

No. 10 of 2010

Tuesday, 27 July 2010

On the

Civil Procedure Bill 2010

Energy and Resources Legislation
Amendment Bill 2010

Firearms and Other Acts Amendment
Bill 2010

Juries Amendment (Reform) Bill 2010

Primary Industries Legislation
Amendment Bill 2010

Water Amendment (Victorian
Environmental Water Holder) Bill 2010

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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 –

Civil Procedure Bill 2010
Energy and Resources Legislation Amendment Bill 2010
Firearms and other Acts Amendment Bill 2010
Juries Amendment (Reform) Bill 2010
Primary Industries Legislation Amendment Bill 2010

The Committee notes the following correspondence –

Water Amendment (Victorian Environmental Water Holder) Bill 2010



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. 10 of 2010

Civil Procedure Bill 2010

| | |
|--------------------------|----------------------|
| Introduced | 22 June 2010 |
| Second Reading Speech | 24 June 2010 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose and Background

The Bill proposes a new principal Act to reform and modernise the laws, practice, procedure and processes for the resolution of civil disputes and for the initiation and conduct of civil proceedings and appeals.

The proposed Act will come into force prior to 1 June 2011. The Bill also makes provision for transitional arrangements in respect to existing proceedings. **[2, 72 to 79]**

The Bill amends the *Supreme Court Act 1986*, the *County Court Act 1958* and the *Magistrates' Court Act 1989*. **[80 to 92]**

The proposed Act will not apply to proceedings brought under specified Acts and also certain Commonwealth Acts. **[4]**

Content

The Bill includes provisions that –

1. introduce overarching obligations for participants in civil proceedings including – to act honestly; to refrain from making frivolous or vexatious claims, or claims for a collateral purpose; to take only those steps necessary to resolve or determine the dispute; to cooperate in the conduct of the proceeding; to not engage in misleading or deceptive conduct; to use reasonable endeavours to resolve the dispute; to use reasonable endeavours to narrow the issues in the dispute; to ensure the costs incurred are reasonable and proportionate to the complexity or importance of the issues and amount in dispute; to minimise delay; and to disclose the existence of all critical documents as early as reasonably possible or at such other time as the court may direct **[16 to 26]**.
2. allow courts the power to sanction breaches of the obligations, including by way of ordering that a party must take a step to remedy a contravention of an obligation or alternatively not be permitted to take a step in the proceedings, making costs orders, expenses orders, immediate payment of costs and or expenses or ordering compensation. The court may make such orders after application by the parties or of its own motion. **[28 and 29]** When commencing proceedings, parties will be required to certify that they have read and understood the obligations. **[41]**
3. require legal practitioners (or, if unrepresented, the party) to certify that any allegations or denials of fact or non-admissions have a proper basis. **[42, 45]**.
4. introduce pre-litigation requirements for civil proceedings. Parties will be required to take reasonable steps to resolve the dispute prior to the commencement of any civil

proceeding in a court, or, failing that, to clarify and narrow the issues in dispute. [32 to 36]

5. require persons involved to consider options for resolving the dispute without the need for legal proceedings in a court, including but not limited to resolution through genuine and reasonable negotiations or appropriate dispute resolution. [34] The court may take non-compliance with these requirements into account in awarding costs and making procedural orders, or may make any other order that it considers appropriate. [38 and 39]
6. give the court the power to make any orders it considers appropriate to manage the proceeding in accordance to facilitate the just, efficient, timely and cost-effective resolution of the real issues in the dispute. [47 to 53]
7. give the court powers to sanction failure to comply with, or misuse of, the discovery process, including by means of; the initiation of contempt proceedings; costs orders against parties and legal practitioners; orders preventing the party from taking any step in the proceeding; awarding compensation; and referrals to appropriate disciplinary authorities for disciplinary action against legal practitioners who aid and abet failure to comply with discovery obligations, failure to comply with orders or directions of the court, or conduct intended to delay, frustrate or avoid discovery of discoverable documents. [56]
8. reform the law relating to summary judgement disposing of a proceedings where a claim or counterclaim has no real prospect of success. Summary judgement may be given on the application of a party or on the court's own motion. [60 to 65]
9. provide courts with the power to make an order referring the proceeding to appropriate dispute resolution. (*also refer to the definition of 'appropriate dispute resolution' at clause 3*) [66 to 69]

Charter report

Operation of the Charter – Exclusion of Charter proceedings from pre-litigation requirements

Summary: Clause 32(1)(b) exempts Charter proceedings from the Bill's provisions for pre-litigation requirements. The Committee is concerned that the clause may deny Charter claimants the benefits of those requirements. It will write to the Attorney-General seeking further information.

The Committee notes that clause 32(1)(b) exempts 'a civil proceeding under section 33 or 39 of the Charter' from the Bill's provisions for pre-litigation requirements in Parts 3.1 (requiring civil litigants to take reasonable steps to resolve disputes by agreement, clarify and narrow the issues in dispute and not unreasonably refuse negotiations or appropriate dispute resolution) and Part 3.2 (allowing a court to take compliance with these requirements into account in costs and other orders.) The Committee observes that, in contrast to the other categories of proceedings exempted by clause 32(1), clause 32(1)(b) potentially applies in any civil proceeding. The exemption will apply whether the Charter is raised by the plaintiff or defendant (including a public defendant) and whether it is a central or minor element of the litigation.

The Second Reading Speech remarks:

[T]he prelitigation requirements only reflect current good practice. It is recognised that there will be some disputes where it would be unreasonable to require the parties to go through a prelitigation process... To provide some guidance around what matters do not need to follow this process, there are some limited statutory exceptions, including appeals, proceedings under the Charter of Human Rights and Responsibilities, and proceedings in which civil penalties are sought...

