

# **No. 6 of 2009**

**Tuesday, 2 June 2009**

**On the**

Appropriation (2009/2010)  
Bill 2009

Appropriation (Parliament 2009/2010)  
Bill 2009

Classification (Publications,  
Films and Computer Games)  
(Enforcement) Amendment  
Bill 2009

Crimes Amendment (Identity Crime)  
Bill 2009

Crown Land Acts Amendment  
(Lease and Licence Terms)  
Bill 2009

Energy Legislation Amendment  
(Australian Energy Market Operator)  
Bill 2009

Environment Protection Amendment  
(Beverage Container Deposit and  
Recovery Scheme) Bill 2009

Justice Legislation Amendment Bill 2009

Macedonian Orthodox Church  
(Victoria) Property Trust Bill 2009

State Taxation Acts  
Amendment Bill 2009

Superannuation Legislation  
Amendment Bill 2009



# Table of Contents

---

	<b>Page Nos.</b>
<b>Alert Digest No. 6 of 2009</b>	
Appropriation (2009/2010) Bill 2009	1
Appropriation (Parliament 2009/2010) Bill 2009	2
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009	3
Crown Land Acts Amendment (Lease and Licence Terms) Bill 2009	4
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	5
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	8
Macedonian Orthodox Church (Victoria) Property Trust Bill 2009	10
State Taxation Acts Amendment Bill 2009	11
Superannuation Legislation Amendment Bill 2009	12
<b>Ministerial Correspondence</b>	
Crimes Amendment (Identity Crime) Bill 2009	15
Justice Legislation Amendment Bill 2009	21
<b>Appendices</b>	
1 – Index of Bills in 2009	25
2 –Committee Comments classified by Terms of Reference	27
3 – Ministerial Correspondence	29

## Glossary and Symbols



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

## Useful provisions

Section 7 of the **Charter** provides –

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

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

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

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



# Terms of Reference

## *Parliamentary Committees Act 2003*

### **17. Scrutiny of Acts and Regulations Committee**

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

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

## **The Committee has considered the following Bills –**

Appropriation (2009/2010) Bill 2009  
Appropriation (Parliament 2009/2010) Bill 2009  
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009  
Crown Land Acts Amendment (Lease and Licence Terms) Bill 2009  
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009  
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009  
Macedonian Orthodox Church (Victoria) Property Trust Bill 2009  
State Taxation Acts Amendment Bill 2009  
Superannuation Legislation Amendment Bill 2009

## **The Committee notes the following correspondence –**

Crimes Amendment (Identity Crime) Bill 2009  
Justice Legislation Amendment Bill 2009



### **Role of the Committee**

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

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

# Alert Digest No. 6 of 2009

---

## Appropriation (2009/2010) Bill 2009

<b>Introduced</b>	5 May 2009
<b>Second Reading Speech</b>	5 May 2009
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. John Brumby MLA
<b>Responsible Minister</b>	Hon. John Lenders MLC
<b>Portfolio responsibility</b>	Treasurer

### Background

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund for the ordinary annual services of the Government for the financial year 2009/ 2010.

### Content and Committee comment

#### [Clauses]

[2]. The Act comes into operation on Royal Assent.

[3]. Provides that the Treasurer may issue the stated amount out of the Consolidated Fund in respect of the financial year 2009/2010 for the purposes set out in Schedule 1 to the Bill.

[4]. Provides that the Consolidated Fund is appropriated to the extent necessary for the purposes included in clause 3.

**The Committee makes no further comment.**

## Appropriation (Parliament 2009/2010) Bill 2009

<b>Introduced</b>	5 May 2009
<b>Second Reading Speech</b>	5 May 2009
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. John Brumby MLA
<b>Responsible Minister</b>	Hon. John Lenders MLC
<b>Portfolio responsibility</b>	Treasurer

### Background

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund to the Parliament for the financial year 2009/2010.

*Note: In addition to appropriating money for the purposes of the Parliament the Bill appropriates money for the Auditor-General for the State of Victoria, being an independent officer of the Parliament pursuant to sections 94A to 94C of the Constitution Act 1975.*

### Content and Committee comment

#### [Clauses]

[2]. The Act comes into operation on Royal Assent.

[3]. Provides that the Treasurer may issue the stated amount out of the Consolidated Fund in respect of the financial year 2009/2010 for the purposes set out in Schedule 1 to the Bill.

[4]. Provides that the Consolidated Fund is appropriated to the extent necessary for the purposes included in clause 3.

**The Committee makes no further comment.**

## Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009

Introduced	5 May 2009
Second Reading Speech	7 May 2009
House	Legislative Assembly
Member introducing Bill	Hon. Rob. Hulls MLA
Portfolio responsibility	Attorney-General

### Purpose and Background

The Bill amends the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (the Victorian Act) to implement amendments consequential on a Commonwealth Amendment Act which, amongst other matters, replaced the prohibition on advertising unclassified films and unclassified computer games with a new scheme that will allow advertising, subject to conditions to be set out in a Commonwealth legislative instrument.

The Bill implements the necessary consequential amendments to the Victorian Act to ensure that it is consistent with the Commonwealth Act in keeping with the National Classification Scheme.

The Bill also removes existing reverse legal onus defences in existing section 49(2) to ensure compatibility with the right to be presumed innocent in section 25(1) of the human rights charter. [8]

**Note:** *The Victorian Act gives effect to the Commonwealth, State and Territory scheme for the classification of publications, films and computer games set out in the Classification (Publications, Films and Computer Games) Act 1995 (Cth). The Victorian Act provides for the enforcement of classification decisions made under the Commonwealth Act by prohibiting the publishing or sale of certain publications, films and computer games. It also prohibits certain material on on-line information services.*

#### Extract from the Second Reading Speech –

*...the Commonwealth Amendment Act establishes a new scheme to allow the advertising of films and computer games prior to their classification, subject to certain conditions. A key feature of the new advertising scheme is the introduction of a self-assessment regime whereby authorised industry assessors will assess the likely classification of an unclassified film or an unclassified computer game for the purposes of advertising. Industry assessors will not make actual classification decisions – the Classification Board remains responsible for all classifications. Alternatively, where self-assessment is not cost effective, or difficult in cases, industry will also have the option of applying to the Classification Board, for a fee, for an assessment of the likely classification of the product.*

*The conditions under which advertising will be permitted under the new scheme are to be set out in a Commonwealth legislative instrument. The Commonwealth censorship Minister must consult with State and Territory censorship ministers before making the legislative instrument, which is reflective of the cooperative nature of the NCS. The policy objectives of the new advertising scheme have been agreed to by censorship ministers through the Standing Committee of Attorneys-General (Censorship) forum.*

...

