

No. 14 of 2009

Tuesday, 24 November 2009

On the

Constitution (Appointments) Bill 2009

Education and Training Reform
Amendment (Overseas Students) Bill
2009

Education and Training Reform
Amendment (School Age) Bill 2009

Emergency Services Legislation
Amendment Bill 2009

Fire Services Funding (Feasibility Study)
Bill 2009

Health Practitioner National Health
(Victoria) Bill 2009

Liquor Control Reform Amendment
(Party Buses) Bill 2009

Melbourne Cricket Ground and Yarra
Park Amendment Bill 2009

Parks and Crown Land Legislation
Amendment (East Gippsland) Bill 2009

Planning and Environment Amendment
(Growth Areas Infrastructure
Contribution) Bill 2009

Serious Sex Offenders (Detention
and Supervision) Bill 2009

Summary Offences and Control of
Weapons Acts Amendment Bill 2009

Transport Legislation Amendment
(Hoon Boating and Other Amendments)
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 \$116.82).
- ‘**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 –

Constitution (Appointments) Bill 2009
Education and Training Reform Amendment (Overseas Students) Bill 2009
Emergency Services Legislation Amendment Bill 2009
Fire Services Funding (Feasibility Study) Bill 2009
Liquor Control Reform Amendment (Party Buses) Bill 2009
Melbourne Cricket Ground and Yarra Park Amendment Bill 2009
Parks and Crown Land Legislation Amendment (East Gippsland) Bill 2009
Planning and Environment Amendment (Growth Areas Infrastructure Contribution) Bill 2009
Serious Sex Offenders (Detention and Supervision) Bill 2009
Summary Offences and Control of Weapons Acts Amendment Bill 2009
Transport Legislation Amendment (Hoon Boating and Other Amendments) Bill 2009

The Committee notes the following correspondence –

Education and Training Reform Amendment (School Age) Bill 2009
Health Practitioner National Health (Victoria) 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. 14 of 2009

Constitution (Appointments) Bill 2009

| | |
|--------------------------|----------------------|
| Introduced | 10 November 2009 |
| Second Reading Speech | 10 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. John Brumby MLA |
| Portfolio responsibility | Premier |

Purpose

The Bill removes doubts relating to actions taken by Lieutenant-Governors and Administrators of the State at any time since the commencement of the *Australia Act 1986* (Cth); and amends the *Constitution Act 1975* to confer the power to appoint a Lieutenant-Governor or Administrator expressly on the Governor.

Notes:

1. *The Constitution Act 1975 provides that the Queen may appoint a person as Lieutenant-Governor or Administrator. This is inconsistent with the Australia Act 1986 of the Commonwealth which provides that all powers and functions of the Queen in respect of a State are exercisable only by its Governor (see blow).*

Section 109 of the Commonwealth Constitution provides that Commonwealth laws prevail over State laws and to the extent of any inconsistency the State law is invalid. The purpose of this Bill is to remedy the inconsistency.

2. *Section 6A of the **Constitution Act 1975** (showing the proposed amendments to be made by clause 7 of the Bill) provides –*

6A Lieutenant-Governor and Administrator

(1) *There shall be—*

- (a) *a Lieutenant-Governor of the State; and*
- (b) *an Administrator of the State.*

~~(2) *The appointment of a person as Lieutenant-Governor shall be during Her Majesty's pleasure by Commission under Her Majesty's Sign Manual and the Public Seal of the State.*~~

(2) *The Governor may appoint a person as Lieutenant-Governor during the Governor's pleasure by Commission under the Public Seal of the State.*

(3) *The Administrator is—*

- (a) *the Chief Justice of the Supreme Court; or*
- (b) *if—*

- (i) *the Chief Justice of the Supreme Court is the Lieutenant-Governor; or*
- (ii) *there is a vacancy in the office of Chief Justice of the Supreme Court or the Chief Justice is absent from the State or unable or unwilling to act as Administrator—*

the most senior judge of the Supreme Court who is present in the State and able and willing to act as Administrator—

and shall be deemed to have been appointed as Administrator during ~~Her Majesty's pleasure~~ the Governor's pleasure

~~(4) A person may be appointed as Administrator during Her Majesty's pleasure by Commission under Her Majesty's Sign Manual and the Public Seal of the State.~~

(4) The Governor may appoint a person as Administrator during the Governor's pleasure by Commission under the Public Seal of the State.

3. Extract from the **Australia Act 1986 (Cth)** –

An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation

WHEREAS the Prime Minister of the Commonwealth and the Premiers of the States at conferences held in Canberra on 24 and 25 June 1982 and 21 June 1984 agreed on the taking of certain measures to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation:

AND WHEREAS in pursuance of paragraph 51 (xxxviii) of the Constitution the Parliaments of all the States have requested the Parliament of the Commonwealth to enact an Act in the terms of this Act:

BE IT THEREFORE ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

1 *Termination of power of Parliament of United Kingdom to legislate for Australia*

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

2 *Legislative powers of Parliaments of States*

(1) *It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra territorial operation.*

(2) *It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.*

3 *Termination of restrictions on legislative powers of Parliaments of States*

(1) *The Act of the Parliament of the United Kingdom known as the Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a State.*

(2) *No law and no provision of any law made after the commencement of this Act by the Parliament of a State shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a State shall include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the State.*

...

7 *Powers and functions of Her Majesty and Governors in respect of States*

- (1) *Her Majesty's representative in each State shall be the Governor.*
 - (2) *Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.*
 - (3) *Subsection (2) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State.*
 - (4) *While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of subsection (2) above.*
 - (5) *The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State.*
- 10 *Termination of responsibility of United Kingdom Government in relation to State matters*
- After the commencement of this Act Her Majesty's Government in the United Kingdom shall have no responsibility for the government of any State.*

Content

The Bill declares that relevant actions taken by all Lieutenant-Governors and Administrators between the commencement of the *Australia Act 1986* and the commencement of this Bill are as valid as they would have been if they had been done by a person validly holding the office of Governor [5]; and provides that the State is not liable to any action, liability, claim or demand arising from the enactment, commencement or operation of the Bill except to the extent that the State would be liable had a relevant action been done, or omitted to be done, at the relevant time by a person validly holding the office of Governor. [6]

The Bill further amends the *Constitution Act 1975* to provide that the Governor, not the Queen, may appoint a person as Lieutenant-Governor or Administrator of Victoria. [7]

Charter report

Lawful restrictions – Retrospective criminal law – Adequacy of statement of compatibility – Operation of the Charter – Bill validating laws that may not have received lawful Royal Assent – Bar on Actions arising from the enactment of the Bill

Summary: Clause 5 seeks to validate laws that may not have received lawful Royal Assent pursuant to the Constitution Act 1975 and that may limit Charter rights. Its retrospective operation may also engage particular rights, including rights against retrospective criminalisation and increases in penalties. Clause 6 may bar a person affected by clause 5 from seeking a declaration of inconsistent interpretation. The Committee will write to the Premier seeking further information.

The Committee notes that the Bill's purpose is to rectify the possible inoperability of s. 6A of the *Constitution Act 1975* since the passage of the *Australia Act 1986* (Cth).

The Statement of Compatibility remarks:

There are no human rights engaged by the Bill. Although the Bill concerns the appointment of Lieutenant-Governors and Administrators, it deals with the process of appointment rather than eligibility to be appointed as Lieutenant-Governor or Administrators. The Bill does not therefore engage the right to participate in public life under section 18 of the Charter.

This discussion appears to address clause 7, which prospectively amends the *Constitution Act 1975* to remove the potential inconsistency with the *Australia Act 1986 (Cth)*. However, the statement does not address two further clauses:

First, clause 5 provides that every Act, including Acts of a legislative nature, purportedly done by a Lieutenant-Governor or Administrator 'has the same force and effect for all purposes' as if they had been done 'at the relevant time by a person validly holding the office of Governor.' **In the case of actions that were necessary for the enactment of a statutory provision, the effect of clause 5 may be to validate laws that may not have received lawful Royal Assent, including laws that engage Charter rights.** Also, clause 5 provides that such Acts are 'deemed always to have had' effect, so it may retrospectively give effect to laws that may previously have been to no effect. **This retrospective operation of clause 5 may engage the Charter's rights against 'unlawful' interferences or Actions¹ and, in the case of previously ineffectual criminal laws, the Charter's rights against retrospective criminalisation or increases in penalty.²**

The Committee considers that, while it may be that any rights limitations effected by clause 5 can be justified under the test in Charter s. 7(2), such a justification should be set out in the statement of compatibility. Depending on the justification, it may not be necessary for the statement to address the specifics of any laws given effect by clause 5.

Second, clause 6(1) provides that:

The State is not liable to any action, liability, claim or demand arising from the enactment, commencement or operation of this Act.

The Committee is concerned that this clause may bar a person affected by the Bill from seeking a declaration of inconsistent interpretation under the Charter.³

The Committee will write to the Premier seeking further information as to the effect of clause 6(1) on the availability of declarations of inconsistent interpretation. Pending the Premier's response, the Committee draws attention to clauses 5 and 6(1).

The Committee makes no further comment.

¹ E.g. Charter s. 20, providing that: 'A person must not be deprived of his or her property other than in accordance with law.'

² Charter s. 27(1) provides that: 'A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.' Charter s. 27(2) provides that: 'A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.'

³ Charter s. 36(2) provides that: 'Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.'

Education and Training Reform Amendment (Overseas Students) Bill 2009

| | |
|---------------------------------|---|
| Introduced | 10 November 2009 |
| Second Reading Speech | 11 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Jacinta Allan MLA |
| Portfolio responsibility | Minister for Skills and Workforce Participation |

Purpose

The Bill amends the *Education and Training Reform Act 2006* (the Act) to provide additional protections for students of education and training organisations, especially overseas students. In particular, the Bill amends Part 4.5 of the Act to provide for an expedited process for the Victorian Registration and Qualifications Authority (VRQA) to take action against institutions that have been approved to provide a specified course to students from overseas, in certain circumstances. The Bill also enables the VRQA to publish information about institutions whose registration, approval or authorisation under Division 3, 4 or 5 of Part 4.3 or approval under Part 4.5 has been suspended or cancelled. **[3]**

Note: *The Education and Training Reform Act 2006 (the Act) regulates the provision of education and training in Victoria. Chapter 4 of the Act relates to the VRQA and its functions. Under that Chapter education and training organisations must be registered, approved or authorised to conduct accredited education and training courses or to award registered qualifications. Part 4.5 of the Act relates to overseas students. The provision of services to overseas students is also governed by the Commonwealth's Education Services for Overseas Students Act 2000 (the ESOS Act). Under the Act, the VRQA approves providers to deliver specified courses of study to overseas students. Providers must then be registered for this purpose under the ESOS Act.*

The Bill inserts a new section 4.2.9 into the Act, to confer power on the VRQA to notify students of an education and training organisation of action taken against the organisation that may affect its delivery of services to those students. This may apply to education and training organisations that deliver to domestic or overseas students. **[4]**

The Bill authorises the VRQA to review the operations of approved providers of courses to overseas students. **[5]**

The Bill further inserts into the Act a new section 4.5.5, which enables the VRQA to take faster action against an institution (other than a school or University) approved to provide a specified course to overseas students, in "exceptional circumstances" and sets out a non-exhaustive definition of exceptional circumstances, to include matters such as serious breaches of occupational health and safety laws, where the provider has notified the VRQA or its students that it intends to cease operations in less than 28 days time, or where it is necessary to take urgent action because of significant non-compliance with prescribed standards or to safeguard or ensure quality of the education. **[6]**

The Committee makes no further comment.

Emergency Services Legislation Amendment Bill 2009

| | |
|---------------------------------|------------------------------------|
| Introduced | 10 November 2009 |
| Second Reading Speech | 11 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA |
| Portfolio responsibility | Minister for Community Development |

Purpose

The Bill —

- amends the *Country Fire Authority Act 1958* —
 - (i) to confer on the Chief Officer of the Country Fire Authority (CFA) a duty to issue warnings and to provide information to the community in relation to bushfires in Victoria and for the CFA to establish guidelines in respect to this duty. The duty to warn is able to be delegated to senior public officers and in turn delegated to the employees of those public officers. **[3]**
 - (ii) to provide for the identification and designation of neighbourhood safer places. **[3 and 8]**
 - (iii) to authorise the Chief Officer to provide advice on the defendability of buildings in the event of bushfires. **[3]**
 - (iv) to allow one unified fire brigades association to represent volunteer members of brigades. **[6 and 7]**
- amends the *Emergency Management Act 1986* in relation to the control of response to fires. **[9 and 10]**

Extracts from the Second Reading Speech —

In its response to the Interim Report, the Government indicated that it would introduce legislation before the end of the year to —

- *confer responsibility on the Chief Officer of the Country Fire Authority to issue warnings and provide information to the community in relation to bushfires; and*
- *require municipal councils to record the existence of neighbourhood safer places in municipal fire prevention plans and municipal emergency management plans.*

The Commission recommended that the State amend the Country Fire Authority Act to provide that the Chief Officer has responsibility to issue warnings and provide information to the community concerning the risk of bushfires.

... The Bill implements these recommendations by providing that the chief officer of the CFA

- *has a duty to issue warnings and provide information to the community in respect of bushfires, and*
- *may delegate this power to either the secretary or the chief fire officer of the DSE, or the chief officer of the Metropolitan Fire and Emergency Services.*

... The Commission also made a number of recommendations in relation to neighbourhood safer places. The Bill implements these recommendations and sets out a process for the identification, assessment, designation and maintenance of neighbourhood safer places in relation to the country area of Victoria.

... The Bill provides that a municipal council is responsible for the identification of neighbourhood safer places, which it then refers to the CFA for assessment, in accordance with the CFA's technical assessment criteria.

... Once designated, the council must record the neighbourhood safer place in its municipal fire prevention plan and its municipal emergency management plan. The council must also ensure appropriate signage (in accordance with guidelines published by the Office of the Emergency Services Commissioner) is placed at the neighbourhood safer place.

... All liability for death or injury arising from the use of a designated neighbourhood safer place as a shelter, on or during a day when the place is beset or threatened by bushfire, which would otherwise flow to the owner or occupier of a designated neighbourhood safer place, transfers instead to the relevant municipal council.

... If the council can show that it acted in accordance with its neighbourhood safer places plan, and the plan itself was not so unreasonable that no reasonable council could have made it, the council will not be liable for death or injury arising out of the use of a neighbourhood safer place as a place of shelter, or for a decision not to designate a particular place as a neighbourhood safer place.

.. The Bill also inserts an explicit power in the CFA Act for the Chief Officer of the CFA to advise the community or any person on ways to improve the defendability of a home or other building in the event of a bushfire.

The Committee makes no further comment.

Fire Services Funding (Feasibility Study) Bill 2009

| | |
|---------------------------------|---|
| Introduced | 10 November 2009 |
| Second Reading Speech | 11 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Tim Holding MLA |
| Portfolio responsibility | Minister for Finance, WorkCover and Transport Accident Commission |

Purpose and Background

The Bill establishes a framework to facilitate the conduct of a feasibility study for the purposes of evaluating an existing or new tax, duty, levy or impost for funding fire services in Victoria.

The Bill extends the powers of the Commissioner of State Revenue to collect data required for a feasibility study and makes provision to ensure privacy safeguards are in place regarding the collection, use and disclosure of any data collected.

Extracts from the Second Reading Speech –

The Government has recently released a Green Paper entitled Fire Services and the Non-Insured. The purpose of this Green Paper is to facilitate community discussion on the best way to fund Victoria's fire services and to determine whether an alternative model would deliver adequate funding in a more equitable way.

The Green Paper outlines the government's intention to gather information and conduct a study to develop a greater understanding of the current levels of insurance throughout Victoria. The study will also consider the effects of the current fire services funding arrangements and assess whether options may improve the equity around fire services funding.

... Currently the statutory role of the Commissioner for State Revenue is to administer the taxation laws. In order for him to participate in a feasibility study into a tax, duty, levy or impost, and undertake an analysis of alternatives, a new statutory function will be conferred on him.

The Bill will allow the Commissioner to collect information for the purposes of a study and disclose that information to officers within the Department of Treasury and Finance for the purposes of the study. The Bill ensures appropriate privacy and confidentiality safeguards are in place so the information collected is used only for the purposes of the study. Appropriate prohibitions regarding the use and disclosure of the information are provided so that details of the study cannot be further disclosed in a manner that identifies individuals.

