No. 1 of 2010

Tuesday, 2 February 2010

On the

Accident Compensation Amendment Bill 2009

Constitution (Appointments) Bill 2009

Crimes Legislation Amendment Bill 2009

Education and Training Reform Amendment Bill 2009

Legislation Reform (Repeals No. 6) Bill 2009

Livestock Management Bill 2009

Magistrates' Court Amendment (Mental Health List) Bill 2009

Public Finance and Accountability Bill 2009

Serious Sex Offenders (Detention and Supervision) Bill 2009

Severe Substance Dependence Treatment Bill 2009

Summary Offences and Control of Weapons Acts Amendment Bill 2009

Transport Integration Bill 2009

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Glossary and Symbols

'*Article*' refers to an Article of the International Covenant on Civil and Political Rights;

'*Assembly*' refers to the Legislative Assembly of the Victorian Parliament;

'*Charter*' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006;*

'*child*' means a person under 18 years of age;

'*Committee*' refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;

'*Council*' refers to the Legislative Council of the Victorian Parliament;

'*court'* refers to the Supreme Court, the County Court, the Magistrates' Court or the Children's Court as the circumstances require;

'*Covenant*' refers to the International Covenant on Civil and Political Rights;

'*human rights'* refers to the rights set out in Part 2 of the Charter;

'***penalty units'*** refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette *(*currently one penalty unit equals $116.82).

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.

'***VCAT***' refers to the Victorian Civil and Administrative Tribunal;

'[ ]' denotes clause numbers in a Bill.

Useful provisions

Section 7 of the ***Charter*** provides –

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

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the imitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

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

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

Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –

  (i) trespasses unduly upon rights or freedoms;

  (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;

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

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

  (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;

  (vi) inappropriately delegates legislative power;

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

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

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –

  (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;

  (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;

  (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975,* but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –

  (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or

  (ii) within 10 sitting days after the Act receives Royal Assent —

  whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;

(d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;

(e) the functions conferred on the Committee by the *Environment Protection Act 1970*;

(f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;

(fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;

(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

The Committee has considered the following Bills –

Accident Compensation Amendment Bill 2009
Crimes Legislation Amendment Bill 2009
Education and Training Reform Amendment Bill 2009
Legislation Reform (Repeals No. 6) Bill 2009
Livestock Management Bill 2009
Magistrates' Court Amendment (Mental Health List) Bill 2009
Public Finance and Accountability Bill 2009
Severe Substance Dependence Treatment Bill 2009
Transport Integration Bill 2009

The Committee notes the following correspondence –

Constitution (Appointments) Bill 2009
Serious Sex Offenders (Detention and Supervision) Bill 2009
Summary Offences and Control of Weapons Acts Amendment Bill 2009

Scrutiny of Acts and Regulations Committee

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. 1 of 2010

Accident Compensation Amendment Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Minister for Finance, WorkCover and the Transport Accident Commission

Purpose and Background

The Bill amends the *Accident Compensation Act 1985* (the Act) mainly in response to recommendations made in a review of the Act undertaken by Mr Peter Hanks, QC.

The Bill introduces a package of reforms for the operation of the compensation scheme that applies to injured workers under the Act. Major provisions in the Bill include to –

1. *increase compensation and benefits available to the dependants and other family members of deceased workers and will allow for provisional payments to be made at the discretion of the Authority.*

2. *simplify formalities in making a claim.*

3. *increase weekly compensation payments.*

4. *allow non-dependant members of the deceased's family to receive some compensation who would otherwise suffer financial disadvantage because of the worker's death.*

5. *align the maximum amount of lump sum benefits payable to the most severely permanently impaired workers with the maximum amount available at common law for pain and suffering damages for workers with a serious injury.*

6. *increases lump sum payments by 10 per cent for workers with spinal injuries.*

7. *provide compensation in the form of superannuation contributions for long-term injured workers.*

8. *increase the maximum weekly payment to eligible workers in the future to $1753.80 to reflect double Victoria's average weekly earnings and double the period during which overtime and shift allowances are included in pre-injury average weekly earnings for the purpose of calculating the worker's weekly compensation payments, from 26 weeks to 52 weeks.*

9. *enable workers to receive up to 13 weeks of weekly compensation payments to allow these workers sufficient time to recover where the worker has a work capacity after 130 weeks of compensation payments, but who subsequently requires surgery because of their injury and need time off work.*

10. *insert a new Part VIIB concerning 'return to work' to clarify the duties of employers and workers in relation to return to work. A staged approach has been introduced to any compensation penalties that might be imposed on the worker for failing to comply with their return-to-work obligations. The powers of the return-to-work inspectorate are also being*

increased to have similar powers to those exercised by their counterparts under occupational health and safety legislation, including the power to issue improvement notices to employers.

11. *provide new anti-discrimination provisions will generally align with the provisions prohibiting discrimination under the Occupational Health and Safety Act and broaden the range of conduct that will be captured under the offence of discriminatory conduct for a prohibited reason. This will prohibit conduct including dismissal, altering the position of a worker to their detriment, treating a worker less favourably and threatening to do these things. In addition, it will be an offence in some circumstances for employers to refuse employment to an applicant for employment where that refusal is relevantly connected to compensation matters.*

12. *make a number of amendments to promote the efficiency of the conciliation process for workers and employers before the Accident Compensation Conciliation Service.*

13. *remove the limitations on the jurisdiction of the Magistrates' Court to deal with workers compensation claims in order to improve access for injured workers.*

14. *introduce a process for review of aspects of premium calculation via WorkSafe and the Supreme Court.*

15. *provide for the review of the setting of premiums by an independent expert body.*

Content and Committee comment

Retrospective application of provisions

The Bill provides for different commencement dates for various provisions in the Bill. **[2]**

The Bill includes several provisions that commence with retrospective effect as far back as 3 December 2003. In each instance the Committee is of the opinion that either no or insufficient explanation is provided to the Parliament as to the significance of the retrospective date chosen and whether any person may be adversely effected by the retrospective commencement. **[49(1), 52, 57(4) and 57(5)]**

Rights or Freedoms – Retrospective commencement – Inadequate explanatory material – Parliamentary Committees Act 2003, section 17(a)(i) – Clauses 49(1), 52, 57(4) and 57(5).

The Committee draws attention to item 1.1 of the Practice Note No. 1 of 2005 concerning unexplained retrospective provisions. The Committee further considers that insufficiently explained legislative provisions may insufficiently subject the exercise of legislative power to proper parliamentary scrutiny.

The Committee will seek further advice from the Minister concerning the significance of the dates chosen for retrospective commencement and whether any person is adversely affected by these provisions.

The Committee draws attention to these provisions.

Reverse onus in civil proceedings – Discriminatory conduct for prohibited reason – Criminal offence and civil proceedings by employee

1. Offence by employer to engage in discriminatory conduct

The Bill restates in an expanded form (242AA and 242AB)) the current offences in section 242(2) and (3) of the Act in respect to discriminatory conduct (defined by new section 242AA(2) e.g. dismisses, treats less favourably or imposes a detriment on the employee). New section 242AA provide for offence proceedings against employers or prospective employers (the employer) who have engaged in discriminatory conduct for a prohibited

reason, as defined by new section 242AA (e.g. an employee makes a claim, notice of injury or co-operates with inspectors). Where in proceedings for an offence under the section all the facts constituting the discriminatory conduct are proved by the prosecution the employer bears the burden of adducing evidence that the reason alleged in the charge was not the dominant reason why the employer engaged in the conduct (section 242AA(6). The section also provides a number of defences in such a proceedings (new section 242AA(7). **[23]**

2. Civil proceedings brought by employee

The Bill inserts new provisions in respect to civil proceedings relating to discriminatory conduct. New sections 242AD and 242AE provide for civil proceedings against employers or prospective employers (the employer) who have engaged in discriminatory conduct for a prohibited reason, as defined by new section 242AA. Where in a civil proceedings all the facts constituting the discriminatory conduct are proved by the applicant the employer bears the burden of adducing evidence that the reason alleged in the charge was not a substantial reason why the employer engaged in the conduct. The section also provides a number of defences in such a proceedings (new section 242AD(8). **[23]**

Rights or freedoms – Reverse onus – Regulatory scheme – Presumption of innocence

The Committee has previously noted offence provisions where a reverse onus applies in respect to adducing evidentiary facts or where a legal burden rests with the defendant in establishing a defence. The Committee considers that such provisions may be justified where evidence is in the exclusive or peculiar knowledge of the defendant, where the penalty for the offence is a pecuniary fine and does not involve imprisonment and where the legislative scheme involves public health or safety. The penalty in this instance is 240 penalty units for a natural person and 1200 penalty units for a body corporate.

The Committee draws attention to the provisions.

Rights or freedoms – Privilege against self-incrimination – Privilege does not apply to production of documents – Fair trial

The Bill inserts a new protection against self-incrimination provision (new section 248D) in Part VIII (General) of the Act. The privilege protects a natural person from being compelled to give information or do any other thing that the person is required to do under the Act or the regulations if giving the information or doing the other thing would tend to incriminate the person. The privilege however does not apply to the production of documents required to be kept and produced under the Act. **[133]**

In respect to the justification for the abridgement of the privilege in respect to the requirement to produce documents in the Statement of Compatibility –

> *The High Court of Australia has recognised that the application of the privilege to documentary material is potentially less far reaching, than the protection for oral answers.* Furthermore, an abrogation of the privilege against self-incrimination in the case of compelled production of already existing documents may be considerably easier to justify than an abrogation of the privilege in the case of oral testimony or documents that are brought into existence to comply with a request for information … the Act establishes a compulsory compensation scheme which involves the keeping of records. Disclosure of these documents is necessary to ensure the purposes of the Scheme are respected and offences under the Act are investigated. … the limit is reasonable and proportionate to the objectives of ensuring reasonable prosecuting prospects for offences against the Act.*
>
> ** Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477 at p. 502, 527 and 555.*

The Committee notes the useful remarks concerning this provision in the section 7(2) analysis of the Statement of Compatibility provided by the Minister. **[133]**

Penalties under the Act

Part 15 of the Bill makes provision for the revision of penalties under the Act. The Bill repeals the general penalty section 251 **[176]** and introduces specific penalties in a number of offence provisions throughout the Act and increases penalties in some instances that currently provide specific offence penalties. **[156 to 175]**

The penalty for giving false information statement at a conciliation moves from a maximum of 50 penalty units to 180 penalty units or 6 months imprisonment and a maximum of 900 penalty units for a body corporate. **[156]** The penalty for assaulting or intimidating a person exercising inspection or information gathering powers under the Act (sections 239 and 240) is increased from 25 penalty units or imprisonment for 6 months to 240 penalty units or 2 years imprisonment or both and 1200 penalty units for a body corporate. **[169]**

The penalties in sections 248 and 248AA of the Act respectively for obtaining payment by fraud and bribery are each increased from 100 penalty units or imprisonment for two years to 1000 penalty units or 2 years imprisonment and 5000 penalty units for a body corporate. **[172]**

The penalty for a provider of a professional service to provide another person false or misleading information in respect to a claim for compensation is increased from 20 penalty units or imprisonment for one month to 180 penalty units or 6 months imprisonment or both. **[173]**

Explanatory memorandum

The Committee is concerned that the explanatory memorandum inadequately explains the penalty increases and in many instances only mechanically restate the clause in the Bill itself. Further the Committee considers that where significant penalty increases are proposed the current penalty should be provided as a proper comparator for the Parliament's consideration.

By way of example the Committee has considered clause note 157 which provides '*updates section 58B of the Act to increase the penalty to a maximum of 60 penalty units for a natural person and 300 penalty units for a body corporate'*. In this regard the Committee considers that what is lacking is an explanation of the offence and the comparator current penalty. Without these vital details the Committee does not consider that the Parliament is properly advised to exercise, with informed consent, the legislative powers of the parliament.

Insufficient explanatory materials – Exercise of legislative powers and sufficient parliamentary scrutiny – Parliamentary Committees Act 2003, section 17(a)(vii)

The Committee draws attention to item 1.4 of the Practice Note No. 1 of 2005 concerning insufficient or unhelpful explanatory memorandum.

The Committee will write to the Minister to express concern as to the adequacy of the explanatory memorandum concerning penalty increases.

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

1. The Bill inserts a new section 92D in the Act concerning a new provisional payment regime in respect of the death of a worker (subject to certain circumstances). Provisional payments by the Authority or self-insurer are entirely discretionary under the Act and are not reviewable by any court or tribunal (92D(9)). **[71]** The Bill inserts a new section 252H in the Act to provide that it is the intention of new section 92D as inserted by clause 71 of the Bill to alter or vary section 85 of the *Constitution Act 1975*. **[73]**

2. The Bill introduces Part 2A into the *Accident Compensation (WorkCover Insurance) Act 1993* that provides for a process of review by WorkSafe of premium amounts that are disputed by employers. New sections 35 and 36A(4) effectively provide that proceedings may only be brought as provided under the new Part and not otherwise. **[114]** The Bill inserts a new section 77(3) in that Act to provide that it is the intention of new sections 35 and 36A(4) as inserted by clause 114 of the Bill to alter or vary section 85 of the *Constitution Act 1975*. **[119]**

3. The Bill inserts a new Division 3AA in Part IV of the Act to introduce a limited objection right for employers in connection with initial decisions by WorkSafe to accept liability for certain claims for compensation and restricts the ability of employers to seek judicial review of decisions by WorkSafe not to allow objections that are lodged with WorkSafe out of time. **[91]** The Bill inserts a new section 252M to provide that it is the intention of new sections 114J and 114M as inserted by clause 91 of the Bill to alter or vary section 85 of the *Constitution Act 1975*. **[92]**

4. The Bill inserts a new section 109AA in the Act to provide that an employer may request the Authority for a written statement of the reasons for a decision on a claim and further provides that no proceedings may be brought against the Authority in respect of any question or other mater under the section. **[43]** The Bill further inserts a new section 252L to declare that it is the intention of new section 109AA as inserted by clause 43 of the Bill to alter or vary section 85 of the *Constitution Act 1975*. **[44]**

5. The Bill inserts new subsections 138(6)-138(9) in the Act to authorise WorkSafe to recover, on behalf of employers, certain payments that they have made to workers, and for which they are directly liable, pursuant to certain provisions of the Act. Clause 138(8) excludes any right of appeal or review by employers in respect of such recovery actions. **[122]** The Bill further inserts a new section 252I to declare that it is the intention of section 138 (as amended) by clause 122 of the Bill to alter or vary section 85 of the *Constitution Act 1975*. **[123]**

6. The Bill inserts a new section 242AC into the Act to allow a person to request WorkSafe to bring a prosecution against an employer who contravenes the anti-discrimination provisions under the Act. Where WorkSafe refuses to bring a prosecution, that person can then request that the matter be referred to the Director of Public Prosecutions (the 'DPP') for his consideration. New section 242AC(7) excludes any right of appeal or review in respect of WorkSafe's decision to bring proceedings against an employer after receiving the advice of the DPP. **[23]** The Bill inserts a new section 252J in the Act to provide that it is the intention of new section 242AC(7) as inserted by clause 23 of the Bill to alter or vary section 85 of the *Constitution Act 1975*. **[26]**

7. The Bill inserts section 252AA into the Act to allow a person to request WorkSafe to bring a prosecution against an employer who contravenes a provision of Part VIIB of the Act (Return to Work – as inserted by clause 129 in Part 13 of the Bill). Where WorkSafe refuses to bring a prosecution, that person can request that the matter be referred to Director of Public Prosecutions (the 'DPP') for his consideration. New section 252AA(7) excludes any right of appeal or review in respect of WorkSafe's decision to bring proceedings against an employer following advice from the DPP. **[135]** The Bill inserts a new section 252N in the Act to provide that it is the intention of new section 252AA as inserted by clause 135 of the Bill to alter or vary section 85 of the *Constitution Act 1975*. **[136]**

Section 85 Statements in the Second Reading Speech –

(1)

Clause 71 inserts section 92D into the Accident Compensation Act 1985. Section 92D allows WorkSafe to make provisional payments to the dependants of a deceased worker prior to any formal decision as to their entitlement, subject to certain restrictions. It is the intention of this clause to alter or vary section 85 of the Constitution Act 1975.