*Importantly, the current prohibition on advertising for certain types of publications and on advertising sexually explicit products will be retained under the new advertising scheme. Advertising unclassified films assessed as likely to be classified X18+ (restricted to adults 18 years and over) or Refused Classification (RC) and computer games likely to be classified RC will continue to be prohibited. [8]*

**The Committee makes no further comment.**

# Crown Land Acts Amendment (Lease and Licence Terms) Bill 2009

<b>Introduced</b>	5 May 2009
<b>Second Reading Speech</b>	7 May 2009
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Peter Batchelor MLA
<b>Portfolio responsibility</b>	Minister for Community Development

## Purpose and Background

The Bill —

- establishes a uniform licensing scheme for tour operators and activity providers operating on Crown land and provides for licences of up to 10 years (currently 3 years) and creates an offence to operate without a licence not found in current legislation. The amendments also provide for regulation making powers and transitional arrangements in these Acts. **[15-17, 21-24, 30, 33, 34, 37, 39, 40, 42, 45, 46]**

The Acts are the –

- *Crown Land (Reserves) Act 1978*,
- *Forests Act 1958*,
- *Land Act 1958*,
- *National Parks Act 1975* and the
- *Wildlife Act 1975*.
- increases the maximum lease term under the *Crown Land (Reserves) Act 1978* and *Forests Act 1958* from 21 years to 65 years (currently limited to 21 years). Certain leases are subject to disallowance by Parliament. **[11, 12 and 19]**
- increases the maximum licence term under the *Crown Land (Reserves) Act 1978* from 3 years to 10 years. **[9]**
- provides for licence terms greater than 10 years under the *Crown Land (Reserves) Act 1978* and *Land Act 1958* in circumstances where the licensee leases adjacent land. **[10 and 29]**
- amends the *Crown Land (Reserves) Act 1978*, *Forests Act 1958*, *Land Act 1958*, *National Parks Act 1975*, *Wildlife Act 1975*, *Coastal Management Act 1995*, *Conservation, Forests and Lands Act 1987*, the *Land (Revocations and Other Matters) Act 1991* and the *Fraser National Park Act 1957* to enhance the operation of those Acts generally and to repeal a number of redundant and spent provisions. **[4- 8, 14, 19, 20, 26, 27, 31, 32, 36 and 47-55]**

## Committee comment

Other than the provisions relevant to the new licensing scheme for tour operators and activity providers the amendments made by the Bill will commence on the day after the Royal Assent. The provisions relating to the licensing scheme for tour operators and activity providers on Crown land will commence on a day to be proclaimed or on 1 July 2011 if not proclaimed earlier. The explanatory memorandum provides that the reason for the later commencement of these provisions is to allow for licence fees and conditions to be prescribed by regulations. **[2]**

**The Committee makes no further comment.**

# Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009

<b>Introduced</b>	5 May 2009
<b>Second Reading Speech</b>	6 May 2009
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Peter Batchelor MLA
<b>Portfolio responsibility</b>	Minister for Energy and Resources

## Purpose and Background

The Bill amends the –

- *National Electricity (Victoria) Act 2005* to provide for the operation of certain provisions of the National Electricity (Victoria) Law relating to the electricity transmission system in Victoria; and
- *National Gas (Victoria) Act 2008* to provide for the operation of certain provisions of the National Gas (Victoria) Law relating to specific transmission and distribution pipelines and the operation of the wholesale and retail gas markets in Victoria; and
- Gas Industry Act 2001 to abolish VENCORP and transfer all rights, responsibilities, assets and liabilities of VENCORP to the Australian Energy Market Operator; and
- *Electricity Industry Act 2000*, the *Gas Industry Act 2001* and various other Acts to facilitate the transfer of rights, responsibilities, assets and liabilities from VENCORP to the Australian Energy Market Operator; and
- *Electricity Industry Act 2000* to transfer the regulation of access to land and premises for the purpose of electricity transmission system augmentations from the Essential Services Commission to the Australian Energy Regulator.

From the explanatory memorandum –

*A new national framework for a single national energy market operator for both electricity and gas has been developed by the Ministerial Council on Energy under the Council of Australian Governments. The new framework is to be enacted through the Parliament of South Australia and will apply in Victoria pursuant to the National Electricity (Victoria) Act 2005 and the National Gas (Victoria) Act 2008.*

*The Bill contains ongoing and transitional provisions that will facilitate introduction of the new framework in Victoria.*

*The Bill provides for the transfer of the powers, functions, rights, responsibilities, assets and liabilities of the Victorian Energy Networks Corporation (VENCORP) to the Australian Energy Market Operator (AEMO).*

## Committee comment

The Bill provides for commencement on a day or days to be proclaimed.

**Note:** (from the explanatory memorandum) – *The clause does not specify a default commencement date because the Bill is implementing a nationally agreed legislative scheme. It is the intention of the scheme that it comes into operation on the same day in all of the participating jurisdictions. The clause provides for maximum flexibility in relation to the commencement of the Bill to ensure that the nationally agreed legislative scheme will commence in Victoria on the nationally agreed day.*

New Part 11 is inserted into the *Gas Industry Act 2001* by clause 34 to provide for the abolition of VENCORP and its Board, and the transfer of functions, powers, duties, liabilities, obligations, property, assets and rights from VENCORP to AEMO. New section 239 provides for the employment by AEMO of employees formerly employed by VENCORP on the same terms and conditions and with no changes to employee entitlements.

## Charter Report

### **National cooperative legislation – Applicability of Charter – Adequacy of statement of compatibility – Transfer of public functions from body bound by the Charter to one that is not**

*Summary:* The Bill is a response to planned modifications to the national cooperative legislation schemes for electricity and gas markets. The Statement of Compatibility does not identify how, if at all, the bill's passage or non-passage would alter the human rights impact of the proposed changes to those schemes. The Committee is also concerned that the Victorian bill may have the effect of transferring public functions exercisable in Victoria from a body subject to the Charter to one that is not. It will write to the Minister seeking further information.

