

No. 8 of 2009

Tuesday, 28 July 2009

On the

Courts Legislation Amendment
(Sunset Provisions) Bill 2009

Energy Legislation Amendment Bill 2009

Human Tissue Amendment Bill 2009

Primary Industries Legislation Further
Amendment Act 2009

Residential Tenancies Amendment
(Housing Standards) Bill 2009

Superannuation Legislation
Amendment Bill 2009

Tobacco Amendment (Protection
of Children) Bill 2009

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Glossary and Symbols



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

Useful provisions

Section 7 of the **Charter** provides –

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

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

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

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



Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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

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

The Committee has considered the following Bills –

Courts Legislation Amendment (Sunset Provisions) Bill 2009
Human Tissue Amendment Bill 2009
Primary Industries Legislation Further Amendment Act 2009
Residential Tenancies Amendment (Housing Standards) Bill 2009
Tobacco Amendment (Protection of Children) Bill 2009 Bill 2009

The Committee notes the following correspondence –

Energy Legislation Amendment Bill 2009
Superannuation 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.

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Courts Legislation Amendment (Sunset Provisions) Bill 2009

Introduced	23 June 2009
Second Reading Speech	25 June 2009
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Background

The Bill amends the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* to provide for the continued operation of the Neighbourhood Justice Centre for a further 4 years until 31 December 2013. [3]

The Bill makes two statute law revisions to reflect the repeal of certain provisions in other Acts. [4]

The Bill repeals provisions of the *Family Violence Protection Act 2008* to enable the continued operation of the Family Violence Intervention Program. [5]

Charter report

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

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

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

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

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

The Committee makes no further comment.

Human Tissue Amendment Bill 2009

Introduced	23 June 2009
Second Reading Speech	25 June 2009
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Background

The Bill amends sections 21 to 23 of the *Human Tissue Act 1982* (the 'Act') to enable persons who have attained the age of 16 or 17 years to consent to donate blood without their parent's consent. [3]

Notes

1. From the explanatory memorandum – *Sections 21, 22 and 23 provide for the consent requirements for the removal of blood from persons not being children, and from children, for the purposes of blood transfusion to another person or for the purpose of using the blood or its constituents for certain other purposes.*

The definition in new section 20A facilitates blood transfusions and blood donations by reducing the age at which persons can consent on their own behalf to the removal of their blood from 18 years of age to 16 years of age. The general definition of child in section 3 of the Act, for the purposes of sections other than 21, 22 and 23, remains a person who has not attained the age of 18 years and is not married.

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

3. From the second reading speech – *The proposed amendment will affect the provision in the Human Tissue Act relating to blood donation only. It will not apply to other aspects of the Act including organ and tissue donation. The proposed amendment will change the definition of a child for the blood donation provisions of the Act only.*

Charter report

Age discrimination – Donating blood – Consent to medical treatment

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

The Committee notes that clause 3, inserting a new section 20A into the Act, provides that 16 and 17 year-olds will be able to donate blood without their parents' consent.¹

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

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

¹ Under s. 21 of the *Human Tissue Act 1982*.

However, clause 3 preserves the existing law barring children *under 16* from donating blood without parental consent. The Committee considers that this aspect of clause 3, which is not addressed in the Statement of Compatibility, may engage the Charter's rights with respect to age discrimination.²

An inflexible age limitation on blood donations may be inappropriate, given the varying physical and emotional maturity of similarly aged teenagers and the alternative controls on the issues of informed consent and health outlined in the Statement of Compatibility. The Committee notes a recent decision of the Supreme Court of Canada (concerning transfusions rather than donations) holding that a statute governing consent to medical treatment must give 'adolescents under 16 the right to demonstrate mature medical decisional capacity' if it is to be compatible with that nation's rights to bodily integrity and equality.³

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

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

However, the Committee observes that clause 3 does not alter the operation of existing s. 24, which permits non-consensual blood transfusions to be performed on 16- and 17-year-olds in some circumstances. In addition, 16- and 17-year-olds are currently unable to utilise the 'refusal of treatment certificate' process set out in the *Medical Treatment Act 1988*.⁴

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

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

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

The Committee makes no further comment.