While the Committee appreciates that the purpose of clause 32(1)(b) is to remove potential barriers to bringing Charter claims, it is concerned that the clause may also deny Charter claimants the benefits of Parts 3.1 and 3.2. It may deter litigants who seek an early resolution of a dispute from relying on the Charter and also permit respondents to Charter claims to needlessly force rights claims into costly court litigation.

The Committee is also concerned that the meaning of ‘a civil proceeding under section 33... of the Charter’ is unclear and may be very broad, because Charter s. 33, which governs referrals of Charter questions from lower courts to the Supreme Court, also refers to ‘a proceeding before a court or tribunal [where] a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter’. The Court of Appeal has recently held that the Charter now affects every interpretation of every Victorian statutory provision.¹

The Committee will write to the Attorney-General seeking further information as to the meaning of clause 32(1)(b)’s reference to ‘a civil proceeding under section 33... of the Charter’. Pending the Attorney-General’s response, the Committee draws attention to clause 32(1)(b).

The Committee makes no further comment.

¹ *R v Momcilovic* [2010] VSCA 50, [35].

Energy and Resources Legislation Amendment Bill 2010

| | |
|--------------------------|-----------------------------------|
| Introduced | 22 June 2010 |
| Second Reading Speech | 24 June 2010 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA |
| Portfolio responsibility | Minister for Energy and Resources |

Purpose

The Bill amends the –

- *Electricity Industry Act 2000* to extend the application of provisions of the Act designed to facilitate cost sharing between small electricity generators for suitably sized and designed augmentations to distribution networks, to require the Essential Services Commission to have regard to a Ministerial direction given under Part 6 of that Act before revoking a licence, and to make further provision for the rollout of advanced metering infrastructure. **[3 to 11]**
- *Electricity Safety Act 1998* in relation to the functions and powers of Energy Safe Victoria, the clearance of vegetation around electric powerlines, bushfire mitigation plans and electricity safety management schemes. **[12 to 35]**

Extracts from the Second Reading Speech –

... The Bill will amend the Electricity Safety Act 1998 to expand the role of the technical safety regulator – Energy Safe Victoria – in overseeing the mitigation and management of bushfire risks by the electricity industry.

... The bushfire mitigation regime that applies to electricity businesses will be strengthened. Importantly, there will be an explicit duty to minimise bushfire danger, to which a substantial penalty will apply. The Bill will also introduce a new penalty on electricity businesses that fail to have an approved bushfire mitigation plan in place by 1 November each year.

... the Bill will introduce an economic incentive scheme for reducing the number of fires started by electrical infrastructure. This scheme will form part of the economic regulatory framework managed by the Australian Energy Regulator. It will provide incentives for distribution businesses to minimise bushfire risks associated with their electricity assets.

- *National Electricity (Victoria) Act 2005* to disapply the smart meter rollout provisions under the National Electricity Law to prevent an overlap with the arrangements under the Electricity Industry Act 2000 and to provide for an economic incentive scheme with respect to fire starts to be established and administered by the Australian Energy Regulator in respect of electricity distribution companies operating in Victoria. **[36 to 42]**
- *Energy Safe Victoria Act 2005* in relation to Energy Safe Victoria's corporate governance arrangements. **[43 and 44]**
- *Mineral Resources (Sustainable Development) Act 1990* to improve the operation of that Act. **[45 to 54]**
- *Petroleum Act 1998* to improve the operation of that Act. **[55 to 63]**
- *Gas Industry Act 2001* to require the Essential Services Commission to have regard to any Ministerial emergency power direction under Part 9 of the Act before revoking a licence under the Act. **[85]**
- *Aboriginal Heritage Act 2006* to make further provision in relation to the interrelationship between cultural heritage management plans and area work plans under the *Mineral Resources (Sustainable Development) Act 1990*. **[87]**

The Bill makes miscellaneous amendments to the *Geothermal Energy Resources Act 2005*; the *Greenhouse Gas Geological Sequestration Act 2008*; the *Offshore Petroleum and Greenhouse Gas Storage Act 2010*; the *Pipelines Act 2005*; the *Victorian Energy Efficiency Target Act 2007*; the *Victorian Renewable Energy Act 2006*; and the *Energy and Resources Legislation Amendment Act 2009*.

The Bill also repeals the now redundant *Mines Act 1958*. [64]

Note: *The minerals and extractive industries are now covered by the Mineral Resources (Sustainable Development) Act 1990.*

Content and Committee comment

Presumption of innocence – Reverse evidentiary onus – Electricity safety offences

The Bill inserts new sections 83B and 83BB [17], a new paragraph (c) into section 98 [23], and a new section 113B into the *Electricity Safety Act 1998*. [26] These amendments create new offences which impose evidential onuses on a defendant to adduce or point to evidence that goes to an exception, excuse or defence.

Where these new offences relate to individuals (section 25(1) of the Charter would not arise if a corporation was a defendant to such a charge) the Statement of Compatibility relevantly provides –

... in my view, these provisions do not inappropriately transfer the burden of proof to a defendant in breach of section 25(1) of the Charter, because once a defendant has adduced or pointed to some evidence, the burden is on the prosecution to prove beyond reasonable doubt the absence of the exception or defence raised. Furthermore, the burdens do not relate to essential elements of the offences and are only imposed on the defendant to raise facts that support the existence of an exception, defence or excuse.

However, even if these provisions did 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) because the defences and exceptions provided relate to matters within the knowledge of the defendant.

The Committee makes no further comment.

