

No. 4 of 2009

Tuesday, 31 March 2009

On the

Bushfires Royal Commission
(Report) Bill 2009

Crimes Amendment (Identity Crime)
Bill 2009

Electricity Industry Amendment
(Premium Solar Feed-in Tariff) Bill 2009

Human Services (Complex Needs)
Bill 2009

Legislation Reform (Repeals No. 4)
Bill 2009

Primary Industries Legislation
Amendment Bill 2008

Statute Law Amendment (Charter of
Human Rights and Responsibilities)
Bill 2009

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Glossary



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

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 –

Bushfires Royal Commission (Report) Bill 2009
Crimes Amendment (Identity Crime) Bill 2009
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009
Human Services (Complex Needs) Bill 2009
Legislation Reform (Repeals No. 4) Bill 2009
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009

The Committee notes the following correspondence –

Primary Industries Legislation Amendment Bill 2008



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.

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Bushfires Royal Commission (Report) Bill 2009

Introduced	10 March 2009
Second Reading Speech	12 March 2009
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Portfolio responsibility	Premier

Purpose and Background

The Bill makes provision for the publication of a Report of the Bushfires Royal Commission and provides a process for publishing and attaching Parliamentary privilege to those Reports when parliament is not sitting by allowing the Minister to give a copy of the Report to the clerk of each House of the Parliament. A Report that is given to the clerk in this way is deemed to have been ordered by the House to be printed.

The Bill requires that, as soon as practicable, the clerk of each House must notify all members of the House that the Report has been received and is available on request and to give a copy of the Report to any member of the house upon request to the clerk.

The Report must also be tabled in the House on the next sitting day of the House.

Note: *Where the procedure provided in the Bill is followed, sections 73 and 74 of the Constitution Act 1975 apply to the publication of the Report, as does any other law relating to the publication of the proceedings of Parliament. This provides absolute privilege to the publication of the Report and protects any person from civil or criminal liability arising from the publication of the Report or copies of the Report.*

The Committee makes no further comment.

Crimes Amendment (Identity Crime) Bill 2009

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

Purpose and Background

[Clauses]

The Bill amends the –

- *Crimes Act 1958* to create offences in relation to identity crime and the *Sentencing Act 1991* to provide for the issue of certificates to victims of identity crime; **[3, 4, 6 and 7]**
- *Children, Youth and Families Act 2005* and the *Sentencing Act 1991* to make technical amendments concerning sentencing procedures where a court reduces a sentence in circumstances where the offender has pleaded guilty. The procedure will allow a court to record a statement in writing or any other form concerning the sentence it would have imposed but for the guilty plea. **[5, 8 and 9]**

Extracts from the Second Reading Speech with cross-references to relevant clauses –

Existing Victorian laws cover aspects of identity crime, including obtaining property or financial advantage by deception, but they do not comprehensively criminalise identity crime. This bill will redress this situation by enacting three specific identity crime offences.

The new offences will cover –

- *making, using or supplying identification information with intent to commit an indictable offence;*
- *possessing identification information with intent to commit an indictable offence; and*
- *possessing equipment capable of making identification documentation with intent to commit an indictable offence. **[3 and 4]***

...

The requirement to prove intent to commit an indictable offence will ensure that the Bill does not capture innocent possession (such as holding a friend's licence at her request) or relatively minor offending behaviour (such as using fake ID to buy alcohol).

*Rather, the offences will target preparatory behaviour that is specific to identity crime and that is often not covered by current Victorian law. For example, if a shop employee uses a skimming device to download customers' credit card information with the intention of then using that information to buy goods illegally, he or she would not be guilty of fraud or theft until the information is used. However, he or she would be captured by the new possession offence. This will allow police to be more proactive in their investigation of such offences, and will also facilitate the prosecution of offenders. **[3 and 4]***

*The certificate provisions in the Bill will allow victims of identity crime to obtain a court certificate to assist them in remedying the effects of the crime. ...Courts will be able to issue certificates following a finding of guilt for an identity crime offence. This is consistent with provisions in Queensland and South Australia. ...the government has decided to opt for a scheme that allows certificates to be issued after an offender has been found guilty. **[6]***

