

No. 10 of 2009

Tuesday, 1 September 2009

On the

Courts Legislation Amendment (Sunset Provisions) Bill 2009

Energy and Resources Legislation Amendment Bill 2009

Gambling Regulation Further Amendment Bill 2009

Human Tissue Amendment Bill 2009

Justice Legislation Further Amendment Bill 2009

Liquor Control Reform Amendment (Licensing) Bill 2009

Local Government Amendment (Offences and Other Matters) Bill 2009

Major Transport Projects Facilitation Bill 2009

Personal Property Securities (Commonwealth Powers) Bill 2009

Tobacco Amendment (Protection of Children) 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 –

Energy and Resources Legislation Amendment Bill 2009
Gambling Regulation Further Amendment Bill 2009
Justice Legislation Further Amendment Bill 2009
Liquor Control Reform Amendment (Licensing) Bill 2009
Local Government Amendment (Offences and Other Matters) Bill 2009
Major Transport Projects Facilitation Bill 2009
Personal Property Securities (Commonwealth Powers) Bill 2009

The Committee notes the following correspondence –

Courts Legislation Amendment (Sunset Provisions) Bill 2009
Human Tissue Amendment Bill 2009
Tobacco Amendment (Protection of Children) 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. 10 of 2009

Energy and Resources Legislation Amendment Bill 2009

Introduced	11 August 2009
Second Reading Speech	12 August 2009
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Minister for Energy and Resources

Background

The Bill amends the —

- *Electricity Industry Act 2000* to make further provision for notifications of standing offers to domestic or small business customers. **[3]**
- *Electricity Safety Act 1998* to provide for equipment to be prescribed under Part 5 rather than be proclaimed, and to empower Energy Safe Victoria to exempt a person from compliance with the equipment efficiency regulations. **[4 to 12]**
- *Electricity Safety Act 1998* and *Electricity Safety Amendment Act 2007* to make further provision in relation to electricity safety management schemes. **[13 to 16]**
- *Gas Industry Act 2001* to make further provision for notifications of standing offers to domestic or small business customers. **[17 and 18]**
- *Gas Safety Act 1997* to provide for a system of labelling Type A appliances that are accepted under that Act. **[19 to 22]**
- *Mineral Resources (Sustainable Development) Act 1990* and the *Resources Industry Legislation Amendment Act 2009* to provide for certain work plans to be approved as area work plans **[26 and 33]**; impose a mine stability levy in relation to certain mines in the La Trobe Valley **[25]**; provide for risk management requirements for declared mines and declared quarries **[24]**. The Bill will require the holder of a mining licence or extractive industry work authority to notify the Chief Inspector of a reportable event such as an event that presents a risk to the geotechnical stability of that mine or quarry. The Bill will enable the Chief Inspector to request a detailed report into a reportable event. **[27 and 34]**
- *Petroleum Act 1998* to provide for the granting of special drilling authorisations to holders of exploration permits, retention leases or production licences and leases, licences and permits under that Act and the *Petroleum (Submerged Lands) Act 1982*. **[35 to 41]**.

Extract from the Second Reading Speech –

The Bill also amends the Petroleum Act 1998 to create a new authorisation called a special drilling authorisation. A special drilling authorisation will enable the holder of a petroleum licence, lease or permit under either the Petroleum Act 1998 or the Petroleum (Submerged Lands) Act 1982, to access their licence, lease or permit area from an adjoining piece of land in onshore Victoria, by way of directionally drilling from the adjoining land to the other area. ... The special drilling authorisation will be subject to the existing approvals, planning, Aboriginal heritage, and environment protection and rehabilitation frameworks in the Act.

The Committee makes no further comment.

Gambling Regulation Further Amendment Bill 2009

Introduced	11 August 2009
Second Reading Speech	13 August 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Gaming

Purpose

The Bill makes miscellaneous amendments to the *Gambling Regulation Act 2003*.

Background

Extracts from the Second Reading Speech –

... This Bill introduces a scheme for the government 'buyback' of gaming machine entitlements if the decision is taken after 2012 to reduce the regional and municipal limits or the State-wide cap of 27,500 gaming machine entitlements. [51 to 55]

... The government has also decided that a single independent monitor will oversee the integrity of gaming machine transactions in gaming venues from 2012.

... The Gambling Regulation Act provides that for a gaming machine to operate it must be connected to the monitoring system. In the absence of the services of the monitor there will be no ability to operate gaming machines. The Bill seeks to address the consequences where there is an absence of monitoring services - for example, where no monitoring licensee has been appointed, where the monitoring licence is cancelled or suspended or in other circumstances where there is a significant failure in the provision of monitoring services. The Bill gives the Minister the power to direct the Commission to appoint a manager to operate the monitoring system on an interim basis until the system is restored or an alternate appointment of a monitoring licensee can be made under the Act.

The possibility of the monitoring system not being available raises significant risks for both the State and the monitoring licensee. The Bill therefore provides for a cap on the liability of the monitor and protections for the State so that the State does not carry any risk in relation to the provision of monitoring services. However, there is a need for a level of liability of the monitoring licensee to be maintained and damages are proposed to apply for poor performance. The Bill provides that the Minister, in consultation with the Treasurer, shall determine the amount of damages payable by the monitoring licensee.

The level of damages and the events for which the monitor will be liable will be set out in the related agreement to be entered into between the licensee and the Minister. The Bill also ensures that players and venues are protected by providing that the monitor will still be liable where a prize cannot be paid out due to a failure to provide the monitoring system. [30 to 40]

... The Bill will replace the current \$3000 limit on payment of bingo prizes in cash with a limit of \$1000. [105]

Content and Committee comment

The Bill provides that its provisions come into operation on proclamation but not later than by 1 September 2012. [2]

Note: From the explanatory memorandum – *The forced commencement date in subsection (2) is due to the fact that under the Principal Act, the new structure of the gaming industry will not commence until 2012. As many of the provisions in this Act relate to the new structure of the gaming industry, those provisions cannot come into operation until that time.*

The Committee makes no further comment.

Justice Legislation Further Amendment Bill 2009

Introduced	28 July 2009
Second Reading Speech	11 August 2009
House	Legislative Assembly
Member introducing Bill	Hon. Bob Cameron MLA
Portfolio responsibility	Minister for Police and Emergency Services Minister for Corrections

Purpose

The Bill amends a number of justice related Acts.

Corrections Act 1986

The Bill amends this Act to ensure that volunteers or offenders who are injured undertaking tasks or programs under the Act are entitled to compensation under the *Accident Compensation Act 1985* but without being deemed to be employees of the Crown for compensation purposes as currently provided by section 110 of the Act. **[3 to 6]**

Note: From the explanatory memorandum – *The amendment does not change the rights or entitlements of volunteers or offenders when injured.*

Drugs, Poisons and Controlled Substances Act 1981

The Bill establishes a mandatory sales and storage regime for precursor chemicals and scientific equipment with the insertion of a new Part VB to the Act. The purpose of the regime is to protect the supply chain by allowing transactions that can be recorded and traced through customer accounts, end user declarations and transaction records. Suppliers will also be required to check each customer's proof of identity. The Bill established strict record keeping storage requirements to ensure transactions can be traced for law enforcement purposes. The regime applies to manufacturers, importers, distributors and wholesalers but does not apply to retail sales of retail products containing precursor chemicals. **[7 to 9]**

Firearms Act 1996

The Bill clarifies the application of the Act in respect to exemptions to hold a firearms licence, use, acquiring, storing and disposing of firearms by the Director and staff of the Office of Police Integrity.

An authorised member of staff of the Office of Police Integrity is exempted from the offences respectively, under section 102 of acquiring certain firearms without a permit issued by the Chief Commissioner of Police; under section 130 for carriage or use of firearms in a town, populous place or thoroughfare when acting in the course of official duties, under section 131 for possession, carriage or use of firearms on private property without the consent of the owner or occupier when acting in the course of official duties. **[15 to 20]**

The Director, Police Integrity is exempted from the requirement to hold a licence under the Act when possessing or carrying a firearm in his or her official duties. **[21]**

Police Integrity Act 2008

The Bill inserts a new category of Office of Police Integrity (OPI) staff, that of 'senior investigator' and permits this category (by delegation from the Director) to exercise coercive questioning powers and to disclose information obtained in the course of investigations to other law enforcement agencies and corresponding authorities. **[22]**

The Part also extends the classes of persons to 'approved health professionals' who may take blood samples from OPI staff who have been involved in a critical incident. **[23 and 24]**

Privilege against self-incrimination

The Bill will amend section 99(6) of the Act to remove 'self-incrimination privilege' as a basis for a claim of privilege in relation to documents or other things seized under a search warrant and provides that the only grounds of privilege applicable to material seized under a search warrant are legal professional privilege, public interest immunity and parliamentary privilege. **[28]**

The Bill provides that the Director may only authorise a member of staff of OPI to possess, carry or use defensive equipment or firearms who has undergone an appropriate course of training and allows defensive equipment and firearms to be possessed, carried and used for defensive purposes and requires the storage requirements in the *Firearms Act 1996* to be complied with. **[29 to 32]**

Sex Offenders Registration Act 2004

The Bill proposes to set up a process that would allow the Chief Commissioner of Police to apply to the Supreme Court for an order suspending a registrable offender's reporting obligations under the Act for a specified period at any time during the reporting period and, on application to the Court, a process for revoking the suspension so made. **[35 to 40]**