The nature of a decision by WorkSafe under clause 71 is a preliminary one and is not ultimately determinative of a dependant's rights to compensation. Where WorkSafe decides not make a provisional payment to a person under this section, that person is then entitled to make a claim under the act in respect of the worker's death. This would have the effect of requiring WorkSafe to make a decision as to the person's entitlement to compensation 'proper' under the act. In the event that WorkSafe were to reject such a claim, the person would then have access to their full court review rights under the act, as is the case for any other disputed claim.

(2)

Clause 114 introduces Part 2A into the Accident Compensation (WorkCover Insurance) Act 1993 ('the Insurance Act') that provides for a process of review by WorkSafe of premium amounts that are disputed by employers.

The clause inserts new sections 32-36M into the Insurance Act that:

- *require employers to first seek review by WorkSafe of their disputed premium before they can bring court proceedings in respect of that dispute; and*
- *restrict the ability of employers to seek review of decisions by WorkSafe not to allow applications for judicial review out of time.*

The new premium review process set out in the Bill is aimed at providing an accessible, low-cost process for employers to challenge premium decisions that will deliver consistency in premium decisions. Employers who remain dissatisfied following a review outcome will continue to have access to their full review rights under the Bill.

The exclusion of applications for review that are made out time ensures that the exercise of WorkSafe's discretion to allow an application that is made out of time is not reviewable.

(3)

Clause 91 introduces a limited objection right for employers in connection with initial decisions by WorkSafe to accept liability for certain claims for compensation. It is the intention of this clause to alter or vary section 85 of the Constitution Act 1975.

The clause inserts new sections 114H-114R into the Accident Compensation Act and restricts the ability of employers to seek judicial review of decisions by WorkSafe not to allow objections that are lodged with WorkSafe out of time.

The exclusion of objections that are lodged out of time ensures that the exercise of WorkSafe's discretion to allow an objection that is made out of time is not reviewable. However employers will continue to have access to the courts outside of the objection process set out in the act.

(4)

Clause 43 introduces a right for employers to request written reasons from agents for certain liability decisions. It is the intention of this clause to alter or vary section 85 of the Constitution Act 1975 by inserting section 109AA which restricts the ability of employers to seek judicial review of the written reasons of those liability decisions.

This is because the review of those liability decisions is already provided for in the internal and external review mechanism introduced by clause 91.

(5)

Clause 122 of the Bill inserts subsections 138(6)-138(9) to authorise WorkSafe to recover, on behalf of employers, certain payments that they have made to workers, and for which they are directly liable, pursuant to certain provisions of the Act. It is the intention of this clause to alter or vary section 85 of the Constitution Act 1975. The clause inserts new section 138(8) to exclude any right of appeal or review by employers in respect of such recovery actions.

The payment amounts that may be recovered under the provision are very small and therefore it would inefficient to provide for appeal or review rights in respect of disputes over whether or what proportion of these payments are recovered.

(6)

Clause 23 of the Bill inserts section 242AC into the Act to allow a person to request WorkSafe to bring a prosecution against an employer who contravenes the antidiscrimination provisions under the Act. Where WorkSafe refuses to bring a prosecution, that person can then request that the matter be referred to the Director of Public Prosecutions for his consideration. New section 242AC(7) excludes any right of appeal or review in respect of WorkSafe's decision to bring proceedings against an employer.

Section 242AC(3) provides an appropriate and proportionate mechanism whereby WorkSafe decisions under this new provision may be subject to scrutiny by an expert body.

(7)

*Clause 135 of the Bill inserts section 252AA into the Act to allow a person to request WorkSafe to bring a prosecution against an employer who contravenes a provision of Part VIIB of the Act.**

Where WorkSafe refuses to bring a prosecution, that person can then request that the matter be referred to Director of Public Prosecutions for his consideration. New section 252AA(7) excludes any right of appeal or review in respect of WorkSafe's decision to bring proceedings against an employer.

Section 252AA(3) provides an appropriate and proportionate mechanism whereby WorkSafe decisions under this new provision may be subject to scrutiny by an expert body.

*Part VIIB is inserted by clause 129 (Part 13) of the Bill relating to return to work employer and employee obligations and the return to work inspectorate

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

The Committee notes that clauses 23, 43, 71, 91, 114, 122 and 135 provide some limitation in bringing proceedings or reviews other than as specified in the provision. Respectively clauses 26, 44, 73, 92, 119, 123 and 136 declare that it is the intention of these limitation provisions to alter or vary section 85 of the Constitution Act 1975.

The Committee having reviewed the section 85 statement made in the Second Reading Speech, the enabling and declaratory clauses, the Statement of Compatibility and the Explanatory Memorandum is of the opinion that the proposed provisions altering or varying section 85 of the Constitution Act 1975 are appropriate and desirable in all the circumstances.

Charter report

Statement of compatibility

The Committee considers that the statement of compatibility provides a very helpful, detailed and balanced analysis of a large number of complex provisions and rights engaged by the Bill.

The Committee makes no further comment.

Crimes Legislation Amendment Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose and Background

The Bill amends the –

1. *Crimes Act 1958* to alter the structure of the penalty provisions established in section 45 for the offence of sexual penetration of a child. This amendment will apply the maximum penalty available under that section (25 years jail) to all offences involving a victim aged under 12. This penalty currently applies to all offences against children under 10. *(Refer to Charter Report)* **[3]**

   Note: *The amendment has the effect that there can be no defence of marriage, mistaken age or consent to an offence against a child under 12.*

   Extract from the Second Reading Speech –

   Section 45 of the Crimes Act establishes the offence of sexual penetration of a child under 16. Three different maximum penalties are provided for:

   - *firstly, if the court is satisfied beyond reasonable doubt that the child was, at the time of the offence, under the age of 10, an offender faces a maximum sentence of 25 years jail;*
   - *secondly, if the court is satisfied beyond reasonable doubt that the child was, at the time of the offence, aged between 10 and 16, and under the care, supervision or authority of the offender, an offender faces a maximum sentence of 15 years jail;*
   - *thirdly, in any other case, an offender faces a maximum sentence of 10 years jail.*

   This Bill will restructure this offence by extending the protection of the most serious of the penalties, 25 years jail, to all children aged under 12. This change will flow on to the other categories of penalty, so that they will apply to offences against children aged between 12 and 16.

   Raising the age limit for the most serious class of offences means that the statutory defences to this offence do not apply to an offence against a child under 12. While there can be a defence of marriage, reasonable mistake as to age or consensual sex between young people where the offence involves a child aged between 12 and 16, none of these will be any defence to an offence against a child aged under 12.

2. *Crimes (Controlled Operations) Act 2004,* the *Fisheries Act 1995* and the *Wildlife Act 1975* to remedy an anomaly in the reporting dates of the chief officer of each law enforcement agency (Department) to the Special Investigations Monitor (the 'SIM') under the respective Acts. The corrections will allow, in each instance, the SIM to report comprehensively on the controlled operations conducted by various agencies. **[4 to 6, 9 to 11 and 13 to 15]**
3. *Evidence (Miscellaneous Provisions) Act 1958* to amend the definition of document in that Act so that it is effectively aligned with the definition of document in the *Evidence Act 2008*. This will ensure consistency between the operation of documentary provisions within the two Acts. **[7]**
4. *Family Violence Protection Act 2008* to adjust the sunset provisions of the Act to allow a longer period of evaluation of the family violence safety notice regime to operate until December 2011. The regime is currently due to sunset in December 2010. **[8]**

   Extract from the Second Reading Speech –

> *An integral feature of that Act was the creation of family violence safety notices. These notices gave police a tool with which they could respond to incidents of family violence that occurred outside court hours.*
>
> *Family violence safety notices are designed to make it easier for police to act quickly, decisively and efficiently to protect victims of family violence. These notices have the same effect as an interim intervention order made by a court to provide legal protection for victims of family violence.*
>
> *A family violence safety notice can contain many of the conditions that a court can include in a family violence intervention order, including requiring a person to leave a residence or prohibiting a person from contacting another person.*

5. *Sentencing Act 1991* to make statute law revision amendments to incorrectly numbered sections in the Act. The Act currently provides that section 130 appears three times. The amendments renumber the sections respectively as sections 139 and 140. **[12]**

Charter report

Children – Fundamental justice – Sexual penetration of 10 and 11 year olds – Abolition of defence of reasonable mistake of age – Abolition of defence of similar age

Summary: Clause 3(5) narrows the current statutory defences to the crime of sexual penetration of children so that they are no longer available to defendants who sexually penetrate children aged 10 or 11. The Committee refers the compatibility of clause 3(5) with the Charter's rights in respect of fundamental justice and to protection of children to Parliament for its consideration.

The Committee notes that clause 3(5), amending existing s. 45(4) of the *Crimes Act 1958*, narrows the current statutory defences to the crime of sexual penetration of children so that they are no longer available to defendants who sexually penetrate children aged 10 or 11.[1]

One defence that will no longer be available to defendants who sexually penetrate children aged 10 or 11 is where:

> *the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or older*[2]

The Committee observes that it would be very rare in practice for a defendant to successfully use this defence in the case of a 10 or 11 year-old child. Rather, as the High Court of Australia recently held, the question of whether or not a defence of reasonable mistake of age should be available to people charged with child sex offences raises a 'common law principle [that] reflects fundamental values as to criminal responsibility'.[3] This issue has arisen repeatedly in overseas courts applying human rights laws, with the highest courts of Canada and Ireland holding that the absence of the defence of reasonable mistake of age is incompatible with defendants' rights to fundamental justice and the highest courts of Hong Kong and the United Kingdom rejecting such arguments.[4]

Another defence that will no longer be available to defendants who sexually penetrate children aged 10 or 11 is where:

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1 The statutory defences in s. 45(4) are expressed as exceptions to the abolition of the defence of consent. As the second-reading speech observes: 'In considering these defences, it must be remembered that the absence of consent is not an element of this offence. Non-consensual sex can always be charged as rape, regardless of the age of the victim and the accused. Rape carries a maximum penalty of 25 years jail.'

2 *Crimes Act 1958*, s. 45(4)(a).

3 *CTM v The Queen* [2008] HCA 25

4 *R v Hess; R v Nguyen* [1990] 2 SCR 906; *C.C. v Ireland & ors* [2006] IESC 33; *So Wai Lun v HKSAR* [2006] 3 HKLRD 39; *R v G* [2008] UKHL 37; *Procurator Fiscal v King* [2009] HCJAC 14.

the accused was not more than 2 years older than the child.[5]

While the Committee considers that there are profound reasons to strongly discourage all sexual acts between children within this age group, it is concerned that making such children potentially liable to conviction for an offence attaching a high stigma that carries a twenty-five year penalty and life-long consequences may engage those children's Charter right to such protection as is in their best interests.[6]

The Statement of Compatibility does not discuss clause 3(5). The Committee notes that clause 3's overall purpose of increasing the maximum penalty for sexual abuse of 10 and 11 year-olds does not require altering any statutory defences. Other possible alternatives to clause 3(5) include making the statutory defences available in all cases (as in offence of indecent acts with children[7]) or providing that children aged 13 or under cannot be convicted of a child sexual offence except in special circumstances (as in Canada.[8])

The Committee refers to Parliament for its consideration the questions of:

- ***whether or not clause 3(5)'s removal of the defence of reasonable mistake of age in the case of sexual penetration of children aged 10 or 11 limits the Charter's rights in respect of fundamental justice[9]***
- ***whether or not clause 3(5)'s removal of the defence of similar age in the case of sexual penetration of children aged 10 or 11 limits the Charter right of children to such protection as is in their best interests***
- ***if so, whether or not clause 3(5) is a reasonable limit on these Charter rights and, in particular, whether there are less restrictive means reasonably available to achieve the purpose of preventing sexual abuse of children aged 10 and 11.***

The Committee will write to the Minister noting that the statement of Compatibility does not discuss 3(5).

The Committee makes no further comment.

5 *Crimes Act 1958*, s. 45(4)(b)

6 Charter, s. 17(2). In Victoria, a child under 14 cannot be convicted unless the prosecution proves that he or she knew that what he or she did was seriously wrong. Children under 10 cannot be convicted in any circumstance: *Children, Youth and Families Act 2005*, s. 344.

7 *Crimes Act 1958*, s. 47(2).

