

No. 11 of 2009

**Tuesday, 14 September
2009**

On the

Courts Legislation Amendment (Judicial
Resolution Conference) Bill 2009

Education and Training Reform
Amendment (School Age) Bill 2009

Land Legislation Amendment Bill 2009

Local Government Amendment
(Conflicting Duties) Bill 2009

Major Transport Projects Facilitation
Bill 2009

Valuation of Land Amendment
Bill 2009

Victorian Renewable Energy
Amendment Bill 2009

Table of Contents

	Page Nos.
Alert Digest No. 11 of 2009	
Education and Training Reform Amendment (School Age) Bill 2009	1
Land Legislation Amendment Bill 2009	5
Valuation of Land Amendment Bill 2009	6
Victorian Renewable Energy Amendment Bill 2009	7
Ministerial Correspondence	
Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009	9
Local Government Amendment (Conflicting Duties) Bill 2009	12
Major Transport Projects Facilitation Bill 2009	19
Appendices	
1 – Index of Bills in 2009	21
2 – Committee Comments classified by Terms of Reference	23
3 – Ministerial Correspondence	25

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 –

Education and Training Reform Amendment (School Age) Bill 2009
Land Legislation Amendment Bill 2009
Valuation of Land Amendment Bill 2009
Victorian Renewable Energy Amendment Bill 2009

The Committee notes the following correspondence –

Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009
Local Government Amendment (Conflicting Duties) Bill 2009
Major Transport Projects Facilitation 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. 11 of 2009

Education and Training Reform Amendment (School Age) Bill 2009

Introduced	1 September 2009
Second Reading Speech	2 September 2009
House	Legislative Assembly
Member introducing Bill	Hon. Bronwyn Pike MLA
Portfolio responsibility	Minister for Education

Purpose

The Bill increases the compulsory school age (which is currently defined as being not less than 6 and not more than 16 years of age), so that it is not less than 6 and not more than 17 years of age.

Note: From the explanatory memorandum – *The change will be part of the legislative framework implementing the National Youth Participation Requirement from 1 January 2010, so as to make it compulsory for parents to ensure their children remain at school until they complete year 12, or after completing year 10 to participate in education or training, or employment, or both, until they turn 17 years of age.* [4]

The Bill will place a duty on parents of children aged not less than 6 nor more than 16 years of age, to ensure their child attends a registered school or undertakes home schooling), by substituting 17 years for the current 16 years. [5]

The Bill provides that it is a reasonable excuse in respect of compulsory school aged children to not attend a registered school or undertake home schooling, if they participate in education or training, or employment, or both, in accordance with a Ministerial Order. [6]

Charter report

Forced work – Movement – Privacy – Conscience – Children – Family rights – Presumption of innocence – Compulsory education for 16 year-olds – Alternatives of education or training, or employment must accord with Ministerial order – Adequacy of Statement of Compatibility

Summary: *The Bill extends an existing scheme for compulsory education to 16 year-olds. Clause 6 provides that the main alternative to compulsory schooling for 16 year-olds is their 'participation in education or training, or employment, or both in accordance with an order made by the Minister'. The Committee will write to the Minister concerning the adequacy of the statement of compatibility and seeking further information about the Bill's compatibility with the rights to privacy and to the presumption of innocence.*

The Committee notes that clause 4, amending s. 1.1.3 of the *Education and Training Reform Act 2006*, lifts the 'compulsory school age' from 16 to 17; clause 5, amending existing s. 2.1.1 of the *Education and Training Reform Act 2006*, provides for 16 year-olds to be made to attend school or receive home instruction; and clause 6, amending existing s. 2.1.3, provides that the main alternative to compulsory schooling for 16 year-olds is their

‘participation in education or training, or employment, or both in accordance with an order made by the Minister’.

The Statement of Compatibility remarks that the Bill:

...engages a number of rights in the charter, namely the right to freedom of thought, conscience, religion and belief in s 14, and the right to freedom of expression in s 15... The principle of compulsory education is affirmed in several human rights treaties... All states are obliged to make primary education compulsory, and no upper age limited has been fixed when marking the end of compulsory education. Thus, it is open to the state to decide when formal education no longer becomes compulsory after primary school... While there is no right to education contained in the Victorian charter, given the international approach, it is unlikely that compulsory education would be interpreted as unreasonably limiting a person’s right to freedom of thought, conscience, religion and belief or right to freedom of expression.

The Committee does not question the policy of compulsory education promoted by the Bill and, in particular, considers that the Bill positively engages the Charter rights of children and the right to education at international law. However, it observes that the general scheme of compulsory education in Victoria pre-dates the Charter and therefore has not, until now, been subject to parliamentary scrutiny for compatibility with human rights.

The Committee considers that the Bill may engage the following Charter rights:

- **Equality (Charter s. 8):** Clauses 4 and 5, which treat 16 year-olds differently from people aged 17 or over, may engage the Charter’s equality rights.
- **Forced work (Charter s. 11):** In the case of 16 year-olds who cannot feasibly participate in either education or training, employment is the only option permitted by clause 6. The Committee is concerned that clause 6 may limit the Charter rights of those 16 year-olds against ‘forced or compulsory labour’.
- **Freedom of movement (Charter s. 12):** Clause 4 extends existing s. 2.1.10, which empowers school attendance officers to stop and question persons who appear to be of ‘compulsory school age’ if they are in a public place during school hours, to persons who appear to be 16, even though some 16 year-olds will be legitimately not attending school under ss. 2.1.3 or 2.1.5. The Committee is concerned that such a power may be an arbitrary limit on such 16 year-olds’ Charter right to movement (and, incidentally, the Charter’s rights to privacy and expression.)
- **Privacy (Charter s. 13(a)):** Clause 6’s requirement for approval by Ministerial order of the alternative of ‘participating in education or training, or employment or both’ amounts to a broad power to control large parts of the lives of those 16 year-olds who do not attend school or receive home instruction. The Committee is concerned that clause 6 may limit the Charter right of such 16 year-olds against interferences in their privacy.
- **Family rights (Charter ss. 13(a) & 17(1)):** In addition to more formal excuses for non-attendance, existing s. 2.1.3(e) provides an excuse for parents where ‘the absence from school or instruction was because of the child’s disobedience and was not due to any fault of the parent’. By contrast, similar legislation on youth participation in England imposed obligations directly on children aged 16 and over, rather than extending existing legislation that imposed obligations on parents.¹ While the Committee observes that actual prosecutions under existing s. 2.1.2 may be rare, it is concerned that the potential for parents to be fined if they do not attempt to exert control over their 16 year-old children may limit the Charter rights of families against arbitrary intrusions and to protection by the State. The Committee also observes that, in contrast to the equivalent