Firearms and Other Acts Amendment Bill 2010

| | |
|---------------------------------|--|
| Introduced | 22 June 2010 |
| Second Reading Speech | 24 June 2010 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Bob Cameron MLA |
| Portfolio responsibility | Minister for Police and Emergency Services |

Purpose

The Bill amends the –

- *Firearms Act 1996* (the 'Act') to –
 - make technical amendments in relation to participation in interstate handgun shooting competitions.
 - make residence in Victoria a precondition of holding a firearms licence and to improve the workability of residency requirements by allowing interstate residents to apply for licences for work purposes and allowing the Chief Commissioner to permit the use and possession of firearms by persons for a limited period of up to 3 months.
 - give effect to a Commonwealth/ States government agreement by the removal of the regulation of imitation firearms from the Act and instead to regulate these items as prohibited weapons under the *Control of Weapons Act 1990*. Display, use and possession of such items will either be by way of approval by the Chief Commissioner or subject to exemption issued by Governor in Council.
 - amend the Act and the *Control of Weapons Act 1990* to provide health service workers with exemptions from elements of the regimes in those Acts in situations where they take possession of a firearm or weapon from a client for public safety purposes such as taking possession of a weapon by a medical practitioner where the client is unconscious and a weapon is found amongst the clients personal effects.
 - make amendments relating to prosecutions where a person is found in possession of a firearm with a defaced or altered serial number by introducing a rebuttable presumption that a firearm with a defaced, erased or altered serial number is not registered. [4] (see report below); and making it an offence to possess a firearm with no serial number. [23]
- *Graffiti Prevention Act 2007* to –
 - empower authorised transport officers to seize graffiti implements from persons on transport property who are suspected of having committed, or are able to commit, a graffiti offence.
 - allow notices relating to the removal of graffiti from private dwellings to apply on multiple occasions or until the owner/occupier withdraws consent; and
- *Liquor Control Reform Act 1998* to amend Schedule 2 of the Act so as to extend the existing scheme allowing police to issue banning notices in designated areas to the crime of disorderly conduct under recently inserted section 17A of the *Summary Offences Act 1966*. (Refer to Charter report) [35]

Extracts from the Second Reading Speech –

... This Bill will make a significant amendment to the *Firearms Act 1996* to make residence in Victoria a precondition of holding a firearms licence.

At the same time, it will also make changes to improve the workability of residency requirements by allowing interstate residents to apply for licences for work purposes if the nature of their work requires them to use a firearm in Victoria, even though they may not be resident in Victoria. The bill adds the residence requirement to all of the different types of firearms licences and provides the Chief Commissioner of Police with the necessary power to cancel a firearms licence where the holder of that licence no longer resides in Victoria.

... Another important aspect of the Bill is to remove the regulation of imitation firearms from the Firearms Act and place it in the Control of Weapons Act 1990.

... Under the Control of Weapons Act 1990, imitation firearms will be treated as prohibited weapons. This means a person can only use and possess them if they have sought and obtained a specific approval from the Chief Commissioner of Police or their use and possession is subject to an exemption issued by the Governor in Council. Either way, there will still be adequate controls on the display, use and storage of such weapons.

... The Bill amends the Firearms Act 1996 to confer the power on the Chief Commissioner of Police to permit the use and possession of firearms by persons from interstate for a limited period of up to three months.

... The Bill amends the Graffiti Prevention Act 2007 to empower authorised transport officers to seize graffiti implements from persons on transport property who are suspected of having committed, or are about to commit, a graffiti offence. The provision authorises authorised officers to use reasonable force in the exercise of the power where that becomes necessary.

... The Bill will also make amendments allowing notices relating to the removal of graffiti from private dwellings to apply on multiple occasions or until the owner/occupier withdraws consent.

... Finally, the Bill amends the Liquor Control Reform Act 1998 to allow for banning notices and exclusion orders to be issued for the offence of behaving in a disorderly manner. The disorderly conduct offence was inserted into the Summary Offences Act 1966 in late 2009 as part of a suite of measures to address weapon-related violence and disorder and public order concerns.

Banning notices, which may be given by a police member, and exclusion orders, which may be ordered by a court, apply within an area designated by the director for liquor licensing when certain criteria are satisfied.

In particular, these notices and orders may apply where a person is suspected of committing a specified offence in the area. The Liquor Control Reform Act 1998 already contains a number of specified offences and it is now appropriate that disorderly conduct be included as a relevant offence.

Content and Committee comment

Presumption of innocence – Reverse evidential onus for defence – Offence regarding serial numbers on firearms

The Bill inserts a new section 8A into the *Firearms Act 1996* which provides that evidence that a firearm does not have a serial number, the serial number of a firearm has been erased, defaced or altered, or the serial number of a firearm is illegible is admissible to establish that the firearm is not registered and, in the absence of evidence to the contrary, is proof of that fact. [4]

The Bill further inserts a new section 134C into the *Firearms Act 1996* to provide that it is an offence for a person to possess a firearm on which there is no serial number without reasonable excuse. The penalty for the offence is 240 penalty units or four years imprisonment. Section 134C(2) provides that in any proceeding against a person for an offence under this section, it is not necessary for the prosecution to prove that the person knew, or was aware, believed or suspected that there was no serial number on the firearm. Section 134C(3) provides that in any proceeding for an offender under this section it is a defence if the person charged had reasonable grounds for believing that there was a serial number on the firearm. [23]

Extract from the Statement of Compatibility –

In my view, clause 4 imposes an evidential onus on a defendant in relation to certain offences under the Firearms Act 1996 in which non-registration is an element of the offence, by requiring a defendant to raise evidence that a firearm is registered. I also consider that clause 23, read in conjunction with section 72 of the Criminal Procedure Act 2009 (Vic), imposes an evidential onus on a defendant to adduce or point to evidence that goes to an exception, excuse or defence. Consequently, these provisions probably do not transfer the burden of proof, because once the defendant has adduced or pointed to some evidence, the burden is on the prosecution to prove beyond reasonable doubt the absence of the exception or defence raised.