8 See, e.g. *Criminal Code 1985* (Can.), s. 150.1(3), exempting 12 or 13 year-olds from prosecution for child sexual offences 'unless the person is in a position of trust or authority towards the complainant, is a person with whom the complainant is in a relationship of dependency or is in a relationship with the complainant that is exploitative of the complainant.' (Children under 12 are automatically exempt from all criminal responsibility in Canada: s. 13.)

9 Charter ss. 21(1) (liberty), 21(2) (arbitrary detention), 24(1) (fair hearing) & 25(1) (presumption of innocence).

Education and Training Reform Amendment Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Bronwyn Pike MLA
Portfolio responsibility	Minister for Education

Purpose and Background

The Bill makes amendments to the *Education and Training Reform Act 2006* (the 'Act').

The Bill –

- makes changes to the investigation of registered teachers, including widening the grounds on which teachers may be investigated and creating in certain circumstances a requirement to undergo a health assessment;
- provides for the establishment of an informal hearing panel and a medical hearing panel to deal with complaints against registered teachers;
- widens the sanctions available to disciplinary panels under Division 12 of Part 2.6 of the Act;
- provides for the annualised registration of teachers who are registered under section 2.6.9 of the Act;
- alters the constitution of merit protection boards and the council of the Victorian Institute of Teaching (the 'Institute') ;
- provides for registered schools to have ongoing registration with respect to accredited senior secondary courses; and

Extracts from the Second Reading Speech –

> *… Under the reforms contained in this Bill the institute will be governed by a smaller council of 12 members, which will be able to focus on leadership and strategic planning for the institute. The council will continue to consist of both appointed and elected members.* **[13]**
>
> *… Renewal of registration will be annualised, with a straightforward online process being developed to minimise the time spent on this task by teachers. Renewal of teacher registration will occur each year coinciding with the payment by the teacher of the annual fee.*
>
> *… the Act is being amended to raise provisional registration from one to two years. In addition, the Institute will also have the power to grant an additional three-month extension of provisional registration to allow applicants to complete the requirements for full registration.* **[17]**
>
> *… The Bill will amend Part 2.6 of the Act to alter the concept of 'fitness to teach' and introduce the concept of 'suitability to teach'. The term 'suitability to teach' is considered to be a broader term than 'fitness to teach' and allows scope to include criteria relating to an applicant's physical and mental health - as well as their criminal records. In addition to a teacher's record of work in Victoria, the Institute will be able to take account of a teacher's record in other parts of Australia as part of determining a teacher's 'suitability to teach'.* **[16]**
>
> *… The Bill will give the institute the power to investigate allegations below the level of serious misconduct and to impose a greater range of sanctions, including that a teacher undertake specified further education or training and cancelling a teacher's registration for a period of time.* **[27 to 29, 46]**
>
> *… The Bill grants the institute the power to initiate an investigation into a matter in relation to a registered teacher under certain circumstances without a complaint or formal notification. … Under the Bill the institute can initiate an investigation if it believes or has knowledge of a*

registered teacher's serious incompetence, misconduct, serious misconduct, lack of fitness to teach or matters which affect ability to practise as a teacher. **[27, 29 and 30]**

The Bill gives the institute the power to convene medical panels in cases where a registered teacher's ability to practise is seriously detrimentally affected or is likely to be seriously detrimentally affected by a physical or mental impairment. … Where a finding is made by a medical panel that a teacher's ability to practise is seriously detrimentally affected or is likely to be seriously detrimentally affected by a physical or mental impairment, the panel will be empowered to make a determination, including to impose a condition on the teacher's registration or to suspend the registration for a period, subject to a condition specified in the determination. **[41]**

The review recommended that the institute be granted the power to enter into an arrangement with teachers that permits deregistration by mutual consent, without the necessity of an investigation and hearing as a precondition to that deregistration. … The decision to surrender registration will be binding with no right of review. **[26]**

*The Act currently provides that the Disciplinary Appeals Board's function is 'to hear and determine appeals in relation to a decision of the Secretary' in regard to misconduct under Division 10. The Bill will provide the Disciplinary Appeals Board with the power to also hear and determine appeals in relation to a decision of the Secretary made in regard to unsatisfactory performance.***[10]**

The Act will be amended so that registered schools that are also approved to provide an accredited senior secondary course will have ongoing registration to provide the accredited senior secondary course. **[59]**

The Committee makes no further comment.

Legislation Reform (Repeals No. 6) Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Premier

Purpose and Background

The Bill repeals 63 spent or redundant Acts in three (3) categories -

- twenty-three (23) principal Acts. The reasons justifying repeal of these Acts are provided in items 1.1 to 1.23 of the explanatory memorandum.
- thirty (30) amending Acts listed in items 2.1 to 2.13. These Acts include transitional or substantive provisions that are now spent or redundant.
- ten (10) amending Acts which are now wholly in operation and have amended the Acts they were enacted to amend and contain no transitional or substantive provisions.

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

> *The first four Acts in the series repealed 200 principal and amending Acts from the statute book. … The Bill will repeal another 63 spent and redundant Acts, which have been identified as part of an ongoing Government-wide review of the statute book.*

Committee notes

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

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

2. ***No compensation provision*** – The *Land (Revocations and Other Matters) Act 1991 (No. 72 of 1991)* which is to be repealed (see item 1.21 of the explanatory memorandum) includes a provision (section 9) providing that the Crown has no obligation to pay compensation in respect of matters arising under the Act. The Crown's rights in respect to compensation rights are preserved by the operation of section 14 of the *Interpretation of Legislation Act 1984* and section 10 which alters or varies section 85 of the *Constitution Act 1975* because of section 9 is no longer required. There are a number of other principal Acts that are to be repealed containing 'no-compensation' provisions that will also be saved by the operation of section 14 of the *Interpretation of Legislation Act 1984*.
3. ***Committee report to the Parliament*** – On 10 December 2009 the Legislative Assembly referred this Bill to the Committee for further consideration, inquiry and report and the Committee expects to table its report on 23 February 2009.

The Committee makes no further comment.

Livestock Management Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Joe Helper MLA
Portfolio responsibility	Minister for Agriculture

Purpose and Background

The purpose of the Bill is to –

- enable the adoption of agreed Victorian and Australian Standards relating to aspects of livestock management;
- address the current commitment towards national consistency in relation to the adoption and enforcement of livestock management standards;
- provide for compliance with the adopted standards;
- provide a co-regulatory mechanism to be able to recognise existing industry compliance arrangements that operate to demonstrate effective compliance with required livestock management standards;
- address issues and complaints regularly received by government related to aspects of livestock management, particularly animal welfare, biosecurity and traceability, which cannot be resolved via the application of current legislation and are often the basis for significant community attention or concern; and
- provide a framework that will consolidate requirements for livestock management and enable the regulatory system to be better described to the community, as well as improving the clarity around the 'expected practices' for livestock operators.

Extracts from the Second Reading Speech –

> *This Bill is enabling legislation that will allow agreed standards to be prescribed, which will then trigger the Bill's operation. As each set of standards is prescribed, the Bill will require the mandatory implementation of those agreed standards of livestock management across all categories of livestock to which the particular standards apply, from the point of birth to slaughter. The government will administer these standards by assessing, verifying and ensuring their application across Victoria. Those responsible for meeting the standards include all individuals and enterprises involved in the husbandry, handling, management, ownership, transportation and/or slaughter of livestock.*
>
> *…*
>
> *Inspectors will be appointed by the secretary and required to have competency as an 'inspector of livestock' under the Livestock Disease Control Act 1994. Inspectors will operate under this Bill at the same time as managing their responsibilities under the Prevention of Cruelty to Animals Act 1986 and the Livestock Disease Control Act 1994, to ensure improved coordination with the existing legislative tools.*

Content and Committee comment

Inspection, search and seizure powers – Emergency powers – Reverse onus offence provisions

Part 5 of the Bill (clauses 27 to 62) provides for enforcement powers under the proposed Act. The Part makes provision for the appointment and powers of inspectors, power of entry with or without the consent of the occupier, search warrants, emergency powers, search and

seizure powers, power to take samples and photographs, power to stop and detain vehicles, notice to comply, suspension notices and offences and infringement penalties.

The Bill provides for emergency powers and allows an inspector to enter any place to exercise enforcement powers under the Act without the consent if the occupier or a search warrant where the inspector reasonably believes that there has been a breach of the Act or the regulations which has or may result in an emergency. The Bill defines emergency in relation to livestock management as meaning '*an event or situation that threatens animal welfare, human health or biosecurity'*. (*Refer to the Charter Report in respect to this clause*). **[3 and 36]**

Reverse onus offences – Evidentiary burden on defendant – Defence of reasonable excuse, acting reasonably in good faith or in the public interest – Presumption of innocence

The Bill creates an offence of knowingly, recklessly or negligently failing to comply within the time specified with a notice to comply without a reasonable excuse. **[48]**

The Bill also creates an offence of knowingly, recklessly or negligently acting or failing to act in a manner that results in serious risk, to human health, animal welfare, biosecurity, of spreading disease. A person does not commit the offence if they act in good faith or in the public interest. **[50]**

The Committee notes this extract from the Statement of Compatibility –

> *Clause 48 provides that it is an offence to knowingly, negligently or recklessly fail to comply with a notice without reasonable excuse.*
>
> *Clause 50 provides that it is an offence to endanger people, animals or risk disease, with subclause (2) providing that a person does not commit an offence if they were acting reasonably in good faith or in the public interest. Clause 58 provides that a person must not obstruct or hinder an inspector in exercising the inspector's powers under this act without reasonable excuse. These offences are subject to penalties ranging from 10 to 60 penalty units in the case of a natural person.*
>
> *By placing a burden of proof on the defendant with respect to the excuse or exemption that applies to these offences, these provisions engage the right to be presumed innocent. However, as these offences are summary offences they are subject to section 130 of the Magistrates' Court Act. The effect of this section is that an evidential burden lies on the defendant who wishes to rely on the excuse or exception contained in the description of these offences.*
>
> *As a result, the defendant must merely present or point to evidence that suggests a reasonable possibility of the existence of facts that establish the excuse or exception and is not required to prove the excuse or exception.*
>
> *Courts in other jurisdictions have generally taken the approach that an evidential onus on a defendant to raise a defence does not limit the presumption of innocence. However, even if these provisions limit the right to be presumed innocent in section 25(1) of the charter, the limitation would be reasonable and justifiable under section 7(2) of the charter because the excuse and exceptions provided for relate to matters within the knowledge of the defendant. Furthermore, the burdens do not relate to essential elements of the offences and where the defendant meets this burden, the prosecution must rebut the existence of that excuse or defence beyond reasonable doubt.*

The Committee has previously considered reverse onus provisions that require the defendant to establish on the balance of probabilities the existence of facts that point to some exception proviso or excuse. The Committee has noted that such offence provisions may be acceptable –

- *where legislation establishing a regulatory scheme involving public safety or health;*

- *where the defendant is only required to present or point to evidence on the balance of probabilities that suggests a reasonable possibility of the existence of facts that establish the excuse exemption or proviso;*
- *where the penalty provided is not excessive and does not involve a custodial sentence; and*
- *where the shifting of the evidentiary burden to establish the exception or proviso is appropriate given that the facts are exclusively or peculiarly within the knowledge of the defendant.*

The Committee draws attention to these provisions.

Charter report

Privacy – Entry and search without consent or warrant – Event or situation that threatens animal welfare, human health or biosecurity

Summary: Clause 36 provides inspectors with powers to enter and search 'any place' without consent or a warrant if an inspector believes that a contravention has or is likely to result in an emergency. The Committee is concerned that 'emergency' is broadly defined and that the powers are not limited to the circumstance where immediate entry without a warrant is necessary.

The Committee notes that clause 36 provides inspectors with powers to enter and search 'any place' without consent or a warrant if:

> *an inspector… believes, in relation to a place, that there has been a contravention of this Act or the regulations which has resulted in or is likely to result in an emergency.*

The power of entry extends to any 'premises or a vehicle'[10], including private homes and cars. The search powers include searching any premises or vehicle reasonably believed to be 'connected with a regulated livestock management activity', demanding and copying 'any document' that 'the inspector reasonably requires' and requiring 'a person' to 'answer a question to the best of that person's knowledge, information and belief'. The Committee considers that clause 36 engages the Charter right of every Victorian 'not to have his or her privacy…, home or correspondence unlawfully or arbitrarily interfered with'.[11]

The Statement of Compatibility remarks:

> *To the extent that these provisions relate to private information and permit access to residences, they arise in controlled and prescribed circumstances set out in the Bill and are lawful. Procedural safeguards have been included in the Bill in relation to the exercise of these powers.*

However, the Committee is concerned that 'emergency' is defined broadly to mean any 'event or situation that threatens animal welfare, human health or biosecurity.'[12] None of these terms is defined. **Also, the emergency entry powers are not expressly restricted to circumstances where immediate entry without a warrant is necessary**, a requirement that appears in some other emergency provisions.[13]

The Committee refers to Parliament for its consideration the question of whether or not clause 36 limits the Charter's right against unlawful or arbitrary interferences in Victorians' privacy, home or correspondence.

The Committee makes no further comment.

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10 Clause 3.

11 Charter s. 13(a)

12 Clause 3.

13 See, e.g, Clause 126(3)(c) of the Transport Integration Bill 2009, presently before Parliament.

Magistrates' Court Amendment (Mental Health List) Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose and Background

The Bill amends the *Magistrates' Court 1989* (the 'Act') and establishes the Mental Health List (the 'MHL') of the Magistrates' Court of Victoria (the 'Court'). The MHL is a 3 year pilot program.