¹ *Education and Skills Act 2008 (UK), ss. 1-2 c.f. Education Act 2006 (UK), ss. 7 & 444.*

NSW provision, there is no express excuse for where a 16 year-old is no longer living with either parent.²

- **Conscience (Charter s. 14):** Some mature 16 year-olds may have compelling personal reasons to not participate in education, training or employment for all or some of their 16th year. However, personal reasons are only partially accommodated by existing s. 2.1.3(f)'s excuse for 'attending or observing a religious event or obligation as a result of a genuinely held belief of the child'. This exception does not cover non-religious matter, such as political, social or family events or obligations. The Committee observes that the Bill's extension of the existing scheme may limit 16 year-olds' rights to freedom of (non-religious) conscience.
- **Children (Charter s. 17(2)):** The Committee observes that, while attending school will be in the best interests of most 16 year-olds, it will not be contrary to the best interests of some. The Committee considers that the compatibility of clauses 5 and 6 with the Charter depends on whether or not the distinct interests of 16 year-olds for whom continued schooling is not an appropriate or feasible option can be catered for.
- **Presumption of innocence (Charter s. 25(1)):** Existing s. 2.1.14 places a reverse onus on the defence of reasonable excuse in s. 2.1.2. The Committee observes that the extension of s. 2.1.14 to parents of 16 year-olds may limit the Charter's right to be presumed innocent. In this regard, the Committee notes that some of the reasonable excuses listed in s. 2.1.3 may not be within the personal knowledge of the parents of some 16 year-olds.

The Statement of Compatibility does not expressly address the above rights, apart from the rights to conscience and to expression.

On the question of whether or not the Charter's rights to conscience or expression are reasonably limited by the Bill, the Committee observes that the Statement's discussion does not address any of the mandatory considerations listed in Charter s. 7(2) or otherwise address whether or not the Bill's limitation of rights is demonstrably justifiable or proportional.³

The Committee recalls its *Alert Digest No 4 of 2007*, where it said:

The Committee considers that where there is a reasonable prospect that a provision in a Bill may test or infringe Charter compatibility that issue should be drawn to the attention of the Parliament and a reasoned, even if brief, analysis of why the provision is nevertheless considered compatible with the Charter should be outlined.

Charter s. 28's requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.⁴

In accordance with its Practice Note No. 2, the Committee will write to the Minister expressing its concern about the adequacy of the Bill's Statement of Compatibility.

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

² Clause 4, *Education Amendment Bill 2009* (NSW), inserting a new s. 23(e) into the *Education Act 1990* (NSW).

³ Charter s. 7(2) provides: "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 limitation; 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."

⁴ Charter s. 28(3)(a) provides: "A statement of compatibility must state... whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible'.

- 1. Is clause 4's extension of existing s. 2.1.14 to parents of 16 year olds compatible with the Charter's right to be presumed innocent?**
- 2. Is clause 6's requirement of approval in a Ministerial order for alternatives to schooling compatible with 16 year-olds' Charter right against arbitrary or unlawful interferences with privacy?**

Pending the Minister's response, the Committee draws attention to clause 4, existing s. 2.1.14 and clause 6.

The Committee makes no further comment.

Land Legislation Amendment Bill 2009

Introduced	1 September 2009
Second Reading Speech	2 September 2009
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA

Purpose

The Bill amends the –

- *Transfer of Land Act 1958* to –
 1. expand the definition of 'Court' to allow the registrar of titles to give effect to orders made by the Magistrates' Court in relation to land valued within its jurisdictional limit⁵ **[3, 7, 8, 10, 41, 46, 47, 50, 55, 56, 57, 63, 66, 67]**
 2. allow the registrar a discretion to consolidate parcels of land where a vesting order is made in adverse possession cases. **[36]**
 3. allow the recording of lease commencement and expiration dates on the relevant folio. **[37]**
 4. provide a uniform consistent time period of 30 days for all transactional matters rather than varying time periods currently provided. **[8, 9, 26, 35, 38, 46 and 57]**
 5. remove the absence from Victoria as a ground for recording a caveat. **[59]**
 6. repeal Schedule 7 (Table A) providing for the general conditions of sale of land following the adoption of a new model contract for the sale of land prescribed by the *Estate Agents (Contracts) Regulations 2008*. **[28 and 71]**
 7. make minor miscellaneous amendments to the Act.
- *Subdivision Act 1988* to provide the registrar with a discretionary power to refuse to accept a plan of subdivision for lodgement if the street addressing information is not provided and to confirm that existing common property may not be increased or decreased without the unanimous resolution of the appropriate owners corporation. The Bill also provides for a more streamlined process for a total consolidation of land affected by an owners corporation where all the land being consolidated is owned by the same person. **[95 to 104]**
- *Surveying Act 2004* to enable the creation of different classes of surveyors for which differing fees may be prescribed and to allow the Board to prescribe training in professional skills other than in cadastral surveying such as planning and risk management. **[73 to 93]**
- *Geographic Place Names Act 1998* to extend the maximum term of appointment of the registrar of geographic names from three years to five years. **[94]**
- *Forests Act 1958* to make miscellaneous amendments to clarify the role of the Minister in granting permits and licences under section 52(1) (licences and permits) of that Act. **[105]**

The Committee makes no further comment.