Additionally, the relevant offences are part of a statutory scheme which regulates firearms and persons who legitimately own and use firearms would be aware of the requirements of the scheme, and chose to be subject to such regulation through their firearm ownership or use.

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) because the defences and exceptions provided relate to matters within the knowledge of the defendant.

Charter report

Adequacy of statement of compatibility – Extension of banning notice scheme to suspected disorderly conduct

Summary: Clause 35 extends the existing scheme allowing police to issue banning notices in designated areas to the crime of disorderly conduct. The Committee is concerned that the combination of an intrusive and unusual police power founded on mere reasonable suspicion with the malleable concept of disorderliness may not satisfy the test in Charter s. 7(2) for reasonable limitations on human rights.

The Committee notes that clause 35, amending schedule 2 of the *Liquor Control Reform Act 1998*, extends the existing scheme in Division 2 of Part 8A of that Act allowing police to issue banning notices in designated areas to the offence of disorderly conduct in s. 17A of the *Summary Offences Act 1965*. The effect of clause 35 is that police will be able to direct anyone who they suspect on reasonable grounds to be behaving in a ‘disorderly manner’ to leave the designated area for up to 72 hours. The Committee has previously reported on the potential Charter incompatibility of both the banning notice scheme² (as well as its recent extension from 24 to 72 hour bans³) and the new offence of disorderly conduct.⁴

The Committee observes that clause 35 amounts to a significant extension of the banning notices scheme. While the existing scheme is limited to offences of violence, drunkenness or offensiveness, the offence of disorderly conduct can apply to a broad range of behaviour that lacks any of these qualities. **The Committee is concerned that the combination of an intrusive and unusual police power founded on mere reasonable suspicion with the malleable concept of disorderliness may not satisfy the test in Charter s. 7(2) for reasonable limitations on human rights.**⁵ The effect of clause 35 is to give the banning notice scheme a similar scope (in designated areas) to the general move-on power in s. 6 of

² *Alert Digest No 15 of 2007*, reporting on the compatibility of clause 5 of the Liquor Control Reform Amendment Bill 2007 with the rights to movement, liberty and the presumption of innocence.

³ *Alert Digest No 5 of 2010*, reporting on the compatibility of clause 49 of the Justice Legislation Amendment (Victims of Crimes and Other Matters) Bill 2010 with the rights to freedom of movement and a fair hearing.

⁴ *Alert Digest No 14 of 2009*, reporting on the compatibility of clause 6 of the Summary Offences and Control of Weapons Amendment Bill 2009 with the right to liberty.

⁵ 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’.

the *Summary Offences Act 1965* (which was also the subject of a Committee report on potential Charter incompatibility⁶), but without a number of the restrictions in the latter scheme.⁷

The Statement of Compatibility's analysis of clause 35 is as follows:

The provisions relating to banning and exclusion orders in the Liquor Control Reform Act 1998 were the subject of a previous statement of compatibility and were found to be compatible.

While the Committee agrees that there is no need to revisit previous analyses of human rights compatibility of existing schemes, it considers that the statement of compatibility for a Bill that extends an existing scheme should always analyse the rights compatibility of the extended portion of the scheme, so that Parliament can be fully informed of incremental encroachments on human rights.

The Committee will write to the Minister expressing its concern about the statement of compatibility for clause 35. Pending the Minister's response, the Committee draws attention to clause 35.

The Committee makes no further comment.

⁶ *Alert Digest No 14 of 2009*, reporting on the compatibility of clause 3 of the Summary Offences and Control of Weapons Amendment Bill 2009 with the right to freedom of movement.

⁷ The move-on power is limited to people in public places, 24 hour (rather than 72 hour) bans and only carries a 5 (rather than 20) penalty unit fine for non-compliance. It is also subject to s. 6(5), which excludes its application to people engaged in expressive conduct.

Juries Amendment (Reform) Bill 2010

| | |
|--------------------------|----------------------|
| Introduced | 22 June 2010 |
| Second Reading Speech | 24 June 2010 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose

The Bill amends the *Juries Act 2000* to –

- provide that remuneration and allowances for jury service are to be paid out of the Consolidated Fund. [3]
- increase community representation on juries by reducing the categories of occupations which render a person ineligible for jury service. [4]
- reduce the period after ceasing any of those occupations during which a person is ineligible for jury service from 10 years to 5 years. [4]

Extracts from the Second Reading Speech –

... In relation to the legal profession, the Bill provides that lawyers who have not practised in the last five years will become eligible for jury service. This increases community representation on juries by up to approximately 14 000 people. In all other Australian jurisdictions, except Western Australia and New South Wales, non-practising lawyers are eligible for jury service.

... All practising lawyers, including all government lawyers, remain ineligible for jury service. Trainee lawyers, such as articled clerks and people undertaking practical legal training, remain ineligible for jury service.

... The Bill also makes the Legal Services Commissioner, Legal Services Board and their staff ineligible for jury service. This replaces the legal ombudsman, which was abolished by the Legal Profession Act.

All secretaries to government departments will become ineligible for jury service. This ensures Victoria's most senior public servants do not sit on juries.

... Significantly, the Bill halves from 10 years to 5 years the period of ineligibility for occupation groups listed in clause 1 of Schedule 2 of the Juries Act. ...

... Potential jurors may still be challenged based on their past occupations or may seek to be excused on that ground.

Charter report

Fair hearing – Independent tribunal – Increased eligibility of retired prosecutors and police officers to serve as jurors

Summary: Clause 4(1) reduces the ineligibility of prosecutors and police officers to serve as jurors from ten years to five years. The Committee will write to the Attorney-General seeking further information as to whether courts and criminal defendants will be informed that a potential juror was once employed by the prosecuting agency or, in a trial where police conduct was at issue, was once a police officer.