The Committee notes that the Bill is a response to proposed modifications to the national cooperative legislation schemes for electricity and gas markets. The texts of the existing schemes are contained in South Australian legislation.<sup>1</sup> Bills for those proposed modifications are presently before South Australia's parliament.<sup>2</sup> In its *Alert Digest No 6 of 2008*, the Committee noted that the application of the Charter to national cooperative schemes is unclear. The Committee later published a letter from the Minister that stated that such national schemes are subject to Division 3 of Part 3 of the Charter, on the interpretation of statutory provisions.<sup>3</sup>

The present bill raises two further concerns:

First, Division 1 of Part 3 of the Charter contains a scheme for human rights scrutiny of Victorian bills.<sup>4</sup> The Committee notes that the Bill's Statement of Compatibility includes an assessment of whether and how the proposed amendments in the bills before the South Australian parliament are compatible with human rights under the Charter. While the Statement thus brings various human rights issues raised by the amendments to the attention of Victoria's Parliament, the Committee notes that their enactment (and application in Victoria) is a matter for South Australia's parliament, not Victoria's.<sup>5</sup> **The Statement of Compatibility does not identify how, if at all, the Victorian bill's passage or non-passage would alter the human rights impact of the proposed changes in South Australia.** The Committee recalls its *Practice Note No 2*, which characterises a Statement of Compatibility as explanatory material and states that 'The Committee will write to Ministers where, in the Committee's opinion, a Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right.' In its *Alert Digest No 14 of 2007*, the Committee observed that, for complex bills, it is

---

<sup>1</sup> *National Electricity (South Australia) Act 1996* (SA), schedule; *National Gas (South Australia) Act 2008* (SA), schedule.

<sup>2</sup> *National Electricity (South Australia) (National Electricity Law—Australian Energy Market Operator) Amendment Bill 2009* (SA), Part 3; *National Gas (South Australia) (National Gas Law—Australian Energy Market Operator) Amendment Bill 2009* (SA), Part 3. Both bills were introduced on 13 May 2009.

<sup>3</sup> *Alert Digest No 8 of 2008*. 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.'

<sup>4</sup> Charter s. 28 provides for statements of compatibility for each new bill that state 'whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible'.

<sup>5</sup> *National Electricity (Victoria) Act 2005* (Vic), s. 6; *National Gas (Victoria) Act 2008*, s. 7.

essential that a Statement of Compatibility identify each clause of a Bill that may limit a Charter right.

Second, Division 4 of Part 3 of the Charter contains a scheme requiring 'public authorities' to act compatibly with human rights in some circumstances.<sup>6</sup> One purpose of the Bill is to facilitate the transfer of functions, including public functions, from VENCORP to the Australian Energy Market Operator.<sup>7</sup> VENCORP, which is established by a Victorian statute, is likely to be a public authority under the Charter.<sup>8</sup> By contrast, AEMO is not established by a Victorian statute and arguably does not exercise its functions on behalf of the State of Victoria, so it may not be a public authority under the Charter.<sup>9</sup> **The Committee is therefore concerned that the Bill may have the effect of transferring public functions exercisable in Victoria (including powers that engage human rights, as discussed in the Statement of Compatibility) from a body subject to the Charter to one that is not.**

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

- 1. whether the passage or non-passage of the Victorian bill will alter the human rights impact (as assessed by the Statement of Compatibility) of the planned amendments to the National Electricity Law and the National Gas Law?**
- 2. whether the Australian Energy Market Operator is a public authority for the purposes of the Charter?**

**Pending the Minister's response, the Committee draws attention to the Bill's interaction with the Charter.**

**The Committee makes no further comment.**

---

<sup>6</sup> Charter s. 38(1) provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' Exceptions are provided for in sub-ss (2)-(4).

<sup>7</sup> Clause 34, replacing Part 11 of the *Gas Industry Act 2001* (Vic).

<sup>8</sup> *Gas Industry Act 2001* (Vic), s. 158 cf Charter s. 4(1)(b), defining a public authority to include: 'an entity established by a statutory provision that has functions of a public nature'. Charter s. 3 defines 'statutory provision' to mean an 'Act'. *Interpretation of Legislation Act 1984* (Vic), s. 38 defines 'Act' to mean 'an Act passed by the Parliament of Victoria'.

<sup>9</sup> Charter s. 4(1)(c) defines a public authority to include 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)'.

# Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009

Introduced	1 April 2009
Second Reading Speech	6 May 2009
House	Legislative Council
Member introducing Bill	Ms Colleen Hartland MLC
Private Member's Bill	

## Purpose and Background

The Bill amends the *Environment Protection Act 1970* to establish a beverage container deposit and recovery scheme to be administered by the Environment Protection Authority (the Authority).

The Authority will manage the operation of the Scheme, collect the beverage container environmental levy, grant exemptions for products that will not require the levy, authorise collection depots and transfer stations to participate in the scheme, enter into agreements with authorised transfer stations and depots, facilitate and promote the Scheme and provide information and advice to the Minister in relation to the operation of the Scheme. [4]

An importer or producer of a beverage container is liable to pay the beverage container environmental levy, unless they are granted an exemption. The amount of the beverage container environmental levy is set at 10 cents. A higher may be set by regulation. The Victorian scheme is consistent with the 10 cent levy in the South Australian container deposit scheme. [4]

## Constitutional validity

The Committee notes that the Bill proposes to introduce a State levy or tax on imported beverage containers with a refund payable only on containers sold within Victoria, and considers that this may have constitutional implications pursuant to section 92 of the Commonwealth Constitution. Section 92 provides –

*Section 92 – Trade within the Commonwealth to be free*

*On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

*But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.*

***The Committee will seek further advice from the Member concerning this question.***

## Charter Report

**Freedom of movement – Offence to bring a beverage container into Victoria without paying a levy – Whether reasonable limit**

*Summary: New section 52D makes it an offence to import a beverage container into Victoria without paying a levy. The Committee is concerned that this provision may limit the Victorians' Charter right to 'enter' Victoria. It will write to the Member seeking further information.*

The Committee notes that clause 4, inserting a new section 52D into the *Environment Protection Act 1970*, makes it an offence to 'import' a beverage container into Victoria without either paying a beverage container environmental levy or obtaining an exemption from the Environmental Protection Authority. The term 'import' is defined to mean 'import or bring into Victoria from another State of Territory or other country'.<sup>10</sup> The penalty for non-compliance is 2400 penalty units.

