No. 12 of 2010

Tuesday, 31 August 2010

On the

Bail Amendment Bill 2010

Confiscation Amendment Bill 2010

Education and Training Reform Amendment (Skills) Bill 2010

Fair Trading Amendment (Australian Consumer Law) Bill 2010

Firearms and Other Acts Amendment Bill 2010

Juries Amendment (Reform) Bill 2010

Justice Legislation Further Amendment Bill 2010

Marine Safety Bill 2010

Occupational Licensing National Law Bill 2010

Personal Property Securities (Statute Law Revision and Implementation) Bill 2010

Primary Industries Legislation Amendment Bill 2010

Private Security Amendment Bill 2010

Residential Tenancies Amendment Bill 2010

Road Legislation Miscellaneous Amendments 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 –

Bail Amendment Bill 2010
Confiscation Amendment Bill 2010
Education and Training Reform Amendment (Skills) Bill 2010
Fair Trading Amendment (Australian Consumer Law) Bill 2010
Justice Legislation Further Amendment Bill 2010
Marine Safety Bill 2010
Occupational Licensing National Law Bill 2010
Residential Tenancies Amendment Bill 2010
Road Legislation Miscellaneous Amendments Bill 2010

The Committee notes the following correspondence –

Firearms and Other Acts Amendment Bill 2010
Juries Amendment (Reform) Bill 2010
Personal Property Securities (Statute Law Revision and Implementation) Bill 2010
Primary Industries Legislation Amendment Bill 2010
Private Security Amendment 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. 12 of 2010

Bail Amendment Bill 2010

Introduced	29 July 2010
Second Reading Speech	29 July 2010
House	Legislative Council
Member introducing Bill	Hon. Justin Madden MLC
Minister responsible	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

The Committee also reported on this Bill in Alert Digest No. 11 of 2010.

Purpose and Background

The Bill –

- amends the *Bail Act 1977* (the 'Act') to –
  1. restructure the Act with Parts. **[3, 6, 14, 16 and 18]**
  2. require a decision-maker to take into account any cultural background or other relevant cultural issues that arise due to the Aboriginality of a person when making a determination under the Act in relation to the person. **[4 and 5]**
  3. clarify and amend the sections relating to conditions of bail **[8]**, sureties and deposits, variation of bail, revocation of bail, further bail applications and appeals. **[6 to 26]**
  4. abolish the common law and statutory right of a surety to apprehend the principal to bring them before a bail justice or a court. **[20]**

  Note: *A surety may still apply to a court to have their liability discharged. (s. 24(1)(b))*

- amends the *Magistrates' Court Act 1989* to provide a new legislative framework for the appointment, re-appointment, qualifications, training, oversight, a code of conduct prescribed in regulations, suspension, retirement of bail justices and acting bail justices. The Bill also provides for the removal of bail justices and acting bail justices by the Governor in Council upon the recommendation of the Attorney-General after an independent investigation. Bail justices are volunteer office holders. **[29 to 34]**
- makes consequential amendments to these and other Acts.

Content and Committee comment

Conditions of bail – Test for initial consideration of bail and test on review

The Bill substitutes a new section 5 concerning conditions of bail including a condition that the accused does not commit an offence while on bail (substituted section 5(3)(b)). **[8]**

The Bill repeals section 18 concerning further applications for revocation or variation of bail conditions and substitutes a new Part 3 concerning those matters. New section 18AD provides that the court or bail justice may vary the amount or conditions of bail if it is reasonable to do so in all the circumstances including a number of prescribed criteria such as consideration as to the nature and seriousness of the offence, the personal circumstances

of the accused, etc. The Committee notes that the tests involved in considering variation of the amount of bail or the conditions of bail differ from the test in considering bail initially. **[15]** (*The Committee reports on this matter in the Charter report below)*

Charter report

Rights of people awaiting trial – Bail conditions imposed to reduce likelihood of offending – Restriction on variation of bail conditions

Summary: Clause 8 permits a condition to be imposed on bail to reduce the likelihood that the accused may commit an offence while on bail. Clause 15 prevents any variation of bail conditions unless the variation is 'reasonable'. The Committee refers to Parliament the question of whether or not these clauses are reasonable limits on the Charter right of people awaiting trial to not be automatically detained in custody, but to have their release subject to guarantees to attend for trial.

The Committee notes that clause 8, substituting existing s. 5, permits a condition to be imposed on bail 'in order to reduce the likelihood that the accused may:

> *(a) fail to attend in accordance with his or her bail and surrender into custody at the time and place of the hearing or trial; or*
>
> *(b) **commit an offence while on bail**; or*
>
> *(c) endanger the safety or welfare of members of the public; or*
>
> *(d) interfere with witnesses or otherwise obstruct the course of justice in any matter before the court.*

The last three purposes go beyond those permitted by Charter s. 21(6), which provides that 'A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend for trial'.[1]

The Statement of Compatibility remarks:

> *The purpose of allowing a decision-maker to impose conditions of bail is to reduce the likelihood that, if released on bail, an accused would: fail to attend court, commit an offence; endanger the safety or welfare of members of the public; or interfere with witnesses otherwise obstruct the course of justice. This purpose is important as it seeks to preserve the integrity of the criminal justice system and to protect the community.*
>
> *Importantly, clause 8 contains a number of provisions aimed at ensuring that decision-makers impose appropriate conditions of bail, namely:*
>
> > *section 5(4), which requires conditions to be no more onerous in nature and number than required to achieved the purposes in section 5(3) and reasonable, having regard to the nature of the alleged offence and the circumstances of the accused*

While the Committee accepts that conditions imposed to reduce the likelihood of danger to others or the justice system are reasonable limits on Charter s. 21(6), it notes that the situation is less clear with respect to conditions to reduce the likelihood of offences that involve neither danger to others nor obstruction of justice, e.g. using drugs in the period between the charge and the trial. While only the Irish Supreme Court has held that preventing future offending is never a legitimate reason to restrict bail,[2] other overseas approvals of the preventative use of bail have generally involved provisions that expressly limit it to particular categories of offences, such as likely or substantially likely offending, serious offences, specified offences, dangerous offences, offences like the one charged or

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1 Charter s. 26(1)(b)(c) include guarantees to attend at other stages in a judicial proceeding and, if appropriate, execution of judgment.

2 *The People (Attorney-General) v O'Callaghan* [1966] IR 501.

offences that the defendant has committed previously.[3] By contrast, clause 8 allows conditions to be set to reduce the likelihood of any offence by the accused.

The Committee also notes that clause 15, inserting a new section 18AD, requires the dismissal of every application to vary bail conditions unless the court or bail justice finds that a variation is 'reasonable… having regard to all the circumstances'. The Committee is concerned that this test:

- is in entirely different terms to the test for initially setting bail conditions in new section 5
- is expressed in general terms without guidance to its content or purpose. The Supreme Court of Canada has rejected a similarly vague test ('public interest') as giving 'courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention'.[4]
- requires consideration, where relevant, of the same list of factors that must be considered under existing s. 4(3)(d) when determining whether the release of a defendant would be an unacceptable risk
- does not require consideration of either the purposive limitation on bail conditions in new section 5(3) or the proportionality test in new section 5(4)

The Committee observes that initial bail conditions are typically set in circumstances when the defendant has had no legal advice and is highly motivated to secure release. Also, the need and impact of bail conditions is highly changeable. As a breach of a bail condition can lead to a cancellation of bail, clause 18 may engage the right against automatic detention in Charter s. 21(6).

The Committee refers to Parliament for its consideration the questions of whether or not:

- ***clause 8, by permitting a bail condition to be set to 'reduce the likelihood' of any offending on bail, even if such offending involves no danger to others or obstruction of justice***
- ***clause 18, by subjecting all variations of bail conditions to a general test of reasonableness***

are reasonable limits on the Charter's provision that 'A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend for trial'.

[3] See *Matznetter v Austria* [1969] ECHR 1, [9] (considering Article 175.1 of the Austrian Code of Criminal Procedure); *United States v Salerno,* 481 US 789 (1987) (considering 18 USC §3141(a)); *R v Morales* [1992] 3 SCR 711 (considering *Criminal Code* (Can.), s. 515(10)(b)); *S v Dlamini* [1999] ZACC 8, [52]-[53] (considering *Criminal Procedure Act 1977* (SA), s. 60(4)(a)) ; BVerfGE 35, 185 (German Constitutional Court, considering *Staffprozessordnung*, para 112a); See also *Constitution of the Republic of Ireland*, Art 40.4.6.

[4] *R v Morales* [1992] 3 SCR 711.

Confiscation Amendment Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Minister responsible	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Background

The *Confiscation Act 1997* (the 'Act') provides for a regime for the confiscation of the proceeds and instruments of crime and property suspected to be tainted in relation to serious criminal activity.

By their nature the provisions of the Act engage property and other Charter rights and contain powers that are directed at restraining and confiscating property based either following criminal conviction (court ordered and automatic forfeiture) or without a conviction (civil forfeiture). The confiscation scheme is balanced by a range of safeguards in respects to non-offenders who may have an interest in property and also those that may suffer undue hardship as a result of forfeiture, by including measures such as exclusion orders and judicial discretion, designed to protect the interests and rights of persons who may be innocently caught by the impact of the Act.

The Bill includes amendments that substitute a new Part 4 of the Act dealing with civil forfeiture of property in the absence of a criminal charge or conviction. The new Part separates this regime from the conviction based regime (court ordered and automatic forfeiture) in Part 3 of the Act. The Bill expands the reach of civil forfeiture orders by including property that is likely to be used in future crime.

Purpose

To Bill amends the *Confiscation Act 1997* (the 'Act') to –

1. insert a new 'objects' section of the Act section outlining the underlying policy aims of the legislative confiscation scheme, namely to deprive persons of the proceeds and instruments of crime, to deter offending and to disrupt criminal activity by preventing the use of tainted property in further offending. **[5]**
2. expand the scope and application of Victoria's asset confiscation scheme by providing for tainted property substitution declarations in automatic forfeiture cases (Schedule 2 offences). These declarations allow courts discretion to substitute an offender's lawfully acquired property for property that was tainted by the offence but which is not available for forfeiture. The example given is that of a drug dealer who carries out criminal activity in a rented house in an effort to protect their own house from forfeiture. **[19]**
3. clarify that a pecuniary penalty order incurs penalty interest as though it were taken to be a judgement debt. **[23]**
4. provide a new general anti-avoidance power to allow courts to set aside a transaction or arrangements designed to defeat the Act's operation. **[31]**
5. redefine the availability of automatic and civil forfeiture to serious fisheries and money laundering offences. The amendments expresses fisheries offences in terms of quantity rather than market value of the fish involved and makes money laundering an offence in its own right without the need to show some related criminal offence. **[32]**

6. clarify the duration of a freezing order is 3 business days and other amendments related to freezing orders. **[16, 46 to 48]**

7. clarify that derivative-use immunity applies to a number of provisions under the Act (sections 19E, 99 and 36T) that require a person to provide information. **[12, 24 and 49]**

8. repeal provisions for civil pecuniary penalty orders (see note 3 below). **[53]**

9. improve existing information gathering powers to require a person who is given notice of a restraining order and who claims an interest in the property to state the nature and extent of the interest. The Bill also provides for a deferral of this requirement in circumstances where the giving of the information may be prejudicial to a persons trial. **[8 to 11]**

10. provide that prescribed persons may issue information notices to financial institutions for the purpose of determining whether property is worth restraining and also the purpose of maintaining and managing property. **[25 to 27, 29]**

11. substitute a revised Part 4 of the Act to clarify and improve the operation of the civil forfeiture powers. The Bill expands the application of the regime to encompass property that is likely to be used in future offending. As with the conviction based regime the new Part 4 makes provision for restraining orders, exclusion orders and forfeiture orders. The Bill also inserts a new definition for derived property for civil forfeiture cases. (see Notes 1 and 2 below) **[34 to 38 and 49]**

Notes:

1. Civil forfeiture order – from the Second Reading Speech – *The civil and conviction-based forfeiture powers in the Act, while procedurally similar, are conceptually distinct. Civil forfeiture focuses on property 'tainted' by serious criminal activity, and enables forfeiture to occur in the absence of a criminal charge or conviction. Civil forfeiture is remedial in nature, in that it disgorges 'tainted' property from those who would otherwise benefit from it. It is also preventive in its purpose, by precluding such property from being used in further criminal activity. By contrast, conviction-based forfeiture focuses on the conduct and property interests of an accused person and may have a punitive effect.*

2. Civil forfeiture order – from the Statement of Compatibility –

… Civil forfeiture proceedings are in rem. An application is made in respect of property, rather than being directed toward a particular person. While property is restrained or forfeited on the basis it is suspected to have been used, or is likely to be used, in connection with unlawful activity or is the proceeds of crime, the proceedings are not aimed at establishing the guilt of any individual and the Bill makes clear that it is not necessary to identify a particular individual as having committed a criminal offence (new section 36K(3)). An application for an exclusion order considers matters such as whether the applicant: knew or was wilfully blind as to the commission of the offence; knew the property would be or was likely to be used in the commission of an offence; acquired the property without knowledge and in circumstances such as not to arouse a suspicion that the property was tainted property or derived property (new sections 36V and 40B).

The purposes of the scheme are remedial and preventative, rather than punitive. The civil forfeiture scheme is aimed at disgorging ill-gotten gains and at removing instruments of crime so they cannot be available for use in future offences, rather than imposing punishment. The scheme also has restitutionary and compensatory purposes in that it ensures that restrained property is first made available to satisfy victims restitution and compensation orders that may be made under the Sentencing Act 1991 (new section 36ZA).

The sanctions involved in the civil forfeiture scheme are also not so serious as to render the scheme criminal or punitive. While very large sums of money and valuable property may be restrained and forfeited, there is no conviction or imprisonment. Further, there are a number of ***safeguards in the Act*** *that prevent the scheme from operating in an unduly harsh manner. These include: the power of the Court to direct the payment of living or business expenses out of restrained property (new section 36H(4)); the ability to apply for an exclusion order (new*

sections 36U to 36V and 40A to 40B); and the power of the court to exclude property from civil forfeiture where it would otherwise cause hardship (new section 38).

3. Civil pecuniary penalty orders – *Division 2 of Part 8 of the Act (sections 63 to 66) currently provides a regime for the DPP to apply to the Supreme Court for a civil pecuniary penalty order irrespective of whether the charge had been withdrawn or finally determined. The Supreme Court may make a determination on the balance of probabilities that the defendant committed a Schedule 2 offence. The Second Reading Speech remarks that these provisions have not been used and may not be consistent in all respects with the Charter.*

Extracts from the Second Reading Speech –

The Bill also expands the availability of automatic and civil forfeiture for serious fisheries and money laundering offences. … the Bill amends the Act to express automatic and civil forfeiture thresholds for fisheries offences in terms of the quantity, instead of the value, of fish involved. This averts difficulties in establishing the market value of fish – difficulties that risk letting commercial poachers off the hook. The new threshold also better reflects the level at which profit motivated offending occurs.