The Committee makes no further comment.

Liquor Control Reform Amendment (Party Buses) Bill 2009

| | |
|---------------------------------|-------------------------------|
| Introduced | 10 November 2009 |
| Second Reading Speech | 11 November 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') in relation to the regulation of the supply and consumption of liquor on party buses and for other purposes.

Extracts from the Second Reading Speech –

Currently, a party bus that supplies alcohol to its customers is required to have a liquor licence. However, most party buses do not supply alcohol. Instead it is brought on board by passengers and consumed on the journey. In these circumstances, party bus operators are not currently required to hold a liquor licence or to obtain a BYO permit.

... The government intends to target those party bus operations which focus on nightclub tours, taking passengers from licensed venue to venue at night. It is these operations that are of primary concern to government, police and the community as they are the operations most often linked to alcohol-related harms and amenity impacts.

... For the purposes of this Bill, a party bus must be operated for hire or reward and have been pre-booked. Importantly, it must operate at night between 8 p.m. and 5 a.m. (regardless of the time of passenger pick-up) and operate for the purpose of transporting passengers to, from or within a designated area for the purposes of visiting those areas. ...Private bus services, such as those operated by community or sporting groups, or where persons hire a bus and provide their own driver, will not be impacted by the new regulatory regime.

To capture the common situation where passengers bring alcohol on board a party bus with them, the Bill will allow the Director of Liquor Licensing to issue a licence or a BYO permit in respect of a party bus. The Bill will make it an offence for a party bus operator to permit or allow liquor to be consumed on board without a licence or permit. This offence will incur a maximum penalty of 50 penalty units. A defence will be available where the party bus operator did not knowingly permit or allow liquor to be consumed on board and took all reasonable steps to ensure that liquor was not consumed on board. The onus will be on the party bus operator to establish both elements of the defence.

This offence will be enforceable by an infringement notice of 2 penalty units as part of the short-term trial expansion of the infringements system. Under the trial, only Victoria Police members will have the power to issue infringement notices for this offence. Authorised persons from the compliance directorate will be able to enforce other provisions of the act as they apply to party buses.

To provide party bus operators with adequate time to prepare and lodge applications for a licence or a BYO permit, the bill provides for a transitional period of three months.

...Importantly, this Bill also provides for an exemption from the offence of permitting a drunken or disorderly person to be on the premises, that is, on board the party bus. This exemption allows a party bus operator to permit drunk and disorderly persons to remain on board, which recognises that it may not be safe or appropriate to set down those persons at a particular time or in a certain area.

A party bus with a licence or BYO permit would be considered a 'public place' under the Summary Offences Act 1966. This means that a passenger on a party bus will still be liable under that act for the offence of being drunk or disorderly.

Content

The Director may grant a BYO permit in respect of a party bus. [5]

The Bill inserts a new section 108(6) to allow a party bus operator to permit a drunken or disorderly passenger to remain on the party bus until the end of the journey but will not require a party bus operator to detain a drunken or disorderly passenger. [6]

Note: *The existing section 108(4)(b) provides that a licensee or permittee must not permit drunken or disorderly persons to be on the licensed premises or on any authorised premises.*

Reverse onus defence

The Bill provides that the operator of a party bus who permits or allows any liquor to be consumed on the party bus in the prescribed circumstances without a licence or BYO permit being in force in respect of that party bus is guilty of an offence. The clause provides for a defence where the accused –

- did not knowingly permit or allow the consumption of liquor on the party bus; and
- had taken reasonable steps to ensure the liquor was not consumed on the party bus. [7]

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| <p>Rights or freedoms – Reverse onus defence – Burden on accused to prove evidential matters on the balance of probabilities – Presumption of innocence – Parliamentary Committees Act 2003, section 17(a)(i)</p> |
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| <p><i>The Committee notes the reverse onus provision and the explanation given in the Statement of Compatibility for its justification in the particular circumstances. The Committee notes that such reverse onus offences are more readily justifiable in respect to an element of an offence which would be disproportionately difficult for the prosecution to prove (i.e. due diligence or absence of knowledge) and where offence is regulatory in nature involving public health or safety and where the penalty is a pecuniary penalty and not one involving imprisonment.</i></p> |
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The Bill provides that a contravention of the new offences may be dealt with by way of infringement notice as part of the trial expansion of the infringements system implemented through Part 2 of the *Infringements and Other Acts Amendment Act 2008* [8]

The Bill provides for the repeal of the infringement notice penalty provision in clause 8 above on the date that corresponds with the completion date for the trial expansion of the infringements system (1 July 2011). [9]

The Committee makes no further comment.

Melbourne Cricket Ground and Yarra Park Amendment Bill 2009

| | |
|---------------------------------|--|
| Introduced | 10 November 2009 |
| Second Reading Speech | 12 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. James Merlino MLA |
| Portfolio responsibility | Minister for Sport, Recreation and Youth Affairs |

Purpose

The Bill amends the *Melbourne (Yarra Park) Land Act 1980*, the *Melbourne Cricket Ground Act 2009* and the *Conservation, Forests and Lands Act 1987* to revoke the appointment of the joint trustees of Yarra Park Reserve, revoke the appointment of the Council of the City of Melbourne as committee of management for Yarra Park Reserve and appoint the Melbourne Cricket Ground Trust ('Trust') as the committee of management for Yarra Park Reserve and to provide for the management of the park and related purposes. The status of Yarra Park as a public park reserved under the *Crown Land (Reserves) Act 1978* remains unchanged.

The Bill provides for Yarra Park to continue to be used for car parking for major events held at the Melbourne Cricket Ground (MCG) and in the Melbourne and Olympic Parks (MOP) precinct. It also allows the trust to provide limited parking on paved areas of Yarra Park for the management, use and enjoyment of the MCG and Punt Road Oval and parking for purposes consistent with the reservation. Commuter car parking will not be permitted in Yarra Park. The Bill establishes a Yarra Park Advisory Committee. [8]

The Bill provides for regulations made under the *Crown Land (Reserves) Act 1978* in relation to Yarra Park Reserve to carry higher penalties than the maximum penalties prescribed under subsections 13(5) and 13(6) of that Act. The penalties are increased from a maximum of 2 penalty units up a maximum of 20 penalty units and will be able to be enforced through infringement notice regulations under the *Conservation, Forests and Lands Act 1987*. [8]

The Minister for Environment and Climate Change will be able to make regulations for Yarra Park under the *Melbourne (Yarra Park) Land Act 1980* in relation to matters including traffic and parking, advertising and soliciting and commercial activities. These regulations will also include penalties up to a maximum of 20 penalty units and will also be able to be enforced through infringement notice regulations under the *Conservation, Forests and Lands Act 1987*.

Existing leases and other rights

The Bill includes relevant transitional provisions including preservation of a lease and several licences and contracts. [8]

Extract from the Statement of Compatibility concerning property rights –

This right is potentially engaged because the revocation of the appointment of the City of Melbourne as the committee of management for Yarra Park Reserve under clause 7 of the Bill has implications for a lease and several licences and contracts that the City of Melbourne has entered into in relation to Yarra Park. There will not, however, be any deprivation of property as a result of the revocation because new provisions included in clause 8 of the Bill (new sections 19-21) save these existing arrangements, to the extent that they relate to Yarra Park, as if they had been entered into by the trust. Further, the lessee, licensees and contractors are all corporations and therefore do not have rights under the Charter.

Submission

The Committee received a submission from the Yarra Park Association concerning freedom of movement in Yarra Park as a result of the car parking proposed by the Bill. The Committee notes the relevant extract of the Statement of Compatibility –

The right to freedom of movement will not be limited by the change of committee of management for Yarra Park. There is no change to the reservation of Yarra Park as a public park and it therefore remains available for public access at all times subject to the relevant regulations.

Clause 8 of the Bill, which inserts provisions allowing car parking for certain purposes in Yarra Park (new section 10) does not limit the right to freedom of movement because people will still be able to move freely in the park even on days when parking is being provided.

The Committee makes no further comment.

Parks and Crown Land Legislation Amendment (East Gippsland) Bill 2009

| | |
|---------------------------------|---|
| Introduced | 10 November 2009 |
| Second Reading Speech | 10 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA |
| Portfolio responsibility | Minister for Environment and Climate Change |

Purpose and Background

The Bill –

- creates new park and reserve areas in East Gippsland and elsewhere under the *National Parks Act 1975* and the *Crown Land (Reserves) Act 1978*;
- inserts transitional and other provisions in the *National Parks Act 1975* and the *Crown Land (Reserves) Act 1978* associated with the creation of the new park and reserve areas;
- deems the new reserves under the *Crown Land (Reserves) Act 1978* to be – restricted Crown land – under the *Mineral Resources (Sustainable Development) Act 1990*;
- repeals redundant or spent provisions in, and make other miscellaneous amendments to, the *National Parks Act 1975* and the *Crown Land (Reserves) Act 1978*.

Extracts from the Second Reading Speech –

The Parks and Crown Land Legislation Amendment (East Gippsland) Bill 2009 will add significant areas to the State's parks and reserves system in East Gippsland and elsewhere.

... The Bill will amend the National Parks Act 1975 and the Crown Land (Reserves) Act 1978 to permanently protect an additional area of more than 45000 hectares of East Gippsland's forests. In particular, the Bill will:

- *add areas to Croajingolong, Errinundra and Snowy River national parks and create Tara Range Park under the National Parks Act; and*
- *create 12 new or expanded nature conservation reserves under the Crown Land (Reserves) Act.*

...

In addition to the East Gippsland park and reserve areas, the Bill will add approximately 2400 hectares to eight other parks across the State: the Alpine, Brisbane Ranges, Grampians, Greater Bendigo, Great Otway and St Arnaud Range national parks, Lerderderg State Park and the Otway Forest Park.

... The Bill will also amend the Mineral Resources (Sustainable Development) Act 1990 to specify the new reserves under the Crown Land (Reserves) Act as restricted Crown land.

The Committee makes no further comment.

Planning and Environment Amendment (Growth Areas Infrastructure Contribution) Bill 2009

| | |
|---------------------------------|--------------------------|
| Introduced | 10 November 2009 |
| Second Reading Speech | 11 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA |
| Portfolio responsibility | Minister for Planning |

Purpose

The Bill purpose of the Bill is to amend the *Planning and Environment Act 1987* (the 'Act') and six related Acts to introduce a new Growth Areas Infrastructure Contribution ('GAIC' scheme for the levying and collection of monetary contributions in certain growth areas for the provision of state infrastructure and associated costs in those areas.

The Bill introduces a GAIC for the provision of state infrastructure and associated costs at a set rate on specified land in existing and future growth areas, which is triggered in a specified set of circumstances (such as on the subdivision of the land or certain land transactions), which will apply retrospectively from December 2008 (the date of the announcement of the charge) and establishes the legislative framework for the amount, payment, management and disbursement of the GAIC. [9]

Extract from the Second Reading Speech –

The GAIC is the way we can pay for the new roads, public transport, schools and other things people need in a community. The contribution will enable this important infrastructure to be delivered earlier in the development of new communities.

Land that is brought within the urban growth boundary, and which is zoned and developed for urban purposes increases significantly in value. This value increase reflects the fact that the land will be developed in the future and the expectation that it will be serviced with key infrastructure and services necessary to support new, vibrant urban communities.

While the government will continue to meet the majority of the costs of state infrastructure, it is also important that the substantial windfall gains that result from changes to the urban growth boundary and land being rezoned for urban development contribute fairly to offset the financial impact of the additional infrastructure service provision.

...

The GAIC model will ensure that the benefits of land being earmarked for urban development are balanced by requiring the people reaping those benefits to make a fair contribution towards the provision of the state infrastructure necessary to support new development in growth areas. ... The growth areas infrastructure contribution is to be a once-only charge, payable on the first 'GAIC event' to occur in relation to particular land.

...

Application of the GAIC will be subject to transitional provisions retrospectively imposing the GAIC liability to trigger events from the date of the announcement of the charge in Melbourne @5 million in December 2008, and a subsequent announcement on 19 May 2009. ... Incorporated into the bill are a range of circumstances where there is no liability to pay a GAIC.

Content

Section 201RA sets out the events that trigger the requirement for the GAIC to be paid whilst section 201RB sets out excluded events. Section 201RC defines which land within a growth area is subject to the GAIC. Sections 201RF and 201RG set out excluded subdivisions of land and building work.

Sections 201S-201SD set out when the GAIC liability arises. Section 201SG defines the amount to be paid and the method by which this amount is indexed. Section 201SE sets out when a GAIC trigger event occurs while Section 201SF sets out who is liable to pay the GAIC. Section 201SM sets out the capacity to elect to defer payment of the contribution and be subject to interest on the deferred amount. Sections 201SN-201SQ set out procedures for calculating interest payable on the deferred contribution as well as when the deferred liability must be paid.

Sections 201TA-201TD set out a range of dutiable and land transactions which are exempt from the requirement to pay the GAIC.

Sections 201TE, 201TF and 201TG set out the circumstances and procedures for reductions of the GAIC liability. Sections 201TH-201TM provide for the establishment of and procedures for a GAIC Hardship Relief Board to consider applications for relief from the GAIC liability. Sections 201U-201VC set out the requirements for the collection, administration and expenditure of the GAIC. [9]

Retrospectivity

The Committee notes the following extract from the explanatory memorandum –

The GAIC is being applied to land that was the subject of the public announcements made in Melbourne @ 5 million on 2 December 2008 and a further public announcement on 19 May 2009 (which added a small number of properties to the Western Investigation Area). The provisions of new Part 9B are to apply to events occurring after the date of the announcements but before the enactment of the legislation as well as to events occurring after the enactment. This element of retrospective application is necessary to ensure that land speculation ahead of the commencement of the Bill does not frustrate the intention of capturing a proportion of the land value increases, that occur when land is designated for urban development, as close to the time this occurs as possible. The person who is to pay the GAIC relating to land sale transactions occurring during the transitional period will be the purchaser. [9] (see proposed section 201RC).

The Committee further notes the following extract from the Second Reading Speech –

The Bill includes retrospective provisions, defining when the liability to pay a GAIC arises where a GAIC event occurs between when the State infrastructure contribution was announced and the commencement of these provisions. The Growth Areas Authority has written to all registered proprietors of land affected by these transitional arrangements so there will be no surprise in these provisions to any land owners in the affected areas; any actions taken since the announcement dates will have been taken in the knowledge of these proposed arrangements.

Rights and freedoms – Retrospective application of public revenue measures to the time of public announcement in the media – Whether justified

The Committee notes that the revenue measures apply from the time of their announcement and persons likely to be affected were contacted and advised of the new policy measures now proposed by this Bill. The Committee also notes the comments in the Minister's Second Reading Speech.

The Committee recognises that retrospective application in respect to taxation and revenue legislation may be justified by government in certain circumstances to avoid the potential of persons and corporations achieving windfall profits between the time of a public announcement and the time of the implementing enactment.

The Committee refers the question whether retrospective application is appropriate in the circumstances for the consideration of the Parliament.

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

Amendment to the Taxation Administration Act 1997

The Bill inserts a new subsection (5) into section 135 of the *Taxation Administration Act 1997* to provide that it is the intention of sections 5, 12(4), 18(1), 96(2) and 100(4) of the *Taxation Administration Act 1997* (the relevant sections), as those sections apply after the commencement of clause 31, to alter or vary section 85 of the *Constitution Act 1975*. [31]

Explanation of the relevant sections of the *Taxation Administration Act 1997*

- Section 5 – defines the meaning of non-reviewable decision and provides effectively that certain decisions are not justiciable by the courts.
- Section 12(4) – provides that a compromise assessment made under the section with the agreement of the taxpayer is a non-reviewable decision.
- Section 18(1) – provides that proceedings for refund or recovery of tax paid under a relevant law must not be brought except as provided in Part 4 of the Act.
- Section 96(2) – provides that an objection to an assessment, valuation or decision must be brought as provided under Part 10 of the Act.
- Section 100(4) – effectively provides that whether or not the Commissioner allows a person to lodge an objection out of time (i.e. after the 60 day period allowed) is not a reviewable decision.