The Bill will clarify that a Court can place a child offender on the Register in respect of serious sexual offences against an adult. **[41]**

The Bill will require additional reporting obligations requiring a registered offender to provide personal information about the registered offenders internet addresses and passport details. (*Refer to Charter Report below*) **[42]**

The Bill will also clarify that a person who has been found guilty of a registrable offence which was committed as an adult, and where that person has also been found guilty of prior relevant offences as a juvenile, that those prior juvenile offences (if relevant) may be taken into account in determining the registration period to be imposed without any discount for consideration of the age of the person when the juvenile offences occurred. **[45 and 46]**

The Bill inserts a new provision to enable the Chief Commissioner of Police to notify the Secretary to the Department of Justice of specified details contained in the Register of Sex Offenders for the purposes of administering the *Working with Children Act 2005*. **[47]**

Legal Aid Act 1978

The Bill provides that Victoria Legal Aid may enter into arrangements for the provision of legal services on behalf of the Secretary to the Department of Justice to persons called to be examined by the Director, Police Integrity and in other circumstances where the Attorney-General has approved the provision of such services. **[53]**

Police Regulation Act 1958

The Bill proposes to amend the Act to allow an approved health professional to take a sample of blood from a Victoria Police member for analysis for the presence of alcohol or a drug of dependence and to provide protection for an approved health professional from any legal action arising from anything properly or necessarily done in the performance of those duties. **[58 and 59]**

Witness Protection Act 1991

The Bill proposes to extend the time that the Director, Police Integrity has to consider an appeal against a decision by the Chief Commissioner to terminate involuntarily a person's participation in the Victorian witness protection scheme from 3 days to 14 days. [62]

Working with Children Act 2005

The Bill proposes to allow for notifications by other jurisdiction's law enforcement agencies in relation to charges or convictions in those jurisdictions and for the Secretary to re-assess a person's eligibility to have an assessment notice based on these notifications. [63]

Charter report

Privacy – Sex offenders must supply user names and identities – Adequacy of statement of compatibility – Whether arbitrary – Whether unlawful

Summary: Clause 42 requires registrable offenders to report their 'user name or identity'. The Committee is concerned that the Statement of Compatibility does not address the compatibility or otherwise of clause 42's extension of the sex offender registration scheme with human rights. The Committee is also concerned that requiring registrable offenders to notify the police of user names that are not used for personal communication may be an arbitrary interference with the offenders' privacy and that registrable offenders will not know how to comply with their new obligations under the Act. It will write to the Minister seeking further information.

The Committee notes that clause 42, amending s. 14 of the Sex Offenders Registration Act 2004, requires registrable offenders to initially report their 'Internet user names' and 'other user name or identity' that are 'used or intended to be used by the registrable offender through the Internet or other electronic communication service'. The same details must also be reported annually (s. 16) and within 14 days of any change (s. 17(1)). The Committee considers that clause 42 engages the rights of registrable offenders not to have their 'privacy or correspondence unlawfully or arbitrarily interfered with'.¹

The Statement of Compatibility remarks:

The purpose sought to be achieved by the limitation relates to societal concerns of child and community safety that are pressing and substantial. The extension of the provision to collect a new range of personal information is necessary having regard to the expanded contact opportunities that are now afforded by the internet environment and other means of remote communication.

The Statement of Compatibility does not specifically address the requirements that the interference with privacy be neither unlawful nor arbitrary.

The Committee observes that, while the present s. 14 requires reporting of a specific list of permanent or semi-permanent personal characteristics (e.g. residence, standard contact details, employment, car registration), or behaviour specific to children (affiliation with an organisation with child membership or participation), clause 42 requires reporting of an open-ended set of typically temporary characteristics related to very diffuse behaviour (i.e. all uses of the internet and electronic communication services) whether or not there is any connection with children or any other potential criminal behaviour. Clause 42 therefore represents a

¹ Charter s. 13(a).

significant increase in surveillance of the behaviour of registered offenders, at a level more akin to the regime set out in the *Serious Sex Offenders Monitoring Act 2005*.²

The Committee is concerned that the Statement of Compatibility does not address the compatibility or otherwise of the sex offender registration scheme in its extended form with human rights. The Committee recalls its *Alert Digest No. 15 of 2008*, where it said (in relation to the *Major Crime Legislation Amendment Bill 2008*):

*The Committee considers that when anything more than a technical extension is made to an existing scheme that engages human rights, Charter s. 28 requires that the Statement of Compatibility include an explanation of the compatibility or otherwise of the scheme (in its extended form) with human rights.*³

The Committee feels that a qualitative change in a broad-based scheme automatically applicable to significant categories of offenders (including offences committed before the amendment) is an important instance of this principle. If such changes are not addressed in the Statement, then there is a risk that human rights may be significantly limited through incremental expansions of existing legislation.

Moreover, while the Committee appreciates the difficulties involved in protecting the community from crimes perpetrated on the internet, it has two concerns about the compatibility of clause 42 with the Charter's right to privacy:

First, the requirement to disclose all user names and identities used online extends considerably beyond 'the expanded contact opportunities that are now afforded by the internet environment.' The internet is widely used not only for broad interpersonal communications (e.g. social networking sites) but also for narrow, impersonal communications (e.g. bids on internet auction sites) and for receiving information (e.g. reading articles on an online newspaper site.) It is common for internet users to be issued with or required to apply for different user names or identities to use most commercial sites (though those user names are typically not released publicly.) **The Committee is concerned that requiring registrable offenders to notify the police of user names that are not used for interpersonal communication (e.g. the login name they use to browse *The Age online*) may be an arbitrary interference with those offenders' privacy.**

Second, clause 42 does not define either 'identity' or 'electronic communication service'. These terms could potentially cover a wide range of information, from trivial to sensitive, including:

- a picture (e.g. of Bart Simpson) nominated by an offender to appear alongside his or her postings on a website discussion forum
- the characteristics of a fictional character played by the offender in an online game (e.g. 'a level 42 Orc blacksmith of the Horde faction')
- the offender's customer number for an online banking service
- the offender's tax file number and digital signature used to fill in an online tax return
- the offender's login name for a secure intranet at a commercial firm
- the name of a secure home wifi network
- the login for the offender's home computer

The Committee is concerned that, in the absence of definitions of 'identity' and 'electronic communication service', registrable offenders will not know how to comply with their new obligations under the Act.

² *Serious Sex Offenders Monitoring Act 2005*, s. 16(h).

³ *Alert Digest No 15 of 2008*, p. 3.

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

- 1. Whether and how the Sex Offenders Registration Act 2004 will be compatible with human rights after clause 42 is enacted.***
- 2. What is the purpose of requiring registered offenders to report user names for websites that involve no or limited personal communication and where the user names may never be published?***
- 3. What is the meaning of 'identity' and 'electronic communication service' in clause 42?***

Pending the Minister's response, the Committee draws attention to clause 42.

The Committee makes no further comment.

Liquor Control Reform Amendment (Licensing) Bill 2009

Introduced	11 August 2009
Second Reading Speech	12 August 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill amends the *Liquor Control Reform Act 1998* (the 'Act') to —

- amend the objects section of the Act to add harm minimisation and the responsible consumption of alcohol as key overall objectives of the Act. [5]
- create three new licence categories for late night licences, restaurant and cafe licences and major event licences (more than 5000 patrons). [6, 9, 13 & 17]
- create late night (general) licences, late night (on premises) licences and late night (packaged liquor) licences as sub-categories of late night licences. [7, 8 & 10-11]
- create renewable limited licences and temporary limited licences as sub-categories of limited licences to recognise the distinction between on-going (renewable businesses) and a one-off event over a limited period which are not renewable. [12 & 14-16]
- introduce a new risk-based structure for licence fees by expanding on the factors that can be used to determine how fees will be set under the regulations. Factors may include the nature and scale of activities; trading hours; number of patrons; previous conduct of the licensee; and the previous compliance history of the licensee. [27 and 29]

Background

Extracts from the Second Reading Speech –

Regulation making power

To enable the introduction of the new risk-based fee model, the Bill expands on the factors that can be used to determine how fees will be set under the regulations. It enables new regulations to provide for calculation of fees on the basis of: the nature and scale of activities being carried out at the licensed premises; the trading hours; the number of patrons; activities that may reduce the risk of alcohol-related harm arising from the operation of a licence or permit; the previous conduct of a licensee or permittee in carrying out activities under a licence or permit; the previous history of a licensee or permittee in complying with this act and the regulations; any other factors that are consistent with the objects of the Act. Through these amendments to the regulations-making power we can capture additional risk factors in the future when further data is available. This may include rewarding venues for good management practices or looking at the broader harm minimisation objectives of the Act.

Content and Committee comment

Commencement provision

Sections 1, and 31 (transitional provisions) come into operation on the date on which the Act receives Royal Assent. The remaining provisions come into operation on proclamation but not later than by 1 July 2011.

Note: The explanatory memorandum provides – *This is to allow sufficient time for the implementation of the Bill.*

The Committee makes no further comment.

Local Government Amendment (Offences and Other Matters) Bill 2009

Introduced	11 August 2009
Second Reading Speech	12 August 2009
House	Legislative Assembly
Member introducing Bill	Hon. Richard Wynne MLA
Portfolio responsibility	Minister for Local Government

Purpose

The Bill amends the *Local Government Act 1989* (the 'Act') to increase the penalties for certain offences and to amend certain penalties for consistency with the *Sentencing Act 1991* and to make technical amendments to the *City of Melbourne Act 2001*.