The Bill also makes the automatic and civil forfeiture powers available for any money laundering offence that meets the relevant monetary threshold. Currently, authorities must establish that the monetary threshold has been met and that the laundered funds themselves relate to a serious criminal offence. The amendment acknowledges that money laundering is a serious crime in its own right, regardless of how the dirty money was made.

… the Bill inserts a general anti-avoidance power into the act. Essentially, this power will allow a court to declare a scheme or transaction to be void if satisfied that its purpose is to defeat the operation of the Act.

.. the Bill expands the application of tainted property substitution powers to apply to automatic forfeiture.

… the Bill will require a person who is given notice of a restraining order to not only declare whether he or she has an interest in restrained property, but to state the nature and extent of such interest.

The Bill also expands the ambit of information notices under the Act. … These changes will help authorities to determine whether it is worth restraining a particular property and to manage property appropriately. … the bill will enable prescribed persons to request the production of documents to assist with property management and maintenance. In practice, the prescribed persons will be senior Department of Justice officials who are responsible for managing restrained property to ensure that its value is preserved.

… clarifying that a derivative use immunity applies to a number of provisions under the Act that require persons to provide information, following the Supreme Court's decision in DAS v. Victorian Human Rights and Equal Opportunity Commission [2009] VSC 381; and

<u>Changes to civil forfeiture</u>

… The Bill substantially re enacts the civil forfeiture provisions in the Act, clearly separating them from the conviction-based regime and making civil forfeiture easier to understand and apply.

… The Bill expands the application of civil forfeiture powers to encompass property that is likely to be used in future offending.

These amendments will also clarify and reinforce the way in which the relevant rights under the Charter of Human Rights and Responsibilities Act 2006 apply in civil forfeiture proceedings.

The Bill also repeals the civil pecuniary penalty order provisions from the Act, which have never been used in practice and which may not be compatible with the Charter in all respects.

Content and Committee comment

Delayed commencement

The Bill provides for a forced commencement provision of not later than by 1 January 2012. The explanatory memorandum notes that this will allow time to make associated regulatory changes consequent upon the amendments in the Bill. **[2]**

Non-conviction based civil forfeiture regime

The Bill substitutes a revised Part 4 of the Act to clarify and improve the operation of the civil forfeiture powers. As with the conviction based regime (forfeiture on court order and automatic forfeiture) the new Part 4 makes provision for restraining orders, exclusion orders and forfeiture orders (see Notes 1 and 2 above). **[49]**

Rights and freedoms – Civil forfeiture scheme – Absence of criminal conviction – Whether punitive or remedial and preventative in nature

The Committee notes the Statement of Compatibility which provides citations of cases from comparative foreign jurisdictions where civil forfeiture schemes of a similar nature are in effect and where such schemes have been held not to impose criminal sanctions. The Committee notes that the regime does not involve a conviction or imprisonment and further notes a number of safeguards contained in the Bill that prevent the scheme from operating in an unduly harsh manner, including exclusion orders, relief from hardship and other measures noted in note 2 above.

The Committee considers that the Victorian scheme may be properly characterised as not imposing criminal sanctions and is civil and non-punitive in nature. **[49]**

Charter report

Confiscation schemes – Statement of compatibility

The Committee notes that the statement of compatibility contains a thorough and balanced account of the very complex human rights issues raised by schemes to confiscate crime-tainted property.

The Committee makes no further comment.

Education and Training Reform Amendment (Skills) Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
House	Legislative Assembly
Member introducing Bill	Hon. Bronwyn Pike MLA
Portfolio responsibility	Minister for Education

Purpose and Background

The Bill amends the *Education and Training Reform Act 2006* (the 'Act') to –

1. facilitate the implementation of the Australian Quality Training Framework (AQTF) in relation to the provision of vocational education and training.
2. include a statutory guarantee in the Act of vocational education and training for a government-subsidised course for students meeting certain criteria. **[3]**
3. widen the functions and composition of the Victorian Registration and Qualifications Authority (VRQA). **[5 and 6]**
4. to strengthen the regulatory system for training organisations. **[8 to 23 and 49]**
5. require registered training organisations to have a single purpose of providing education and training. **[24 to 28]**
6. require registered training organisations to have appropriate complaint handling processes and to establish a register of complaints and provide for the referral of unresolved complaints to prescribed resolution and student welfare process. **[28 to 34]**
7. provide that standard contract terms must be included in contracts for the provision of services by registered training organisations. **[35 and 36]**
8. provide for additional offences relating to registered training organisations and the issue of infringement notices in relation to offences committed by those organisations. **[44 and 46 to 48]**
9. strengthen enforcement powers in relation to registered training organisations. **[37 to 44]**
10. make various governance reforms to the Victorian Skills Commission, TAFE institute boards and the Adult, Community and Further Education Board. **[50 to 68]**

The Bill also makes statute law revision amendments to a number of University Acts. **[71 and the Schedule]**

Extracts from the Second Reading Speech –

> *<u>Protection of students</u>*
>
> *… The Bill will enable regulations to prescribe standard terms that must be included in contracts between providers and their students, covering matters such as fees and refunds, rights to compensation, cooling-off periods, resolution of disputes, and the award of qualifications. Further, these 'fair contract terms' may apply for a student's benefit even if a provider did not put them in the contract the student actually signed.*
>
> *The Bill will require commercial or 'fee for service' providers of vocational education and training to establish an internal complaints system as a condition of registration. Further, the Bill will enable the Minister to approve industry-based disputes handling systems, to which students may refer unresolved complaints.*

… The Bill also formalises the role of the VRQA in investigating student complaints.

The Bill will authorise the VRQA to publish consumer warnings, similar to those issued by Consumer Affairs Victoria, to warn prospective students of the risk of dealing with a particular training organisation.

Regulation of vocational education and training

The policy framework for the regulation of vocational education and training is nationally agreed through the AQTF. The Education and Training Reform Act establishes the legal rules to put that framework into effect in Victoria. This Bill will add a 'statement of intent' provision to make this objective clear.

… The Bill will confer power to make regulations that set out a mandatory Code of Conduct for providers of vocational education and training in this state. The code may cover dealings with students (including handling student complaints), standards for accuracy and completeness of marketing materials, the information that providers must give to prospective students, public liability insurance, and a number of other matters.

The Bill will enhance the regulatory and enforcement role of the Victorian Registration and Qualifications Authority, or 'VRQA'. The criteria that the VRQA applies in registering or deregistering providers of vocational education and training will be set out more clearly and in more detail. These will include criteria for assessing a provider's viability and whether its management are fit and proper to carry out their responsibilities.

The VRQA's inspectors will, subject to appropriate civil liberties safeguards, have increased capacity to carry out inspections to check whether a provider is complying with relevant laws. …The new regulatory powers range from issuing official warnings, to negotiating enforceable undertakings from a provider, to issuing infringement notices as an alternative to prosecution in open court. The Bill will also create several new offences for breaching prescribed standards of conduct or for not complying with requirements in relation to the fair treatment of students.

Governance reforms

The Bill will alter the membership and functions of the Victorian Skills Commission.

… The Bill will also improve governance and accountability of the state's TAFE institutes, which deliver vocational education and training.

Skills for Life -- the Victorian training guarantee

The Bill will set out, in law, the Victorian government's guarantee of subsidised training for eligible Victorians.

Content and Committee comment

The Bill provides that the Act comes into operation by proclamation but not later than by 1 January 2013. In respect to the delayed commencement the Committee notes this extract from the explanatory memorandum –

This will allow time for the necessary administrative arrangements to be put in place prior to commencement, including the recruitment and training of the staff that will carry out new functions under the legislation. Further, it is intended that, relying on the powers conferred by section 13 of the Interpretation of Legislation Act 1984, some implementation arrangements will be made before provisions are proclaimed. It will also allow time for institutions and registered training organisations (RTOs) to arrange to comply with the new legislative requirements before they take effect.

The Committee notes the useful and detailed explanatory memorandum concerning this Bill.

The Committee makes no further comment.

Fair Trading Amendment (Australian Consumer Law) Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
House	Legislative Assembly
Member introducing Bill	Hon. Bronwyn Pike MLA
Minister responsible	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill inserts a new Part 2 in the *Fair Trading Act 1999* (the 'Victorian Act') which will apply the Australian Consumer Law (the 'uniform law') as a law of Victoria from 1 January 2011. The Bill will repeal provisions of the current Victorian Act that are to be superseded by the uniform law. The Bill makes related changes and consequential amendments, repeals and provides for transitional and savings provisions in the Victorian Act and other Victorian Acts. *(Refer to Charter report in respect to the human rights impact of applied laws).*

Background

The Commonwealth Parliament has passed two Acts that establish the new uniform law namely the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 (Cth)* and the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth) (the No. 2 Act).* Schedule 1 of the No. 2 Act inserts a new Schedule 2 to the *Trade Practices Act 1974* (*Cth*) which provides for the uniform law. The No. 2 Act also renames the *Trade Practices Act 1974 (Cth)* as the ***Competition and Consumer Act 2010*** *(Cth).*

The uniform law will replace the 9 existing State, Territory and Federal laws regulating unfair practices, unfair contract terms, product safety schemes, reporting requirements for suppliers, product safety bans and product recalls, implied conditions and warranties, civil penalty levels, core enforcement powers.

The uniform laws are based broadly on the consumer protection provisions in the current *Trade Practices Act 1974 (Cth),* and also on the best practice elements of various consumer protection laws of the States and Territories provided for in their respective Fair Trading Acts.

Overall, 14 best practice proposals were adopted within the uniform law. Eleven of these originated from the Victorian Fair Trading Act. These include –

1. a prohibition on false or misleading testimonials;
2. a provision clarifying that a consumer is not liable to pay for unsolicited services;
3. a requirement for specified consumer agreements to be transparent;
4. a statutory right to an itemised bill or receipt for goods or services supplied above a certain value; and
5. provisions clarifying the intended interpretation of laws relating to pyramid selling.
6. laws protecting consumers against unfair contract terms in consumer contracts.
7. laws on unsolicited consumer agreements, which incorporate many features taken from the current Victorian provisions governing contact sales and telephone agreements.

Key points from the Second Reading Speech

1. *The Commonwealth Parliament has passed two Acts to establish the framework for the new Australian Consumer Law.*
2. *The Australian Consumer Law to apply in Victoria will comprise of Schedule 2 to the Competition and Consumer Act of the Commonwealth 2010 (formerly the Trade Practices Act 1974), and regulations made for the purpose of that Schedule.*
3. *The intergovernmental agreement sets out the procedures for the implementation of future amendments to the Australian Consumer Law or related regulations, and allows all governments to propose amendments.*
4. *The Director of Consumer Affairs Victoria will be the 'regulator' for the purposes of the enforcement and administration of the Australian Consumer Law in Victoria.*
5. *The Bill sets out the jurisdiction of Victorian Courts and Tribunals to deal with disputes arising under the Australian Consumer Law.*
6. *The Bill repeals those Parts and provisions of the Victorian Act that will be replaced by new Australian Consumer Law provisions and, where appropriate, amends the remaining provisions of the Victorian Act to ensure consistency.*
7. *The enforcement and administration Parts of the Victorian Act (Parts 1, 6, 7, 8, 9, 10 and 11) will, with some modification, continue as the framework for the administration of fair trading and consumer protection in Victoria.*
8. *Part 2C of the Victorian Act will also continue to govern frustrated contracts in Victoria and there is no change proposed for the current Part 5A which currently deals with fair credit reporting.*
9. *The Bill repeals Part 5 of the Victorian Act dealing with lay-by agreements which will now be addressed by the uniform laws.*
10. *Part 6 of the Victorian Act will also continue to operate. The Part enables the preparation and approval of codes of practice.*
11. *The Bill amends Parts 7 and 8 (Administration, Powers of the Director) to harmonise those provisions with the uniform law and to remove powers to be contained in the uniform laws. The 'show cause notice' section (106B) will however be retained as there is no equivalent in the uniform laws.*
12. *The Bill establishes the Victorian Consumer Law Fund into which will be paid penalties awarded under the uniform law.*
13. *Part 9 of the Victorian Act will be retained to ensure that Victorian consumers have continued access to the VCAT as a low-cost forum to resolve disputes arising under the Australian Consumer Law and the matters covered by the remaining parts of the Victorian Act.*
14. *The Bill also amends the inspection powers in Part 10 of the Fair Trading Act to ensure they align with the uniform laws.*
15. *The uniform laws will be enforced through a multiple-regulator approach, the provisions of Part 11 of the Fair Trading Act will be used for the enforcement of the uniform laws in Victoria.*

Content and Committee comment

Rights or freedoms – Privilege against self-incrimination – Application of Fair Trading Act 1999 enforcement provisions to the uniform laws – Immunity does apply to derivative use or to documents

1. The Committee notes the Statement of Compatibility (the Statement) in respect to a number of provisions that engage the privilege against self-incrimination applied by clause 9 of the Bill (applying the uniform law as law in Victoria). The Statement provides that current section 106HA in Part 8 of the Victorian Act which deals with the power to obtain information and documents to monitor compliance will apply to these applied uniform laws and that section only provides for direct use immunity. Further section 106I of the Victorian Act covers the powers of the Director to obtain information, documents

and evidence where the Director intends to investigate a contravention of the Act and again this section covers only direct use immunity and does not extend to a derivative use immunity.

In respect to the absence of derivative use immunity for other evidence uncovered in the course of the compelled disclosure regime in the Act the Statement remarks '*this means that such further evidence is permitted to be used in a criminal prosecution against the person which thus arguably limits the right against self-incrimination.*

The Committee notes the Charter s. 7(2) analysis for the rationale of not providing a derivative use immunity in the regulatory environment covered by the legislation. The Committee has not reported on the human rights compatibility of s. 106I in this context, as it considers that the Bill does not extend the Director's present powers with respect to self-incrimination.

Note: *The Committee address the Charter compatibility of s. 106I in its report on the Residential Tenancies Amendment Bill 2010, below.*

2. The Statement of Compatibility also reports on the general self-incrimination provision (section 133) in Part 10 of the Act (inspection powers) and notes the absence of the privilege for documents required to be produced under the Part. The Committee notes the Charter s. 7(2) analysis for the rationale of not providing immunity in respect to documents in the trade and commerce regulatory environment covered by the legislation.

Rights or freedoms – Presumption of innocence – Defendant to prove legal onus on balance of probabilities

Rights or freedoms – Presumption of innocence – Reverse evidentiary onus – Exceptions, proviso and rebuttal

Evidential onuses

The Statement of Compatibility provides details of a number of sections in the uniform law that require a defendant to point to some evidence of an exception, proviso or to rebut a presumption. The Statement remarks that none of the defences impose a legal burden on a defendant and the evidentiary matters are those that are within the peculiar knowledge of the defendant justifying the reverse evidentiary onus in a regulatory environment where, absent the reverse onus, enforcement of compliance would be ineffective.

Legal onuses

Sections 157, 207, 208, 209, 210 and 211 of the uniform law require defendants to prove certain things in order to make out the relevant defence. Sections 162 and 163 require a defendant to prove something in order to be exempt from the application of the relevant provision. By placing a burden of proof on a defendant, these provisions may limit the right to be presumed innocent.