² Charter s. 8(2) provides that 'Every person has the right to enjoy his or her human rights without discrimination.'

³ *A.C. v. Manitoba (Director of Child and Family Services)* [2009] SCC 30, [115]

⁴ *Medical Treatment Act 1988*, s. 5(1)(d).

Primary Industries Legislation Further Amendment Act 2009

Introduced	23 June 2009
Second Reading Speech	23 June 2009
Royal Assent	30 June 2009*
House	Legislative Assembly
Member introducing Bill	Hon. Joe Helper MLA
Portfolio responsibility	Minister for Agriculture

***Note:** *The Act received Royal Assent on 30 June 2009 and the Committee provides this report pursuant to section 17(c) of the Parliamentary Committees Act 2003. The Primary Industries Legislation Amendment Act 2009 was given Royal Assent on 30 June 2009.*

Background

The Bill amends the *Primary Industries Legislation Amendment Act 2009* (the 'Legislation') which was expected to have been passed before the end of 2008. The Legislation includes a number of provisions that were to commence on 1 January 2009 and other forced commencement dates that are no longer practical (see extract below). The Bill has been drafted to be passed consecutively with the Legislation to amend its commencement provisions so as to clarify their operation and to avoid any retrospective operation. Other minor amendments are also required that are consequential to the Legislation not being passed before 31 December 2008.

Notes: The commencement provision of the Legislation respectively provided –

- (1) *This Act (except sections 9, 10, 18 and 107 and Division 1 of Part 5 and sections 109 to 119) comes into operation on the day after the day on which it receives the Royal Assent.*
- (2) *Division 1 of Part 5 comes into operation on 1 January 2009.*
- (3) *Subject to subsection (5), sections 9, 10, 18 and 107 come into operation on a day or days to be proclaimed.*
- (4) *Subject to subsection (6), sections 109 to 119 come into operation on a day or days to be proclaimed.*
- (5) *If a provision referred to in subsection (3) does not come into operation before 1 December 2009, it comes into operation on that day.*
- (6) *If a provision referred to in subsection (4) does not come into operation before 31 December 2008, it comes into operation on that day.*

The Bill provides for sections 109 to 119 of the Legislation (amending the *Veterinary Practice Act 1997*) to have a forced commencement on 31 December 2010 in place of 31 December 2008. These provisions implement in Victoria an agreed national model for the national registration of veterinary practitioners. [3]

Note: From the explanatory memorandum – *The delayed forced commencement date will allow sufficient time for this legislation to be implemented in a manner consistent with other state regimes.*

The Committee makes no further comment.

Residential Tenancies Amendment (Housing Standards) Bill 2009

Introduced	24 June 2009
Second Reading Speech	24 June 2009
House	Legislative Council
Member introducing Bill	Mr Greg Barber MLC
Private Member's Bill	

Background

The Bill amends the *Residential Tenancies Act 1997* (the 'Act') to —

- enable the Minister for Housing to set by regulation minimum housing standards for rented premises and rooming houses;
- resolve disputes between tenants and landlords arising from these minimum standards not being complied with.

The Bill inserts a definition of prescribed minimum housing standard into the Act by allowing regulations to be made on a number of listed subject areas pursuant to section 511 of the Act in respect to rented premises and rooming houses. [11]

Extract from the Second Reading Speech

This Bill does not prescribe what these minimum [housing] standards are; this role is rightly left to the Minister who has the resources at her or his disposal to investigate what standards should be implemented and how they can most effectively be targeted. This legislation is pointedly aimed to help those in the darkest corners of the housing market. It would ensure that the places they inhabit have guaranteed minimum standards such as heating, insulation, lighting, adequate plumbing for sanitisation, security requirements and the range of non-exhaustive measures listed in clause 11. Such measures can also improve the energy performance of these dwellings, reducing costs to tenants.

...