The Committee notes that clause 4(1), amending clause 1 of Schedule 2, reduces the ineligibility of a number of office holders to serve as jurors from ten years to five year. The offices include public servants engaged in 'in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of

justice or penal administration’ and members ‘of the police force’.⁸ The Committee considers that clause 4(1) engages the Charter’s right to have criminal charges decided by an ‘independent’ court.⁹

In 2007, the House of Lords examined much more extensive United Kingdom reforms that made current prosecutors and police officers eligible to serve as jurors.¹⁰ While the House of Lords did not question the compatibility of these reforms with human rights, a majority held that it would be unfair for police officers to serve in trials where police conduct was at issue¹¹ or for prosecutors to serve in trials brought by the authority that employs them. The Committee observes that these concerns may also arise in a lesser form in relation to jurors who served as police officers or prosecutors five years earlier (a time period that might potentially encompass the events at issue in the trial.)

The Statement of Compatibility remarks:

The bill does not alter existing safeguards in the Juries Act to ensure juries are independent and impartial. Safeguards against bias, including peremptory challenges based on occupational experience, continue to apply. Potential jurors retain the right to seek to be excused from jury service.

The bill increases community representation on juries while ensuring they remain independent and impartial. The bill, therefore, does not limit the right to a fair hearing under section 24 of the charter.

However, the Committee observes that the Juries Act only appears to provide for the divulgence of a potential juror’s current occupation.¹² The English Court of Appeal, responding to the fair trial concerns raised by the House of Lords, has held that:¹³

It is essential that the trial judge should be aware at the stage of jury selection if any juror in waiting is or has been, a police officer or a member of the prosecuting authority, or is a serving prison officer. Those called for jury service should be required to record on the appropriate form whether they fall into any of these categories, so that this information can be conveyed to the judge.

The Committee will write to the Attorney-General seeking further information as to whether the court and criminal defendants will be informed that a potential juror was once employed by the prosecuting agency or, in a trial where police conduct was at issue, was once a police officer. Pending the Attorney-General’s response, the Committee draws attention to clause 4(1).

The Committee makes no further comment.

⁸ Schedule 2, clause 1 (f) & (g).

⁹ Charter s. 24(1).

¹⁰ *R v Abdroikof* [2007] UKHL 37.

¹¹ E.g. where a police officer was the alleged victim of a crime, where police misconduct was alleged and where there was a dispute between a police witness and a civilian witness.

¹² *Juries Act 2000*, s. 36(1), providing that ‘[I]n a criminal trial, the proper officer must select persons from the panel and call out the name or number and occupation of those persons ... until the required number, after allowing for all challenges for cause that have been upheld and each arraigned person’s right of challenge under section 39, is selected.’ By contrast, see *Jury Act 1995* (Qld), s. 37(2), providing that: ‘If a person has no present remunerative occupation and is not engaged in domestic duties, the person’s occupation is taken to be the person’s last remunerative occupation’.

¹³ *Khan & Ors v R* [2008] EWCA Crim 531, [132] (emphasis added)

Primary Industries Legislation Amendment Bill 2010

| | |
|---------------------------------|--------------------------|
| Introduced | 22 June 2010 |
| Second Reading Speech | 24 June 2010 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Joe Helper MLA |
| Portfolio responsibility | Minister for Agriculture |

Purpose

The Bill amends the –

- *Catchment and Land Protection Act 1994* to enable improved management of noxious weeds and pest animals. **[3 to 14]** The amendments include the ability of the Minister to make an emergency declaration published in the Government Gazette of a prohibited pest animal. **[6]**
- *Livestock Disease Control Act 1994* to improve the prevention of and response to the outbreak of disease in livestock and to provide for the release of specified information collected under the Act for certain purposes. **[15 to 46]** The amendments provide for a scheme providing for property identification codes that identifies the property at which cattle or livestock is to be kept. **[21]**
- *Primary Industries Legislation Amendment Act 2009* and the *Veterinary Practice Act 1997* to further provide for the implementation of the National Recognition of Veterinary Registration scheme. **[47 to 54]**

Extracts from the Second Reading Speech –

... The Bill provides the Department with formal powers to enter land and manage infestations of restricted pest animals. This largely aligns Department responsibilities and operational provisions with those that exist in respect of State prohibited weeds.

The Bill will assist in protecting Victoria from new invasive pest animal species by providing for an emergency declaration of a new pest animal species which poses a threat to Victoria.

... The Bill will enable the release of disease notification and property identification information to a greater range of persons and their agencies for specified purposes including to other emergency response agencies. This will facilitate a more coordinated approach to emergencies and disease outbreaks.

The Bill also amends the Veterinary Practice Act 1997 that deals with the registration of veterinary practitioners and for investigations into the professional conduct and fitness to practise of registered veterinary practitioners.

The Bill will complete the legislative framework for the implementation in Victoria of the agreed national model for the national registration of veterinary practitioners.

The Bill will also clarify the basis on which the Veterinary Practitioners Registration Board of Victoria may investigate complaints concerning the professional conduct of practitioners.

Content and Committee comment

Delayed commencement

The Bill provides for commencement by proclamation with a forced commencement not later than by 30 November 2012. The explanatory memorandum provides –

Subclause (2) provides for a forced commencement date of 30 November 2012. This is to enable new appointments to be made to the Cattle Compensation Advisory Committee and the Sheep and Goat Compensation Committee. The current appointments expire in May 2013.