The section 85 statement in the Second Reading Speech provides –

Clause 31 of the Bill inserts a new subsection (5) into section 135 of the Taxation Administration Act 1997 to provide that it is the intention of sections 5, 12(4), 18(1), 96(2) and 100(4) of the Taxation Administration Act 1997, as those sections apply after the commencement of clause 31, to alter or vary section 85 of the Constitution Act 1975. These provisions preclude the Supreme Court and the Victorian Civil and Administrative Tribunal (VCAT) from entertaining proceedings of a kind to which these sections apply, except as provided by those sections.

A central purpose of this Bill is to bring the growth areas infrastructure contribution under the Taxation Administration Act 1997.

This Bill provides that for the purposes of the Taxation Administration Act 1997, Part 9B of the Planning and Environment Act 1987 and any regulations made under that act for the purposes of that part is a 'taxation law'.

Part 9B of the Planning and Environment Act 1987 introduces a growth areas infrastructure contribution for the provision of state infrastructure in certain growth area land.

Section 5 of the Taxation Administration Act 1997 defines the meaning of non-reviewable in relation to the Taxation Administration Act 1997 which now also applies to the growth areas infrastructure contribution. 'Non-reviewable' is referred to in sections 12(4) and 100(4) of the Taxation Administration Act 1997.

The reasons for limiting the jurisdiction of the Supreme Court in relation to a compromise assessment under section 12 of the Taxation Administration Act 1997 are that agreement has been reached between the commissioner and the taxpayer on the taxpayer's liability, and the purpose of the section would not be achieved if the decision were reviewable, and this provision now applies to the growth areas infrastructure contribution.

Section 18 of the Taxation Administration Act 1997 establishes a procedure, the adherence to which is a condition precedent to taking any further action for recovering refunds. The purpose

of the provisions is to give the commissioner the opportunity to consider a refund application before any collateral legal action can be taken. The purpose of these provisions would not be achieved if the commissioner's actions were subject to judicial review. This provision will apply to the growth areas infrastructure contribution under this Bill.

Division 1 of part 10 of the Taxation Administration Act 1997 establishes an exclusive code for dealing with objections, and this division will also apply to the growth areas infrastructure contribution under this Bill. This code establishes the rights of objectors in a statutory framework and precludes any collateral actions for judicial review of the commissioner's assessment or decision of a type referred to in section 96(1) of the Taxation Administration Act 1997.

The objections and appeals provisions of part 10 of the Taxation Administration Act 1997 establish that review of assessments is only to be undertaken in accordance with an exclusive code identified in that part. The purpose of these provisions would not be achieved if any question concerning an assessment or decision referred to in section 96(1) was subject to judicial review except such judicial review as provided by division 2, part 10 of the Taxation Administration Act 1997.

A power is provided to the commissioner under section 100 of the Taxation Administration Act 1997 which provides the commissioner with discretion to allow an objection to be lodged even though out of time. This decision is non-reviewable to ensure the efficient administration of the act and to enable outstanding issues relating to assessments to be concluded expeditiously. This provision will apply to the growth areas infrastructure contribution under this Bill. Constitution Act 1975, section 85 – Repeal, alteration or variation of the unlimited jurisdiction of the Supreme Court

Section 85, Constitution Act 1975 – Jurisdiction of the Supreme Court – Taxation Administration Act 1997

The Committee notes the effect of the relevant sections in the Taxation Administration Act 1997 (the Act) and considers that there is no reason why the non-reviewable decision provisions in the Bill should be treated any differently to all other taxation measures the Act applies to. 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.

The Committee makes no further comment.

Serious Sex Offenders (Detention and Supervision) Bill 2009

| | |
|---------------------------------|----------------------|
| Introduced | 10 November 2009 |
| Second Reading Speech | 12 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob. Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose

The Bill proposes a new and modified scheme of detention and supervision orders for persons who have served custodial sentences for serious sex offences and who pose an unacceptable risk of harm to the community. The Bill also seeks to facilitate the treatment and rehabilitation of such offenders so as to reduce their risk of harm to the community.

This Bill will repeal the current *Serious Sex Offenders Monitoring Act 2005* and replace the scheme which operated under that Act with the new detention and supervision scheme.

Eligible offenders

The Bill defines 'eligible offender' as a person over the age of 18 who has served a custodial sentence for a relevant offence (Schedule 1). [4]

Detention and supervision orders

The Bill proposes a two-tier scheme, with one tier for the post-sentence detention of high-risk sex offenders and a second tier providing supervision for high risk offenders who can safely be supervised in the community.

A court will be able to impose on an eligible offender in respect of whom an application has been made:

- a detention order – for offenders who cannot safely be supervised in the community; or
- a supervision order – for offenders who can safely be supervised in the community but who require post-sentence supervision. These offenders may, in appropriate cases, be directed to reside at a residential facility in the community or other accommodation in the community.

The Statement of Compatibility states that the *'new scheme is not punitive in nature, but ensures that the orders effect the minimum level of limitation upon rights necessary to ensure community safety. It is a civil scheme rather than a criminal scheme and it effects prevention, protection and rehabilitation, rather than punishment'*.

The scheme provides that the Secretary to the Department of Justice (the 'Secretary') can apply to the Supreme Court or the County Court in respect of an eligible offender for a supervision order; and the Director of Public Prosecutions, on the recommendation of the Secretary, can apply to the Supreme Court for a detention order.

In making a supervision order, the Supreme Court must be satisfied that the offender poses an unacceptable risk of re-offending if the order is not made and the offender is in the community and in making a detention order, the Supreme Court must be satisfied that the risk of re-offending would be unacceptable unless the order is made. If the Supreme Court is not satisfied that a detention order is justified it may make a supervision order. In either case the court must be satisfied by that evidence to a high degree of probability.

Where the Supreme Court decides to make a supervision order, then all core conditions must be imposed and the court has discretion to impose further discretionary conditions, provided that they represent the minimum interference with the offender's liberty, privacy or freedom of movement that is necessary in the circumstances to adequately ensure the purposes of the conditions, and are reasonably related to the gravity of the risk of the offender re-offending.

Submission

The Committee received a submission from the Victorian Privacy Commissioner, Ms Helen Versey. The submission will be posted on the Committee website.

The submission makes the following key points –

- *Electronic monitoring – Supervision orders – clauses 16(1)(m), and 4 of Schedule 3* – The provisions in respect to electronic surveillance of an offender subject to a supervision order insufficiently prescribe or limit any unnecessarily intrusive surveillance of the offender. *Certain technologies will be so invasive that their use may be inappropriate under the Information Privacy Act 2000 and may be arbitrary under the Charter.* The technologies should be more clearly defined to ensure they are adequate and proportionate for the purpose without being unnecessarily intrusive upon the privacy rights of offenders. Clause 16(1)(m) should be amended to limit the types of electronic monitoring that can be imposed as part of a supervision order.
- *Visitor's privacy – clauses 141 and 142* – The information collection and search and coercion powers in respect to visitors to residential facilities accommodating offenders are more onerous, extensive and intrusive than exist under the *Corrections Act 1986 and the Corrections Regulations 2009* in respect to visitors to prisons. The breadth of these powers makes them inappropriate under the *Information Privacy Act 2000* and may be considered to be arbitrary under the *Charter*. Clauses 141 and 142 should be amended to mirror the search powers under the *Corrections Act 1986*.
- *Sharing of information – clauses 189 and 190* – The disclosure powers are too broad and allow disclosure of sensitive personal information to potentially thousands of persons. Disclosure should be restricted to a limited number of senior public office holders. *'Almost unlimited disclosure of sensitive information makes this provision (189) inappropriate under the Information Privacy Act and arbitrary under the Charter'*. Further it is unclear as to whose responsibility it is to develop the mandatory guidelines under clause 190. The Privacy Commissioner should be consulted in the development of these guidelines. Clauses 189 and 190 should be amended to better control the sharing of sensitive personal information.

Content

The Bill defines the offenders eligible for the making of a supervision or detention order or an interim order. An eligible offender will be any person who is 18 years of age or older and is serving a custodial sentence for a relevant offence. Offences that qualify as a relevant offence for the purpose of this Bill are set out in Schedule 1. [4]

Supervision orders – Part 2

The Secretary may apply for a supervision order to a court in respect to an eligible offender and a court may make the order if it is satisfied that the offender poses an unacceptable risk of committing a relevant offence if a supervision order is not made and the offender is in the

community. The court must be satisfied to a high degree of probability that the evidence presented by the Secretary is of sufficient weight to justify the decision to make a supervision order. The court must also be satisfied that the evidence presented by the Secretary is acceptable and cogent. **[7 to 9]**

For the avoidance of doubt determination that an offender poses an unacceptable risk of committing a relevant offence even if the likelihood that the offender will commit a relevant offence is *less than a likelihood of more likely than not*.

The Secretary bears the burden of proof that the offender poses an unacceptable risk of committing a relevant offence if a supervision order is not made and the offender is in the community. **[7 to 9]** (*Refer to Charter report*).

Core conditions

The Bill provides for the core conditions and matters that must be included by the court in a supervision order that may be for up to 15 years. The core conditions include attendance as directed by the Adult Parole Board ('APB') including for the purpose of assessments such as medical assessments and not to leave the State without the permission of the APB. **[10, 15 and 16]**

Discretionary conditions

The Bill further provides for discretionary conditions that a court may impose on an offender if the court it appropriate to do so to reduce the risk of re-offending by the offender and to provide for the reasonable concerns of the victim(s) of the offender in relation to their own safety and welfare. The discretionary matters include where the offender may reside (including a special residential facility - see clause 18); the time during which the offender must be at the residence or leave the residence; places the offender may not visit or visit only at specified times; treatment and rehabilitation orders; a prohibition on alcohol and drug consumption; submitting to breath testing, urine analysis; types of employment that are prohibited; types of behaviour and community activity that are prohibited; persons or classes of persons that are not to be contacted; forms of monitoring to be complied with by the offender; and personal medical examinations which the offender must attend. **[17]**

Residential facility

The court is required to consider whether or not the offender should reside in a residential facility, and may impose a condition under clause 17 that an offender reside in a residential facility if no other suitable accommodation is available. **[18]**

The court may further impose any other conditions that it considers appropriate to reduce the risk of re-offending by the offender, which includes conditions aimed at rehabilitation and treatment of the offender or aimed at addressing the reasonable concerns of the victim(s) of the offender in respect to their own safety and welfare such as access to internet or a condition of the Adult Parole Board. **[19 and 20]**

The Secretary and the offender may make submissions to the court in relation to the conditions of a supervision order and sets out that the court must consider any victim submissions it receives before imposing any conditions on the offender however the court has absolute discretion as to the weight the court gives to any victim submission. **[21 and 23]**

Certificate of resources – Court must not impose inconsistent condition

The Secretary may provide the court with a certificate of available resources (such as residential, monitoring or rehabilitation - see clause 195) and a court must not impose a

condition on a supervision order inconsistent with the certificate. [22] (*Refer to Charter report below*)

Detention orders – Part 3

The Director of Public Prosecutions (the 'DPP') may apply to the Supreme Court for a detention order in respect of an eligible offender. [33]

In making a detention order the Supreme Court must first be satisfied that the offender poses an unacceptable risk of the offender committing a relevant offence if a detention order or supervision order is not made and the offender is in the community. For the avoidance of doubt the Bill declares that a determination that an offender poses an unacceptable risk of committing a relevant offence may be made *even if the likelihood that the offender will commit a relevant offence is less than more likely than not*. As with a supervision order the DPP bears the burden of proving that the offender poses an unacceptable risk of committing a relevant offence if a detention or supervision order is not made and the offender is in the community. The Supreme Court may only make a detention order if the evidence to support it is cogent and to a high degree of probability. [35 to 38] The DPP may apply to the Supreme Court for the renewal of a detention order. [45]

Interim orders – Part 4

The Secretary may apply to a court for an interim supervision order in respect of an offender who is the subject of an application for a supervision order or an application for a renewal of a supervision order.

The DPP may apply to the Supreme Court for an interim detention order in respect of an offender who is the subject of an application for a detention order or an application for a renewal of a detention order.

An interim order (supervision or detention) may be made where the documentation supporting the application would, if proved justify the making of the final order and it is in the public interest to make the order. In respect to an interim supervision order the same conditions may attach as to a final order. An interim order may be extended more than once. The total period of an interim order cannot be for more than 4 months except in exceptional circumstances. [50 to 64]

Review of orders – Part 5

The Bill provides for review of a supervision order not later than 3 years after the order was made or some shorter specified period, on application to the court by the Secretary and in respect to detention orders on application to the court by the DPP after 1 year or a shorter specified period. [65 and 66]

The Secretary, the DPP and the offender may apply to the court that made a supervision order for leave to apply for a review of that order and the DPP or offender may apply for leave to the Supreme Court in respect to a review of a detention order. The court may grant leave if it is satisfied that there are new facts or circumstances which would justify a review of the order or it would be in the interests of justice to review the order. [68]

The Secretary or the offender, with the leave of the court that made the order, may apply to the court to review any condition of a supervision order or interim supervision order other than a core condition. The court may grant leave where any new facts or circumstances have arisen since the conditions were made which would justify the review or if it would be in the interests of justice. [76 and 77]

Proceedings relating to orders – Part 6

The Part declares that proceedings under Parts 2 to 5 and 7 are civil in character but the civil procedure rules do not apply to those proceedings. [79]

Right to a fair hearing – disclosure of prosecution evidence to offender – court discretion to exclude disclosure where no significant unfairness to offender

In respect to any proceedings relating to orders the court has a discretion to make an order to exclude evidence from disclosure to the offender if it in the public interest to do so and where exclusion would not lead to significant unfairness to the offender. [81]

The Committee notes that the provision is a derogation from the general principle that an accused person in a criminal proceedings is entitled to full disclosure of the case against them including the availability of material and witnesses that the prosecution does not intend to lead at trial.

The Committee observes that at common law courts retain a discretion to exclude evidence that is for a number of reasons not in the public interest to disclose. In such circumstances the prejudice to the public interest must be weighted carefully against any prejudice to an accused in securing a fair and effective trial.

The Committee draws attention to the provision.

Medical examination of offender

The court may order the offender to attend for a personal examination by a medical expert or any other person for the purposes of making a report or giving evidence in relation to an application but does not empower an order to be made that would require an offender to submit to a physical examination or actively cooperate in a personal examination. [84]

The offender is entitled to a reasonable opportunity to obtain legal representation for a hearing under Parts 2 to 5. [87]

Appeals – Part 7

The Bill provides that the offender who is subject to a supervision order, detention order or interim order may appeal to the Court of Appeal against a decision made by a court under the Bill and sets out what type of decisions under the Bill may be appealed against. [96]

The Secretary and the DPP if they consider it is in the public interest to do so, may appeal to the Court of Appeal against a decision relating to a supervision or detention order or interim supervision or detention order made by a court under the Bill and sets out what type of decisions under the Bill may be appealed against. The Court may consider new evidence on appeal [97 to 103]

Assessment of eligible offenders – Part 8

Where the Secretary considers that an application for a detention order should be made he or she may refer the matter to the DPP. [105]

The Secretary may direct an offender to attend a personal examination for the purposes of an assessment report. A medical expert can still make an assessment report if the offender has not complied with a direction to attend for a personal examination. However an offender cannot be required to submit to a physical examination or actively co-operate in the carrying out of a personal examination, for example by being compelled to answer questions by a medical expert. [107]

Management of offenders on detention orders – Part 9

The APB is responsible for reviewing and monitoring an offender on detention or interim detention orders. [114]

The Bill provides that an offender in custody in a prison under a detention order or interim detention order must be treated in a way that is appropriate to his or her status as an unconvicted prisoner subject to certain reasonable requirements set out in the clause and must not be accommodated or detained in the same area or unit as prisoners who are serving custodial sentences except in certain circumstances. [115] (*Refer to Charter report below*)

Management of offenders on supervision orders – Part 10

The Part (clauses 117 to 158) deals with management of supervision orders and sets out the functions of the APB.