There are two main functions that are established by this Bill. Firstly, it vests in the minister the power to set permanent or temporary quality standards for either rooming houses or regular tenancy agreements or both. The second function that the bill provides for is a series of dispute procedures if the landlord does not voluntarily take steps to bring the premises up to the declared standard. The tenant is able to instigate the process by informing the landlord they have not met the required standard. If there has been no action after 28 days, the tenant can inform the director of consumer affairs, who is then obliged to inspect the premises and file a report within 28 days. If the report declares that the dwelling does not meet that standard, then the aggrieved tenant can seek an order from VCAT that the premises be brought up to that standard. The tenant may also seek an order that they withhold their rent from the landlord by paying it into the rent special account.

The Committee makes no further comment.

Tobacco Amendment (Protection of Children) Bill 2009

Introduced	23 June 2009
Second Reading Speech	24 June 2009
House	Legislative Assembly
Minister introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Background

The Bill amends the *Tobacco Act 1987* (the 'Act') in relation to –

- a new offence prohibiting the display of tobacco advertising, including tobacco product display, in retail outlets, with an exemption for 'specialist tobacconists' and on-airport duty-free shops; [39]
- a new offence where a person smokes in a motor vehicle where another person under the age of 18 years is present; [19]
- a new offence prohibiting the sale of tobacco from temporary outlets; [38]
- a new power for the Minister for Health to ban the sale, in certain circumstances, of tobacco products and packaging that appeal to young people, non-tobacco products that resemble tobacco products, and any other product, the nature or advertising of which might encourage young people to smoke; [38]
- amendments implementing a review of penalties and enforcement provisions including new body corporate provisions and extended provisions for the power of the secretary to require disclosures by tobacco companies and wholesalers of information relating to tobacco retailing businesses. [45, 47, 48, 51]

Extracts from the Second Reading Speech –

Point-of-sale display bans

...The Bill provides for a ban on tobacco advertising, including point-of-sale displays, in retail outlets with exemption for specialist tobacconists and the continuation of an exemption for on-airport duty-free shops. Specialist tobacconists and on-airport duty-free shops will remain subject to existing advertising restrictions and prescribed product display areas.

In recognition of the fact that a small number of retail businesses derive their income solely or significantly from tobacco products an exemption from the point-of-sale display ban will be provided for specialist tobacconists which derive 80 per cent or more of their gross turnover from the sale of tobacco products.

... Businesses will be able to advise customers of the availability of tobacco products through the use of prescribed price boards and signage such as a 'cigarettes sold here' sign. The existing prohibition on public tobacco advertising will continue to be enforced by council inspectors, to prevent advertising signs in shop windows promoting cigarettes and other tobacco products. [4 to 6], [39]

Smoking in cars carrying children

... This new offence will be enforced by police members, who are given appropriate powers in the Bill to direct motorists to stop and to issue infringement notices. The maximum penalty for breaching this ban will be 5 penalty units, with an infringement penalty of 2 penalty units. [19], [40 to 46]

Ministerial power to make ban orders

... Giving the Minister for Health the ability to ban products that appeal to young people will allow current products to be quickly removed from the market and enable the government to respond rapidly if products emerge in the future.

... This reform will enable the secretary to recommend to the Minister for Health to ban the retail and wholesale sale of products which meet the following criteria:

- tobacco products, or the smoke of such products, possessing a distinctive fruity, sweet or confectionery-like character; or
- tobacco products that have packaging that appeals to young people;
- non-tobacco products that resemble tobacco products; or
- any other product, the nature or advertising of which might encourage young people to smoke; and with regard to the objectives of the act, the supply of those products should be prohibited.

The overriding condition for a ban order recommendation from the secretary is that, with regard to the objectives of the act, the supply of those products should be prohibited. The minister may take immediate action without a recommendation if the product or class of products has been prohibited or restricted under a prescribed corresponding law. For example, the South Australian tobacco legislation will be prescribed so the products that are prohibited under that legislation's corresponding provisions may quickly be banned from sale in Victoria. [38]

Temporary sales

The Bill provides for the prohibition of sales of tobacco products from 'temporary outlets', being temporary in terms of:

- structure: being sold from a temporary display stand, booth, tent or temporary or mobile structure; or temporary in terms of
- time: being sold from a retail outlet that is established in an area or premises for the duration of a specific sports, music or arts-related function or event in that area or premises. [38]

Content and Committee comment

The provisions of the Bill commence on 1 January 2010 except for Part 2 of the Bill which comes into operation on 1 January 2011.