Charter report

Freedom of movement – Extension of the ban on removing items from quarantine area to items with no connection to livestock – ‘any other material’

Summary: Clause 24 extends the ban on removal of items from a quarantine area without permission to items that have no connection with livestock. The Committee is concerned that clause 24 may leave the prohibition’s effect unclear to people subject to the ban. It will write to the Minister seeking further information.

The Committee notes that clause 24 amends s. 11(b)(ii) of the *Livestock Disease Control Act 1994*, an offence provision that regulates all certain conduct in quarantine areas regardless of the content of a quarantine notice.¹⁴ The amendment is as follows:

A person must not—

(b) without the written authority of an inspector-

(ii) remove from a quarantine area any livestock product, fodder or fittings or any soil, sand or any other material ~~upon which diseased livestock have been kept or with which diseased livestock have had contact.~~

Penalty: 60 penalty units.

Clause 24 thus extends the ban on removal of items from a quarantine area without permission to items that have no connection with livestock. The Committee considers that clause 24 may engage the Charter’s rights to freedom of movement and to property.¹⁵

The Explanatory Memorandum remarks that clause 24:

amends section 11(b)(ii) of the LDC Act so that the prohibition against removing from a quarantine area any livestock product, fodder or fittings or any soil, sand or any other material, applies without qualification. This ensures that it is not necessary to know with certainty that the livestock is diseased for the prohibition to apply.

The Committee observes that, in the case of ‘soil, sand or any other material’, clause 24 goes beyond this rationale, as there is now no requirement of any connection to livestock for items in this category. **The Committee is concerned that the deletion of the qualifying words in s. 11(b)(ii) may leave the prohibition’s effect, and especially the words ‘or any other material’, unclear to people subject to the ban.**

The Committee will write to the Minister seeking further information as to the meaning of s. 11(b)(ii), if amended by clause 24, of the term ‘any other material’. Pending the Minister’s response, the Committee draws attention to clause 24.

The Committee makes no further comment.

¹⁴ Section 110(1) of the *Livestock Disease Control Act 1994* provides: ‘(1) An inspector who believes on reasonable grounds that, in order to prevent the spread of disease, it is necessary to do so, may by notice in writing order that any premises, place or vehicle be quarantined and kept secure so as to prohibit or restrict the movement of any livestock, livestock product, fodder or fitting onto or out of the premises, place or vehicle affected by the notice.’

¹⁵ Charter ss. 12 and 20.

Ministerial Correspondence

Water Amendment (Victorian Environmental Water Holder) Bill 2010

The Bill was introduced into the Legislative Assembly on 25 May 2010 by the Hon. Tim Holding MLA. The Committee considered the Bill on 7 June 2010 and made the following comments in Alert Digest No. 8 of 2010 tabled in the Parliament on 8 June 2010.

Committee's Comments

[2] – Inappropriate delegation of legislative power – Delayed commencement

The Committee once again draws attention to Practice Note No. 1 of 2005 (item 1.3) and observes that for the past 5 years the Committee has sought information from Members introducing Bills to provide explanatory material for delayed commencement exceeding one year from introduction. The Committee further observes that the main objective of issuing Practice Note No. 1 was the avoidance of needless Ministerial correspondence on routine matters that should be included in explanatory material when Parliament is asked to exercise its legislative powers.

The Committee will seek this explanatory material from the Minister.

The Committee also requests that the Minister draw this matter to the attention of the responsible legal and legislation officers within his portfolio.

Minister's Response

Thank you for your facsimile dated 9 June 2010 seeking advice regarding the default commencement date of the Water Amendment (Victorian Environmental Water Holder) Bill 2010.

The Victorian Government aims and expects that the Bill, once passed, will be proclaimed to commence on 1 July 2011, thereby coinciding with the start of the new water year. However, a default commencement date of 1 January 2012 was adopted to ensure that there is sufficient time to establish the Victorian Environmental Water Holder as a new statutory body responsible for making decisions on environmental water use in Victoria, should extra time be required.

The establishment of the Victorian Environmental Water Holder will involve:

- recruiting and appointing at least three Victorian Environmental Water Holder Commissioners;*
- establishing the Victorian Environmental Water Holder office, including recruitment of staff, arrangements for office accommodation and development of operating procedures, processes and systems;*
- transferring water rights and entitlements held by the Environment Minister to the Victorian Environmental Water Holder, including making relevant changes on the water register; and*
- preparing a Corporate Plan and Ministerial Rules to apply to the Victorian Environmental Water Holder and waterway managers.*

The implementation process is expected to take several months to complete. Furthermore, Timelines may be affected by the State election later this year, noting that the Bill may be

passed shortly before the caretaker period, and certain actions, such as the appointment of Commissioners, cannot occur during this time.

In these circumstances, adopting a default commencement date of 1 January 2012 was considered to be sensible and appropriate.

I have also drawn Practice Note No. 1 of 2005 (item 1.3) to the attention of relevant legal and legislation officers within the Department of Sustainability and Environment.

Thank you for raising this matter with me.

TIM HOLDING MP
Minister for Water

30 June 2010

The Committee thanks the Minister for this response

Committee room
26 July 2010

Appendix 1

Index of Bills in 2010

Alert Digest Nos.