Note: From the Second Reading Speech – *The levels of most penalties in the Local Government Act were set in 1989, when originally enacted, and changes are now required. Most penalty levels currently specified in the Act are inconsistent with the standards laid out in the Sentencing Act 1991. As a result the Bill amends many penalty levels to match those standards.*

Background

From the Second Reading Speech –

Offences relating to the misuse of voters rolls or the provision of false enrolment information are proposed to be increased from 10 or 20 penalty units to a maximum of 120 penalty units. [5, 6 and 37]

... The Bill will increase the maximum penalty for a person who nominates for election when not entitled to do so from 20 penalty units to either imprisonment for two years or a fine of 240 penalty units. [7]

Interfering with a person's free exercise of their democratic rights or interfering with a person when marking their ballot paper will have a penalty of up to one year imprisonment or a fine of 120 penalty units. These offences previously had penalties of only 1 penalty unit. A similar penalty level will also be set for a person who breaches the secrecy of the vote. [8 and 17]

Actions that constitute serious interference with the voting process, such as interfering with ballot boxes, interfering with the delivery of postal votes or impersonating a voter, will have higher maximum penalties of imprisonment for two years or fines of up to 240 penalty units. [9 to 15]

A person who commits an offence by offering, giving, seeking or accepting a bribe in connection with an election may be liable to a maximum penalty of five years imprisonment or a fine of up to 600 penalty units. [16]

The penalty for acting as a councillor when not entitled to be a councillor will be increased from 10 penalty units to a maximum of imprisonment for one year or a fine of 120 penalty units. In addition, a court will be empowered to order a person found guilty of this offence to repay any allowances, reimbursements, equipment or materials received during the period they acted as a councillor when not entitled to do so. [20 and 42]

The Bill also amends the list of possible offences that, if convicted, result in a person ceasing to be eligible to be a councillor for seven years. In addition to existing offences, this will now also apply to a conviction for an unlawful nomination or acting as a councillor when not capable. It will also apply to convictions for some additional electoral offences, such as interfering with a person's exercise of their rights or publishing a misleading representation of a ballot paper. [38]

The Bill makes a number of amendments to the Local Government Act to improve the functioning of the Act. This includes some amendments relating to the conflict of interest provisions.

... The definition of an 'applicable gift' will be amended by the Bill to exclude hospitality received from a not-for-profit organisation at a function or event that is attended in an official capacity by a mayor, councillor or member of council staff. This will enable attendance at many functions without giving rise to possible conflicts of interest in the future as long as the level of hospitality is reasonable. [43, 46]

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.⁴

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 expression⁵ 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.⁶

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.

⁴ *Alert Digest No 8 of 2009*, p. 10.

⁵ Charter s. 15(2) provides that 'Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds'.

⁶ Charter s. 25(1) provides that 'A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.'

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.

Major Transport Projects Facilitation Bill 2009

Introduced	12 August 2009
Second Reading Speech	13 August 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

Purpose and background

The Bill proposes to facilitate the development and construction of major transport infrastructure projects ('project') by providing for a 'one-stop shop' fully coordinated assessment and approval process in relation to all the regulatory requirements needed to enable the undertaking of projects.

The Bill provides that a project is "declared" by the Governor in Council on recommendation of the Premier after being assessed as being of State or regional economic, social or environmental significance. A Ministerial guideline published by the Premier will specify the criteria for determining whether to declare a project.

The 'one-stop shop' consolidates the multiple environmental, planning and heritage approvals required for projects into a single assessment and approval process by providing that the Minister for Planning may determine all required approvals in a single decision-making power and in accordance with specified statutory time limits. The Planning Minister's decision must take into account the criteria under existing legislation.

A project must be assessed using one of two assessment "streams"— either the comprehensive impacts statement (CIS) assessment process or the impact management plan (IMP) assessment process.

The IMP assessment process is intended to provide a streamlined assessment and approval process in cases where only a limited number of approvals are required. The IMP stream is available only where the land required for the project is owned by a public authority or reserved for a public purpose, and where the project does not require or has already obtained relevant approvals or consents under State legislation.

A CIS statement for a declared project must be publicly exhibited and submissions invited. The Minister for Planning will establish a body similar to a planning panel known as an assessment committee to receive and review submissions, and to conduct a preliminary hearing and formal public hearing in relation to the CIS.

The Planning Minister must take into account the assessment committee's recommendation and other material when making his or her decision as to whether to grant the necessary approvals sought under the CIS process.

The Bill ousts all forms of judicial review and appeal against all decisions in Parts 1 to 4 of the Bill except the final approval decision of the Planning Minister in clause 77(1). A review of a decision under clause 77 will be subject to certain requirements to expedite the hearing to minimise the impact of the proceeding on project delivery timelines.

Content and Committee comment

Compulsory acquisition of land

The Bill proposes to grant a project authority the power to compulsorily acquire an interest in land and or a native title right for any purpose connected with an approved project following

the making of an order by the project Minister. The Bill further allows a project authority to temporarily occupy land for the purpose of the Act, including the power to demolish structures (other than places of residence or business). **[112-132]**

The Bill provides that the *Land Acquisition and Compensation Act 1986* (Land Acquisition Act) applies, with minor modification, to the acquisition of interests in land and or temporary occupation of land for the purposes of an approved project. **[113]**

Note: From the Statement of Compatibility – *As the acquisition land is to be governed by the Land Acquisition Act, the acquisition gives rise to a right to compensation on just terms, and the lawfulness of an acquisition may be tested through judicial review. Further, the Land Acquisition Act sets out clear requirements for notification, procedures for acquisition and determination of compensation. Similarly, any compulsory acquisition of a native title right must comply with the procedures set out under the Commonwealth Native Title Act 1993. Any holder of a native title right must be compensated on just terms for the loss of this right.*

Possession of private residence

The Bill provides for the authority to enter into possession of project land and provides that where the project land is used as the principal place of residence, the authority must not enter into possession within 3 months of the land becoming project land and unless the project authority has given 7 days notice in writing of its intention to enter into possession but the time period may be reduced by certification of the Governor in Council if it is not practicable to do so having regard to the urgency of the case or other exceptional circumstances and the public interest. **[151-155]**

Note: From the Statement of Compatibility – *The decision is subject to judicial review, which ensures that its lawfulness may be scrutinised by the courts. On that basis, the Bill does not provide for unlawful or arbitrary interference with a person's home and does not limit the right to privacy in s 13 of the Charter.*

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

No appeal or review lies in respect to certain decisions

The Bill prevents appeals being brought or reviews of decisions from occurring in relation to decisions made under Parts 1, 2, 3 and 4 of the Act, apart from the decision of the planning Minister under proposed section 77 (final planning approval decision). **[263 and 265]**

Clause 265 declares that it is the intention of section 263 to alter or vary section 85 of the *Constitution Act 1975*. Section 263 provides that no appeal shall lie against certain decisions made under Parts 1 to 4 of the Act.

The Committee notes the section 85 Statement from the Second Reading Speech –

Clause 263 of the Bill provides that no decision made or purported to be made under Parts 1, 2, 3 or 4 of the Bill (other than the approval decision) is liable to be challenged, appealed against, reviewed, quashed or called in question in any court or tribunal (including VCAT) on any account or before any person acting judicially within the meaning of the Evidence Act 1958. This provision applies despite anything to the contrary in an applicable law (as defined under the Bill).

In addition, clause 263 provides that no proceedings seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration or injunction, or seeking any order under the Administrative Law Act 1978 may be brought against a decision-maker under Parts 1, 2, 3 or 4 of the Bill in respect of those decisions.

The term 'decision' is defined widely in clause 263 to capture all relevant decisions (defined in the clause as specified decisions), purported specified decisions and decisions and purported decisions made for the purpose of a specified decision.

The clause explicitly provides that its purpose and intent is to preclude any review or appeals of any kind, including an absence of jurisdiction, excess of jurisdiction or any other ground of administrative law review or challenge or appeal.

The only decision under the bill excepted from this general limitation is the final approval decision of the planning minister under clause 77(1) of the bill. This is clearly the most important decision in the scheme reflected in the Bill.

The Bill expedites any review of a decision under clause 77(1) by providing:

- that despite any alternative provision, any proceeding to challenge a decision must be commenced within 21 days from the date on which notice of the making of the decision is published in the Government Gazette. This time limit is a mandatory not directory requirement;*
- that in hearing and determining the proceeding, the court may at its discretion conduct the proceeding with as much informality and expedition as possible; and*
- that in hearing and determining the proceeding, or any matter in the proceeding, including whether or not to grant any stay or injunction relating to that proceeding, the court must have regard to the need for the expeditious development of transport infrastructure in order for services to be provided for the benefit of the Victorian community and the need for certainty of risk and cost in the delivery of declared projects.*

The reason for altering or varying section 85 of the Constitution Act 1975 is to provide for greater certainty of process under the Bill in order to expedite the delivery of transport infrastructure and services for the benefit of the Victorian community.

The key objective of the Bill is to provide a more certain, predictable and timely process for the consideration of project impacts and the granting or approvals, consents and authorisations that are required before the construction of a major transport project can proceed.