Extract from the Statement of Compatibility –

> *The Bill will introduce a new procedural framework in the Magistrates' Court of Victoria which is designed to assist courts to appropriately address the issues associated with offending behaviour of accused persons with mental illness and co-occurring impairments. Court-based interventions and support programs which target complex needs of mentally impaired persons have been shown to be effective in reducing the risk factors associated with reoffending.*
>
> *One of the principal features of the Mental Health List (the list) is that it will have a dedicated magistrate who will be actively involved in supervising the progress of the accused's individual support plan. The program will also have a clinical assessment function which will be undertaken by qualified court-based mental health practitioners.*
>
> *The third aspect of the program involves the coordination of health and welfare services which will be undertaken by experienced court-based case managers.*
>
> *A suitable term of court supervision will be determined based on the accused's specific needs and circumstances. It is anticipated that the majority of accused will be discharged from the program within six months. However, the services will be available for up to 12 months where an accused's circumstances require a longer period of care.*

Content

The Bill provides for the Mental Health List (the 'MHL') of the Court (new sections 4S to 4Y) where a criminal proceedings is referred to the MHL by the Court, at a specified venue of the court, where the accused consents to the proceedings being dealt with in the MHL and the proceedings relates to an offence involving serious violence, violence or a sexual offence as defined by new section 4S. The accused must meet certain eligibility criteria (new section 4T). The amendments set out the specific powers of the court in the MHL including the removal or transfer of the proceedings from or to the MHL (4U and 4X). **[5]**

The Bill allows for court rules to be made in respect to the practice and procedure of the MHL. **[6]**

Unless the Parliament enacts extending legislation the amendments made by the Bill are to sunset not later than by 1 August 2013. **[2 and 8]**

The Committee makes no further comment.

Public Finance and Accountability Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Treasurer

Purpose and Background

The Bill proposes a new principal Act concerning public finance, accountability and financial and resource management in Victoria.

The Bill will repeal the *Financial Management Act 1994*, the *Borrowing and Investment Powers Act 1987*, the *Monetary Units Act 2004* and the *Public Authorities (Dividends) Act 1983*. **[54 to 58]**

Extracts from the Explanatory Memorandum –

> *The Bill introduces three key elements to the Victorian public finance framework.*
>
> *First, the Bill establishes a clearer definition of, and a differential framework for, public bodies. Four categories for public bodies will exist, differentiated on the basis of size, complexity and risk profile. The Bill and its supporting frameworks will include minimum standards of public finance for all public bodies in Victoria. However, the differential framework will provide for a fit for purpose application of public finance requirements, reducing the administrative burden for smaller, less complex and lower risk public bodies, while ensuring that the highest standards continue to apply to Departments and the highest categories of public bodies. …*
>
> *Second, the Bill sets out public finance and accountability principles and procurement principles that will apply to all public finance and procurement arrangements in Victoria. In administering the Bill and its supporting frameworks, government must have regard to these principles. …*
>
> *Third, and central to the new principles, is the requirement for government planning, budgeting and accountability processes to focus on the achievement of outcomes. The Bill contains new requirements for government to produce a statement of its intended outcomes for the Victorian community, and regularly report on progress in achieving those outcomes.*

Extract from the Statement of Compatibility –

> *The purpose of the Bill is to enact a cohesive framework for public finance and financial management in Victoria that supports effective government resource allocation and promotes transparent accountability for performance to Parliament. The Bill creates an Act to replace the Financial Management Act 1994, the Borrowing and Investment Powers Act 1987, the Monetary Units Act 2004 and the Public Authorities (Dividends) Act 1983. The Bill will also amend the Constitution Act 1975, the Administrative Arrangements Act 1983 and other related legislation.*
>
> *The main features of the Bill include:*
>
> *(a) the establishment of a differential framework to better account for the range of captured public entities and their differing sizes, complexities and risk profiles;*
>
> *(b) the provision for government's intended outcomes and associated outputs to be the determinants for the whole of cycle planning, resource allocation, resource management and reporting;*
>
> *(c) requirements that all government reporting is clear, accurate, timely and accessible for users;*
>
> *(d) more effective procurement governance that focuses on the probity of high-risk procurement activities of all public entities;*

(e) an extension of the scope of borrowing and investment powers to all public entities, centralising their application through the Treasury Corporation of Victoria; and

(f) clarification of the responsibilities of department heads, accountable officers and public entities in relation to each other, executive government and Parliament.

Content and Committee comment

Delayed commencement

The Bill provides that some provisions will come into operation on 1 July 2011. **[2]**

The Committee refers to item 1.3 of its Practice Note No.1 of 2005

1.3 Unexplained Commencement by Proclamation or Delayed Commencement in excess of 12 months

Where a Bill provides for the commencement of an Act by proclamation and no forced commencement provision is provided OR where the commencement is more than 12 months from Royal Assent, the Committee expects that Parliament will be informed as to the reasons why it is desirable or necessary to employ such a commencement provision. Where there is insufficient information provided to the Parliament, the grounds for any initial adverse report by the Committee will be that such a provision may constitute an inappropriate delegation of legislative power within the meaning of section 17(a)(vi) of the Act.

The Committee draws attention to the Practice Note and will request further information from the Minister as to the necessity or desirability of such a delayed commencement provision.

Repeal of provisions in the Constitution Act 1975

The Bill repeals sections 93 and 94(2) of the *Constitution Act 1975*. These provisions are respectively within Division 1 and 2 of the *Constitution Act 1975* and relate to the consolidated revenue concerning warrants for issue of money by the Governor directed to the Treasurer and a consequential redundant subsection. **[60]**

Note: *The repeal of sections 93 and 94(2) of the Constitution Act 1975 is not subject to the provisions of section 18 of the Constitution Act 1975 concerning Parliaments powers to alter the Constitution Act 1975 (i.e. the special entrenchment provisions).*

The Committee makes no further comment.

Severe Substance Dependence Treatment Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose and Background

The purpose of the Bill is to provide for a legislative regime for Court Orders for the detention and treatment of persons with severe substance dependence. The Bill repeals the *Alcoholics and Drug-dependent Persons Act 1968*.

Submissions received

The Committee received written submissions concerning this Bill from the following organisations –

- Human Rights Law Resource Centre
- Youthlaw
- Fitzroy Legal Service Inc.
- Victorian Aboriginal Legal Service Co-operative Ltd.
- Federation of Community Legal Centres.
- PILCH Homeless Person's Legal Clinic.
- Harm Reduction Victoria Inc.

These submissions will be posted on the Committee's website: www.parliament.vic.gov.au/sarc

In brief the submissions make the following contentions –

- *There is insufficient evidence or research concerning harm reduction outcomes or evidence of positive long term behavioural effects where involuntary detention schemes are employed to justify the proposed legislation. There are studies in New Zealand that cast doubt on the efficacy of involuntary treatment schemes compared to other mechanisms. The proponents of the legislation bear the onus of proving the benefits and need for the legislation.*
- *The Alcoholics and Drug-dependent Persons Act 1968 was a regressive piece of legislation which even for its time showed a lack of understanding of the social complexities of drug dependence and the approach to tackle it. Dependence does not necessarily equate with an inability to make a free and informed decision regarding treatment.*
- *Involuntary treatment should not be imposed on a person who has the legal capacity to provide free and informed consent.*
- *Internal motivation is likely to be a more compelling factor in achieving positive outcomes. Given that the scheme infringes a number of basic human rights, the Minister should provide further evidence to justify the Bill and lacking that further evidence the Committees should report that the Bill is incompatible with the Charter.*
- *There are effective less restrictive options available to government including education strategies, counselling, group therapy and access to voluntary treatment programs.*
- *Broader community consultation should have taken place.*
- *Parents, spouses de-facto partners and others who apply for orders risk alienating the subject of the order which may contribute to exacerbating the persons dependency problem.*

- *The term severe substance dependence (section 5) and the criteria for an order in section 8 are too broad to be a meaningful or reliable threshold test. The Bill should not apply to person who retain legal capacity and choose to refuse treatment. The broad criteria suggests that potentially a larger group of persons will be captured within the Act's ambit.*

- *Involuntary treatment runs the risk of subsequent overdose due to reduced tolerance produced by periods of involuntary abstinence.*

- *Detention without any specific wrong doing would act as a discriminatory law in respect to drug dependent persons and will have harmful impact on drug users and their relationships with likely applicants for such orders.*

- *Involuntary detention where no offence has been committed is a significant interference with human rights and may disproportionately target young people and the homeless.*

- *Resources devoted to involuntary treatment may adversely impact of places for voluntary treatment.*

- *Priority for funding for drug rehabilitation should be given to voluntary admissions and for various reasons funding involuntary treatment is a misdirection of resources. Young persons with substance abuse issues experience significant difficulty in accessing voluntary treatment programs. The Committees should recommend an increase in funding for voluntary drug treatment programs.*

- *The oversight / review mechanisms are inadequate.*

- *That the Bill should be amended to guarantee legal representation and advocacy support and that Victoria Legal Aid be given notice of the hearing and have a right to appear.*

- *The Bill should be amended to guarantee that a person subject to an Order has access to voluntary treatment once the involuntary order has ceased to apply.*

- *Involuntary withdrawal of a drug dependent person (not convicted of any offence) may constitute cruel and unusual punishment.*

Extracts from the Second Reading Speech –

… The first point of access to the legislation will be through an examination and assessment provided by a prescribed registered medical practitioner. The practitioner may complete a recommendation that the person be admitted to and detained in a treatment centre if the practitioner is satisfied that all the criteria for detention and treatment apply to the person. … only certain groups of registered medical practitioners will be prescribed to provide this assessment and complete a recommendation.

… the medical practitioner conducting the examination must also consult with the senior clinician of the treatment centre at which it is proposed to detain the person.

… The Bill provides that any adult person will be able to make an application to the Magistrates Court for a detention and treatment Order.

… Before making an application the Bill requires that the applicant must have arranged for the person to be examined by a prescribed medical practitioner for the purposes of making a recommendation…

… The Bill specifies that the applicant must personally serve a copy of the application on the person within 24 hours. The Court must list the application for hearing within 72 hours of the application being lodged.

… The person has the right to attend the hearing and be legally represented.

The Court cannot make a detention and treatment Order unless it is satisfied that each of the criteria for detention and treatment apply to the person and, having regard to all relevant matters, the Court considers the detention and treatment of the person at a treatment centre is necessary.

… The Bill provides for a period of up to 14 days detention and treatment. … Detention and treatment will not be applied to any person under 18 years of age.

… The Bill provides that the Court may direct a hearing to be held in a closed Court and prohibit the publication of any report of the proceedings. …The matters being considered by the Court relate to a person's sensitive health and personal information.

…Before the Court can make a detention and treatment Order, the Court must have received a certificate from the manager of the treatment centre or the senior clinician at which it is proposed to admit the person stating that there are facilities and services available in that service for the treatment of the person.

… If the Court makes a detention and treatment Order, the person is to be detained and treated in a treatment centre. The period of detention is strictly limited to a maximum of 14 days. During this period, the Bill gives the person an important right to apply at any time to the Magistrates Court for the Order to be revoked.

…The Bill provides that a warrant may be applied for from a magistrate if the applicant believes on reasonable grounds that all of the criteria for detention and treatment apply to a person and a prescribed registered medical practitioner is unable to access the person for the purpose of determining whether or not to make a recommendation. … The magistrate must be satisfied by evidence on oath that there are reasonable grounds for the belief that the criteria apply to the person and is unable to be accessed.

… the Bill provides that the person may nominate another person to help protect their interests.

In Order to provide independent support and advice to people who come under the Bill, the public advocate must be notified within 24 hours that the person has been admitted to a treatment centre. The public advocate must visit the person as soon as practicable.

… To assist the public advocate to perform this role, the Public Advocate will be informed about important stages of the person's treatment, such as admission, transfer to a different treatment centre or discharge from the detention and treatment Order.

The person must be given a written statement of rights and entitlements under the legislation within 24 hours of admission.

Only people who are incapable of making decisions about their substance use and personal health, welfare and safety may be subject to detention and treatment.

The Bill provides a right to a second medical opinion about both the treatment the person is receiving and whether or not the criteria for detention and treatment continue to apply to the person. … If the senior clinician disagrees with the second opinion and does not propose to discharge the detention and treatment Order, the senior clinician must notify the public advocate without delay.

… Importantly, the senior clinician must discharge a person from a detention and treatment Order if at any time the criteria no longer apply to the person.

… the Bill includes specific powers to enter premises in prescribed circumstances to enable a person to be taken to a treatment centre. In addition, it authorises the use of restraint and sedation to enable safe transport to a treatment centre. … Sedation or restraint may only be used in the prescribed circumstances. The Bill provides additional safeguards by limiting the power to restrain or administer sedation to prescribed persons.

Content and Committee comment

'Court' means the Magistrates' Court.

'Order' means a detention and treatment Order made under the Act.

'person' means the person who is the subject of the application for an Order.

'practitioner' means a prescribed registered medical practitioner under the Act.

Part 1 – Preliminary

Provides for the purpose, commencement, objectives, general definitions, specific definitions for 'severe substance abuse' and 'treatment' and provides for treatment centres. **[1 to 7]**

The definition of '*severe substance dependence'* includes the requirement that the person is incapable of making decisions about his or her substance use and personal health, welfare and safety due primarily to the person's dependence on the substance. **[5]**

Criteria for detention and treatment

The subject of the application –

- must be 18 years of age or older; and
- have a severe substance dependence; and
- be in need of immediate treatment to save the person's life or prevent serious damage to the person's health; and
- the treatment can only be provided to the person by admitting them to a treatment centre; and there is no less restrictive means reasonably available to ensure the treatment is provided. **[8]**

Part 2 — Detention and Treatment Order

The Magistrates' Court has an exclusive jurisdiction to hear and determine applications. The person must be personally served with the application and supporting documents from the recommending practitioner. **[9 and 10]**

The applicant must make certain enquiries with the VCAT to determine if the person has a guardian and where a guardian has been appointed serve the guardian with the application and supporting documents. **[11]**

A practitioner may make a recommendation for an Order if he or she has personally examined the person and is of the opinion that each of the criteria set out in clause 8 apply to the person. **[12]**

Special warrant

A person over 18 years of age or a member of the police force may apply to a magistrate for a special warrant to examine the person where it is necessary to enable a practitioner to examine the person to determine whether or not to make a recommendation under clause 12 for an Order.

