

No. 12 of 2009

Tuesday, 13 October 2009

On the

Criminal Procedure Amendment
(Consequential and Transitional
Provisions) Bill 2009

Deakin University Bill 2009

Fair Work (Commonwealth Powers)
Bill 2009

La Trobe University Bill 2009

Land (Revocation of Reservations and
Other Matters) Bill 2009

Monash University Bill 2009

Planning Legislation Amendment Bill
2009 (No. 2)

Sentencing Amendment Bill 2009

Statute Law Amendment (Evidence
Consequential Provisions) Bill 2009

Local Government Amendment
(Offences and Other Matters) Bill 2009

Personal Property Securities
(Commonwealth Powers) Bill 2009

Road Legislation Amendment Bill 2009

Superannuation Legislation
Amendment Bill 2009

University of Melbourne Bill 2009

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Glossary and Symbols



- ‘**Article**’ refers to an Article of the International Covenant on Civil and Political Rights;
- ‘**Assembly**’ refers to the Legislative Assembly of the Victorian Parliament;
- ‘**Charter**’ refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;
- ‘**child**’ means a person under 18 years of age;
- ‘**Committee**’ refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;
- ‘**Council**’ refers to the Legislative Council of the Victorian Parliament;
- ‘**court**’ refers to the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court as the circumstances require;
- ‘**Covenant**’ refers to the International Covenant on Civil and Political Rights;
- ‘**human rights**’ refers to the rights set out in Part 2 of the Charter;
- ‘**penalty units**’ refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (currently one penalty unit equals \$113.42).
- ‘**Statement of Compatibility**’ refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.
- ‘**VCAT**’ refers to the Victorian Civil and Administrative Tribunal;
- ‘[]’ denotes clause numbers in a Bill.

Useful provisions

Section 7 of the **Charter** provides –

Human rights – what they are and when they may be limited –

- (2) *A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—*
- (a) *the nature of the right; and*
 - (b) *the importance of the purpose of the limitation; and*
 - (c) *the nature and extent of the imitation; and*
 - (d) *the relationship between the limitation and its purpose; and*
 - (e) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

Section 35 (b)(iv) of the **Interpretation of Legislation Act 1984** provides –

In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.



Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are –

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –
 - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
 - (ii) within 10 sitting days after the Act receives Royal Assent —
whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

The Committee has considered the following Bills –

Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009
Deakin University Bill 2009
La Trobe University Bill 2009
Land (Revocation of Reservations and Other Matters) Bill 2009
Monash University Bill 2009
Planning Legislation Amendment Bill 2009 (No. 2)
Sentencing Amendment Bill 2009
Statute Law Amendment (Evidence Consequential Provisions) Bill 2009
University of Melbourne Bill 2009

The Committee notes the following correspondence –

Fair Work (Commonwealth Powers) Bill 2009
Local Government Amendment (Offences and Other Matters) Bill 2009
Personal Property Securities (Commonwealth Powers) Bill 2009
Road Legislation Amendment Bill 2009
Superannuation Legislation Amendment Bill 2009



Role of the Committee

The Scrutiny of Acts and Regulations Committee is an all-party Joint House Committee, which examines all Bills and subordinate legislation (regulations) presented to the Parliament. The Committee does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced scrutiny of Bills in 1982. They are precedents and traditions followed by all Australian scrutiny committees. Non-policy scrutiny within its terms of reference allows the Committee to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.

The *Charter of Human Rights and Responsibilities Act 2006* provides that the Committee must consider any Bill introduced into Parliament and report to the Parliament whether the Bill is incompatible with human rights.

Alert Digest No. 12 of 2009

Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009

| | |
|--------------------------|----------------------|
| Introduced | 16 September 2009 |
| Second Reading Speech | 17 September 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose and Background

The Bill –

- makes consequential amendments to other Acts as a result of the *Criminal Procedure Act 2009* (the 'Act') (reported in *Alert Digest No.1 of 2009*), and
- provides transitional arrangements for the commencement of that Act, and
- amends the Act to provide for witnesses in sexual offence and family violence cases, and
- makes other miscellaneous amendments relating to criminal procedure.

Extracts from the Second Reading Speech –

The Criminal Procedure Act 2009 was passed by Parliament in February 2009. The Criminal Procedure Act overhauls existing laws that deal with criminal procedure (including summary procedure, committals, trial procedure and appeals) by rationalising and clarifying provisions, modernising language and processes and improving the efficiency, fairness and effectiveness of the criminal justice system.

In order to implement this comprehensive and far-reaching legislative regime, the Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill makes a significant number of consequential amendments to other Acts where those Acts deal with matters connected to criminal procedure. In total, 137 Acts require amendment, including the Children, Youth and Families Act 2005, the Crimes Act 1958, the Evidence Act 1958, the Magistrates' Court Act 1989, the Public Prosecutions Act 1994 and the Supreme Court Act 1986.

The Bill makes two main types of consequential amendments, namely:

- *modernising language and terminology; and*
- *updating cross-references to acts or provisions which will be repealed by the Criminal Procedure Act.*

In addition to these consequential amendments, the Bill also:

- *introduces further improvements to criminal procedure; and*
- *provides transitional arrangements for the commencement of the Criminal Procedure Act.*

Charter of Human Rights and Responsibilities

The Charter of Human Rights and Responsibilities (the Charter) enables questions of law relating to the application of the charter or the interpretation of a statutory provision in accordance with the Charter to be referred:

- from the County Court to the Trial Division of the Supreme Court; and
- from the Trial Division of the Supreme Court to the Court of Appeal.

The Criminal Procedure Act provides for a new case-stated process that will enable the Court of Appeal to quickly consider important legal issues from either the County Court or the trial division of the Supreme Court.

Consistent with this new approach, the bill amends section 33 of the charter to allow charter-related questions to be referred from the County Court to the Court of Appeal. This will provide a quicker and more direct way of dealing with charter issues. This amendment will apply to both civil and criminal proceedings in the County Court.

Content and Committee comment

The Bill inserts into the *Criminal Procedure Act 2009* a new Part 8.2 which re-enacts those sections of the *Evidence Act 1958* that provide special rules and procedures for the giving of evidence by protected witnesses (including the complainant), children and a cognitively impaired witness in sexual offence and family violence proceedings.

The relevant sections that are proposed to be relocated are sections 37A to 37E and sections 41A to 41H of the *Evidence Act 1958*. Item 54 of the Schedule repeals these sections in that Act. The Bill clarifies and consolidates the sections in new Part 8.2. **[50]**

Cross – examination of complainant as to past sexual history

New Part 8.2 prohibits, without leave of the court, cross-examination of the complainant as to general reputation and past sexual history (new sections 339 to 352). The re-enacted provisions allow an accused to seek leave out of time, waive the requirement that the application be in writing and amends the test from ‘exceptional circumstances’ to ‘interests of justice’ (new sections 345 and 347). *(also refer to Charter Report below)* **[50]**

Cross-examination by accused person

In Part 8.2 new section 356 prohibits the accused from personally cross-examining a protected witness (defined in section 354) and sets out the procedure that applies where the accused is not legally represented (357). Where the accused is not legally represented the court may order that legal aid be provided to the accused. The section further provides for the form of caution to be made by the court where the accused refuses legal aid. The caution concerns the disadvantage the accused may suffer if the accused seeks to adduce evidence in their defence. New section 358 also provides for the presiding judge to warn the jury about adverse inferences that may not be drawn where any of the special cross-examination procedures in Part 8.2 are applied in the course of a sexual offence trial. **[50]** *(also refer to Charter Report below and the Charter section 7(2) reasonable limitations analysis in the Statement of Compatibility)*

Note: Part 8.2 (new section 354) provides a definition for ‘protected witness’ –

protected witness means (a) the complainant; or (b) a family member of the complainant; or (c) a family member of the accused; or (d) any other witness whom the court declares under section 355 to be a protected witness.

Right to a public hearing

New sections 360(1)(d) and 372(1)(c) provides that the presiding judge may exclude certain persons (other than the accused and their legal representative) from being present in court while a witness (any witness including the complainant) is giving evidence. **[50]**

Part 8.2 makes special provision for the prior to trial recording of evidence of children and cognitively impairment complainants in a criminal proceedings that relates to a sexual offence and provides special procedures for the use of such recorded evidence (new sections 366 to 387). **[50]**

Amendment to the Charter of Human Rights and Responsibilities (the Charter)

The Bill amends section 33(3) of the *Charter* to enable Charter-related questions to be referred from the County Court directly to the Court of Appeal currently such questions are referred to the Trial Division of the Supreme Court. The amendment will apply to both civil and criminal proceedings in the County Court. **[Schedule, item 18.3]**

Offence of perjury – statement of evidence

The Bill clarifies when the offence of perjury is committed in respect to a written statement of evidence for the purposes of a criminal proceeding, potential criminal proceedings or the investigation of an offence. **[53]**

Appeals from the Children's Court

The Bill substitutes a new Part 5.4 in the *Children, Youth and Families Act 2005* to set out the procedure for criminal appeals from the Children's Court. The new Part also provides that costs cannot be awarded against a child appellant who loses or abandons an appeal. **[69]**

Repeal, alteration or variation of section 85 of the Constitution Act 1975 (unlimited jurisdiction of the Supreme Court)

1. The Bill inserts a new Part 5.4 into the *Children, Youth and Families Act 2005* and amends section 599 of that Act to declare that it is the intention of section 430Q to alter or vary section 85 of the *Constitution Act 1975*. **[69 and 85]**

Statement under section 85(5) of the Constitution Act 1975

New Division 5 of Part 5.4 of the Children, Youth and Families Act 2005 provides for a right of appeal from the Criminal Division of the Children's Court to the Supreme Court on a question of law. New section 430Q provides that if a person appeals to the Supreme Court under this Division, that person abandons finally and conclusively any right to appeal to the County Court or to the Trial Division of the Supreme Court in relation to that proceeding.

The Trial Division of the Supreme Court hears appeals from a decision of the President of the Children's Court under new Divisions 1 and 2 of part 5.4. If a person appeals to the Supreme Court on a question of law from a final order of the President of the Children's Court under new Division 5, new section 430Q means that the person cannot appeal to the Trial Division of the Supreme Court.

Two important considerations in developing a framework for appeals are that a person should have a right to appeal and that there should be finality to proceedings. New Part 5.4 provides two avenues for appeals. One appeal provides a fresh hearing of all of the evidence. This is provided in Divisions 1 and 2 of new Part 5.4. The other appeal involves an appeal on a question of law to the Supreme Court. This is provided in Division 5 of new Part 5.4. Because there are two types of appeal, the Bill provides in new section 430Q that where a person chooses to appeal on a question of law, they abandon any right to an appeal involving a fresh hearing of the matter. This ensures that there is appropriate finality to proceedings and prevents the proliferation of proceedings in relation to decisions of the Children's Court.

2. The Bill substitutes a new section 49 into the *Public Prosecutions Act 1994* to provide that it is the intention of this section to alter or vary section 85 of the *Constitution Act 1975*. **[96]**

Statement under section 85(5) of the Constitution Act 1975

Section 49 of the Public Prosecutions Act 1994 currently limits the jurisdiction of the Supreme Court.

Clause 96 of the Bill substitutes a new section 49 into the Public Prosecutions Act 1994 to modernise the terminology as a result of changes introduced by the Criminal Procedure Act. Specifically reference to 'presentment' is replaced with 'indictment', the term 'making a presentment' is replaced with 'filing an indictment' and the term 'set aside' is included.

With the exception of these changes to terminology, the proposed new section 49 re-enacts the existing section 49 of the Public Prosecutions Act 1994.

Proposed new section 49(a) provides that it is the intention of this section to alter or vary section 85 of the Constitution Act 1975 to the extent necessary to prevent the Supreme Court from entertaining any proceeding in which a verdict returned by a jury on a trial on indictment or an order made by a court on or in connection with such a verdict is sought to be challenged, appealed against, reviewed, quashed, set aside or called into question on the ground that the filing of the indictment was dependent on the making of a special decision and the procedures prescribed by the Act for the making of a special decision had not been complied with.

The reason for preventing any challenge to a jury verdict or court order in these circumstances is to provide certainty and efficiency in the administration of justice. Further, any irregularity in compliance with the special decision process does not concern the substantive issue of whether the accused is guilty or not guilty of the offence charged.

Proposed new section 49(b) provides that it is the intention of this section to alter or vary section 85 of the Constitution Act 1975 to prevent any application by a person for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief in respect of a verdict returned by a jury on a trial on indictment or a court order on or in connection with such a verdict on the ground referred to in proposed new section 49(a).

The reason for preventing these applications under the circumstances stated is to provide certainty and efficiency in the administration of justice. Again, any irregularity in compliance with the special decision process does not concern the substantive issue of whether the accused is guilty or not guilty of the offence charged.

Constitution Act 1975, section 85 – Repeal, alteration or variation of the unlimited jurisdiction of the Supreme Court

1. *The Committee notes that clause 69 inserting a new section 430Q in the Children, Youth and Families Act 2005 limits appeals to the Supreme Court.*

The Committee having reviewed the section 85 statement made in the Second Reading Speech, the declaratory and enabling clauses, the Statement of Compatibility and the Explanatory Memorandum is of the opinion that the proposed provisions altering or varying section 85 of the Constitution Act 1975 are appropriate and desirable in all the circumstances.