Note: From the explanatory memorandum – *The delayed commencement of Part 2 of the Bill is necessary to ensure that the retail outlets affected by the restrictions on tobacco advertising imposed by Part 2 have time to prepare for the restrictions by either changing their tobacco display arrangements or applying for certification as specialist tobacconists.*

New section 5U provides that in proceedings for an offence against new section 5S (offence to smoke in car if person under 18 is present) evidence that a person present in the relevant motor vehicle appeared to be under the age of 18 is, in the absence of evidence to the contrary, proof that the person was under the age of 18. [19]

Ban orders

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

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

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

Specialist tobacconist certificates

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

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

The Bill substitutes the Schedule of infringement offences with a new Schedule that includes separate penalties for natural persons and for bodies corporate. In comparison to the current Schedule, the new Schedule also includes some higher penalties and infringement penalties for some of the new offences introduced by the Bill. [51]

Charter report

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

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

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

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

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

While the Committee agrees that criminalising the first scenario positively engages the Charter right of children 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child', the Committee is concerned that the second scenario may not. Indeed, **this aspect of the new s. 5S may partially criminalise teen smoking and hamper the free association and movement of older teenagers**, in situations where no vulnerable people are being exposed to second-hand smoking.⁵ The Committee therefore considers that the second scenario may negatively engage older teenagers' Charter rights to association and protection.⁶

⁵ As the Committee explained in its *Alert Digest No 8 of 2008*, there is a considerable debate about whether criminalising smoking by children will promote or hamper the effort to prevent children from become addicted to tobacco.

⁶ See Charter ss. 16(1) & 17(2).

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

- providing that the offence cannot be committed by minors or restricting its enforcement against minors⁷
- limiting the offence to where the passenger is under 16⁸
- providing a defence when the smoker and passenger are similar ages.

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

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

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

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

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

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

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

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

⁷ E.g. s. 15K of the *Tobacco Act 1987*, providing that minors cannot be convicted of a number of offences (including smoking at under-age venues). See also the *Public Health Act 1997* (Tas), which bans arrests of children for offences against officers enforcing the ban and barring the issuing of infringement notices against children under 16.

⁸ E.g. *Public Health (Tobacco) Act 2008* (NSW), s. 30; Health and Other Legislation Amendment Bill 2009 (Qld), clause 180; *Tobacco Products Regulation Act 1997* (SA), s. 48; ACT Health, Consultation Paper, 'Exploring Options for Managing Smoking in Motor Vehicles When Children Are Present'. See also Tobacco Products Control Amendment Bill 2008 (WA), which is limited to passengers under 17.

section 5U therefore may cause innocent people to be convicted of offences against new section 5S.

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

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

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

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

Doubling of penalties – Adequacy of statement of compatibility

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

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

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

The Statement of Compatibility does not address these clauses.

While the Committee feels that a Statement of Compatibility need not address minor changes in offence penalties (such as the 20% increases in fines provided for in clauses 25 and 27(3)). However the Committee considers that Statements should address the impact of a provision doubling a fine for an offence on any rights engaged by that offence. In particular, the Statement should address whether or not the new penalty is a proportionate means of achieving the purpose of any provision limiting rights.⁹

The Committee will write to the Minister concerning the Statement of Compatibility with respect to clauses 12 to 18, 27(1), 34 and 35.

The Committee makes no further comment.

⁹ See *Coleman v Australia*, Communication No. 1157/2003, UN Human Rights Committee, [7.3]

Ministerial Correspondence

Energy Legislation Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 5 May 2009 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 1 June 2009 and made the following comments in Alert Digest No. 6 of 2009 tabled in the Parliament on 2 June 2009.

Committee's Comments

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. Bills for those proposed modifications are presently before South Australia's parliament. 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.

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. 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. **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 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. One purpose of the Bill is to facilitate the transfer of functions, including public functions, from VENCORP to the Australian Energy Market Operator. VENCORP, which is established by a Victorian statute, is likely to be a public authority under the Charter. 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. **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.