The warrant authorises and directs a member of the police force, accompanied by a practitioner to enter the premises specified in the warrant (subject to clause 37 which outlines the manner in which the power of entry must be exercised); and to use reasonably necessary force to enable the practitioner to examine the person to decide whether or not a recommendation for an Order should be made. **[13]**

Before the hearing of an application for an Order the senior clinician or the manager of a treatment centre must provide a certificate of available services to the Court. **[14]**

Hearing an application for an Order

At a hearing of the application the person has a right to appear and the onus of proof is on the applicant to establish on the balance of probabilities that each of the criteria for an Order apply. On hearing an application the Court is not bound by rules or practices as to evidence. *(Refer to Charter Report below).* **[15]**

The person has a right to be represented by a legal practitioner at the hearing. If the person has a guardian the guardian has the right to appear and make representations to the Court. **[18]**

Court may be closed and reporting of proceedings prohibited or restricted

The Court may order a closed hearing and may make an Order prohibiting or restricting the publication of various aspects of a hearing. Whether or not an order is made the Act prohibits various listed people, including the applicant and the person from being identified or identifiable from and publication or broadcast relating to a hearing. *(Refer to comment below)* **[19]**

The Order

The Court may only make the Order for 14 days if it is satisfied, on the balance of probabilities, that each of the criteria for an Order apply to the person; and detention and treatment at a treatment centre is necessary and the Court has obtained a certificate of available services from the senior clinician or the manager of the treatment centre at which it is proposed to detain the person. *(Refer to comment below)* **[20]**

Revocation

The person has the right to apply to the Court at any time for the Order to be revoked. An application for revocation may be made by the person or on the person's behalf by the person nominated to protect the person's interests or, if applicable, by the person's guardian. The onus of proof is on the applicant for revocation (the person, the person's nominee or the person's guardian) to establish on the balance of probabilities that one or more of the criteria for the Order no longer apply. **[22]** *(Refer to Charter Report below in respect to 'Habeas Corpus')*

Part 3 — Admission, Detention and Treatment of Person at Treatment Centre

Sets out the requirement for the senior clinician to examine a person, after admission to a treatment centre, to review whether the criteria for detention and treatment apply. **[23]**

Sets out the procedure for the appointment of a nominated person. **[24]**

Sets out other actions that must be taken by the senior clinician or manager of the treatment centre as soon as practicable after a person is admitted including providing the person with a statement of his or her rights and entitlements under this Bill including the right to legal advice and notifying the Public Advocate, the person's nominated person, and if applicable, the person's guardian, of their admission to the treatment centre. **[25 and 26]**

Requires the Public Advocate to make arrangements to visit the person and sets out the role of the Public Advocate in relation to the person. **[27]**

Provides that treatment provided to the person under the Act may be provided ***without*** the consent of the person. **[28]**

Provides that a person admitted to a treatment centre is entitled to obtain a second opinion from a suitably qualified registered medical practitioner and must be assisted to obtain a second opinion if assistance is necessary. **[31]**

Provides for transfer of the person to another treatment centre where this is necessary and makes provision for the grant of leave of absence from a centre. **[32 and 33]**

Provides for the apprehension of the person who is absent from a treatment centre without leave or who fails to return after a period having been granted. **[34]**

Provides for the discharge of a person and for discharge plans. **[35 and 36]**

Part 4 — General

Power of entry to premises, restraint search and sedation of the person

Provides power of entry to premises under a special warrant, an Order or to apprehend a person absent without leave and authorises a member of the police force or an ambulance paramedic to use reasonable force to restrain a person, or for a medical practitioner, or a nurse or ambulance paramedic as directed by a medial practitioner, to sedate a person in specified circumstances, and to undertake a 'frisk search' or 'ordinary search' (as defined in the Act) of the person where the member of the police, senior clinician or an employee of a treatment centre ***reasonably suspects*** that the person is carrying anything that presents a danger to the person or anyone else or could assist the person to escape. **[37 and 38]**

The Committee draws attention to the provision in respect to 'frisk or ordinary search' which adopts the lower threshold test of 'reasonably suspects' rather than the higher threshold of 'reasonably believes'.

Rights or freedoms – Preventative detention and treatment – Detention in absence of criminal charge – Characterisation of law – Whether the detention and treatment power achieves a legitimate preventative not punitive purpose – Whether exercise of judicial power a meaningful discretion – Separation of powers

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

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

In Fardon[14] *the High Court held (in respect to the legislation there in issue) –*

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

And subsequently applying Fardon the Hight Court has held –

> *'The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature… depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed'*[15]

The Committee considers that the question whether the legislative regime serves a legitimate non-punitive purpose in matter to be determined by Parliament.

In considering the second question of whether there is meaningful independent judiciary involvement in respect to the imposition of detention and treatment orders in the prosed scheme the Committee considers the following factors are noteworthy to consider –

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

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

- *an Order is made by the Court after a hearing at which evidence must be presented by the applicant who has the burden of proof to establish all the elements necessary to justify the Order and the Court has a meaningful discretion in determining whether an Order should be made;*
- *the respondent to the application is present or has an opportunity to be present and is advised of the proposed orders sought in the application in sufficient detail sufficient to oppose the application;*
- *respondent has the opportunity to obtain legal advice or assistance; and*
- *the regime provides an opportunity for review or revocation of any orders made.*

The Committee refers to the Parliament the question whether there are sufficient and compelling reasons to justify a scheme of detention and treatment in circumstances where no offending has occurred.

Rights or freedoms – Judicial proceedings – Impartiality of courts – court closure and restrictions on reporting

The Committee notes that provisions of the Act (clause 19) provide that court proceedings may be closed and orders made prohibiting or restricting reporting and provides penalties for breach of such an order. The Committee accepts that these provisions may derogate from the general principle that judicial proceedings be public, open and transparent.

The Committee notes that under the provisions of the current Alcoholics and Drug-dependent Persons Act 1968 (section 22) a person had to obtain permission to publish or report such proceedings and it was both an offence to do so without permission and such publication was not subject to privileged protection against defamation.

Subject to the Charter Report below the Committee also accepts that given the nature of the proceedings the privacy of the respective parties may be a more compelling factor to justify the derogation of the principle in this instance.

The Committee draws attention to the provision.

Rights or freedoms – Liberty of the subject – Habeas corpus* – Reverse onus to challenge lawfulness of continued detention and treatment

The Committee notes that clause 22 of the Bill places an legal onus on the person detained to establish on the balance of probabilities that the order should be revoked, that is, to establish that continued detention is no longer lawful. The Committee examines this question in light of International precedents in the Charter Report below

> *** Habeas corpus** / *Lat* / – have the body. Originally a type of writ issued by a superior court allowing a prisoner to have himself or herself removed from prison and be brought before the court to have the matter for which he or she was being detained determined. This type of proceeding became the method by which the Supreme Court could review decisions of justices or magistrates refusing bail or imposing excessive bail: *R v Rochford; Ex parte Harvey* (1967).

Charter report

Non-consensual medical treatment – Privacy – Liberty – Detention and treatment order – Whether demonstrably justified – Whether under law – Whether reasonable

Summary: The Bill significantly limits the Charter rights of people with severe substance dependence against non-consensual medical treatment and to privacy and liberty. While the Committee considers that the goals of saving the life and welfare of such people are sufficiently important to justify such limitations, it has concerns about whether aspects of the Bill satisfy the Charter's test for reasonable limits on rights.

The Committee notes that Bill provides that people with severe substance dependence can potentially be:

- forcibly examined by a prescribed registered medical practitioner;[16]
- searched, sedated and forcibly taken to a treatment centre[17]
- detained at the treatment centre for 14 days and apprehended if they leave without permission[18]
- forcibly provided with medically assisted withdrawal from dependence and symptom relief from that dependence[19]

The Committee observes that the Bill significantly limits the Charter's rights of people with severe substance dependence against non-consensual medical treatment and to privacy and liberty.[20] However, it also aims to promote the Charter rights of such people to life and security.[21]

The Statement of Compatibility remarks:

> *The criteria for treatment in the Bill are such that only a small group of persons is likely to be captured by the Bill. These persons will be persons experiencing severe substance dependence to the extent that they no longer have an ability to make decisions not only about treatment for their substance use, but also decisions about their personal health, welfare and safety.*
>
> *In my opinion, the Bill's objectives are consistent with the principle of personal autonomy. The Bill aims to enhance the capacity of persons with a severe substance dependence to make their own decisions about their substance use and personal welfare. The provisions for detention and treatment are designed to give persons with severe substance dependence 'time out' from their substance use, creating an opportunity for the person to engage with services for voluntary treatment.*

While the Committee considers that the goals of saving the life and welfare of people with severe substance dependence are sufficiently important to justify limiting other Charter rights of those people, it has concerns about whether aspects of the Bill satisfy the Charter's test for limiting rights, including its requirements that any limits be demonstrably justified, legally circumscribed and reasonable.[22]

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16 Clause 13(3)(b).

17 Clause 13(3)(b).

18 Clauses 20(3) & 34

19 Clauses 6(1) and 28(2)

20 Charter ss. 10(c), 13(a) and 21(1).

21 Charter ss. 9 and 21(1).

22 Charter s. 7(2) provides that: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including: (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the

First, the Statement of Compatibility remarks that:

> *Research has shown that for this very small group of people a brief period of civil detention and treatment can be beneficial and life-saving.*
>
> *The 2007 Turning Point Alcohol and Drug Centre Report on compulsory treatment prepared for the Australian National Council on Drugs (ANCD research paper 14, Pritchard, Mugavin and Swan) found that while the Australian and international civil commitment legislation has not been evaluated for its long-term effectiveness, there is evidence that compulsory treatment can be an effective harm reduction mechanism for some people. This finding is supported by a 2004 review of the ADDPA, undertaking for DHS by the Turning Point Alcohol and Drug Centre (Swan and Alberti) and a 2008 literature review of the effectiveness of compulsory residential treatment prepared by the NZ Ministry of Health (Broadstock, Brinson and Weston,* Human Services Advisory Committee Report 2008.*)*

The Committee observes that the reports cited by the Statement emphasise the lack of scientific evidence for or against compelled treatment of non-offenders and refer only to 'mainly anecdotal' or 'largely anecdotal' evidence of harm reduction.[23] The Committee is concerned that, in the case of such significant limits on human rights, anecdotal evidence may be insufficient to satisfy Charter s. 7(2)'s requirement that any limits be 'demonstrably justified'.

Second, the Committee is concerned that the Bill does not define 'substance' in the definition of 'severe substance dependence' and therefore does not limit the substances that people may be forced to withdraw from.[24] This differs from the current *Alcoholics and Drug-Dependent Persons Act 1968*, which is limited to alcohol and drugs of dependence specified in Schedule 11 of the *Drugs, Poisons and Controlled Substances Act 1985*.[25] It also differs from the otherwise identical NSW definition of 'severe substance dependence', which is limited to substances set out in a schedule of the *Drugs and Alcohol Treatment Act 2007* (NSW).[26] The Committee is concerned that, without a definition of 'substance', the Bill may not satisfy the requirement in Charter s. 7(2) that any rights limitation be made 'under law'.

Third, unlike in NSW, the court is not expressly required to determine whether detention and treatment is in the person's best interests or to find that the person has refused voluntary treatment.[27] Indeed, non-consensual medically assisted withdrawal can be imposed without compliance with the procedures for treating people with a disability under Part 4A of the *Guardianship and Administration Act 1986* and contrary to a valid certificate of refusal of such treatment made under the *Medical Treatment Act 1988*.[28]

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limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.'

23 E Pritchard, J Mugavin and A Swan, *Compulsory Treatment in Australia: A Discussion Paper on the Compulsory Treatment of Individuals Dependent on Alcohol and/or Other Drugs* (Australian National Council on Drugs, 2007), p. 104; Marita Broadstock, David Brinson and Adele Weston, *A Systematic Review of the Literature: The Effectiveness of Compulsory, Residential Treatment of Chronic Alcohol or Drug Addiction in Non- Offenders* (Health Services Assessment Collaboration, 2008), p. 104. See also the submissions of the Human Rights Law Resources Centre at pp. 2-3 and the Federation of Community Legal Centres at pp. 5-8.

24 Clauses 4 and 5.

25 *Alcoholics and Drug-Dependent Persons Act 1968*, s. 3 (defining 'alcoholic', 'drug-dependent person' and 'drug of addiction') and *Drugs, Poisons and Controlled Substances Act 1985*, s. 3 (defining 'drug of dependence').

26 *Drug and Alcohol Treatment Act 2007* (NSW), s. 3(1) (defining 'severe substance dependence' and 'substance'). See also *Alcohol and Drug Dependency Act 1968* (Tas), s. 4, requiring the Governor to declare that a substance if a drug for the purposes of the Act.

27 See *Drug and Alcohol Treatment Act 2007* (NSW), ss. 9(3)(c) & 34(4). See also the submission of the Harm Reduction Victoria Inc, pp. 3-11 and Human Rights Law Resources Centre, pp. 4.5.

28 Clause 6(2).

Moreover, the Bill provides for detention and treatment orders lasting 14 days after admission, rather than 7 days (with the possibility of a 7 day extension) under the current Act.[29] The Statement of Compatibility remarks:

> *The duration of the detention (for up to 14 days) is based on evidence that medically supervised withdrawal commonly requires between 7 and 14 days.*

The Committee is concerned that, in contrast to the current Act, the Bill automatically sets the length of the order at the maximum term and, in contrast to NSW, does not provide for a court to specify a shorter term.[30]

While the Committee appreciates that the Bill requires a court to find that detention and treatment at a treatment centre is 'necessary' and sets out detailed principles governing treatment decisions by senior clinicians,[31] it is concerned that the lack of express requirements for courts to determine both the patient's best interests and the order's duration may not satisfy Charter s. 7(2)'s requirement that any limits on rights be 'reasonable'.

The Committee refers to Parliament for its consideration the question of whether or not the Bill, by authorising substantial limits on people's rights against non-consensual treatment and to privacy and liberty but:

- ***citing only anecdotal evidence for beneficial effects of compelled treatment;***
- ***not defining the substances that people can be forced to withdraw from;***
- ***not expressly requiring a court to determine whether treatment is in the person's best interests***
- ***not providing for a court to set a lower detention period than the statutory maximum***

satisfies the test for reasonable limits on Charter rights in s. 7(2) of the Charter.

Fair hearing – Exemption from rules of evidence – Suppression of identity of parties and witnesses

Summary: The Committee has concerns about the compatibility of the Bill's procedural provisions with the Charter's right to a fair and public hearing.