2. *The Committee notes that clause 96 substituting a new section 49 in the Public Prosecutions Act 1994 limits appeals to the Supreme Court.*

The Committee having reviewed the section 85 statement made in the Second Reading Speech, the declaratory and enabling clauses, the Statement of Compatibility and the Explanatory Memorandum is of the opinion that the proposed provisions altering or varying section 85 of the Constitution Act 1975 are appropriate and desirable in all the circumstances.

Charter report

Privacy – Fair hearing – Sexual history evidence

Summary: Clause 50 bars the admission of evidence as to the sexual activities of sexual offence complainants without the leave of the court. Whilst the Committee considers that the new Division generally balances the competing rights at stake, it has some concerns about the details of the scheme.

The Committee notes that clause 50, inserting a new section 342 into the *Criminal Procedure Act 2009*, bars the admission of ‘evidence as to the sexual activities’ of sexual offence complainants ‘without the leave of the court’. The remainder of the new Division 2 of Part 8.2 places restrictions on when leave can be granted. The new sections largely reflect the previous s. 37A of the *Evidence Act 1958*, which was drafted and (in 2006) amended before the Charter was enacted.

The Statement of Compatibility remarks:

New division 2 of the scheme restricts the right of the accused to admit evidence or cross-examine with respect to the complainant's chastity and sexual history. The protections are designed to preserve the privacy and reputation of the complainant in sexual offence proceedings. I consider this protection to be well balanced against the right of the accused to examine witnesses and present relevant evidence to the court. New section 344 provides that the accused may seek leave to admit evidence or cross-examine a witness and the court may grant leave if it is satisfied that the evidence has substantial relevance to a fact in issue and it is in the interests of justice (new section 349). The bill also improves the scheme from its current form in section 37A of the Evidence Act 1958 by making it easier for an accused to apply for leave out of time or to waive the requirement that the application be in writing by amending the test from 'exceptional circumstances' to 'interests of justice' (new sections 345 and 347).

Whilst the Committee considers that the new Division 2 of Part 8 generally balances the competing rights at stake,¹ it has some concerns about the details of the scheme:

First, the scheme’s main protection for complainants’ Charter right to privacy is s. 342’s ban on admitting ‘evidence as to the sexual *activities*... of the complainant’ without leave. The High Court has held that this formulation applies to evidence of ‘any occasion or episode of sexual activity involving the complainant’ but does not extend to ‘evidence that tends to prove the state of his or her sexual experience’.² So, the Victorian statute, unlike some others in Australia,³ permits a complainant to be asked without prior leave about his or her lack of sexual experience.

Second, new section 349 bars a court from granting leave to admit sexual history evidence during a trial unless ‘it is satisfied that the evidence has substantial relevance to a fact in issue.’ Unlike some other Australian statutes,⁴ there is no provision for evidence that is relevant only to the complainant’s credibility.⁵ While this approach appropriately excludes attempts to link the complainant’s sexuality to his or her honesty, it also may exclude some

¹ Charter s. 13(a) provides that: ‘A person has the right not to have his or her privacy unlawfully or arbitrarily interfered with’. Charter s. 24(1) provides that ‘A person charged with a criminal offence has the right to have the charge decided after a fair hearing.’

² *Bull v R* [2000] HCA 24, [62].

³ E.g. *Criminal Procedure Act 1986* (NSW), s. 293(3)(a); *Evidence Act 2001* (Tas), s. 194M(1)(b).

⁴ E.g. *Crimes Act 1914* (Cth), s. 15YC(2)(b); *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s. 53(1)(b); *Evidence Act 1929* (SA), s. 34L(2)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld), s. 4 (rule 2(b))

⁵ Similar language was removed from the previous s. 37A of the *Evidence Act 1958* (Vic) by s. 33(2) of the *Crimes (Sexual Offences) Amendment Act 2006* (Vic). A similar change in Western Australia has been held to bar evidence that is characterised as only relevant to credibility: *Hill v R* [2003] WASCA 177, [50]-[58].

relevant evidence, such as previous false complaints or transferred memories from earlier assaults.⁶

Third, new section 350 bars a court from granting leave to admit sexual history evidence at a sentencing hearing unless the offender either pleads guilty to or is found guilty of 'all sexual offences charged against the offender'. This means that offenders who are acquitted of some but not all charged offences are barred from adducing *any* sexual history evidence at a sentencing hearing, even when it is substantially relevant to the issue of sentence. For example, such an offender will be unable to argue that any harm suffered by the victim was due to unrelated sexual assaults. No other Australian jurisdiction has such a rule or draws any such distinction.

The Committee refers to Parliament for its consideration the questions of whether or not:

- 1. new section 342, by permitting a complainant's lack of sexual experience to be adduced without leave, is compatible with complainants' Charter right against arbitrary or unlawful interferences in their privacy.***
- 2. new section 349, by barring defendants from adducing sexual history evidence that is relevant only to a complainant's credibility, is compatible with the Charter right to a fair hearing.***
- 3. new section 350, by barring offenders who are acquitted of some but not all charged offences from adducing any sexual history evidence at all at a sentencing hearing, is compatible with their Charter right to a fair hearing.***

Fair hearing – Unrepresented accused barred from contradicting a protected witness's testimony

Summary: Clause 50 inserts a new provision that is in identical terms to one that the Committee previously reported may limit the Charter's right to a fair hearing.

The Committee notes that clause 50, inserting a new section 357(5), provides that an accused person who refuses legal representation to cross-examine a protected witness in a sexual or family violence offence prosecution or otherwise refuses to co-operate must be told that he or she 'will not be permitted to adduce evidence in relation to a fact in issue in order to contradict the evidence of a protected witness'. **The new section is in the same terms as the existing s. 37CA(9) of the Evidence Act 1958, which was considered by the Committee in its report on the Family Violence Protection Bill in Alert Digest No 9 of 2008.**

The Committee observes that new section 357(5), like its predecessor, appears to mimic the rule of evidence known as the rule in *Browne v Dunn*; however, it is much stricter than that rule (which is ordinarily enforced through less drastic remedies, such as allowing witnesses to be recalled and drawing adverse inferences). The High Court of Australia has cast doubt on whether the rule in *Browne v Dunn* should be applied to criminal defendants at all, at least 'without serious qualification', given the prosecution's burden of proof: *MWJ v R* [2005] HCA 74, [41]. **The Committee therefore considers that new section 357(5) may limit such defendants' Charter right to a fair hearing.**

The Committee refers to Parliament for its consideration the question of whether or not new section 357(5), by completely barring uncooperative defendants from

⁶ E.g. *HG v R* [1998] HCA 2, [71], holding that such expert evidence is relevant only to the credibility of a complainant.

contradicting the evidence of a protected witness, is compatible with the Charter's right to a fair hearing.

Retrospective penalties – New maximum fine – Transitional provision

Summary: A transitional provision for a new maximum fine for indictable offences tried summarily does not address the situation where an indictable offence was committed before the commencement of the *Criminal Procedure Act 2009* but the summary hearing was granted after that commencement. The Committee will write to the Attorney-General seeking further information.

The Committee notes that item 110.83 of schedule 1, inserting a new section 138 into the *Sentencing Act 1991*, provides that a new maximum fine of 500 penalty units for indictable offences tried summarily⁷ applies to any sentence imposed after commencement. New section 138(2) creates an exception where the new maximum is higher than the previous one, but only where 'the Magistrates' Court determined to grant a summary hearing of a charge for the offence' before the commencement of the *Criminal Procedure Act 2009*.

The Statement of Compatibility remarks:

The transitional provision in the bill ensures that the new maximum jurisdiction penalty does not impose a penalty that is greater than the penalty applying at the time the accused consented to, and the court granted, summary jurisdiction.

However, Charter s. 27(2) provides:

A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

The Committee is concerned that the transitional provision does not address the situation where an indictable offence was committed before the commencement of the *Criminal Procedure Act 2009* but the summary hearing was granted after that commencement.

The Committee will write to the Attorney-General seeking further information as to the maximum fine applicable in a summary hearing granted after the commencement of the *Criminal Procedure Act 2009* in respect of an indictable offence committed before commencement that previously attracted a maximum fine of less than 500 penalty units when tried summarily.

The Committee makes no further comment.

⁷ New section 433 (renumbered from s. 380) of the *Criminal Procedure Act 2009*, inserting a new s. 112A into the *Sentencing Act 1991*.

Land (Revocation of Reservations and Other Matters) Bill 2009

| | |
|---------------------------------|------------------------------------|
| Introduced | 15 September 2009 |
| Second Reading Speech | 17 September 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA |
| Portfolio responsibility | Minister for Community Development |

Purpose

The Bill will –

- facilitate projects and developments on Crown land;
- allow the government to sell surplus land and enter into land exchanges;
- improve the management of Crown land sites; and
- provide for more accurate recording of the Crown land portfolio.

Background

Montefiore Homes Community Residence

The Bill will revoke the permanent reservation and restricted Crown grant on the site to allow the government to sell the site to Jewish Care. The site will be sold on the condition that it continues to be used for aged-care and community services. **[3]**

Altona Memorial Park Cemetery

This Bill will revoke the permanent reservations over two land parcels to enable them to be transferred to VicRoads for completion of the upgrade and roadworks along Dohertys Road between Fitzgerald Road and Grieve Parade. **[4]**

J. R. Parsons Reserve, Sunshine

The Bill will enable the construction of bus priority works, including a new bus lane at the intersection of Wright Street, Market Road and Sunshine Road in Sunshine, as part of the new red orbital route 903 which runs between Altona and Mordialloc. To complete this bus lane, VicRoads needs a small parcel of Crown land sitting within the J. R. Parsons Reserve on Wright Street, which is permanently reserved for public recreation. This Bill will remove the reservation over this land parcel, allowing it to be transferred to VicRoads. **[5]**

Kananook Creek reserve

The Bill will revoke the permanent reservation over a parcel of Crown land at the Seaford Caravan Park, near Kananook Creek Reserve to enable a land exchange with a parcel of private land. **[6]**

Yarra Bend Park Reserve

The Bill revokes land currently governed by the *Kew and Heidelberg Lands Act 1933* which establishes the Yarra Bend Park Trust (the 'trust') as managers of the park. The Bill will transfer the management of the park from the trust to Parks Victoria. **[9 to 12]** The Bill provides transitional provisions expressly preserving any current leases. **[13 and 14]**

The Bill will also repeal the –

- *Kew and Heidelberg Lands Act 1933*
- *Kew and Heidelberg Lands Act 1958* [15]

Caulfield Racecourse reserve

This Bill will remove the current permanent reservation and restricted Crown grant over the car park site (the Tabaret car park) enabling it to be transferred to the Melbourne Racing Club. In exchange, the government will acquire two parcels of Caulfield Racecourse land from the Melbourne Racing Club to create a new public park reserve. [17 to 20]

Royal Park reserve

The Bill will update the Crown land portfolio by correctly reserving this area as zoo land. [21 to 24]

Western Oval reserve

Currently, the Western Oval reserve is permanently reserved for recreation purposes under the *Footscray (Recreation Ground) Lands Act 1968*. The Bill will revoke the permanent reservation and temporarily reserve the site for 'recreation, social and community services', which will allow the land to be used for a broad range of purposes. [25 to 27]

The Bill will also remove the Maribyrnong City Council as managers of the reserve.

The Bill further revokes redundant legislation being the –

- *Footscray (Recreation Ground) Lands Act 1968 and the*
- *Footscray (Western Oval Reserve) Act 1981*. [28]

Kardinia Oval reserve

The Bill will amend the *Geelong (Kardinia Park) Land Act 1950* to enable the council to offer the Geelong Football Club licences of up to 40 years. [30]

The Committee makes no further comment.

Planning Legislation Amendment Bill 2009 (No. 2)

| | |
|---------------------------------|--------------------------|
| Introduced | 15 September 2009 |
| Second Reading Speech | 15 September 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA |
| Minister responsible | Hon. Justin Madden MLC |
| Portfolio responsibility | Minister for Planning |

Purpose and Background

The Bill amends the —

- *Planning and Environment Act 1987* to enable certain applications for planning permits and amendments to planning permits as specified by the Minister for Planning to be decided on by Development Assessment Committees to be established pursuant to the Bill. [5]
- *Docklands Act 1991* to amend the objective of the Victorian Urban Development Authority by removing the expiry date of the involvement of the Authority in the Docklands development. [6]
- *Heritage Act 1995* to increase the maximum penalty that may be prescribed for an infringement offence from the current 4 penalty units to a maximum of 10 penalty units. [7]
- *Local Government Act 1989* to provide an exception from conflict of interest provisions in relation to a conflict which may arise for a councillor as a result of that councillor being a member of a Development Assessment Committee (DAC). There are specific probity provisions in the new Part 4AA Division 5 that cover conflict of interests arising from a councillor serving on a DAC. [8]
- *Melbourne Convention and Exhibition Trust Act 1996* to clarify and broaden the powers and functions of the Melbourne Convention and Exhibition Trust so that it can operate throughout Victoria. Currently the Trust is limited to operating within the City of Melbourne and the City of Port Phillip. [9]

Extracts from the Second Reading Speech –

The Planning Legislation Amendment Bill 2009 was defeated in the Legislative Council on 11 June 2009. Under the Constitution Act 1975 the Bill became a disputed Bill and was referred to the Dispute Resolution Committee⁸ by a motion of the Legislative Assembly on 11 August 2009. ... I will refer to the amendments made as a result of the dispute resolution as I outline the main provisions of the Bill.