Emergency power to vary conditions for up to 72 hours without a court order

Where there is an imminent risk either to the offender or the community or residential accommodation may become unavailable the APB has emergency powers to vary supervision conditions for up to 72 hours without a court application. [120]

The Governor in Council, by order published in the Government Gazette, may designate a residential facility for the purposes of the Act. [133]

An offender may enter and leave the facility subject to the supervision conditions and the directions of the APB. [138]

Visitors may enter a residential facility at any time and may also be excluded on the grounds of public order or safety. A residential supervisor may request a visitor to give certain information including their identity, relationship to the offender and the purpose of their visit. If they fail to give the information they may be excluded from the facility. [139 to 141]

The Bill specifies the circumstances in which a search power order may be given by the officer in charge of a residential facility including the power to read any correspondence in the possession of the offender saving any specific prescribed correspondence such as a letter to or from the Ombudsman or a lawyer [142], and grants a supervision officer the power to seize anything found at a residential facility while carry out a search. [143]

A supervision officer may take a photograph of an offenders residing at a residential facility. [145]

The Bill also provides search and seizure powers where the offender is not a resident in a residential facility. [152 and 153]

The Bill provides for mandatory alcohol and drug testing of offenders. [155 to 158]

Breach of supervision order – Part 11

Detention without court sanction

The Bill provides for penalties for a breach of a supervision order including arrest and detention (for up to 10 hours) by an officer no police questioning may occur during this holding period. [159 to 172]

Change of name – Part 12

The Bill prohibits an offender or a person on his or her behalf from making a change of name application to a Registrar without having first obtained the Adult Parole Board's written approval. [173 to 181]

Restriction and sharing of information – Part 13

The Bill creates an offence in relation to the publication of certain material that is before the court in a proceeding under the Act unless the court makes a publication order under clause 183. The material captured by the offence includes information before the court that might identify a person (other than the offender) who has attended or given evidence or identify a victim of a relevant offence committed by the offender. The court may also make a publication order in respect to the identity or whereabouts of an offender. [182 to 186]

General, repeal and consequential amendments – Parts 14 and 15

The Bill repeals the *Serious Sex Offenders Monitoring Act 2005* which is the legislation that is superseded by this Bill. [200]

The Bill amends the *Corrections Act 1986* to enable a victim to be given certain information about an offender subject to a detention or supervision order under this Bill. [202]

Schedule 1 of the Bill specifies the offences that are relevant offences for the purposes of the Bill and **Schedule 2** provides transitional provisions.

Rights or freedoms – Right not to be subjected to double jeopardy (punishment) – Retrospective penalty – Characterisation of law – Whether the detention power is a punitive or preventative measure – Detention not based on commission of new offence – Exercise of judicial power – Separation of powers

The Committee has previously noted that great caution needs to be exercised in the passage of any enactment that seeks to impose a period of 'preventative detention' on any person where that detention is not based on punishment for an offence. The question for Parliament to consider is whether the imposition of the detention is punitive in character or whether the detention is a protective measure and if it preventative whether the detention scheme involves a meaningful judicial determination on imposition and subsequent oversight and review.

Detention of persons who have not committed any offence may constitute a serious infringement upon common law rights and freedoms and International Human Rights Law, amongst them the right to liberty and the presumption of innocence.

In *Fardon*⁴ the High Court held (in respect to the legislation there in issue) –

.. the provisions in the Bill is a general law designed to achieve a legitimate preventative , non-punitive purpose in the interest of public (family) protection. The making of a detention order is not conditioned upon a finding that an offender has engaged in conduct forbidden by law. Rather the orders are premised upon a finding that (a member believes on reasonable grounds that detention is necessary to ensure the safety of the aggrieved family member or to preserve any property of that person) there is an unacceptable risk that the person may commit an offence.

4 *Fardon v Attorney-General (Qld)* [2004] HCA 46, [2004] 210 ALR 50.

And subsequently applying *Fardon* the High Court has held –

*'The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature... depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed'*⁵

The Committee notes that a useful test developed by the High Court in *Fardon* was to characterise the law by asking whether its central purpose was to serve a punitive purpose or whether the law acts in a protective manner and is designed to achieve a legitimate objective in protecting the public. The later objective is not conditioned on the premise of an adjudication that an offender has engaged in unlawful conduct for which punishment may be legitimately (judicially) imposed.

Extract from the Statement of Compatibility -

It is important to highlight that the detention and supervision scheme is civil rather than criminal. Its purposes and effects are geared toward prevention, protection and rehabilitation rather than the punishment of the offender. Further, the scheme is based on the risk of reoffending, rather than the fact of a person having been convicted, or on any particular event that may have taken place in the past. Whilst a conviction may be a 'trigger' for eligibility, whether an order is imposed is based on an assessment of future risk.

*...In considering this issue, I have relied on the jurisprudence of the High Court of Australia and in particular, the decision of *Fardon v. Attorney-General for the State of Queensland (2004) 223 CLR 575*, which dealt with relevant human rights issues in the context of the post-sentence management of high-risk sex offenders. A number of judges addressed whether the relevant law in Queensland was punitive or protective in nature. Callinan and Heydon JJ considered that:*

The Act ... is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective rather than a punitive enactment.

Furthermore, Gummow J said:

It is accepted that the common-law value expressed by the term 'double jeopardy' applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continued detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted. The act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure.

The question whether the law is preventative and not punitive is a question for the consideration of Parliament.

Charter report

Human rights restrictions equivalent to those imposed on people who are intellectually disabled, mentally ill, have an infectious disease or are on parole – No legislative requirement of specialist accreditation for experts who assess risk – Orders may be imposed on offenders who are more likely than not to not re-offend – Whether reasonable limits

Summary: The bill potentially restricts the Charter rights of offenders who are eligible for supervision or detention orders to a similar extent to people who have intellectual disabilities, are mentally ill, have an infectious disease or are on parole. The Committee considers that the goal of preventing future sexual offences may justify such significant limitations on human rights, but that whether or not the bill satisfies the test for reasonable limits will depend on whether it is applied only to offenders who pose a sufficient risk of re-offending.

5 *Kruger v The Commonwealth (1997) 190 CLR 1 at 162*, per Gummow J.

While the test imposed by the bill is suited to identifying risks of re-offending, the Committee is concerned about the absence of a legislative requirement that risks be assessed by accredited experts and that an order can be made even though a court considers that it is more likely than not that the offender won't re-offend in the absence of an order.

The Committee notes that the bill re-enacts, extends and alters the scheme in the existing *Serious Sex Offenders Monitoring Act 2005*.⁶ In particular, the bill, like the current Act:

- limits the Charter's right to freedom of movement,⁷ by requiring offenders who are subject to supervision orders to report to and submit to examinations, and to obtain permission before leaving Victoria.⁸
- potentially engages or limits offenders' Charter rights against non-consensual treatment and to privacy, conscience, expression and association,⁹ through optional conditions attached to those orders.¹⁰ However, unlike the current Act, these conditions are set by a court (rather than the Adult Parole Board), unless there is an imminent risk of harm to the offender or the community.¹¹
- potentially significantly restricts the Charter's right to liberty,¹² through an optional condition to supervision orders requiring offenders to 'reside at a residential facility'.¹³ Unlike the current Act, this condition is also set by a court (rather than the Adult Parole Board), unless other accommodation specified by the court becomes unavailable.¹⁴ Also, people ordered to reside at residential facilities become subject to potential restrictions imposed by a court, the Parole Board or a supervision officer on leaving the facility.¹⁵

Most significantly, the bill, unlike the current Act, provides for the complete removal of some offenders' Charter right to liberty,¹⁶ through detention orders that 'commit the offender to be detained in prison for the period of the order'.¹⁷

The Committee observes that the bill potentially restricts the Charter rights of eligible offenders to a similar extent to eligible people who have intellectual disabilities,¹⁸ are mentally ill,¹⁹ have an infectious disease²⁰ or are on parole.²¹ The Committee

⁶ See the Committee's earlier reports on that Act at *Alert Digest No 2 of 2005*; *Alert Digest No 12 of 2006*; *Alert Digest No 5 of 2008*; *Alert Digest No 2 of 2009*.

⁷ Charter s. 12 provides that: 'Every person lawfully within Victoria has the right to move freely within Victoria and to leave it'

⁸ Clauses 16(2)(b-d), (f).

⁹ Charter ss. 10(c), 12, 13(a), 14, 15 & 16.

¹⁰ Clauses 17, 19-20.

¹¹ Clause 120(2)(a).

¹² Charter s. 21.

¹³ Clause 18.

¹⁴ Clause 120(2)(b).

¹⁵ Clause 138.

¹⁶ Charter s. 21.

¹⁷ Clause 42.

¹⁸ *Disability Act 2006*, Division 5 of Part 8, providing for 'supervised treatment orders' (including a requirement to reside in approved premises) for people with an intellectual disability who pose a significant risk of serious harm to another person.

¹⁹ *Mental Health Act 1986*, Division 2 of Part 3, providing for 'involuntary treatment orders' (including detention at an approved health service) for people who appear to be mentally ill and for whom involuntary treatment is necessary for the protection of members of the public.

²⁰ *Public Health and Wellbeing Act 2008*, Division 2 of Part 8, providing for 'public health orders' (including detention and isolation) for people with an infectious disease where the order is necessary to eliminate or reduce a serious risk to public health.

²¹ *Corrections Act 1986*, Division 5 of Part 8, for the imposition of terms and conditions on parolees (including not leaving Victoria without permission and reporting to and carrying out instructions of community corrections officers: see Schedule 4 to the *Corrections Regulations 2009*) and the cancellation of parole (including return to prison) at the discretion of the Adult Parole Board.

considers that the purpose of preventing future sexual offences may justify such significant limitations on human rights, but that whether or not the bill satisfies the Charter's test for reasonable limits on rights will depend on whether it is applied only to people who pose a sufficient risk of re-offending.

The bill identifies eligible offenders by requiring that:

- the offender have been previously sentenced to imprisonment for a sexual offence set out in Schedule 1²²
- a court find that the offender 'poses an unacceptable risk' of committing such an offence in the future if not subject to an order²³
- a court be so satisfied 'by acceptable, cogent evidence' and 'to a high degree of probability'²⁴
- these matters be periodically reviewed by a court during the course of the order²⁵
- courts determining these matters must consider expert reports assessing the risk of re-offending²⁶

While the terms of these tests are suited to identifying risks of re-offending, the Committee has two concerns about their compatibility with the Charter:

First, the bill does not implement the Victorian Sentencing Council's recommendation that the legislation state that expert risk-assessment reports can only be prepared by a psychologist or psychiatrist with specific expertise in the area of sexual offending and a demonstrated understanding of the issues involved in assessing risk who has been accredited for this purpose.²⁷ Rather, the bill only requires assessment by a 'medical expert'. Clause 3 provides that:

Medical expert means a psychiatrist, psychologist or other health service provider of a prescribed kind.

The Committee observes that it is unclear whether the words 'of a prescribed kind' apply only to the 'other health service provider' or to psychiatrists and psychologists as well.

Second, clauses 9(5) and 36(2) specify that the test of 'unacceptable risk' can be satisfied even though a court considers that it is more likely than not that the offender will not re-offend in the absence of an order. Two Victorian judges have, to date ruled that this potentially sets a threshold that is too low to satisfy the test for reasonable limits on rights.²⁸ Those rulings were made in relation to the current Act, which does not provide for detention orders.

The Committee will write to the Minister seeking further information as to whether or not a psychiatrist or psychologist must be 'of a prescribed kind' before he or she can prepare an assessment report.

²² Clause 4.

²³ Clauses 9(1) & 36(1).

²⁴ Clauses 9(2) & 37.

²⁵ Part 5.

²⁶ Clauses 9(3), 35(2) and 72(1).

²⁷ Sentencing Advisory Council, *High-risk offenders: Post-sentence supervision and detention*, May 2007, recommendations 9-A (1-3) & 9-B (1-2) cf clause 106(1).

²⁸ *R J E v Secretary to the Department of Justice* [2008] VSCA 265, [113] (Nettle JA); *Secretary to the Department of Justice v AB* [2009] VCC 1132, [267] (Ross J)

Pending the Minister's response, the Committee refers to Parliament for its consideration the question of whether or not the bill, by potentially subjecting convicted sexual offenders who:

- ***a court finds pose an unacceptable risk of re-offending:***
- ***without a requirement of assessment by experts who are accredited as specialists in sexual offending and risk assessment; and***
- ***even where the court considers that it is more likely than not that the offender won't re-offend***
- ***to human rights limitations equivalent to those potentially imposed on people who are mentally ill, intellectually disabled, have an infectious disease or are serving a prison sentence***

satisfies the Charter's test for reasonable limits on human rights.²⁹

Fair hearing – Proportionate limits on rights – Court must not consider impact of order when determining risk – Court must not impose conditions inconsistent with certificate of available resources – Whether determination by an 'independent' court

Summary: The effect of clauses 9(4), 22(4) & 36(3) is that a court may be required to find that an offender poses an unacceptable risk if an order with a particular condition isn't imposed even though the court will be unable to impose that condition because the Secretary provides a certificate stating that the condition cannot be resourced. The Committee is concerned that a certificate of available resources, especially one that greatly restricted the available conditions that a court may impose, would undermine the court's independence from the executive. It will write to the Minister seeking further information.

The Committee notes that Division 3 of Part 2 empowers courts to set all conditions of a supervision order. Clause 15 provides that:

- the primary purpose of the conditions is to reduce the risk of re-offending, including by promoting the rehabilitation and treatment of the offender³⁰
- the court must ensure that the conditions constitute the minimum necessary interference on the offenders' rights³¹
- the court must ensure that the conditions are reasonably related to the gravity of the risk of the offender re-offending³²

The Committee observes that Division 3 of Part 2 provides a significantly higher level of protection for offenders subject to a supervision order than the current *Serious Sex Offenders Monitoring Act 2005* (which instead gives the Adult Parole Board the role of imposing or varying conditions and does not contain any minimal impairment or proportionality constraints.) In particular, the court's role ensures that conditions on supervision orders will be set according to the rules of natural justice, consistently with the offender's Charter right to a fair hearing and the Charter's test for limits on human rights.³³

However, the Committee is concerned that these protections may be substantially restricted in practice, due to the following provisions:

²⁹ Charter s. 7(2) provides that: '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...'

³⁰ Clauses 15(3) & (5).

³¹ Clause 15(6)(a).

³² Clause 15(6)(b).

³³ Charter ss. 7(2) & 24(1).

- clauses 9(4) & 36(3), which bar a court from considering the means of managing a risk or the likely impact of a supervision order or detention order on the offender when determining whether or not an offender poses an unacceptable risk. The Committee observes that these clauses may be inconsistent with the test of unacceptable risk, which requires an assessment of risk 'if an order is not made'.
- clause 22(4), which bars a court from imposing a condition on a supervision order that is inconsistent with a 'certificate of available resources' provided to the court by the Secretary to the Department of Justice. The Committee is concerned that clause 22 does not provide for any limits on the Secretary's discretion to provide a 'certificate of available resources'.

Neither of these provisions appears in the equivalent legislation in New South Wales, Queensland and Western Australia (even though all these jurisdictions similarly give courts the role of setting all conditions to supervision orders.)

The effect of these clauses is that a court may be required to find that an offender poses an unacceptable risk if an order with a particular condition isn't imposed even though the court will be unable to impose that condition because the Secretary provides a certificate stating that the condition cannot be resourced. While clauses 9(7) and 36(5) provide that a court may make no order in such circumstances, the Committee observes that a court will be forced to choose between failing to prevent an unacceptable risk it has found to exist or imposing a condition or order that goes beyond the minimum necessary interference with the offender's rights or is disproportionate to the gravity of that risk.

The Committee is concerned that clause 22(4) allows the state party that initiated a civil proceeding to impose unreviewable constraints on the court's determination of the outcome of that proceeding. **A certificate of available resources may engage the Charter right of offenders to have proceedings in respect of orders determined by an 'independent' court,** if there is no process to challenge its making or contents.³⁴

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

1. **What legal constraints apply to the making and provision of a certificate of available resources?**
2. **What legal proceedings are available to challenge the making or contents of a certificate of available resources?**

Pending the Minister's response, the Committee draws attention to clauses 9(4), 22(4) & 36(3).

Uncharged detainees – Treatment inappropriate to status as unconvicted prisoner – Detention in the same area as persons servicing custodial sentences – Adequacy of statement of compatibility

Summary: Clause 115 provides for exceptions to the Charter's requirements for the treatment of uncharged persons in relation to people who are subject to a detention order. The Committee will write to the Minister expressing its concern about the statement of compatibility to clause 115.

The Committee notes that Charter s. 22 provides that a person detained without charge must:

³⁴ Charter s. 24(1). For example, there is no equivalent, in the case of certificates of available resources, to clause 113, which provides for disputes about assessment reports, progress reports or other reports made to a court.