If decisions other than the final approval decision can be reviewed or appealed, it introduces uncertainty and generates a risk of delay to project delivery. This risk appears first in the form of project delay and lost benefits to the community. The risk also reduces the attractiveness of Victoria's major transport projects in investment markets and results in risk of increased costs for those private sector construction companies that are preparing bids to participate in the delivery of projects. Such costs are ultimately passed on to the state.

The costs can be very significant -- in the tens of millions of dollars -- if, for example, delay means that it is not possible to secure finances before available funding is allocated elsewhere and the cost of credit increases. Delays can also prolong the operation of 'bid teams' for weeks or months while the outcome of a review or appeal is being determined.

Secondly, decisions under the Bill relating to the assessment, approval and delivery of major transport projects are based on transparent and accountable decision-making processes that incorporate best practice approaches to public consultation. For example, public exhibition and public hearings are mandatory and integral parts of the comprehensive impact statement process under the Bill; and the primary decision-maker, the planning minister, is accountable for his or her decisions. These characteristics and features of the Bill significantly reduce the risks that section 85 of the Constitution Act safeguards against.

The expected benefits of certainty are high and the risks associated with removing review and appeal rights for decision other than the approval decision are considered low. It is not in the public interest for the delivery of major transport infrastructure in Victoria to potentially be delayed by applications seeking scrutiny of a process which retains the rights to challenge the key decision, and is already transparent and inclusive and administered by a responsible Minister.

Constitution Act 1975, section 85 – Repeal, alteration or variation of the unlimited jurisdiction of the Supreme Court⁷

The Committee notes that clause 263 prevent appeals or reviews of decisions made under Parts 1 to 4 of the proposed Act.

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**Expression – Public life – Criminalisation of insults at an assessment meeting – Whether reasonably necessary**

Summary: Clause 252 may criminalise vigorous public participation in an impact assessment meeting. The Committee considers that clause 252 may be incompatible with the Charter. The Committee will write to the Minister seeking further information.

The Committee notes that clause 252 provides that anyone who ‘insults a member of an assessment committee while the member is performing functions or exercising powers as a member’ or ‘insults any person attending a hearing before an assessment committee’ is guilty of an offence. Clause 252 engages the Charter’s rights to expression and public life.

The Statement of Compatibility remarks:

These provisions are reasonably necessary for the protection of public order under s 15(3) of the Charter,... They are... reasonably necessary to achieve the purpose of maintaining public order in such a forum. It is essential for the production of proper and accurate impact assessments that such hearings are conducted in an environment that is free from intimidation or coercion.

The Committee observes that the remainder of clause 252 already criminalises assaults, obstruction, misbehaviour, interruptions and disobedience at impact assessment meetings. **A ban on insulting behaviour goes further than banning ‘intimidation or coercion’ and may criminalise vigorous public participation in an impact assessment meeting.** In 2004, a majority of the High Court ruled that the term ‘insulting’ extends to public allegations of corruption,⁸ a meaning that a (different) majority considered to be incompatible with the federal constitution’s freedom of political expression. **The Committee therefore considers that clause 252 may be incompatible with the Charter.**

Clause 252 is in identical terms to s. 169 of the *Planning and Environment Act 1987*, which was enacted two decades before the Charter became operational. The Committee considers that the criminalisation of insults should be reconsidered in light of the passage of the Charter and, in particular, the right to freedom of expression. Indeed, a recent Bill decriminalised insulting a member of staff of the Victorian Equal Opportunity and Human

⁷ Section 85(1) of the *Constitution Act 1975* provides that “Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction”.

⁸ *Coleman v Power* [2004] HCA 39, 220 CLR 1, on interpretation: [16] (Gleeson CJ), [72] (McHugh J), [286] (Callinan J), [314] (Heydon J); on constitutionality: [102, 104-105] (McHugh J), [199] (Gummow & Hayne JJ), [253] (Kirby J).

Rights Commission⁹ and another Bill recently declined to criminalise insulting a person operating a road safety camera.¹⁰

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

- 1. In light of the remainder of clause 252, why is the criminalisation of insults in impact assessment meetings reasonably necessary to achieve the purpose of protecting public order?***
- 2. Is the continuing criminalisation of insulting behaviour in political contexts appropriate, in light of the High Court's decision in Coleman v Power?***

Pending the Minister's response, the Committee draws attention to clause 252.

The Committee makes no further comment.

⁹ *Equal Opportunity Act 1995*, s. 202(b) and clause 12 of the *Equal Opportunity Amendment (Governance) Bill 2009*.

¹⁰ Clause 23 of the *Road Legislation Amendment Bill 2009*, inserting a new s. 73A into the *Road Safety Act 1986*.

Personal Property Securities (Commonwealth Powers) Bill 2009

Introduced	11 August 2009
Second Reading Speech	13 August 2009
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill proposes to refer certain matters relating to security interests in personal property (PPS) to the Commonwealth Parliament so as to enable that Parliament to enact legislation that will allow for a uniform national system of registration of, and regulation over, security interests in personal property (which includes motor vehicles, boats, contractual rights and uncertified shares). The national system will be supported by a public Register of Personal Property Securities maintained by a national Registrar.

Notes:

1. *Section 51 (xxxvii) of the Constitution of the Commonwealth enables State Parliaments to refer matters to the Commonwealth Parliament.*
2. *From the Statement of Compatibility – Personal property is often referred to as goods or chattels, and includes intangible things like shares but not land or real property. Personal property securities are security interests in such property. Examples of personal property securities are security interests over a car in return for the provision of a car loan and company charges -- the car or the company's assets may be seized or sold if the person obtaining the loan or charge defaults on their repayments.*

Background

The Commonwealth law – the Personal Property Securities Bill 2009 (Cth)

Extract from the Senate Scrutiny Committee report on the Commonwealth Bill.¹¹

In particular, the bill:

- *specifies the circumstances when personal property would be able to be acquired free of a security interest;*
- *includes default rules for determining priority between competing security interests in the same property;*
- *includes special priority rules for specific transactions, including 'purchase money security interests', accounts, authorised deposit-taking institution (ADI) accounts, crops, livestock, accessions and commingled goods;*
- *provides rules for determining priority between security interests and other interests, such as repairers' liens and the interests of an execution creditor;*
- *provides a process for enforcing security agreements following default by debtors; and*
- *establishes the Register which will contain, among other things, details of registered security interests in personal property (financing statements), details of the grantor and the secured party, and an address for service of notice on the secured party.*

¹¹ Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2009*, 12 August 2009.

The Victorian Bill

Extracts from the Second Reading Speech –

... The State Referral Bill will refer legislative power from the Victorian Parliament to the Commonwealth Parliament to enable the Commonwealth to enact a Personal Property Securities Act and subordinate legislation under that Act. This Commonwealth legislation will allow for a uniform system of registration of, and regulation over, security interests in personal property. The commitment by the States to refer legislative power to the Commonwealth is reflected in the intergovernmental Personal Property Securities Law Agreement signed by the Council of Australian Governments on 2 October 2008.

... PPS can be broadly defined to mean interests in personal property by which a creditor has the right to take or keep possession of, or otherwise deal with that property, on the default by a debtor. Security interests in personal property include mortgages, charges, and pledges as well as financing leases, hire-purchase agreements, and retention of title agreements where a sale does not transfer ownership until full payment is received.

Personal property can mean any type of property that is not land or buildings. Examples of tangible personal property would include goods such as motor vehicles, boats, aeroplanes, office furniture, artworks, business machinery and equipment, stock-in-trade, crops and livestock and financial property such as currency, chattel paper, and letters of credit.

... the PPS Bill applies to all types of personal property with certain exceptions where for public policy reasons those types of property will continue to be governed by existing schemes;

... the PPS Bill provides for a central PPS register to be administered by a PPS registrar and deputy registrar and establishes rules relating to the lodgement of security interests on the register, the amendment of data on the register and notification requirements for relevant parties;

... the PPS Bill provides that it is intended to operate concurrently with State laws and specifies certain circumstances where state laws will prevail over the PPS Bill and certain circumstances where the PPS Bill will prevail over state laws; the PPS Bill allows a state law to designate an interest in property created by that state law, such as a lien, to be a 'priority interest' which places that interest ahead of any competing PPS interests where a secured party seeks to enforce the PPS interest;

... the PPS Bill confers concurrent jurisdiction on all levels of Federal, State and Territory courts to hear and determine any disputes arising under the PPS scheme;

... the PPS Bill contains a review clause requiring the Commonwealth Government to review the PPS scheme within three years after the date of commencement.

State Referral Bill

... New South Wales, as first referring State, has passed its Personal Property Securities (Commonwealth Powers) Act 2009 and that Act received royal assent on 19 June 2009.

The State Referral Bill provides an amendment reference to allow the Commonwealth to make future legislative amendments to the PPS Act

... the State Referral Bill includes separate commencement provisions for both tradeable water rights and fixtures though proclamation by Governor in Council. Due to the complexities involved with determining whether these subject areas ought to be brought within the national scheme at a future date it would not be expedient to specify a commencement date for these amendment references in the State Referral Bill.

... The State Referral Bill makes clear, however, that the referral of power to the Commonwealth does not include provision for the Commonwealth to make laws in a manner that would exclude or limit the operation of a State law that deals with the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right.

Further, the referral does not extend to providing the Commonwealth with power to exclude or limit a state law that limits, restricts or prohibits the kinds of interests that may be created or held in such statutory rights or the type of person or body that may create or hold interests in those rights.