⁵ The Magistrates' Court can determine most disputes over money or property up to the value of \$100,000, however where the parties consent in writing the court may hear cases with an unlimited value. The Magistrates' Court may also hear matters exceeding the jurisdictional amount whether others Acts so specify.

Valuation of Land Amendment Bill 2009

Introduced	1 September 2009
Second Reading Speech	2 September 2009
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Minister responsible	Hon. Gavin Jennings MLC
Portfolio responsibility	Minister for Environment and Climate Change

Purpose

The Bill amends the *Valuation of Land Act 1960* (the 'Act') to allow councils the option of transferring their responsibility for completing rating authority valuations and the responsibility to manage objections and appeals to the Valuer-General. The Bill also proposes to make the Valuer-General the custodian of statewide valuation data. **[5, 7, 10, 14, 22, 23]** The Bill makes consequential amendments to a number of related Acts. **[31 to 35]**

Note: From the Statement of compatibility – *All Valuer-General valuation processes are subject to external audits biannually. In addition, annual audits are conducted on the Valuer-General's panel of valuers.*

The Committee makes no further comment.

Victorian Renewable Energy Amendment Bill 2009

Introduced	1 September 2009
Second Reading Speech	2 September 2009
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Minister for Energy and Resources

Purpose

The Bill amends the *Victorian Renewable Energy Act 2006* to support the transition of the Victorian Renewable Energy Target (VRET) scheme to the Commonwealth's expanded RET scheme. The Council of Australian Governments (COAG) agreed to the expansion of the Commonwealth's Renewable Energy Target (RET) scheme at its meeting on 30 April 2009. Amendments to implement this agreement have been enacted by the Commonwealth Parliament pursuant to the *Renewable Energy (Electricity) Amendment Act 2009 (Cth)*.

Note: Extracted from the Second Reading Speech –

The Bill will facilitate the transition of the Victorian renewable energy target (VRET) scheme to the Commonwealth's expanded renewable energy target (RET) scheme. As agreed at the Council of Australian Governments (COAG) meeting on 30 April 2009, the expansion of the Commonwealth's renewable energy target scheme will seek to increase renewable electricity generation in Australia to 20 per cent of the total electricity generation capacity in Australia by 2020.

... The Bill supports the expansion of the Commonwealth scheme by removing the entitlement to create Victorian renewable energy certificates from 1 February 2010 and removing the obligations on VRET participants to surrender renewable energy certificates to meet their VRET scheme target for the year 2010 and onwards. This will enable entitlements and liabilities under the expanded Commonwealth scheme to apply instead.

... The provisions in the Bill will operate closely with transitional provisions under the amendments to the Commonwealth's Renewable Energy (Electricity) Act 2000 which were passed by the Commonwealth Parliament on 20 August 2009. Transitional arrangements under the Commonwealth's expanded RET scheme will enable renewable energy certificates under the Victorian scheme to be exchanged for certificates under the expanded Commonwealth scheme and deem VRET scheme participants to be participants under the expanded RET scheme.

Content and Committee comment

The provisions in the Bill come into operation on a day or days to be proclaimed. [2]

Note: From the explanatory memorandum – *The clause does not specify a default commencement date because the Bill implements a transition to the Commonwealth's Renewable Energy Target (RET) scheme. The non inclusion of a default commencement date is needed to provide for maximum flexibility to ensure that the Bill commences on the same day or days as the relevant provisions of the Renewable Energy (Electricity) Amendment Act 2009 of the Commonwealth.*

The Committee makes no further comment.

Ministerial Correspondence

Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009

The Bill was introduced into the Legislative Assembly on 28 July 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 10 August 2009 and made the following comments in Alert Digest No. 9 of 2009 tabled in the Parliament on 11 August 2009.

Committee's Comments

Charter report

Fair hearing – Restrictions on evidence and compulsion of witnesses – Meaning of restriction – Whether reasonable limit

Summary: Clauses 5, 9, 15 and 18 may engage the Charter right of litigants in proceedings held after a judicial resolution conference to a fair hearing. The terms of the limit on the compellability of judicial officers appear to be broader than their intended purpose. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clauses 5, 9, 15 and 18 provide that evidence relating to judicial resolution conferences is 'not admissible at the hearing of' various proceedings and that judicial officers are 'not compellable to give evidence in any proceeding' about aspects of judicial resolution conferences.

The Statement of Compatibility remarks that the Bill does not engage the right to a fair hearing because judicial resolution conferences aren't civil proceedings for the purposes of Charter s. 24(1). **However, the Committee observes that the clauses operate in subsequent civil and criminal proceedings and therefore may engage the Charter right of litigants in those proceedings to a fair hearing.**

The Committee notes that each of the clauses provides that judicial officers are:

not compellable to give evidence in any proceeding, whether civil or criminal, of anything said or done or arising from the conduct of the judicial resolution conference.

The Explanatory Memorandum states that these provisions are:

intended to prevent [judicial officers] being compellable to give evidence intended to assist in the interpretation of the terms of a written agreement arising out of a judicial resolution conference, and signed by parties at the conclusion of a judicial resolution conference.

However, the terms of the limit on the compellability of judicial officers appear to be broader than this purpose.

In particular, the Committee observes that:

- *The provisions are not limited to judicial officers who preside over the judicial resolution conference.*
- *The words 'said or done' are at large. In particular, in contrast to the Bill's provisions on admissibility of evidence, the words are not limited to anything 'said or done by any person in the course of the conduct of the judicial resolution conference.'*
- *The meaning of the phrase 'anything arising from the conduct of the judicial resolution conference' is not clear. Many things may arise from a conference, including*

proceedings subsequent to a judicial resolution conference, which would ordinarily be subject to s. 16(2) of the Evidence Act 2008 (a narrower restriction on compellability.)