The Committee notes that Part 2 of the Bill provides for the Magistrates' Court to make detention and treatment orders. **The Committee has concerns about Part 2's compatibility with the Charter right of people who are subject to an application for a detention and treatment order to a fair and public hearing:**[32]

First, clause 15(3) exempts the court from 'rules or practice as to evidence'. While the Committee appreciates that hearings in respect of detention and treatment orders may be conducted in circumstances of urgency, it is concerned about the removal of the protections of the law of evidence (including restraints on hearsay, opinion and tendency evidence) in light of the significant human rights at stake. The Committee notes that no substitute standards of procedure are provided by clause 15(3).[33] Unlike in New Zealand, the ability of

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29 *Alcoholics and Drug-Dependent Persons Act 1968*, s. 11(1).

30 *Drug and Alcohol Treatment Act 2007* (NSW), s. 34(5).

31 Clauses 3, 20(2)(b), 28 & 30.

32 Charter s. 24(1). See *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, [418]

33 E.g. *Victorian Civil and Administrative Tribunal Act 1998*, s. 97, providing that 'The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.'; *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 9(2), providing that the Court must be satisfied '(a) by acceptable, cogent evidence; and (b) to a high degree of probability— that the evidence is of sufficient weight to justify the decision.'; *Drug and Alcohol Treatment Act 2007* (NSW), s. 37(2), providing that the court may inform itself

the person facing detention to 'lead evidence and cross-examine witnesses' depends on the court's discretion.[34] Unlike in NSW, there is no explicit bar on proceeding where the subject of the proposed order wants or requires, but does not have, legal representation.[35]

Second, clause 19(5) makes it an offence to publish the identity of the parties or any witness in the proceedings 'whether or not the Court makes an order'. Unlike the existing Act and the NSW statute, there is no exception for where a court authorises the publication or where the publication is of an official report of the proceedings.[36] While the Committee appreciates that hearings in respect of detention and treatment orders involve highly sensitive matters and that confidentiality is ordinarily vital, it is concerned that an absolute bar on publication in all circumstances, without any option for a court to lift the requirement in the interests of justice, may prevent appropriate public scrutiny of such proceedings.[37] For example, people who are subject to an order will be unable to publicise their own experiences or grievances about the process or the people involved unless they do so anonymously.

The Committee refers to Parliament for its consideration the question of whether or not the following rules governing proceedings for detention and treatment orders:

- ***clause 15(3), excluding the rules of evidence;***
- ***clause 19(5), irrevocably barring publication of the identities of parties and witnesses; and***

are compatible with the Charter right of subjects of an application for a detention and treatment order to a fair and public hearing.

Habeas corpus – Revocation of detention and treatment orders – Limited grounds for revocation – Onus of proof on detainee

Summary: The Committee is concerned about limitations that clause 22 places on the power of the Magistrates' Court to review the lawfulness of a person's detention in review proceedings. In light of the clear rulings on this topic from Europe, clauses 22(4) and 22(8) may be incompatible with the right to habeas corpus in Charter s. 21(7). The Committee will write to the Minister seeking further information.

The Committee notes that clause 22 provides for a person who is the subject of a detention and treatment order to apply to the Magistrates' Court for the order to be revoked. The Committee notes that clause 22 engages the right to habeas corpus (i.e. the right to go to court to test the lawfulness of anyone's detention) in Charter s. 21(7):

> *Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must-*
>
> *(a) make a decision without delay; and*
>
> *(b) order the release of the person if it finds that the detention is unlawful.*

'in the way the Magistrate thinks appropriate and as the proper consideration of the matter before the Magistrate permits'.

[34] Clause 15(4), providing that 'the Court may permit the person who is the subject of the application to lead evidence and cross-examine witnesses'. Compare *Alcoholism and Drug Addiction Act 1966* (NZ), s. 35(2).

[35] *Drug and Alcohol Treatment Act 2007* (NSW), s. 37(7). See also the submission of the Human Rights Law Resources Centre at pp. 5-6.

[36] *Alcoholics and Drug-Dependent Persons Act 1968* (Vic), s. 22(1); *Drug and Alcohol Treatment Act 2007* (NSW), s. 41.

[37] See *Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors* [2010] UKSC, [63]-[65]. See also Charter s. 24(2), providing that: 'a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter' and Charter s. 15(2) (freedom of expression.)

Charter s. 21(7) is not limited to criminal proceedings and, in particular, applies to people detained for 'drug addiction'.[38]

The Committee is concerned about limitations that clause 22 places on the power of the Magistrates' Court to review the lawfulness of a person's detention in review proceedings.

First, clause 22(4) provides:

> *An application for the revocation of the order must be on the ground that one or more of the criteria for detention and treatment no longer applies to the person.*

The Committee observes that clause 22(4) bars a detainee from seeking revocation on the ground that a further condition for the granting of such orders – that, 'having regard to all other relevant matters, the Court considers that the detention and treatment of the person at a treatment centre is necessary' – no longer applies.[39] The English Court of Appeal, applying the equivalent European right to *habeas corpus*, has held that it is 'axiomatic that if the function of the tribunal is to consider whether the detention of the patient is lawful, it must apply the same test that the law required to be applied as a precondition to admission'.[40]

Second, clause 22(8) provides:

> *The onus of proof is on the person applying for the revocation of the detention and treatment order to establish on the balance of probabilities that one or more of the criteria for detention and treatment no longer applies to the person who is the subject of the order.*

In 2002, the English Court of Appeal declared that such a reverse onus requirement imposed on detainees under that country's mental health legislation was incompatible with the European Convention's right to *habeas corpus*.[41] That historic ruling (the first declaration of incompatibility under that nation's *Human Rights Act 1998*) was subsequently affirmed by the European Court of Human Rights and led to an amendment of the English legislation.[42]

The Statement of Compatibility does not discuss the compatibility of clause 22 with Charter s. 21(7). While the Committee acknowledges that Victorians detained under detention and treatment orders will be able to apply for a common law writ of *habeas corpus* in the Supreme Court,[43] it observes that the European Court of Human Rights has held that 'a judicial review as limited as that available in the [common law] habeas corpus procedure… is not sufficient for a continuing confinement… as the reasons capable of initially justifying such a detention may cease to exist'.[44]

In light of the clear rulings on this topic from Europe, the Committee considers that clauses 22(4) and 22(8) may be incompatible with the right to *habeas corpus* in Charter s. 21(7).

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38 United Nations Human Rights Committee, *General comment 8/16 of 27 July 1982 [Liberty and Security of Person]*, para 1. See also Articles 5(1)(e) & 5(4) of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*.

39 Clause 20(2)(b).

40 *R (H) v Mental Health Review Tribunal* [2001] EWCA Civ 415, [31] applying Article 5(4) of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*. See also *Kadem v Malta* [2003] ECHR 19, [42], where the European Court of Human Rights held that the required review, 'being intended to establish whether the deprivation of the individual's liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention.'

41 *R (H) v Mental Health Review Tribunal* [2001] EWCA Civ 415, [31]

42 *Reid v United Kingdom* [2003] ECHR 94, [74].

43 *Supreme Court (General Civil Procedure) Rules*, Order 57.

44 *X v United Kingdom* [1981] ECHR 6, [58].

The Committee will write to the Minister seeking further information about the compatibility of clauses 22(4) and 22(8) with Charter s. 21(7). Pending the Minister's response, the Committee draws attention to clauses 22(4) and 22(8).

The Committee makes no further comment.

Transport Integration Bill 2009

Introduced	8 December 2009
Second Reading Speech	10 December 2009
House	Legislative Assembly
Member introducing Bill	Hon. Lynne Kosky MLA
Minister responsible	Hon. Martin Pakula MLC
Portfolio responsibility	Minister for Transport

Purpose and Background

The Bill proposes an Act (the 'Act') for a new framework for an integrated and sustainable transport system in Victoria. It incorporates the key elements of the transport system under one Act and sets out the vision, objectives and decision-making principles for the transport system to guide the activities of transport bodies and interface bodies.

The Bill empowers the Minister and the Department of Transport (the 'Department') with the central strategic policy and portfolio coordination role for Transport and transfers eight of the transport systems current agencies from various Acts into the Act. It is proposed that other agencies will be transferred to the Act by amending Acts during 2010.

The Act will provide the Department with a body corporate capability for project delivery through the Transport Infrastructure Development Agent. **[40 to 50]**

The Act will repeal the *Southern and Eastern Integrated Transport Authority Act 2003.* **[202]**

Extract from the Second Reading Speech –

> *The Transport Integration Bill provides the broad policy and agency settings, while various subject-specific statutes contain the policy and regulatory detail relating to particular transport system activities. Regulations and other subordinate instruments support each act as required.*
>
> *…*
>
> *The Bill reconstitutes transport agencies established by legislation such as the Transport Act, the Rail Corporations Act and the Southern and Eastern Integrated Transport Authority Act, bringing them within the same legislative framework.*
>
> *…*
>
> *In essence, the Transport Integration Bill:*
>
> 1. *places a requirement on transport bodies and key non-transport bodies to have regard for the objectives and decision-making principles of the Bill;*
> 2. *requires planning to be undertaken in line with this policy framework;*
> 3. *establishes transport bodies under one piece of legislation, with a common goal to work together to foster greater integration and sustainability.*

Extract from the Statement of Compatibility –

> *Aside from empowering the Minister and the Department of Transport with the central strategic policy and portfolio coordination role for transport, eight of the transport system's current agencies, categorised as transport system agencies, transport corporations and transport safety agencies will be transferred from various acts into the Bill. The inclusion of the remaining agencies will occur in an amending Bill in 2010 as part of the Port Futures project.*
>
> *This will include an amalgamation of the Port of Melbourne Corporation and the Port of Hastings Corporation and will also include the transfer of the Victorian Regional Channels Authority.*

Three name changes are included in the alignment process proposed by the Bill. The V/Line Passenger Corporation is to be renamed the V/Line Corporation to better reflect the range of its operations, which also include responsibilities for network access and freight interests. The Southern and Eastern Integrated Transport Authority is to be renamed the Linking Melbourne Authority to reflect the broadening of its role into further complex urban road projects across Melbourne.

… The Chief Investigator, Transport and Marine Safety investigations is to be renamed Chief Investigator, Transport Safety as the marine sector is part of the transport system. Similarly, the offices of the Director, Public Transport Safety and the Director of Marine Safety are to be amalgamated into the single and independent office of Director, Transport Safety. … The powers which would be available to both the Chief Investigator, Transport Safety and Director, Transport Safety under the Marine Act 1988 are under consideration as part of the current review of marine safety laws towards a new proposed Marine Safety Act in 2010.

Content and Committee comment

Delayed commencement

The Bill provides that other than sections 1 and 2, the provisions of the Act are to commence on proclamation but not later than by 1 July 2011. **[2]**

Inappropriately delegates legislative power – Delayed commencement – Committee Practice Note No. 1 of 2005, item 1.3

The Committee draws attention to item 1.3 in Practice Note No. 1 of 2005 concerning delayed commencement provisions of more than 12 months from the time a Bill is introduced in the Parliament. The Committee there noted that such delays should be justified and at least a brief explanation given for the need or desirability to use such a provision in either the Second Reading Speech or the Explanatory Memorandum.

The Committee will seek further advice from the Minister.

Compulsory land acquisition

The Bill provides that the Secretary to the Department of Transport, the Director of Public Transport and Victorian Rail Track may compulsorily acquire any land required in connection with the performance of their powers or the exercise of their functions. Acquisition of interests in land under the Bill requires Ministerial approval and the acquisition and compensation requirements in the *Land Acquisition and Compensation Act 2009* will apply in each case, with minor modification. Where compensation cannot be agreed to between the owner and the Minister the judicial review process set out in that Act applies. **[36, 71 and 121]**

Entry onto land or in a building including a residence

The Bill permits the Secretary to enter any land and do all things necessary and convenient for the purpose of determining whether the land should be compulsorily acquired **[36]**, further the Roads Corporation may enter into a building and undertake activities necessary to ascertain the construction and condition of a building including a private residence **[96]** and Victorian Rail track may enter any land to construct or maintain works supporting any rail signalling system. **[126]**

Extract from the Statement of Compatibility –

The Secretary may only exercise the powers in clause 36 with the consent of the owner after giving written notice or in the case of an emergency. Residential land may only be accessed during the day (until 6.00 p.m.), and the secretary (and those acting on his or her behalf) must cooperate with the owner, causing as little inconvenience as possible and must compensate any damage.

The Roads Corporation may only enter a building and Victorian Rail Track may only enter land when it is necessary and convenient to fulfil its respective functions. The Roads Corporation must give an occupier reasonable and written notice and may only enter a building during the day. Unless immediate entry is necessary because of an emergency, Victorian Rail Track must give an occupier seven days notice and may only enter residential land when authorised between 7.30 a.m. and 6.00 p.m. (unless the occupier consents to the entry and agrees to a different time).

Further, when exercising this power of entry, Victorian Rail Track must cooperate with the owner and occupier of the relevant land, and can only stay as long as is reasonably necessary and must cause as little inconvenience as possible.

Before the director of public transport or Victorian Rail Track can temporarily occupy land, they must comply with the notice requirements set out in sections 75(3) and (4) of the LACA.

Part 1 sets out preliminary matters such as the purpose and definitions, and describes the agencies that have been declared transport bodies or interface bodies for the purposes of the Bill. **[1 to 5]**

Part 2 sets out the vision, transport system objectives and decision-making principles. It also includes the capacity of the Minister to make statements of policy principle to provide support to transport and interface bodies in respect of the interpretation and application of the framework. **[6 to 28]**

Part 3 sets out the general powers of the Minister and the Secretary as well as the charter of the Department of Transport to support the minister in the administration of the Bill. It also provides for the establishment of a transport infrastructure development agent in the Department to deliver projects under the Victorian transport plan.

Wide delegation provisions

Part 3, 5 and 6 include a number of delegation powers of the Minister, the Secretary, the Director of Public Transport, the Roads Corporation and the Transport Corporation to delegate to 'any person'. **[31, 39, 79, 115 and 170] [Part 3 – 29 to 62]**

Makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers – Parliamentary Committees Act 2003, section 17(a)(ii)

Clauses 31, 39, 79, 115 and 170.

The Committee notes that neither the explanatory notes nor the Second Reading Speech provide advice or justification for the desirability to include such provisions. The Committee draws attention to item 1.2 of Practice Note No. 1 of 2005 concerning unexplained wide delegation powers.