- be segregated from persons who have been convicted of offences, except where reasonably necessary (Charter s. 22(2)); and
- be treated in a way that is appropriate for a person who has not been convicted (Charter s. 22(3))

However, while clause 115 restates both these rules in relation to people who are subject to detention orders, it also provides for exceptions to them:

Clause 115(3) provides that an offender who is subject to a detention order may be detained in the same area as persons serving custodial sentences if either:

- (a) it is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation and other group activities of this kind
- (b) it is necessary for the safe custody or welfare of the offender or prisoners or the security or good order of the prison
- (c) the offender has elected to be so accommodated or detained

The Statement of Compatibility remarks:

There are exceptions to this, which I believe fall within the scope of the right because they are reasonably necessary.

The Committee observes:

- the circumstances listed in clause 115(3)(a) appear to be very broad and may justify routine detention of a person who is subject to a detention order with other prisoners. The Committee considers that Charter s. 22(2)'s 'reasonably necessary' language is concerned with significant practical concerns (such as those listed in clause 115(3)(b)), rather than merely the convenient management and treatment of an offender.
- Charter s. 22(2) makes no provision for uncharged detainees to elect to be accommodated with convicted offenders. The Committee is concerned that an election under clause 115(3) by an offender to be accommodated with convicted offenders may arise from avoidable deficiencies in the accommodation conditions applicable to uncharged detainees.

Also, clause 115(1) makes the requirement in Charter s. 22(3) 'subject to any reasonable requirements to maintain':

- (a) the management, security and good order of the prison; and
- (b) the safe custody and welfare of the offender or any other prisoners.

However, the Committee observes that Charter s. 22(3) is not expressed as subject to any exceptions. The Statement of Compatibility does not address clause 115(1).

The Committee is concerned that, in contrast to supervision at a residential facility,³⁵ there is no requirement for an offender to be notified of, given reasons for or make submissions concerning changes in detention conditions, or for a court to set conditions (including protective conditions) for detention orders or for determinations about accommodation in prison to be reported to or reviewed by a court.

The Committee will write to the Minister expressing its concern about the statement of compatibility in relation to clause 115(1). Pending the Minister's response, the Committee draws attention to clause 115 and the requirements of Charter s. 22 with respect to the treatment of uncharged detainees.

³⁵ Cf clauses 122-128 & 132.

Double jeopardy – Retrospective increase in penalties – Supervision and detention orders – Application to crimes committed and sentences served before the bill commenced – Whether punishment/penalty

Summary: The Committee considers that clauses 4(1) & 4(3) and clause 8 of schedule 2 may engage the Charter's rights against double jeopardy and retrospective increases in penalty, depending on whether supervision or detention orders expose them to an additional punishment or penalty.

The Committee notes that clause 4(1) defines the offenders who are 'eligible' for a supervision or detention order to include anyone who, at the time of the application is serving a custodial sentence (including parole) for a sexual offence in schedule 1. Clause 4(3) and clause 8 of schedule 2 provide that offenders who are the subject of extended supervision orders under the current Act are eligible for detention orders that they were not eligible for when they completed their sentence.

So, people who committed offences before the Bill commences will be potentially subject to orders that they were not eligible for when they committed those offences and are additional to punishments they have already received (or would have been eligible to receive) for those offences. Moreover, people who are presently subject to extended supervision orders (which do not permit detention in a prison) will become eligible for detention orders.

The Committee considers that clauses 4(1) and 4(3) and clause 8 of schedule 2 may engage the Charter's rights against:

- **double jeopardy,³⁶ depending on whether or not supervision or detention orders are classified as 'punishment'**
- **retrospective increases in penalty,³⁷ depending on whether or not supervision or detention orders are classified as a 'penalty'**

The Statement of Compatibility remarks:

It is important to highlight that the detention and supervision scheme is civil rather than criminal. Its purposes and effects are geared towards prevention, protection and rehabilitation rather than the punishment of the offender. Further, the scheme is based on the risk of reoffending, rather than the fact of a person having been convicted, or on any particular event that may have taken place in the past. Whilst a conviction may be a 'trigger' for eligibility, whether an order is imposed is based on an assessment of future risk.

The Committee notes that clause 1 provides that the purposes of the Bill are to protect the community and to facilitate treatment and rehabilitation. Clause 15 provides that the purpose of conditions to supervision orders are, primarily, to reduce the risk of re-offending and, secondarily, to provide for the reasonable concerns of victims. Clause 6 provides that proceedings for orders are 'civil in nature' but that the rules regulating practice and procedure in civil proceedings do not apply. Unlike all other civil proceedings in Victoria, proceedings for detention orders may result in a litigant being committed to prison.

As the Committee observed in *Alert Digest No 5 of 2008* the meaning of 'punishment' and 'penalty' is a question of substance, rather than form or legislative declaration, and is a matter of considerable dispute. The two most relevant court rulings are:

- a 2004 judgment of the High Court of Australia, considering constitutional issues about the separation of powers that differ from the issues of human rights raised by the

³⁶ Charter s. 26 provides that: 'A person must not be... punished more than once for an offence in respect of which he or she has already been finally convicted... in accordance with law'.

³⁷ Charter s. 27(2) provides that: 'A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.'

Charter, where a majority of judges observed that similar continuing detention legislation should not be classified as punitive,³⁸ and

- a 2006 judgment of New Zealand's Court of Appeal, applying human rights provisions that are similar to the Charter, where the Court unanimously held that supervision legislation that did not provide for detention infringed offenders' rights against double jeopardy and retrospective increases in penalty.³⁹

As the Committee has previously noted, retrospective eligibility for new orders may operate unfairly on offenders who elected to plead guilty or to make sentencing submissions for a sexual offence at a time when people who were sentenced for such offences would not have been liable to post-sentence supervision or detention.

The Committee observes that the Supreme Court of Victoria has recently held that the Charter does not apply to any proceedings in respect of extended supervision orders first issued prior to 2007, including all future reviews of those orders.⁴⁰ **The Committee will write to the Minister seeking further information as to whether the Charter will apply in all proceedings under the Bill, including proceedings in respect of people who were first subjected to extended supervision orders prior to 2007.**

The Committee refers to Parliament for its consideration the question of whether or not clause 4, by making people eligible for post-sentence supervision or detention (including potentially being committed to prison after their sentence is completed) in relation to offences that did not attract such eligibility when they were committed or when the offender was sentenced imposes an additional 'punishment' or a 'penalty' contrary to the Charter's rights against double jeopardy and retrospective increases in penalty.

The Committee makes no further comment.

³⁸ *Fardon v Attorney-General (Qld)* [2004] HCA 46, [34] (McHugh J), [74] (Gummow J), [216]-[217] (Callinan & Heydon JJ) cf [20] (Gleeson CJ, questioning the 'strict division between punitive and preventative detention'), [185] (Kirby J, holding that the law retrospectively imposes additional punishment) & [197] (Hayne J, holding that the distinction might be relevant and resolved differently in another case.)

³⁹ *Belcher v Chief Executive of the Department of Corrections* [2006] NZCA 262, [49]. See also the identical conclusion of New Zealand's Attorney-General (*Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill* and *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) Orders) Amendment Bill* but c.f. the report of the New Zealand Parliament's Justice and Electoral Committee, noting that '[i]t is possible to consider retrospective application of the extended supervision regime not to be "punishment".')

⁴⁰ *Secretary to the Department of Justice v Fletcher (Ruling No 3)* [2009] VSC 503, applying Charter s. 49(2).

Summary Offences and Control of Weapons Acts Amendment Bill 2009

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|---------------------------------|--|
| Introduced | 10 November 2009 |
| Second Reading Speech | 12 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA for Hon. Rob. Cameron MLA |
| Portfolio responsibility | Minister for Police and Emergency Services |

Purpose

The Bill amends the –

- *Summary Offences Act 1996* to confer on police a new power to direct people to move on from an area if they are, or are likely to become, involved in a breach of the peace or threat to public safety.

The Bill also creates a new offence of disorderly conduct, empowers the police to arrest and lodge in safe custody a person who is found drunk and disorderly in a public place, and expands the list of offences for which infringement notices can be issued.

- *Control of Weapons Act 1990* to clarify and strengthen the existing power to search a person for weapons on reasonable suspicion that the person is carrying a weapon in a public place. It also provides the police with a new power to search persons for weapons in public places within temporarily designated areas. This new power is not premised on the police first forming a reasonable suspicion that the person to be searched is carrying a weapon. The bill regulates in detail the way in which the new search powers are to be exercised (and includes special protections as to the circumstances in which, and manner in which, strip searches can be conducted).

Submissions

The Committee has received written submissions from the following organisations and persons –

- Victorian Equal Opportunity and Human Rights Commission
- Centre for the Human Rights of Imprisoned People
- Human Rights Law Resource Centre
- Law Institute Victoria
- Victorian Aboriginal Legal Service Co-operative Limited
- Youth Affairs Council of Victoria Inc.
- African Think Tank Inc.
- Centre for Multicultural Youth
- Council to Homeless Persons
- Indigenous Social Justice Association
- Maribyrnong City Council, Youth Services and Social Support
- Melbourne Copwatch
- Moreland Community Legal Centre Inc.
- Nicholas Chenu
- Northern Bundji Bundji Project
- Peninsula Community Legal Centre Inc.
- Ross Rees Pty Ltd.
- Royal Children's Hospital Melbourne, Centre for Adolescent Health
- Ruth Liston, Lecturer, School of Social and Political Sciences, Univ. of Melbourne
- Simply Skateboarding

- South East Local Learning and Employment Network
- Thea Lamaro
- Women's Health in the North
- Youth Projects Inc.
- Federation of Community Legal Centres
- PILCH Homeless Persons' Legal Clinic
- Youthlaw
- Claire Turpin
- Fitzroy Legal Service

Summary of major points made by submissions

Whilst it is not possible to fully detail the content of these submissions the Committee notes that the major contentions / points made by the submissions are that –

- The Bill is inconsistent with fundamental human rights set out in the *Charter* and this is acknowledged in the Statement of Compatibility itself and the government will proceed with the proposed legislation nevertheless.
- The decision to enact laws incompatible with the *Charter* permitting the operation of provisions acknowledged to enable unreasonable breaches of human rights is a serious matter and should be approached with caution and planning if it is not to undermine the *Charter*.
- There has been no public consultation with the community during the development of the proposed legislation permitting very broad powers. A process of consultation should explain to the community the necessity for these laws and enable meaningful participation by groups most affected by the proposed laws.
- Police will have extensive search powers in designated areas even where they have formed no reasonable belief or suspicion that a person may be carrying a weapon. In the absence of a reasonable suspicion/ belief requirement the proposed laws are in breach of the *Charter*.
- The police search powers include search of children of any age which is inconsistent with the rights of children.
- Move on powers may be applied in a discriminatory way and may be particularly discriminatory in their impact on indigenous Australians, the young, the homeless, persons with a mental impairment and other vulnerable groups.
- The move on power should not be based on anticipated future conduct and therefore the test of 'is likely to' should be deleted.
- The inclusion of 'breach of the peace' as a relevant test in the move on power is unwarranted and should be deleted.
- The move on power should only apply in areas where they are associated with particular licensed premises.
- The proposed law impinge on the right to protest and therefore engage the right to freedom of expression and freedom of association also protected under the *Charter*.
- The Statement of Compatibility lacks the necessary detail to adequately explain the rationale for the provisions of the proposed legislation.
- A minimum age permitting the search of children should be prescribed.
- Strip search of children below 18 years of age should not be permitted.
- Limiting the type of location that may be designated to alleviate unintended impact on the homeless or other vulnerable groups.

- Requiring orders to be in writing and be subject to review.
- Recording the data of the use of the directions powers to include sufficient material to enable effective analysis.
- If the proposed laws are enacted there should be appropriate reporting and monitoring on the laws operation and impact as well as set periodic reviews.
- There should be parliamentary and judicial oversight of the designation or particular geographical areas in which searches of individuals can occur.
- The designation of areas power should be narrowed in circumstances attracting the order, size or include areas only where there are associated licensed premises.
- Search powers in a designated area should not apply to circumstances of lawful protest / demonstrations.

Content

Summary Offences Act 1966

Move on powers

The Bill inserts a new section 6 regarding move on powers.

Note: *Move on powers currently exist in every other State and Territory in Australia, in England and a number of other international jurisdictions.*

The new power will give police the power to give a direction to a person or persons, to leave a public place or a part of a public place (that is, give a direction to move on) if the police member suspects on reasonable grounds that the person or persons is or are breaching or is or are likely to breach the peace; or the person or persons is or are endangering, or is or are likely to endanger the safety of any other person; or the behaviour of the person or persons is likely to cause injury to a person, damage to property or is a risk to public safety.

A direction given to a person or persons may be given orally by the police member and may direct the person or persons not to return to, or not to be in, the public place, or to the part of the public place as the case may be, for a specified period. The provisions will exclude certain activities from being subject to the operation of the power. These are where a person, whether not the person is in company of other persons is —

- picketing a place of employment; or
- demonstrating or protesting about a particular issue; or
- apparently intending to publicise their view about a particular issue through speech, the use of a banner or placard or other means. [3]

The Committee notes that this power may be used where no actual incident or event has happened but is likely to happen. The move on power will be able to be used on suspicion based on reasonable grounds.

The Committee further notes the inclusion of the term ‘breach of the peace’ as also attracting the move on power.

The Committee notes that a number of submissions raised concerns that such a power was vague and may lead to arbitrary decisions.

The Committee observes that the power cannot be invoked to limit protest or picketing

The Committee draws attention to the provision.

Persons found drunk – section 13

The Bill increases the penalty for the offence of being drunk in a public place to a maximum penalty of 4 penalty units (currently 1 penalty unit) and makes the offence an infringement offence provided in clauses 7 and 8. [4]

Persons found drunk and disorderly – section 14

The Bill amends the offence of persons found drunk and disorderly in a public place to enable police to arrest persons who are drunk and disorderly in a public place and to place them into safe custody in the same manner as police are currently able to arrest people and place them in safe custody in relation to the offence of drunk in a public place and increases the penalty from 1 to 5 penalty units and makes the offence an infringement offence provided in clauses 7 and 8. [5]

The Committee notes the existing offence in section 13 allows for a person found drunk to be arrested and lodged in safe custody.

New offence – Disorderly conduct – new section 17A

The Bill establishes a new offence for any person to behave in a disorderly manner in a public place with a penalty of 5 penalty units applying. The new offence will be an infringement offence (clauses 7 and 8). [6]

The Committee notes the new offence involves the broader question of determining the meaning and extent of ‘disorderly’ as regards behaviour or conduct. This may be regarded as a very broad and vague power requiring subjective assessments by police as to the proper characterisation of the behaviour as being ‘disorderly’. The Committee also notes the uncertain interpretation in current jurisprudence on the meaning of ‘disorderly’.

The Committee notes the new section may raise issues concerning freedom of expression and peaceful assembly and notes the discussion on these matters in the Statement.

The Committee further raises this new offence in its Charter report below.

The Committee draws attention to the provision.

Control of Weapons Act 1990

Search without warrant

The Bill substitutes a new section 10 to allow a police member to search a person for weapons where the member has a reasonable grounds for suspecting that the person is carrying or has in his or her possession in a public place a prohibited weapon, a controlled weapon or a dangerous article. The substituted section does not require the person to produce the weapon or article and refers to the Schedule 1 search regime.

The search must be conducted in the least invasive way that is practicable in the circumstances and a person who is being searched under this provision may be detained by a police member only for as long as is reasonably necessary to conduct the search. [9]

Rights or freedoms – Search without warrant where officer has a ‘reasonable suspicion’

The Committee notes the use of the lower threshold test of 'reasonable suspicion' rather than the test of 'reasonable belief'. The test is the same as the current section 10.

The Committee has previously commented on the lower threshold test for the granting of search warrants and has accepted previously the proposition that a lower threshold may be justified in regulatory schemes involving public safety or health.

In respect to this Bill the Committee notes the lower threshold test applies to a search without warrant.

Subject to the Committee's comments in the Charter Report the Committee notes that whilst the search does not involve any judicial oversight (warrant) it appears to be reasonably circumscribed by the provision itself (new section 10) and by the Schedule (Conduct of Searches).

The Committee draws attention to the provision.

Designated areas and stop and search of persons and vehicles

The Bill inserts new sections 10C to 10L into the Act in relation to new forms of weapons stop and search powers that may be exercised in public places within designated areas.