Charter Report

Rights in criminal proceedings – Notice of charges – Alternative verdict

Summary: *The Committee considers that clause 4 engages defendants' Charter right to be informed promptly of the nature of the charge. The Committee will write to the Minister expressing its concern about the Statement of Compatibility in respect of clause 4.*

The Committee notes that clause 4, inserting a new section 426 into the Crimes Act 1958 (Vic), provides that a jury may find a person charged with one offence (making, using or supplying identification information) guilty of an alternative offence (possession of identification information.) The Committee considers that clause 4 engages defendants' Charter right to be informed promptly of the nature of the charge.¹

The Statement of Compatibility remarks:

New Zealand courts have held that the right refers to the charges actually laid, not charges that the police might be in a position to make but have not yet made: R v. K (1995) NZLR 440, 447 (HC). On this view, the right does not extend to lesser included offences, therefore clause 4 does not limit an accused's right to be informed.

The Committee observes that R v K held that the defendant did not have to be notified of charges before he was 'in peril of them'.² However, the effect of clause 4 is that a defendant will be 'in peril of' being found guilty of possessing identification information whenever he or she is charged with making, using or supplying identification information.

The Committee considers that the Statement of Compatibility to the Criminal Procedure Bill correctly concluded that alternative verdict provisions 'limit an accused's right to be properly informed promptly and in detail of the nature of the charge'.

The Committee will write to the Minister expressing its concern about the Statement of Compatibility in respect of clause 4. Pending the Minister's response, the Committee draws attention to clause 4.

Privacy and reputation – Fair hearing – Rights in criminal proceedings – Retrospective penalties – Identity crime certificates – Procedures at hearing – Naming of defendant – Appeals

Summary: *Clause 6 makes no provision for procedural rights of defendants, for whether or not the defendant can be named and for appeal rights, in respect of identity crime certificates. It therefore may engage a number of the defendant's Charter rights. The Committee will write to the Minister seeking further information.*

The Committee notes that clause 6, inserting a new Part 4A into the *Sentencing Act 1991*, provides that a court, after it finds a person guilty of an identity crime offence, may issue a certificate to the victim of the offence. However, **no provision is made for any role for the defendant in the hearing or for any appeals in respect of identity crime certificates.** This contrasts with other 'orders in addition to sentence', all of which can be appealed as part of the defendant's sentence and many of which provide for express rights for the defendant

¹ Charter s.25(2)(a) provides that: 'A person charged with a criminal offence is entitled without discrimination... to be informed promptly and in detail of the nature and reason for the charge...'

² *R v K* [1995] 2 NZLR 440

to appear, make submissions and test evidence at the hearing, or for constraints on fact-finding by the court.³

The Statement of Compatibility remarks:

Charter section 25(2)(d) protects the right of an accused to be tried and to defend himself or herself in person or through legal assistance. Clause 6 permits a court that has found an accused guilty of an identity crime offence to issue a certificate to a person who is a victim of the offence. This clause does not engage the right to be tried in person, it is contingent on a finding of guilt.

The Committee observes that the issuing of a certificate is not only contingent on a finding of guilt, but also requires the court to make additional findings about the offence the defendant committed:

- that the use of identification information was a necessary element of the offence;
- that the victim's identification information was used in connection with the commission of the offence; and
- that the victim did not consent to that use.

Moreover, new section 89G(b) permits a court to include 'any other matter the court considers relevant' in the certificate. These findings and matters may have legal implications for the defendant in subsequent proceedings, e.g. civil litigation between the victim and the defendant, or in professional discipline matters. The Committee therefore considers that clause 6 may engage the defendant's Charter rights to a fair hearing and to minimum procedural guarantees in criminal proceedings.⁴

The Committee also observes that clause 6 lacks a provision (contained in the exposure draft and MCLOC model laws) barring the court from naming the defendant in the certificate. The Committee is concerned that naming the defendant, at least where the certificate includes matters that go beyond the mere fact that the defendant is guilty of an offence, may (in the absence of procedural protections) amount to an unlawful attack on the defendant's reputation.⁵ In extreme cases, such a certificate may even be a 'penalty' for the purposes of the Charter's right against retrospective increases in criminal penalties⁶ (so that clause 7, providing for the retrospective operation of clause 6, may limit that right.)