The Committee will seek further advice from the Minister.

Part 4 sets out the planning requirements for the portfolio, including requiring the Department to prepare or revise both the Victorian transport plan and corporate plans in line with the policy framework. **[63 and 64]**

Part 5 continues the establishment of Victoria's transport system agencies: the Director of Public Transport and the Roads Corporation (VicRoads). **[65 to 115]**

Part 6 continues the establishment of the state's transport corporations, Victorian Rail Track and V/Line Corporation, and establishes the Linking Melbourne Authority (formerly the Southern and Eastern Integrated Transport Authority). **[116 to 170]**

Part 7 provides for the state's independent safety compliance and investigation offices. Including the Director, Transport Safety and the Chief Investigator, Transport Safety. The

Director, Transport Safety is charged with public transport and marine safety regulation and subsumes the roles of the Director, Public Transport Safety and the Director of Marine Safety. **[171 to 197]**

Part 8 of the Bill relates to general matters, including regulation-making powers. The Part also repeals the *Southern and Eastern Integrated Transport Authority Act 2003* and makes consequential amendments as set out in the six schedules. **[198 to 206]**

The Committee makes no further comment.

Constitution (Appointments) Bill 2009

The Bill was introduced into the Legislative Assembly on 10 November 2009 by the Hon. John Brumby MLA. The Committee considered the Bill on 23 November 2009 and made the following comments in Alert Digest No. 14 of 2009 tabled in the Parliament on 24 November 2009.

Committee's Comments

Charter report

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

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

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

The Statement of Compatibility remarks:

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

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

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

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

Second, clause 6(1) provides that:

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

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

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

Minister's Response

Thank you for your letter to the Premier concerning the Committee's report on the Constitution (Appointments) Bill 2009 (Bill). The Premier has asked me to respond on his behalf.

The report makes a number of comments in relation to the Bill's compatibility with the Charter of Human Rights and Responsibilities Act 2006 (Charter).

In particular, the report notes that clause 5 of the Bill may engage the right against 'unlawful interference or Actions' and the right against retrospective criminal laws. However, I note that the Bill, and in particular, clause 5, merely confirms the validity of laws that were in operation or purported to be in operation. A person is not subject to any laws that were not already passed by Parliament and granted Royal Assent by the Governor or a person acting as the Governor's Deputy. For this reason, I do not consider that clause 5 of the Bill engages these parts of the Charter.

The report also notes that clause 6 of the Bill may bar a person affected by the Bill from seeking a declaration of inconsistent interpretation in relation to this Bill. I do not consider clause 6 preventing such a declaration being made as it does not come within the definition of 'action, liability, claim or demand arising from the enactment, commencement or operation of this Bill'.

I thank the Committee for its observations on the Bill and trust that my comments have been of assistance.

HON ROB HULLS MP
Acting Premier of Victoria

12 January 2010

The Committee thanks the Acting Premier for this response.

Serious Sex Offenders (Detention and Supervision) Bill 2009

The Bill was introduced into the Legislative Assembly on 10 November 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 23 November 2009 and made the following comments in Alert Digest No. 14 of 2009 tabled in the Parliament on 24 November 2009.

Committee's Comments

Charter report

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

Summary: The Bill potentially restricts the Charter rights of offenders who are eligible for supervision or detention orders to a similar extent to people who have intellectual disabilities, are mentally ill, have an infectious disease or are on parole The Committee considers that the goal of preventing future sexual offences may justify such significant limitations on human rights, but that whether or not the Bill satisfies the test for reasonable limits will depend on whether it is applied only to offenders who pose a sufficient risk of re-offending. While the test imposed by the Bill is suited to identifying risks of re-offending, the Committee is concerned about the absence of a legislative requirement that risks be assessed by accredited experts and that an order can be made even though a court considers that it is more likely than not that the offender won't re-offend in the absence of an order.

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

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

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

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

The Bill identifies eligible offenders by requiring that:

- *the offender have been previously sentenced to imprisonment for a sexual offence set out in Schedule 1*
- *a court find that the offender 'poses an unacceptable risk' of committing such an offence in the future if not subject to an order*
- *a court be so satisfied 'by acceptable, cogent evidence' and 'to a high degree of probability'*
- *these matters be periodically reviewed by a court during the course of the order*
- *courts determining these matters must consider expert reports assessing the risk of re-offending*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) it is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation and other group activities of this kind

(b) it is necessary for the safe custody or welfare of the offender or prisoners or the security or good order of the prison

(c) the offender has elected to be so accommodated or detained

The Statement of Compatibility remarks:

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

The Committee observes:

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

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

(a) the management, security and good order of the prison; and

(b) the safe custody and welfare of the offender or any other prisoners.

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

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

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

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

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

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

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

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

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

The Statement of Compatibility remarks:

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

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

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

- *a 2004 judgment of the High Court of Australia, considering constitutional issues about the separation of powers that differ from the issues of human rights raised by the Charter, where a majority of judges observed that similar continuing detention legislation should not be classified as punitive; and*
- *a 2006 judgment of New Zealand's Court of Appeal, applying human rights provisions that are similar to the Charter, where the Court unanimously held that supervision legislation that did not provide for detention infringed offenders' rights against double jeopardy and retrospective increases in penalty.*

As the Committee has previously noted, retrospective eligibility for new orders may operate unfairly on offenders who elected to plead guilty or to make sentencing submissions for a

sexual offence at a time when people who were sentenced for such offences would not have been liable to post-sentence supervision or detention.

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

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

Minister's Response

Thank you for your letter of 25 November 2009 forwarded to the Attorney-General on behalf of the Scrutiny of Acts and Regulations Committee (the Committee) concerning the Serious Sex Offenders (Detention and Supervision) Bill 2009. The Attorney-General has asked me to respond.

My response addresses questions posed by the Committee and set out in boxes in the Extract, as well as general comments regarding other issues raised by the Committee.

Medical Experts

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

The Bill does not specify that a psychiatrist or psychologist must be of a prescribed kind before he or she can prepare an assessment report. The words 'of a prescribed kind' apply only to the 'other health service provider' and not to psychiatrists and psychologists in the definition of 'medical expert' in clause 3 of the Bill.

In the context of the regime as a whole, it is not considered necessary or appropriate for the type of psychologist or psychiatrist to be prescribed.

In its final report on High Risk Offenders: Post-Sentence Supervision and Detention, the Sentencing Advisory Council (SAC) made recommendations in relation to addressing this issue in a reformed extended supervision scheme that:

- *a system should be established for accrediting people authorised to conduct assessments under the Serious Sex Offenders Monitoring Act 2005 (SSOMA);*
- *accreditation should be limited to psychologists or psychiatrists who have a specific expertise in the area of sexual offending and/or serious violent offending and who have a demonstrated understanding of the issues involved in assessing risk;*
- *section 7 of the SSOMA should be amended to state that an assessment report can only be prepared by a person accredited for these purposes;*
- *standards and guidelines should be developed for risk assessments under the SSOMA.*

The absence of an accreditation system for medical experts providing assessments under the regime does not compromise the offender's position. Clause 113 of the Bill specifically provides a mechanism for disputing assessment reports and other reports and the court may not take the report, or that part of the report that is in dispute, into consideration in determining the application unless the party disputing the report has been given the opportunity to:

- *lead evidence on the disputed matters; and*

- *cross-examine the author of the report on its contents.*

This means that the offender can challenge the medical expert's expertise, and the court will determine whether or not it is persuaded by the report.

Given that the expertise of a medical expert can be adequately tested at court, it is considered the specification within the Bill of specific expertise is not warranted and may be unnecessarily prescriptive.

The Department of Justice has, however, established minimum criteria which it uses to guide its selection of medical experts to undertake assessments for the purposes of the scheme.

In making its decision on an application under the Bill, the court must be satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the court's decision. If the medical expert's assessment report does not provide that degree of satisfaction, the court will not be in a position to make the order.

In the Government's view, the regime established by the Bill provides ample safe-guards, while including sufficient flexibility to be practical, to ensure that the court is provided with the best available evidence to allow it to make its determinations under the Bill.

Certificate of Available Resources

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

1. What legal constraints apply to the making and provision of a Certificate of Available Resources?

2. What legal proceedings are available to challenge the making or content of a Certificate of Available Resources?

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

How the Certificate of Available Resources works

Clauses 22 and 195 of the Bill give the Secretary the power to prepare a Certificate of Available Resources and to identify the requisite content. If the Secretary provides a Certificate to the court it must state whether or not there are facilities or services available for the accommodation, care, monitoring, rehabilitation or treatment of the offender and, if there are, give an outline of those facilities and services.

If there are no facilities or services available, the Certificate may contain any other options that the Secretary considers appropriate for the court to consider in making the proposed order or in refusing to make any order.

The court may require the Secretary to give evidence or to provide a further Certificate to clarify or expand on the matters dealt with in the Certificate. This would include any alternative options if particular facilities or services were not available.

The court must consider any Certificate provided by the Secretary and may not impose a condition that is inconsistent with the Certificate. The court's discretion to impose any appropriate condition is not otherwise fettered by the Certificate.

Court's decision if resources are not available

The Committee expressed concern that a court may be required to find that an offender poses an unacceptable risk if an order with a particular condition is not imposed, even though the court will be unable to impose the condition because the Secretary provides a Certificate stating that the condition cannot be resourced. The Committee acknowledges that a court may make no order in such circumstances, but notes that a court will be forced to choose between failing to prevent an unacceptable risk that it has found to exist, or imposing a condition or order that goes beyond the minimum necessary interference with the offender's rights or is disproportionate to the gravity of the risk.

The Committee also expressed concern that the Certificate may engage the Charter right of offenders to have proceedings in respect of orders determined by an 'independent' court.

The Government has been careful to develop a regime that works, that is, a regime that protects the community and the rights of offenders. In constructing the regime the Government considered the issues raised by the Committee and endeavoured to address them. There is little point in a court imposing unworkable conditions, or conditions that require the community to devote an unreasonable amount of limited community resources to a particular offender. However, the regime has been carefully crafted to provide for flexibility to allow for effective, workable and reasonable conditions to be imposed.

By providing the court with a Certificate, the court can frame appropriate conditions. The Bill provides for a wide-range of conditions. If a particular resource is not available, then the court may alter other conditions to achieve the same effect as would have been achieved by the use of a particular resource.

Additionally, the court could impose temporary conditions under clause 24, if necessary, and require the parties to attend before the court before the end of the specified period for a hearing to determine final conditions.

The court retains control over the conditions of a supervision order. The Bill ensures that the power of the court is not fettered and that the exercise of its power is independent.

Rights of appeal in relation to conditions

Any decision made by the court is subject to appeal on certain grounds, including in respect of conditions. The Court of Appeal has the power to consider new evidence that may be relevant to the application.

The exercise of statutory power

If the Secretary provides the court with a Certificate, the Secretary could be called to give evidence and, therefore, could be cross-examined on the content of the Certificate. There is also provision for the court to call for additional information by way of a Certificate to clarify or expand on the matters dealt with in the Certificate.

Distinction from the power to dispute reports under clause 113

There is no equivalent to clause 113 of the Bill, which specifically provides the power to dispute assessment and other reports. This does not prevent the offender from seeking to challenge the content of a Certificate, including the opportunity to lead evidence on the disputed matters and to cross-examine the author of the Certificate on its content.

The purpose of clause 113 is to build into the proceedings a formal process for identifying the issues in dispute between the parties to the proceedings. The central and important role of assessment reports, progress reports and other reports is recognised by ensuring that the parties to the proceedings are given proper notice of the aspects of the reports that are in dispute. It requires the parties to consider the reports, including those on which the party seeks to rely, and to specify where the grounds of dispute arise. This should reduce the amount of time spent at hearing in leading evidence from and cross-examining the authors of the reports, which may be unnecessary if the content is not in dispute.

The existence of clause 113 for challenging assessment and other reports does not mean that the content of Certificates of Available Resources cannot be challenged or the subject of contrary evidence. There is no provision that prohibits such a challenge. While the rules regulating the practice and procedure of a court in civil proceedings do not apply, the rules relating to procedural fairness remain.

Status of offenders on detention orders

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

The Committee has expressed concern about the Statement of Compatibility in relation to clause 115(1). I consider that clause 115(1) is compatible with section 22 of the Charter.

Clause 115(1) provides that an offender in a prison under a detention or interim detention order must be treated in a way that is appropriate to his or her status as an unconvicted prisoner, subject to any reasonable requirements necessary to maintain the management,

security and good order of the prison, and the safe custody and welfare of the offender or any other prisoners. Section 22(3) of the Charter provides that a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

In practice, one of the ways to achieve this is by the dedication of a small, separate, self-contained unit at HM Prison Ararat to offenders on detention orders. It will accommodate those offenders who choose to live there, subject, of course, to any reasonable requirements necessary to maintain the management, security and good order of the prison, and the safe custody and welfare of the offender or any other prisoners. From this unit, the offenders may, if they choose, access the programs and general prison facilities that are available to other prisoners.

To the extent that clause 115(1) constitutes a limitation on section 22(3) of the Charter, I consider that the limitation is reasonable for the following reasons. The limitation is directed at 'reasonable requirements', which relates to the management, security and good order of the prison, and the safe custody and welfare of the offender or any other prisoners. These exceptions aim to achieve the important purpose of ensuring that the over-arching management of the prison is not compromised.

The Adult Parole Board is responsible for reviewing and monitoring the progress of offenders on detention orders and interim detention orders. This provides an additional check on the treatment of these offenders.

In addition to the questions raised in the Extract, the Committee considered some other issues in the Alert Digest in relation to which I thought it would be useful to comment as follows.

Exclusion of evidence from disclosure

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

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

The Committee draws attention to this provision.

In this comment, the Committee was referring to clause 81 of the Bill.

The Bill has been drafted to protect the rights and interests of the offender while, at the same time, enhancing community protection and facilitating the treatment and rehabilitation of offenders.

Clause 81 of the Bill gives the court the power to exclude evidence from disclosure to the offender if it is in the public interest and if:

- *the material cannot be suitably redacted or communicated to the offender in a way that would not prejudice the public interest; and*
- *the making of the order in the circumstances would not lead to significant unfairness to the offender.*

As explained in the Statement of Compatibility, the power to exclude evidence can only occur in circumstances where it is in the public interest to do so, and it would not lead to significant unfairness to the offender. In my view, this power does not prejudice an offender's right to a fair hearing.