This Bill seeks to amend the Planning and Environment Act 1987 in order to introduce a system of Development Assessment Committees to make decisions on particular types of planning permit applications of significance, and to set out clear provisions in the Act relating to effective and transparent probity for members of a Development Assessment Committee and associated issues.

... The Dispute Resolution required that the Bill be amended to list suburbs in which the principal activity centres are located (some of which are now designated as central activities districts) and the Geelong central activities area.

⁸ References to 'Dispute Resolution' concern the dispute resolution procedure provided in the *Constitution Act 1975* where a dispute arises between the Houses of the Parliament concerning a Bill.

... The Dispute Resolution also required amendments be made to the Bill to ensure that there is a public exhibition process prior to the establishment of a boundary that is to be covered by a Development Assessment Committee. In addition, there is a new provision that requires the Minister for Planning to refer criteria that are to be decided on by a Development Assessment Committee to an advisory committee under section 151 of the Planning and Environment Act 1987 and that the advisory committee undertake a public consultation process. The Bill has been amended to give effect to this requirement.

... An amendment to the Bill as a result of the Dispute Resolution requires a meeting of a Development Assessment Committee to be open to the public. The provisions on costs have also been removed from the Bill.

... A provision that enabled the Minister for Planning to remove a Development Assessment Committee member if he or she acted in a way that was not in the best interest of the development assessment committee has been removed from the Bill as part of the Dispute Resolution process.

The Committee makes no further comment.

Sentencing Amendment Bill 2009

| | |
|--------------------------|----------------------|
| Introduced | 15 September 2009 |
| Second Reading Speech | 17 September 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose

The Bill amends the *Sentencing Act 1991* to provide that in sentencing an offender, a court must have regard to '*whether the offender was motivated by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated*'. [3]

The amendment inserts a new section 5(2)(daaa) and applies to a sentence imposed on or after the commencement of the provision, irrespective of when the offence was committed. (Refer to Charter Report below). [4]

Notes:

1. Section 5 of the *Sentencing Act 1991* provides that "in sentencing an offender a court must have regard to" a number of factors including the nature and gravity of the offence, the offender's degree of responsibility for the offence, the impact of the offence on the victim, the offender's previous character, and the presence of any aggravating or mitigating factors concerning the offender or of any other circumstances.
2. The preamble to the *Racial and Religious Tolerance Act 2001* provides –
However, some Victorians are vilified on the ground of their race or their religious belief or activity. Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, Indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.
It is therefore desirable that the Parliament enact law for the people of Victoria that supports racial and religious tolerance.
3. Sections 7 and 8 of the *Racial and Religious Tolerance Act 2001* relevantly provide –
7(1). *Racial vilification unlawful – A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.*
8(1). *Religious vilification unlawful – A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.*

Background

The Committee notes the following extract from the explanatory memorandum –

The amendment promotes the recognition in sentencing of the existing common law consideration of motivation, and has the following intended features —

- *the amendment is particularly intended to promote protection of groups of people with common characteristics such as groups characterised by religious affiliation, racial or cultural origin, sexual orientation, sex, gender identity, age, impairment (within the meaning of the *Equal Opportunity Act 1995*) or homelessness;*

- a victim associated with a group, or believed to be associated with a group, includes a victim associated by reason of membership of the group, by coming to the assistance of a member of the group during the offence, by being an advocate or lobbyist for the group, by being in employment related to the group, or being an acquaintance, friend or family member of a member of the group;
- as victims include persons suffering as a direct result of the offence, the consideration may apply to offences against property not owned by the victim, such as graffiti that was motivated by hatred or prejudice against the group;
- absence of the factor will not be taken as mitigating the offence.

Charter report

Fair hearing – New statutory aggravating sentencing factor – Transitional provision

Summary: Clause 4 provides that clause 3's insertion of a new statutory aggravating factor applies to every 'sentence imposed on or after' commencement. The Committee considers that clause 4's retrospective operation may engage the Charter right to a fair sentencing hearing.

The Committee notes that clause 3, amending s. 5 of the *Sentencing Act 1991*, inserts a new aggravating factor for crimes motivated by hate or prejudice to the main statutory guideline on sentencing. **While the Committee considers the clause 3 is compatible with human rights,⁹ it is concerned about clause 4, inserting a new section 138, which provides that clause 3 applies 'to a sentence imposed on or after the commencement of that Act, irrespective of when the offence was committed.'** The effect of clause 4 is that the new statutory aggravating factor will apply retrospectively: to offences, prosecutions, trials, sentencing hearings and appealed sentences that pre-dated the Act's commencement.

The Statement of Compatibility remarks:

Section 27(2) of the charter provides that a penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed. The bill includes a transitional provision so that the amendment to section 5(2) of the Sentencing Act applies to the sentencing of a person on or after commencement of the amendment, regardless of when the person's offence was committed. As noted above, the sentencing practice being reinforced by the amendment already applies to the sentencing of offenders motivated by hatred or prejudice. The amendment will therefore not change a sentencing court's discretion.

Australian and international jurisprudence reflects that a reference to the penalty in human rights instruments comparable to section 27(2) is a reference to a maximum penalty. The bill's amendment does not change any maximum penalty for any offence. In consideration of the above, the amendment does not limit the right in section 27(2). The transitional provision is consistent with previous amendments to the Sentencing Act that do not retrospectively penalise offenders.

The Committee observes that:

- previous transitional provisions in the form of clause 4 have only been used for amendments that introduce beneficial sentencing options, make procedural changes or redress earlier anomalies.¹⁰

⁹ The United States Supreme Court rejected a free speech challenge to a similar rule in *Wisconsin v Mitchell*, 508 US 476 (1993).

¹⁰ *Sentencing (Amendment) Act 1993*, s. 117A(2); *Sentencing and Other Acts (Amendment) Act 1997*, inserting s. 1118(1); *Sentencing (Amendment) Act 1997*, inserting s. 119(1); *Sentencing (Amendment) Act 1999*, inserting s. 122(1); *Sentencing (Amendment) Act 2002*, inserting s. 126; *Correction and Sentencing Acts (Home Detention) Act 2003*, inserting s. 127A(1); *Courts Legislation (Jurisdiction) Act 2006*, inserting s. 132.

- most earlier transitional provisions in this form expressly provided that sentences imposed on appeal from sentences imposed before commencement are to be dealt with under the earlier law.¹¹ This prevents an offender from being subject to a different statutory provision simply because he or she appeals. Clause 4 lacks a similar proviso.
- neither previous amendment adding a new sentencing factor to s.5(2) was accompanied by a transitional provision like clause 4. Instead, there was either no transitional provision¹² or the provision was limited to 'a proceeding for an offence commenced on or after' the clause's commencement.¹³ The latter approach prevents the possibility that an offender who pleads guilty or participates in a sentencing hearing under one statutory provision will be sentenced under a different statutory provision.¹⁴

The Committee therefore considers that clause 4 may engage offenders' Charter right to a fair sentencing hearing.¹⁵ In particular, it engages an aspect of that right described by the Attorney-General in another statement of compatibility:¹⁶

In the criminal law context, an initial requirement is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties. This ensures that the criminal justice system operates in a way that is predictable to the accused.

The Committee refers to Parliament for its consideration the question of whether or not clause 4, by retrospectively applying a new statutory sentencing factor to proceedings that are already in progress and appeals from completed proceedings, limits offenders' Charter right to a fair hearing.

The Committee makes no further comment.

¹¹ Sentencing Act 1991, s. 117(3); Sentencing and Other Acts (Amendment) Act 1997, inserting s. 1118(6); Sentencing (Amendment) Act 1997, inserting s. 119(1); Sentencing (Amendment) Act 1999, inserting s. 122(1); Correction and Sentencing Acts (Home Detention) Act 2003, inserting s. 127A(2).

¹² Sentencing (Victim Impact Statements) Act 2004, inserting ss. 5(2)(da) & 5(2)(db).

¹³ Sentencing (Further Amendment) Act 2005, inserting s. 5(2)(daa) and s. 130.

¹⁴ See also s. 135, inserted by the Criminal Procedure Legislation Amendment Act 2008, which is limited to a plea hearing that commences after the Act commences.

¹⁵ Charter s. 24(1) provides that 'A person charged with a criminal offence has the right to have the charge decided after a fair hearing.'

¹⁶ Statement of Compatibility to the Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill, Legislative Assembly, 17th September 2009, p. 3367.

Statute Law Amendment (Evidence Consequential Provisions) Bill 2009

| | |
|---------------------------------|----------------------|
| Introduced | 16 September 2009 |
| Second Reading Speech | 17 September 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose and Background

The Bill seeks to facilitate the introduction and implementation of the *Evidence Act 2008* (the 'Act') (Also refer to *Alert Digest Nos. 9 of 2008*).

Note: From the Statement of Compatibility –

In the second-reading speech to the Evidence Act 2008 I indicated that a separate Bill would be introduced dealing with consequential and transitional provisions. This Bill is based on the recommendations in the report by the Victorian Law Reform Commission on the implementation of the Uniform Evidence Act in Victoria (the implementation report).

In order to implement the new statutory scheme for evidence law, this Bill makes a number of consequential amendments to other Acts where those Acts deals with matters connected to evidence law, or the operation of those Acts will be impacted by the operation of the Evidence Act 2008.

The Bill also repeals a large number of sections in the Evidence Act 1958 that have been replaced by the Evidence Act 2008. It also renames the Evidence Act 1958 to the Evidence (Miscellaneous Provisions) Act 1958.

The Bill also provides for transitional arrangements setting out when provisions of the Evidence Act 2008 commence operation. Transitional arrangements for consequential amendments made by the Bill have also been included.

It is intended to commence the operation of the provisions in the Bill with the commencement of the *Evidence Act 2008* not later than by 1 January 2010. **[2]**

The Bill repeals section 5 of the *Evidence Act 1958* which provides a court with discretion in criminal proceedings to exclude illegally obtained evidence or evidence unfairly prejudicial to a defendant. These discretions are now covered by sections 90 and 135 to 138 of the *Evidence Act 2008*. **[4]**

Part 2 of the Bill provides for the repeal of large portions of the *Evidence Act 1958* which are to be provided in the successor *Evidence Act 2008* and further provides for transitional provisions consequent of these repeals. **[3 to 36]**

The Bill inserts new clause 4(1)(g) to Part 2 of the Dictionary to the Act which amends the definition of unavailability of persons to extend the circumstances in which a person is taken to not be available to give evidence to when a person is mentally or physically unable to give evidence, and it is not reasonably practicable to overcome that inability. **[52]**

Note: Extract from the explanatory memorandum –

The definition of unavailability of persons is primarily relevant to the operation of sections 63 and 65 of the Evidence Act 2008, which provide exceptions to the hearsay rule where a person who has made a previous representation is not available to give evidence about an asserted fact. The Uniform Evidence Acts do not accommodate witnesses who should be considered unavailable because of their physical or psychological condition; this is particularly pertinent to sexual offence complainants in retrials.

As noted above in the note to clause 15, sections 55AB and 55AC of the Evidence Act 1958 provide for circumstances in which a person's prior evidence, which would otherwise be hearsay, can be used in a subsequent proceeding, and for a definition of unavailability of persons which includes circumstances where a person is incapable of giving evidence in the relevant proceeding. These sections are repealed by this Bill as this aspect is covered by the relevant hearsay provisions within the Evidence Act 2008, the expansion of the definition of unavailability of persons ensures that the Evidence Act 2008 provisions continue to do the work currently achieved by sections 55AB and 55AC. This amendment responds to recommendation 8-2 of the NSW, Australian and Victorian Law Reform Commissions in their Uniform Evidence Act Report 2005.

Chapter report

Fair hearing – Confrontation – Hearsay exception for persons who are unfit to testify

Summary: The effect of clause 52 is to extend the first-hand hearsay exceptions in the Evidence Act 2008 to representations made by persons who are unfit to testify in court. The Committee considers that clause 52 may engage a defendant's Charter rights to a fair hearing and to examine witnesses against them.

The Committee notes that clause 52, amending the Dictionary to the *Evidence Act 2008*, expands the definition of 'unavailability' to include were 'the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability.' **This extends the first-hand hearsay exceptions in sections 63 and 65 to representations made by persons who are unfit to testify in court.**

The Second Reading Speech remarks:

This amendment implements an outstanding recommendation of the NSW, Australian and Victorian Law Reform Commission in their uniform Evidence Act report 2005. The amendment is also necessary to ensure that the hearsay provisions of the Evidence Act 2008, to which the definition is relevant, appropriately cover the work now done by sections 55AB and 55AC of the Evidence Act 1958, which are repealed by the Bill.

The Committee observes that this law reform recommendation was omitted from the model endorsed by the Standing Committee of Attorneys-General¹⁷ and has not been followed in any other Australian jurisdiction. The Committee notes that the amended definition goes much further than the existing ss. 55AB and 55AC of the *Evidence Act 1958*. Those provisions are limited to past depositions and retrials where the accused 'had a full opportunity to cross-examine the witness'.¹⁸ The new definition applies to the exceptions in s. 65(2), which are not limited in this way. **The Committee therefore considers that clause 52 may engage defendants' Charter rights to a fair hearing and to examine witnesses against them.**¹⁹

The Statement of Compatibility remarks:

Section 65 departs from the common law and, therefore, potentially engages the right to a fair hearing under section 24 of the Charter.