Finally, the Committee is concerned that the absence of a mechanism to appeal the making of a certificate may limit the defendant's Charter right to a fair hearing and to have convictions and sentences reviewed by a higher court in accordance with the law.⁷ In particular, there is no express provision governing what happens to an identity crime certificate if the defendant successfully appeals against the offence in respect of which the certificate was issued.

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

- 1. What procedural rights will a defendant have at a hearing for the issuing of an identity crime certificate?***
- 2. Will the court be able to include the defendant's name in the identity crime certificate?***

³ See definition of 'sentence' in s. 566 of the *Crimes Act 1958* and ss. 83, 84(7), 85F, 85G, 87A(6), 87G, 87I, 89C of the *Sentencing Act 1991*.

⁴ Charter ss. 24(1) & 25(2).

⁵ Charter s. 13(b) provides that: 'A person has the right... not to have his or her reputation unlawfully attacked.'

⁶ 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.'

⁷ Charter ss. 24(1) & 25(4).

- 3. *Will the defendant be able to appeal against the issuing of an identity crime certificate?***
- 4. *What happens if an identity crime certificate is issued and the defendant successfully appeals against the conviction for the identity crime offence?***

Pending the Minister's response, the Committee draws attention to clauses 6 and 7.

The Committee makes no further comment.

Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009

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

Purpose and Background

The Bill facilitates and regulates the payment of a premium feed-in tariff to Victorian residential electricity customers with grid connected, small scale solar photovoltaic systems to assist Victorian households in making a personal contribution to tackling climate change. The Bill will amend the *Electricity Industry Act 2000* and the *National Electricity (Victoria) Act 2005* to provide for the establishment of this scheme.

Key points from the Second Reading Speech –

This Bill will introduce a premium solar feed-in tariff scheme to support Victorian households who choose to invest in solar photovoltaic systems.

Feed-in tariffs apply to power generated by customers and supplied to the electricity network. The Bill provides for Victorian households with small scale solar power systems to be credited a premium rate of no less than 60 cents for every unused kilowatt hour of power fed back into the grid. The credit will apply to all systems of up to 3.2 kilowatts capacity installed at a customer's principal place of residence. The scheme will run for 15 years and have a cap of 100 megawatts of generating capacity.

...

Clauses 5 to 13 make consequential amendments to the existing provisions and insert new sections that set out the various elements of the premium solar feed-in tariff scheme. These new sections largely mirror the existing provisions.

Content and Committee comment

Clause 2 provides that the Act on proclamation but not later than by 1 July 2011. Neither the Explanatory Memorandum nor the Second Reading Speech explain the necessity or desirability for a potential two year delay in commencement.

Delayed commencement – Inappropriate delegation of legislative power

The Committee refers to its Practice Note No. 1 concerning delayed commencement provisions exceeding one year from introduction in the Parliament. In such circumstances the Committee will seek to ensure that Parliament has sufficient information to determine whether a delay in commencement is justified.

The Committee will seek further information from the Minister.

The Committee makes no further comment.

Human Services (Complex Needs) Bill 2009

Introduced	10 March 2009
Second Reading Speech	12 March 2009
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose and Background

The purpose of the Act is to facilitate the delivery of welfare services, health services, mental health services, disability services, drug and alcohol treatment services and housing and support services to certain persons with multiple and complex needs by providing for the assessment of such persons and the development and implementation of appropriate care plans.

The proposed Act makes provision for the assessment of eligibility and the preparation and monitoring of care plans.

The Bill will repeal the *Human Services (Complex Needs) Act 2003*.

Notes:

Clause 7 provides the criteria for the determination of who is an eligible person for the purposes of the Act.

An eligible person must have attained at least 16 years of age and appear to satisfy 2 or more of the following criteria —

- o has a mental disorder within the meaning of the Mental Health Act 1986;*
- o has an acquired brain injury;*
- o has an intellectual impairment;*
- o is an alcoholic or drug-dependent person within the meaning of the Alcoholics and Drug-dependant Persons Act 1968.*

In addition, the person must have exhibited violent or dangerous behaviour that caused serious harm to himself or herself or some other person or is exhibiting behaviour which is reasonably likely to place himself or herself or some other person at risk of serious harm and be in need of intensive supervision and support.

Clause 8 provides that a person must not be determined to be an eligible person if they refuse to be considered for eligibility.

The Committee makes no further comment.

