The submitter supports the revised text.	Sub-clause (a) clarifies that the words being brought forward from section 14(a) "within the scope of his or her apparent authority" relate only to receiving the money or property and not also "to misapplying the money or property". **No change**.

(Cl 24)		
28 (Improper use of trust property for partnership purposes) (Cl 26)	**CT**: The submitter suggests replacing "person beneficially interested therein" with "any person beneficially interested in the trust property" rather than with "beneficiaries". The submitter thinks that term has too narrow a meaning and could be read to unintentionally exclude bare trusts (created by statute, trustee has no duties, may be a vehicle for transferring property without disclosing legal owner's name) and commercial trusts.	We agree with the submitter's view that the word "beneficiaries" in sub-clause (1), which revised the 1908 wording "the persons beneficially interested therein", may narrow the meaning of the 1908 words. **Change**: We replaced the word "beneficiaries" in sub-clause (1) with "the persons beneficially interested in the trust property".
34 (Liability of partner who leaves firm) (Cl 32)	**CT**: The submitter agrees the change to sub-clause (1) -replacing a reference to "retirement" with a reference to "leaving the firm"-is a minor (s31(2)(i)) amendment and is consistent with Parliament's intention to capture any partner who has left the firm for any reason, not just by virtue of retirement.	The submitter supports the change as a minor amendment in Schedule 2. **No change.**
40(1) (Co-owners of land who purchase other land out of profits) (Cl 38(1))	**CT**: In sub-clause (1)(c), the submitter recommends replacing the expression "in like manner" in section 23(3) of the 1908 Act with "similar manner" rather than the "same manner". The submitter considers that "in like manner" allows for a level of similarity but does not require the manner to be exactly the same. The text "same manner" will possibly unintentionally narrow the existing law.	We agree that "in a similar manner" more closely brings forward the legal effect of the current provision. **Change**: We replaced the wording "in the same manner" with "in a similar manner".
44(1) (Court may charge partner's interest for their separate judgment debt)	**CT**: The submitter recommends removing "or a Judge of that court" as it would have expected the Bill only to refer to the High Court and it has not seen that formulation in other legislation, and (as noted in the Bill) matters of court procedures are best left to court rules.	We agree that the references to a Judge in this clause are unnecessary. **Change**: We removed the references to a Judge of the High Court from sub-clauses (1) and (2).

(Cl 42(1))		
44(3) (Court may charge partner's interest for their separate judgment debt) (Cl 42(3))	**CT**: The submitter agrees that allowing the District Court to give directions is a minor amendment (under section 31(2)(i)) that reconciles an inconsistency and is justified in clarifying Parliament's intent.	Under section 26(2), the High Court can make orders and give directions but if matters are moved to the District Court, that Court can under section 26(2A) only make orders. Sub-clause 3 will allow the District Court to give directions also under this clause. The submitter supports this change, which is noted as a minor amendment in Schedule 2. **Change:** We added another reference to a direction in sub-clause (3)(b) to clarify that the District Court can make an order or give a direction when an application has been made for an order or direction.
46 (Rules about interests and duties of partners) (Cl 44)	**PW**: The submitter would not align the wording between section 20(3) (agreement being either express or "inferred as a fact from the course of dealing") [clause 34(3)(b) Liability of partner who leaves firm] and section 27 ("any agreement (express or implied) between the partners") of the 1908 Act. The submitter thinks the sections address different contexts. "Inference from a course of dealing " is different to "implied agreement" and the submitter thinks there was a good reason to differentiate.	In view of the submitter's comments, that the expressions have different meanings, we have not aligned them. **No change**.
54 (Access to [accounting] records) (Cl 52)	**PW**: The submitter is fairly sure that "books" in the 1908 Act extends to all records of the firm (the nature of the contracts the partnership has made etc), and not just to accounting records. The submitter refers to *Inversiones* [2011] EWHC 1762, and *Hilton v D IV LLP* [2015] EWHC 2 (Ch). The	Clause 54 updated the expression "partnership books" to "partnership [accounting] records" and we asked whether it meant just accounting records. In view of the submitters' comments and cases, we agree the expression "partnership books" covers partnership records generally, and not just the accounting or accounting and administrative records.