The Committee observes that new section 52D is not limited to containers intended for sale in Victoria. Rather, it appears to apply to all containers in the possession of someone entering Victoria by any means. New section 52D requires such travellers to choose between throwing out or leaving all their beverage containers behind when entering Victoria, paying the levy on each container, seeking an exemption from the Authority, or risking a hefty fine.

**The Committee is concerned that new section 52D may limit Victorians' Charter right to enter Victoria.**<sup>11</sup> The ubiquity of beverage containers and their utility in particular to travellers mean that even a modest levy may limit that right, unless it satisfies the test for reasonable limits on rights in Charter s. 7(2).<sup>12</sup> Whilst the purpose of environmental protection may justify restrictions on what people bring into Victoria, the environmental benefit of imposing on a levy on containers that are not sold in Victoria is not apparent, as new section 52K bars any refunds for such containers. The Committee observes that the South Australian deposit scheme avoids limiting people's right to enter that state, by imposing a levy on suppliers or sellers of containers, instead of importers or producers.<sup>13</sup>

***The Committee will write to the Member seeking further information as to the compatibility of new section 52D with Charter s. 12. Pending the Member's response, the Committee draws attention to new section 52D.***

The Committee makes no further comment.

---

<sup>10</sup> Clause 3, amending existing s. 4.

<sup>11</sup> Charter s. 12 provides that: 'Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.'

<sup>12</sup> Charter s. 7(2) provides that: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified...'

<sup>13</sup> *Environment Protection Act 1993* (SA), s. 69B.

## **Macedonian Orthodox Church (Victoria) Property Trust Bill 2009**

<b>Introduced</b>	5 May 2009
<b>Second Reading Speech</b>	7 May 2009
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Rob. Hulls MLA
<b>Portfolio responsibility</b>	Private Bill

### **Purpose and Background**

The Bill establishes a corporate trustee for the Macedonian Orthodox Church within Victoria to hold, acquire, deal with and dispose of property for the benefit of the Church and provides for the vesting of certain property in the corporate trustee. Property so vested is exempt from duty and other taxes. **[13 and 14]**

There is to be established a Board of trustees which consists of nine members including the Metropolitan as president and the Deputy Bishop as vice-president and vests the Board with the responsibility to manage the affairs of the Trust. The functions and powers of the Trust include to acquire, hold, deal with or dispose of property located within Victoria for the benefit of the Church and to act as a trustee in certain circumstances. **[4 to 12]**

**The Committee makes no further comment.**

## State Taxation Acts Amendment Bill 2009

<b>Introduced</b>	7 May 2009
<b>Second Reading Speech</b>	7 May 2009
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Rob. Cameron MLA
<b>Member Responsible</b>	Hon. John Lenders MLC
<b>Portfolio responsibility</b>	Treasurer

### Purpose and Background

The Bill amends the *Duties Act 2000* —

- to clarify the operation of certain provisions in relation to determining consideration for the transfer of dutiable property;
- to clarify the scope of the exemption from duty in relation to deceased estates;
- to clarify the circumstances in which the family farm exemption from duty is to apply;
- to provide that a policy of life insurance that is an FHSA (first home saver account) is exempt from life insurance duty;
- to clarify the circumstances in which a reassessment of duty (within 5 years of the initial assessment) that is charged in respect of a transfer or transaction in relation to an instrument that failed to give effect to the transfer or transaction. **[3 to 11]**

The Bill also amends the *First Home Owner Grant Act 2000* to include new amounts payable in relation to eligible transactions with a commencement date on or after 1 July 2009. **[12 and 13]**

The *Land Tax Act 2005* is amended retrospectively (1 January 2006) to clarify that various procedures under a number of Acts and regulations that applied in respect of matters under the *Land Tax Act 1958* before the commencement of the *Land Tax Act 2005* continue to so apply. **[14]**

**The Committee makes no further comment.**

## Superannuation Legislation Amendment Bill 2009

Introduced	5 May 2009
Second Reading Speech	7 May 2009
House	Legislative Assembly
Member introducing Bill	Hon Tim Holding MLA
Portfolio responsibility	Minister for Finance

### Purpose and Background

The Bill amends the following Acts —

- *Emergency Services Superannuation Act 1986*;
- *Constitution Act 1975*;
- *County Court Act 1958*;
- *Parliamentary Salaries and Superannuation Act 1968*;
- *State Employees Retirement Benefits Act 1979*;
- *State Superannuation Act 1988*;
- *Transport Superannuation Act 1988*; and
- *Superannuation (Portability) Act 1989*.

This Bill will —

- give new Protective Services Officers access to the Emergency Services Superannuation (ESSS) defined benefit scheme and give current Officers the option of joining the ESSS defined benefit scheme; **[5, 7, 9 & 10]**
- allow the reinstatement of reversionary spouse pensions that were cancelled upon remarriage of the recipient under the *Parliamentary Salaries and Superannuation Act 1968* and the *State Superannuation Act 1988*; **[22 to 24 & 28 to 31]**
- amend the Acts governing Victorian public sector superannuation schemes to enable the trustees of these schemes to give effect to superannuation agreements and orders made under the *Family Law Act 1975 (Cth)* in respect of persons in de facto relationships; **[16, 17, 19, 20, 21, 24, 27, 30, 34 & 36]**
- allow the Emergency Services Superannuation Board (ESSB) the option to offer insurance to spouse account holders; **[13]**
- give members of the former State Superannuation Fund (SSF) the option to transfer their Commonwealth Government co contribution payments into a superannuation product of their choice; **[25]**
- amend the *Emergency Services Superannuation Act 1986* to ensure that ESSB can comply with the Commonwealth Bankruptcy Act reforms; **[6]**
- amend the *Emergency Services Superannuation Act 1986* to clarify the ability of beneficiary account holders to join the ESSPLAN accumulation fund **[5]**; and
- amend the *Constitution Act 1975* to enable future Governors to enter into salary sacrifice arrangements. **[18]**

## Charter Report

### ***Equal and effective protection against discrimination – Restoration of pension cancelled on the ground of marital status – Pension only restored from date of application***

*Summary:* The Bill provides for the re-instatement of pensions previously cancelled on the ground of re-marriage. However, any entitlement is limited to the period after an eligible person applies for reinstatement. The Committee considers that this limitation may engage the Charter right of eligible people to 'equal and effective protection against discrimination' on the ground of marital status. It will write to the Minister seeking further information.