Legislation Reform (Repeals No. 4) Bill 2009

Introduced	10 March 2009
Second Reading Speech	12 March 2009
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Portfolio responsibility	Premier

Purpose and Background

The Bill repeals 50 spent or redundant Acts relating to land amongst them are forty-five (45) principal Acts.

The Committee notes the following extracts from the Second Reading Speech –

The Schedule to the Bill lists the spent and redundant Acts to be repealed. The focus of this Bill is on land. The Acts identified for repeal largely relate to legislation that revoked permanent reservations over, and grants of, Crown land to provide changes in land status to support government or projects supported by government. A number of the Acts provided leasing powers that are now contained in the Crown Land (Reserves) Act 1978.

The Acts to be repealed have been identified as suitable for repeal following a review of Victoria's legislation by the Office of Chief Parliamentary Counsel and the Department of Sustainability and Environment.

Content and Committee comment

Rights and obligations – In respect to the repeal of Acts that may have included provisions creating rights or imposing obligations the Committee notes the operation of section 14(2)(e) of the *Interpretation of Legislation Act 1984*. The section relevantly provides that –

Where an Act or a provision of an Act is repealed or amended or expires, lapses or otherwise ceases to have effect the repeal, expiry, lapsing or ceasing to have effect of that Act or provision shall not unless the contrary intention expressly appears affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision.

No compensation and specific compensation provisions – A number of the Acts to be repealed include provisions providing that the Crown has no obligation to pay compensation and some Acts make provision for specific compensation. These Acts are noted in the explanatory memorandum which, in each case notes that any compensation rights are preserved by the operation of section 14 of the *Interpretation of Legislation Act 1984*.

Section 85, Constitution Act 1975 – The Committee further notes that a number of these Acts contain a section 85 *Constitution Act 1975* declaratory provision varying or altering the jurisdiction of the Supreme Court. The explanatory memorandum refers to these Acts at items 1.28 to 1.34.

Further Committee report – On 12 March 2009 the Legislative Assembly referred this Bill to the Committee for further consideration, inquiry and report and the Committee expects to table its report in May 2009.

The Committee makes no further comment.

Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009

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

Purpose and Background

The Bill amends seven Acts to ensure their compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (the 'Charter').

The Acts to be amended contain provisions that are potentially incompatible with the human rights contained in the Charter and the Bill seeks to ensure that each of these Acts can be read compatibly with Charter rights.

The Bill amends these Acts in respect to the right to equality (section 8), right to freedom of expression (section 15), and the right to the presumption of innocence (section 25(1) of the Charter).

Content and Committee comment

Right to equality – Charter, section 8 (refer to clauses 5 and 6 of the Bill)

Education and Training Reform Act 2006

Extract from the Second Reading Speech –

The section requiring amendment currently provides that only people under the age of 65 are entitled to be re-employed on an ongoing basis in the teaching service. Instead, re-employment will be based on competence, capacity and satisfaction of the criteria for registration as a teacher, rather than age.

Right to freedom of expression – Charter, section 15 (refer to clauses 17 and 13 of the Bill)

Victorian Urban Development Authority Act 2003

Project Development and Construction Management Act 1994

Extract from the Second Reading Speech –

[the Acts].contain confidentiality provisions which limit freedom of expression, by making it an offence for a person to communicate any information obtained because of their connection with the relevant agency or a particular development, except when carrying out official duties. The offence provision currently criminalises the disclosure of all information. The Bill will be amended so that it will be an offence to communicate confidential information, rather than all information.*

** semble. These Acts will be amended .*

Right to the presumption of innocence – Charter, section 25(1)

Extract from the Second Reading Speech –

Four of the seven Acts to be amended contain 'reverse onus' provisions which limit the right to be presumed innocent under the Charter. Most criminal offences require the prosecution to prove all elements of the offence beyond reasonable doubt. 'Reverse onus offence' is an umbrella term for offences which require the defendant to prove a defence, disprove a presumption or disprove an element of the offence, in order to escape liability. In the context of a reverse onus offence, a distinction can be drawn between a legal onus and an evidential onus. A legal onus requires the defendant to prove a defence. An evidential onus requires the defendant to simply point to evidence that raises their defence. Reverse onus offences may limit the right to be presumed innocent under the charter, because of the risk that a person may be found guilty through their inability to prove their defence even where there is reasonable doubt that they are guilty. An evidential onus on the defendant is much more likely to be compatible with the right to be presumed innocent than a legal onus.