Extracts from the Statement of Compatibility –

> *… the courts have held that it may be subject to limits, particularly where, as here, the relevant offences are public welfare offences of a regulatory nature; and the defences and exceptions are enacted for the benefit of defendants so that they can escape liability in certain circumstances.*
>
> *The purpose of imposing a legal burden is to ensure the effectiveness of enforcement and compliance with the Bill by enabling the offences to be effectively prosecuted and to thus operate as an effective deterrent and protection of the public.*

The defences and the associated legal burdens reflect a policy of imposing obligations upon persons who engage in consumer activity to ensure compliance with the Act. It is intended to make persons responsible for any breaches that occur, not just deliberate breaches.

…. In addition, most of the defences relate to states of knowledge or belief that are solely within the knowledge of the accused, or establishing due diligence. Conversely, it would be difficult and onerous for the Crown to investigate and prove these elements beyond reasonable doubt. Therefore, it is appropriate for the burden to rest with the defendant.

… The imposition of a burden of proof on the defendant is directly related to the purpose of enabling the relevant offence to operate as an effective deterrent while also providing suitable defences and exceptions in circumstances where the contravention was not deliberate. A legal burden is imposed to avoid evidentiary problems that may arise, particularly where the relevant facts are within the knowledge of the accused, and which may lead to a loss of convictions.

Charter report

Application of Commonwealth laws – Operation of the Charter – Practice Note No. 3

Summary: Clause 9 applies Commonwealth provisions as laws of Victoria. The Committee will write to the Minister seeking further information as to the application of the Charter.

The Committee notes that clause 9, inserting a new section 9(1)(a), applies the 'Australian Consumer Law text' (defined by new section 8 to mean schedule 2 of the *Competition and Consumer Act 2010* (Cth) and regulations made under s. 139G of that Act) 'as a law of' Victoria.

While the statement of compatibility addresses the compatibility of the Australian Consumer Law with the Charter, the explanatory material does not address whether or not the applied laws will be subject to the Charter's provisions on scrutiny, interpretation, declarations of inconsistent interpretation or obligations of public authorities. In its recent *Practice Note No. 3*, the Committee remarked:

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:… 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.

The Committee will write to the Minister seeking further information as to the application of Charter ss. 28, 29, 32, 36 and 38 to the Australian Consumer Law, as applied in Victoria by new section 9(1)(a).

The Committee makes no further comment.

Justice Legislation Further Amendment Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Attorney-General and other Ministers

Purpose

The main purposes of the Bill are to amend the –

1. *Crimes Act 1958* in relation to the digital evidence capture scheme and its impact on agencies other than Victoria Police that conduct investigations of indictable criminal matters. The Bill amends the definition of 'authorised person' who are covered under the Act for recording retrieval and storage purposes, to include investigating officials and persons engaged by a Department or agency (other than members of the police force). The Bill clarifies that a recording may be played for purposes connected with civil or criminal proceedings or an inquiry before a court or tribunal and places recording retention obligations (minimum 7 years) on Departmental heads where the investigating official is not a member of Victoria Police. The Bill provides transitional arrangements such as the amendments only apply to recordings made after the commencement of the amendments. **[3 to 6]** *(Refer to Charter report below)*
2. *Liquor Control Reform Act 1998* to insert a new Part 8B in the Act to enable the Director on receipt of advice from a fire safety inspector to order the immediate closure and evacuation of licensed premises where a serious fire threat to the health or safety of any person on those premises or in close proximity to the licensed premises is present or could arise. The premises would remain closed until the threat has been rectified by the licensee or permittee. The provisions allow fire safety inspectors to enter and inspect licensed premises at any time without notice and without a warrant in circumstances where there are reasonable grounds for suspecting serious safety of health threats. Pending further review of the Act the new Part 8B sunsets two years after its commencement. **[7 to 10]**
3. *Drugs, Poisons and Controlled Substances Act 1981* (the 'Act') to ban the sale, supply and display of *ice pipes* in Victoria. The amendments also make provision for the seizure confiscation, forfeiture and destruction of these items. The prohibition is currently covered by a Ministerial banning order under the *Fair Trading Act 1999.* The inclusion of these prohibitions in the Act is considered necessary as the new harmonised Australian Consumer Law (see report on Fair Trading Amendment (Australian Consumer Law) Bill 2010 also in this Alert) which Victoria intends to adopt, does not include this prohibition. *(Refer to the Charter report below)* **[11]**
4. *Children, Youth and Families Act 2005* with the objective of reducing time spent by parties at the Children's Court to remove the 21-day limit on the duration and extension of certain interim accommodation orders and remove the requirement for undertakings to be signed or entered into for certain interim accommodation orders. **[12 to 14]**
5. *Corrections Act 1986* to allow sheriffs and contracted staff working in the Sheriff's Communication Centre to access, disclose and make use of particular offender information held by Corrections Victoria for the purpose of executing infringement warrants. The objective of this information sharing is to locate an offender's current address, assist in the assessment of the suitability of an offender for a community work permit (in default of payment of infringement penalties) and to assess any potential enforcement risks posed by the person. **[15]**

6. *Metropolitan Fire Brigades Act 1958* and the *Country Fire Authority Act 1958* to enable the penalty interest rates applicable to those Acts to change accordingly whenever the Attorney-General fixes a new penalty interest rate by notice under section 2 of the *Penalty Interest Rates Act 1983* rather than the current practice of notices in the Government Gazette*.* **[16-18 and 23-26]**

7. *Emergency Management Act 1986* to correct a cross-referencing error. **[19]**

8. *Fair Work (Commonwealth Powers) Act 2009* to replace a reference to the *Equal Opportunity Act 1995* with a reference to the new *Equal Opportunity Act 2010*. **[20]**

9. *Legal Profession Act 2004* to clarify the Legal Services Board's powers to invest money standing to the credit of the Public Purpose Fund. The amendments have retrospective application.

   Note: The explanatory memorandum states that – *in order to ensure that there is no doubt of the Board's financial arrangement powers the Bill provides that those powers existed at the commencement of the Act (12 December 2005).* ***[2, 21 and 22]***

10. *Serious Sex Offenders (Detention and Supervision) Act 2009* to provide that despite the existence of a court suppression order, media organisations may publish the identity and location of an offender if the information is published at the request of police, and publication is in the course of law enforcement functions or in the execution of a warrant or the arrest or apprehension of an offender. **[27]**

11. *Interpretation of Legislation Act 1984* to insert a new Part 6 (Authorised Versions) in the Act to permit Chief Parliamentary Counsel to authorise electronic versions of legislation and statutory rules and make direct electronic versions admissible as evidence in courts. **[28]**

12. *Guardianship and Administration Act 1986* insert a new Part 5A in the Act to enable VCAT to appoint an administrator to manage the estate and financial affairs of missing persons. **[29 to 33]**

13. *Gambling Regulation Act 2003* to make a range of technical amendments to clarify the functions and obligations of the post-2012 monitoring licensee and gaming venues with respect to the operation of linked jackpot arrangements, extend the powers of the Victorian Commission for Gambling Regulation to make standards with respect to monitoring and gaming under the post 2012 gambling industry structure and amend the wagering tax provisions to give effect to concessional tax arrangements for premium customers. **[34 to 53]**

    Note: *The amendments to this Act have a delayed commencement provision of not later than by 1 September 2012 to coincide with the proposed new gambling industry structure commencing in 2012.*

14. *Children, Youth and Families Act 2005* and the *Infringements Act 2006* to clarify an earlier amendment to provide an extension of time to file a charge sheet in the Children's Court in children's infringement matters. The amendment will allow more flexibility for children to apply for an internal review rather than proceedings directly to court. The amendments apply retrospectively to internal review decisions served on a child on or after 1 July 2010. **[54 to 59]**

15. *Supreme Court Act 1986*, *Magistrates Court Act 1989* and *County Court Act 1958* and other Acts to provide for uniform statutory immunities for judges and other court officers such as registrars in the exercise of administrative and other functions in courts and the Victorian Civil and Administrative Tribunal. Administrative functions include the issues of warrants, committal proceedings and case assignment. The Bill proposes a uniform and coherent set of statutory immunities based on the existing statutory provisions and established common law principles. The immunity will extend to any administrative actions performed by judicial officers in their official capacity as well as administrative functions performed in their capacity as a *persona designata (a person designated individually or by name, rather than as a member of a class).* The immunity does not

extend to matters un-related to court functions such as occupational health and workplace related laws and responsibilities. **[60 to 68]**

16. *Prostitution Control Act 1994* to insert a new Part 2A in the Act to enable police to issue banning notices to exclude a person for up to 72 hours from a declared area if police suspect on reasonable grounds the person has committed or is committing an offence against section 12(2)(b) of the Act (invite or solicit a person for prostitution). A person may seek a review of a banning notice to a police officer above the rank of sergeant. The provisions also permit the issue of infringement penalty notices. A banning notice will not be able to be issued to a person who lives or works in the declared area. A declared area may be created by notice published in the Government Gazette by the Attorney-General pursuant to section 18(4) of the *Summary Offences Act 1966* if the Attorney-General is satisfied that conduct contrary to sections 12 or 13 of the Act is frequently occurring in the area. The new regime will operate on a trial basis for one year from the commencement of the provisions. **[69]**

Content and Committee comment

Search and seizure powers without consent or search warrant

The amendments made to the *Liquor Control Reform Act 1998* include provisions authorising fire safety inspectors to enter and search licensed premises, other than part of a premises used for residential purposes, at any time without prior notice or warrant where there are reasonable grounds for suspecting that there is a serious fire threat (new section 148W). **[7]**

Presumption of innocence – Reverse evidential onus – Defendant to establish 'reasonable excuse' – Failure to comply with requirement of fire safety inspector

The amendments made to the *Liquor Control Reform Act 1998* includes a provision (new section 148Z) making it an offence to fail to comply with a requirement (assist during search of premises) of a fire safety inspector without reasonable excuse. **[7]**

Privilege against self-incrimination – Requirement to produce documents – Direct use immunity for documents in criminal proceedings but immunity does not extend to derivative use

The amendments made to the *Liquor Control Reform Act 1998* include a requirement to give information, a document or assistance to a fire safety inspector undertaking a search of licensed premises (new section 148Y). These assistance requirements are to be read in conjunction with the existing provision in section 130F of the Act governing self-incrimination which provide for the privilege in respect to answering questions, either in writing or orally, but do not allow the privilege for existing documents required to be produced. Where a document is required to be produced a direct immunity is granted in respect to criminal proceedings. The Statement of Compatibility canvasses in some detail the justification for not extending the immunity in respect to use of the document to derivative use immunity. **[7]**

Charter report

Expression – Offences relating to recordings of police interviews – Transitional provision

Summary: The Committee will write to the Minister concerning an error in the Second Reading Speech and the continuing absence of a transitional provision for the new offences concerning recordings of interviews introduced by the Justice Legislation Miscellaneous Amendments Act 2010.

The Committee notes that clause 6, inserting a new section 616 into the *Crimes Act 1958*, provides for transitional arrangements for Part 2 of the Bill, which in turn makes some minor

amendments to offences inserted into the *Crimes Act* by the *Justice Legislation Miscellaneous Amendments Act 2010*.

In its report on the Bill for the earlier Act, the Committee remarked that the original scheme:[5]

> *lacks any transitional provision. It therefore may apply to existing recordings that have already been disseminated or published. If that is correct, then any non- authorised person who currently possesses such a recording will commit an offence unless they destroy it prior to the bill receiving Royal Assent and a publisher will require permission from a court to republish a previously published recording.*

In response to a query from the Committee, the Minister wrote:

> *It was always the intention that the new regime would apply only to recordings made on or after commencement of the Bill. I am considering whether an appropriate amendment is necessary to clarify this intention.*[6]

In his Second Reading Speech for the present Bill, the Minister remarked:

> *Finally, the bill addresses an issue raised by SARC in its Alert Digest No. 13 of 2009 by inserting a new transitional provision that makes it clear the scheme applies to recordings made on or after the commencement of the scheme.*

This appears to be a reference to clause 6. However, the Committee observes that new section 616 does not address the scheme inserted by the earlier Bill and does not provide that that scheme only applies to recordings made after the scheme's commencement. Rather, it only provides that the minor adjustments to the scheme by the current Bill apply only to recordings made about the commencement of Part 2.[7]

The Committee will write to the Minister concerning the error in the Second Reading Speech and the continuing absence of a transitional provision for the new offences concerning recordings of interviews introduced by the Justice Legislation Miscellaneous Amendments Act 2010.

Property – Offence to display or sell items capable of being used to smoke methylamphetamine – Aluminium foil, spoons and test tubes

Summary: Clause 11 makes it an offence to display or sell ice pipes. The definition of 'ice pipe' potentially includes everyday items such as aluminium foil, spoons and test tubes. The Committee considers that the clause may engage the Charter's right to property.

The Committee notes that clause 11, inserting a new Part VAB into the *Drugs, Poisons and Controlled Substances Act 1985*, makes it an offence to display or sell ice pipes. The offences carry fines of 240 penalty units and new sections 80HD to 80HH provide for the seizure and forfeiture of such devices.

New section 80HA(a) defines 'ice pipe' to include 'a device:

> *capable of being used or intended for use or designed for the introduction, or for introducing, into the body of a person the drug of dependence methylamphetamine, by means of smoking or inhaling of smoke or fumes resulting from the heating or burning of methylamphetamine in a crystalline form…*

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5 *Alert Digest No 13 of 2009*

6 *Alert Digest No 4 of 2010*

7 The effect of clause 6 is correctly described in the Explanatory Memorandum.

The Committee notes that the inclusion in the ban of devices 'capable of being used' to smoke methylamphetamine goes beyond the existing Victorian ban under the *Fair Trading Act 1989*[8] and equivalent bans in Queensland,[9] South Australia[10] and Western Australia.[11] Only New South Wales has a similar ban.[12]

The Committee observes that devices 'capable of being used' to smoke methylamphetamine potentially include everyday objects such as aluminium foil, spoons and test tubes.[13] The Committee considers that the offence and forfeiture provisions are therefore potentially so broad and vague in operation that they may engage the Charter right 'not to be deprived of property other than in accordance with law.'[14]

The Committee will write to the Minister seeking further information as to whether or not the definition of 'ice pipe' in new section 80HA(a) may include aluminium foil, spoons and test tubes.

The Committee refers to Parliament for its consideration the question of whether or not clause 11, by banning the sale and display of devices 'capable of being used' to smoke methylamphetamine (potentially including all aluminium foil, spoons and test tubes), and providing for their forfeiture, is compatible with the Charter's right not to be deprived of property other than in accordance with law.

The Committee makes no further comment.

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8 Victoria Government Gazette No S. 11 Thursday 22nd January 2004, which covers only objects *'used, intended for use, or designed for use in smoking'.*

9 *Tobacco and Other Smoking Products Act 1998* (Qld), s. 26ZPF(2), providing a defence for devices designed primarily for other uses, and listing aluminium foil, spoons and test tubes as examples of devices that would satisfy the defence.