... The State Referral Bill provides that where a Victorian statute expressly excludes a licence, right, entitlement or authority from the application of the PPS legislation the Victorian legislation will

prevail and, as a consequence, the purported lodgement of security interests in those excluded matters would be ineffective.

... The State Referral Bill does not refer power to the Commonwealth regarding State laws that provide for the confiscation, seizure, extinguishment or other forfeiture of property or interests in property in connection with the enforcement of State laws.

... the State Referral Bill provides for the termination of any or all of the initial and amendment references through a Governor in Council proclamation on a day specified in that proclamation but no earlier than the first day after 12 months has elapsed from the date that proclamation was published in the Government Gazette.

Content and Committee comment

Commencement

Other than sections 6(2) to 6(4) the Act comes into operation on Royal Assent. Sections 6(2) to 6(4) concern amendment references and the Bill will enable each of the amendment references to be commenced at different times on proclamation. [2]

The Committee notes the commencement by proclamation provisions and considers that having regard to the uniform national scheme legislation introduced by this referral of legislative powers to the Commonwealth by a number of jurisdictions that such a provision is justifiable in the circumstances.

The Bill defines the referred PPS matters and those matters specifically excluded from the reference. [4]

The Bill also refers certain matters (referred PPS matters) in relation to different kinds of personal property so as to enable the Commonwealth to make amendments to the Commonwealth PPS Act from time to time concerning security interests in those kinds of property. Each of those references is defined in the Bill to be an amendment reference.

The amendment references relate to the following kinds of personal property —

- personal property (other than fixtures and water rights);
- fixtures (which are goods, other than crops, that are affixed to land);
- transferable water rights (which are certain transferable rights, entitlements or authorities, whether or not exclusive, that are granted by or under the common law or legislation of the State in relation to the control, use, or flow of water).

The Bill provides for exclusions from the referred PPS matters that are intended to limit the power of the Commonwealth Parliament to use an amendment reference to exclude or limit the power of the State to administer, vary and abrogate any State statutory rights (such as licences) that it creates from time to time. [6]

The Bill provides for the termination of the initial reference and also for the termination of any or all of the amendment references. [7]

The proposed laws of the Commonwealth were tabled in the Legislative Assembly of New South Wales on 16 June 2009. [9]

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.

Issue	Victorian terms of reference	Senate term of reference
<i>Clauses (Cth)</i>	<i>Parliamentary Committees Act 2003</i>	<i>Senate Standing Order</i>
‘Henry VIII’ clauses 8(3), 118(5), 255, 258(4), 259(3).	s. 17(a)(vi)	24(1)(a)(iv)
Wide discretion / delegation of powers 147 and 197	s. 17(a)(ii)	24(1)(a)(ii)
Reverse onus of proof 299(2)	s. 17(a)(i)	24(1)(a)(i)

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.

Notes:

1. *A ‘Henry VIII’ clause is one that enables regulations or subordinate instruments to change responsibilities and entitlements conferred by the principal Act. Whether such a legislative provision is necessary or desirable must be determined on a case by case basis. As a matter of routine the Committee will always seek to ensure that Parliament is fully advised as to the justification for their inclusion in legislation. An inappropriate use of such clauses may constitute an inappropriate delegation of legislative power to the executive branch within the meaning of section 17(a)(vi) of the Parliamentary Committees Act 2003.*
2. *A wide delegation of powers or wide discretion is the vesting of decision making power in the hands of a public official or other person. The power granted is either too broad or without appropriate constraints or the class of person the power is invested in is unlimited or insufficiently confined to persons of sufficient experience and or qualification or accountability. Where such a clause is present this may engage section 17(a)(ii) of the Parliamentary Committees Act 2003 (“makes rights, freedoms or obligations dependent on sufficiently defined administrative powers”).*
3. *Reverse onus provisions engage section 17(a)(i) of the Parliamentary Committees Act 2003 (undue trespass to rights and freedoms). In the ordinary course within the criminal system the prosecution bears the legal and evidentiary burden to prove beyond reasonable doubt the necessary elements constituting the particular offence alleged.*

Where a statute shifts the evidentiary or legal burden to the defendant this is characterised as a 'reverse onus' or 'shifting of the onus of proof' provision.

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,¹² (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.

¹² Charter s. 13(a) provides that "A person has the right- (a) not to have his or her privacy [or] home... unlawfully or arbitrarily interfered with."

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.

Ministerial Correspondence

Courts Legislation Amendment (Sunset Provisions) Bill 2009

The Bill was introduced into the Legislative Assembly on 23 June 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 27 July 2009 and made the following comments in Alert Digest No. 8 of 2009 tabled in the Parliament on 28 July 2009.

Committee's Comments

Charter report

Statement of compatibility – Description of counselling order scheme as applicable only to 'male offenders'

Summary: The Statement of Compatibility incorrectly describes the effect of clause 5.

The Committee notes that clause 5 removes sunset provisions in the Family Violence Protection Act 2008 relating to counselling orders provided for in Part 5 of that Act.

The Statement of Compatibility incorrectly describes the effect of clause 5 as to 'require male offenders to attend compulsory counselling'. However, Part 5 of the Act is applicable to all 'adult' respondents (of any gender) to applications for a family violence intervention order for whom final orders have been made (subject to further eligibility requirements that do not refer to gender or criminal history.) A final order can be made against a respondent to a family violence intervention order whether or not that person has committed or has been found to have committed a criminal offence.

The Committee will write to the Minister suggesting that the words 'adult who is the subject of an order' be used in place of 'male offender' in the Statement of Compatibility'.

Minister's response

Thank you for your letter of 29 July 2009 advising that the Scrutiny of Acts and Regulations Committee considered the Courts Legislation Amendment (Sunset Provisions) Bill 2009 (the Bill) in Alert Digest No 8 of 2009.

The Bill repeals Part 15 of the Family Violence Protection Act 2008 (the Act) to make the Compulsory Counselling Order Provisions ongoing. The Bill also extends sunset provisions in the Courts Legislation (Neighbourhood Justice Centre) Act 2006 to allow the Neighbourhood Justice Centre to continue operations for a further four years.

The Alert Digest report is directed at the Statement of Compatibility accompanying the Bill. The Statement of Compatibility describes the effect of Part 5 of the Act as to 'require male offenders to attend compulsory counselling' in relation to a discussion of the application of section 10 protection from torture or degrading treatment under the Charter of Human Rights and Responsibilities Act 2006 (the Charter). However, the Alert Digest points out that Part 5 of the Act is applicable to all adult respondents of any gender and not just 'male offenders'.

While the Act is applicable to both men and women, currently only men's counselling programs are funded by the Department of Justice. This is because evidence suggests that men are predominantly the perpetrators of family violence.

The Victorian Family Violence Database confirms that family violence continues to be perpetrated overwhelmingly against women. In each of the seven years (1999-2006)

contained in its trend analysis, approximately 80 per cent of adult aggrieved family members at incidents of family violence recorded by police, or included in finalised applications for an intervention order, were female and 20 per cent were male.

During these same years, approximately 95 per cent of Supported Assistance Accommodation Program agencies and Victims Support Agency Helpline adult clients for family violence were female.

Accordingly, the pilot program for compulsory men's counselling was established to address men's violent behaviour. The Act's reference to gender neutral adult offenders leaves open the possibility that counselling program could be expanded in the future to address women's violent behaviour if it is considered necessary.

Furthermore, the discussion in the Statement of Compatibility on section 10 of the Charter, in relation to Part 5 of the Act initially refers to requiring 'male offenders to attend compulsory counselling'. However, after this initial reference to 'male offenders', the Statement subsequently refers to 'respondents' and 'persons'.

If the Committee requires clarification of any of the matters raised in the paper, please do not hesitate to contact Ruth Andrew of the Courts and Tribunals Unit, Department of Justice (8608 6119).

*ROB HULLS MP
Attorney-General*

26 August 2009

The Committee thanks the Attorney-General for this response.

Committee Further comments

Equal protection of the law – Counselling services presently limited to male respondents – Secretary's obligations under the Charter

The Committee notes the Attorney-General's advice that 'currently only men's counselling programs are funded by the Department of Justice.' Section 133(2) of the *Family Violence Protection Act 2008* provides that the Secretary to the Department of Justice 'may approve, in writing, counselling that the Secretary considers appropriate to address family violence to be provided by particular persons or bodies.' The Committee considers that the limitation of such approvals to counselling for male offenders may engage the Charter's right to equal protection of the law.¹

The Committee observes that approximately 80% of Victorians who are the subject of court orders relating to family violence are male.² While family violence is overwhelmingly committed by males, females are nevertheless a significant fraction of respondents (although the statistics may obscure relevant differences between the two groups, their victims and the efficacy for counselling.)

The Committee also observes that Charter s. 38(1) requires the Secretary to exercise the discretion under s. 133(2) in a way that is compatible with human rights and with proper consideration to human rights. In light of this continuing obligation, the Committee is satisfied that the bill's removal of the sunset clause for the counselling provision of the Act is compatible with the Charter's right to equal protection of the law.

¹ Charter s. 8(3).

² Victims Support Agency, *Victorian Family Violence Database (Volume 3): Seven Year Trend Analysis Report*, Department of Justice, 2008, p. 48.