...

The proposed amendments will ensure compatibility with the right to be presumed innocent by making amendments which change reverse legal onus provisions to reverse evidential onus provisions where appropriate, or removing the reverse onus altogether.

Australian Grands Prix Act 1994

Clauses 3 and 4 amend section 51(5)(a) and (b) of the Act which deals with offences against a regulation made under the Act and provides a transitional provision to cover any existing but incomplete proceedings.

The amended section will respectively provide that an allegation in a complaint that a person named in the complaint was the owner of a specified vehicle, or was the person who parked the vehicle on specified land, is deemed to be proved in the absence of evidence to the contrary (not proof to the contrary as is currently provided).

Fair Trading Act 1999

Clause 7 inserts a new subsection 4(2A) to qualify the current section 4(2) and provides that in any proceedings under the Act concerning a representation made by a natural person about a future matter, the person making the representation is taken not to have had reasonable grounds for making the representation unless the person adduces evidence to the contrary. Currently section 4(2) imposes a legal burden of proof on a defendant in respect to a representation about a future matter and the qualification makes it clear that the section only imposes an evidential burden.

Clause 8 inserts a new subsection 14(3). The section concerns false or misleading representations and as in clause 7 above this clause clarifies that a natural person bears only an evidential burden in having to adduce evidence to the contrary.

Clause 9 provides transitional provisions to cover any existing but incomplete proceedings under sections 4 and 14.

Forests Act 1968

Clauses 10 and 11 amend sections 59 and 61 of the Act to remove any reverse onus requirements provided currently in those sections, effectively requiring the prosecution to prove all elements of the offence.

Clause 12 provides transitional provisions to ensure that the amendments apply only to proceedings commenced after the amendments come into force.

Transport Act 1983

Clause 14 amends section 228ZL which currently allows a transport safety officer (the officer) to direct a relevant person to provide assistance to the officer to enable the officer effectively to exercise a power under the Division of that Act. It is an offence not to comply with such a direction and currently there is a legal burden on the defendant to prove that the direction was unreasonable or the direction given was outside the scope of the business or other activity of the defendant. The amendment removes the legal burden and the defendant needs only present or point to evidence that the direction was unreasonable or on the balance of probabilities that the direction was outside the scope of the business or other activities of the defendant.

Clause 15 amends section 228ZN which deals with an offence to fail to state a person's business address when an officer requires the person to provide it (involving a relevant rail operations business). The section currently places a legal burden on the defendant to establish that they did not have a business address or the person's business address was not connected with rail operations.

Clause 16 provides any necessary transitional provisions to cover any existing but incomplete proceedings involving prosecutions under the relevant sections in clauses 14 and 15 above.

The Committee accepts that the question whether it is justifiable to place an evidential burden on a defendant is one to be considered on a case by case basis. The Committee has previously accepted that a reverse onus provision may be justified whether the offence is regulatory in nature, and where the penalty is a relatively low level fine and does not involve imprisonment and where the evidence to be adduced by the defendant is more easily within his or her knowledge and that evidence would be unreasonably difficult for the prosecution to prove.

The Committee accepts that a proportionate balance must be struck between the effective prosecution of regulatory offences and the rights of a defendant in criminal or pecuniary penalty proceedings.

The Committee draws attention to these provisions and to its Charter Report below.

Charter Report

Presumption of innocence – Preservation of reverse onuses in current proceedings – Meaning of 'commenced'

Summary: Clauses 4, 9, 12 and 16 preserve current limitations on defendants' Charter rights for proceedings that have already commenced. The Statement of Compatibility does not address these clauses. The Committee will write to the Minister seeking further information.