- *The bar on judicial compellability inserted by clauses 5, 9, 15 and 18 for judicial conference proceedings is absolute. There is therefore no mechanism for limiting any capricious effect of the clauses. This contrasts, for example, with s. 16(2) of the Evidence Act 2008 (whose general bar on judicial compellability in proceedings is subject to a court giving leave.)*

For example, the provisions would bar a judge alleged to have taken a bribe from one of the parties being compelled to testify at civil proceedings aimed at overturning an allegedly corrupt settlement and at criminal proceedings against the allegedly corrupt party.

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

- 1. Should the limits on compellability in clauses 5, 9, 15 and 18 be restricted to judicial officers who preside over a judicial resolution conference?**
- 2. Should the words 'said or done' be qualified so that they are restricted to what is said or done by any person in the course of conduct of the judicial resolution conference?**
- 3. What is the meaning of the phrase 'anything arising from the conduct of the judicial resolution conference'?**
- 4. Do clauses 5, 9, 15 and 18 limit the Charter right to a fair hearing of litigants in future civil and criminal proceedings?**
- 5. If so, is a leave requirement like the one in s. 16(2) of the Evidence Act 2008 a less restrictive alternative reasonably available to achieve the purpose of the bar on judicial compellability inserted by clauses 5, 9, 15 and 18?**

Pending the Attorney-General's response, the Committee draws attention to clauses 5, 9, 15 and 18.

Minister's response

I refer to your letter dated 11 August 2009 setting out the concerns of the Scrutiny of Acts and Regulations Committee in relation to the Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009.

I respond to the Committee's specific questions as follows:

- 1. Should the limits on compellability in clauses 5, 9, 15 and 18 be restricted to judicial officers who preside over a judicial resolution conference?**

It is anticipated that a judge responsible for case management may refer proceedings suitable for judicial dispute resolution to a different judge for the conduct of the judicial resolution conference. It is possible, therefore, that two or more judges may be associated with the same proceedings.

The wording should not be restricted as suggested. It would not be appropriate for any judges associated with the judicial resolution conference (regardless of whether the judge was involved in a referring or presiding role) to be compellable to give evidence in subsequent proceedings.

The purpose of clauses 5, 9, 15 and 18 is to confirm that the existing non-compellability rule in section 16(2) of the Evidence Act 2008 applies to judicial resolution conferences in the same way as it does to every other proceeding over which a Judge presides.

The clauses are limited by section 16(2) of the Evidence Act 2008, which gives a Court in a subsequent proceeding the power to order a Judge to give evidence in exceptional circumstances. The Courts indicated that in order to embark on the judicial resolution conference process successfully, and with complete confidence, it

must be put beyond doubt that judicial immunity extends to the conduct of ADR processes.

As stated above, the new clauses only confirm the already existing protection that section 16(2) provides. This is why the clauses are made subject to section 16(2).

- 2. Should the words 'said or done' be qualified so that they are restricted to what is said or done by any person in the course of conduct of the judicial resolution conference?**

The words "said or done" in clauses 5, 9, 15 and 18 should be read as referring to anything said or done in the course of the conduct of the judicial resolution conference.

- 3. What is the meaning of the phrase 'anything arising from the conduct of the judicial resolution conference'?**

The phrase "anything arising from the conduct of the judicial resolution conference" should be given its ordinary meaning.

Clauses 5, 9, 15 and 18 are expressed to operate "(W)ithout limiting section 16 of the Evidence Act 2008". The meaning of these words is that the ability of a court to order a Judge to give evidence under section 16 prevails over the immunity granted by the clauses. Therefore the clauses do not broaden the restriction on compellability as provided by section 16 as they are subject to it.

In accordance with section 16 of the Evidence Act 2008, it would be open to a court in subsequent proceedings to give leave to compel a judge to give evidence about anything arising from the conduct of a judicial resolution conference.

The Explanatory Memorandum provides an illustrative example of the way in which the non-compellability provision is intended to operate in respect of judicial resolution conferences.

- 4. Do clauses 5, 9, 15 and 18 limit the Charter right to a fair hearing of litigants in future civil and criminal proceedings?**

The clauses do not limit the Charter right to a fair hearing. As the operation of section 16 of the Evidence Act 2008 is not limited, the bar on judicial compellability is not absolute. Given the operation of section 16(2) of the Evidence Act 2008, the 'capricious effects' referred to by the Committee are avoided.

In particular, in the example put forward by the Committee, it would be open to the court hearing civil or criminal proceedings to give leave to compel the judge to give evidence pursuant to section 16(2) of the Evidence Act 2008.

- 5. If so, is a leave requirement like the one in s.16(2) of the Evidence Act 2008 a less restrictive alternative reasonably available to achieve the purpose of the bar on judicial compellability inserted by clauses 5, 9, 15 and 18?**

As indicated above, section 16(2) of the Evidence Act 2008 applies.

I trust these responses are of assistance.

ROB HULLS MP
Attorney-General

Received 4 September 2009

The Committee thanks the Attorney-General for this response.

Local Government Amendment (Conflicting Duties) Bill 2009

The Bill was introduced into the Legislative Assembly on 28 July 2009 by the Hon. Richard Wynne MLA. The Committee considered the Bill on 10 August 2009 and made the following comments in Alert Digest No. 9 of 2009 tabled in the Parliament on 11 August 2009.

Committee's Comments

Charter report

Public affairs – Disqualification of political employees from being Councillors – Discrimination on the basis of political belief or activity – Whether reasonable limit – Adequacy of Statement of Compatibility – Less restrictive alternatives

Summary: Clause 3, by disqualifying Ministerial employees, Parliamentary advisors and electorate officers from becoming or remaining a Councillor may limit the Charter right of such employees 'without discrimination, to participate in the conduct of public affairs, directly', including discrimination on the basis of political activity. The Committee will write to the Minister seeking further information.