10 *Summary Offences Act 1953* (SA), s. 9B, covering devices 'apparently intended for use or designed for use in smoking… methamphetamine crystals'

11 Western Australian Government Gazette 17 October 2008 No. 178, which is in the same terms as Victoria's current ban and notes that it covers 'products specifically used for smoking or inhaling methamphetamine'.

12 *Drug Misuse and Trafficking Act 1985* (NSW), s. 11A.

13 See the examples listed in s. 26ZPF(2) of the *Tobacco and Other Smoking Products Act 1998* (Qld).

14 Charter s. 20

Marine Safety Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

Purpose

The Bill is for a new principal Act to provide for safe marine operations in Victoria by —

1. imposing a range of safety duties on owners, managers, designers, manufacturers, suppliers of vessels, marine safety infrastructure and marine safety equipment. **[24 to 29]**, marine safety workers. **[30]**, masters and users of recreational vessels. **[31, 32],** passengers on vessels. **[33].**
2. providing for the registration of vessels. **[36 to 44]**
3. providing for the licensing and licensing exemptions of masters of recreational vessels and hire and drive vessels. **[45 to 61]**
4. providing for the regulation and management of the use of, and navigation of vessels on State waters. The provisions include matters such as safe construction certificates, certificates of competency, detention of unsafe vessels and a duty to report incidents. Part 4 also provides enforcement powers including impoundment, immobilisation, seizure, forfeiture and disposal of vessels. The Part further makes provision for embargo notices, infringement notices, disciplinary proceedings against permission holders and owner onus provisions similar to those applying in road legislation. *(Refer to Charter report below in respect to the owner onus regime)* **[62 to 219]**
5. requiring port management bodies to engage harbour masters and providing for the licensing of persons to act as harbour masters and the authorisation of persons to act as assistant harbour masters. **[220 to 238]**
6. providing for the registration of pilotage service providers and the licensing of pilots and requiring the use of pilots in declared parts of State waters. **[239 to 257]**
7. providing for the functions, duties and powers of the Safety Director and the general administration of the Act. Provide for Ministerial approved codes of practice, regulation making powers and review of decisions by VCAT. **[258 to 312]**
8. providing for savings and transitional arrangements in respect to licence and other operational maters under the old Act after the commencement day. **[313 to 374]**
9. making consequential amendments and repeals to the *Marine Act 1988,* consequential amendments to the *Transport (Compliance and Miscellaneous) Act 1983* and consequential amendments to a number of other Acts. **[375 to 420]**

The Bill will repeal substantial parts of the *Marine Act 1988*. The remaining provisions of that Act will deal with drug, alcohol and pollution matters in the context of safe marine operations. The 1988 Act will be renamed as the *Marine (Drug, Alcohol and Pollution Control) Act 1988.*

Content and Committee comment

Delayed commencement

The Bill has a default commencement date of 1 July 2012. **[2]**

The Committee notes that no explanation is given by the Minister concerning the desirability for providing a delayed commencement of more than 1 year from introduction. The Committee draws attention to Practice Note No. 1 (2005) concerning delayed commencement provisions.

The Committee will seek further advice from the Minister.

Compulsory acquisition of land

The Bill provides the Minister a power to purchase land required for the provision of a navigation aid for State waters. Any compulsory acquisition must be accordance with the procedures for compensation in the *Land Acquisition and Compensation Act 1986.* **[271]**

Forfeiture and sale of vessels

The Bill provides a regime for the seizure, impoundment, immobilisation, forfeiture and sale of recreational vessels. The provisions include compensation where a person is found not guilty or the charges not proceeded with. Relevant appeal rights to the Magistrates' Court also apply. The provisions also provide for third party protections against forfeiture orders. **[Part 4.2]**

Reverse legal onus

The Bill prides a number of provisions that create a legal onus for a defendant to prove on the balance of probabilities certain defences.

1. Operation of a vessel in contravention of an embargo notice

A person must not operate or permit the operation of a recreational vessel in contravention of an embargo notice and provides that an accused can escape liability if she or he can prove, on the balance of probabilities, that she or he did not know, and it was not reasonable for her or him to know, that an embargo notice was issued in respect of the vessel. **[154(5)]**

2. Owner onus

The Bill provides for an 'owner onus' regime similar to that found in road legislation whereby the owner of a vessel is presumed to be the operator of that vessel, for the purpose of offences involving the unlawful operation of a vessel. The regime permits the owner of a vessel to make a statutory declaration in the form of a 'known user', 'illegal user', 'sold vessel' or 'unknown user' statement to escape liability for an offence (clause 178). In turn a person who has been nominated in a known user or sold vehicle statement can themselves make a nomination rejection statement (clause 179).

Where proceedings are initiated against a person, they have a defence if they prove, on the balance of probabilities, that –

- such a statement was made and was accepted, or ought to have been accepted, by an enforcement officer;
- that the officer should not have cancelled the acceptance of the statement on the basis that the nomination was incorrect; or
- where a person had been nominated as responsible and had furnished a nomination rejection statement, the officer ought to have been satisfied that the nomination was incorrect (clause 181). **[Part 4.7 – sections 174 to 182]** *(Refer to Charter report)*

3. Failure to comply with a direction of a transport safety officer

The Bill amends *Transport (Compliance and Miscellaneous) Act 1983*) (inserting new section 228ZBA(3) to provide that it is an offence to fail to comply with a direction of a transport safety officer to do anything necessary to enable the effective and safe detention of a vessel. New section 228ZBA(5) provides that it is a defence to the charge if the accused can prove on the balance of probabilities that the direction or its subject matter was outside of the scope of the

business or other activities of the accused-for example, that the accused was not authorised to operate or capable of operating the vessel. **[401]**

In each instance the Committee notes the section 7(2) Charter analysis and justification for these reverse legal onus provisions in the Statement of Compatibility. In each instance the Statement concludes that the imposition, as an alternative, of only an evidential burden is not reasonably workable in a regulatory environment given the relative ease with which a defendant mat adduce the pertinent proof. The Committee makes the Charter report in respect to Part 4.7 (sections 174 to 182) below concerning the owner onus regime.

Reverse evidential onus provisions

The Committee notes that the Bill contains a number of reverse evidential onus provisions. The justification for these reverse onus provisions in the context of the marine regulatory regime established by the Bill are listed with a section 7(2) Charter analysis in the Statement of Compatibility.

In each instance the relevant provision provides a defence of reasonable excuse. The offence provisions are –

- allowing an unlicensed person to be the master of a registered recreational vessel. **[52]**
- operating a vessel in contravention of certificate. **[63]**
- tampering with a vessel. **[89]**
- failure to comply with a direction of the Safety Director regarding removal of vessel. **[92]**
- failure to surrender vessel after being served with a police notice. **[107 and 119]**
- obstructing or hindering a person executing a search and seizure warrant. **[143]**
- non-compliance with an activity exclusion zone (enter or remain in waters) notice. **[210]**
- failure to comply with a navigation direction by an applicable regulatory entity. **[213]**
- failure to comply with a prohibited navigation notice. **[214]**
- failure to comply with emergency navigation direction. **[215]**
- failure to comply with a direction of a harbour master or obstructing a harbour master. **[237]**
- failure to comply with direction by the Safety Director to remove obstruction to navigation. **[267]**
- failure to comply with a direction of a transport safety officer. **[399]**
- failure to comply with a direction of a transport safety officer. **[401]**
- possess a license etc obtained by dishonest means. **[305]**
- interfere with a navigation aid without lawful authority. **[302]**

In respect to these provisions the Committee notes these extracts from the Statement of Compatibility –

> *These provisions impose an evidential onus on an accused to adduce or point to evidence that goes to the excuse….*
>
> *Courts in other jurisdictions have generally taken the approach that an evidential onus on an accused 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 nonetheless be reasonable and justifiable under section 7(2).*

> *The defences of reasonable excuse that are provided relate to matters within the knowledge of the accused and, if the onus were placed on the prosecution, would involve the proof of a negative which would be very difficult.*

Charter report

Rights of criminal defendants – Owner onus scheme – Person nominated by owner must prove innocence – Nomination statement by owner is evidence of matters stated in it

Summary: Clauses 175, 176, 179(1)(a) and 181(c) require a person nominated by a registered owner as the master or purchaser of a vessel a the time of an owner onus offence to prove his or her innocence of the offence. The Committee considers that these clauses may be incompatible with criminal defendants' Charter right to be presumed innocent until proved guilty according to law.

The Committee notes that clause 176 makes a 'responsible person' liable for any offence prescribed as an owner onus offence as if that person was the vessel's master at the time of the offence. Clause 175 defines 'responsible person' to include a person nominated by the vessel's registered owner as the master or owner of the boat at the time of the offence. A nominated person can only avoid a conviction for the offence if he or she makes a 'nomination rejection statement' respectively denying having possession, control and being the master, of the vessel or being the owner of the vessel at the time of the offence and either:

- an enforcement official is 'satisfied… that the nomination was incorrect' (clause 179(1)(a)); or
- the nominated person proves at his or her trial that the enforcement official ought to have been 'satisfied… that the nomination was incorrect' (clause 181(c))

In short, a person nominated by a registered owner as the master or purchaser of a vessel at the time of an owner onus offence is required to prove his or her innocence of the offence. The Committee considers that clauses 175, 176, 179(1)(a) and 181(c) may limit the Charter right of criminal defendants to be presumed innocent until proved guilty according to law.[15]

The Statement of Compatibility remarks:

> *These offences are regulatory in nature and exist in relation to an activity that is highly regulated and which gives rise to an obligation to take care in the interest of public safety.*
>
> *Where the prosecution has proved that an owner's vessel was used in the commission of an offence, the owner would need to prove certain matters in order to escape liability. Where the accused was not operating the vessel, proving that a statement was made and was accepted or ought to have been accepted is not an unduly onerous means of avoiding liability. It is also reasonable for the owner to know who is operating the vessel at the time of the offence and, if this is not known, provide a statement to this effect.*
>
> *In most cases, discharging the onus will simply require production of the statement and any related correspondence.*

While the Committee accepts that it is reasonable to place an onus on the registered owner of a vessel to establish that someone else was in charge of or owned it at the time of an offence, the Committee considers that the situation is completely different in relation to a person who is merely nominated by the registered owner. Such a person is only connected to the offence by the say-so of a party wishing to escape liability for the offence and may indeed find it difficult to prove that the nomination was incorrect.

[15] Charter s. 25(1)

Although the Committee is aware that similar rules operate in relation to some road offences in Victoria, it observes that no other Australian jurisdiction requires nominated persons to prove their innocence on the balance of probabilities. Instead, those jurisdictions either leave the onus of proof unchanged in prosecutions of nominated people[16] or only place an evidentiary burden on such people.[17]

The Committee considers that clauses 175, 176, 179(1)(a) and 181(c) may be incompatible with the Charter right of criminal defendants to be presumed innocent until proved guilty according to law.

The Committee also notes that clause 180(2) provides that the mere written statement of the registered owner nominating the person is 'evidence, and in absence of evidence to the contrary, proof of the matters stated in it'. This means that a nominated person may be convicted solely or mainly on the basis of hearsay from the registered owner and without the opportunity to cross-examine the owner. The Committee considers that clause 180(2) may engage the Charter right of criminal defendants 'to examine, or have examined, witnesses against him or her, unless otherwise provided for by law' or their broader right to a fair hearing.[18] The statement of compatibility does not address the compatibility of clause 180(2) with the Charter.

The Committee will write to the Minister seeking further information as to the compatibility of clause 180(2) with the Charter. Pending the Minister's response, the Committee refers to Parliament for its consideration the question of whether or not clauses 175, 176, 179(1)(a) and 181(c), by requiring a person nominated by a vessel's registered owner to prove his or her innocence of an offence committed in relation to a vessel, is compatible with the Charter right of criminal defendants to be presumed innocent until proved guilty according to law.

The Committee makes no further comment.

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16 *Road Transport (General) Act 1999* (ACT), s. 37; *Transport Operations (Road Use Management) Act 1995* (Qld), s. 124; *Road Traffic Act 1961* (SA), s. 137A.

17 *Road Transport (General) Act 2005* (NSW), s. 179; *Traffic Regulations 1999* (NT), s. 53; *Traffic Act 1925* (Tas), s. 43GA; *Road Traffic Act 1974* (WA), s. 98.

18 Charter ss. 25(2)(g) & 24(1). See *Al-Khawaja & Tahery v UK* [2009] ECHR 110, [36].

Occupational Licensing National Law Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
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 implements the Occupational Licensing National Law (the 'national law') which sets out the regulatory framework for the National Occupational Licensing System (the 'national system'). Part 2 of the Bill adopts the national law as a law of Victoria as set out in the Schedule.

The purpose of the national system is to remove duplication and inconsistency in the regulatory arrangements throughout Australia relating to the licensing of various occupational groups. Under the national scheme, businesses and workers with a licence issued by the licensing authority will be able to operate across Australia without the need to hold multiple licences.

> **Note:** *The process agreed at COAG to bring about the national system involves the passage of the national law in the Victorian Parliament. Following this, the remaining States and Territories will pass legislation that makes the national law a law of each of those jurisdictions. The national system will be implemented through cooperative national legislation that does not involve a referral of powers to the Commonwealth government.*

The national system will initially apply to these occupational areas –

- air conditioning and refrigeration,
- building and building related occupations;
- electrical;
- land transport (passenger vehicle drivers and dangerous goods only);
- maritime;
- plumbing and gas fitting;
- property-related occupations.

The national system is to commence with a delegated agency model, where the national authority will develop licence policy but delegate the operation of licensing services to the States and Territories, who will also retain responsibility for regulating licensee conduct.

The national law provides a set of comprehensive licensing requirements, from which the Ministerial Council will make regulations which will specify the licensing requirements for each specific occupational area. **[regulation making powers – Schedule sections 160 to 165]**

The National Occupational Licensing Authority is to be governed by a Board to be appointed by the Ministerial Council and will administer the system and make recommendations to the Ministerial Council. The Authority will be supported in its policy role by Occupational Licence Advisory Committees to be established under the national law for each licensed occupation.

The public will be able to access information concerning licensees through the establishment of a national register and thus be able to verify that a particular individual or business is appropriately licensed.

On 1 July 2012 the occupation groups comprising air conditioning and refrigeration, electrical, plumbing and gas fitting, and property related occupations (excluding conveyancers and valuers) will commence under the national system. The remaining occupations will commence after 1 July 2013.

Submissions received

The Committee received a submission from the Office of the Victorian Privacy Commissioner. The full written submission will be available on the Committee's Website. The summary of the submission as provided for in the submission is reproduced below. The Committee will forward the submission to the Minister for comment.