Minister's Response

I refer to your letter dated 2 June 2009, regarding the Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 (the Bill).

The Bill is part of a ten year process of developing the national energy market. The Bill transfers the rights, responsibilities, assets and liabilities of the Victorian Energy Networks Corporation (VENCorp) to a new national energy market operator, the Australian Energy Market Operator (AEMO).

In April 2007, the Council of Australian Governments agreed to establish a single, industry funded national energy market operator, to be called AEMO, for both electricity and gas, to strengthen the national character of energy market governance.

Answers to the specific questions raised by the Committee are set out below:

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?

As noted by the Committee, in addition to considering the amendments being made by the Bill, the Charter Statement of Compatibility (the Statement) examines the amendments to the National Gas Law (NGL) and the National Electricity Law (NEL) to be made by the South Australian Parliament.

As detailed in the Statement and Second Reading Speech for the Bill, the NGL and NEL exist in South Australian Acts and are applied as laws of Victoria through operation of section 7 of the National Gas (Victoria) Act 2008 and section 6 of the National Electricity (Victoria) Act 2005 (Victorian application Acts).

Consequently, any amendments made to the NGL or NEL will not come before the Victorian Parliament for counterpart amendment but will apply automatically to Victoria through the Victorian application Acts. Any proposed amendments to those national laws will, however, require unanimous agreement by all jurisdictions through the Ministerial Council on Energy. Further, a Victorian Bill can disapply or modify the application of the national laws, in whole or in part.

It is considered that the passage or non-passage of the present Bill will not alter the human rights impact (if any) of the planned amendments to the national law, in that none of its clauses touch upon those aspects of the proposed amendments to the national laws that may engage the Charter.

2. Whether the Australian Energy Market Operator is a public authority for the purposes of the Charter?

Section 6 of the Charter provides that the Charter applies to public authorities.

Section 4(1)(b) of the Charter defines a public authority as being an entity established by statutory provision that has functions of a public nature. In addition, section 4(1)(c) of the Charter provides that a public authority is an entity whose functions are, or include, functions of a public nature, when it is exercising those functions on behalf of the State.

The proposed amendments to the NGL (section 91B) and NEL (section 50(2)) confer functions and powers of a public nature on AEMO, including responsibility for the operation and administration of the national electricity and gas markets and ensuring the security of gas transmission and power systems.

Accordingly, it is considered that AEMO will be a public authority for the purposes of the Charter as the functions and powers conferred on it are of a public nature.

I thank you for raising these issues with me.

Peter Batchelor MP
Minister for Energy and Resources

15 July 2009

The Committee thanks the Minister for this response.

Superannuation Legislation Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 5 May 2009 by the Hon. Tim Holding MLA. The Committee considered the Bill on 1 June 2009 and made the following comments in Alert Digest No. 6 of 2009 tabled in the Parliament on 2 June 2009.

Committee's Comments

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.) **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.***

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.

Minister's Response

Thank you for your letter of 2 June 2009 in which you advise that the Scrutiny of Acts and Regulations Committee does not believe that the Superannuation Legislation Amendment Bill 2009 is compatible with the Charter of Human Rights and Responsibilities.

I understand that the Committee is concerned that the prospective application of the reinstatement of reversionary spouse pensions may engage the Charter right of eligible people to "equal and effective protection against discrimination" on the ground of marital status. The Committee has expressed particular concern as to any delay in an eligible

person's application affecting their entitlement to reinstatement. The Committee has requested information as to how eligible people will be informed of their entitlements and provided with information on how to apply.

I appreciate the Committee's comments on this issue and understand the importance of its responsibility in scrutinising bills introduced into Parliament and, in particular, the Committee's role in assessing the compatibility of proposed bills with the human rights set out in the Charter. However, the Government remains of the view that the reinstatement of reversionary spouse pensions does not impose any limits upon the equality right in section 8 of the Charter but rather "will redress the historical discrimination on the basis of marital status that occurred when reversionary spouse pensions were cancelled upon remarriage." Further, the Government maintains that any historical discrimination was reasonable and can be justified under section 7(2) of the Charter.