The Committee notes that clauses 22, inserting a new section 18A into the *Parliamentary Salaries and Superannuation Act 1968*, and 28, inserting a new section 38 into the *State Superannuation Act 1988*, provide for the re-instatement of pensions cancelled on the ground of re-marriage.

The Statement of Compatibility remarks:

*This amendment will redress the historical discrimination on the basis of marital status that occurred when reversionary spouse pensions were cancelled upon remarriage.*

However, new sub-sections 18A(5) of the *Parliamentary Salaries and Superannuation Act 1968* and 38(4) of the *State Superannuation Act 1988* limit any entitlement to the period after an eligible person applies for reinstatement.

The Committee is concerned that no redress is provided for pensions denied prior to that date, including the period after the discriminatory nature of the denial was recognised (e.g. by Parliament's repeal of the earlier disentitlement.<sup>14</sup>) **The Committee therefore considers that the new sub-sections may engage the Charter right of eligible people to 'equal and effective protection against discrimination' on the ground of marital status.**<sup>15</sup>

The Committee is especially concerned that eligibility for a reinstatement of a pension denied on the ground of marital status only arises after an eligible person applies for that reinstatement. Once clauses 22 and 28 have commenced, any delay in an eligible person's application for reinstatement will surely be due either to the person's unawareness of their eligibility, or difficulties in applying. Allowing such matters to further financially disadvantage such people may further limit their right to equal and effective protection against discrimination.

***The Committee will write to the Minister seeking further information as to measures that will be taken to inform eligible people of their entitlements and assist them to apply for them. Pending the Minister's response, the Committee draws attention to new sub-sections 18A(5) of the Parliamentary Salaries and Superannuation Act 1968 and 38(4) of the State Superannuation Act 1988.***

The Committee makes no further comment.

<sup>14</sup> The repeals occurred on 30 November 1993 and 1 December 1993. See *Public Sector Superannuation (Administration) Act 1993*, ss. 2(1) & 2(5).

<sup>15</sup> Charter s. 8(3) provides that 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination'. Discrimination includes discrimination on the basis of marital status.



# Ministerial Correspondence

---

## Crimes Amendment (Identity Crime) Bill 2009

The Bill was introduced into the Legislative Assembly on 10 March 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 30 March 2008 and made the following comments in Alert Digest No. 4 of 2009 tabled in the Parliament on 31 March 2009.

### Committee's Comments

#### 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.*

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

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.

**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. In extreme cases, such a certificate may even be a 'penalty' for the purposes of the Charter's right against retrospective increases in criminal penalties (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. 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. **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.**

## Minister's Response

*I refer to your letter dated 31 March 2009 regarding your Committee's consideration of the Crimes Amendment (Identity Crime) Bill 2009 (the Bill).*

*The Committee expressed concern about the Statement of Compatibility in respect of the alternative verdict provision in clause 4 of the Bill. The Committee also asked for my response to four issues relating to the identity crime certificate provisions, dealt with in turn.*

### **Clause 4 – Alternative verdict for identity crime offences**

*The Committee considers that clause 4 engages an accused's Charter section 25(2)(a) right to be informed promptly and in detail of the nature and reason for the charge and expressed concern regarding the Statement of Compatibility in respect of clause 4. The Committee also considers that the Statement of Compatibility to the Criminal Procedure Bill correctly concluded that alternative verdict provisions limit an accused's Charter section 25(2)(a) right to be informed.*

*The Statement of Compatibility to the Criminal Procedure Bill dealt with a number of alternative verdict provisions, many of which are of more general application than the one contained in the Bill. In that context, I concluded that the relevant provisions prima facie limit an accused's Charter right to be informed of the charge, but that the limit is justifiable, appropriate and proportionate.*

*Clause 4 allows a person charged with 'making, using or supplying identification information' to instead be convicted of the lesser offence of 'possession of identification information'. The Statement of Compatibility deals with this issue. The provision is specific and restricted. A person charged with making, using or supplying identification information must necessarily be alleged to have possessed identification information. Therefore, the person would have been informed of all of the relevant facts and conduct relating to the possession offence at the time they were charged. For these reasons, I concluded in the Statement of Compatibility that clause 4 does not limit an accused's Charter section 25(2)(a) right.*

*However, in the event that clause 4 does limit that right, the limit is justifiable for the same reasons advanced in the Criminal Procedure Bill Statement of Compatibility. These are:*

- *The power to convict of alternative offences is a long standing and important part of the criminal justice system and the courts have always been vigilant to ensure that proper safeguards are in place to protect the interests of the accused. Those common law safeguards continue to operate and will be supplemented by the statutory powers in the Criminal Procedure Act. The most important safeguard is that an offence must be a true alternative to the offence charged; all of the elements of the alternative offence must also be elements of the charged offence. Courts also have a general power to adjourn proceedings, which may be used to remedy any lack of information. In addition, at trial the court has an express power to prevent a jury from considering an alternative offence if it considers that it is in the interests of justice to do so.*
- *A power to convict for alternative offences is important to the efficient running of the criminal justice system. If it did not exist then, where an alternative offence is clearly appropriate, a charge would need to be re-laid and the criminal process started afresh.*
- *Alternative offences can also assist an accused, particularly in a jury trial, by allowing for the possibility that a less serious charge will be accepted as appropriate, and that a lower maximum penalty will apply. For example, a person charged with making, using or supplying identification information would face a maximum penalty of 5 years imprisonment, however if convicted of the alternative offence of possession would face a maximum penalty of 3 years imprisonment.*

## **Clauses 6 and 7 – Identity crime certificates**

### **1. What procedural rights will an accused have at a hearing for the issuing of an identity crime certificate?**

The Committee notes that clause 6 allows a court that has found a person guilty of an identity crime offence to issue an identity crime certificate to a victim of the offence, and that no provision is made for any role for the accused in the hearing or for any appeals in respect of identity crime certificates. The Committee is concerned that “this contrasts with other ‘orders in addition to sentence’, all of which can be appealed as part of the ...[accused’s] sentence...” and that this absence may limit the accused’s fair hearing and appeal rights under the Charter.