The Committee notes that clause 3, inserting a new section 28A(1)(b) into the Local Government Act 1989, disqualifies employees of Ministerial officers, Parliamentary advisers or electorate officers of any Australian parliamentarian from becoming or remaining a Councillor. The Committee considers that clause 3 may limit the Charter s. 18(1), which provides:

Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

The Statement of Compatibility remarks:

Similar restrictions are provided under section 49 of the Constitution Act 1975 (Victoria) which prevents a person from being a member of the Victorian Parliament, if they also hold any office or place of profit under the Crown or are in any manner employed in the public service of Victoria or the commonwealth.

Similarly the Bill provides that eligibility requirements apply to persons who stand for council election. While the requirements in this case are less restrictive... they are equally necessary.

There are good reasons to ensure a clear separation between a person's role as a candidate for election and their position working for a member of Parliament. Significant potential exists for conflicts between a person's obligations to the member they work for and their ability to freely represent themselves and their policies to their local community as a candidate for the officer of councillor.

In addition, people working for members of Parliament can have access to public resources and information not available to other candidates that may be used to benefit an election campaign.... Public resources and information should not be able to be used in a way that undermines key democratic principles or create a perception that municipal elections are not conducted in a fair manner.

The Committee observes that:

- **Under the Charter, 'discrimination' extends to discrimination on the basis of 'political belief or activity' or on the basis of 'personal association' with someone who has a 'political belief or activity'.** These terms include 'engaging... in a lawful political activity'. By limiting the disqualification to employees of politicians, rather than to all public servants (as in s. 49 of the Constitution Act 1975), new section

28A(1)(b) may engage the anti-discrimination aspect of the Charter's right to participate in public affairs.

- In contrast to elected officers in the state and federal Parliaments, Councillors are not remunerated on a full-time basis, but rather are presently paid between \$6800 and \$24200 per annum, depending on the category of the council and decisions made by each council. So, new section 28A(1)(b) may create a significant disincentive to participation in local councils by political employees.
- The United Nations Human Rights Committee has held, in relation to the right to participate in public affairs in the International Covenant on Civil and Political Rights:

If there are reasonable grounds for regarding certain elective officers as incompatible with tenure of specific positions, (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights [to vote and to be elected].

While the Committee appreciates that new section 28A(1)(b) implements a recommendation of the Ombudsman arising from a recent inquiry, it nevertheless observes that even measures to implement compelling government interests must satisfy Charter s. 7(2), which provides:

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 limitation; 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.*

In particular, overseas courts applying similar standards have held that 'there must be proportionality between the effects of the measures responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.'

In addition, the Committee notes that the Statement of Compatibility's analysis of the factor listed in Charter s. 7(2)(e) simply states that: 'There are no less restrictive means reasonably available to achieve the intended purposes.' The Committee considers that a mere assertion that there are no reasonably available alternatives does not satisfy the Charter's requirement that the Statement of Compatibility state how a bill is compatible with human rights. Rather, whenever a provision in a Bill limits a Charter right, the Statement should explain why there are no alternatives or why any alternatives are not reasonably available.

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

- 1. Whether or not new section 28A(1)(b), by singling out political employees for disqualification as Councillors, limits the Charter right of Ministerial employees, parliamentary advisers and electoral officers to participate directly in public affairs without discrimination on the basis of political activity; and**
- 2. If so, whether or not new section 28A(1)(b) is a reasonable limit on that right according to the test set out in Charter s. 7(2).**
- 3. What alternatives to new section 28A(1)(b) were considered? Why are those alternatives not reasonably available?**

Pending the Minister's response, the Committee draws attention to new section 28A(1)(b).

Guarantee of the will of electors – Privacy – Disqualification of sitting councillors – Whether retrospective – Seven day grace period – Whether reasonable limit – Whether arbitrary interference

Summary: New section 28B may partially annul the results of the 2008 local government elections, by forcing elected Councillors out of office on the basis of a disqualification ground that did not exist when those elections were held. The Committee considers that this section may be incompatible with the Charter right of electors in the 2008 local government elections to a guarantee of the free expression of their will. The 7 day grace period provided for by new section 28B may be an unreasonable interference with the privacy of Councillors who are employed as political advisers. The Committee will write to the Minister seeking further information.

The Committee notes that clause 3, inserting a new section 28B into the Local Government Act 1989, provides that sitting Councillors go 'out of office' seven days after the commencement of the Bill if they continue to hold an office listed in new section 28A. New section 28B therefore ensures that the new ground of disqualification set out in new section 28A applies to Councillors elected prior to the commencement of the Bill.

The Committee considers that new section 28B may engage the Charter s. 18(2)(a), which provides:

- (2) Every eligible person has the right...
- (a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors...

The Statement of Compatibility remarks:

It should be noted that the amendment does not have a retrospective application since it does not affect their previous service as a councillor.

However, the Committee observes **that new section 28B may partially annul the results of the 2008 local government elections, by forcing elected Councillors out of office on the basis of a disqualification ground that did not exist when those elections were held.**

The Committee considers that the Charter right of '[e]very eligible person... to... be elected' is necessarily limited by a law that changes the definition of 'eligible person' and applies that change to an already elected person. The Charter right of voters to 'municipal elections that guarantee the free expression of the will of the electors' is necessarily limited by a law introduced after the election that prevents a person who was elected to office from continuing to hold that office until the next general election. A by-election to fill such a vacancy may not provide a substitute guarantee, as it will be based on a different electoral roll, different political circumstances and, most importantly, a different list of candidates that excludes the previously elected candidate.

The Statement of Compatibility remarks:

It is important the councillors elected in the November 2008 general elections are subject to these eligibility requirements at they can equally have conflicting duties during their term as councillor.

The Committee observes that the European Court of Human Rights has held, in relation to similar political rights in Europe, that:

once the wishes of the people have been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system may call that choice into question, except in the presence of compelling grounds for democratic order.

In that case, Greece's Constitution had been amended to bar parliamentarians from professional activities, with the result that a parliamentarian elected prior to the amendment was removed from office on the ground that he had continued to act as a lawyer. The Court

held that this action ‘deprived his constituents of the candidate whom they had chosen freely and democratically to represent them for four years in Parliament, in breach of the principle of legitimate expectation.’ These findings were made despite the proposal for disqualification having been mooted prior to the election and the availability of an eight day grace period for the member to cease his professional activities. The Court observed that the Greek Government ‘have not advanced any ground of pressing significance to the democratic order that could have justified the immediate application of the absolute disqualification.’