Human Tissue Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 23 June 2009 by the Hon. Daniel Andrews MLA. The Committee considered the Bill on 27 July 2009 and made the following comments in Alert Digest No. 8 of 2009 tabled in the Parliament on 28 July 2009.

Committee's Comments

Charter report

Age discrimination – Donating blood – Consent to medical treatment

Summary: Clause 3 preserves the existing law barring children under 16 from donating blood without parental consent. The Committee considers that this may engage the Charter's rights with respect to age discrimination. It will write to the Minister seeking further information.

The Committee notes that clause 3, inserting a new section 20A into the Act, provides that 16 and 17 year-olds will be able to donate blood without their parents' consent.

In discussing the Charter right to privacy, the Statement of Compatibility remarks:

The clause is reasonable in the circumstances, given the need to recruit young donors to the blood supply and the controls put in place to ensure their full informed consent is obtained and their health protected. The clause will also enable competent mature minors to exercise increased control over their bodies, which is in accordance with the charter's protection against uncontrolled interference with their bodily privacy.

However, clause 3 preserves the existing law barring children under 16 from donating blood without parental consent. The Committee considers that this aspect of clause 3, which is not addressed in the Statement of Compatibility, may engage the Charter's rights with respect to age discrimination.

An inflexible age limitation on blood donations may be inappropriate, given the varying physical and emotional maturity of similarly aged teenagers and the alternative controls on the issues of informed consent and health outlined in the Statement of Compatibility. The Committee notes a recent decision of the Supreme Court of Canada (concerning transfusions rather than donations) holding that a statute governing consent to medical treatment must give 'adolescents under 16 the right to demonstrate mature medical decisional capacity' if it is to be compatible with that nation's rights to bodily integrity and equality.

In discussing the Charter right of children to protection, the Statement of Compatibility remarks:

It should be noted that this amendment brings blood donation into line with the current law on the ability of a mature minor to consent to medical treatment.

However, the Committee observes that clause 3 does not alter the operation of existing s. 24, which permits non-consensual blood transfusions to be performed on 16- and 17-year-olds in some circumstances. In addition, 16- and 17-year-olds are currently unable to utilise the 'refusal of treatment certificate' process set out in the Medical Treatment Act 1988.

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

- 1. whether or not clause 3, by preserving the requirement of parental consent for blood donations by children under 16, is compatible with the Charter's rights against age discrimination.**
- 2. whether or not clause 3 is consistent with the current law on the ability of 16- and 17-year olds to refuse consent to medical treatment set out in existing s. 24 and in the Medical Treatment Act 1988.**

Pending the Minister's response, the Committee draws attention to clause 3.

Minister's response

I write in response to a number of queries raised by the Committee about the above named Bill.

Charter Report

Statement of Compatibility - Age discrimination - donating blood - consent to medical treatment

Whether or not clause 3, by preserving the requirement of parental consent for blood donations by children under 16, is compatible with the Charter's rights against age discrimination.

As noted by the Committee, the Bill preserves the existing law barring children under the age of 16 from donating blood without parental consent. This age restriction may engage section 8(3) of the Charter in that it continues to restrict under-16 year olds from giving blood without parental consent. Section 8(3) of the Charter provides that every person is equal before the law, is entitled to equal protection of the law without discrimination, and has the right to equal and effective protection against discrimination. Discrimination, in relation to a person, means discrimination within the meaning of the Equal Opportunity Act 1995 on the basis of an attribute specified in section 6 of that Act, and this includes age.

However, section 7(2) of the Charter permits rights to be subject to "such reasonable limits as can be demonstrably justified in a free and democratic society." The limits to section 8(2) by virtue of clause 3 of the Bill are considered reasonable and justifiable in a free and democratic society for the purposes of section 7(2) of the Charter having regard to the following factors:

(a) the nature of the right being limited

The prohibition of discrimination is one of the cornerstones of human rights instruments and this is reflected in the preamble to the Charter. However, the right is not absolute and can be subject to reasonable limitations under section 7 of the Charter.

(b) the importance of the purpose of the limitation

The purpose of the limitation is to ensure that, while the pool of potential blood donors is expanded to include mid-teens, the health and safety of younger teens and children is not compromised. It is a public necessity for the State to make a determination as to an appropriate age limit for the donation of blood by young persons for the purpose of regulating the blood donation system and protecting the health of children. There are protective health reasons for setting such an age limit; a child under the age of 16 years may not as yet have reached a weight that would enable them to donate safely (the Australian Red Cross Blood Service (ARCBS) stipulates that children aged 16 and 17 years must weigh at least 50 kilograms to be eligible to donate), and a child under the age of 16 years may not have the maturity and cognitive ability to understand their own health needs, and the potential ramifications of their decision to donate, including their answers to the screening questions, for the safety of recipients. These are essentially protective measures, and such restrictions are consistent with the right in section 17(2) of the Charter which entitles children to appropriate protection.

There are also practical reasons; each prospective donor under 18 must be assessed by the ARCBS to see if they understand fully what they are doing. This is comparable to the 'mature minor' test for consenting to medical treatment at common law, and to extend this to young people below the age of 16 would mean considerably more assessment with the likelihood of far fewer applicants meeting the test. The Bill does not in fact prohibit completely such children from donating but imposes additional criteria reflecting the increased likelihood of immaturity: a parent's consent and the advice of a registered medical practitioner that the donation is not likely to be prejudicial to the health of the child.

The Committee should note that the choice of 16 years as the 'cut off' was based upon the agreement of all Australian health ministers to achieve national consistency. It is in keeping with the age limit determined as appropriate by South Australia, New South

Wales, the Australian Capital Territory, the Northern Territory and Tasmania. It also reflects other Victorian laws which impose age limits on behaviour which require a level of maturity and responsibility; obtaining a driver's licence and the lawful consumption of alcohol have age requirements set higher because of the higher level of maturity and responsibility required.

(c) the nature and extent of the limitation

The Bill limits the right not to be discriminated against in terms of age only to the extent that a person cannot donate blood without parental consent unless they are 16 years or older. It in fact expands the pool of those under the age of majority who may present themselves independently to be assessed as to whether they are of sufficient maturity to understand what they are doing and its implications. Young people under the age of 16 are still able to donate blood but, given their youth, physical and possible intellectual or emotional immaturity, must give their own consent, and have a parent's consent, and have the advice of a registered medical practitioner that the donation is not likely to be prejudicial to the health of the child. The limitation is therefore narrow in terms of both nature and extent.

(d) the relationship between the limitation and its purposes

There is a direct relationship between the limitation and the purpose of ensuring that the extension of the age limit for potential blood donors is only extended in a way which is safe for donors and the blood donation system. Limiting the expanded pool to those 16 years or older protects those younger than 16 who because of their age, are less likely to have the maturity and capacity to make an informed decision about donating and understand the implications of their actions.

(e) any less restrictive means reasonably available to achieve its purpose

In relation to age, there are no less restrictive means reasonably available to achieve the purpose of protecting persons under 16 years of age who are less likely to have the maturity and capacity to make an informed decision about donation. While an age criteria involves a degree of generalisation without regard for the particular abilities, maturity and other qualities of individuals, it is necessary and reasonable for Parliament to set an age limit reflecting its assessment of when many young persons will have sufficient maturity to be appropriate candidates for blood donation. It would place an unreasonable administrative burden on the Australian Red Cross Blood Service to require them to assess individuals aged below 16 years as to their capacity to donate blood given the increased likelihood that they would not be appropriate donors, and the arrangement proposed in the Bill means that such children can still donate blood, once appropriate additional protective elements are satisfied.

On the basis of the above, it is considered that clause 3 is compatible with the Charter's rights against age discrimination.

Whether or not clause 3 is consistent with the current law on the ability of 16- and 17-year-olds to refuse medical treatment set out in existing s.24 and in the Medical Treatment Act 1988.

The Bill enables what are sometimes termed 'mature minors' to consent to donating blood without obtaining a parent's consent and the advice of a registered medical practitioner that the donation is not likely to be prejudicial to his or her health. It does this by amending the definition of 'child', for the purposes of those sections alone, to a person under the age of 16. In practice, such a person's capacity to so consent in an informed way in the context of donating blood to the homologous supply will be assessed by trained staff each time such a person presents for donation. In this way, this process reflects the way in which under-18 year olds are assessed today, in accordance with the common law, by medical practitioners each time they present for medical services and treatment without their parents.

The amended definition of 'child' for the purposes of the Bill means that the definition differs from the definition of 'child' for the purposes of section 24 of the Act and for the purposes of the refusal of treatment provisions in the Medical Treatment Act, which remains as someone under the age of 18. These provisions deal with quite different matters from blood donation and raise quite distinct policy issues.

Section 24 of the Act and the refusal of treatment provisions of the Medical Treatment Act deal specifically with life and death situations and, as such, different public policy priorities come to the fore.

Section 24 deals with blood transfusions. The circumstances in which such a medical procedure is contemplated are far removed from those in which blood donation is contemplated. The section does away with the need for any consent in effect (of a parent or of a child of any level of maturity) where medical circumstances dictate that a transfusion is a reasonable and proper treatment for the child's condition and without it, the child is likely to die. The Committee is likely to be aware the provision was introduced in order to resolve the issue where a parent would refuse a life-saving transfusion for their child on the basis of their religious beliefs. Parliament makes it clear that such a decision is a clinical one which rests with the registered medical practitioners and that they are immune from criminal liability in administering a transfusion in the circumstances contemplated by the section.