The Committee notes that clauses 3, 10, 11, 14 and 15 repeal existing 'reverse onus' provisions that may limit defendants' Charter right to be presumed innocent until proved guilty.⁸ However, **clauses 4, 9, 12 and 16 preserve the existing provisions – and, hence, any limitations on defendants' Charter rights – for proceedings that have already 'commenced'. The Statement of Compatibility does not address these clauses.**

While it is common for ongoing proceedings to be exempted from changes to procedural rules, the Committee observes that such exemptions may be unnecessary with respect to alterations to the burden of proof, which only affect the final, verdict stage of any criminal

⁸ 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.'

proceeding. The effect of clauses 4, 9, 12 and 16 (and, hence, the extent of any limitation on the Charter right to be presumed innocent) is unclear, because 'commenced' may refer to the laying of charges, or a variety of later events in criminal proceedings.⁹

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

- 1. Do clauses 4, 9, 12 and 16 limit the Charter's right to be presumed innocent until proven guilty and, if so, are those limits reasonable according to the test in Charter s. 7(2)?**
- 2. When do proceedings 'commence' for the purposes of clauses 4, 9, 12 and 16?**

Pending the Minister's response, the Committee draws attention to clauses 4, 9, 12 and 16.

Presumption of innocence – Reverse onus provision – Overlapping defences – Transitional operation

Summary: *New sub-section 228ZL(5) engages the Charter right of defendants to be presumed innocent until proven guilty. The statement of compatibility does not address this provision. The Committee will write to the Minister seeking further information.*

The Committee notes that clause 14, amending s. 228ZL of the *Transport Act 1983* – a criminal offence for failing to obey a direction from a transport safety office – replaces the following provision that sets out two defences:

- (4) In proceedings for an offence against subsection (3), it is a defence if the person charged establishes that –*
- (a) the direction was unreasonable; or*
 - (b) without limiting paragraph (a), the direction or its subject-matter was outside the scope of the business or other activities of the person.*

New sub-section 228ZL(4) re-enacts s228ZL(4)(a) as a traditional defence (where the prosecution bears the burden of proof.) By contrast, new sub-section 228ZL(5) re-enacts s228ZL(4)(b) as an express 'reverse onus' provision, with the defendant bearing the burden of proof. The Committee considers that new sub-section 228ZL(5) may limit defendants' Charter right to be presumed innocent until proved guilty.¹⁰

The Committee has three concerns about the new sub-section 228ZL(5):

First, **the statement of compatibility does not address this provision** and, in particular, whether or not it is a reasonable limit on the Charter's right to be presumed innocent until proved guilty according to the test in Charter s. 7(2).¹¹

Second, the existing defence in s. 228ZL(4)(b) uses the term 'establishes', which is capable of being re-interpreted under Charter s. 32 in a way that doesn't limit the Charter's right to be presumed innocent. By contrast, the new sub-section 228ZL(5) uses express language that is not capable of such re-interpretation.¹² Clause 14 may, therefore, have widened the definition of the criminal offence in s. 228ZL. The Committee is concerned that it may not be

⁹ See *R v BDW* [2009] VSCA 28, [154]-[157].

¹⁰ Charter s. 25(1) provides that 'A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.'

¹¹ 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...'

¹² Charter s. 32(1) provides that 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

possible for a court to read new sub-section 228ZL(5), which may widen criminal liability, as only applying prospectively, as it is not severable from new sub-section 228ZL(4), which is clearly intended to apply retrospectively. New sub-section 228ZL(5) may therefore engage the right of defendants not to be subject to wider criminal liability than applied when they committed the alleged criminal conduct.¹³

Third, the subject-matter of the defence in sub-section 228ZL(5) appears to overlap with the subject-matter of the defence in sub-section 228ZL(4). It is unclear who bears the burden of proof if the defence adduces evidence suggesting that the defence was unreasonable because its scope was outside the business or other activities of the defendant.

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

- 1. Is new sub-section 228ZL(5) a reasonable limit on the Charter's right to be presumed innocent until proven guilty according to the test in Charter s. 7(2)?***
- 2. Will new sub-section 228ZL(5) apply to offences committed before the commencement of the Bill?***
- 3. What is the relationship between new sub-sections 228ZL(4) and 228ZL(5)?***

Pending the Minister's response, the Committee draws attention to clause 14.

The Committee makes no further comment.

¹³ 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.' 'Criminal offence' includes the burden of proof for particular elements of the offence: see *Calder v Bull*, 3 US 386 (1798).

Ministerial Correspondence

Primary Industries Legislation Amendment Bill 2008

The Bill was introduced into the Legislative Assembly on 7 October 2008 by the Hon. Joe Helper MLA.