	submitter thinks it would not be right, as a matter of policy, to limit the right to accounting records only. Truncation also would not be consistent with the rights of a principal against an agent and he referred to *Bowstead & Reynolds on Agency* (21st ed, 2018) Article 50. **CT**: The submitter suggests that "accounting records" is too narrow a replacement for "books" particularly when considered in the context of analogous provisions in the Companies Act (section 189), the Limited Partnerships Act (section 74), and the Trusts Bill (clause 41). The submitter notes that other clauses in the Bill deal with the maintenance and provision of accounting records - eg clause 58 (imposing duty on partners to ensure that accounts are provided to the partners), and clause 63 (providing for the maintenance of accounting records by large partnerships. Those existing provisions imply a broader definition of books. The submitter suggests the text "partnership records" could be adopted. This expression would include both accounting records and administrative records (including meeting minutes and the relevant partnership agreement and any amendments).	**Change**: We deleted the references to "[accounting]" in clause 54 and "[accounting]"in its heading has been changed to "partnership". We also made a minor change in sub-clause (1) to require records to be "reasonably available" (rather than kept) to cover modern ways of record-keeping. We added a corresponding item to Schedule 2.
59 (Accountability of partners for private profits)	**CT**: The submitter suggests the term "account to" be used in both clauses, as it is used in fiduciary contexts, like trusts, and is taken to mean that the	In view of the comments, we considered aligning the wording in clause 60 with clause 59 (bringing forward sections 33 and 32) for consistency, by replacing the wording "must account for and pay

60 (Duty to account for profits of competing business) (Cl 55, cl 56)	amount is to be paid or set-off. "Account to" is preferred for consistency and on the basis that "account to" and "account for and pay to " have the same intended meaning, although "account to" is more flexible, as it includes set-off arrangements. The 2 clauses should be consistent to ensure there is no inadvertent interpretation as a result of removing the "pay to" wording. **PW**: The submitter supports omitting the words "pay over" in clause 60.	[over] to the firm all profits" with "must account to the firm for all profits". However, clause 59 broadly applies where a partner receives any private benefit from the partnership, while clause 60 is about external circumstances, such as where a partner has a competing business. In these different contexts, we think the expressions "account to" and "account for and pay over to" have different meanings and need to be kept. **Change**: We reinstated the word "over" currently in section 33 in clause 60: "Every partner must account for and pay over to the firm". A minor change has aligned the clause 59 heading with the text of the provision, referring in the heading to "a benefit" rather than to "profits".
70 (Partnership dissolved at end of term, by end of venture or undertaking, or by notice), and 57 (Partnership that continues after end of fixed term) (Cl 66, cl 68)	**CT**: The submitter suggests that clause 70(1)(a) [a partnership is dissolved if fixed term ends] should be expressly made subject to clause 57, which allows for a partnership for fixed term to be presumed to continue where the business is continued by the partners without settlement or liquidation of the partnership's affairs. This change would • improve readability and accessibility of the legislation by clarifying that a fixed term partnership may continue by conduct, and • is consistent with clause 70(2) (providing that clause 70(1) is subject to any agreement between the parties) by recognising that	We agree and have inserted a new sub-clause in clause 70 (now clause 66(2)) to cross refer to clause 57 (now clause 68). We have also moved clause 57 into Part 4 Subpart 2 (End of partnership). **Change**: We added a "signpost" sub-clause to clause 70 to cross-refer to clause 57. We relocated clause 57 in Part 4 Subpart 2 (*End of partnership*), as clause 68.

	conduct can constitute an agreement between the parties.	
74 (Court may dissolve partnership) (Cl 72)	**PW**: The submitter favours retaining the concept of "permanent" in the new phase "mentally impaired".	The expressions “mentally disordered persons, and persons of unsound mind” in section 17 of the Judicature Act 1908 were replaced by “mentally impaired persons who, in the opinion of the court, lack wholly or partly the competence to manage their own affairs” in section 14(1)(a) of the Senior Courts Act 2016. The court has a general discretion under clause 74(f) if it considers it is “just and equitable” to dissolve a partnership. If the concept of “permanence” is carried forward, the court would be able to deal with a case where the lack of competence is not permanent under that provision. We agree with the submitter’s point that the lack of competence should be permanent to reflect the current wording of section 38(a). **Change**: We updated the wording (“mentally disordered” and “permanently unsound mind”) in clause 74(a) to “a partner is a mentally impaired person who, in the opinion of the court, permanently lacks wholly or partly the competence to manage their own affairs.”
78 (Application of partnership property) (Cl 76)	**CT**: The submitter queries whether both "termination " or "dissolution" could be used together, and throughout the Bill.	Section 42 refers to the “termination” of the partnership as compared to other references to the partnership being dissolved. The word “termination” has been replaced with “dissolution” for consistency. We think “termination” in clause 78(2) is used in the sense of an end and “dissolution” is fine. **No change.**