Section 67 of the Bill imposes notice requirements where such evidence is proposed to be introduced. In addition, there are safeguards under sections 135-137 that operate to protect parties in a proceeding and to ensure a fair trial. Given these safeguards, and the purpose of the provision, the right to a fair hearing is not limited.

¹⁷ Standing Committee of Attorneys-General, Model Uniform Evidence Bill, available at http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws

¹⁸ See *Evidence Act 1958*, s. 55AB(2)(b)(i) cf s. 55AC(2) (transcripts of earlier trials of the same defendant for the same offence.) See also s. 65(3) of the *Evidence Act 2008*.

¹⁹ Charter s. 24(1) provides that 'A person charged with a criminal offence... has the right to have the charge decided after a fair hearing.' Charter s. 25(2)(g) provides that defendants are entitled to 'examine or have examined, witnesses against him or her, unless otherwise provided for by law'.

Whilst the expansion of the definition of 'unavailability' of persons' broadens the operation of sections 63 and 65, it does not change the character of the provisions or the assessment that these provisions do not limit the right to a fair hearing.

The Committee observes that the new definition of unavailability may apply when the victim or major eyewitness to a crime is unable to testify due to trauma or fear relating to the crime, but is willing to make a detailed statement to the police. The effect of clause 52 is that such a police statement may be presented in a criminal trial as the sole or decisive evidence against the accused, without the accused being able to cross-examine the person who made it.

The Committee notes that earlier this year, the European Court of Human Rights ruled that a very similar English provision breached a defendant's right to a fair hearing in this circumstance.²⁰ While the UK Court of Appeal has since rejected the European Court's ruling, it did so because of a further English provision authorising a court to stop a case that is based wholly or partly on such a statement that is 'so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe'.²¹ The Committee notes that Victorian courts have no equivalent power.²²

The Committee refers to Parliament for its consideration the question of whether or not clause 52, by permitting a witness statement to be used as the sole or decisive evidence against an accused without any opportunity for cross-examination, is compatible with defendants' Charter rights to a fair hearing and to examine witnesses against them.

The Committee makes no further comment.

²⁰ *Al-Khawaja and Tahery v UK* [2009] ECHR 110, [37], ruling that 'the Court doubts whether any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant.'

²¹ *Horncastle v R* [2009] EWCA Crim 964, [58] & [73]-[75], relying on s. 125 of the *Criminal Justice Act 2003*, which provides that: 'If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings; and (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.'

²² On the *Evidence Act 2008* discretions, see *Papakosmas v R* [1999] HCA 37, [39]-[40] & [97]. On the residual common law discretion, see *Rozenes v Beljajev* [1995] 1 VR 533.

Deakin University Bill 2009, La Trobe University Bill 2009, Monash University Bill 2009 and University of Melbourne Bill 2009

| | |
|--------------------------|---|
| Introduced | 16 September 2009 |
| Second Reading Speech | 17 September 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Jacinta Allan MLA |
| Portfolio responsibility | Minister for Skills and Workforce Participation |

Purpose and Background

Each of the above Bills is substantially identical other than a unique preamble and some minor provisions reflecting the distinctive history on the relevant institution and the consequential transitional provisions.

The Bills provide for –

- a governing body of each University to be the Council and allow each Council to determine the number of Council members in a range from a minimum of 14 to a maximum of 21. **[11]**
- a number of disqualifications from Council membership including membership of any Australian Parliament, conviction of an indictable offence and certain disqualification under the Corporations Act. **[14]**
- the appointment of major office holders such as the Vice-Chancellor. **[24 to 27]**
- university statutes and regulations to be made by the respective Councils and provides for the subject matters these statutes and regulations may cover. **[28 to 34]**
- powers to acquire and dispose of land, **[35 to 38]**
- powers for the creation and administration of trust funds, **[39 to 43]**
- borrowing and investment powers (within Ministerial guidelines) **[44 to 47]**,
- joint ventures participation powers and audit requirements. **[48 to 51]**
- the re-enactment of the current provisions declaring that a fine imposed under university statutes or regulations is a civil debt recoverable summarily. **[61 and 62]**
- saving and transitional arrangements relevant to each University such as the continuation of the current Councils the and saving of existing gifts, trusts and dispositions.
- the repeal the Acts that originally constituted the respective Universities and their constituent bodies. **[63]**

From the Statement of Compatibility –

The University Bills are based on template legislation that will be used for all of Victoria's public universities, to ensure consistency with the agreed national protocols for university governance. The primary purpose of the template legislation is to rationalise existing separate pieces of legislation, remove obsolete provisions and provide each university with its own current Act reflecting best practice and a consistent approach to governance and reporting requirements.

The University Bills also amend governance provisions where appropriate to meet the requirements of the Commonwealth's revised national governance protocols.

The University Bills will each set out the objects and powers of each university, and its status as a body corporate and body politic consisting of a council, academic staff, graduates and students. The University Bills will provide for a seal, so that each university enjoys all the powers of an individual, such as the capacity to sue and be sued, enter into contracts and acquire land.

The University Bills will allow for the continued existence of the universities' respective governing council and set out its powers, functions and membership. The council of each university will have the power to make, revoke and alter any statutes and regulations pertaining to the university.

The Committee makes no further comment.

Ministerial Correspondence

Fair Work (Commonwealth Powers) Bill 2009

The Bill was introduced into the Legislative Assembly on 3 June 2009 by the Hon. Rob Hulls MLA, and after passing both Houses received Royal Assent on 17 June 2009. The Committee considered the Bill on 22 June 2009 and made the following comments in Alert Digest No. 7 of 2009 tabled in the Parliament on 23 June 2009.

Committee's Comments

Charter report

Commonwealth laws made pursuant to a Victorian referral – Application of Charter's operative provisions – Whether Charter will be overridden

Summary: A Victorian referral of legislative power to the Commonwealth raises uncertainties about the operation of the Charter with respect to laws enacted pursuant to the referral. The Act may reduce the Charter's protection of Victorian employers' and employees' human rights. The Committee will write to the Attorney-General seeking further information.

The Committee notes that s. 4(1)(a), referring power to the Commonwealth to enact a proposed new Division 2A into Part 3-1 of the Fair Work Act 2009 (Cth), permits the application of the Commonwealth Act to Victorian employers, employees and outworker entities who would not otherwise be subject to that law. Section 4(1)(b) additionally authorises the Commonwealth Parliament to amend the Act in the future on various 'referred subject matters'.

In its Alert Digest Nos. 6 of 2008 and 6 of 2009, the Committee observed that a Victorian statute giving a South Australian statute the force of law in Victoria raises uncertainties about the operation of the Charter. A Victorian referral of legislative power to the Commonwealth raises similar uncertainties and distinct ones of its own, including the possibility that the Act may reduce the Charter's protection of Victorian employers' and employees' human rights.

The common uncertainties relate to the continuing operation of the Charter's provisions for:

- ***scrutiny of new laws*** made pursuant to Victoria's referral, given that future amendments will be enacted by the Commonwealth (rather than the Victorian) parliament
- ***interpretation of legislation*** supported by Victoria's referral, given that the Fair Work Act 2009 is a Commonwealth (rather than Victorian) statute and is subject to the Commonwealth's interpretation law
- ***court declarations of inconsistent interpretation*** about statutory provisions made pursuant to Victoria's referral, given that those laws are Commonwealth (rather than Victorian) statutory provisions and courts examining them may be exercising federal (rather than state) judicial power.
- ***obligations of public authorities*** administering laws made pursuant to Victoria's referral, given that those entities are established by Commonwealth (rather than Victorian) enactments.

In its Alert Digest No. 9 of 2008, the Committee published the Minister for Energy and Resources' view that Charter s. 32 applies to national cooperative laws in force in Victoria.

In its Alert Digest No. 6 of 2009, the Committee wrote to the Minister seeking information about the Charter obligations of corporations administering those laws in Victoria. However, the Committee observes that different considerations may arise in relation to federal laws that extend to some Victorians because of a Victorian referral of legislative power.

An additional uncertainty that arises when Victoria refers legislative power is that valid Commonwealth statutes may invalidate State statutes, including the Charter. This means that the Victorian Act might authorise the removal or reduction of the Charter's protections for the human rights of Victorian employers and employees who are brought within the Commonwealth law, including both protections from the federal scheme itself (to the extent that it or any future amendments limit Charter rights) and Charter protections that are additional to that scheme (e.g. from Victorian laws that limit employment rights protected by the Charter or against Victorian public authorities whose acts or decisions limit such rights.)

The Committee is especially concerned that neither the Victorian Act nor the Commonwealth Act expressly provides that the Charter continues to apply. In particular, while both Acts expressly preserve the Equal Opportunity Act 1995 (Vic), neither expressly preserves the additional protections against discrimination in Charter s. 8. Also, it is possible that Part 3-1 of the Commonwealth Act, once it applies to most Victorian workplaces, will 'cover the field' on the 'right to form and join trade unions', potentially rendering the right to freedom of association in Charter s. 16(2), or Charter provisions protecting that right, partially invalid.

The Committee will write to the Attorney-General seeking further information as follows:

- 1. Will future amendments to the Fair Work Act 2009 (Cth) made pursuant to the referred power in s. 4(1)(b) be scrutinised for their compatibility with human rights pursuant to Division 1 of Part 3 of the Charter?***
- 2. Will the Fair Work Act 2009 (Cth), to the extent that it is supported by the Victorian referral in s. 4(1)(a), be interpreted pursuant to Charter s. 32?***
- 3. Will a court be able to make declarations of inconsistent interpretation pursuant to Charter s. 36(1) if the Fair Work Act 2009 (Cth), or future amendments to that Act, cannot be interpreted consistently with a human right?***
- 4. Will Fair Work Australia be subject to Division 4 of Part 3 of the Charter when it is administering laws made pursuant to the Victorian referral in s. 4(1)(a)?***
- 5. Will the Charter, or any provision of it, be rendered invalid to any extent by the enactment of the proposed new Division 2A of Part 1-3 of the Fair Work Act 2009 (Cth)?***
- 6. Has Charter s. 30 been complied with in relation to the Fair Work (Commonwealth Powers) Bill 2009? If not, what are the consequences of non-compliance?***

Pending the Attorney-General's response, the Committee draws attention to the Charter's interaction with the Fair Work Act 2009 (Cth).

Minister's Response

Thank you for your letter of 23 June 2009 enclosing a copy of the report of the Scrutiny of Acts and Regulations Committee (the Committee) in Alert Digest No. 7 of 2009, in respect of the Fair Work (Commonwealth Powers) Bill 2009 (Referral Bill).

As you will be aware, the referral pursuant to the Referral Bill replaced Victoria's 1996 industrial relations referral to the Commonwealth and was made so that the Commonwealth Parliament could extend the application of the new Fair Work laws to Victorian employers that are not constitutional corporations and their employees.

The Committee has raised six questions relating to the operation of the Charter of Human Rights and Responsibilities in the context of the new referral. My responses to those questions are **attached**.

I note in respect of the Committee's final question, that the timing of the introduction and passage of the Referral Bill was dictated by the requirement that the drafting of key parts of the Bill mirror the drafting of corresponding parts of the Commonwealth Bill giving effect to the new referral (the Fair Work (State Referral and Consequential and other Amendments) Bill 2009 (Cth) and the requirement that these parts of the Referral Bill be enacted and commence before the corresponding parts of the Commonwealth Bill.

Because of restrictions arising from the wording of the 1996 referral, if the new referral and the Commonwealth Act giving effect to it had not been in operation by 1 July 2009, there would have been significant gaps in the workplace relations laws applying to around 30 per cent of the Victorian workforce from that date. This would have included gaps in the agreement-making arrangements and general employee protections under the Fair Work laws, which would have exposed vulnerable Victorian workers to exploitation and created confusion for employers and employees as to their rights and obligations.

I also note with appreciation, that non-Government Members of the Parliament agreed to facilitate prompt passage of the Referral Bill in order to avoid these consequences for Victorian workers and businesses.

Should you have any queries in relation to my responses, please contact Harriet Shing of my office on 9651 9840.

MARTIN PAKULA MP
Minister for Industrial Relations

5 October 2009

Responses to questions from the Scrutiny of Acts and Regulations Committee in respect of the Fair Work (Commonwealth Powers) Bill 2009

- 1. Will future amendments to the Fair Work Act 2009 (Cth) made pursuant to the referred power in s.4(1)(b) [of the Fair Work (Commonwealth Powers) Act 2009] be scrutinised for their compatibility with human rights pursuant to Division 1 of Part 3 of the Charter?**

Division 1 of Part 3 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter) applies to Bills introduced into, or to be introduced into, the "Parliament".

"Parliament" is defined by section 38 of the Interpretation of Legislation Act 1984 (Vic) as the Parliament of Victoria.

Future amendments to the Fair Work Act 2009 (Cth) (Fair Work Act) will be made through Bills introduced into the Commonwealth Parliament. Neither section 28 of the Charter (the obligation to prepare and table a compatibility statement) nor section 29 of the Charter (the obligation of the Committee to consider whether any Bill introduced to the Victorian Parliament is incompatible with human rights recognised in the Charter) will extend to future amendments made by the Commonwealth Parliament to the Fair Work Act.