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| Building Amendment Bill 2010 | 6, 7 |
| Child Employment Amendment Bill 2010 | 4, 7 |
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| Consumer Affairs Legislation Amendment Bill 2009 | 2 |
| Control of Weapons Amendment Bill 2010 | 8, 9 |
| Courts Legislation Miscellaneous Amendments Bill 2010 | 6, 9 |
| Credit (Commonwealth Powers) Bill 2010 | 3 |
| Crimes Legislation Amendment Act 2010 | 4 |
| Crimes Legislation Amendment Bill 2009 | 1, 4 |
| Domestic Animals Amendment (Dangerous Dogs) Bill 2010 | 7 |
| Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bongs) Bill 2010 | 7 |
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| Electoral Amendment (Electoral Participation) Bill 2010 | 9 |
| Energy and Resources Legislation Amendment Bill 2010 | 10 |
| Environment Protection Amendment (Landfill Levies) Bill 2010 | 5 |
| Electricity Industry Amendment (Critical Infrastructure) Bill 2009 | 3 |
| Equal Opportunity Bill 2010 | 4, 5 |
| Fair Trading Amendment (Unfair Contract Terms) Bill 2010 | 6 |
| Firearms and other Acts Amendment Bill 2010 | 10 |
| Gambling Regulation Amendment (Licensing) Bill 2010 | 6 |
| Health and Human Services Legislation Amendment Bill 2010 | 4 |
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| Liquor Control Reform Amendment (ANZAC Day) Bill 2010 | 2 |
| Livestock Management Bill 2009 | 1 |
| Magistrates' Court Amendment (Mental Health List) Bill 2009 | 1 |
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Scrutiny of Acts and Regulations Committee

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| State Taxation Acts Amendment Bill 2010 | 7 |
| Statute Law Amendment (National Health Practitioner Regulation) Bill 2010 | 3 |
| Summary Offences and Control of Weapons Acts Amendment Bill 2009 | 1 |
| Superannuation Legislation Amendment Bill 2010 | 8 |
| Supported Residential Services (Private Proprietors) Bill 2010 | 9 |
| Therapeutic Goods (Victoria) Bill 2010 | 5, 6 |
| Transport Integration Bill 2009 | 1, 2 |
| Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010 | 4 |
| Transport Legislation Amendment (Ports Integration) Bill 2010 | 7 |
| Trustee Companies Legislation Amendment Bill 2010 | 5 |
| Water Amendment (Victorian Environmental Water Holder) Bill 2010 | 8, 10 |
| Working with Children Amendment Bill 2010 | 9 |

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

Justice Legislation Amendment Bill 2010 4

Public Finance and Accountability Bill 2009 1

Transport Integration Bill 2009 1

Transport Legislation Amendment (Compliance Enforcement and Regulation) Bill 2010 4

Water Amendment (Victorian Environmental Water Holder) Bill 2010 8

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

Associations Incorporation Amendment Bill 2010 8

Building Amendment Bill 2010 6

Child Employment Bill 4

Civil Procedure Bill 2010 10

Control of Weapons Amendment Bill 2010 8

Courts Legislation Miscellaneous Amendments Bill 2010 6

Crimes Legislation Amendment Act 2010 4

Crimes Legislation Amendment Bill 2009 1

Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bonges) Bill 2010 7

Equal opportunity Bill 2010 4

Firearms and Other Acts Amendment Bill 2010 10

Juries Amendment (Reform) Bill 2010 10

Justice Legislation Amendment Bill 2010 4

Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010 5

Livestock Management Bill 2009 1

| | |
|--|----|
| Members of Parliament (Standards) Bill 2010 | 5 |
| Personal Safety Intervention Orders Bill 2010 | 9 |
| Pharmacy Regulation Bill 2010 | 7 |
| Primary Industries Legislation Amendment Bill 2010 | 10 |
| Severe Substance Dependence Treatment Bill 2009 | 1 |
| Superannuation Legislation Amendment Bill 2010 | 8 |
| Therapeutic Goods (Victoria) Bill 2010 | 5 |

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 03.03.10 | 13 of 2009 3 of 2010 |
| Justice Legislation Miscellaneous Amendments Bill 2009 | Police and Emergency Services | 10.11.09 16.03.10 | 13 of 2009 4 of 2010 |
| 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 16.12.09 | 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 15.02.10 | 15 of 2009 2 of 2010 |
| Accident Compensation Amendment Bill 2009 | Finance, WorkCover and the Transport Accident Commission | 02.02.10 09.03.10 | 1 of 2010 4 of 2010 |
| Crimes Legislation Amendment Bill 2009 | Attorney-General | 02.02.10 15.03.10 | 1 of 2010 4 of 2010 |
| Transport Integration Bill 2009 | Transport | 02.02.10 22.02.10 | 1 of 2010 2 of 2010 |
| Equal Opportunity Bill 2010 | Attorney-General | 23.03.10 13.04.10 | 4 of 2010 5 of 2010 |
| Public Finance and Accountability Bill 2009 | Treasurer | 02.02.10 15.04.10 | 1 of 2010 6 of 2010 |
| Severe Substance Dependence Treatment Bill 2009 | Mental Health | 02.02.10 21.04.10 | 1 of 2010 6 of 2010 |
| Therapeutic Goods (Victoria) Bill 2010 | Health | 13.04.10 29.01.10 | 5 of 2010 6 of 2010 |
| Building Amendment Bill 2010 | Planning | 05.05.10 24.05.10 | 6 of 2010 7 of 2010 |
| Child Employment Amendment Bill 2010 | Attorney-General | 23.03.10 19.05.10 | 4 of 2010 7 of 2010 |
| Justice Legislation Amendment Bill 2010 | Attorney-General | 23.03.10 05.05.10 | 4 of 2010 7 of 2010 |
| Education and Training Reform Further Amendment Bill 2010 | Education | 13.04.10 07.05.10 | 5 of 2010 7 of 2010 |
| Members of Parliament (Standards) Bill 2010 | Premier | 13.04.10 13.05.10 | 5 of 2010 7 of 2010 |

| Bill Title | Minister/ Member | Date of Committee Letter / Minister's Response | Alert Digest No. Issue raised / Response Published |
|--|-------------------------|---|---|
| Courts Legislation Miscellaneous Amendments Bill 2010 | Attorney-General | 05.05.10 08.06.10 | 6 of 2010 9 of 2010 |
| Pharmacy Regulation Bill 2010 | Health | 25.05.10 08.06.10 | 7 of 2010 9 of 2010 |
| Water Amendment (Victorian Environmental Water Holder) Bill 2010 | Water | 08.06.10 | 8 of 2010 |