> *The creation of a national occupational licensing scheme is a large undertaking, but will also involve collection and disclosure of vast amounts of personal information.*
>
> *Significant detail as to how precisely the Bill is to work in practice will be left to subsequent regulation making.*
>
> *Criminal History Information:*
>
> *The Bill widely defines 'criminal history' information, potentially permitting large-scale collection of criminal history information of applicants. The definition also includes information relating to charges (undermining presumptions of innocence and situations where a court orders a conviction not be recorded) and traffic related infringements.*
>
> *The way in which criminal history information will be handled by the Licensing Authority is effectively left to regulation; privacy concerns will be dependent on the view of the Ministerial Council.*
>
> *The limited protection for criminal history information (in that it will not include 'spent convictions') is ineffective in Victoria, given that Victoria lacks any spent convictions legislation.*
>
> *Information and Privacy:*
>
> *The Privacy Act 1988 (Cth) is to apply in relation to the law, but provisions of it can be removed or altered by regulation. Protections in the Privacy Act are therefore uncertain and subject to the regulatory decision making process. It is unclear whether the National Privacy Principles or Information Privacy Principles in the Privacy Act will apply.*
>
> *National Registers:*
>
> *The proposed national registers will collectively contain thousands of records relating to licensees. All matters in relation to how information on the registers will be collected, recorded and kept and inspection, access and publication of public registers has been left to national regulation. This means it is currently not possible to analyse the privacy implications of the national register, and protection will be dependent on the Ministerial Council.*
>
> *The Bill contains no mechanism to suppress information from a public register where there are legitimate security concerns (such as contained in the Business Licensing Authority Act 1998 (Vic)).*
>
> *Ministerial Council and regulation-making process:*
>
> *Regulations made by Ule Ministerial Council will determine much of the substantial effects of the Bill and appear difficult to disallow. It will be vital for the Council to consider privacy issues and consult with privacy authorities in making such regulations if it is to afford privacy protections to applicants.*

Content and Committee comment

Delegating legislative power to the executive – Whether appropriate – Commencement by proclamation – National scheme legislation

The proposed Act is to commence on proclamation. The Committee notes that the provision will enable the commencement to coincide with the commencement of corresponding laws of other participating jurisdictions, and as such there may be appropriate reasons to allow for a commencement by proclamation provision. **[2]**

Delegation of legislative power – Modifications to certain Commonwealth Acts by regulations

The Committee notes that certain provisions allow regulations to modify a number of Commonwealth Acts, these are the *Privacy Act 1988 (Cth),* the *Freedom of Information Act 1982 (Cth)* and the *Archives Act 1983 (Cth).* In each instance the explanatory memorandum provides that '*Modifications will be needed as some aspects of the [relevant Act] may not be relevant for the purposes of the national licensing system, or will need to be tailored to ensure that the protection works efficiently and effectively for the system. These modifications can be effected through the national regulations making power provided at subclauses (3) and (4)'.*

The Committee notes that in general a power to allow a subordinate instrument to modify an Act should be considered to be an in appropriate delegation of legislative power.

The Committee notes the concerns of the Office of the Victorian Privacy Commissioner in respect to the modifications that may be made to the *Privacy Act 1988 (Cth)* by regulations. The submission questions whether the Information Privacy Principles in the Commonwealth Act will apply**. [135, 137 and 141]**

The Committee will write to the Minister seeking further advice whether –

1. ***The Minister is satisfied that there is a need to include provisions in the National Law that permit regulations to modify an Act?***

2. ***Whether the National Privacy Principles or the Information Privacy Principles will apply in to any modified provisions of the Privacy Act 1988 (Cth)?***

Privilege against self-incrimination – Limitation concerning mandatory documents

The national laws in the Schedule to the Bill provide monitoring and enforcement powers including a requirement give information, answer questions and produce documents. The privilege in the national law applies save for the requirement to produce a document the licensee has access to and is required to keep under the national law. **[Schedule sections 61 to 63]** *(The limitation to the privilege in respect to documents is reported in the Statement of Compatibility)*

Rights or freedoms – Relevance of spent convictions – Absence of Victorian spent conviction legislation – Whether Victorians at a disadvantage

The Committee notes the submission of the Office of the Victorian Privacy Commissioner in respect to the absence in Victoria of legislation in respect to spent convictions and whether this may place Victorian licence or permit applicants at a disadvantage to their interstate counterparts.

The Committee will write to the Minister in respect to the absence in Victoria of a legislative regime dealing with spent convictions and whether this may disadvantage Victorian applicants in any way.

Rights or freedoms – Presumption of innocence – Probity examination - Criminal history records – Consideration of charges pending permissible – Use by licensing agencies

The Committee notes the detailed and useful section in the explanatory memorandum for this Bill and in particular in respect to the use of criminal history records for licensing purposes. The explanatory memorandum notes that –

- *each criminal history offence in the national licensing scheme will be prescribed in the occupational specific regulation as being an offence that is relevant for that occupation and subgroups (e.g. a supervised trainee) within that occupation.*
- *the definition of criminal record includes consideration of charges pending and not yet determined.*
- *the use of charges to determine applications may be considered contrary to the presumption of innocence but also notes that this has been accepted previously by Parliaments when it can be justified on public safety/ interest grounds and where there may be a public interest in restraining a person's scope of work until such matters are dealt with.*
- *the national law provides that the criminal history of an applicant is only relevant to the extent that there is a connection between the history and the inherent requirements of that occupation.*
- *the proposed national laws provide appropriate appeal rights (internal review and judicial review) against adverse administrative decisions.* **[4 and 19]**

Parliamentary supervision of regulations – Scrutiny and disallowance of regulations made by the Ministerial Council – Subordinate Legislation Act 1994 (Vic) to apply

The Committee notes that whilst many of the procedural provisions of the *Subordinate Legislation Act 1994* (the 'Act') do not apply to the national law the scrutiny and disallowance provisions, with some modification, do apply.

The Victorian Member of the Ministerial Council must table regulations made under the national law in the Parliament. The national regulations will be subject to the same scrutiny (section 21 of the Act) and disallowance provisions (section 23 of the Act) as if they were statutory rules under the Act. However, a disallowed regulation will only cease to have effect if it is disallowed in a majority of participating jurisdictions. **[5, 7, 8 and Schedule section 164 of the national law]**

The Committee makes no further comment.

Residential Tenancies Amendment Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
House	Legislative Assembly
Member introducing Bill	Hon. Bronwyn Pike MLA
Minister responsible	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill amends the *Residential Tenancies Act 1997* (the 'Act') in relation to –

Park site agreements to –

1. insert a new Part 4A to provide a regulatory framework for site tenancy agreements and rights between site residents who own their own dwelling and site owners. The new Part provides for the rights, duties and responsibilities of owner-renters and park operators in relation to site agreements, re-sale of dwellings, assignment of site agreements and regulates termination of agreements and compensation. The provisions include an increased notice period from 120 days to 365 days.
2. provide that site agreements must be in writing, prohibit harsh and unconscionable terms, provide disclosure of information to potential renters such as, a condition report, fees and charges and notice of rent increases. The Part provides for a cooling off period and a right to form and participate in resident committees. The Bill provides a grace period of 12 months to allow time to adjust to these requirements. Further, regulation may prescribe other important information that agreements must include.
3. allow the site owner to make reasonable rules concerning the control, use and management of the park.
4. increase the monetary jurisdiction of VCAT from $10,000 to $100,000 concerning disputes under Part 4A.
5. regulate entry and the manner of entry to a site tenants dwelling by the site owner and the site tenants obligations to permit lawful entry.
6. Insert a new Division 3A into Part 6 governing the termination of Part 4A site agreements
7. provide a 5 year minimum term that must be offered to residents in new parks registered after the commencement of the reforms made by the Bill. **[4 to 73]**

> **Note:** *A resident in a caravan park who resides in a moveable caravan who is not subject to a site agreement or a resident in a dwelling owned by the operator of the park will continue to be covered by the current provisions in Part 4 of the Act.*

Rooming houses to –

1. introduce a head of power to make regulations prescribing standards and requirements for rooming houses and provide penalty offences for breach of those standards. The six minimum standards to be implemented in regulations immediately cover, fire safety plans, power overload protection, working double power outlets, fire safe locks on bedroom doors, locks on bathroom doors and window coverings. **[76]**
2. expand the powers of the Director to initiate investigations and bring representative proceedings without the need of an application being made by a resident. **[74 and 75]**
3. amend and clarify the inspection powers concerning rooming houses to permit entry and search of common areas (non-residential rooms). Search of a residential room will require consent of the resident or a search warrant. **[82]**

4. establish reporting obligations by building owners and their agents (if any) to local government where the owner has reason to believe that the building is being used without being registered as a rooming house. **[77]**
5. improve protections for residents given a notice to vacate in circumstances where the operator has defaulted on their lease. A minimum of 45 days notice to vacate must be given. **[79]**

Tenancy history databases – to implement a nationally consistent approach for the regulation of privately owner electronic databases containing information about individual tenancy histories. The provisions will require certain information to be given to tenancy applicants concerning the database to be used before an application is made, give the applicant details of the listing made, restrict the circumstances when a person may be listed on a tenancy database and allow a tenant to apply to VCAT to rectify inaccurate, incomplete, ambiguous or out of date listings. **[88]**

Fire safety in caravan parks – to improve the regulation of fire safety and emergency management planning and procedures in caravan parks and to increase penalties for breaches of compliance orders and closure orders. **[83 to 87]**

Increased penalties – to provide adequate deterrence against unlawful action by increasing penalties throughout the Act. In each case the explanatory memorandum compares the increase by reference to the existing penalty and notes that the penalties have not been reviewed since 1997. **[89 to 163]**

Amendments to other Acts

Duties Act 2000 – to make consequential amendments necessary as a result of the insertion of new Part 4A (site agreements) to the *Residential Tenancies Act 1977.* **[169]**

Fair Trading Act 1999 – to clarify the Director's powers relevant to proceedings on behalf of a person without the persons consent under section 105 of the Act in circumstances where there is express legislative provision of an Act that provides that consent is not required. The amendments also provide that where the Director continues proceedings without a person's consent the Director must compensate the person for any loss or expense incurred by that person. **[170 and 171]**

Content and Committee comment

Delayed commencement

The provisions in the Bill have a forced commencement date of not later than 31 March 2012. **[2]** In respect to the delayed commencement the Committee notes the explanatory memorandum –

> *This commencement period is necessary to enable regulations to be made and for the development and implementation of an education program and other non-legislative matters incidental to the commencement of the Bill.*

Presumption of innocence – Reverse evidentiary onus provisions

The Bill includes a number of amendments that provide 'reasonable excuse' reverse evidentiary onus provisions. Three of the amendments that attract Charter consideration in the Statement of Compatibility do so simply because they increase penalties (clauses 105, 116 and 130). These offences relate to entering premises occupied by tenants and residents. The Bill also inserts a new section creating a comparable offence in respect to entering a site tenant's residence without reasonable excuse (clause 10 – new section 206ZZP). A fifth

provision is also discussed which substitutes an evidentiary onus in place of an existing legal onus (clause 131 substituting a new section 229). **[10, 105, 116, 130 and 131]**

Privilege against self-incrimination – Abrogation in respect to documents – Derivative use of evidence

The Bill amends the Act so that section 106I of the *Fair Trading Act 1999* (the applied section) will apply to the Act. That section concerns the investigative powers of the Director to require a person to answer questions or produce documents or provide evidence in respect to a contravention of the Act.

The applied section expressly abrogates the privilege against self-incrimination by providing that a person cannot refuse to answer a question, provide information or produce or permit the inspection of a document on the ground that the answer, information or document may tend to incriminate the person and then goes on to provide that the answer to a question or the provision of any information by the person in compliance with the section cannot be used against that person in any criminal proceedings other than proceedings under that section.

The Committee notes that the Statement of Compatibility provides a Charter analysis in respect to the abrogation of the privilege in relation to documents and the absence of derivative use immunity for any answers given or documents provided. *(Refer to Charter report below)* **[82(2)]**

Power of entry into residential premises without warrant

1. *Site-tenanted owned dwellings* – The Bill inserts a new Part 4A (Site agreements and site-tenant owned dwellings) and includes a right of entry (new section 206ZZI and 206ZZJ) by the owner or owner's agent to enter a site occupied by a site tenant in certain circumstances such as, by consent; in case of emergency; under an abandonment order made by the Tribunal; by prior 24 hour advance notice. The grounds for such entry are; for non-compliance of a tenant or owner duty under the Act; where the site is to be sold or used as security for a loan; or where a site inspection is necessary and entry has not been made within the last 6 months. The Committee notes that the Statement of Compatibility discusses whether these provisions are reasonably circumscribed to the extent they are reasonably necessary to permit an owner to enter a tenant's site and canvasses tenant's rights such as compensation or Tribunal orders prohibiting entry. **[10]**
2. *Rooming houses* – In respect to entry and search of rooming houses by inspectors monitoring operator compliance under the Act the Bill clarifies that the limitations in respect to that part of the premises used for residential purposes do not apply to the common areas of rooming houses such as the kitchen, hallway and living areas and that these may be entered and searched. Access to resident's rooms will continue to require consent or a search warrant. The Statement of Compatibility discusses the privacy aspects (of owners and residents) of this provision. **[82]**
3. *Caravan parks* – The Bill extends the categories of persons who may exercise entry and inspection powers in relation to caravan parks and moveable dwellings under the Act (section 525) to include any officer or employee of a fire service and provide that they are authorised persons within the meaning of the Act. **[85]**

Charter report

Self-incrimination – Director of Consumer Affairs may compel people believed to have information about breaches of tenancy law to lead investigators to evidence of their own criminality

Summary: Clause 82(2) permits the Director to oblige people believed to have information about breaches of tenancy law to lead investigators to evidence of their own criminality. The Committee considers that clause 82(2) may be incompatible with the Charter's rights with respect to self-incrimination.

The Committee notes that clause 82(2), amending s. 507A, extends the operation of s. 106I of the *Fair Trading Act 1989*, which empowers the Director of Consumer Affairs Victoria to require anyone who he or she believes to have information about a contravention of certain laws, to contraventions of the *Residential Tenancies Act*. Under s. 106I(4), such a person is obliged to answer questions even if they would tend to incriminate him or her. Although s. 106I(5) provides that those answers are generally inadmissible in later proceedings, that immunity does not apply to information derived from those answers. **So, clause 82(2) permits the Director to oblige people believed to have information about breaches of tenancy law to lead investigators to evidence of their own criminality.** The Victorian Supreme Court has held that such a scheme limits the Charter's rights with respect to self-incrimination.[19]

The Statement of Compatibility remarks:

> *The inspectors' questioning powers are necessary to ensure inspectors are able to obtain all relevant information in relation to compliance with the act. The abrogation of the privilege is designed to protect the public interest in ensuring that inspectors have adequate powers to investigate and enforce compliance with obligations under the act. Compliance with obligations protects rooming house residents.*
>
> *The purpose of not providing a derivative-use immunity in respect of answers… is to ensure that in appropriate cases criminal offences can be effectively prosecuted.*
>
> *I consider that a derivative-use immunity… would significantly impede the ability to investigate and prosecute criminal offences.*

The Committee observes that:

- Such arguments were rejected by the Supreme Court in 2009 in relation to a scheme designed to investigate organised crime that incorporated significant court supervision.
- A clear majority of Australian jurisdictions' residential tenancy laws either don't abrogate the privilege against self-incrimination or provide for a full derivative use immunity.[20]
- The effect of clause 82(2) is not limited to landlords or even to parties to a tenancy agreement. So, it may lead to the compelled self-incrimination of rooming house residents or family, friends or neighbours of tenants.
- Information derived from compelled answers may be used to prosecute any Australian offence, including offences with no connection to tenancy law, e.g. drug offences.[21]

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19 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381

20 Privilege expressly preserved: *Residential Tenancies Act 2010* (NSW), s. 98(2); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), s. 445(5). Privilege not expressly abrogated: *Residential Tenancies Act 1999* (NT), s. 140; *Residential Tenancies Act 1995* (SA), s. 31. Express derivative use immunity: *Fair Trading (Consumer Affairs) Act 1973* (ACT), s. 12I(2)(a). The two jurisdictions that don't provide derivative use immunity are Tasmania and Western Australia.