- 2. Will the Fair Work Act 2009 (Cth), to the extent that it is supported by the Victorian referral in s. 4(1)(a) [of the Fair Work (Commonwealth Powers) Act 2009], be interpreted pursuant to Charter s. 32?**

Section 32 of the Charter applies to "statutory provisions". That term is defined in section 30) of the Charter to mean "an Act ... or a provision of an Act". "Act" is defined in turn by section 38 of the Interpretation of Legislation Act 1984 (Vic) as an Act passed by the Parliament of Victoria. It is clear that section 32 of the Charter does not extend to the interpretation of Acts passed by the Commonwealth Parliament.

A law passed by the Commonwealth in reliance upon a referral of power from a State is and remains a law of the Commonwealth. Consequently, the reach of section 32 of the Charter will not extend to the interpretation of provisions of the Fair Work Act.

3. Will a court be able to make declarations of inconsistent interpretation pursuant to Charter s. 36(1) if the Fair Work Act 2009 (Cth), or future amendments to that Act, cannot be interpreted consistently with a human right?

Like section 32, section 36(1) of the Charter applies to “statutory provisions”. For the reasons discussed above, a law passed by the Commonwealth Parliament in reliance upon a referral of power from a State is not a “statutory provision” for the purposes of section 36 of the Charter.

Accordingly, a court will not be able to make declarations of inconsistent interpretation pursuant to section 36(1) of the Charter in relation to the Fair Work Act or future amendments to it.

4. Will Fair Work Australia be subject to Division 4 of Part 3 of the Charter when it is administering laws made pursuant to the Victorian referral in s. 4(1)(a) [of the Fair Work (Commonwealth Powers) Act 2009]?

Division 4 of Part 3 of the Charter applies to “public authorities”. That term is defined in section 4 of the Charter. Relevantly, that definition includes an entity established by a “statutory provision that has functions of a public nature” and an entity whose functions include functions of a public nature when “exercising those functions on behalf of the State”.

Fair Work Australia is established by section 575 of the Fair Work Act and consequently, for the reasons given earlier, is not established by a “statutory provision”. Further, Fair Work Australia's functions are set out in section 576 of the Fair Work Act and pursuant to section 579, Fair Work Australia has the privileges and immunities of the Crown in right of the Commonwealth. These provisions are inconsistent with any view that Fair Work Australia exercises functions on behalf of the State.

It follows that Fair Work Australia is not a “public authority” within the meaning of section 4 of the Charter, and consequently it is not subject to Division 4 of Part 3 of the Charter.

5. Will the Charter, or any provision of it, be rendered invalid to any extent by the enactment of the proposed new Division 2A of Part 1-3 of the Fair Work Act 2009 (Cth)?

A Commonwealth law that limited a right set out in the Charter would not be inconsistent with the Charter within the meaning of section 109 of the Constitution, because the Charter does not purport to erect a freestanding entitlement to all of the rights that it recognises. Instead, the Charter gives legal effect to rights only to the specific extent provided in the Charter.

The Charter does not say anything about Commonwealth laws that modify or limit any of the rights that it recognises. If the Commonwealth enacted laws having that effect, those laws would not be inconsistent with the Charter, and would not invalidate any provision of the Charter, because the Charter says nothing about what can properly be done by the Commonwealth.

6. Has Charter s.30 been complied with in relation to the Fair Work (Commonwealth Powers) Bill 2009? If not, what are the consequences of non-compliance?

In my view, section 30 of the Charter has substantively been complied with, as the Committee considered the Fair Work (Commonwealth Powers) Act 2009 and reported to Parliament on the Act. However, even if section 30 was not complied with, no legal consequences would arise from such a failure.

Section 6(2)(b) of the Charter provides that the Charter applies to courts and tribunals "to the extent that they have functions under Part 2 and Division 3 of Part 3" of the Charter, whereas section 6(2)(a) provides that the Charter applies to the Parliament "to the extent that Parliament has functions under Divisions 1 and 2 of Part 3" of the Charter.

Division 1 of Part 3, which includes section 30, relates to the "scrutiny of new legislation" and is concerned with the legislative process. The reporting role of the Committee is thus part of the legislative process and is not justiciable.

In *Boscawen and Others v Attorney-General of New Zealand* [2009] NZCA 12, the New Zealand Court of Appeal found (at [32]) that the Attorney-General's reporting role under section 7 of the New Zealand Bill of Rights "is part of the legislative process and is therefore covered by the principle of comity". The court was consequently prohibited by article 9 of the Bill of Rights 1988 from reviewing the Attorney-General's performance of his or her section 7 duty. Article 9 of the Bill of Rights 1988 also applies in *Victoria (Mees v Road Corps)* (2003) 128 FCR 418. Accordingly, no legal consequences would arise from any failure to comply with section 30 of the Charter.

The Committee thanks the Minister for this response.

Local Government Amendment (Offences and Other Matters) Bill 2009

The Bill was introduced into the Legislative Assembly on 11 August 2009 by the Hon. Richard Wynne MLA. The Committee considered the Bill on 31 August 2009 and made the following comments in Alert Digest No. 10 of 2009 tabled in the Parliament on 1 September 2009.

Committee's Comments

Charter report

Increased penalties – Adequacy of statement of compatibility – Expression – Presumption of innocence

Summary: The Bill provides for increased penalties for a variety of offences. However, the Statement of Compatibility does not address any of the increased penalties. The Committee will write to the Minister seeking further information.

The Committee notes that the Bill provides for increased penalties for a variety of offences under the Local Government Act 1989. However, the Statement of Compatibility does not address any of the increased penalties.

The Committee recalls its Alert Digest No 8 of 2009, where it stated (in relation to the Tobacco Amendment (Protection of Children) Bill 2009):

While the Committee feels that a Statement of Compatibility need not address minor changes in offence penalties the Committee considers that Statements should address the impact of a provision doubling a fine for an offence on any rights engaged by that offence. In particular, the Statement should address whether or not the new penalty is a proportionate means of achieving the purpose of any provision limiting rights.

The Committee considers that the same approach should apply where, as in the present Bill, a previous fine is replaced with a potential prison sentence or a prison sentence is substantially increased.

For example, clause 10, amending s. 55A(1), lifts the penalty for the offence of distributing 'any matter or thing that is likely to mislead or deceive a voter in relation to the casting of

the vote of the voter' from its present 10 penalty units to '60 penalty units or imprisonment for 6 months'. Section 55A(1) engages Charter rights to expression and s. 55A(3), which requires a defendant charged under s. 55A(1) to prove the absence of an honest and reasonable mistake of fact as to the misleading nature of the thing distributed, engages the Charter right to be presumed innocent.

In relation to s. 55A(1), the Committee is concerned that the meaning and application of the phrase 'like to mislead or deceive a voter in relation to the casting of the vote of the voter' may be unclear to people participating in political expression. So, the introduction of a potential prison sentence for this offence may significantly chill political expression in relation to local government elections, with implication under both the Charter and the federal Constitution. In relation to s. 55A(3), the Committee observes that reverse onuses on offences that carry a potential prison sentence ought to be rare. So, clause 10's introduction of a prison penalty for this offence requires a detailed explanation of how the modified offence will be compatible with the Charter.

The Committee will write to the Minister seeking further information as to:

- 1. Whether and how the Bill's clauses that significantly increase the penalties for various offences under the Local Government Act 1989 are compatible with human rights?**
- 2. In particular, whether and how clause 10 is compatible with the Charter's right to expression and the presumption of innocence.**

Pending the Minister's response, the Committee draws attention to the Bill and, in particular, to clause 10.

The Committee makes no further comment.

Minister's response

I refer to the Parliament of Victoria, Scrutiny of Acts and Regulations Committee's ('the Committee') letter of 1 September 2009 and its comments in Alert Digest No. 10 of 2009 regarding the Local Government Amendment (Offences and Other Matters) Bill 2009 ('the Bill').

Clause 10 compatibility with the Charter

Clause 10 of the Bill amends the penalty levels in sections 55A(1) and (2) of the Local Government Act 1989 ('the Act'). The amendments will bring the section into line with the equivalent provisions in section 84 of the Electoral Act 2002 ('the Electoral Act').

The phrase "likely to mislead or deceive a voter in relation to the casting of the vote of the voter" in sections 55A(1) and (2) of the Act, has been given a narrow interpretation by the courts and tribunals. Its operation is confined mostly to cases where a voter has been misled in the physical act of marking the ballot paper. It has been held not to apply to cases where the voter has been misled in the formation of a judgement or decision about who to vote for.

*This interpretation has been said to be dictated by the High Court decision in *Evans v Crichton-Browne* (1980) 147 CLR 169, which dealt with section 161(e) of the Commonwealth Electoral Act 1918, which was similar to section 55A of the Act.*

Based on this narrowly defined interpretation, and given that for section 15(3) of the Charter of Human Rights and Responsibilities 2006 ('the Charter'), the necessity to increase the penalties in sections 55A(1) and (2) of the Act is to preserve public order and uphold the integrity of the voting system in accordance with the principles of democracy, any limitation on a person's right to freedom of expression is reasonably justified.

As a matter of course, all candidates at Council elections are provided with Election Information Kits by the Victorian Electoral Commission ('VEC'), which contain specific

information about the meaning and operation of sections 55A(1) and (2) of the Act. Similar information is also provided in a publication available on the VEC web site.

Further, for section 55A(3) of the Act, the onus of proof is on the accused to prove the defence that he or she did not know and could not reasonably be expected to have known that the electoral material was likely to mislead a voter when casting the voter's vote.

Imposing a legal onus on the accused under section 55A(3) of the Act may be considered a limitation on the right to be presumed innocent under section 25(1) of the Charter. However, the reverse onus under section 55A(3) is reasonably justified given the narrow application of the offence, the type of deceptive and fraudulent conduct which section 55A regulates and the importance of ensuring Council elections are conducted in a fair and democratic manner.

The obvious less restrictive measure would be to impose the legal burden on the prosecution to disprove any exemption or defence exists in relation to the offences in section 55A. However, such matters would be difficult for the prosecution to gather evidence and prove beyond reasonable doubt, given that they are generally matters peculiarly within the knowledge of the defendant.

You may wish to note that section 84 of the Electoral Act, which contains identical provisions to section 55A, is currently under review by the Electoral Matters Committee, as part of its review of misleading or deceptive electoral content. Further consideration is expected to be given to the nature and operation of section 55A after the conclusion of the Committee review, with the intention that any necessary amendments will be in place before the November 2012 Council elections.

Significant increases in penalty levels

Significant increases to maximum penalty levels for offences that appear to engage Charter rights are proposed in Clauses 7, 13, 17 and 20 of the Bill.

Clause 7 increases the penalties in section 52 of the Act from 20 penalty units to a maximum of 240 penalty units or two years imprisonment. These provisions make it an offence to unlawfully nominate for election as a Councillor and given the increase in the penalty level for this offence, it might be regarded as a limitation on the Charter right to participate in public life.

The increase to the penalties in section 52 of the Act is necessary to provide an appropriate deterrent, so as to ensure that only people who are qualified to be a Councillor nominate for an election. The effect of an unlawful nomination may result in the unlawful election of a person not qualified to act as a Councillor or in the voiding of an election, making such deterrence measures reasonably justified.

Clause 13 increases the penalties in section 56 of the Act from 10 penalty units to a maximum of 60 penalty units. Although these penalty increases might be regarded as limiting a person's right to free expression under the Charter, any such limitation is reasonably justified by the necessity to ensure public order by providing for fair and democratic elections.

The specific purpose of these offences is to ensure unauthorised electoral material is not distributed to voters in the vicinity of a voting centre. The authorisation process ensures that a how-to-vote card is not likely to mislead voters in the process of casting their votes. Increasing the penalty levels for these offences will provide for more effective deterrence measures for the protection of voters from forms of misdirection and misinformation that can lead them to invalidate their votes, which in turn strengthens the Charter rights to free expression and the participation in public life.

Clause 17 amends the penalties in section 60 of the Act. While the increase of the penalty from 6 months imprisonment to a maximum of 120 penalty units or one year imprisonment might also be regarded as limiting the right to free expression under the Charter, the limitation is justified by the need to protect public order by ensuring the secrecy of electors'

votes. It is an essential component of democratic elections that electors are entitled to vote in a way that is secret in order to minimise undue influence. Section 60 is therefore essentially a protection of the Charter right to free expression and the right to participate in public life.

Clause 20 amends the penalty in section 66 of the Act from 10 penalty units to a maximum fine of 120 penalty units or one year imprisonment. Section 66 makes it an offence for a person to act as a Councillor if the person is incapable of being or continuing to be a Councillor, and the increase in the penalty level may be seen to limit the right to take part in public life under the Charter. However, this restriction provides for appropriate deterrence measures to ensure that members of the community are represented by people that meet the appropriate eligibility requirements of the Act to hold Council office. This includes that the person is, and remains, an eligible voter in the municipality and that he or she has not been convicted of an offence that disqualifies him or her from holding office.

RICHARD WYNNE MP
Minister for Local Government

25 September 2009

The Committee thanks the Minister for this response.

Personal Property Securities (Commonwealth Powers) Bill 2009

The Bill was introduced into the Legislative Assembly on 11 August 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 31 August 2009 and made the following comments in Alert Digest No. 10 of 2009 tabled in the Parliament on 1 September 2009.

Committee's Comments

Charter report

Privacy – Personal Property Securities Register – Registration and searches of personal information of grantors – Commonwealth laws made pursuant to a Victorian referral – Privacy protections depend on regulations made under those laws and their implementation by the Personal Property Securities Registrar – Application of Charter's operative provisions

Summary: Sections 153, 170 & 171 of the proposed Commonwealth Act, which regulate the storage and searching of personal information about grantors on the Personal Property Securities Register, engage the grantors' Charter right to privacy. The Committee is concerned that the making and content of any regulations affecting these sections, as well as the conduct of the Registrar of Personal Property Securities in operating the register, may not be subject to the Charter's operative provisions. It will write to the Attorney-General seeking further information.