A designated area is an area in respect of which there is in effect a declaration that has been made under new sections 10D or 10E respectively, planned designated areas and unplanned designated areas.

Planned areas (10D) concern those locations that have had a history of weapons related violence or disorder over the last 12 months or was associated with a particular event or celebration on previous occasions and violence is likely to recur. Unplanned designated areas (10E) deal with the scenario where the police receive intelligence that a weapons related incident has or is likely to occur.

New section 10F provides that the level of police member who may be delegated the power to make a declaration of a planned or an unplanned designation must not be of a rank lower than that of inspector. Declarations may not be for periods of greater than 12 hours and the area must not be larger than is reasonably necessary to respond effectively to the threat.

Power to search persons in designated area

New section 10G sets out the powers that may be exercised by police when a planned or an unplanned designation of an area is in force. A member of police may, without warrant, stop and search a person, and may search anything in that person's possession or under their control, for weapons provided that the person (or thing) is in a public place within the designated area. A police member must conduct the least invasive search that is practicable in the circumstances (refer to Schedule 1) and any detaining of a person for the purposes of a search under section 10G must be for a period that is no longer than is reasonably necessary to conduct the search.

The Committee notes that the Statement of Compatibility provides that this clause is incompatible with the Charter. The power to randomly search a person or vehicle in a public place within a designated area is not premised on the basis of a reasonable belief or suspicion. The power to search includes the power to undertake a strip search where the police member considers there is a reasonable suspicion the person may be concealing a weapon.

In respect to the search powers the Statement of Compatibility specifically acknowledges that they are incompatible with the rights to privacy under Charter 13(a) and the rights of children under Charter 17(2). The Statement further provides that the provisions are nevertheless justified and the Government considers the legislation is

'important for preventative and deterrent reasons, including the protection of children'.

The Committee notes the serious implications of the Ministers candid declaration of incompatibility and draws particular attention to these provisions.

The Committee further reports on these provisions in the Charter report below.

New section 10H will empower a police member to, without a warrant, stop and search a vehicle and anything that is in or that is on the vehicle, provided that the vehicle is in a public place that is within a designated area and there is a person in or on the vehicle at that time.

New section 10I contains provisions regarding the information that must be given by police to persons who are detained and searched under these new search provisions.

New section 10J provides an express power for police to seize and detain any item that is found during a search under the new powers set out in new sections 10G and 10H.

New section 10K provides police with the power to obtain a disclosure of the identity of any person who is to be subject to a strip search under the provisions of Schedule 1 to the Act.

New section 10L establishes a further new offence for a person to, without reasonable excuse, obstruct or hinder a police member in the exercise of search powers. **[12]**

Conduct of searches – Schedule 1

The Bill inserts new Schedule 1 regarding the manner in which searches of persons and things are to be conducted under substituted section 10 and new section 10G. **[13]**

Clause 3 enables a police member to carry out an initial electronic device search of a person or thing.

Clause 4 allows for a further search of things to be conducted once there has been an initial electronic device search, and the police member considers that a person may be concealing a weapon. This form of search may include—

- a request that the person produce and empty any bag, basket or receptacle of its contents or that the person turn out their pockets;
- a search by the member of any bag, basket or receptacle or a search through and the moving of the contents of any bag, basket or receptacle;
- a pat down of the area of the person's pockets; or
- a search through and the moving of the contents of the person's pockets after the pockets have been turned out or have been patted down.

Clause 5 of Schedule 1 allows for a further outer search of a person following an initial electronic device search and the police member considers that the person may be concealing a weapon. This form of search may include—

- the police member running their hands over the person's outer clothing;
- the removal, upon the request of the police member, of the person's overcoat, coat or jacket and any gloves, shoes or hat after which the member may use an electronic metal detection device, may run his or her hands over the person's outer clothing and may search the items of clothing that have been removed by the person, including by the use of an electronic metal detection device.

Clause 6 sets out a number of things that a police member must comply with, as far as is reasonably practicable, in conducting an outer search of a person. These matters include—

- informing the person whether they will be required to remove outer clothing and, if so, why this is necessary;
- that the police member must ask for the cooperation of the person;
- the search must be conducted in a manner that affords the person reasonable privacy and it must be conducted as quickly as is reasonably practicable;
- the search must be of the least invasive kind reasonably necessary in the circumstances;
- where a search involves the police member running their hands over the person's outer clothing, it must be conducted by a police member of the same sex as the person being searched, if that is reasonably practicable.

Clause 7 of Schedule 1 enables a police member to conduct a strip search of a person provided that a search has already been conducted under clause 4 or 5 of the Schedule and the member reasonably suspects that the person is concealing a weapon. The member must also believe on reasonable grounds that a strip search is necessary due to the seriousness and urgency of the circumstances. A person may be directed to accompany the member to a police vehicle or other private place in which the search is to be conducted.

Clause 8 requires a police member who intends to conduct a strip search of a person to comply with certain requirements regarding the information that must be given to that person.

Clause 9 sets out specific rules that apply when a police member conducts a strip search of a person.

Clause 10 empowers police to search the clothing that has been removed by a person during their strip search.

Clause 11 of Schedule 1 makes particular provision for rules that are to apply to any search of a child, other than an initial search involving the use of an electronic metal detection device or an examination of things under clause 4 of Schedule 1.

A search of a child must be conducted in the presence of a parent or guardian of the child being searched or, if that is not acceptable to the child, in the presence of an independent person who is capable of representing the interests of the child and who, as far as practicable in the circumstances, is acceptable to the child. However, if a parent or guardian is not then present and the seriousness and urgency of the circumstances require the search to be conducted without delay, then the search must be conducted in the presence of an independent person who is capable of representing the interests of the child and who, as far as practicable in the circumstances, is acceptable to the child.

Clause 12 makes particular provision for rules that are to apply to any search of a person with impaired intellectual functioning, other than an initial search or a search under clause 5 of Schedule 1 that is limited to a search involving the use of an electronic metal detection device or an examination of things under clause 4 of Schedule 1.

A search of a person with impaired intellectual functioning must be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the person, in the presence of an independent person who is capable of representing the interests of the person and who, as far as practicable in the circumstances, is acceptable to the person.

Under subclause (4), however, if a parent or guardian is not then present and the seriousness and urgency of the circumstances require the search to be conducted without delay, then the search must be conducted in the presence of an independent person who is

capable of representing the interests of the person and who, as far as practicable in the circumstances, is acceptable to the person.

Charter report

Freedom of movement – Move-on powers – Whether ‘under law’ – Whether least restrictive alternative reasonably available

Summary: The Committee is concerned that clause 3's terms do not place clear and accessible boundaries on the police's move-on power and observes that some move-on powers in other Australian jurisdictions include narrower or clearer constraints.

The Committee notes that clause 3, inserting a new section 6 into the Summary Offences Act 1966, empowers police to direct some people in public places ‘to leave the public place, or part of the public place’ and to not return for a specified period. Clause 3 limits the Charter's right to freedom of movement.

The Statement of Compatibility remarks:

The ‘move-on’ power provides police with a pre-emptive tool to diffuse dangerous situations and to ensure the peaceful enjoyment of public spaces by the citizenry. In this way, there is a clear and rational connection between the limitation on the right to freedom of movement and the purpose of the provision....

Clause 3 is carefully tailored. The ‘move on’ power is only triggered if there is a reasonable suspicion of a breach of the peace, threat to safety, or threat to injury or damage (or a likelihood of one of these things occurring) and is in effect for a limited period of time. Additionally, subclause (5) specifies that the power does not apply in relation to a person who is picketing a place of employment; demonstrating or protesting about a particular issue; or speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person's view about a particular issue. This means that activities with a high expressive content will generally be exempted from interference. In light of these limits to its operation, clause 3 restricts the right to freedom of movement no more than reasonably necessary to achieve the legislative purpose.

Whilst the Committee agrees that the purposes of diffusing dangerous situations and ensuring peaceful enjoyment of public spaces may justify limiting the Charter's right to freedom of movement,⁴¹ and observes that such powers exist in every other Australian jurisdiction, it is concerned that clause 3's terms do not place clear and accessible boundaries on the police's move-on power. In particular:

- The power is triggered by a reasonable suspicion of ‘likely’ outcomes⁴²
- One of those outcomes – breach of the peace – is a technical and evolving common law concept that is unlikely to be well understood by lay people⁴³
- No criteria are provided for the police's exercise of their discretion as to either the giving or the content of the direction

While the European Court of Human Rights has held that a police power to enter a home to prevent a breach of the peace is a ‘lawful’ interference in rights in the context of a domestic dispute,⁴⁴ the Committee is concerned that the much wider context in which move-on powers may be exercised, and its combination with a criminal penalty for disobeying a

⁴¹ *Temoannui v Ford* [2009] ACTSC 69, [29]

⁴² See also Federation of Community Legal Centres submission, p. 4; Youth Affairs Council of Victoria Inc submission, p. 3.

⁴³ See also Human Rights Law Resources Centre submission, Annexure p. 1; Federation of Community Legal Centres submission, p. 3.

⁴⁴ *McLeod v UK* [1998] ECHR 92, [45].

direction, means that the terms of clause 3 may be insufficient to satisfy the Charter's requirement that any limitation on rights be made 'under law'.⁴⁵

The ACT Supreme Court has held that, for move-on powers to comply with that jurisdiction's *Human Rights Act 2004*, 'the extent to which persons are to be restricted from exercising their statutory right to freedom of movement and association must be the minimum necessary to achieve that objective'.⁴⁶ **Whilst clause 3 is more protective than earlier forms of move-on powers that still apply in some Australian jurisdictions,⁴⁷ the Committee is concerned that more modern powers in other Australian jurisdictions are subject to various narrower constraints on the exercise of those powers, including:**

- Requiring a reasonable belief, rather than a reasonable suspicion⁴⁸
- Restricting the power to when a person is likely to engage in 'violent conduct'⁴⁹
- Requiring that the person be 'obstructing', 'harassing' or 'intimidating' people, or acting in a way that would cause fear to people of reasonable firmness, (instead of the 'breach of the peace' language)⁵⁰
- Limiting the direction to one that is for the purpose of reducing those outcomes⁵¹
- Limiting the direction to one that is reasonable in the circumstances⁵²
- Requiring the police officer to 'take into account the likely effect of the order on the person, including but not limited to the effect on the person's access to the places where he or she usually resides, shops and works, and to transport, health, education or other essential services'⁵³
- Exempting the subject of the direction from compliance if he or she stopped the relevant conduct after the direction was given⁵⁴
- Limiting the period of time that a person can be told not to return to six⁵⁵ hours, rather than 24 hours.

The Committee refers to Parliament for its consideration the question of whether or not clause 3 is a reasonable limit on the Charter's right to freedom of movement according to the test in Charter s. 7(2)⁵⁶ and, in particular, whether or not clause 3 sets out clear and accessible rules governing the interference with the right; and there are

⁴⁵ Charter s. 7(2) provides that: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified...'

⁴⁶ *Temoannui v Ford* [2009] ACTSC 69, [29].

⁴⁷ *Summary Offences Act 1953* (SA), s. 18; *Summary Offences Act 1979* (NT), s. 47A, both targeted at 'loitering' and providing for imprisonment for non-compliance with directions.

⁴⁸ *Crime Prevention Powers Act 1998* (ACT), s. 4(1); *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 197(1); *Police Offences Act 1935* (Tas), s. 15B(1).

⁴⁹ *Crime Prevention Powers Act 1998* (ACT), s. 4(1). The Dictionary defines 'violent conduct' to mean violence or intimidation to a person or damage to property.

⁵⁰ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 197(1)(a)-(c)

⁵¹ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 197(2)

⁵² *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 197(2).

⁵³ *Criminal Investigations Act 2006* (WA), s. 27(3)

⁵⁴ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 199(2); *Criminal Investigations Act 2006* (WA), s. 27(7).

⁵⁵ *Crime Prevention Act 1998* (ACT), s. 4(3)(b).

⁵⁶ Charter s. 7(2) provides that: '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... any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

any less restrictive alternatives reasonably available to achieve the purpose of clause 3.

Deprivation of liberty except on grounds, and in accordance with procedures, established by law – Drunk and disorderly persons may be lodged in safe custody – Arrest for disorderly conduct

Summary: The Committee is concerned that clause 5(1) does not include any express constraints on the duration of the power to detain a drunk and disorderly person and that clause 6's language may be too malleable to protect the Charter's right not to be deprived of liberty 'except on grounds... established by law'.

The Committee notes that clause 5(1), amending existing s. 14 of the *Summary Offences Act 1966*, provides that a person who is 'found drunk and disorderly in a public place' may be 'arrested by a member of the police force and lodged in safe custody'.

The Statement of Compatibility remarks:

In practical terms, this amendment does not empower the police to do anything that they cannot already do. This is because any person who has contravened section 14 will also have contravened section 13 (and therefore already be eligible to be arrested and lodged in safe custody for that offence)... Nevertheless, as the amendment to section 14 provides the police with an additional power, I consider the charter issues raised by the provision briefly below....

In my view, the power to arrest a person who is found drunk and disorderly in a public place and lodge them in safe custody is not arbitrary. It is for the legitimate purpose of protecting the safety of both the person themselves and others in the community by placing them in a safe environment until they have sobered up. Implicitly, it must be exercised for this purpose, and the person must not be detained for longer than is reasonably necessary for those purpose.... The Victoria Police manual also contains detailed guidance for police about protecting the safety and welfare of persons who are drunk while in custody.

While the Committee agrees the clause 5(1) merely reiterates an existing power and that protecting the safety of drunk persons is a legitimate purpose, it is nevertheless concerned that the power in question may engage the Charter's right against deprivation of liberty 'except... in accordance with procedures, established by law'.⁵⁷ **In contrast with both the regular arrest power in Victoria⁵⁸ and with provisions on dealing with public drunkenness in other Australian jurisdictions,⁵⁹ clause 5(1) does not include any express constraints on the duration of the power to detain a drunk and disorderly person.** The European Court of Human Rights has held that neither implied limitations nor administrative guidelines suffice to satisfy the 'established by law' requirement in relation to powers to detain drunk and disorderly people.⁶⁰

The Committee also notes that clause 6, inserting a new section 17A into the *Summary Offences Act 1966*, creates an offence of 'behaving in a disorderly manner in a public place'. Although the offence is punishable only by a fine and may be dealt with as an infringement offence, it is nevertheless possible that people found committing the offence may be

⁵⁷ Charter s. 21(3)

⁵⁸ Section 458(3) of the *Crimes Act 1958* provides that arrestees 'shall be held in the custody of the person apprehending him only so long as any reason referred to in the said paragraph for his apprehension continues'.

⁵⁹ *Intoxicated People (Care and Protection) Act 1994* (ACT), s. 4(3); *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s. 207(2)(f); *Police Offences Act 1935* (Tas), s. 4A(6).

⁶⁰ *Hafsteinsdóttir v Iceland* [2004] ECHR 251,[54]-[56].

arrested, e.g. to 'prevent the continuation or repetition of the offence', thus engaging the Charter's right to liberty.⁶¹

The Statement of Compatibility does not address the right to liberty, but does remark on clause 6's compatibility with the right to freedom of expression as follows:

...[T]he language in which the offence of behaving in a 'disorderly manner' is malleable, allowing for it to be interpreted and applied narrowly so as to ensure consistency with a human rights framework. So, for example, the New Zealand Supreme Court recently considered the meaning of the equivalent New Zealand offence... Each member of the court formulated, in slightly different language, a test that he or she considered sufficient to protect the right... It is to be expected that the Victorian police and, if necessary, the judiciary will likewise interpret and apply the new offence in a manner that is consistent with section 15(3) of the Charter...

The Committee is concerned that, unless and until the meaning of 'behaves in a disorderly manner' is subject to an authoritative court ruling, this terminology may be too malleable to protect the Charter's right not to be deprived of liberty 'except on grounds... established by law'.⁶²

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

- 1. clause 5(1), by providing that persons found drunk and disorderly in a public place may be 'lodged in safe custody' but not stating any limits on the duration of such detention, limits the Charter's right against deprivations of liberty 'except... in accordance with procedures, established by law'?***
- 2. clause 6, by empowering the potential arrest of anyone who 'behaves in a disorderly manner in a public place', uses language that is too malleable to protect the Charter's right against deprivations of liberty 'except on grounds... established by law'?***

Movement – Privacy – Unwarranted weapon searches – Whether reasonable limit

Summary: The Committee considers that the compatibility of clause 12 with human rights depends on whether or not: the threat of violence or disorder with weapons is sufficient to justify the potential stopping and searching of anyone who is in an area where such violence is likely to occur; it is necessary, in order to prevent such violence or disorder from occurring, to suspend the usual requirement that a police officer suspect on reasonable grounds that a person to be searched is carrying a weapon; and that the designation and search powers and those who exercise them are subject to sufficient legal and practical constraints to prevent unjustified rights limitations, including unlawful discrimination.