The Government notes that the enactment of reversionary spouse pensions and their cessation upon remarriage was upon the recommendation of the Victorian Equal Opportunity Board on the basis of a 'needs' approach as outlined in the Report of the Equal Opportunity Board into Discrimination in Superannuation and Pension Schemes (1980).

The provisions resulting in cessation of reversionary pensions upon remarriage were removed in 1993, but these provisions did not retrospectively reinstate pensions that had already ceased. The Human Rights and Equal Opportunity Commission subsequently rejected complaints that the failure to reinstate reversionary spouse pensions was a breach of the Sex Discrimination Act 1984 (Cth).¹ Other jurisdictions, such as Canada, have also rejected claims that provisions such as these are discriminatory on the basis that any difference in treatment arises as a result of the date of remarriage rather than marital status.²

The Government notes that society, and particularly the position of women, has changed since the recommendations of the Victorian Equal Opportunity Board in 1980. As the House of Lords has made clear, considerable deference should be accorded to Parliament in addressing discrimination which was historically justified, but with changes in society can no longer be justified.

The reinstatement of a surviving spouse's pension can impact upon the pensions paid to other dependents of the deceased member. Accordingly, it would not be appropriate to reinstate a pension prior to the date of application.

However, I acknowledge that in order to take advantage of the changes in entitlements, affected people will need to be aware of the changes. With this in mind, I have asked ESSSuper to write to all eligible former pensioners and provide them with information regarding the changes to entitlements and how to make an application. ESSSuper has advised that an announcement of the change in entitlements will also be posted on its website.

TIM HOLDING MP

*Minister for Finance, WorkCover
and the Transport Accident Commission*

30 June 2009

The Committee thanks the Minister for this response.

Further Committee comments

The Committee notes the Minister's view that 'the reinstatement of reversionary spouse pensions does not impose any limits upon the equality right in section 8 but rather "will redress historical discrimination on the basis of marital status that occurred when reversionary spouse pensions were cancelled upon remarriage".'

¹ *Southwell v Victorian Superannuation Board* [1997] HREOCA 45 (31 July 1997).

² See, for example, *Bauman v Nova Scotia (Attorney-General)* (2001) NSCA 51; *Howe v Canada (Attorney General)* 2007 BCCA 314.

The Committee observes that there are several different equality rights in Charter s. 8. While most of the rights in Charter s. 8 are engaged by bills that are discriminatory, an additional one – Charter s. 8(3)'s right to 'equal and effective protection against discrimination' – is engaged by bills that redress discrimination. The Committee considers that, where such a bill provides only limited redress and/or excludes some affected people from that redress, the statement of compatibility should explain how any limitations and exclusions are reasonable according to the test in Charter s. 7(2). This applies when or not the bill is beneficial in purpose; any historical discrimination can be justified; or the limitations or exclusions are based on attributes of discrimination set out in s. 6 of the *Equal Opportunity Act 1985*.

The Committee also notes that the tribunal and court decisions cited by the Minister do not address the merits of either the past or present rules on reversionary pensions. The HREOC complaint was dismissed because of a statutory exemption for superannuation schemes. The Canadian complaints were dismissed because the Canadian Charter does not apply retrospectively and the prospective discrimination fell outside of the protection of the Canadian Charter's anti-discrimination right. Neither jurisdiction has a right analogous to Charter s. 8(3)'s right to 'equal and effective protection against discrimination.' The Committee also observes that the Canadian legislation reinstating past reversionary pensions did so retroactively to the date of commencement of the Charter's equality right.

While the Committee appreciates the complexity of superannuation schemes as outlined in the Minister's letter, it considers that such matters should be dealt with in the statement of compatibility in the context of a Charter s. 7(2) analysis that both demonstrates the justification for the limitations and addresses the availability of less restrictive alternatives.

The Committee will write to the Minister seeking further information as to whether or not making the reinstated pension available from a fixed date (such as the commencement of the Bill or Charter s. 8) instead of the date of the application is a less restrictive alternative reasonably available to achieve the purpose of redressing historical discrimination.