In light of these factors and the Victorian Supreme Court's ruling on a similar but more protective scheme relating to organised crime, the Committee considers that clause 82(2) may be incompatible with the Charter's rights with respect to self-incrimination.

The Committee refers to Parliament for its consideration the question of whether or not clause 82(2), by allowing the Director of Consumer Affairs Victoria to compel people believed to have information about a contravention of tenancy law to lead investigators to evidence of their own criminality, is compatible with the Charter's rights with respect to self-incrimination.

The Committee makes no further comment.

[21] *Fair Trading Act 1989*, s. 106P(2)(c).

Road Legislation Miscellaneous Amendments Bill 2010

Introduced	10 August 2010
Second Reading Speech	12 August 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

Purpose

The Bill amends the *Road Safety Act 1986* (the 'Act') to –

1. extend the operation of the immediate licence suspension system to the offence of failing to provide a sample of oral fluid, and to require the licence to be immediately surrendered to the police member issuing a notice for such failure. **[15]**
2. provide a mandatory minimum 3 month licence cancellation period for a first offence, and a mandatory minimum 6 month licence cancellation period for a subsequent offence, where a person is convicted or found guilty by a court of failing a drug-driving test. **[14]**
3. remove the maximum licence cancellation and disqualification periods for failing a drug-driving test (now 6 months for a first offence, 12 months for a subsequent offence). **[14]**
4. provide for an extension of time to nominate another driver in the circumstances where a person has been issued with a traffic infringement notice in respect of an excessive speed infringement but is unaware that the notice has been issued. **[20]**
5. provide that where a person is issued with a traffic infringement notice of a drug-driving infringement and does not lodge a notice of objection to the drug-driving infringement will have their licence or permit suspended for 3 months and have a conviction recorded for that infringement. **[21]**
6. allow VicRoads to confirm whether or not a person or body is the registered operator of a vehicle or trailer in response to a request by a vehicle or trailer dealer where the dealer specifies the name of the person whom the dealer believes is the registered operator of the vehicle or trailer. **[22]**
7. confirm that vehicle-related information such as the make, model and year of manufacture can be released by VicRoads upon request. **[22]**

The Bill also amends the –

- *Melbourne City Link Act 1995* to address a number of issues that have arisen in relation to leases granted under the Act and the operation of the freeway management system installed on the Link road as part of the M1 Upgrade. **[4-6, 9 and 10]]**
- *EastLink Project Act 2004* and the *Melbourne City Link Act 1995* to clarify that the existence of a suspended tollway billing arrangement cannot be used as a defence for driving a vehicle in a toll zone that is not registered for tolling purposes. **[3 and 7]**
- *Road Management Act 2004* to clarify the powers of State road authorities to deal with vehicles moved, kept or impounded on the grounds that they are causing an obstruction or danger or are illegally parked and clarify that authorities may charge fees before releasing a vehicle that has been impounded and the power to sell, destroy of otherwise dispose of a vehicle if the fees are not paid within 60 days. **[11]**
- *Transport (Compliance and Miscellaneous) Act 1983* to clarify the intended operation of the regulation-making power to facilitate the operation of the evidential provisions relating to the smart card ticketing system. **[24]**

The Committee makes no further comment.

Ministerial Correspondence

Firearms and Other Acts Amendment Bill 2010

The Bill was introduced into the Legislative Assembly on 22 June 2010 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 26 July 2010 and made the following comments in Alert Digest No. 10 of 2010 tabled in the Parliament on 27 July 2010.

Committee's Comments

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 scheme (as well as its recent extension from 24 to 72 hour bans) and the new offence of disorderly conduct.*

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

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.

Minister's Response

Thank you for your letter dated 28 July 2010 regarding the Committee's consideration of the Firearms and Other Acts Amendment Bill 2010.

The Committee has sought further information regarding the operation and scope of clause 35 in the Bill. Specifically, the Committee is concerned at the adequacy of the Statement of Compatibility in relation to the inclusion of the offence of disorderly conduct in the banning notice and exclusion order scheme.

I note the Committee has chosen to describe the offence as potentially applying to a broad range of behaviour that lacks any connection with violence, drunkenness or offensiveness and has expressed concern that the combination of the police powers founded on "mere" reasonable suspicion and the "malleable" concept of disorderliness may not satisfy the test found in section 7(2) of the Charter that limitations on human rights be reasonable.

I do not share these concerns. The Government has responded to community concern at the occurrence of violence and anti-social behaviour on our streets. It has always been my view that the average citizen ought to be free from the risk of violent, drunken or anti-social behaviour. Disorderly behaviour in public places diminishes the ability of ordinary law-abiding citizens to enjoy public spaces. The instances of such behaviour act as a disincentive to the average person who may otherwise wish to take advantage of the many vibrant and attractive public activities on offer in Victoria.

I do not agree that the concept of "disorderliness" is malleable in the sense suggested by the Committee. It is a concept familiar in the criminal courts. It is behaviour that goes beyond the merely annoying or ill mannered and involves a level of seriousness appropriate to warrant the intervention of the criminal law. In addition, the exercise of "reasonable suspicion" by the police is a familiar concept that does not imply any lessening of the matters police must take into account when exercising their discretion as to the best way to respond to a given situation.

The offence of disorderly conduct exists in many other jurisdictions. The legal limits of when the criminal law will intervene have been tested on a number of occasions. Any concern that this offence will lead to an unwarranted intrusion with human rights because of trivial or merely irritating behaviour is, in my view, misconceived. I fully expect the police will exercise their powers and discretion in a professional manner. Any claim to the contrary can be tested in the courts and, if upheld, the police will clearly face the consequences of wrongly characterising behaviour as criminal.

In conclusion, I consider the Statement of Compatibility to be sufficient. In my view, the extension of the banning notice and exclusion order scheme to the offence of disorderly conduct does constitute a reasonable limitation on human rights.

Thank you for bringing this matter to my attention and for giving me the opportunity to respond to the Committee's concerns.

Bob Cameron MP
Minister for Police & Emergency Services

18 August 2010

The Committee thanks the Minister for this response

Juries Amendment (Reform) Bill 2010

The Bill was introduced into the Legislative Assembly on 22 June 2010 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 26 July 2010 and made the following comments in Alert Digest No. 10 of 2010 tabled in the Parliament on 27 July 2010.

Committee's Comments

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'. *The Committee considers that clause 4(1) engages the Charter's right to have criminal charges decided by an 'independent' court.*

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. 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 issue 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. The English Court of Appeal, responding to the fair trial concerns raised by the House of Lords, has held that:

> *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).

Minister's Response

Thank you for your letter dated 28 July 2010 enclosing Charter Report of the Scrutiny of Acts and Regulations Committee (SARC), as extracted from Alert Digest No. 10 of 2010.

Your letter –

a. *considers that clause 4(1) of the Juries Amendment (Reform) Bill 2010 (the Bill) engages the Charter's right to have charges decided by an 'independent' court. The engagement is said to be because of the increased eligibility of retired prosecutors and retired police officers to serve as jurors under the Bill; and*

b. *seeks further information on 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.*

The principal aim of the Bill is to increase community representation on juries by reducing categories of occupation groups ineligible for jury service and by reducing the period of ineligibility for jury service.

One of the main reforms under the Bill is to halve the period of ineligibility for jury service from ten years to five years. This covers all the occupation groups listed in Clause 1 of Schedule 2 of the Juries Act 2000, including a member of the police force and prosecutors.[1]

The Government considers that clause 4(1) of the Bill engages but does not limit the right to a fair hearing by an independent court or tribunal (which includes the jury) under the Charter of Human Rights and Responsibilities. There are already existing safeguards that ensure a court and criminal defendants have a fair trial by an independent and impartial juror whether or not a potential juror is a former employee of a prosecuting agency or a former police officer.

A lawfully constituted jury is fundamentally important to providing a fair trial to an accused.[2] *If a jury is unlawfully constituted this represents a fatal irregularity in the trial.*[3] *In Webb*[4] *the High Court held whether a jury is not impartial depends on whether a fair-minded and informed observer would have a reasonable apprehension of a lack of impartiality on the part of the jury.*[5]

The Bill engages the right to a fair hearing because it reduces the period of ineligibility of police and prosecutors from jury service. Under clause 4(1) a person could serve on a jury after five years has elapsed since ceasing that employment.

In England and Wales, the courts have found the mere presence of a serving police officer on a jury does not of itself raise apprehended bias in the jury and does not contravene the human right to a fair trial by an independent and impartial court.[6] *Applying this to the Victorian context, the Bill does not alter the current law under the Juries Act that serving police officers and serving prosecutors are not eligible for jury service. This is a crucial difference to the English system.*[7] *On similar reasoning to that in England, the mere presence of a former police officer or prosecutor having been retired for 5 years would not of itself give rise to a reasonable apprehension of bias in a jury to a fair-minded and informed observer in Victoria.*

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1 *Juries Act 2000*, Clause 1(f) and (g) of Schedule 2. A prosecutor is covered by the definition: 'a person employed or engaged (whether on a paid or voluntary basis) in the public sector within the meaning of the *Public Administration Act 2004* in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration'. A prosecutor may also be a practising lawyer or government lawyer or member of the police force.

2 *R v Panozzo; R v Iaria* [2003] VSCA 184 at [27] – [30] per Vincent JA.

3 *R v* Hall [1971] VR 293; *R v Cherry* [2005] VSCA 89 at [10] – [11], [14]; *Martin v The Queen* [2010] VSCA 153 at [86].

4 *Webb & Hay v R* [1994] HCA 30.

5 *Webb & Hay v R* [1994] HCA 30 at [2] per Mason J and McHugh J; *Scetrine v The Queen* [2010] VSCA 194 at [14]. This is the same test for judges. A similar test for jurors exists in England and Wales - see *R v Abdroifkof* [2007] UKHL 37 at [1], [14] – [17] per Lord Bingham; *Khan v R* [2008] EWCA Crim 531 at [7] per Lord Phillips.

6 *R v Abdroifkof* [2007] UKHL 37 at [46] per Baroness Hale at [68], [78] per Lord Carswell; *Khan v R* [2008] EWCA Crim 531 at [24] per Lord Phillips; *Cornwall v R* [2009] EWCA Crim 2458 at [19] – [20].

7 *Criminal Justice Act 2003*, Schedule 33.

If a retired police officer or retired prosecutor retains pre-formed views about the justice system or knows a party to the proceeding or was connected to the case under trial, there are existing safeguards to prevent them serving on a jury.

For example, a person may seek to be excused by the Juries Commissioner or the court for any good reason, which includes potential impartiality due to a previous occupational experience held at any time.[8] It is therefore unnecessary to adopt the English approach to disclose past occupations where it may be relevant to a trial involving police conduct as this is already addressed by the excusal process.

In addition, potential jurors may be challenged during jury selection based on their present occupation.[9] For example, section 36(1) of the Juries Act requires the potential juror's present occupation be disclosed during the selection stage. This process includes exhaustion of all the peremptory challenges and challenges for cause made by the parties. An accused also has a common law right to challenge the composition of the jury as a whole, known as a challenge to the array.[10] The peremptory challenge has been held by the High Court and the Court of Appeal to be a fundamental right.[11] It is an immediate response to a potential juror for any reason including holding a certain occupation.[12]

Neither the Bill nor the Juries Act requires disclosure of a past occupation outside of the eligibility period. However, it may be disclosed as part of an application to be excused from jury service or as part of a challenge for cause. Hence, the Queensland approach does not appear necessary at this time.[13]

In the English case of Khan[14], Lord Phillips suggested that the court and criminal defendants be informed whether a potential juror is or has been a prosecutor or a police officer. This approach has been suggested, in part, because England permits current police officers and current prosecutors to serve on juries and because peremptory challenges have been abolished in that jurisdiction. This is not the case in Victoria.

The English approach also involves, in specific cases, judges asking specific questions to potential jurors to relating to a past occupation as a police officer or prosecutor.[15] To do so would undermine the purpose of jury service eligibility period as contained in section 5(3) of the Juries Act. Importantly, it could also creates a situation where potential jurors are questioned in court including about their connection to the accused or any witnesses as well as their views based on a past occupation, irrespective of how long ago it was held.[16] The eliciting of information from potential jurors about their past occupational history outside the existing process presents a danger of eventually leading to questioning similar to that practised in the United States and this is not appropriate in Victoria.

In Victoria, the eligibility period, excusal process, system of challenges and the placing of the jury pool in the courtroom (eg so they view the parties to see if they are known to them) ensures that any connection between a potential juror and the trial is disclosed. Such potential jurors are removed from the jury pool. It should also be noted a further safeguard exists under section 43 of the Juries Act whereby a trial judge, during a trial, may discharge a juror who is not impartial without discharging the whole jury.

For these reasons, the reforms made by the Bill do not interfere with existing safeguards that ensure juries are independent and impartial.

I trust that my response sufficiently assists SARC in its deliberations.

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8 *Juries Act 2000*, sections 8 to 13.

9 Challenges can be by way a peremptory challenge, challenge for cause or by standing aside a potential juror.

10 *R v Badenoch* [2001] VSC 409; *R v Badenoch* [2004] VSCA 95 at [66] – [71]; *Greer v R* (1996) 84 A Crim R 482.

11 Johns v R [1979] HCA 33 at [20] per Barwick CJ; at [15] per Gibbs J; at [1] per Stephen J; R v Cherry [2005] VSCA 89 at [10].

12 *Katsuno v R* [1999] HCA 50 at [26] – [29], [45], [51] per Gaudron, Gummow and Callinan JJ; at [118] per Kirby J.

13 *Jury Act 1995 (Qld)*, section 37(2).

14 *Khan v R* [2008] EWCA 531 at [131- [132].

15 *Cornwall v R* [2009] EWCA Crim 2458 at [24].

16 See for example, the questioning of a juror in *Yemoh v R* [2009] EWCA Crim 930.

If SARC requires any clarification of the matters raised, please do not hesitate to contact my office.