The Committee considers that new section 28B may be incompatible with the Charter right of electors in the 2008 local government elections to a guarantee of the free expression of their will.

The Committee is additionally concerned that **the 7 day grace period provided for by new section 28B may be an unreasonable interference with the private lives of Councillors who are employed as political advisers.** A decision to retain or abandon a job or career is a significant personal decision that requires time for consideration, consultation with affected people and alternative sources of income. Although sitting Councillors are doubtless currently aware of the Bill, the Committee considers that they should not be expected to take action in response until after the Bill has been enacted. Because the Bill commences on royal assent, such Councillors will have only one week to choose between their elected position and their profession. As some members of the European Court of Human Rights have observed, such a constrained choice between public and private careers may limit the right to privacy. The Committee observes that new section 28B may be an arbitrary limit on employees’ privacy in the case of employees who are legally required to give more than seven days notice before they resign from their employment.

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

1. **Whether or not new section 28B limits the Charter right to electors in the 2008 local government elections to a guarantee of their will.**
2. **If so, whether or not new section 28B is a reasonable limit on that Charter right according to the test in Charter s. 7(2).**
3. **Whether a lengthier grace period than 7 days would be an alternative reasonably available to achieve the purpose of new section 28B that is less restrictive of the rights of Councillors against arbitrary interference in their privacy.**
4. **Whether new section 28B may operate arbitrarily in the case of employees who are legally required to give more than seven days notice before they resign from their employment.**

Pending the Minister’s response, the Committee draws attention to new section 28B.

Minister’s response

I refer to the Parliament of Victoria, Scrutiny of Acts and Regulations Committee’s (‘the Committee’) letter of 11 August 2009 and its comments in Alert Digest No. 9 of 2009 regarding clause 3 of the Local Government Amendment (Conflicting Duties) Bill 2009 (‘the Bill’).

Section 28A(1)(b) and the right to take part in public life

Proposed new section 28A of the Local Government Act 1989 (‘the Act’) provides an objective and reasonable criteria for determining whether or not a person is ‘eligible’ to become or continue to be a Councillor or nominate as a candidate at a Council election. Specifically, section 28A(1)(b) of the Act disqualifies persons who hold ‘specified positions’ which give rise to conflicting duties with their obligations to their local community as a Councillor. The disqualification is not an arbitrary one that discriminates on the basis of an individual’s political belief or activity, or their personal association with someone who has a political belief or activity. The grounds for disqualification apply equally irrespective of the

person's political allegiances, and are not dependent on factors such as membership of a political party.

Direct discrimination refers to the less favourable treatment of a person with a relevant attribute compared to a person without that attribute in the same or similar circumstances. All people wishing to run for or hold the office of Councillor are subject to the same qualifications. Section 18(2) of the Charter of Human Rights and Responsibilities 2006 ('the Charter') protects the right of eligible persons to be elected at municipal elections. The UN Human Rights Committee recognises that objective and reasonable criteria may be placed on eligibility for election, including that certain elective offices may be incompatible with other public offices.¹

The Committee observes that because the disqualification only applies to employees of politicians and not to all public servants, it may be discriminatory on the basis of a "political belief or activity" or a "personal association" with someone who has a "political belief or activity." In this sense, the Committee compares the restrictions to those applying under section 49 of the Constitution Act 1975 ('the Constitution Act'), which prevent members of Parliament from holding an office of profit under the Crown. In my view, it is not reasonable to use the section 49 qualifications as a direct comparator. Section 49 of the Constitution Act and the proposed amendments in the Bill address different concerns. The restriction in section 49 applies because a person may not be part of two arms of the same government simultaneously: that is the public service (part of the Executive arm of government) and the Parliament. It is based on the principle of the separation of powers. The only exception to this rule under the Westminster system of government is Ministers of the Crown who must be members of both the Parliament and the Executive. Section 28A is not concerned to address disqualification related to the separation of powers – a person who is both a public servant and a Councillor does not breach the separation of powers as the two forms of government are distinct.

Section 28A(1)(b) is concerned to address the conflict of duties described in the Ombudsman's Report tabled in Parliament on 7 May 2009. The mischief this Bill seeks to combat is related to the principle of independence, namely the inherent difficulties in acting as a Councillor in the interests of a municipality, while at the same time serving the interests of a Minister or a member of State or Federal Parliament, or in fact, acting as a member of Parliament. The Bill provides a targeted and limited measure to avoid known instances of conflicting duties, and in my opinion it is not appropriate to extend the disqualification further to rule out all public servants.

There is no reasonable alternative to the new section 28A(1)(b). It has been suggested by some that the conflict of interest rules, under Division 1A of Part 4 of the Act, might be extended so that persons who hold specified positions are prevented from participating in Council business where they have a conflict. However, this approach is not a reasonable option because, as indicated above, the nature of the conflicts addressed in section 28A(1)(b) are inherent in the holding of the relevant positions. Conflicts of interest are defined by reference to clear and demonstrable connections between the interests or obligations of a Councillor and the relevant matter under consideration. The problem addressed by section 28A(1)(b) deals with conflicts of a general nature that will not be limited to particular matters before the Council. Section 28A makes clear that the new eligibility requirements apply to all Councillors, current and future, and enables candidates currently holding a position described in section 28A(1)(b) to take leave from that position to stand as a Councillor. Section 28B provides a less restrictive alternative by allowing a seven-day grace period to enable current Councillors to resolve present conflicts.