Importantly, proceedings under the Bill are not criminal in nature. The regime is protective rather than punitive. Accordingly, the Committee's concern about a derogation from the general principle that an accused person in a criminal proceedings is entitled to full disclosure, does not strictly apply.

In any event, however, the Bill provides significant protections for the offender with regard to the evidence. Before excluding any evidence, the court must be satisfied that:

- *it is in the public interest not to disclose the evidence to the offender;*
- *the material cannot be suitably redacted or otherwise communicated to the offender in a way which does not prejudice the public interest; and*
- *it would not lead to significant unfairness to the offender.*

The Bill imposes a heavy onus on the applicant to show that it is in the public interest not to disclose the evidence to the offender. There is substantial case law concerning the question of what is in the public interest, which makes it clear that courts will be very concerned to ensure a proper assessment of whether excluding any evidence could result in a degree of unfairness to the offender that would displace the public interest in not disclosing the evidence to the offender.

Clause 81 has been carefully drafted to protect the public interest where the nature of the evidence is such that it should not be disclosed to the offender. Arguably, the matters the court must be satisfied about may be more onerous than the requirements at common law because clause 81 requires more than just the public interest to be taken into account. The additional matters are weighted in favour of the protection of the offender's rights in the proceeding. Accordingly, the Government is satisfied that clause 81 is necessary and appropriate.

Punitive or protective

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

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

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

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

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

And subsequently applying Fardon the High Court has held –

> *'The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature ...depends on whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed. '*
>
> *The Committee notes that a useful test developed by the High Court in Fardon was to characterise the law by asking whether its central purpose was to serve a punitive purpose or whether the law acts in a protective manner and is designed to achieve a legitimate objective in protecting the public. The later objective is not conditioned on the premise of an adjudication that an offender has engaged in unlawful conduct for which punishment may be legitimately (judicially) imposed.*

Extract from the Statement of Compatibility

> *It is important to highlight that the detention and supervision scheme is civil rather than criminal. Its purposes and effects are geared toward prevention, protection and rehabilitation rather than the punishment of the offender. Further, the scheme is based on the risk of reoffending, rather than the fact of a person having been convicted, or on any particular event that may have taken place in the past. Whilst a conviction may be a 'trigger' for eligibility, whether an order is imposed is based on an assessment of future risk.*
>
> *...In considering this issue, I have relied on the jurisprudence of the High Court of Australia and in particular, the decision of Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575, which dealt with relevant human rights issues in the context of the post-sentence management of high-risk sex offenders. A number of judges addressed whether the relevant law in Queensland was punitive or protective in nature. Callinan and Heydon JJ considered that:*
>
> *The Act... is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective rather than a punitive enactment.*

Furthermore, Gummow J said:

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

The question whether the law is preventative or punitive is a question for the consideration of Parliament.

The Government recognises that the Bill substantially restricts the behaviour of certain individuals after the completion of their sentences. However, the Bill identifies legitimate, non-punitive purposes for these restrictions, that is:

- *principally, to enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences and, who present an unacceptable risk of harm to the community, to be subject to that detention; and*
- *secondly, to facilitate the treatment and rehabilitation of these individuals.*

The Bill addresses the behaviour of that class of offenders who have not been rehabilitated during their period of imprisonment and who pose an unacceptable risk of harm to the community. The Bill provides a mechanism for managing that future risk, not punishing the individuals for their earlier behaviour.

The requirements for making either a detention order or a supervision order carefully balance and protect the offender's interests with those of the community to ensure that any restrictions imposed on the offender are the minimum that are necessary to achieve the purposes of the Bill. This limitation on the restrictions imposed on offenders flows through the regime for both detention and supervision orders. This limitation does not stop at the making of orders. For supervision orders, it continues in the determination of conditions and the giving of directions or instructions. For detention orders, it extends to the care taken to ensure that offenders detained in prison are treated as unconvicted prisoners.

The requirements for annual reviews of detention orders, and regular reviews of supervision orders, as well as the ability to go back to the court at any time, ensure that the orders are imposed only where the risk that is being managed is current. It highlights the protective purpose of the scheme by ensuring that the offender is only subject to an order while he or she continues to pose the requisite risk.

Double jeopardy and retrospectivity

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

The Committee referred to Parliament the above issue. For completeness, I note that the Committee highlighted key points from the Statement of Compatibility, that is, that the regime has been framed as follows:

- *it is a civil scheme rather than criminal;*
- *its purposes are prevention, protection and rehabilitation rather than the punishment of the offender;*
- *a conviction is a trigger for eligibility, but whether an order is imposed is based on an assessment of future risk.*

The Committee also asked whether the Charter will apply in all proceedings under the Bill, including proceedings in respect of people who were first subjected to extended supervision orders before the commencement of the Charter in 2007. This issue may arise in future proceedings and its determination will depend on the particular facts of each case and the application of the transitional provisions of the Charter, so it would not be fruitful for me to speculate upon how the court may, in any given proceeding, resolve this issue at the present time.

Compatibility of the test for making orders with the Charter

On pages 3 and 4 of the Extract (pages 26 and 27 of the Alert Digest), the Committee expressed concern about whether the test for making orders was compatible with the Charter. It said

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

In responding to this concern, I note that the decisions referred to by the Committee relate to the previous test for assessing risk under the SSOMA. In the decision of RJE v Secretary to the Department of Justice [2008] VSCA 265, the Court of Appeal interpreted the test of likelihood in the SSOMA as requiring that an offender is 'more likely than not' to commit a relevant offence if released into the community without being subject to a supervision order. Nettle JA relied upon the Charter.

The Government responded to this decision by amending the test for making supervision orders in the SSOMA to provide greater flexibility to courts to take into account the nature and gravity of the potential offending.

A number of assessment tools are used by medical experts to assist in determining risk of sexual re--offending. While some of the tools that consider static risk include probability estimates of re-offending, it is ultimately the medical expert's clinical judgement – which takes into account the full range of dynamic, environmental, internal and external factors – that provides the critical clinical assessment of level of risk. This judgement is not able to be expressed in statistical terms.

The new test of 'unacceptable risk' in the Bill reflects similar considerations of ensuring that the court not only considers the likelihood of re-offending but also other factors, such as the level of harm that the offender poses to the community if an order is not made. In particular, the test will ensure that the threshold for making an order does not turn purely on a statistical risk assessment.

The Committee has also referred to the decision of Ross J in Secretary to the Department of Justice v AB [2009] VCC 1132, who found the amended test in the SSOMA was incompatible with the Charter.

In my view, a number of the compatibility concerns expressed by Ross J are addressed in the new Bill by giving the court rather than the Adult Parole Board the discretion to impose conditions on supervision orders and ensuring that they are tailored to the risk posed by the offender and represent the minimum interference with the offender's rights.

The test in the Bill is compatible with the Charter because it reflects an appropriate balance between the rights of offenders and the rights of the community, particularly potential victims, including children.

Bob Cameron MP
Minister for Corrections

16 December 2009

The Committee thanks the Minister for this response.

Summary Offences and Control of Weapons Acts Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 10 November 2009 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 23 November 2009 and made the following comments in Alert Digest No. 14 of 2009 tabled in the Parliament on 24 November 2009.

Committee's Comments

Charter report

Statement of partial incompatibility – Unwarranted weapon searches – Operation of the Charter

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

The Statement of Compatibility remarks:

> *As I am entitled to do, I make this statement indicating that the legislation is partially incompatible with the charter to the extent that it provides powers for police to randomly search persons and vehicles in public places within the designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon.*
>
> *I have already determined that sections 10G and 10H of the Control of Weapons Act 1990 are incompatible with the charter in relation the section 13(a). Similarly, I have determined that they are incompatible with section 17(2).*

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

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

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

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

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

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

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

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

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

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

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

Minister's Response

Thank you for your letter of 25 November 2009, requesting my advice in relation to amendments to the Control of Weapons Act 1990 (the Principal Act) as contained in the Summary Offences and Control of Weapons Acts Amendment Bill 2009 (the Bill).

As noted in the second reading speech for the Bill, the Bill provides a range of stronger powers for Victoria Police to assist in tackling the growing incidence of drunkenness, disorderly behaviour and violence, which involves the carrying and use of weapons in the Victorian community.

In particular, the Principal Act now includes two grounds for conducting searches for weapons in a public place without warrant – namely, on reasonable suspicion that the person is carrying a weapon and in a designated area. The Principal Act now also specifies the grounds upon which an area can become a designated area, while a new Schedule 1 sets out various procedures Victoria Police must follow, in conducting any searches of persons or things under the Principal Act.

I now turn to each of the questions and concerns directed to me in the Scrutiny of Acts and Regulations Committee's Charter Report, contained within Alert Digest No.14 of 2009 and as tabled in Parliament on 24 November 2009.

Compliance with s28 of the Charter

In relation to the statement of compatibility for the Bill, the Committee has expressed concern about its compliance with the requirement under s28(3)(b) of the Charter of Human Rights and Responsibilities Act 2006 (Charter), for statements of compatibility to identify the 'nature and extent' of any incompatibility with human rights.

As noted in the Charter Report, I have concluded that new sections 10G and 10H of the Principal Act are incompatible with both the right to privacy (s13(a) of the Charter) and the right of children, without discrimination, to such protection as is in their best interests and which is needed by reason of their being children (s17(2) of the Charter).

In relation to the right in s13(a) of the Charter, as noted in the statement of compatibility, new sections 10G and 10H of the Principal Act are incompatible to the extent that they provide powers for police to randomly search persons and vehicles in public places within the designated areas, even if police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon. In keeping with the proportionality test envisaged by s7 of the Charter, I have drawn this conclusion on balance, taking into account the extent of the interference with s13(a) that is enabled by these new powers and the absence of a requirement to firstly form a reasonable suspicion.

New sections 10G and 10H of the Principal Act are also incompatible with the right in s17(2) of the Charter, to the extent that they enable police to conduct random searches, without reasonable suspicion, as noted above. I am also mindful of the legal principle of the paramountcy of the rights of children and the fact that the interference with privacy that is enabled by these provisions has the potential to cause a greater detriment where children are concerned.

Operation of override declarations

The Committee has also requested further information as to the operation of the Charter's provisions on override declarations. In response to this query I would refer the Committee to the second reading speech for the Charter, delivered on 4 May 2006 in the Legislative Assembly, by the Hon. Rob Hulls MP, Attorney-General. The Attorney-General explained that:

> *Consistent with preserving the sovereignty of Parliament, [what is now section 31 of the Charter] provides that in exceptional circumstances Parliament can declare in an act that the act or a provision within the act will operate notwithstanding that it is incompatible with one or more of the human rights contained in the charter. 'Exceptional circumstances' may include threats to national security or a state of emergency which threatens the safety, security and welfare of people in Victoria. It is the intention of the government that this override power should only be used in such circumstances where it can be shown that the public interest will be best served by doing so.*

The Committee has also observed that the satisfaction of the threshold for an override declaration cannot be assessed in the absence of a statement from the Minister as to whether or not exceptional circumstances exist that might justify it. In this particular case, taking into account the above passage, I did not consider it appropriate to make an override declaration and accordingly, no such statement has been made.

Obligations on public authorities

Having regard to my opinion that new sections 10G and 10H of the Principal Act are incompatible with the Charter, the Committee has sought further information on the obligations on public authorities under s38 of the Charter, where they are required to give effect to incompatible provisions in legislation.

As the Committee has noted in its Charter Report, s38(2) of the Charter provides that the obligations on public authorities that are outlined in subsection (1) do not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Section 38 of the Charter also provides an example of the circumstances when the exemption in s38(2) could be invoked, that is, where the public authority is acting to give effect to a statutory provision that is incompatible with a human right. Accordingly, where police conduct random searches in accordance with the requirements of new sections 10G and 10H of the Principal Act, they will have the benefit of the exemption set out in s38(2) of the Charter.

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

Bob Cameron MP
Minister for Police & Emergency Services

7 January 2010

The Committee thanks the Minister for this response.

Committee Room
1 February 2010

Appendix 1
Index of Bills in 2010

Alert Digest Nos.

Appendix 2
Committee Comments classified by Terms of Reference

This Appendix lists Bills under the relevant Committee terms of reference where the Committee has raised issues requiring further correspondence with the appropriate Minister.

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Accident Compensation Amendment Bill 2009 1

(ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers

Transport Integration Bill 2009 1

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

Transport Integration Bill 2009 1

(vi) inappropriately delegates legislative power

Public Finance and Accountability Bill 2009 1
Transport Integration Bill 2009 1

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

Crimes Legislation Amendment Bill 2009 1
Livestock Management Bill 2009 1
Severe Substance Dependence Treatment Bill 2009 1

Section 17(b)

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

Accident Compensation Amendment Bill 2009 1

Appendix 3
Ministerial Correspondence 2009-10

Table of correspondence between the Committee and Ministers during 2009-10

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Electricity Industry Amendment (Critical Infrastructure) Bill 2009	Energy and Resources	10.11.09	13 of 2009
Justice Legislation Miscellaneous Amendments Bill 2009	Police and Emergency Services	10.11.09	13 of 2009
Constitution (Appointments) Bill 2009	Premier	24.11.09 *12.01.10*	14 of 2009 *1 of 2010*
Serious Sex Offenders (Detention and Supervision) Bill 2009	Corrections	24.11.09 *16.16.09*	14 of 2009 *1 of 2010*
Summary Offences and Control of Weapons Acts Amendment Bill 2009	Police and Emergency Services	24.11.09 *07.01.10*	14 of 2009 *1 of 2010*
Consumer Affairs Legislation Amendment Bill 2009	Consumer Affairs	08.12.09	15 of 2009
Accident Compensation Amendment Bill 2009	Finance, WorkCover and the Transport Accident Commission	02.02.10	1 of 2010
Crimes Legislation Amendment Bill 2009	Attorney-General	02.02.10	1 of 2010
Public Finance and Accountability Bill 2009	Treasurer	02.02.10	1 of 2010
Severe Substance Dependence Treatment Bill 2009	Health	02.02.10	1 of 2010
Transport Integration Bill 2009	Transport	02.02.10	1 of 2010