While clause 3 is consistent with the current common law on the ability of mature minors to consent to medical treatment, as noted in the Statement of Compatibility, it does differ, quite appropriately, from the very specific provisions of section 24, dealing with a very specific form of medical treatment, where Parliament has determined that the need to save a young person's life with this treatment outweighs the usual primacy of individual consent.

This reflects the common law, where in a medical emergency a doctor, deciding that it is necessary to immediately carry out a medical procedure to preserve the life or health of the patient, acts as an agent of necessity and is permitted to carry out whatever treatment is immediately required in the best interests of the patient, regardless of whether consent has been obtained.

The ability to consent to medical treatment and to donate blood is also distinct from the ability to refuse medical treatment in the specific circumstances contemplated by Part 2 of the Medical Treatment Act. The provisions reflect the view that the serious nature of a decision to refuse what may amount to life-saving or extending treatment is too significant a decision to be left to those who may have the capacity to understand what they are doing. In this Part of the Act, Parliament has determined that only those who have reached the age of majority for all manner of legal responsibilities will be eligible to execute a refusal of treatment certificate. Even such adults will need to satisfy a registered medical practitioner and another person of the matters outlined in subsection 5(1). This also reflects the common law, which does not appear to recognise that a child who is sufficiently mature to consent to proposed medical treatment also has an equivalent right to refuse to consent to the same treatment.

I trust that this advice answers the committee's concerns.

*Hon Daniel Andrews MP
Minister for Health*

10 August 2009

The Committee thanks the Minister for this response.

Tobacco Amendment (Protection of Children) Bill 2009

The Bill was introduced into the Legislative Assembly on 23 June 2009 by the Hon. Daniel Andrews MLA. The Committee considered the Bill on 27 July 2009 and made the following comments in Alert Digest No. 8 of 2009 tabled in the Parliament on 28 July 2009.

Committee's Comments

38 – Ban orders

The Bill makes provision for the Minister to ban a product on the recommendation of the Secretary or a product banned under a law of the Commonwealth or other State or Territory that is a tobacco product possessing a distinctive fruity, sweet or confectionary-like character (new section 15N). The Bill further provides that the Secretary may recommend to the Minister a product be banned the supply of which should be prohibited having regard to the objects of the Act (new section 15O). It is an offence to breach a ban order (new section 15S). [38]

The Committee notes the wide Ministerial administrative power to ban products considered appropriate to be banned having regard to the general objectives of the Act.

The Committee will seek further advice from the Minister concerning appeal rights against such a ban order.

39 – Specialist tobacconist certificates

The Bill makes provision for the certification of specialist tobacconists who will not be subject to the same advertising restrictions as non-specialist retailers of cigarettes. [39]

The Committee will seek further advice concerning an applicants appeal rights from an administrative decision of the Secretary to grant or revoke such a specialist tobacconist certificate.

Charter report

Protection of children – Freedom of association – Ban on smoking in a vehicle containing a person under 18 – Teenager smokers

Summary: The Committee is concerned that the new s. 5S may partially criminalise teenage smoking and hamper the free association of older teenagers. The Committee will write to the Minister seeking further information.

The Committee notes that clause 19, inserting a new s. 5S into the Act, makes it an offence for anyone to smoke in a motor vehicle if someone else in the vehicle is aged under 18.

The Committee observes that the terms of the new s. 5S encompass two quite different scenarios:

- *parents and other responsible adults exposing young children in their care to second-hand smoke.*
- *cars occupied by groups of teenagers close to 18 years of age, including some smokers. For example, if 16- and 17-year-olds are passengers in a car, and the 16-year-old smokes, then she will be guilty of an offence (even if the 17-year-old smokes too.)*

*While the Committee agrees that criminalising the first scenario positively engages the Charter right of children 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child', the Committee is concerned that the second scenario may not. Indeed, **this aspect of the new s. 5S may partially criminalise teen smoking and hamper the free association and movement of older teenagers, in***

situations where no vulnerable people are being exposed to second-hand smoking. The Committee therefore considers that the second scenario may negatively engage older teenagers' Charter rights to association and protection.

None of the other Australian offences that criminalise smoking in cars where minors are present are fully enforceable when a 17 year-old smokes next to another 17-year old. Narrower alternatives to the new s. 5S may include:

- providing that the offence cannot be committed by minors or restricting its enforcement against minors
- limiting the offence to where the passenger is under 16
- providing a defence when the smoker and passenger are similar ages.

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

1. **whether or not the new s. 5S, in its application to groups of similarly aged teenagers in motor vehicles, limit those teenagers' Charter rights to association and protection; and**
2. **if so, whether or not there are less restrictive alternatives reasonably available to achieve the purpose of protecting vulnerable children from second-hand smoking.**

Pending the Minister's response, the Committee draws attention to new s. 5S.

Presumption of innocence – Smoker must present evidence of a young-looking passenger's age – Mistake as to age of passenger

Summary: New section 5U relieves the prosecution of the burden of proving an essential element of an offence. The Committee will write to the Minister seeking further information.

The Committee notes that clause 19, inserting a new section 5U into the Tobacco Act 1987, provides that, for the purposes of a prosecution under new section 5S, evidence that someone appears to be under 18 is proof of that fact in the absence of evidence to the contrary. So, anyone who smokes in a car occupied by someone who merely looks under 18 (or is thought to look under 18 by someone) will have to present evidence that the person is 18 or over in order to avoid being convicted of an offence.

*The Statement of Compatibility argues that new s. 5U does not limit the Charter's presumption of innocence, because 'the prosecution still bears the legal burden of proving a contested matter beyond reasonable doubt'. While the Committee agrees that evidential burdens on exceptions, exemptions, provisos, excuses or qualifications to offences do not engage the right to be presumed innocent, **the Committee observes that the new section 5U relieves the prosecution of the burden of proving an essential element of the offence.** Moreover, it does so in a very common innocent circumstance: where a person smokes alongside an adult passenger who looks younger than 18. The Committee therefore considers that new section 5U may limit the Charter right of such smokers to be presumed innocent until proven guilty.*

The Committee is concerned that the evidential burden in new section 5U concerns a matter that is not within the personal knowledge of the defendant. The true age of a passenger who looks young may be something that a defendant is unable to give evidence about. New section 5U therefore may cause innocent people to be convicted of offences against new section 5S.

The Committee also observes that no provision is made in the new offence for a defence of mistake of fact as to the age of the passenger, even if the smoker's mistake is a reasonable one.

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

1. **Whether or not new section 5U may result in a person being convicted of an offence against new section 5S even when the person is actually innocent of that offence.**
2. **If so, whether or not new section 5U is a reasonable limit on the Charter's presumption of innocence according to the test set out in Charter s. 7(2).**

3. Whether or not a defence of mistake of fact is available to a person charged under new section 5S.

Pending the Minister's response, the Committee draws attention to new section 5U.

Doubling of penalties – Adequacy of statement of compatibility

Summary: The Statement of Compatibility does not address a number of clauses that double the penalties for various criminal offences that engage Charter rights.

The Committee notes that a number of the Bill's provisions double, and in some cases more than double penalties, for natural persons for various criminal offences that engage Charter rights as follows:

- *clauses 12 to 18 and 35 double the penalty of offences involving a failure to place 'no smoking signs' at various venues (engaging freedom of expression)*
- *clause 27(1) more than doubles the penalty for the offence of selling tobacco to a minor (which incorporates a reverse onus provision engaging the presumption of innocence)*
- *clause 34 doubles the penalty for the offence of occupying an underage venue where smoking occurs (which incorporates a reverse onus provision engaging the presumption of innocence)*

The Statement of Compatibility does not address these clauses.

While the Committee feels that a Statement of Compatibility need not address minor changes in offence penalties (such as the 20% increases in fines provided for in clauses 25 and 27(3)). However 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 will write to the Minister concerning the Statement of Compatibility with respect to clauses 12 to 18, 27(1), 34 and 35.

Minister's response

I write in response to a number of queries raised by the Committee about the above named Bill.

Ban Orders and Specialist Tobacconist Certificates

Both a person aggrieved by a decision made by the Minister under section 15N to ban a tobacco product and a person aggrieved by a decision of the Secretary under sections 15U and 15X to grant or cancel a specialist tobacconist's certificate may seek judicial review of the decision in the Supreme Court of Victoria, either under the Administrative Law Act 1978 or the common law.

The criteria on which these decisions will be made are set out clearly in the legislation. In the circumstances of Section 15U and 15X the Bill also specifies that the applicant must be given opportunity to make a written submission before their application is refused (15U) and a certificate holder must be given the opportunity to be heard prior to the cancellation of their certificate (15X).

Charter report

New section 5S – limit on the right to free association and protection of children

The Committee considers that the new section 5S may limit the right to freedom of association for older teenagers and the right to protection. The right to freedom of association is intended to protect people's right to belong to associations and organizations with common purposes such as trade unions and political parties. It does not apply to situations involving teenagers or indeed other people who merely choose to spend their leisure time together. In addition, the Bill does not prevent teenagers from travelling in cars together; rather it prohibits them from smoking while doing so if someone under the age of 18 years old is present. It requires them to refrain from smoking or to leave the vehicle

before smoking, to protect other young people from the effects of passive smoking. I do not consider that the right to freedom of association is engaged in these circumstances.