#### *Appeal rights*

Charter section 25(4) protects the right to appeal a criminal conviction and any sentence imposed in respect of it. The Bill does not provide for the accused to appeal against the issuing of an identity crime certificate, as it is not a conviction or a sentence.

Section 566 of the Crimes Act 1958 defines ‘sentence’ to include any order made under Parts 3, 3A, 4 and 5 of the Sentencing Act 1991. Identity crime certificates will be issued under new Part 4A of the Sentencing Act, which is not included in the definition of ‘sentence’. It is a separate process from sentencing the accused for the crime, ‘sentence’ is connected to punishment.

An identity crime certificate is not an ‘order in addition to sentence’. ‘Orders in addition to sentence’ are contained in Part 4 of the Sentencing Act and include restitution orders, compensation orders, recovery of assistance paid under Victims of Crime Assistance Act 1996, cost recovery orders, forfeiture and disqualification orders. These orders restrict an accused’s rights or create obligations e.g. by imposing a debt, requiring forfeiture of property etc.

In contrast, an identity crime certificate sets out that the victim’s identification information was used without their consent, in the commission of an offence. It is issued to the victim to help them to demonstrate the court’s finding to third parties and to help them to overcome the problems caused by the crime. Unlike orders under Part 4 of the Sentencing Act, the certificate does not impose obligations on, or restrict the rights of, the accused.

For these reasons, I consider that it would not be appropriate to allow the issue of an identity crime certificate to be appealed as part of the accused’s sentence.

#### *Procedural rights*

The Committee considers that clause 6 may engage Charter sections 24 and 25(2)(d) rights to a fair hearing and to be tried and to defend himself or herself (in person or through legal assistance) as the court is required to make additional findings about the offence in certificate proceedings.

Charter sections 24 and 25(2)(d) rights apply to the hearing and determination of criminal charges (or civil proceedings) and, where relevant, on appeal. However, the certificate process is administrative in nature and occurs after the hearing and determination of the charge. The accused is not formally a party to the proceeding as the findings required for the court to issue a certificate do not involve additional allegations against the accused. However, the accused will generally be present and often represented. To ensure that the court has sufficient flexibility in certificate proceedings, the Bill provides that the court is not bound by the rules of evidence and may inform itself in any way it thinks fit. This may include hearing submissions from the accused or his or her legal representative.

In addition to the powers provided for in the Bill, courts have inherent powers to ensure the integrity, efficiency and fairness of their processes. These inherent powers will apply to certificate proceedings.

*For these reasons, I do not consider that the absence of express procedural rights for an accused at a hearing for the issue of an identity crime certificate engages fair hearing and appeal rights or the right to be tried in person.*

**2. Will the court be able to include the accused's name in the identity crime certificate?**

*Charter section 13(b) - right not to have reputation unlawfully attacked*

*The Committee observes that clause 6 does not contain a provision barring the court from naming the accused in the certificate unlike the Exposure Draft Bill and the Model Criminal Law Officers' Committee (MCLOC) model laws.*

*The Exposure Draft Bill and the MCLOC model allowed for certificates to be issued independently of a prosecution and where no offender has been charged, tried or found guilty. In order to protect the fair hearing rights of an accused (who may have subsequently been charged with a criminal offence), it was necessary under those schemes to ensure that the certificate does not contain the name of the offender or an alleged offender.*

*The Bill introduces a more limited certificate scheme that only allows a certificate to be issued by a court that had found a person guilty of an identity crime offence and leaves it to the court to determine whether or not to name the accused in the certificate. Unless the court orders otherwise, court proceedings are always open to the public and court records, which include the accused's name, are a matter of public record. The primary purpose of the certificate is to demonstrate that the victim did not do certain acts or make certain transactions, not that the accused did the acts or made the transactions. If the court considers that it is not appropriate to include the accused's name on the certificate, there is no requirement to do so. This may be the case in circumstances where, for example, the court has ordered suppression of the accused's name.*

*For these reasons, I consider that the ability to include the accused's name on an identity crime certificate does not constitute an unlawful attack on the accused's reputation for the purposes of Charter section 13(b), hence does not engage or limit that right.*

*Charter section 27(2) - right against retrospective increases in criminal penalties*

*Clause 7 allows a certificate to be issued in relation to an offence that was committed before the commencement of the Bill. The Committee is concerned that, in extreme cases, a certificate bearing the accused's name may be a penalty for the purposes of the Charter's section 27(2) right against retrospective increases in criminal penalties.*

*The European Court of Human Rights dealt with the issue of what is, and what is not, a penalty in *R v Field* [2003] 1 WLR 882. The Court of Appeal referred to *Welch v United Kingdom* (1995) 20 EHRR 247 as the leading case on this issue and accepted the following as the criteria to determine whether measure is a penalty:*

- (i) the starting point is whether the measure is imposed following a criminal conviction;*
- (ii) the nature and purpose of the measure;*
- (iii) its characterisation under national law;*
- (iv) the procedures involved in the making and implementation of the measure;*
- (v) its severity; and*
- (vi) the court will look at the substance, rather than the form, in determining whether the measure forms part of a "regime of punishment".*

*An identity crime certificate will not be imposed on the accused as it does not directly affect the accused's rights. Rather, it will be issued to a victim of the offence, following a finding of guilt in criminal proceedings. The certificate will set out that the victim had their*

identification information used, without their consent, in the commission of the identity crime offence. Its primary purpose is to help the victim to overcome any problems caused by the crime (e.g. in dealings with creditors and banks). It would not compel a third party (e.g. financial institutions and credit reporting agencies) to take restorative action and, unlike penalties (e.g. sentences, orders in addition to sentence etc), a certificate would not directly affect the accused's rights and obligations.

For these reasons, I do not consider that an identity crime certificate is a penalty. Therefore, clause 7 does not engage or limit the Charter right against retrospective increases in criminal penalties.