Section 28B and the right to take part in public life

The Committee requested further information about section 28B in relation to the right of electors in the 2008 local government elections to "a guarantee of the free expression of their will". The Bill does not call into question the conduct of, nor the results of, the 2008 municipal elections. Instead, the Bill responds to an issue of "pressing significance to the

¹ Human Rights Committee, *General Comment 25*, UN Doc CCPR/C/21/Rev. 1/Add.7 (12 July 1996), [15]-[16].

democratic order² that has been brought to the Parliament's attention by the Ombudsman's Report tabled on 7 May of this year. This issue of significant public interest, together with the much more limited scope of the disqualification, distinguishes the reforms proposed by the Bill from the case referred to by the Committee, *Lykourazos v Greece*.³ In that case, the disqualification was much broader, namely a revision of the Greek Constitution making all professional activity incompatible with the duties of a member of Parliament. Furthermore, the European Court of Human Rights noted that the Government in that case had "not advanced any ground of pressing significance to the democratic order that could have justified the immediate application of the absolute disqualification."⁴ Importantly, the European Court expressly noted that the guarantees of the right to vote and to stand for election "are not absolute" and that in relation to limitations on the right, the margin of appreciation is wide in that context. The Court stated that

*[t]here are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.*⁵

As set out in the Statement of Compatibility for the Bill, new section 28B is a reasonable limitation on section 18(2) of the Charter. The limitation is reasonable since Councillors who hold specified positions would be recognised as holding positions that are inherently conflictual and their continued occupation of those positions would continue to undermine the legitimacy of local government as a "distinct and essential tier of Government" under the Constitution Act. The requirement that conflicts between positions be resolved immediately recognises that electors have a right to be represented by people who are wholly committed to their local community and do not have alternative commitments to another level of government.⁶

There are a number of existing circumstances where an elected Councillor may be lawfully removed from office. This includes where the Councillor has ceased to be an eligible voter in the municipality, where the Councillor has become a bankrupt, committed a crime or resigned from office. In addition, the Local Government Act provides circumstances where VCAT may disqualify a Councillor from office or the Governor-in-Council may suspend all of the Councillors of a Council. The Constitution Act also provides that the Parliament may pass an Act to dismiss an entire Council.

Any position that becomes vacant as a result of the Bill will be filled in accordance with democratic processes prescribed in the Act. These processes ensure that vacancies are filled in accordance with the votes cast by electors, either at the 2008 elections in the case of a countback, or at a by-election conducted after the position becomes vacant.

Section 28B and the right to privacy and reputation

I turn now to the Committee's suggestion that section 28B, and the seven-day period provided in this section, may be an arbitrary interference with the privacy of Councillors who are employed as political advisors contrary to section 13(a) of the Charter. This suggestion is said to be based on the fact that section 28B requires Councillors to take a 'significant personal decision that requires time for consideration, consultation with affected people and alternative sources of income'. Reference is made to the decision of the European Court of Human Rights' decision in *Lykourazos v Greece*.⁷

In my view, it is questionable whether the right to privacy extends this far. I note that in the decision of *Lykourazos v Greece*, the Court did not consider it necessary to decide the issue while the minority opinion concluded that Article 8 was engaged. Even so, it is

² *Lykourazos v Greece* [2006] ECHR 1176, [57].

³ *Ibid.*

⁴ *Ibid* [57].

⁵ *Ibid* [51].

⁶ See Human Rights Committee, *General Comment* 25, [7], [23].

⁷ [2006] ECHR 1176.

important to note that the decisions of the European Court on this issue have generally dealt with restrictions in relation to private sector employment, rather than the issue here, which concerns restrictions on public sector employment. In any case, the eligibility criteria and the seven-day grace period to resolve conflicts cannot be considered arbitrary for the purposes of section 13(a) of the Charter. This is in view of the compelling public purpose of the Bill. Moreover, the Bill cannot be said to unfairly surprise Councillors as the proposed amendment has been known about for a considerable time, and indeed follows from a well-publicised report of the Victorian Ombudsman.

In particular, I am of the view that the seven-day grace period specified in section 28B is 'within [the] range of reasonable alternatives'⁸ available to meet the legislative purpose of the Bill. Section 28B fairly balances the need to give Councillors a period to formally make their decision whether to give up conflicting employment with the countervailing need to ensure that damaging conflicts of interest are removed as soon as possible, and ensuring that any period of disruption to Councils and local governance is kept to a minimum. A longer period would delay the process of replacing Councillors who elect to give up their office, hindering the ability of Councils to undertake their functions and make decisions in the best interests of the community. This is a particularly significant issue where multiple vacancies arise at a single Council or where a vacancy is for the only Councillor representing a particular ward.

I thank you for the Committee's comments and the opportunity to respond.

*RICHARD WYNNE MP
Minister for Local Government*

1 September 2009

The Committee thanks the Minister for this response.

⁸ *Sabet v Medical Practitioners Board* [2008] VSC 346, [188] (Hollingworth J).

Major Transport Projects Facilitation Bill 2009

The Bill was introduced into the Legislative Assembly on 12 August 2009 by the Hon. Tim Pallas MLA. The Committee considered the Bill on 31 August 2009 and made the following comments in Alert Digest No. 10 of 2009 tabled in the Parliament on 1 September 2009.

Committee's Comments

Charter report

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

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.

Minister's response

I refer to your letter of 1 September 2009 seeking my advice with respect to the matters raised by the Scrutiny of Acts and Regulations Committee in its Alert Digest No. 10 of 2009 regarding the Major Transport Projects Facilitation Bill.

Answers to the Committee's queries are below.

1. In light of the remainder of clause 252, why is the criminalisation of insults in impact assessment meetings reasonably necessary to achieve the purposes of protecting public order?

Response: The "remainder of clause 252" makes it an offence to "assault or obstruct a member of an assessment committee or any person attending a hearing" or to "misbehave at" or "repeatedly interrupt" a hearing before an assessment committee or (without lawful excuse) "disobey a direction of" an assessment committee.

The retention of the offence of "insults" a member or any person attending a hearing (as part of clause 252 as a whole) is reasonably necessary to achieve the purpose of maintaining public order at these hearings. 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 concept of "insults" properly captures the form of behaviour that the clause is intended to prevent.