The Committee notes that clause 6(1), referring power to the Commonwealth to enact a text tabled before the NSW Parliament, has the effect that the proposed Personal Properties Securities Act (Cth) will, if enacted, apply to a broader range of property transactions in Victoria than otherwise, pursuant to s. 243(1)(b) of the proposed Act.

In its Alert Digest No 7 of 2009, the Committee reported that a Victorian referral of legislative power to the Commonwealth raises uncertainties about the continuing operation of the Charter's provisions for scrutiny of new laws, interpretation of legislation, court declarations of inconsistent interpretation and obligations of public authorities. The Committee wrote to the Attorney-General about each of those matters in relation to the Fair Work (Commonwealth Powers) Bill 2009 and has not yet received a response. This bill raises similar issues.

In particular, the Committee observes that ss. 153, 170 & 171 of the proposed Commonwealth Act, which regulate the storage and searching of personal information about grantors (i.e. people who borrow money with personal property as collateral) on the Personal Property Securities Register, engage the Charter right of grantors (who are typically natural persons) to privacy, (e.g. if grantors have to supply their date of birth, address and other personal details and if the database can be searched in a way that can reveal these details.)

The Statement of Compatibility remarks:

The PPS register will contain personal information, as set out in proposed section 153. However, the register will only contain limited details about the grantor of the security interest (the debtor). If the property is consumer property required by the regulations to be described by a serial number, no details about the grantor will appear in the PPS register. If the property is consumer property but is not required to have a serial number, the PPS register will only contain the grantor's name and date of birth ...

Part 5.5 of the proposed commonwealth PPS act sets out clearly who may search the PPS register and for what purposes. Under proposed section 170, searches may only be conducted if a person applies to the Registrar and receives permission. The register may only give access to the PPS register if the conditions in section 170(3)

are met. Proposed sections 171 and 172 set out the criteria for a lawful search of the register.

While the Statement details a variety of regimes that can potentially protect grantors' privacy (including criminal sanctions for improper use and complaints to the federal privacy commissioner), the Committee observes that the main automatic protections for grantors' privacy depend on the passage and content of regulations made by the Governor-General under s. 303 of the proposed Commonwealth Act. In particular, the regulations will define:

- the details that grantor must provide to register financial statements in relation to particular property (s. 153, items 2 & 8)
- prohibitions on some searches of the register (s. 170(3)(d))
- permitted search criteria (s. 171(1)(e))
- the way in which the results of searches are worked out (s. 171(3))

The Committee is concerned that the making and content of any regulations, as well as the conduct of the Registrar of Personal Property Securities in operating the register, may not be subject to the Charter's operative provisions.

The Committee will write to the Attorney-General seeking further information as follows:

- 1. Will regulations for the proposed Personal Property Securities Act (Cth), made pursuant to the referred power in clause 6(1), be scrutinised for their compatibility with human rights?**
- 2. Will those regulations be interpreted pursuant to Charter s. 32?**
- 3. Will a court be able to make declarations of inconsistent interpretation pursuant to Charter s. 36(1) if those regulations cannot be interpreted consistently with a human right?**
- 4. Will the Governor-General be subject to Division 4 of Part 3 of the Charter when she makes regulations that are supported by the referred power in clause 6(1)?**
- 5. Will the Registrar of Personal Property Securities be subject to Division 4 of Part 3 of the Charter when it is administering laws made pursuant to the Victorian referral in clause 6(1)?**

Pending the Attorney-General's response, the Committee draws attention to ss. 153, 170 & 171 of the proposed Personal Property Securities Act (Cth).

The Committee makes no further comment.

Minister's response

Thank you for your letter of 1 September 2009 enclosing a copy of the report of the Scrutiny of Acts and Regulations Committee (the Committee) in Alert Digest No.10 of 2009 regarding the Personal Property Securities (Commonwealth Powers) Bill 2009 (the State Referral Bill).

The State Referral Bill was introduced into Parliament on 11 August 2009 and is part of a national scheme to establish a unitary framework for the registration and regulation of security interests in 'personal property that is to be administered by the Commonwealth Government. This scheme will consist of a Commonwealth enacted Personal Property Securities Act and Personal Property Securities Regulations (the PPS scheme) supported by a referral of legislative powers from State Parliaments and is also underpinned by an intergovernmental Personal Property Securities Law Agreement 2008 (the PPS Agreement). At the time of this response, I note that New South Wales has enacted its Personal Property Securities (Commonwealth Powers) Act 2009 and that a referral bill is currently before the Queensland Parliament. It is anticipated that the Commonwealth will act on the referral from the States to enact the proposed Commonwealth Personal Property Securities Bill 2009 (the PPS Bill).

General comment on the effect of the Victorian Charter of Human Rights and Responsibilities on Commonwealth legislation enacted pursuant to a referral of powers

The Committee has sought my response on a number of questions that go towards the future operation of the PPS scheme and its constitutional interaction with the Victorian Charter of Human Rights and Responsibilities (the Charter). Referrals of State legislative power pursuant to section 51(xxxvii) of the Australian Constitution are intended to enable a comprehensive, workable and uniform national scheme on important issues for Australia as a whole. Where a State referral is made, in effect the Commonwealth is endowed with a new and additional head of legislative power, extending only as far as the referral allows. Any Bill passed by the Commonwealth Parliament as a result of a referral is an Act of the Commonwealth Parliament which operates by force of the Commonwealth's, not the State's, legislative power. In particular, when the Victorian Parliament sets out a text in the schedule to a referral Act, it does not intend that text to operate or be interpreted as a law of Victoria. Instead, the State Act simply delineates the 'matter' that may be the subject of Commonwealth legislation, in the expectation that when the Commonwealth enacts a law in terms of the scheduled text that law will be interpreted as a law of the Commonwealth.

Thus, the force and effect of a State referral Act is spent, as a law of the State, once passed by the State Parliament, except to the extent that the referral may be varied or repealed. From the date of enactment of a referral Act by a State Parliament, the matter referred is in the Commonwealth's hands to which the Commonwealth's interpretative and other measures apply. The resulting Commonwealth legislation, including subordinate legislation, is accordingly not subject to 'the Charter as the reach of the Charter does not extend to Commonwealth laws.'ⁱ

On the general constitutional question of whether a Commonwealth law enacted pursuant to a referral of power from a State represents a form of 'vesting' of State legislative power in the Commonwealth, the High Court has observed that this is not the case.ⁱⁱ Further, it has been more explicitly observed that a Commonwealth law made pursuant to a referral of legislative power cannot be characterised as a law enacted by delegation from, or on behalf of, the State Parliament but is made under the legislative power of the Commonwealth Parliament pursuant to section 51 of the Australian Constitution and subject to the restrictions of the Constitution.ⁱⁱⁱ

However, to the extent that the Victorian Government must satisfy itself that the application of a Commonwealth scheme supported by a referral of legislative powers is of benefit to the Victorian community and suitable for introduction into Victorian Parliament, the Government will negotiate to ensure such schemes are developed and implemented in a Charter compatible manner. The responsible Minister will prepare a Statement of Compatibility in relation to the State referral legislation, including the initially referred text (i.e. the text of the proposed Commonwealth Bill) as part of the State Referral Bill (where a text-based referral is contemplated). This legal obligation does not extend to future amendments to the proposed Commonwealth Act once enacted, or to any regulations made by the Commonwealth, unless the national scheme specifically contemplates further legislative action on the part of the Victorian Parliament to give any future amendments to the Commonwealth Act constitutional operation in Victoria.

The Committee's specific questions on the future operation of the PPS scheme

- 1. Will there be scrutiny of future amendments to the proposed Personal Property Securities Act and scrutiny of proposed Personal Property Securities Regulations made pursuant to the referred power ill clause 6(1)[and clauses 6(2) to 6(4)] for their compatibility with human rights.**

ⁱ See, in the context of the *Human Rights Act 2004* (ACT), *Fletcher v Harris* (2005) 190 FLR 59 and *R v Tjanara v Goreng-Goreng* [2008] ACTSC 74.

ⁱⁱ *Graham v Paterson* (1950) 81 CLR 1, 19 per Latham CJ and at 21-22 per McTieman J.

ⁱⁱⁱ *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1, at 53 per Windeyer J.

Section 32(1) of the Charter provides that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. The term 'statutory provision' is defined in section 3 of the Charter to mean 'an Act... or a provision of an Act.' An 'Act' is defined by section 38 of the Interpretation of Legislation Act 1984 as an Act passed by the Parliament of Victoria. Thus, it is clear that the Victorian Charter applies to an Act of the Victorian Parliament. It does not apply to Acts of the Commonwealth Parliament and, by extension, to any subordinate legislation made under those Acts.

Accordingly, there is no obligation on the Commonwealth Government or indeed the Commonwealth Parliament to scrutinise future amendments to the PPS Act, made pursuant to the amendment references in clauses 6(2), 6(3) or 6(4), or to scrutinise any future PPS regulations for human rights compatibility under section 32 of the Charter.

In relation to the privacy considerations raised by the Committee on clauses 153, 170 and 171 of the PPS Bill that was tabled in the New South Wales Parliament on 16 June 2009, I would note that the Victorian Government has, during the development of the PPS Bill, advocated for robust privacy protection measures to be included in the PPS scheme which included specifying the name and date of birth as the only personal information of an individual grantor to be disclosed on the PPS Register and for the inclusion in the PPS Bill of a penalty regime for privacy breaches. I also note that the Victorian Privacy Commissioner has made submissions both to the Commonwealth Government and the Senate Committee on Legal & Constitutional Affairs during this policy development process. Significant improvements to privacy protection were made during the drafting of the Bill.

In relation to future amendments to the PPS Act and the future promulgation of PPS regulations by the Commonwealth, the Commonwealth Government has an obligation under clause 3.3 of the PPS Agreement to consult with the States and Territories on such proposals prior to introducing amending legislation into the Commonwealth Parliament. The Commonwealth Government has stated that it will be releasing draft regulations for public consultation later this year and will be consulting with the States and Territories pursuant to the PPS Agreement. The Victorian Government will be scrutinising these regulations for compatibility with the Charter and will advocate for Charter-compatible outcomes. Further, the Victorian Government will scrutinise the extent to which the draft regulations add to, or modify the operation of, clauses 153, 170 and 171 of the PPS Bill.

2. Will the PPS scheme be interpreted pursuant to Charter section 32?

Based on the reasons outlined in my general comment on the constitutional effect of the Charter with respect to Commonwealth law, and on the reasons outlined in my response to Question 1, the PPS Act and Regulations (being Commonwealth law) will not be not subject to the requirements of section 32 of the Charter.

3. Will a court be able to make declarations of inconsistent interpretation pursuant to Charter section 36(1) if those regulations cannot be interpreted consistently with a human right?

Based on the reasons outlined in my general comment on the constitutional effect of the Charter with respect to Commonwealth law, and on the reasons outlined in my response to Question 1, the PPS Act and Regulations (being Commonwealth law) will not be subject to section 36 of the Charter.

4. Will the Governor-General be subject to Division 4 of Part 3 of the Charter when she makes regulations that are supported by the referred power in clause 6(1)?

Section 38(1) of the Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. The term 'public authority' is defined in section 4 of the Charter. The definition includes a public official within the meaning of the Victorian Public Administration Act 2004.

The Governor-General does not fall within the definition of a public official within the meaning of the Public Administration Act 2004 and is not included within the definition of a 'public authority' under the Charter. Accordingly, the Governor-General is not subject to Division 4 of Part 3 of the Charter.

5. Will the Registrar of Personal Property Securities be subject to Division 4 of Part 3 of the Charter when it is administering laws made pursuant to the Victorian referral in clause 6(1)?

The obligations in Division 4 of Part 3 of the Charter apply to 'public authorities'. Public authorities are defined in section 4 of the Charter, to include 'an entity established by a statutory provision that has functions of a public nature', and 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State'. As discussed above, 'statutory provision' refers to a Victorian Act or subordinate instrument, or a provision thereof.

The office of the PPS Registrar will be established under the Commonwealth PPS Act and will be exercising powers and functions conferred upon that office under that Act. As such, the office of the PPS Registrar will not be established under a 'statutory provision' for the purposes of the Charter. Moreover, the office of the PPS Registrar will not be exercising statutory functions on behalf of the State - it will be an authority established by Commonwealth legislation, acting on behalf of the Commonwealth.

Accordingly, the PPS Registrar will not be subject to the Charter when administering the PPS scheme.

Operation of 'Henry VIII' and other clauses in the Personal Property Securities Bill

The Committee has sought clarification on the operation of certain provisions in the PPS Bill. On the questions concerning the inclusion of 'Henry VIII' clauses in the PPS Bill which allow the prescription of further matters by PPS regulations, the operation of the reverse onus provision in clause 299 of the PPS Bill and provisions concerning the scope of the delegation of powers from the PPS Registrar, I understand that the Commonwealth Attorney-General is currently considering similar questions put to him by the Senate Committee on Legal & Constitutional Affairs. I will respond to the Committee on these matters as soon as I have the opportunity to consider the Commonwealth Government's response.