ROB HULLS MP
Attorney-General

17 August 2010

The Committee thanks the Attorney-General for this response

Personal Property Securities (Statute Law Revision and Implementation) Bill 2010

The Bill was introduced into the Legislative Assembly on 29 July 2010 by the Hon. Justin Madden MLC. The Committee considered the Bill on 9 August 2010 and made the following comments in Alert Digest No. 11 of 2010 tabled in the Parliament on 10 August 2010.

Committee's Comments

Charter report

Privacy – Transfer of Victorian registers to national register – No current regulations on privacy of national register

Summary: Clauses 6, 18, 19 and 20 permit the transfer of individuals' records to the Registrar of Personal Property Securities. Clause 21 immunises the Victorian bodies from liability for 'good faith' transfers. However, regulations for the federal register have not been published or enacted to date. The Committee will write to the Minister for more information.

The Committee notes that clauses 6, inserting a new section 41 into the Chattel Securities Act 1987, 18, 19 and 20 permit the Roads Corporation, the Registrar-General and the Registrar of Co-operatives to transfer their records, including private information on various securities registers, to the Registrar of Personal Property Services to assist in the establishment of the Personal Property Securities Register. *The Committee considers that Part 5 engages the Charter's right to privacy.*

The Statement of Compatibility remarks:

> *Registrars will be required to deal with the information held on their registers and exercise the powers in the bill in a manner that is consistent with the Information Privacy Act 2000. The PPS registrar in receiving that information will be bound by the Privacy Act 1988 (Commonwealth). The provisions of the PPS act that establish and regulate the PPS register are compatible with the rights set out in the charter.*

However, the Committee is concerned that there are presently gaps in the protection of the privacy of information transferred pursuant to clauses 6, 18, 19 and 20.

In relation to acts by the Victorian authorities, the Committee observes that clause 21 provides that these bodies are 'not liable for anything done or omitted to be done in good faith' in exercise (or in reasonable belief that they are exercising) powers under new section 41 or clauses 18, 19 and 20.

In relation to acts by the Registrar of Personal Property Securities, the Committee observes that regulations governing the privacy of the federal Personal Property Securities Register have not yet been settled or enacted. In relation to this issue, the Committee's Alert Digest No. 10 of 2009, reporting on the Personal Property Securities (Commonwealth Powers) Bill 2009, remarked:

> *[T]he Committee observes that ss. 153, 170 & 171 of the proposed Commonwealth Act, which regulate the storage and searching of personal information about grantors (i.e. people who borrow money with personal property as collateral) on the Personal Property Securities Register, engage the Charter right of grantors (who are typically natural*

persons) to privacy, (e.g. if grantors have to supply their date of birth, address and other personal details and if the database can be searched in a way that can reveal these details.)…

[T]he main automatic protections for grantors' privacy depend on the passage and content of regulations made by the Governor-General under s. 303 of the proposed Commonwealth Act. In particular, the regulations will define:

- *the details that grantor must provide to register financial statements in relation to particular property (s. 153, items 2 & 8)*
- *prohibitions on some searches of the register (s. 170(3)(d))*
- *permitted search criteria (s. 171(1)(e))*
- *the way in which the results of searches are worked out (s. 171(3))*

In its Alert Digest No. 12 of 2009, the Committee published the Minister's response, which confirmed that neither the federal regulations nor the Registrar of Personal Property Services will be subject to the Charter. The Minister also remarked:

In relation to future amendments to the PPS Act and the future promulgation of PPS regulations by the Commonwealth, the Commonwealth Government has an obligation under clause 3.3 of the PPS Agreement to consult with the States and Territories on such proposals prior to introducing amending legislation into the Commonwealth Parliament.

The Commonwealth Government has stated that it will be releasing draft regulations for public consultation later this year and will be consulting with the States and Territories pursuant to the PPS Agreement. The Victorian Government will be scrutinising these regulations for compatibility with the Charter and will advocate for Charter-compatible outcomes. Further, the Victorian Government will scrutinise the extent to which the draft regulations add to, or modify the operation of, clauses 153, 170 and 171 of the PPS Bill.

However, the Committee observes that, while an updated discussion paper on the proposed regulations was released in October 2009, no draft regulations have been released for public discussion and no regulations have been promulgated.

The Committee will write to the Minister seeking further information as to the progress of the regulations of the Personal Property Securities Act 2009 (Cth).

Pending the Minister's response the Committee refers to Parliament for its consideration the questions of whether or not clauses 8, 17, 18, 19 and 20, by authorising the transfer of Victorians' information to the federal Personal Property Securities Register when Victorian authorities are immunised from liability for good faith transfers and no regulations have yet been published regulating the privacy of the federal register, are compatible with the Charter's right to privacy.

Minister's Response

I refer to the report of the Scrutiny of Acts and Regulations Committee (the Committee) in Alert Digest No.11 of 2010 regarding the ***Personal Property Securities (Statute Law Revision and Implementation) Bill 2010*** *(the Bill). The Committee has sought further information as to the progress of the Commonwealth's draft Personal Property Securities Regulations 2010 (PPS regulations) to be made under the Personal Property Securities Act 2009 (PPS Act) and has raised clauses 6, 17, 18, 19 and 20 of the Bill for consideration by Parliament.*

A. Privacy implications for transfer of Victorian registration data to Commonwealth PPS register

Clause 17 of the Bill sets out the definitions for Part 5 - Provision of information of the Bill. Clause 18 provides for the transfer of information contained in the records of the Roads Corporation under Part 3 of the Chattel Securities Act 1987 "that is necessary" to give effect to the PPS Act and to assist in the establishment of the PPS register. Similarly, clause 19 provides for the transfer of information recorded in the Office of the Registrar-General under Part VII and VIII of the Instruments Act 1958 while clause 20 provides for the transfer of information contained in the records of the Registrar of Co-operatives under the Co-operatives Act 1996. As the Statement of Compatibility to this Bill notes, the exercise of the powers in this Bill will be required to be in a manner consistent with the Information Privacy Act 2000. In

preparing this Bill the Government has consulted with the Office of the Victorian Privacy Commissioner. Accordingly, it is important to note the inclusion of the qualifying words in clauses 18 - 20 "that is necessary" which is intended to limit the scope and purpose of the transfer of data to give effect to the PPS Act and to the establishment of the PPS register. I consider this approach to be consistent with the information privacy principles in the Information Privacy Act 2000.

*At a practical or operational level, I trust the information set out in **Attachment A** to this letter will assist with the Committee's consideration of the scope of the data to be transferred to the Commonwealth. The majority of registered secured parties on the relevant Victorian registers are corporate entities. In relation to the grantors or mortgagors of the security interests, where these are individuals, there is very little personal information currently recorded other than their name. In relation to the method by which the data is to be transferred to the Commonwealth I am advised that data on the Register of Stock Mortgages and the Register of Co-operative Charges will be recorded in Microsoft Excel spreadsheet format and uploaded onto the PPS register website through a secure server. I understand that the data will be encrypted and subject to authorised password access. In relation to the method by which data on the Vehicle Securities Register is to be transferred, the data will be transferred through direct electronic transfer from the VicRoads register to the PPS register. This would be done through a secure uplink, subject to encryption and authorised password access. As the PPS register is currently being built (and refined), and as operational testing is yet to be completed, there may be some variations to the methodology outlined above. However, I am advised that the data security protocols are of a high standard.*

*Clause 6 of the Bill inserts a new section 41 into the Chattel Securities Act 1987 enabling the Roads Corporation to provide written notice to the PPS Registrar or any variation of particulars to be held in the 'continued register', which will be, in effect, a historical database to be maintained by VicRoads. This clause enables VicRoads to notify the PPS Registrar of any variations to particulars or the correction of any inaccuracies in particulars on the continued register to allow the PPS Registrar to make similar corrections as needed in relation to the details of migrated Victorian vehicle security interests for consistency. Based on the type of data to be transferred from the Vehicle Securities Register (as set out in **Attachment A**), and given the majority of secured interest holders are corporate entities, there is likely to be minimal personal information disclosed under this information sharing power.*

In view of the above, I consider the powers conferred by this Bill in clauses 6, 17 to 20 that enable the transfer of certain information held by Victorian agencies necessary to assist the Commonwealth to establish the PPS register and for its future operation to be compatible with the right to privacy under section 13 of the Charter of Human Rights and Responsibilities.

Further, it is my view that the 'good faith' immunity in clause 21, operating in conjunction with the information transfer powers in this Bill and to the extent that it raises any privacy considerations, does not limit the right to privacy. The immunity is not unlawful or arbitrary, does not preclude an individual from making a complaint to the Victorian Privacy Commissioner if they believe that there has been a breach of the Information Privacy Act 2000, and does not preclude merits or judicial review of the State's handling of personal information under these information-sharing powers.

B. Privacy protection at the Commonwealth level following transfer of data

I note the concern raised by the Committee that any Commonwealth regulations, which could modify or alter the operation of sections 153, 170 and 171 of the PPS Act, have not been made or that draft regulations have not been released. I can advise the Committee that the Commonwealth released a public exposure draft of the PPS Regulations in April 2010 which is accessible from the Australian Attorney-General's Department website at –

http://www.ag.gov.au/www/agd/adg./nsf/Page/PersonalPropertySecurityReform_PPSDownloads#6

*The Government has scrutinized the draft regulations and notes that the Victorian Privacy Commissioner has made a submission to the Commonwealth with respect to the draft regulations. A copy of that submission is at **Attachment B**. The Government has endorsed to the Commonwealth the comments contained in the Privacy Commissioner's submission. I understand that prior to the Commonwealth Government entering into caretaker mode the Commonwealth was considering the various submissions made in response to the draft regulations. I expect that further discussions will occur with the Commonwealth to refine the*

draft regulations following the Federal elections and prior to these regulations being made. Again, I flag that the Commonwealth Privacy Act 1988 applies to the PPS Registrar and to data contained on the PPS register. Section 173 of the PPS Act provides that an unauthorised search or use of personal information constitutes an interference with the privacy of an individual. Section 1 72 of the PPS Act provides penalties for unlawful searches including 50 penalty units for breaches by individuals and 250 penalty units for breaches by corporations. The PPS Act also allows for claims for civil remedies flowing from a breach of an obligation arising under that Act to be brought in a court.

In conclusion, I consider that the provisions of the Personal Property Security (Statute Law Revision and Implementation) Bill 2010 do not limit the right to privacy under section 13 of the Charter of Human Rights and Responsibilities.

Should you have any queries in relation to this letter, or wish to arrange a meeting with officers from my department, please contact Mary Polis from my office on 9651 1124.

ROB HULLS MP
Attorney-General

25 August 2010

The Committee thanks the Attorney-General for this response

Attachment A

1. Data to be migrated from the Victorian Register of Co-operative Charges

No.	***Data field***
1	*Name of registered entity / mortgagor (the Co-operative)*
2	*Name of Mortgagee / chargee*
3	*Charge number and description of charge*
4	*Particulars of property subject to, and consideration given in favour of, charge*
5	*Date of execution of charge and date of registration*

2. Data to be migrated from the Victorian Register of Stock Mortgages

No.	***Data field***
1	*Date of deed of mortgage*
2	*Names of the mortgagor and mortgagee (address details of the mortgagee is recorded only if provided by the mortgagee)*
3	*Value / details of consideration provided*
4	*Description of the stock that is mortgaged*

3. Data to be migrated from the Victorian Vehicle Securities Register

No.	***Data field***
1	*Client and Account Number of the registered security interest holder*
2	*Name, address and telephone contact of registered security interest holder*
3	*Description and particulars of motor vehicle subject of security interest*
4	*Type of security / finance interest*
5	*Date and time of registration*
6	*End date of registration*
7	*Notation of any State enforcement interest against motor vehicle*

Attachment B

Office of the
Victorian Privacy
Commissioner

Office of the Victorian Privacy Commissioner

Submission to Australian Attorney General's Department

on its

Personal Property Securities Regulations 2010 – Exposure Draft & Commentary

27 May 2010

1. Introduction

Once complete, the Personal Property Securities Reform will harmonise and streamline more than 70 existing pieces of Commonwealth, State and Territory Legislation and establish a national personal property securities register (PPSR) with electronic registration and search processes that will replace more than 40 different registers of security interests. While I recognise the benefits of PPS reform and support the proposed reforms generally, there are issues within the Personal Property Securities Regulations 2010 – Exposure Draft & Commentary (the Regulations) which raise issues for individuals' privacy.

My concerns with the regulations are detailed briefly below.

2. Regulation 5.6 – Verification statements – publication as alternative

This regulation allows the Registrar to publish a single verification statement in relation to a large number of registration events on a website maintained by the Registrar. Section 158(1)(b) of the *Personal Property Securities Act 2009* (the PPS Act) allows this where the Registrar considers that it would be inconvenient for verification statements to be sent to each secured party (e.g. to assist the migration process).

As I commented in my previous submission (in November 2009) on the regulations, while regulation 5.6 states that such a verification statement may be published 'on a website maintained by the Registrar on the Internet', neither the regulations or the PPS Act make it clear as to what personal information will be included in a verification statement.

The publication of verification statements on a public website (in relation to new registrations or migrated registrations) will have obvious privacy implications for individuals whose personal information is included in them. If the same information from a Financing Statement (e.g. a grantors name and date of birth (DOB)) is included in a 'bulk' verification statement, this means that the public will have general access to name and DOB information, creating a clear risk that these statements may be used to facilitate identify fraud.

Access to an individual's name and DOB should be strictly limited. While this information appears on the PPS Register (and ideally, access to DOB would only be returned on searches to distinguish between grantors that are identical) currently, the fee required to search the Register will act as an indirect privacy protection. If DOB is made generally available, this protection disappears.

The regulations should therefore clearly set out the information to be included on a Verification Statement, limiting those details to what is necessary to fulfil the purpose of publishing the verification statement (e.g. DOB information should not be included).

I also note that the Registrar publishing verification statements on the internet under regulation 5.6 as opposed to providing direct notifications has additional consequences for secured parties and grantors – who may be unaware not only that their information is on the Registrar's website, but as a consequence, that it has been included on the PPS Register. In my view, it is preferable that secured parties receive direct notice from the Registrar about migrated interests, and that in all other circumstances (data migration from existing registers aside) the regulations restrict this power to be used only in the rarest of circumstances.

3. Regulation 5.8 –Access to the Register prohibited

Under section 170(3)(d) of the PPS Act the Registrar must give a person access to the PPS Register to search for data if, amongst other things, access to the data is not prohibited by the regulations. Under regulation 5.8 the Registrar may deny access where a court has ordered information to be withheld, or where the Registrar considers that it is in the 'public interest' that access to the data should not be permitted.

Provision for an individual to apply to the PPS Registrar to have their information prohibited from a search is an appropriate privacy safeguard. However, in my view, currently regulation 5.8 does not go far enough to address privacy concerns.

The term 'the public interest' may be an onerous concept for the Registrar to interpret, without guidelines as to what this term means. As I have previously submitted, in order for the 'public interest' power to be transparent, the considerations that the Registrar must take into account should be set out in the regulations, with one of the grounds for withholding access being where the public interest in protecting the privacy of the individual's information outweighs the public interest in providing access in all the circumstances. Provision should also be made so that individuals receive sufficient notice of their right to apply for restricted access to their details. If individuals are unaware of this right, then they will be unable to exercise it.