**3. Will the accused be able to appeal against the issuing of an identity crime certificate?**

I dealt with this issue earlier, in my response to the Committee's question regarding the procedural rights of an accused at a hearing for the issuing of an identity crime certificate.

**4. What happens if an identity crime certificate is issued and the accused successfully appeals against the conviction for the identity crime offence?**

As the issuing of an identity crime certificate is contingent on a finding of guilt, upon successful appeal against conviction for an identity crime offence to which the certificate relates, the basis for the certificate will no longer exist. In such cases, there are a number of existing mechanisms to ensure that the certificate is set aside. These include the courts' power to make any order they consider ought to be made or to exercise any power that the originating court could have exercised. This position is expressly addressed in the Criminal Procedure Act 2009, which provides for the court to set aside 'ancillary orders' on appeal. In addition, the prosecution or the accused may refer the matter back to the originating court.

Given the reasons outlined above, I consider that clauses 4, 6 and 7 do not limit Charter rights in the manner suggested. However, in the event that clause 4 does limit the right to be informed, as an accused is at risk of conviction for an offence which is not contained in a charge-sheet or indictment, the limit is justifiable, reasonable and proportionate, hence compatible with the Charter.

**ROB HULLS MP**  
**Attorney-General**

4 May 2009

**The Committee thanks the Attorney-General for this response.**

## Justice Legislation Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 31 March 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 4 May 2009 and made the following comments in Alert Digest No. 5 of 2009 tabled in the Parliament on 5 May 2009.

### Committee's Comments

#### Charter Report

#### **Freedom of expression – Criminalisation of offensive gambling advertising – Whether reasonably necessary – Whether lawful restriction**

*Summary: The Committee considers that clause 49, criminalising 'offensive' gambling advertising, engages the Charter's right to freedom of expression. It is concerned that the clause may not be reasonably necessary for the protection of public morality; and that it may be difficult for wagering service providers to judge in advance whether a particular instance of gambling advertising is or isn't offensive.*

*The Committee notes that clause 49, inserting a new s. 4.7.8 into the Gambling Regulation Act 2003, makes it a criminal offence for a wagering service provider to disseminate any gambling advertising that 'is offensive'. **The Committee considers that clause 49 engages the Charter's right to freedom of expression.***

*The Statement of Compatibility remarks:*

*Advertising which is offensive may often be contrary to public morality and its prohibition (subsection 4.7.8(1)(f)) is a lawful restriction.*

***The Committee is concerned that, while some offensive gambling advertising may be contrary to public morality, criminalising all such advertising may go further than is 'reasonably necessary' to protect public morality. The Committee is also concerned that it may be difficult for wagering service providers to judge in advance whether a particular instance of gambling advertising is or isn't offensive.***

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

- 1. why criminalising offensive gambling advertising is reasonably necessary to protect public morality.***
- 2. how wagering service providers will be able to judge in advance whether a particular instance of gambling advertising is or isn't offensive.***

***Pending the Minister's response, the Committee draws attention to clause 49 and, in particular, new subsection 4.7.8(1)(f).***

***The Committee makes no further comment.***

### Minister's Response

*I refer to your letter of 8 May 2009 in relation to the Justice Legislation Amendment Bill 2009. The below response addresses the matters that have been raised by the Committee:*

- 1. Why is criminalising offensive gambling advertising reasonably necessary to protect public morality***

*Clauses 40 and 41 of the Bill will amend the Gambling Regulation Act 2003 to allow interstate wagering service providers to advertise their business services in Victoria. The National wagering market is a highly competitive environment and it is envisaged that some wagering service providers will undertake aggressive advertising campaigns in an attempt to establish a business profile in Victoria.*

*Criminalisation was identified as the preferred approach to establishing advertising standards as the Government has no other means available to influence the behaviour of interstate wagering service providers. It must be noted that interstate based wagering providers are not registered in this State and accordingly are not bound by the same conditions of registration (e.g. adherence to a Responsible Gambling Code of Conduct) which apply to Victorian based operators.*

*In the absence of criminalisation any communication, image or message which an interstate wagering service provider may choose to use to promote their business services in Victoria could be published in an unrestricted manner. It is argued that the need to protect public morality under these circumstances outweighs the potential restriction upon the right to freedom of expression under the Charter.*

*Furthermore, as noted in the Statement of Compatibility, while freedom of expression is an important right under the Charter, international law has afforded less protection to this right in matters limited to purely commercial interests (refer Markt Intern Verlag GmbH and Klaus Beermann v. Germany [1989]).*

*Wagering service providers are motivated solely by commercial interests so it is argued that the State has a greater margin of discretion in these circumstances than might be afforded in other matters such as those relating to freedom of political expression.*

*Finally, it must be noted that the vast majority of wagering service providers who will seek to advertise their services in Victoria are corporations and accordingly do not enjoy any human rights protection under the Charter. Both natural persons and corporations can be licensed as wagering service providers in most Australian jurisdictions, however, only corporations typically hold the necessary financial resources to commence and sustain an advertising campaign.*

**2. How will gambling wagering service providers be able to judge in advance whether a particular instance of gambling advertising is or isn't offensive.**

*This matter was considered during the drafting of the Bill however it was determined that it would be impracticable to attempt to define each and every instance of gambling advertising which might be considered to be offensive.*

*SARC is advised that offensive matters, conduct or behaviours are criminalised in a number of Victorian Acts however no commonly accepted definition exists. An example in this regard is section 18 of the Summary Offences Act 1966. This section creates an offence with respect to offensive behaviour by a person in a motor vehicle however does not seek to define any of the specific actions which constitute such behaviour.*

*In response to SARC's specific query, SARC is advised that the Australian Association of National Advertisers produces a Code of Ethics for advertisers which can provide some guidance to wagering service providers as to instances of gambling advertising which might be considered to be offensive. Relevant sections of the code include:*

- 1.1 Advertising or Marketing Communications shall comply with Commonwealth law and the law of the relevant State or Territory;*
- 2.1 Advertising or Marketing Communications shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, sex, age, sexual preference, religion or political belief;*
- 2.2 Advertising or Marketing Communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised;*
- 2.3 Advertising or Marketing Communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience and, where appropriate, the relevant programme time zone; and*

- 1.5 Advertising or Marketing communications shall only use language which is appropriate in the circumstances and strong or obscene language shall be avoided.