Should you have any queries in relation to this letter, or wish to arrange a meeting between officers from my department and officers of the Committee to further discuss these issues, please do not hesitate to contact Ms Mary Polis from my office on 9651 1124.

ROB HULLS MP
Attorney-General

14 September 2009

The Committee thanks the Attorney-General for this response.

Committee's Comments

Senate Committee report on Commonwealth Bill

The Committee notes advice from Senator the Hon. Helen Coonan the Chair of the Senate Standing Committee for the Scrutiny of Bills (the Senate Committee) concerning the inclusion of a number of clauses in several Bills currently before the Commonwealth Parliament that concern national scheme legislation and that engage the Senate Committee's terms of reference. One of these Commonwealth Bills is the Personal Property Securities Bill 2009 (Cth) (the Commonwealth Bill) which gives effect to the subject matter of the powers being referred to the Commonwealth Parliament by the Victorian Bill.

The Senate report raised matters concerning the inclusion of 'Henry VIII' clauses, wide or insufficiently defined delegation of powers clauses, and a reverse onus of proof clause.

The Senate Committee's report tabled in the Commonwealth Parliament is found in the Senate's Alert Digest 9/09 (the Senate report') and identifies the following provisions that engage the Senate Committee's terms of reference which are identical to the Victorian Scrutiny Committee's terms of reference.

The Committee notes that other than the 'Henry VIII' clause 259(3) of the Commonwealth Bill the Senate Committee was not satisfied as to the explanatory material provided with the Bill and resolved to seek further clarification from the Commonwealth Attorney-General.

The Committee observes that this Bill refers legislative powers to the Commonwealth and is not therefore model, mirror or template legislation giving rise to a substantive Victorian Act. However, the Committee observes that the power once referred to the Commonwealth will apply laws for the State of Victorian which will impact on both natural and legal persons.

The Committee has therefore determined to ask the State Attorney-General whether he is satisfied that the inclusion of these provisions in the Commonwealth Bill, as reported by the Senate Committee, are appropriate and justified in each case.

Minister's response

I refer to your letter of 1 September 2009 enclosing a copy of the report of the Scrutiny of Acts and Regulations Committee (the Committee) on the Victorian Personal Property Securities (Commonwealth Powers) Bill 2009 and to my response of 14 September 2009 concerning the interaction between the Personal Property Securities (PPS) scheme and the operative provisions of the Charter of Human Rights and Responsibilities.

The Committee also sought my views on the inclusion of certain clauses in the Commonwealth Personal Property Securities Bill 2009 (the PPS Bill). These questions concerned the inclusion of 'Henry VIII' type clauses in the PPS Bill which enable regulations to alter responsibilities or entitlements conferred under the principal Act, provisions concerning the scope of the delegation of powers from the PPS Registrar and the operation of the reverse onus provision in clause 299 of the PPS Bill.

These matters were the subject of query from the Senate Scrutiny of Bills Committee to the Commonwealth Attorney-General, the Hon Robert McClelland MP. The Commonwealth Attorney General's response dated 3 September 2009 was published on the Senate Committee's website on 16 September 2009. I understand that the Senate Committee has accepted the Government's response and has requested that the Explanatory Memorandum accompanying the PPS Bill be amended to incorporate the information provided in that letter.

Having considered the Minister's response and the Senate Committee's conclusions on these matters, my response is as follows.

Potentially inappropriate regulation making powers ('Henry VIII') clauses

The Committee has sought my views on a number of clauses in the PPS Bill that enable regulations or subordinate instruments to be made that may alter the effect of provisions of the principal Act. With respect to all the regulation-making powers contained in the PPS Bill, as noted in my letter of 14 September 2009, the Commonwealth Government has an obligation under clause 3.3 of the intergovernmental Personal Property Securities Law Agreement 2008 (the PPS Agreement) to consult with the States and Territories prior to introducing amending legislation into the Commonwealth Parliament or making new regulations.

Subclause 8(3)

Clause 8 sets out the interests to which the PPS Act will not apply. The list of excluded interests in personal property was the subject of extensive negotiation between the States, Territories and the Commonwealth. However, as noted by the Commonwealth Attorney-General, it may be necessary in the future to ensure that the PPS scheme can operate effectively in complex future financial markets. While the regulation-making power in subclause 8(3) will make a flexible approach possible, it is not intended to provide a general override of subclause 8(1).

Subclause 118(5)

Clause 118 applies where an obligation is secured by both an interest in personal property and an interest in land. The clause is intended to facilitate the use of a single process to enforce the obligation, rather than proceeding separately under the PPS scheme and under the State land law scheme. Subclause 118(4) acknowledges that some modification of the State land law scheme may be necessary to ensure that security interests in personal property can be effectively enforced. Subclause 118(5) allows regulations to be made to effect that modification. Regulations made under this subclause will not modify the principal Act, and so the subclause cannot be truly referred to as an 'Henry VIII' clause. The power is intended to be used to modify the operation of a State land law, only to the extent necessary to allow it to be used to enforce personal property security interests in the limited circumstances described by clause 117. It should be made clear that these regulations will not purport to modify a State land law or its operation in relation to the enforcement of security interests against land which falls within the legislative responsibility of the State.

Clause 255 and subclause 258(4)

As discussed in my letter of 14 September 2009, when a referral is made to the Commonwealth under section 51(xxxvii) of the Australian Constitution, any resulting Commonwealth legislation is truly Commonwealth law. Section 109 of the Australian Constitution provides that, to the extent of any inconsistency, Commonwealth laws prevail over State laws. However, under the PPS Agreement the States, Territories and the Commonwealth agreed that certain State and Territory legislation should operate concurrently with the PPS Act and Regulations despite inconsistency and that in some circumstances State and Territory legislation should operate exclusively. Clause 255 is intended to facilitate the operation of State laws with the Commonwealth PPS scheme by allowing regulations to be made to remove inconsistencies, by providing that in some circumstances a provision or provisions of the PPS Act does not apply.

Clause 258 sets out the Commonwealth's intention that other legislation - Commonwealth, State and Territory - should sometimes prevail over the operation of the PPS Act and Regulations. The clause will only apply to certain laws prohibiting or limiting a person creating, acquiring or dealing with personal property or a security interest in personal property. Clause 258(4) will allow regulations to be made to allow the PPS scheme to prevail over the inconsistent laws. The Commonwealth Attorney-General has indicated that this power may be used where a State or Territory law has the unintended consequence of undermining the operation of the national scheme. I expect that this power would be used sparingly.

As a result, I am satisfied with the inclusion of these clauses in the PPS Bill.

Potentially wide delegation of powers clauses

Clause 147 enables the establishment of the PPS Register and grants the PPS Registrar certain discretions in relation to the form of the Register and access to the Register. I understand that this provision has been partly based on section 1274(1) of the Corporations Act 2001, which allows the Australian Securities Investments Commission to 'keep such registers as it considers necessary in such form as it thinks fit'. This aspect of the clause is intended to ensure that the operation of the Register is not hampered by legislative constraints that do not keep pace with technological developments. With respect to the general discretions created in this provision, in my view they are directed to ensuring the general workability of the scheme. For example, clause 147(5) enables the PPS

Registrar to refuse access to the PPS Register where the Registrar considers that access is not practical. Clause 147(6) ensures that if the PPS Registrar refuses access, she or he must publish a notice giving the details, including the period of suspension or refusal. The PPS Registrar will be bound by ordinary administrative law principles in making this decision, including a requirement of reasonableness. Clause 192 expressly requires the Registrar to provide details of each occasion on which access to the Register was refused, or the operation of the Register was suspended, in the Annual Report.

Clause 197 of the PPS Bill enables the PPS Registrar to delegate, by written instrument, all or any of his or her functions or powers under the Act to prescribed persons. This clause recognises that the PPS Registrar will require the assistance of staff to administer the PPS scheme, and such clauses are standard inclusions in modern legislation at both State and Commonwealth level. I refer you to, for example, section 8 of the Births, Deaths and Marriages Registration Act 1996 (Vic) or section 102 of the Australian Investments and Securities Commission Act 2001 (Cth), both of which enable the use of discretion by the established authority in exercising powers and functions. Further, clause 197(2) provides for supervision of delegates by the PPS Registrar, Deputy Registrar or a person engaged under the Public Service Act 1999 (Cth). All of these people are bound by the accountability provisions of the Public Service Act 1999 (Cth). The PPS Registrar is additionally required under clause 192 to report annually to the Commonwealth Parliament in respect of all the activities of his or her office in administering the PPS scheme.

I am satisfied with the inclusion of these clauses in the PPS Bill.

Reverse onus of proof

The Committee has also referred to clause 299(2) of the PPS Bill which provides for a presumption of knowledge of a security agreement or security interest where personal property is transferred between members of the same household, between related companies, or between a company and its director/officer. The ordinary burden of proof is therefore altered in such matters. As the Committee notes (at note 3 on page 20 of its Report), a reverse onus may raise concerns about the right to be presumed innocent in criminal matters. However, clause 299(2) has effect only in civil proceedings and provides an important safeguard for financiers against sham transactions by defaulting borrowers. This measure preserves the reputation and integrity of the loan market and provides an additional incentive for lenders to provide finance to ordinary consumers and businesses without needing to undertake multiple checks. Further, this clause maintains the current applicable standard for certain purchases of chattels subject to a security interest in Victoria as set out in section 8(1) of the Chattel Securities Act 1987. Accordingly, I am satisfied with the inclusion of this clause in the PPS Bill.

I trust this information assists to clarify the matters raised by the Committee.

ROB HULLS MP
Attorney-General

29 September 2009

The Committee thanks the Attorney-General for this response.

Road Legislation Amendment Bill 2009

The Committee considered this Bill in Alert Digest No. 5 of 2009 and wrote to the Minister on 6 May 2007. The Committee has not received a response to its concerns and will again request the Minister for a response at the earliest possible opportunity.

Superannuation Legislation Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 5 May 2009 by the Hon. Tim Holding MLA. The Committee considered the Bill on 1 June 2009 and made comments in Alert Digest No. 6 of 2009 tabled in the Parliament on 2 June 2009.

The Minister responded on 30 June 2009, which was reproduced in Alert Digest No 8 of 2009 on 28 July 2009. The Committee made further comments in relation to the Minister's response in that report, reproduced below.

Committee's Further Comments

The Committee notes the Minister's view that 'the reinstatement of reversionary spouse pensions does not impose any limits upon the equality right in section 8 but rather "will redress historical discrimination on the basis of marital status that occurred when reversionary spouse pensions were cancelled upon remarriage".'

The Committee observes that there are several different equality rights in Charter s. 8. While most of the rights in Charter s. 8 are engaged by bills that are discriminatory, an additional one – Charter s. 8(3)'s right to 'equal and effective protection against discrimination' – is engaged by bills that redress discrimination. The Committee considers that, where such a bill provides only limited redress and/or excludes some affected people from that redress, the statement of compatibility should explain how any limitations and exclusions are reasonable according to the test in Charter s. 7(2). This applies when or not the bill is beneficial in purpose; any historical discrimination can be justified; or the limitations or exclusions are based on attributes of discrimination set out in s. 6 of the Equal Opportunity Act 1985.

The Committee also notes that the tribunal and court decisions cited by the Minister do not address the merits of either the past or present rules on reversionary pensions. The HREOC complaint was dismissed because of a statutory exemption for superannuation schemes. The Canadian complaints were dismissed because the Canadian Charter does not apply retrospectively and the prospective discrimination fell outside of the protection of the Canadian Charter's anti-discrimination right. Neither jurisdiction has a right analogous to Charter s. 8(3)'s right to 'equal and effective protection against discrimination.' The Committee also observes that the Canadian legislation reinstating past reversionary pensions did so retroactively to the date of commencement of the Charter's equality right.

While the Committee appreciates the complexity of superannuation schemes as outlined in the Minister's letter, it considers that such matters should be dealt with in the statement of compatibility in the context of a Charter s. 7(2) analysis that both demonstrates the justification for the limitations and addresses the availability of less restrictive alternatives.

The Committee will write to the Minister seeking further information as to whether or not making the reinstated pension available from a fixed date (such as the commencement of the Bill or Charter s. 8) instead of the date of the application is a less restrictive alternative reasonably available to achieve the purpose of redressing historical discrimination.

Pending the Minister's response, the Committee draws attention to the Bill.

Minister's response

Thank you for your letter of 29 July 2009 in which you seek further information concerning the above Bill.

In particular, you seek further information as to whether or not making the reinstated pension available from a fixed date instead of the date of the application is a less restrictive

alternative reasonably available to achieve the purpose of redressing historical discrimination.

As previously advised, the Government is of the view that the provision of the Bill providing for reinstatement of reversionary spouse pensions does not impose any limits upon the equality right in section 8 of the Charter of Human Rights and Responsibilities (the Charter). Rather, the provision promotes the right to equality in section 8 of the Charter by providing a mechanism for re-instatement of pensions previously cancelled on the grounds of re-marriage.

Any potential limits upon the right to equality occur by reason of the provisions of the pre-amended legislation, not as a result of the Bill. I do not consider that section 28 of the Charter requires that I state why the pre-amended legislation is compatible with human rights.

However, as already explained, I consider that the previous provisions are not incompatible with the right to equality. To amount to discrimination, as defined by the Charter, the differential treatment must be based upon a prohibited attribute. This approach is adopted in all jurisdictions, irrespective of the wording of the right, including in relation to Article 26 of the International Covenant on Civil and Political Rights (ICCPR), upon which the right to equality in section 8 is based. Distinctions based upon matters such as the date of remarriage or the date of application for reinstatement are not prohibited attributes.