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

**Committee Room
27 July 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, 5
Casino Legislation Amendment Bill 2009	7
Children Legislation Amendment Bill 2009	5
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009	6
Courts Legislation Amendment (Sunset Provisions) Bill 2009	8
Crimes Amendment (Identity Crime) Bill 2009	4, 6
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Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009	4, 5
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Gambling Regulation Amendment (Licensing) Bill 2009	2
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State Taxation Acts Amendment Bill 2009	6
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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)

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

Tobacco Amendment (Protection of Children) Bill 2009 8

(vi) inappropriately delegates legislative power

Bus Safety Bill 2008 1, 5

Criminal Procedure Bill 2008 1, 3

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

Bus Safety Bill 2008 1

Courts Legislation Amendment (Sunset Provisions) Bill 2009 8

Crimes Amendment (Identity Crime) Bill 2009 4

Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 6

Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 6

Fair Work (Commonwealth Powers) Bill 2009 7

Human Tissue Amendment Bill 2009 8

Justice Legislation Amendment Bill 2009 5

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

Tobacco Amendment (Protection of Children) Bill 2009 8

Transport Legislation Amendment (Driver and Industry Standards) Act 2008 1

Section 17(b)

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

Criminal Procedure Bill 2008 1

Equal Opportunity Amendment (Governance) Bill 2008 1

Appendix 3

Ministerial Correspondence

Table of correspondence between the Committee and Ministers during 2008-09

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Assisted Reproductive Treatment Bill 2008	Health	06.11.08 08.12.08	12 of 2008 1 of 2009
Major Crime Legislation Amendment Bill 2008	Attorney-General	02.12.08 23.02.09	15 of 2008 3 of 2009
Primary Industries Legislation Amendment Bill 2008	Agriculture	02.12.08 10.03.09	15 of 2008 4 of 2009
Relationships Amendment (Caring Relationships) Bill 2008	Attorney-General	02.12.08 19.12.08	15 of 2008 1 of 2009
Bus Safety Bill 2008	Public Transport	04.02.09 30.03.09	1 of 2009 5 of 2009
Criminal Procedure Bill 2008	Attorney-General	04.02.09 23.02.09	1 of 2009 3 of 2009
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	Industrial Relations	04.02.09 29.06.09	1 of 2009 7 of 2009
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	Finance	04.02.09 21.04.09	1 of 2009 5 of 2009
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Public Transport	04.02.09 30.03.09	1 of 2009 5 of 2009
Salaries Legislation Amendment (Salary Sacrifice) Act 2008 AND Transport Legislation Amendment (Driver and Industry Standards) Act 2008	WorkCover Public Transport	04.02.09	1 of 2009
Serious Sex Offenders Monitoring Amendment Act 2009	Corrections	26.02.09 22.04.09	2 of 2009 5 of 2009
Major Sporting Events Bill 2009	Minister for Sport & Recreation	20.03.09 01.04.09	3 of 2009 5 of 2009
Crimes Amendment (Identity Crime) Bill 2009	Attorney-General	31.03.09 04.05.09	4 of 2009 6 of 2009
Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009	Energy and Resources	31.03.09 09.04.09	4 of 2009 5 of 2009

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Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009	Attorney-General	31.03.09 04.06.09	4 of 2009 7 of 2009
Justice Legislation Amendment Bill 2009	Racing	08.05.09 29.05.09	5 of 2009 6 of 2009
Road Legislation Amendment Bill 2009	Roads and Ports	06.05.09	5 of 2009
Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009	Energy and Resources	02.06.09 15.07.09	6 of 2009 8 of 2009
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009	Ms Colleen Hartland MLC	02.06.09 04.06.09	6 of 2009 7 of 2009
Superannuation Legislation Amendment Bill 2009	Finance	02.06.09 30.06.09 28.07.09	6 of 2009 8 of 2009 8 of 2009
Fair Work (Commonwealth Powers) Bill 2009	Industrial Relations	23.06.09	7 of 2009
Courts Legislation Amendment (Sunset Provisions) Bill 2009	Attorney-General	28.07.09	8 of 2009
Human Tissue Amendment Bill 2009	Health	28.07.09	8 of 2009
Tobacco Amendment (Protection of Children) Bill 2009	Health	28.07.09	8 of 2009