The Committee considered the Bill on 27 October 2008 and made the following comments in Alert Digest No. 13 of 2008 tabled in the Parliament on 28 October 2008. The Committee wrote to the Minister again on 2 December 2008 in relation to a further matter reported in Alert Digest No. 15 of 2008.

Committee's Further Comments

The Committee notes that the response does not address the issue that the Committee wrote to the Minister about, which concerned the headings to clause 68 and existing s116 of the Fisheries Act 1995. In its Alert Digest no 13 of 2008, the Committee remarked:

that the headings of the existing offence – ‘Sale of fish taken in contravention of this Act or corresponding law’ – and clause 68 do not adequately describe the scope of the offence, which extends to the possession of such fish. Overseas courts have held that adequate notification of laws is an essential precondition for any law that limits a human right. The Committee considers that it should be made clear that mere possession of a fish, with no intention to sell, may expose the possessor to liability and imprisonment in the absence of an affirmative defence.

The Committee also expresses its surprise at the Minister's remark that existing s116 was found to be reasonable and justifiable when it was reviewed for Charter compatibility in 2007. The Committee reiterates its concern that exposing ordinary end sellers and consumers to a potential prison sentence merely for possessing a fish that someone else has handled illegally, unless they establish a complex defence in court, may go beyond what is necessary to achieve the purpose of protecting environmental resources. The Committee therefore considers that clause 68 may be incompatible with the Charter's right for criminal defendants to be presumed innocent until proven guilty.

The Committee will write to the Minister again concerning the headings to clause 68 and s. 116 of the Fisheries Act 1995, and also expressing its concern about these provisions' Charter compatibility. Pending the Minister's response, the Committee draws attention to clause 68.

Minister's Response

Thank you for your letter of 2 December 2008 concerning the Committee's further comments on the above Bill.

On the first matter – the headings to clause 68 of the Bill and section 116 of the Fisheries Act 1995 – the Committee's point is well-made. I have asked the Department of Primary Industries to ensure this matter is addressed at the earliest opportunity in an appropriate amending Bill.

On the Second matter, I note the Committee's further comments. I reiterate that, for the reasons set out in the Statement of Compatibility, I am of the opinion that the Bill is compatible with the Charter of Human Rights and Responsibilities.

*Joe Helper MP
Minister for Agriculture*

10 March 2009

The Committee thanks the Minister for this response.

**Committee Room
30 March 2009**

Appendix 1

Index of Bills in 2009

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Associations Incorporation Amendment Bill 2008	1
Assisted Reproductive Treatment Bill 2008	1
Bushfires Royal Commission (Report) Bill 2009	4
Bus Safety Bill 2008	1
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Criminal Procedure Bill 2008	1, 3
Duties Amendment Bill 2008	1
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009	4
Equal Opportunity Amendment (Governance) Bill 2008	1
Fair Trading and Other Acts Amendment Bill 2008	1
Gambling Regulation Amendment (Licensing) Bill 2009	2
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Melbourne Cricket Ground Bill 2008	1
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Relationships Amendment (Caring Relationships) Bill 2008	1
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Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	4
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1
Transport Legislation General Amendments Bill 2008	1
Transport Legislation Miscellaneous Amendments Bill 2008	1
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)

(vi) inappropriately delegates legislative power

Bus Safety Bill 2008	1
Criminal Procedure Bill 2008	1

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

Bus Safety Bill 2008	1
Crimes Amendment (Identity Crime) Bill 2009	4
Major Sporting Events Bill 2009	3
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Serious Sex Offenders Monitoring Amendment Act 2009	2
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	4
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1

Section 17(b)

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

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

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	1 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	Attorney-General	04.02.09	1 of 2009
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	Finance	04.02.09	1 of 2009
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Public Transport	04.02.09	1 of 2009
Salaries Legislation Amendment (Salary Sacrifice) Act 2008 AND Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Attorney-General	04.02.09	1 of 2009
Serious Sex Offenders Monitoring Amendment Act 2009	Corrections	26.02.09	2 of 2009
Major Sporting Events Bill 2009	Minister for Sport & Recreation	20.03.09	3 of 2009
Crimes Amendment (Identity Crime) Bill 2009	Attorney-General	31.03.09	4 of 2009
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	Attorney-General	31.03.09	4 of 2009