Finally, should it become apparent that there is still some uncertainty as to instances of gambling advertising which might be considered to be offensive, the Government could request that the Victorian Commission for Gambling Regulation (VCGR) produce guidelines for wagering service providers.

It may be noted that the VCGR currently issue guidelines for assessing whether trade promotion lotteries are offensive or contrary to the public interest. A copy of these guidelines is attached for your information.

Thank you for bringing these important matters to my attention and for giving me the opportunity to respond to the Committee's questions and concerns.

**ROB HULLS MP**  
Minister for Racing

Encl: VCGR Guidelines – Trade Promotion Lotteries

Received 29 May 2009

---

## **Victorian Commission for Gambling Regulation**

### **Trade Promotion Lotteries**

#### **Guideline for Assessing whether Trade Promotion Lotteries are Offensive or contrary to the Public Interest.**

The following guideline sets out some requirements for trade promotion lotteries. The list is not exhaustive and the Commission will consider each trade promotion lottery on its merits.

#### **A Trade Promotion Lottery must:**

- Comply generally with the law, including the Gambling Regulation Act 2003, the Trade Practices Act 1974, the Fair Trading Act 1999, the Firearms Act 1996, the Prostitution Control Act 1994, the Liquor Control Reform Act 1998, the Tobacco Act 1987 and related regulations and mandatory codes.
- Comply with the relevant approved industry code (publications, film, television, radio, internet, computer games, advertising, gaming machine games, responsible gambling) as the case may be. The industry code or standard must be approved by the relevant regulator or in the case of advertising by the Australian Association of National Advertisers (AANA).

#### **A Trade Promotion Lottery must not:**

- Advertise gaming machines outside an approved gaming venue.
- Encourage a person to gamble more on gaming machines by means which may offend the principles of responsible gambling.
- Suggest that entering a trade promotion lottery will improve a person's financial prospects, social status or make a person more attractive to others.
- Suggest that a person's skill can influence the outcome of a game that is purely a game of chance.
- Allow or encourage minors to participate if the goods or services being promoted by the trade promotion lottery or the prizes awarded in the trade promotion lottery would be illegal for them to purchase.

- *Use a lottery method for a trade promotion lottery targeted to a minor that is similar to other gambling products.*
- *Promote cigarettes, tobacco or tobacco products.*
- *Promote firearms except by a licensed firearms dealer*
- *Promote prostitution services other than in accord with law.*
- *Promote or involve an objectionable contract (for example, where the consequences to be imposed on an entrant in a promotion are so dire that a court would be unlikely to enforce them).*
- *Misrepresent the goods or services of the trade or business being promoted.*
- *Promote or involve unconscionable conduct.*
- *Require or encourage a person to undertake acts which are dangerous, violent, humiliating, or involving harm to the person or harm to a person's property.*
- *Involve behaviour, language or depiction that would generally be regarded as indecent or offensive if conducted/published/broadcast in/to the public (eg pornographic or cause undue offence on religious, cultural, disability or gender grounds).*

***The Committee thanks the Minister for this response.***

**Committee Room  
1 June 2009**

# Appendix 1

## Index of Bills in 2009

---

	<b>Alert Digest Nos.</b>
Appropriation (2009/2010) Bill 2009	6
Appropriation (Parliament 2009/2010) Bill 2009	6
Associations Incorporation Amendment Bill 2008	1
Assisted Reproductive Treatment Bill 2008	1
Bushfires Royal Commission (Report) Bill 2009	4
Bus Safety Bill 2008	1, 5
Children Legislation Amendment Bill 2009	5
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009	6
Crimes Amendment (Identity Crime) Bill 2009	4, 6
Criminal Procedure Bill 2008	1, 3
Crown Land Acts Amendment (Lease and Licence Terms) Bill 2009	6
Duties Amendment Bill 2008	1
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009	4, 5
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	6
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	6
Equal Opportunity Amendment (Governance) Bill 2008	1
Fair Trading and Other Acts Amendment Bill 2008	1
Gambling Regulation Amendment (Licensing) Bill 2009	2
Human Services (Complex Needs) Bill 2009	4
Justice Legislation Amendment Bill 2009	5, 6
Legislation Reform (Repeals No. 4) Bill 2009	4
Liquor Control Reform Amendment (Enforcement) Bill 2008	1
Macedonian Orthodox Church (Victoria) Property Trust Bill 2009	6
Major Crime Legislation Amendment Bill 2008	3
Major Sporting Events Bill 2009	3, 5
Melbourne Cricket Ground Bill 2008	1
Melbourne University Amendment Bill 2009	3
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1
Parliamentary Salaries and Superannuation Amendment Bill 2009	5
Planning Legislation Amendment Bill 2009	5
Primary Industries Legislation Amendment Bill 2008	4
Relationships Amendment (Caring Relationships) Bill 2008	1
Resources Industry Legislation Amendment Bill 2008	1
Road Legislation Amendment Bill 2009	5
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1, 5
Serious Sex Offenders Monitoring Amendment Act 2009	2, 5
State Taxation Acts Amendment Bill 2009	6
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	4
Superannuation Legislation Amendment Bill 2009	6
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1, 5
Transport Legislation General Amendments Bill 2008	1
Transport Legislation Miscellaneous Amendments Bill 2008	1
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, 5
Criminal Procedure Bill 2008	1, 3

##### (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
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	6
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	6
Justice Legislation Amendment Bill 2009	5
Major Sporting Events Bill 2009	3
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1
Road Legislation Amendment Bill 2009	5
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Serious Sex Offenders Monitoring Amendment Act 2009	2
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	4
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**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
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	Attorney-General	04.02.09	1 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	Attorney-General	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**

---

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	Attorney-General	31.03.09	4 of 2009
Justice Legislation Amendment Bill 2009	Racing	08.05.09 29.05.09	5 of 2009 6 of 2009
Road Legislation Amendment Bill 2009	Roads and Ports	06.05.09	5 of 2009
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	Energy and Resources	02.06.09	6 of 2009
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	Ms Colleen Hartland MLC	02.06.09	6 of 2009
Superannuation Legislation Amendment Bill 2009	Finance	02.06.09	6 of 2009