Outstanding correspondence

| | | | |
|---|-------------------------------|----------|------------|
| Crimes Legislation Amendment Act 2010 | Attorney-General | 23.03.10 | 4 of 2010 |
| Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010 | Transport, Roads and Ports | 23.03.10 | 4 of 2010 |
| Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010 | Attorney-General | 13.04.10 | 5 of 2010 |
| Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bongs) Bill 2010 | Mr Peter Kavanagh MLC | 25.05.10 | 7 of 2010 |
| Associations Incorporation Amendment Bill 2010 | Consumer Affairs | 08.06.10 | 8 of 2010 |
| Control of Weapons Amendment Bill 2010 | Police and Emergency Services | 08.06.10 | 8 of 2010 |
| Superannuation Legislation Amendment Bill 2010 | Finance | 08.06.10 | 8 of 2010 |
| Personal Safety Intervention Orders Bill 2010 | Attorney-General | 22.06.10 | 9 of 2010 |
| Civil Procedure Bill 2010 | Attorney-General | 27.07.10 | 10 of 2010 |
| Firearms and Other Acts Amendment Bill 2010 | Police and Emergency Services | 27.07.10 | 10 of 2010 |
| Juries Amendment (Reform) Bill 2010 | Attorney-General | 27.07.10 | 10 of 2010 |
| Primary Industries Legislation Amendment Bill 2010 | Agriculture | 27.07.10 | 10 of 2010 |



Scrutiny of Acts and Regulations Committee

Practice Note

[No. 3]

The Committee adopted the following Practice Note on 26 July 2010.

The Committee's Practice Notes advise Victorian Government legislation officers of the Committee's expectations in respect to information that should be provided to the Parliament concerning provisions in Bills that engage the Committee's terms of reference. To avoid needless Ministerial correspondence the Committee strongly prefers that this information should be set out in explanatory material¹ provided at the time a Bill is introduced in Parliament.

This Practice Note addresses matters arising under the Charter that repeatedly arise in Bills and that, in some cases, have been the subject of recent rulings by Victorian courts:

Bills applying non-Victorian laws – Compatibility with human rights – Impact on the operation on the Charter – Adequacy of explanatory material

The Victorian Parliament often considers Bills that apply non-Victorian laws or refer powers to non-Victorian bodies. Such Bills raise a number of concerns for scrutiny, including that the non-Victorian laws or powers may not be subject to the protections in the Charter. While the passage of national co-operative laws is a matter for Parliament, the Committee considers that the explanatory material to Bills creating or enhancing such schemes should fully explain their human rights impact.

The Committee would prefer that the explanation have two components: First, the Statement of Compatibility may assess the human rights compatibility of all existing non-Victorian laws that are to be applied in Victoria. Second, the explanatory material may set out whether, and to what extent, the Charter's operative provisions (including its provisions for scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities) will apply under the national cooperative scheme.

Privilege against self-incrimination – Removal of the privilege – Whether reasonable limit

The Victorian Supreme Court recently considered whether a Victorian statute that abolished the common law privilege against self-incrimination was compatible with the Charter.² This Note sets out the Committee's views on the requirements of statements of compatibility in light of that decision.

¹ Explanatory material includes – (1) a Statement of Compatibility made under section 28 of the *Charter of Rights and Responsibilities Act 2006*, (2) an explanatory memorandum (clause notes), and (3) Ministerial correspondence.

² *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381. See Charter ss. 24(1) & 25(2)(k).

Where a provision of any Bill either provides that a human being must answer questions or provide information or documents that may tend to incriminate that person, or creates new powers or extends existing ones that are subject to such a provision, the Statement of Compatibility should state whether and how that provision satisfies the test for reasonable limits on rights in Charter s. 7(2).

The Committee would prefer that the analysis of reasonable limits set out the demonstrable justification for: the coercive power itself; any removal of the privilege against self-incrimination; any permission to use the answers or information derived from them in later proceedings; and any preconditions on the availability of protections against self-incrimination. The Statement's discussion of less restrictive alternatives reasonably available to achieve the purpose of the provision may address whether the privilege against self-incrimination could be abrogated in a narrower way.

Presumption of innocence – Reverse onus – Whether reasonable limit

The Victorian Court of Appeal recently declared that it cannot interpret the 'deemed possession' provision of the *Drugs, Poisons and Controlled Substances Act 1985* in a way that is consistent with the Charter's right to be presumed innocent until proved guilty according to law.³ This Note sets out the Committee's views on the requirements of statements of compatibility in light of the decision.

The Statement of Compatibility for any Bill that creates (or extends the operation of or increases the applicable penalty in respect of) a provision that reduces the prosecution's burden to prove the accused's guilt or requires an accused to offer evidence of their innocence should state whether and how that provision satisfies the Charter's test for reasonable limits on rights. Examples of such provisions include ones that place the legal onus of proof on an accused with respect to any issue in a criminal proceeding; deem a fact to be proved in any circumstance; provide that proof of any fact is 'prima facie evidence' of a different fact; or place an evidential onus on an accused with respect to an essential element of an offence

The Committee would prefer that the analysis of reasonable limits assess the risk that the provision may allow an innocent person to be convicted of the offence and set out the demonstrable justification for allowing such a risk. In the case of a provision that places a legal onus on an accused, the analysis may address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision's purpose.

[The Committee's Practice Notes are available on - www.parliament.vic.gov.au/sarc]

**Committee Room,
26 July 2010**

³ *R v Momcilovic* [2010] VSCA 50