2. Is the continuing criminalisation of insulting behaviour in political contexts appropriate in light of the High Court's decision in *Coleman v Power*?

*Response: It is noted that in *Coleman v Power* [2004] HCA 39, the High Court determined that an offence that includes the term "insults" should be interpreted in a manner that excludes political comment.*

It is necessary to retain the clause in its present form to control other forms of inappropriate behaviour (including insults which are not of a political nature) which may arise during assessment committee hearings. Clause 252 will ensure that assessment committee hearings are properly conducted and appropriately inform both the assessment committee's recommendation under clause 73 and the Planning Minister's approval decision under clause 77.

Clause 252 is based on section 169 of the Planning and Environment Act 1987 (which applies to planning panel hearings).

*Tim Pallas MP
Minister for Roads and Ports*

Received 9 September 2009

The Committee thanks the Minister for this response.

**Committee Room
14 September 2009**

Appendix 1

Index of Bills in 2009

	Alert Digest Nos.
Appropriation (2009/2010) Bill 2009	6
Appropriation (Parliament 2009/2010) Bill 2009	6
Associations Incorporation Amendment Bill 2008	1
Assisted Reproductive Treatment Bill 2008	1
Bushfires Royal Commission (Report) Bill 2009	4
Bus Safety Bill 2008	1, 5
Casino Legislation Amendment Bill 2009	7
Cemeteries and Crematoria Amendment Bill 2009	9
Children Legislation Amendment Bill 2009	5
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009	6
Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009	9, 11
Courts Legislation Amendment (Sunset Provisions) Bill 2009	8, 10
Crimes Amendment (Identity Crime) Bill 2009	4, 6
Criminal Procedure Bill 2008	1, 3
Crown Land Acts Amendment (Lease and Licence Terms) Bill 2009	6
Duties Amendment Bill 2008	1
Education and Training Reform Amendment (School Age) Bill 2009	11
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009	4, 5
Energy and Resources Legislation Amendment Bill 2009	10
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	6, 8
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	6, 7
Equal Opportunity Amendment (Governance) Bill 2008	1
Fair Trading and Other Acts Amendment Bill 2008	1
Fair Work (Commonwealth Powers) Bill 2009	7
Food Amendment (Regulation Reform) Bill 2009	7
Gambling Regulation Amendment Bill 2009	7
Gambling Regulation Amendment (Licensing) Bill 2009	2
Gambling Regulation Further Amendment Bill 2009	10
Human Services (Complex Needs) Bill 2009	4
Human Tissue Amendment Bill 2009	8, 10
Justice Legislation Further Amendment Bill 2009	10
Justice Legislation Amendment Bill 2009	5, 6
Land Legislation Amendment Bill 2009	11
Legislation Reform (Repeals No. 4) Bill 2009	4
Liquor Control Reform Amendment (Enforcement) Bill 2008	1
Liquor Control Reform Amendment (Licensing) Bill 2009	10
Local Government Amendment (Conflicting Duties) Bill 2009	9, 11
Local Government Amendment (Offences and Other Matters) Bill 2009	10
Macedonian Orthodox Church (Victoria) Property Trust Bill 2009	6
Major Crime Legislation Amendment Bill 2008	3
Major Sporting Events Bill 2009	3, 5
Major Transport Projects Facilitation Bill 2009	10, 11
Melbourne Cricket Ground Bill 2008	1
Melbourne University Amendment Bill 2009	3
National Parks Amendment (Point Nepean) Bill 2009	7

Scrutiny of Acts and Regulations Committee

Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1, 7, 9
Parliamentary Salaries and Superannuation Amendment Bill 2009	5
Personal Property Securities (Commonwealth Powers) Bill 2009	10
Planning Legislation Amendment Bill 2009	5
Primary Industries Legislation Amendment Bill 2008	4
Primary Industries Legislation Further Amendment Act 2009	8
Racing Legislation Amendment (Racing Integrity Assurance) Bill 2009	9
Relationships Amendment (Caring Relationships) Bill 2008	1
Residential Tenancies Amendment (Housing Standards) Bill 2009	8
Resources Industry Legislation Amendment Bill 2008	1
Road Legislation Amendment Bill 2009	5
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1, 5
Serious Sex Offenders Monitoring Amendment Act 2009	2, 5
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
Valuation of Land Amendment Bill 2009	11
Victorian Renewable Energy Amendment Bill 2009	11
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
--	----

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

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

(vi) inappropriately delegates legislative power

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

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

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

Scrutiny of Acts and Regulations Committee

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

Scrutiny of Acts and Regulations Committee

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	Attorney-General	31.03.09 04.06.09	4 of 2009 7 of 2009
Justice Legislation Amendment Bill 2009	Racing	08.05.09 29.05.09	5 of 2009 6 of 2009
Road Legislation Amendment Bill 2009	Roads and Ports	06.05.09	5 of 2009
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	Energy and Resources	02.06.09 15.07.09	6 of 2009 8 of 2009
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	Ms Colleen Hartland MLC	02.06.09 04.06.09	6 of 2009 7 of 2009
Superannuation Legislation Amendment Bill 2009	Finance	02.06.09 30.06.09 28.07.09	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 04.09.09	9 of 2009 11 of 2009
Local Government Amendment (Conflicting Duties) Bill 2009	Local Government	11.08.09 01.09.09	9 of 2009 11 of 2009
Justice Legislation Further Amendment Bill 2009	Police and Emergency Services Corrections	01.09.09	10 of 2009
Local Government Amendment (Offences and Other Matters) Bill 2009	Local Government	01.09.09	10 of 2009
Major Transport Projects Facilitation Bill 2009	Roads and Ports	01.09.09 09.09.09	10 of 2009 11 of 2009
Personal Property Securities (Commonwealth Powers) Bill 2009	Attorney-General	01.09.09	10 of 2009
Education and Training Reform Amendment (School Age) Bill 2009	Education	15.09.09	11 of 2009