The Committee has also expressed concern that the section may limit the right of older children to protection. The Charter provides that children have a right to such protection as is in their best interests and needed by them by reason of being a child.

It should be noted that the policy behind the legislation in general and particularly the amendments in this Bill is to discourage young people, including older teenagers, from smoking. In other words, it is with the protection of children in mind that the Bill has been drafted.

Section 5U – reversal of an evidentiary burden

The Committee has expressed concern that the evidential burden on a person to provide proof of the age of a passenger who appears to be under 18 years old is a limitation on the right to be presumed innocent because it removes the onus on the prosecution to prove an essential element of the offence.

It is debatable that the right to be presumed innocent is engaged as the burden is an evidential not a legal one. It is envisaged that in many cases the accused will be able to discharge this burden by stating in the interview that the alleged "victim" of passive smoking is 18 years or older. As the police officer will not be in a position to know the age of the victim, the police officer will accept the evidence of the accused and would only prosecute if the victim looks significantly younger than 18.

To the extent that the provision engages the presumption of innocence, the reverse onus is reasonable and justifiable. The objective of the provision is to protect children from the effects of passive smoking.

It is true that the age of a passenger may not always be within the knowledge of the accused. However, the problem is that it is not possible to compel the alleged victim to disclose his or her age. A police officer cannot demand to know a person's age and details when that person is not suspected of having committed a crime. While in some circumstances the accused may not know (although they can inquire before smoking) or may not be in a position to find out the age of a passenger, the prosecution will never be in the position to know the age of the victim unless it is volunteered. Hence the evidentiary burden on the accused. The alternative was to create a strict liability offence.

Even when an infringement notice is issued, the prosecution must prove beyond reasonable doubt, in the face of the charge being contested and evidence having been raised to the contrary, that each element of the offence is made out.

Statement of Compatibility – increased penalties

The penalties in clauses 12 to 18 relate to offences by the occupier of premises of failing to place prescribed no smoking signs in those premises. The Committee notes that these clauses engage the right to freedom of expression. Section 15 of the Charter provides that this right may be subject to lawful restrictions reasonably necessary for the protection of public health.

A person is prohibited from smoking in specified premises such as enclosed restaurants and cafes, retail shopping centres and workplaces. It is reasonable to require the occupier of these types of premises to place signs up warning patrons of the prohibition.

Penalties for not complying with the legislation should be commensurate with the harm that unrestricted tobacco use is known to cause. The existing penalties of 5 penalty units were at the lowest level of the scale of penalties for Victorian legislation found in the Sentencing Act 1991. The increase is to the next permissible penalty of 10 penalty units and is proportionate to any restriction on the right to freedom of expression. Education and information is the principal means by which venue operators with responsibilities to control tobacco use in enclosed spaces become aware of their obligations. Penalties, however, are also a key element as they provide a clear and meaningful incentive to comply with the legislation. The penalties should also be commensurate with other Victorian legislation and the tobacco laws of other jurisdictions.

Offences and penalties appropriate for bodies corporate have been created as many of the occupiers of these premises are bodies corporate. For example, a penalty of approximately

\$500 for smoking in an enclosed workplace is inadequate to ensure compliance by companies operating licenced premises.

Clause 27(1) increases the penalty for the offence of selling tobacco to a minor which is the most significant statutory measure for achieving the objective of preventing young people from taking up smoking. There is an existing reversal of the evidentiary burden in section 12(3C) of the Act. To the extent that the provision engages the presumption of innocence, the reverse onus is reasonable and justifiable. The aim is to prevent the owner of a retail outlet from avoiding responsibility for the actions of a person who sells cigarettes to a minor at that outlet except in very limited circumstances. Given the importance of deterring retail businesses from selling cigarettes to young people under 18, this is a reasonable and necessary limitation to achieve the objective. The increase in the penalty from the fourth to the fifth and highest level on the penalty scale reflects the seriousness of the offence.

Clause 34 increases the penalty for the offence in section 15G by an occupier of allowing smoking to occur at underage dance/music events. This offence is structured to avoid criminalization of the behavior of large groups of young people who attend the events and to instead focus attention of the responsibility of the occupiers of the venues and on adult smokers. The occupier can defend a charge if satisfying the onus of proof set out in existing section 15G(2) that requires that the occupier to provide evidence that it did all that is within its power to discourage young people from smoking on the premises. To the extent that the provision engages the presumption of innocence, the reverse onus is reasonable and justifiable. The existing penalty of 5 penalty units was at the lowest level of the scale of penalties for Victorian legislation found in the Sentencing Act 1991. The increase is to the next penalty level of 10 penalty units and is proportionate to any restriction on the presumption of innocence.

I trust this response assists the Committee.

*Tim Holding MP
Minister for Finance, WorkCover
and the Transport Accident Commission*

29 May 2009

The Committee thanks the Minister for this response.

Committee's further comments

Association – Ban on smoking in a car with a minor present – Discouraging teenage smoking – Whether arbitrary

The Committee notes the Minister's view that Charter s. 16(2)'s 'right to freedom of association is intended to protect people's right to belong to associations and organizations with common purposes such as trade unions and political parties. It does not apply to situations involving teenagers or indeed other people who merely choose to spend their leisure time together.' The Committee observes that no such intention was stated in the Charter's explanatory memorandum or other supporting documents. While Canadian and European courts have construed similar rights in this narrow way, New Zealand courts have held that the right to associate extends to 'the right of an individual to associate *with any other individual simpliciter*'.³ Given that the matter is yet to be addressed by a Victorian court and that equivalent protection arises in any event under Charter ss. 8(2), 12, 13(a) and 15(2), the Committee considers that Statements of Compatibility should address any provision of a bill that limits the ability of individuals to associate with each other.

In the case of new section 5S, the Committee notes the Minister's remark that 'the policy behind... the amendments in this Bill is to discourage young people, including older

³ Butler & Butler, *The New Zealand Bill of Rights Act: a commentary*, LexisNexis, New Zealand, 2005, [15.7.2].

teenagers, from smoking.’ While the Committee appreciates the importance of this goal, it considers that it must not be achieved by limiting the rights of teenagers in an arbitrary manner. In this regard, the Committee observes that new section 5S will discourage two 17 year-olds from smoking together in a car, but will not discourage a 17 year-old from smoking outside of a car or in a car alone or with an 18 year-old.

The Committee refers to Parliament for its consideration the questions of:

- 1. Whether or not new section 5S, by barring 17 year-olds from smoking together in cars, but not otherwise, limits the Charter rights of 17 year-olds to associate with each other; and**
- 2. If so, whether or not new section 5S is a reasonable limit on those rights according to the test set out in Charter s. 7(2) to achieve the purpose of reducing the effects of smoking on minors.**

Presumption of innocence – Defendants must present evidence of the age of passengers who appear under 18 – Whether less restrictive alternatives reasonably available – Whether defence of mistake of fact available

The Committee notes the Minister’s remark that:

[T]he problem is that it is not possible to compel the alleged victim to disclose his or her age. While in some circumstances the accused may not know (although they can inquire before smoking) or may not be in a position to find out the age of a passenger, the prosecution will never be in the position to know the age of the victim unless it is volunteered. Hence the evidentiary burden on the accused. The alternative was to create a strict liability offence.

The Committee observes that alternative ways to deal with this issue include relying on the admissibility of the police officer’s opinion as to the passenger’s age⁴ or empowering police officers to order passengers who appear to be under 18 to disclose their age.⁵

The Committee also observes that the Minister did not address the Committee’s query as to the availability of a mistake of fact defence under new section 5S. However, the Committee notes that the Minister’s comment that the alternative of ‘a strict liability offence’ was rejected.

The Committee refers to Parliament for its consideration the questions of:

- 1. Whether or not new section 5U, by requiring defendants to present evidence of a passenger’s age in order to avoid conviction for smoking in a car where an occupant appears to be under 18, limits the Charter’s right to be presumed innocent until proven guilty?**
- 2. If so, whether or not new section 5U is a reasonable limit on that right and, in particular, whether there are less restrictive alternatives reasonably available to achieve the purpose of overcoming the difficulty of proving the exact age of teenage passengers?**

**Committee Room
31 August 2009**

⁴ Evidence Act 2008 (Vic), s. 78.

⁵ E.g. Public Health Act 1997 (Tas), s. 67H(3)(a).

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State Taxation Acts Amendment Bill 2009	6
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	4, 7
Superannuation Legislation Amendment Bill 2009	6, 8
Tobacco Amendment (Protection of Children) Bill 2009	8, 10
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1, 5
Transport Legislation General Amendments Bill 2008	1
Transport Legislation Miscellaneous Amendments Bill 2008	1
Water Amendment (Non Water User Limit) Bill 2009	9
Workplace Rights Advocate (Repeal) Bill 2008	1

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

Tobacco Amendment (Protection of Children) Bill 2009	8
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(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
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

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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

Criminal Procedure Bill 2008	1
Equal Opportunity Amendment (Governance) Bill 2008	1
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

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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	6 of 2009 8 of 2009 8 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	9 of 2009
Local Government Amendment (Conflicting Duties) Bill 2009	Local Government	11.08.09	9 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	10 of 2009
Major Transport Projects Facilitation Bill 2009	Roads and Ports	01.09.09	10 of 2009
Personal Property Securities (Commonwealth Powers) Bill 2009	Attorney-General	01.09.09	10 of 2009