The Committee notes that clause 12, inserting new sections 10D and 10E into the *Control of Weapons Act 1990*, provide for the designation of areas:

- where there is a likelihood that previous violence or disorder involving the use of weapons (either in that area or at previous occasions of an event to be held in that area) will recur; or
- where it is likely that violence or disorder involving weapons will occur and designation is necessary to prevent or deter it

New sections 10G and 10H empower the police in such areas to, without a warrant:

⁶¹ Charter s. 21.

⁶² Charter s. 21(3). See also Human Rights Law Resources Centre submission, Annexure p. 2.

- search a person for weapons.
- search an occupied vehicle for weapons
- detain a person or vehicle for so long as is reasonably necessary to conduct such a search

Clause 12 engages the Charter's rights to freedom of movement and against arbitrary interferences in privacy.⁶³

The House of Lords has held that similar provisions in the *Terrorism Act 2000* (UK) are compatible with the rights to liberty and privacy in Europe's human rights convention.⁶⁴ Clause 12 is broader than those provisions in that it:

- applies to all violence or disorder involving weapons, rather than to terrorism
- authorises strip searches in some circumstances
- extends to risks related to 'events' (potentially including political protests)⁶⁵
- does not require Ministerial confirmation of a designation of an area⁶⁶

However, it also is more protective of human rights than the UK provisions in that:

- it is limited to 'necessary' (rather than efficacious) designations for 12 hours (rather than 28 days)
- is enforced by an offence carrying a fine (rather than imprisonment) and
- except when violence is likely to occur in a particular time period, requires public advertising of the designation and bars a repeat designation within 10 days of a previous one.

The Committee considers that the compatibility of clause 12 with human rights depends on whether or not:

- **the threat of violence or disorder with weapons is sufficient to justify the potential stopping and searching of anyone who is in an area where the Commissioner believes that such violence is likely to occur; and**
- **it is necessary, in order to prevent such violence or disorder from occurring, to suspend the usual requirement that a police officer suspect on reasonable grounds that the person to be searched is carrying a weapon**
- **the designation and search powers and those who exercise them are subject to sufficient legal and practical constraints to prevent unjustified rights limitations, including unlawful discrimination⁶⁷**

⁶³ Charter s. 12 provides that: 'Every person lawfully within Victoria has the right to move freely within Victoria'. Charter s. 13(a) provides that: 'A person has the right not to have his or her privacy unlawfully or arbitrarily interfered with'.

⁶⁴ *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12. The matter is now before the European Court of Human Rights.

⁶⁵ See also Human Rights Law Resources Centre submission, Annexure p. 3.

⁶⁶ Cf *Terrorism Act 2000* (UK), s. 46(4)

⁶⁷ See *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [57], where Lord Hope stated: "It should be noted, of course, that the best safeguard against the abuse of the power in practice is likely to be found in the training, supervision and discipline of the constables who are to be entrusted with its exercise. Public confidence in the police and good relations with those who belong to the ethnic minorities are of the highest importance when extraordinary powers of the kind that are under scrutiny in this case are being exercised. The law will provide remedies if the power to stop and search is improperly exercised. But these are remedies of last resort. Prevention of any abuse of the power in the first place, and a tighter control over its use from the top, must be the first priority."

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| <p>The Committee refers these questions to Parliament for its consideration.</p> |
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Statement of partial incompatibility – Unwarranted weapon searches – Operation of the Charter

Summary: In the Minister's opinion, new sections 10G and 10H are an arbitrary interference with Victorians' privacy, do not provide Victorian children with such protection as is in their best interests and are not reasonable limits on these rights. While the Parliament undoubtedly has the power to enact the bill, the Committee has a number of concerns about the operation of the Charter in relation to new sections 10G and 10H. It will write to the Minister seeking further information.

The Statement of Compatibility remarks:

As I am entitled to do, I make this statement indicating that the legislation is partially incompatible with the charter to the extent that it provides powers for police to randomly search persons and vehicles in public places within the designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon.

I have already determined that sections 10G and 10H of the Control of Weapons Act 1990 are incompatible with the charter in relation the section 13(a). Similarly, I have determined that they are incompatible with section 17(2).

The Committee observes that these remarks mean that, in the Minister's opinion:

- **new sections 10G and 10H arbitrarily interfere with Victorians' privacy;⁶⁸ and**
- **new sections 10G and 10H do not provide Victorian children with such protection as are in their best interests and are needed by them by reason of being children;⁶⁹ and**
- **new sections 10G and 10H are not reasonable limitations that are demonstrably justified in a free and democratic society.⁷⁰**

While the Parliament undoubtedly has the power to enact the bill, the Committee has a number of concerns about the operation of the Charter in relation to new sections 10G and 10H:

First, the statement of compatibility does not identify in what way new sections 10G and 10H fail to protect children in their best interests or in what respect they are unreasonable limits on either the right to privacy or the rights of children. The Committee observes that the Charter requires an identification of the 'nature and extent' of any incompatibility.⁷¹ As the

⁶⁸ Charter s. 13(a) provides that: 'A person has the right not to have his or her privacy unlawfully or arbitrarily interfered with'.

⁶⁹ Charter s. 17(2) provides that: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'

⁷⁰ Charter s. 7(2) provides that: '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.' The classic test for whether or not a law satisfies this test was stated by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, [69]-[70], which provides that a law will fail the test if either: (1) its objective is not sufficiently important to warrant overriding human rights; or (2) it is not rationally connected to that objective; or (3) it does not impair rights as little as possible to achieve that objective; or (4) its effects are disproportionate to that objective.

⁷¹ Charter s. 28(3)(b) provides that: 'A statement of compatibility must state - if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.'

Victorian Equal Opportunity and Human Rights Commission has remarked in a submission to the Committee:⁷²

[T]his requirement is not only intended to require full disclosure regarding incompatibility per se, but is also vital to assessing any explanations provided by the Government. It is only where the community appreciates the full scope and magnitude of a particular infringement on rights that it can form an informed opinion on whether rational is provided is or is not satisfactory.

The Committee considers that such an explanation is also vital to the assessment of the bill by members of Parliament.

Second, the bill does not contain an override declaration in respect of new sections 10G and 10H. The Victorian Equal Opportunity and Human Rights Commission has remarked in its submission to the Committee:

Enacting an override in the circumstances surrounding this Bill would have set a low threshold for such declarations in the future, which would be highly unsatisfactory.

However, the Committee observes that the satisfaction of the threshold for an override declaration cannot be assessed in the absence of a statement from the Minister as to whether or not exceptional circumstances exist that might justify it. The inclusion of an override declaration would have the advantages of requiring the Minister to make such a statement and ensuring that Parliament revisits the enactment of new sections 10G and 10H within five years.⁷³

Third, if the bill is incompatible with human rights, then police exercising powers under new sections 10G and 10H may not be required to act compatibly with those rights or to give proper consideration to those rights.⁷⁴ Also, because other clauses introduced by clauses 12 and 13 have a common purpose with new sections 10G and 10H, police exercising those powers (including the powers to designate areas under new sections 10D and 10E) may also not be bound by the Charter's obligations.

The Committee will write to the Minister expressing its concern about the statement of compatibility's compliance with Charter s. 28(3)(b)'s requirement that a statement identify the 'nature and extent' of any incompatibility with human rights; and seeking further information as to the operation of the Charter's provisions on override declarations (Charter s. 31) and obligations of public authorities (Charter s. 38(2)) in relation to clauses 12 and 13. Pending the Minister's response, the Committee calls attention to new sections 10G and 10H.

The Committee makes no further comment.

⁷² Victorian Equal Opportunity and Human Rights Commission submission, pp. 1-2. See also Human Rights Law Resources Centre submission, p. 1; Homeless Persons' Legal Clinic submission, p. 5.

⁷³ Charter s. 31(1) provides that: 'Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.' Charter s. 31(3) provides that: 'A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.' Charter s. 31(7) provides that: 'A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.'

⁷⁴ Charter s. 38(2) provides that the obligation of public authorities in Charter s. 38(1) 'does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision'. The sub-section provides the following example: 'Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right'

Transport Legislation Amendment (Hoon Boating and Other Amendments) Bill 2009

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|--------------------------|--|
| Introduced | 11 November 2009 |
| Second Reading Speech | 12 November 2009 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA for Hon. Tim Pallas MLA |
| Portfolio responsibility | Minister for Roads and Ports |

Purpose

The Bill –

- amend the *Marine Act 1988* to introduce provisions modelled on Part 6A of the *Road Safety Act 1986* (the hoon driving laws) aimed at addressing the problem of recreational vessel 'hoon' behaviour, including powers of seizure, impoundment, immobilisation, forfeiture and disposal of vessels involved in the commission of the offence of dangerous operation of a vessel under section 22 of the *Marine Act 1988*. [5]
- amends the *Marine Act 1988* to provide that systematic or persistent offenders against relevant maritime laws can be prohibited from being a director, secretary or officer concerned in the management of a body corporate involved with activity concerned with vessels. [6 and 7]
- amends the *Crimes Act 1958* to extend the offences in sections 318 and 319 of culpable driving causing death and dangerous driving causing death or serious injury to include the operation of a vessel; [44 to 49]

Extract from the Second Reading Speech –

At present the Crimes Act offences of culpable driving causing death and dangerous driving causing death or serious injury apply to the driving of motor vehicles.

The Bill amends sections 318 and 319 of the Crimes Act to extend the application of these offences to the operation of marine vessels. This will close a significant gap in the current hierarchy of sanctions.

Where dangerous operation of a vessel results in death, the only serious fatality-related offence that may apply is manslaughter. This carries a maximum penalty of 20 years imprisonment.

There is a large gap to the most serious Marine Act offence applicable in these circumstances - dangerous operation of a vessel. This carries a maximum penalty of two years imprisonment, aligning it to the Road Safety Act offence of dangerous driving.

These amendments mean that the same hierarchy of offences and penalties that apply when road deaths or serious injuries are caused by culpable or dangerous driving will apply when the dangerous operation of a vessel causes death or serious injury on the water.

Culpable operation of a vessel causing death will carry a maximum penalty of 20 years imprisonment.

Dangerous operation of a vessel causing death will carry a maximum penalty of 10 years imprisonment, while dangerous operation of a vessel causing serious injury will be punishable by up to 5 years imprisonment.

It is important to clarify that these offences focus on individual criminal responsibility.

The Bill specifically provides that the person who is in charge of the vessel involved in a fatality will not be guilty of the new offences merely by virtue of their position. For the master of a commercial vessel to be guilty of the offences, for example, there would need to be evidence of some specific conduct or omission by the master personally. However, more than one

person may be individually criminally liable in relation to the same fatal incident where each person substantially contributed to the dangerous operation of the vessel.

Typically the operator of a vessel is the person who steers or navigates the vessel. However, as a number of people may be involved in operating a large vessel, it also includes a person who directs or gives instructions to another person who is 'physically' steering or navigating the vessel.

- amendments to the *Port Services Act 1995* to close gaps in the regulation of hazardous activities at the Port of Melbourne and to give the Port of Melbourne Corporation certain enforcement powers to compel port users to comply with safety, security and environmental management requirements specific to the port, to deal effectively with unattended or abandoned property, and to give the corporation a limited set of powers to set conditions and regulate the provision of towage services; **[11 to 14]**
- make provision in the *Transport Act 1983* for the appointment of port safety officers for the port of Melbourne relating pollution abatement and the regulation of other potentially hazardous port activity. Officers are to have entry, inspection and search and seizure powers; **[15]**
- minor amendments to the *Accident Towing Services Act 2007* (which commenced on 1 January 2009) to address certain gaps that have been identified in the Act and to ensure that it operates to meet its purposes; **[32 to 35]**
- amendments to the *Road Safety Act 1986* to allow VicRoads to disclose and use information that may be considered to be of a personal nature and commercially sensitive (i) to transport regulators and the Port of Melbourne Corporation to enable these bodies to undertake their statutory functions; (ii) to government departments and agencies to assist with verification of information in a driver licence or learner permit that is produced as evidence of a person's identity; and (iii) for emergency response and management purposes; creating additional exemptions from the bus driver fatigue management scheme in the *Road Safety Act 1986* **[20 to 22]**; and providing more flexible sanctions in respect of misconduct by suppliers of alcohol interlocks **[16 to 18]**;
- a further amendment to the *Road Safety Act 1986* to confirm that the 'hoon' motor vehicle impoundment regime in Part 6A applies to excessive speeding in a heavy vehicle; **[19]**
- amendments to the *Road Management Act 2004* to provide VicRoads with express power to store vehicles which have been removed after being unlawfully parked on a freeway, and to recover the reasonable costs of removing abandoned property and other obstructions **[26 to 29]**; amendments to support the government's directions for an integrated and sustainable transport system in relation to roads and network-wide coordination; **[24 and 25]**
- an amendment to the *Melbourne City Link Act 1995* to repeal a redundant provision; **[30 and 31]**
- amendments to the objects and functions of VicRoads, including transfer of responsibility for the EastLink project from the Southern and Eastern Integrated Transport Authority to VicRoads. **[36 to 43]**

Content

Marine Act 1988

Some provisions in the Bill come into force on or before 1 September 2011. **[2]**

Note: From the Second Reading Speech –

It is intended that the powers to seize, seek surrender and impound vessels will come into force on 1 September 2011- that is, in time for the 2011-12 boating season.

This phased introduction of the scheme allows adequate time for police to resolve implementation and enforcement issues related to the impoundment provisions, learning from the experiences of the coming holiday boating season and a full boating season in 2010-11.

The Bill inserts a new Part 7A in the Act concerning the impoundment, immobilisation and forfeiture or recreational vessels are modelled on Part 6A of the *Road Safety Act 1986*. [5]

Police powers include powers to seize, impound, immobilise and issue embargo notices. The Part includes appeal rights where a vessel is impounded or immobilised on the grounds that the action may cause exceptional hardship to the applicant or another person. Where an operator is found guilty of an offence or repeated offences a court may make an impoundment, immobilisation, or forfeiture and disposal order. The new Part includes appeal provisions and provisions for costs to be awarded where the operator of a recreational vessel is found not guilty of an offence. The new Part includes search and seizure powers under warrant. [5]

The Bill provides certain disqualification provisions for directors or office holders of corporations involve in certain marine activity if a relevant marine safety law breach is involved. [6 and 7]

The Bill inserts a new Part 10AA concerning prohibition of use of recreational vessels and hire and drive vessels and enables police to place an embargo notice on a vessel ordering that it not be used for up to 48 hours and to allow an officer to order a person off the water for up to 24 hours. [8]

Transport Act 1983

Privilege against self-incrimination – The Bill makes provision for port safety officers for the port of Melbourne relating to the regulation of hazardous port activity. Officers are to have entry, inspection and search and seizure powers.

The Bill provides that the privilege against self-incrimination *does not apply* where there is a statutory duty for a person to provide information, documents or assistance to the port safety officer (new sections 230ZC and 230ZD). However any information, documents or assistance is not admissible in any criminal proceedings against a natural person other than an offence for providing false information (new section 230ZE). [15]

The Committee makes no further comment.

Ministerial Correspondence

Education and Training Reform Amendment (School Age) Bill 2009

The Bill was introduced into the Legislative Assembly on 1 September 2009 by the Hon. Bronwyn Pike MLA. The Committee considered the Bill on 14 September 2009 and made the following comments in Alert Digest No. 11 of 2009 tabled in the Parliament on 15 September 2009.

Committee's Comments

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

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.

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:

- 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.

Minister's Response

Thank you for your letter of 16 September 2009 on behalf of the Scrutiny of Acts & Regulations Committee (the Committee) concerning the Education and Training Reform Amendment (School Age) Bill 2009. My response to the two questions posed by the Committee, and comments regarding some of the general concerns raised by the Committee, follow below.

Question 1 – Is clause 4's extension of existing section 2.1.14 to parents of 16 year olds compatible with the Charter's right to be presumed innocent?