*I have previously referred the Committee to Canadian jurisprudence on this issue. Contrary to the Committee's comments, the legislative provisions in *Bauman v Nova Scotia (Attorney General)* (2001) 197 DLR (4th) 644 did not involve backdating all pensions to the date of commencement of the Canadian Charter of Rights and Freedoms (17 April 1985). For those whose pensions had ceased because of remarriage prior to the commencement of the Charter, pensions were only reinstated effective 1 January 1999. Although the case turned principally on arguments as to whether the relief claimed amounted to the retrospective application of the Canadian Charter, the Nova Scotia Court of Appeal considered the appropriate comparator group in order to determine whether any differential treatment was based upon a prohibited ground. It rejected the proposition that the appropriate group would be 'those widows who did not remarry and thus did not have their pensions terminated'.*

The court held that the distinction was not based upon marital status but on the date of remarriage:

The distinction here is temporal, that is, based upon the date of remarriage. The inquiry ends at this point. Discrimination can only occur where the differential treatment is based upon an enumerated or analogous ground. It is unnecessary to proceed to the third step of the equality analysis.

The same reasoning applies here. The effect of amendments to the legislation in 1993 was to remove any distinction based upon marital status by repealing the provision resulting in suspension of survivor spouse pensions upon remarriage. Any distinction that remained was based upon the date of remarriage rather than a prohibited attribute. That is, those that remarried prior to the 1993 amendments did not receive pensions while those who remarried after the amendments did. It is this distinction the Bill now addresses, on a prospective basis.

Even if there was a limit upon the equality right by the pre-amended legislation, I consider that any historical discrimination was reasonable and justified. Indeed such provisions were recommended by the Victorian Equal Opportunity Board in its 1980 Report into Discrimination and Pension Schemes.

As the right is not limited by the provisions of the Bill, it is not necessary to justify the limitation under section 7(2) of the Charter. Nevertheless, I refer to my previous letter to the Committee, which discusses the reasons for the prospective application of the provision, in particular that the reinstatement of a surviving spouse's pension can impact upon the pensions paid to other dependents of the deceased member.

Therefore it would not be appropriate to reinstate a pension prior to the date of application

TIM HOLDING MP

*Minister for Finance, WorkCover
and the Transport Accident Commission*

23 September 2009

The Committee thanks the Minister for this response.

**Committee Room
12 October 2009**

Appendix 1

Index of Bills in 2009

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| Appropriation (Parliament 2009/2010) Bill 2009 | 6 |
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| Assisted Reproductive Treatment Bill 2008 | 1 |
| Bushfires Royal Commission (Report) Bill 2009 | 4 |
| Bus Safety Bill 2008 | 1, 5 |
| Casino Legislation Amendment Bill 2009 | 7 |
| Cemeteries and Crematoria Amendment Bill 2009 | 9 |
| Children Legislation Amendment Bill 2009 | 5 |
| Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009 | 6 |
| Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009 | 9, 11 |
| Courts Legislation Amendment (Sunset Provisions) Bill 2009 | 8, 10 |
| Crimes Amendment (Identity Crime) Bill 2009 | 4, 6 |
| Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 | 12 |
| Criminal Procedure Bill 2008 | 1, 3 |
| Crown Land Acts Amendment (Lease and Licence Terms) Bill 2009 | 6 |
| Deakin University Bill 2009 | 12 |
| Duties Amendment Bill 2008 | 1 |
| Education and Training Reform Amendment (School Age) Bill 2009 | 11 |
| Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009 | 4, 5 |
| Energy and Resources Legislation Amendment Bill 2009 | 10 |
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| | |
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| Major Transport Projects Facilitation Bill 2009 | 10, 11 |
| Melbourne Cricket Ground Bill 2008 | 1 |
| Melbourne University Amendment Bill 2009 | 3 |
| Monash University Bill 2009 | 12 |
| National Parks Amendment (Point Nepean) Bill 2009 | 7 |
| Occupational Health and Safety Amendment (Employee Protection) Bill 2008 | 1, 7, 9 |
| Parliamentary Salaries and Superannuation Amendment Bill 2009 | 5 |
| Personal Property Securities (Commonwealth Powers) Bill 2009 | 10, 12 |
| Planning Legislation Amendment Bill 2009 | 5 |
| Planning Legislation Amendment Bill 2009 (No. 2) | 12 |
| Primary Industries Legislation Amendment Bill 2008 | 4 |
| Primary Industries Legislation Further Amendment Act 2009 | 8 |
| Racing Legislation Amendment (Racing Integrity Assurance) Bill 2009 | 9 |
| Relationships Amendment (Caring Relationships) Bill 2008 | 1 |
| Residential Tenancies Amendment (Housing Standards) Bill 2009 | 8 |
| Resources Industry Legislation Amendment Bill 2008 | 1 |
| Road Legislation Amendment Bill 2009 | 5, 12 |
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| Sentencing Amendment Bill 2009 | 12 |
| Serious Sex Offenders Monitoring Amendment Act 2009 | 2, 5 |
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| Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009 | 4, 7 |
| Statute Law Amendment (Evidence Consequential Provisions) Bill 2009 | 12 |
| Superannuation Legislation Amendment Bill 2009 | 6, 8, 12 |
| Tobacco Amendment (Protection of Children) Bill 2009 | 8, 10 |
| Transport Legislation Amendment (Driver and Industry Standards) Act 2008 | 1, 5 |
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| Transport Legislation Miscellaneous Amendments Bill 2008 | 1 |
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| Victorian Renewable Energy Amendment Bill 2009 | 11 |
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Appendix 2

Committee Comments classified by Terms of Reference

This Appendix lists Bills under the relevant Committee terms of reference where the Committee has raised issues requiring further correspondence with the appropriate Minister.

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

| | |
|--|----|
| Local Government Amendment (Conflicting Duties) Bill 2009 | 9 |
| Personal Property Securities (Commonwealth Powers) Bill 2009 | 10 |

(ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers

| | |
|--|----|
| Personal Property Securities (Commonwealth Powers) Bill 2009 | 10 |
|--|----|

(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions

| | |
|--|---|
| Tobacco Amendment (Protection of Children) Bill 2009 | 8 |
|--|---|

(vi) inappropriately delegates legislative power

| | |
|--|------|
| Bus Safety Bill 2008 | 1, 5 |
| Criminal Procedure Bill 2008 | 1, 3 |
| Personal Property Securities (Commonwealth Powers) Bill 2009 | 10 |

(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities

| | |
|---|----|
| Bus Safety Bill 2008 | 1 |
| Courts Legislation (Amendment) Judicial Resolution Conference) Bill 2009 | 9 |
| Courts Legislation Amendment (Sunset Provisions) Bill 2009 | 8 |
| Crimes Amendment (Identity Crime) Bill 2009 | 4 |
| Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 | 12 |
| Education and Training Reform Amendment (School Age) Bill 2009 | 11 |
| Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 | 6 |
| Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 | 6 |
| Fair Work (Commonwealth Powers) Bill 2009 | 7 |
| Human Tissue Amendment Bill 2009 | 8 |
| Justice Legislation Amendment Bill 2009 | 5 |
| Justice Legislation Further Amendment Bill 2009 | 10 |
| Local Government Amendment (Conflicting Duties) Bill 2009 | 9 |
| Local Government Amendment (Offences and Other Matters) Bill 2009 | 10 |
| Major Sporting Events Bill 2009 | 3 |
| Major Transport Projects Facilitation Bill 2009 | 10 |

Scrutiny of Acts and Regulations Committee

| | |
|--|---------|
| Occupational Health and Safety Amendment (Employee Protection) Bill 2008 | 1, 7, 9 |
| Personal Property Securities (Commonwealth Powers) Bill 2009 | 10 |
| Road Legislation Amendment Bill 2009 | 5 |
| Salaries Legislation Amendment (Salary Sacrifice) Act 2008 | 1 |
| Serious Sex Offenders Monitoring Amendment Act 2009 | 2 |
| Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009 | 4 |
| Tobacco Amendment (Protection of Children) Bill 2009 | 8 |
| Transport Legislation Amendment (Driver and Industry Standards) Act 2008 | 1 |

Section 17(b)

(i) and (ii) repeals, alters or varies the jurisdiction of the Supreme Court

| | |
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| Major Transport Projects Facilitation Bill 2009 | 10 |

Appendix 3

Ministerial Correspondence

Table of correspondence between the Committee and Ministers during 2008-09

| Bill Title | Minister/ Member | Date of Committee Letter / Minister's Response | Alert Digest No. Issue raised / Response Published |
|--|-----------------------------------|---|---|
| Assisted Reproductive Treatment Bill 2008 | Health | 06.11.08 08.12.08 | 12 of 2008 1 of 2009 |
| Major Crime Legislation Amendment Bill 2008 | Attorney-General | 02.12.08 23.02.09 | 15 of 2008 3 of 2009 |
| Primary Industries Legislation Amendment Bill 2008 | Agriculture | 02.12.08 10.03.09 | 15 of 2008 4 of 2009 |
| Relationships Amendment (Caring Relationships) Bill 2008 | Attorney-General | 02.12.08 19.12.08 | 15 of 2008 1 of 2009 |
| Bus Safety Bill 2008 | Public Transport | 04.02.09 30.03.09 | 1 of 2009 5 of 2009 |
| Criminal Procedure Bill 2008 | Attorney-General | 04.02.09 23.02.09 | 1 of 2009 3 of 2009 |
| Occupational Health and Safety Amendment (Employee Protection) Bill 2008 | Industrial Relations | 04.02.09 29.06.09 23.06.09 30.07.09 | 1 of 2009 7 of 2009 7 of 2009 9 of 2009 |
| Salaries Legislation Amendment (Salary Sacrifice) Act 2008 | Finance | 04.02.09 21.04.09 | 1 of 2009 5 of 2009 |
| Transport Legislation Amendment (Driver and Industry Standards) Act 2008 | Public Transport | 04.02.09 30.03.09 | 1 of 2009 5 of 2009 |
| Salaries Legislation Amendment (Salary Sacrifice) Act 2008 AND Transport Legislation Amendment (Driver and Industry Standards) Act 2008 | WorkCover Public Transport | 04.02.09 | 1 of 2009 |
| Serious Sex Offenders Monitoring Amendment Act 2009 | Corrections | 26.02.09 22.04.09 | 2 of 2009 5 of 2009 |
| Major Sporting Events Bill 2009 | Minister for Sport & Recreation | 20.03.09 01.04.09 | 3 of 2009 5 of 2009 |
| Crimes Amendment (Identity Crime) Bill 2009 | Attorney-General | 31.03.09 04.05.09 | 4 of 2009 6 of 2009 |
| Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009 | Energy and Resources | 31.03.09 09.04.09 | 4 of 2009 5 of 2009 |

Scrutiny of Acts and Regulations Committee

| Bill Title | Minister/ Member | Date of Committee Letter / Minister's Response | Alert Digest No. Issue raised / Response Published |
|---|--|---|---|
| Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009 | Attorney-General | 31.03.09 04.06.09 | 4 of 2009 7 of 2009 |
| Justice Legislation Amendment Bill 2009 | Racing | 08.05.09 29.05.09 | 5 of 2009 6 of 2009 |
| Road Legislation Amendment Bill 2009 | Roads and Ports | 06.05.09 | 5 of 2009 |
| Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 | Energy and Resources | 02.06.09 15.07.09 | 6 of 2009 8 of 2009 |
| Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 | Ms Colleen Hartland MLC | 02.06.09 04.06.09 | 6 of 2009 7 of 2009 |
| Superannuation Legislation Amendment Bill 2009 | Finance | 02.06.09 30.06.09 28.07.09 23.09.09 | 6 of 2009 8 of 2009 8 of 2009 12 of 2009 |
| Fair Work (Commonwealth Powers) Bill 2009 | Industrial Relations | 23.06.09 | 7 of 2009 |
| Courts Legislation Amendment (Sunset Provisions) Bill 2009 | Attorney-General | 28.07.09 26.08.09 | 8 of 2009 10 of 2009 |
| Human Tissue Amendment Bill 2009 | Health | 28.07.09 10.08.09 | 8 of 2009 10 of 2009 |
| Tobacco Amendment (Protection of Children) Bill 2009 | Health | 28.07.09 10.08.09 | 8 of 2009 10 of 2009 |
| Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009 | Attorney-General | 11.08.09 04.09.09 | 9 of 2009 11 of 2009 |
| Local Government Amendment (Conflicting Duties) Bill 2009 | Local Government | 11.08.09 01.09.09 | 9 of 2009 11 of 2009 |
| Justice Legislation Further Amendment Bill 2009 | Police and Emergency Services Corrections | 01.09.09 | 10 of 2009 |
| Local Government Amendment (Offences and Other Matters) Bill 2009 | Local Government | 01.09.09 25.09.09 | 10 of 2009 12 of 2009 |
| Major Transport Projects Facilitation Bill 2009 | Roads and Ports | 01.09.09 09.09.09 | 10 of 2009 11 of 2009 |
| Personal Property Securities (Commonwealth Powers) Bill 2009 | Attorney-General | 01.09.09 14.09.09 01.09.09 29.09.09 | 10 of 2009 12 of 2009 |
| Education and Training Reform Amendment (School Age) Bill 2009 | Education | 15.09.09 | 11 of 2009 |
| Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 | Attorney-General | 13.10.09 | 12 of 2009 |