80 (Rights where partnership dissolved for fraud or misrepresentation) (Cl 78)	**CT**: The submitter thinks it is clear that "debts and liabilities of the firm" and "debts and obligations of the firm" are different concepts. A liability is a financial obligation whereas obligation is broader and can include an obligation to do something rather than pay an amount. The submitter noted that the two expressions are used in sections 25 to 28 and 87 of the Limited Partnerships Act. As a result, consideration should be given to maintaining the distinction.	This clause has some apparently inconsistent references to debts and liabilities. Section 44(a) and (b) refer to "partnership liabilities" while sections 42 and 44(c) refer to "debts and liabilities of the firm". Section 12 refers to "debts and obligations of the firm". In view of the feedback, that the distinction is intended, we have kept the different references. **No change**.
80 (Rights where partnership dissolved for fraud or misrepresentation) (Cl 78)	**PW**: The submitter said that he would not at this stage touch the interrelationship between rescission of a partnership for fraud and misrepresentation and Part 2 of the Contract and Commercial Law Act 2017. He thinks for one thing the reference to indemnification in section 80(1)(c) would probably extend to obtaining the equivalent of damages even against a non-fraudulent partner.	There is a difficult relationship between this clause and the Contractual Remedies Act 1979 (now in subpart 3 of Part 2 of the Contract and Commercial Law Act 2017). Any change to address the relationship would be more than a minor amendment to clarify Parliament's intent and is a future reform issue. **No change**. We removed a corresponding item in Schedule 2.
81 (Right of outgoing partner or partner's estate to share profits or obtain interest) (Cl 79)	**PW**: The submitter said that he has doubts whether a change to the 5% interest rule would be a minor change. Plainly and as the draft signals any such change would need to be put into Schedule 2.	Legislation that refers to a rate of interest is often linked to a rate that can move up or down to reflect market rates. We considered whether to replace the reference to 5% with a reference to interest calculated under the Interest on Money Claims Act 2016 (or to the interest rate referred to in section 12(3) of that Act). We agree that this change is too big and is a future reform issue. **No change**. We removed a corresponding item in Schedule 2.
82 (Option to purchase share of	**PW**: The submitter says that he hasn't formed a final view yet, but thinks that the omission of the reference to "interest" in section 45(2) in the 1908	Clause 82 brings forward section 45(2). The outgoing partner or estate are not entitled to profits, if the surviving partners exercise an option to buy their share. This provision only refers to profits (not

outgoing or deceased partner) (Cl 80)	Act is deliberate. A quick look at an older edition of *Lindley & Banks on Partnership* suggests that this is the case in respect of the English legislation. The submitter comments what is going on here is that once an option to purchase the interest in the partnership of the outgoing partner is exercised, it is no longer appropriate to give a share of profits to the outgoing partner, but until the purchase moneys are paid over interest should continue to accrue.	to interest as under section 45(1)). Noting the feedback about whether to extend the provision to refer to interest, we have not made the change. **Action**: We removed the bracketed words "[or to interest under that section]". A corresponding item in Schedule 2 has been removed.
Schedule 1 (Transitional, savings, and related provisions) Clause 1(Act applies to all partnerships)	**CT**: The submitter believes that the new Act should apply to all partnerships formed after the date of enactment, and 18 months following that date with respect to existing partnerships. While agreeing this is a revision Bill and therefore there should be no major disruptions to existing partnerships, the submitter thinks the wide-ranging nature of partnerships and the broad abilities to contract out of the Act means there is a potential risk of unintended consequences of even minor changes for existing partnerships. An 18-month lead in time for any existing partnerships would allow time for those partnerships to consider and update their arrangements and documents where necessary.	The Bill will apply to all partnerships not just those formed after the new Act comes into force. This is on the basis that the new Act will not involve a substantive change to the effect of the law. The changes in legal effect permitted under section 31(2)(i) of the Legislation Act 2012, that are set out in Schedule 2, are minor. They will also apply to all partnerships, regardless of when they were formed. Otherwise, in future, there would be two classes of partnership, and two sets of rules. Partners would continue to refer to the repealed Act (which would be less accessible) and there may be confusion about which Act applied. This is an issue that needs to be considered on a case by case basis. There could be situations requiring a prospective application only provision, as in the Contract and Commercial Law Act 2017. The minor changes in Schedule 2 of that Act only apply to contracts entered into after that Act came into force, reflecting the different contexts. As noted above in relation to clause 2, we consider that 6 months gives people sufficient time to change their documents. The Contract and Commercial Law Act 2017 had the same lead in period.

		Change: We omitted clause 4 (Changes in legal effect do not apply to existing partnerships) of Schedule 1.