I do not believe that the right to be presumed innocent in section 25(1) of the Charter is engaged by clause 4 of the Bill.

The amendment in clause 4 does not change the intent or operation of the onus of proof provision contained in section 2.1.14 of the Education and Training Reform Act 2006. The obligation of a parent under section 2.1.14 is not materially altered by the age of the child to whose parent the provision applies.

I acknowledge that there is a reverse onus of proof contained in section 2.1.14 of the Act, and that placing a burden of proof on the defendant limits the rights of the defendant to be presumed innocent. However, I believe the placing of the burden of proof upon the defendant when proving the grounds of a reasonable excuse under the Act is reasonable and justified in the circumstances, as the defence will necessarily turn upon the defendant's motivation for not complying with the duty under section 2.1.1 of the Act. Such motivation can only be known by the defendant and it is therefore appropriate that the defendant be required to prove his or her motivation for failing to comply with the duty in section 2.1.1 of the Act, rather than having their potential reasonable excuses disproved by the State.

Accordingly, I believe that section 2.1.14 is reasonable, but more relevantly, that clause 4 is compatible with the Charter.

Question 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?

The ‘Order made by the Minister’ referred to in clause 6 of the Bill will be an Order of general application and does not require the disclosure of any personal information or otherwise interfere with privacy. Accordingly, clause 6 is compatible with the right to privacy in section 13 of the Charter.

Other concerns raised by the Committee

The Committee raised concerns regarding the adequacy of the Statement of Compatibility (the Statement) in relation to the mandatory considerations listed in section 7(2) of the Charter, in relation to the right in section 14 of the Charter to freedom of conscience, and in addressing whether or not the Bill’s limitation of rights is demonstrably justified or proportional.

As was expressed in the Statement, in my opinion the provisions in the Bill do not unreasonably limit the right to section 14 of the Charter. However, if the Bill did limit section 14 of the Charter, any such limitation would be reasonable and demonstrably justified within the meaning of section 7(2) of the Charter for the following reasons:

1. Nature of the right

The right to freedom of thought, conscience, religion and belief encompasses both the right to hold beliefs and the right to manifest those beliefs. Manifestation of belief may also involve the right to freedom of expression under section 15 of the Charter.

The case law provides no comprehensive definition of the words ‘thought, conscience and religion’, though it is clear that section 14 would protect both religious and secular beliefs. However, not all opinions or convictions constitute beliefs in the sense protected by section 14. For example, in the United Kingdom, a belief in assisted suicide was found not to constitute a belief protected by this right (see *Pretty v United Kingdom* [2002] 2 FLR 45).

Section 14 will also not protect every act motivated or inspired by a religion or a belief – only those manifestations which communicate the substance of the belief.

2. The importance and purpose of the limitation

The limitation raised by the Committee is that the Bill requires 16 year olds to either attend school, or to participate in other education, training or employment. It is possible that the personal circumstances of children aged 16 years old and under may mean that the children may not wish to, or may be unable to, meet this requirement. The example raised by the Committee mentioned family obligations as a reason as to why a 16 year old may be unable to meet this requirement, and why requiring a 16 year old to do so could limit his or her right to freedom of conscience.

The purpose of the limitation is to ensure that children receive adequate education. However, by providing that children who have completed Year 10 can also study outside school, or attend training, or be employed, the limitation recognises that the traditional schooling environment may not be appropriate for all children. This reflects the maturity of 16 year old children (who have completed Year 10), as opposed to younger children, to begin to make choices regarding their education and careers. It is important however that 16 year olds continue to engage in activities which lead to their development as productive adult members of society and this is why it is necessary to require 16 year olds to either undertake schooling, other education, training or employment. Additionally, under section 2.1.5 of the Act, I have the power to exempt a child from attendance at school in specific circumstances.

3. The nature and extent of the limitation

As I have noted above, the limitation is not extensive as it allows 16 year olds to choose the type of education or employment they wish to engage in, and I consider that the nature of the limitation is appropriate given the important purpose it serves of ensuring that children are properly educated.

4. *The relationship between the limitation and its purpose*

The limitation is directly related to the purpose of ensuring that children receive an appropriate level of education.

5. *Any less restrictive means reasonable available*

Given the flexibility that is already contained within the Bill and Act, ranging from circumstances such as illness, an accident or observation of a religious event through to a child undertaking a traineeship or apprenticeship, and the fact that I can provide other exemptions where necessary, I consider that there are no less restrictive means reasonably available to achieve the purpose of the limitation.

Consequently, even if section 14 of the Charter were limited by the Bill, I consider that the limitation would be demonstrably justified within the meaning of section 7(2) of the Charter.

Please contact Greg Donaghue, Manager, Legislation Services Unit, Department of Education and Early Childhood Development, by telephone on 9637 3116 if you have any additional queries in relation to the Education and Training Reform Amendment (School Age) Bill 2009.

Hon Bronwyn Pike MP
Minister for Education

10 November 2009

The Committee thanks the Minister for this response.

Health Practitioner National Health (Victoria) Bill 2009

The Bill was introduced into the Legislative Assembly on 14 October 2009 by the Hon. Daniel Andrews MLA. The Committee considered the Bill on 9 November 2009 and made the following comments in Alert Digest No. 13 of 2009 tabled in the Parliament on 10 November 2009.

Committee's Comments

Information Privacy

Information privacy – Criminal records, identity information, health and professional conduct information and public records – Whether provisions unduly require or authorise acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000 – Parliamentary Committees Act 2003, section 17(a)(iv)

...

4. *Public registers available for inspection – Whether register appropriately limited to protect personal privacy*

Clauses 222 – 228

The Committee notes the provisions concerning the registers of registered health practitioners to be kept under the National Law that may be accessed by the public.

The Committee notes the concerns expressed by the DPC in his submission concerning the inclusion in these registers of health professional's unique identifiers and other matters. The DPC also expressed concern at the provision, on application of a copy of an 'entire register' and the inappropriate use of such a copy.

The Committee notes this extract from the Statement of Compatibility –

Recognising that publishing information about a practitioner could place some individuals at risk because of their personal circumstances, a National Board may decide not to record information about a practitioner in a register if a practitioner requests that the information not be published and the board reasonably believes that the inclusion of the information in the register would present a serious risk to the health or safety of the practitioner (clause 222(3)). A National Board may also decide not to include information about a condition or undertaking relating to a practitioner's impairment if it is necessary to protect the practitioner's privacy and there is no overriding public interest for the conditions or the details of the undertaking to be published.

Similarly, the National Board may decide to remove information that discloses a registered health practitioner has been reprimanded if it considers that is no longer necessary or appropriate for the information to be recorded on the register.

Division 3 of Part 10 does not limit a person's right to privacy because it does not authorise an interference that is unlawful or arbitrary. This is because any interference serves the legitimate purpose of protecting the public and the clauses adequately specify the circumstances in which these interferences may occur.

The Committee will write to the Minister to seek further advice as to whether the content of these registers are appropriately limited or sufficiently circumscribed to achieve no more than their legitimate policy objectives.

Pending the Minister's response the Committee draws attention to the provisions.

Absence of explanatory material – Henry VIII clauses – whether inappropriate delegation of legislative power – Parliamentary Committees act 2003, section 17(a)(vi)

The Committee notes that other than the enabling clauses of the Victorian Bill there are no explanatory materials provided for the substance of the Bill being the Appendix to the Bill comprising the relevant schedules. The Committee notes that explanatory material was provided in the counterpart Queensland Bill.

In particular the Committee notes that there is no explanation in respect to clauses 213, 215 and 235 which appear to allow regulations to modify primary legislation. The Committee observes that the explanatory material provided to the Parliament of Queensland gave some justification for the inclusion of these clauses.

The National Law will allow regulations to modify the application of the following Acts, Privacy Act 1988 (Cth), Freedom of Information Act 1982 and the Ombudsman Act 1976 (Cth).

The Committee accepts that the inclusion of a power to allow regulations to modify an Act may be justified in certain circumstances including to give effect to the application of national schemes of legislation. [213, 215 and 235]

The Committee will draw the attention of the Minister to the absence of any explanatory material other than for clauses 1 to 7.

Minister's Response

Thank you for your letter of 11 November 2009 and the attached copy of the Scrutiny of Acts and Regulations Committee's report ('the Report') on the Health Practitioner National Health (Victoria) Bill 2009. I would like to thank the Committee for its detailed report on the Bill. In relation to the two issues that the Committee has raised, my response is as follows.

Public registers

The Committee has sought further advice as to whether the content of public registers are appropriately limited or sufficiently circumscribed to achieve no more than their legitimate policy objectives. Specifically, the Committee was concerned with the inclusion of health professional's unique identifiers and other matters.

The Schedule to the National Law provides in section 225 for specific information to be held on a Board's public register. I believe that the information that may be included on a public register is reasonable for the purposes of registration. I note that the list includes a person's principal practice address. Victoria supported the nationally agreed position that a practitioner's place of residence should not be part of the information stored on the public register. The information held on the register will identify suburb and practice postcode.

This would assist a member of the public in making a specific notification in relation to a practitioner. The Committee should note a further safeguard contained in section 226 of the Schedule to the Bill which provides that where a practitioner requests this, the Board can choose not to record certain information in the register where it reasonably believes that the information would present a serious risk to the health and safety of the practitioner.

It is essential for a registration number to be linked to a particular registrant to ensure there is differentiation between registrants with similar names. The 'unique identifier' is a separate number, allocated to registrants for the purposes of linkage to national E-Health systems, and will not be included on the public register.

Any additional information held on the public register in relation to conditions of registration, dates of suspension and reasons for decisions regarding conduct matters are all essential for the protection of the public.

The legislation allows the National Boards to make an extract of the public register available only if it is in the public interest. There are similar provisions in the current Victorian Health Professions Registration Act 2005 and I am advised that the current State boards may choose to provide an extract for the purposes of a legitimate research study, under strict confidentiality conditions, or to another statutory authority. An example of this is where a Board provides an extract to an external agency such as Victoria Police or Medicare Australia.

Extracts are not provided for commercial purposes. I expect that the National Boards will continue to apply such principles.

Absence of any explanatory material

I note that the Committee raises the issue of no explanatory materials being provided to Parliament on the substance of the National Law. It observes the material provided to the Parliament of Queensland that gave justification to allow regulations to modify primary legislation.

The making of regulations will be important in the context of the scheme, for example in applying only those sections of the Commonwealth's FoI, Privacy and Ombudsman Acts that are relevant to the national scheme. The Bill provides for these regulations to be tabled in each House of Parliament and each Parliament may choose to disapply the regulations. If a majority of States and Territories chose to disapply the regulation, these would be deemed to be not agreed.

Hon Daniel Andrews MP
Minister for Health

18 November 2009

Committee Room
23 November 2009

Appendix 1

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| Superannuation Legislation Amendment Bill 2009 | 6, 8, 12 |
| Tobacco Amendment (Protection of Children) Bill 2009 | 8, 10 |
| Transport Legislation Amendment (Driver and Industry Standards) Act 2008 | 1, 5 |
| Transport Legislation Amendment (Hoon Boating and Other Amendments) Bill 2009 | 14 |
| Transport Legislation General Amendments Bill 2008 | 1 |
| Transport Legislation Miscellaneous Amendments Bill 2008 | 1 |
| University of Melbourne Bill 2009 | 12 |
| 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 |
|--|---|

(iv) unduly requires or authorises acts or practices that may have an adverse effect on privacy within the meaning of the *Information Privacy Act 2000*

| | |
|---|----|
| Health Practitioner Regulation National Health (Victoria) Bill 2009 | 13 |
|---|----|

(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 |
| Health Practitioner Regulation National Health (Victoria) Bill 2009 | 13 |

(vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

| | |
|---|----|
| Health Practitioner Regulation National Health (Victoria) Bill 2009 | 13 |
|---|----|

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

| | |
|---|----|
| Bus Safety Bill 2008 | 1 |
| Constitution (Appointments) Bill 2009 | 14 |
| Courts Legislation (Amendment) Judicial Resolution Conference) Bill 2009 | 9 |
| Courts Legislation Amendment (Sunset Provisions) Bill 2009 | 8 |
| Crimes Amendment (Identity Crime) Bill 2009 | 4 |
| Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 | 12 |
| Education and Training Reform Amendment (School Age) Bill 2009 | 11 |
| Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 | 6 |
| Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 | 6 |

Scrutiny of Acts and Regulations Committee

| | |
|--|---------|
| Fair Work (Commonwealth Powers) Bill 2009 | 7 |
| Health Practitioner Regulation National Health (Victoria) Bill 2009 | 13 |
| Human Tissue Amendment Bill 2009 | 8 |
| Justice Legislation Amendment Bill 2009 | 5 |
| Justice Legislation Further Amendment Bill 2009 | 10 |
| Justice Legislation Miscellaneous Amendments Bill 2009 | 13 |
| 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 |
| 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 (Detention and Supervision) Bill 2009 | 14 |
| Serious Sex Offenders Monitoring Amendment Act 2009 | 2 |
| Summary Offences and Control of Weapons Acts Amendment Bill 2009 | 14 |
| 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 |

Statement of Compatibility – Committee concerns

| | |
|--|----|
| Electricity Industry Amendment (Critical Infrastructure) Bill 2009 | 13 |
|--|----|

Section 17(b)

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

| | |
|--|----|
| Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 | 12 |
| 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 20.10.09 | 5 of 2009 13 of 2009 |
| Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 | Energy and Resources | 02.06.09 15.07.09 | 6 of 2009 8 of 2009 |
| Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 | Ms Colleen Hartland MLC | 02.06.09 04.06.09 | 6 of 2009 7 of 2009 |
| Superannuation Legislation Amendment Bill 2009 | Finance | 02.06.09 30.06.09 28.07.09 23.09.09 | 6 of 2009 8 of 2009 8 of 2009 12 of 2009 |
| Fair Work (Commonwealth Powers) Bill 2009 | Industrial Relations | 23.06.09 | 7 of 2009 |
| Courts Legislation Amendment (Sunset Provisions) Bill 2009 | Attorney-General | 28.07.09 26.08.09 | 8 of 2009 10 of 2009 |
| Human Tissue Amendment Bill 2009 | Health | 28.07.09 10.08.09 | 8 of 2009 10 of 2009 |
| Tobacco Amendment (Protection of Children) Bill 2009 | Health | 28.07.09 10.08.09 | 8 of 2009 10 of 2009 |
| Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009 | Attorney-General | 11.08.09 04.09.09 | 9 of 2009 11 of 2009 |
| Local Government Amendment (Conflicting Duties) Bill 2009 | Local Government | 11.08.09 01.09.09 | 9 of 2009 11 of 2009 |
| Justice Legislation Further Amendment Bill 2009 | Police and Emergency Services Corrections | 01.09.09 | 10 of 2009 |
| Local Government Amendment (Offences and Other Matters) Bill 2009 | Local Government | 01.09.09 25.09.09 | 10 of 2009 12 of 2009 |
| Major Transport Projects Facilitation Bill 2009 | Roads and Ports | 01.09.09 09.09.09 | 10 of 2009 11 of 2009 |
| Personal Property Securities (Commonwealth Powers) Bill 2009 | Attorney-General | 01.09.09 14.09.09 01.09.09 29.09.09 | 10 of 2009 12 of 2009 |
| Education and Training Reform Amendment (School Age) Bill 2009 | Education | 15.09.09 10.11.09 | 11 of 2009 14 of 2009 |
| Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 | Attorney-General | 13.10.09 | 12 of 2009 |

| | | | |
|---|---|----------------------|--------------------------|
| Electricity Industry Amendment (Critical Infrastructure) Bill 2009 | Energy and Resources | 10.11.09 | 13 of 2009 |
| Health Practitioner Regulation National Health (Victoria) Bill 2009 | Health | 10.11.09 18.11.09 | 13 of 2009 14 of 2009 |
| Justice Legislation Miscellaneous Amendments Bill 2009 | Police and Emergency Services | 10.11.09 | 13 of 2009 |
| Constitution (Appointments) Bill 2009 | Premier | 24.11.09 | 14 of 2009 |
| Serious Sex Offenders (Detention and Supervision) Bill 2009 | Attorney-General | 24.11.09 | 14 of 2009 |
| Summary Offences and Control of Weapons Acts Amendment Bill 2009 | Attorney-General, Police and Emergency Services | 24.11.09 | 14 of 2009 |