Finally, consideration should be given to providing the Registrar with a power in the regulations to limit searches by certain individuals. For example, where an individual or organisation has searched the PPS Register for an unauthorised purpose, the Registrar should have the power to refuse that individual or organisation the right to conduct further searches in general or further searches in relation to specific categories of property.

HELEN VERSEY
Privacy Commissioner

Primary Industries Legislation Amendment Bill 2010

The Bill was introduced into the Legislative Assembly on 22 June 2010 by the Hon. Joe Helper MLA. The Committee considered the Bill on 26 July 2010 and made the following comments in Alert Digest No. 10 of 2010 tabled in the Parliament on 27 July 2010.

Committee's Comments

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. 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.*

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.

Minister's Response

Thank you for your letter of 28 July 2010, expressing the Committee's concerns with clause 24 of the proposed Primary Industries Legislation Amendment Bill 2010 (the PILA 2010 Bill).

As requested, 1 provide the following advice in relation to the Committee's concerns.

Clause 24 of the PlLA 2010 Bill amends section 11 of the Livestock Disease Control Act 1994 (the LDC Act) that requires written authority from an inspector for the removal of certain things from a quarantine area. Section 11 of the LDC Act must be read in conjunction with section 110 of the LDC Act, which provides for the issue of the quarantine notice to be served directly on the owner or person in charge or apparent control of the premises or place concerned.

Thus, as is the current practice, the inspector will have direct contact with the individual concerned who will be made aware of their responsibilities by the inspector. The inspector will also provide support and guidance for the duration of the quarantine notice. Thus in practice there will be no inherent uncertainty with the application of section 11 as proposed to be amended. I also advise that a quarantine notice is only issued in limited circumstances, those being in relation to an exotic disease, for example foot and mouth disease or a non exotic disease with the capacity to spread to humans, such as anthrax.

The intention of the amendment to section 11(b)(ii) is to improve disease control by tightening controls on the movement of materials that may be vectors for the spread of disease. Section 11(b)(ii) currently requires a person to seek the written authority of an inspector only where the 'other material' has had contact with diseased livestock or is located where diseased livestock has been kept. Distinguishing diseased livestock from healthy livestock within a quarantine area, and furthermore, whether it is diseased or healthy livestock that has been in contact with the thing capable of spreading disease, is not practicable or achievable in a rapid and dynamic disease control situation.

The term 'any other material' is considered and will be applied to only refer to things that can be vectors of livestock disease. The affect of the proposed amendment is that any material similar to a livestock product, fodder or fittings or soil or sand that is capable of spreading disease that is contained within the quarantine area, will be required to be treated cautiously by a farmer and for that person to apply to an inspector if the material is to be taken from a quarantine area. This removes the onus on the Department of Primary Industries to prove that the material had been in contact with diseased livestock. It is vital that in areas under quarantine, that the Department of Primary Industries has the necessary and unambiguous power to control and combat livestock diseases.

In closing, I also point out that the Statement of Compatibility was prepared by the Victorian Government Solicitor's Office and settled with the Human Rights Unit of the Department of Justice. Consistent with that Statement, I consider clause 24 to be Compatible with the Charter

Joe Helper MP
Minister for Agriculture

19 August 2010

The Committee thanks the Minister for this response

Private Security Amendment Bill 2010

The Bill was introduced into the Legislative Assembly on 27 July 2010 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 9 August 2010 and made the following comments in Alert Digest No. 11 of 2010 tabled in the Parliament on 10 August 2010.

Committee's Comments

Charter report

Fair hearing – Protected information – Closed hearings

The Committee notes that clause 23, inserting new sections 150A to 150E, provide rules for the conduct and determination of proceedings to review a refusal to give or renew, or to cancel, a private security licence or registration, where the Chief Commissioner specifies under new section 150A that the grounds for refusal or cancellation were based on protected information.

New section 150C(1) provides that VCAT must first determine whether the information is 'protected information'. Clause 4, amending existing s. 4, defines 'protected information' to mean intelligence, a document or a thing whose production or inspection either:

- *'is likely to… reveal the identity of':*
  - *'a member of the police force who provided [the] information'*
  - *'a person who has provided a member of the police force with [the] information'*
  - *'a person whose name appears in… information provided to a member of the police force'*
  - *'a person who is or has been the subject of an investigation by a member of the police force'*
- *'is likely to… put' any of the above persons' 'safety at risk'*
- *'places at risk an ongoing investigation'*
- *'risks the disclosure of any investigative method'*
- *'is otherwise not in the public interest'*

To the extent that VCAT decides that the information is protected information, new section 150D(3)(a) provides that 'VCAT must take all steps and precautions to prevent the release of that information' and new sections 150D(4) and 150E(4) exempt the Commissioner and VCAT from explaining their reasons for any decision to the extent that those reasons involve protected information.

New section 150C(3) provides for closed sessions where only the Chief Commissioner and a 'special counsel' 'are entitled to be present' and to make submissions. New section 150C(2) permits VCAT to determine whether or not information is 'protected information' in such a closed session. New section 150D(1) provides:

> *Without limiting any other power of VCAT conferred by or under this or any other Act, if VCAT decides that any of the evidence adduced under section 150C(3) is protected information, the provisions of that subsection continue to apply to the hearing of the proceeding to the extent that it relates to that protected information.*

New section 150B requires VCAT to appoint a 'special counsel' to represent the applicant's interests. New section 150B(4) bars the special counsel from taking 'instructions' for the applicant or the applicant's representative once the counsel has received a confidential application or the hearing has commenced, except for 'written questions' approved by VCAT 'after hearing submissions from the Chief Commissioner on their content' under new section 150D(3)(b).

The Committee observes that the above regime appears to differ from:

- *other Victorian regimes for hearings based on protected information, which provide for several options for dealing with that information, including merely limiting the disclosure of confidential affidavits to some persons, based on the court's judgment of the 'public interest'.*
- *other Australian regimes that the High Court has upheld as constitutional on the basis that decision-makers under those regimes are 'not directed as to which particular steps may be taken' to maintain confidentiality and provide that 'steps taken may be provisional in the sense that they may be varied, added to or subtracted from, as the exigencies of the litigation… progressively appear'. In this regard, it is not clear whether new section 150D(1) requires VCAT to continue to hold a closed hearing under new section 150C(3) if it determines that the information is protected information.*
- *fair hearing requirements specified by the European Court of Human Rights, which bar decisions being made on the basis of closed information unless that information is a minor part of the decision or where it consists of specific factual assertions that can be and are put to the party affected by them.*

The Committee therefore considers that clause 23 may engage the Charter right of applicants to have their civil proceeding 'determined… after a fair… hearing'.

The Statement of Compatibility remarks:

> *The limitation will operate in some cases to prevent applicants from knowing the full case against them and directly presenting their case to VCAT. However, protections are in place to ensure that the right to a fair hearing is not unreasonably limited. These include:*

> *The fact that VCAT must determine whether or not the information does actually constitute 'protect information' for the purposes of the bill (new section 150C). This ensures that the special procedures will only apply where there is a genuine need to maintain the confidentiality of that information.*
>
> *The fact that VCAT (itself a 'public authority' for the purposes of the charter) is given the power to determine what weight to give to protected information in its decision-making process (new section 150D(2)(a))*
>
> *The appointment of special counsel to ensure that the rights of the applicant are represented at the hearing….*
>
> *…[T]he scheme at issue here differs in two fundamental ways from those at issue in the European… decisions. First, the matters at stake for the appellants in those cases… were of far greater consequence than the matters at stake for applicants for a private security licence. Secondly, new section 150D(3)(b)… ensures that the special counsel can adequately represent the applicant's interests at the hearing…*

However, the Committee observes that:

- *The definition of 'protected information' inserted by clause 4 is not limited to information where there is a 'genuine need… to maintain… confidentiality'. Rather, para (a) covers information that 'is likely to… reveal the identity' of various people, without any assessment of whether that information is confidential and the extent to which there is a need to maintain confidentiality. To this extent, the definition is broader than similar definitions in regimes that have been upheld as confidential by the High Court. While a similar definition is used in other Victorian laws, those other regimes do not specify any mandatory consequences that follow if information is held to fall within that definition and, in particular, permit courts to vary the approach they take according to 'the extent' to which the information falls within the definition.*
- *VCAT's determination of the weight to be given to the information will be made without reference to the applicant's response to the information. For example, VCAT will not know whether a source relied upon by the Commissioner for Police is biased against the applicant. Also, it is not clear whether VCAT's obligations under the Charter will apply to decisions made under new sections 150A to 150E, as VCAT's obligations only extend to decisions in an 'administrative capacity' and do not apply if another provision (such as new section 150D(3)(a)) makes it unreasonable to act compatibility with human rights.*
- *The special counsel is generally barred by new section 150B(4) from receiving instructions from his or her client. While the process in new section 150D(3)(b) does provide for seeking further instructions, that process requires prior approval of VCAT after submissions from the Commissioner of Police, it is limited by their discretionary nature and the complete lack of confidentiality of the counsel's communication to his or her client.*

The Committee will write to the Minister seeking further information as to whether or not new section 150D(1) makes it mandatory for VCAT to continue to hold a closed hearing once it has determined that any information on which the Commissioner based his or her decision is protected information. Pending the Minister's response the Committee refers to Parliament for its consideration the question of whether or not clause 23, by providing for procedures to determine applications for review of licensing decisions on the basis of information that is not disclosed to the applicant, is compatible with the Charter's right to a fair hearing.

Minister's Response

Thank you for your letter of 11 August 2010 on behalf of the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria ("Committee") requesting my advice in relation to amendments to the Private Security Act 2004 ("Act") contained in the Private Security Amendment Bill 2010 ("Bill").

As you will be aware, the purpose of the Bill is to implement the first stage of the COAG Agreement made in July 2008 so as to bring harmony between the various Australian laws that regulate the private security industry. Under the agreement, Victoria, like other jurisdictions, is obliged to amend its law so that the nature, and even existence, of any criminal

intelligence that was taken into account in refusing to grant a security licence is not disclosed to the applicant or indeed disclosed generally.

An applicant who has been convicted or found guilty of certain prescribed offences within a specified timeframe will not be granted a licence. The Act already provides for this; although, the Bill will enlarge the list of offences that will so disqualify a person from successfully applying for a licence. To avoid this, some criminal gangs put forth a member for licensing who does not have a disqualifying criminal history. Such a person is known in the industry as a cleanskin and the gang may organise for him or her to work as a security guard or crowd controller at an entertainment venue and use the person as a gateway to distribute drugs within those premises. In order to prevent this, the Chief Commissioner of Police – the regulator of the private security industry in Victoria – may refuse to grant a licence to a person who is the subject of sensitive police investigation, for instance, an investigation that related to the applicant's gang membership.

It is important that this criminal intelligence remain confidential. To release it publicly, or even simply to the applicant, may compromise an on-going police investigation, or the safety of the officers undertaking it, or even to disclose the means by which undercover surveillance operates. Furthermore, for law enforcement agencies of one State to have the confidence to share such information with their counterparts in another State, there must be a system in which it is made clear that such information will not be disclosed. The COAG Agreement recognises this and obliges jurisdictions to prevent its release even in circumstances in which the disappointed applicant is given no reason as to why his or her security licence application has failed. Naturally, under statute and general administrative law principles, a person denied the means by which to make a livelihood should be given reasons on which the decision was based and possess the ability to have that decision judicially reviewed.

The Bill seeks to balance these competing interests by preventing the release of criminal intelligence while at the same time allowing an unsuccessful applicant the right to bring review proceedings of the decision to refuse a licence in VCAT. It sets out a procedure whereby the applicant is informed by the Chief Commissioner that the application is refused for reasons that cannot be made known to him but that he can seek review of the decision in VCAT. If the applicant does seek review, the Chief Commissioner then makes a written record of those reasons and provides them to VCAT. In all cases, a special counsel is appointed to represent the interests of the applicant and the applicant does not pay for these services. The special counsel undertakes to keep confidential any evidence disclosed to him or her during the proceedings. The proceedings are held in closed session so that the applicant and the public are excluded from it. However, the special counsel is able, with leave of the tribunal, to obtain further instructions from the applicant.

The Chief Commissioner and the special counsel will make submissions as to whether the criminal intelligence falls within the statutory definition of criminal intelligence (called "protected information" in the Bill). If VCAT determines that it does fall within the definition, argument will turn to the weight that should be given to it in reviewing the decision to refuse the licence. If VCAT determines that it doesn't fall within the definition, the information is released and during the remainder of the proceedings, the applicant is admitted. (If the Chief Commissioner considers that the release of the information would cause greater harm than would the issuing of a licence to the applicant, the Chief Commissioner can agree to grant the licence and the proceedings are halted.)

Where VCAT determines that the information does fall within the definition, the applicant will continue to be excluded from the proceedings. To allow him or her to be admitted at this stage would defeat the stated intention of the COAG Agreement, namely, the prevention of the release of the criminal intelligence. The special counsel will continue to represent the interests of the applicant by arguing that the licence should be granted despite the existence of the intelligence. Finally, VCAT will determine, overall, whether the licence should be granted and will report the outcome to the applicant.

This procedure is based on that found in other Victorian legislation, such as in the Casino Control Act 1991, and was the subject of extensive consultation with the Courts and Tribunals Unit of the Department of Justice, the new President of VCAT, and the Victorian Government Solicitor. Victoria is alone (save also for the Australian Capital Territory) in being obliged to develop legislation in conformity with human rights legislation and, accordingly, has had to design a review mechanism that satisfies both the terms of the COAG Agreement and the provisions of the Charter.

The Statement of Compatibility was drafted by the Victorian Government Solicitor and advice from him stated that the review procedure in the Bill is compatible with the Charter of Human Rights and Responsibilities in as much as the right to a fair hearing is not unreasonably limited. The statement supports this by referring to the fact that VCAT must: determine whether the criminal intelligence falls within the definition of protected information; what weight should be given to that evidence; and appoint a special counsel who has full access to that information. The statement recognises that the procedure endeavours to ensure that the interests of the applicant are fully considered and that arguments in favour of being granted a licence are openly debated by a barrister with complete knowledge of the case made out against the applicant to the greatest extent possible short of the applicant being told highly confidential police information. Inevitably, a compromise must be reached in such cases that protects, on the one hand, the applicant's right to a fair hearing and, on the other hand, the public's right to have criminal activity appropriately investigated and minimised. As stated recently in Gypsy Jokers Motorcycle Club Inc v. Commissioner of Police [2007] WASCA 49:

> *"It appears, therefore, that both the European Court of Human Rights and the courts of the United Kingdom accept that there will be circumstances in which the normal requirements of procedural fairness must yield to the public interest in protecting the confidentiality of investigative material. They do so, however, on condition that there are judicial safeguards in place to protect the fairness of the proceedings."*

In all, and taking into account the public policy requirement for police investigations to continue in a protected and effective manner, I believe that the applicant in these circumstances is offered a fair hearing in having his case reviewed in VCAT within the requirements of the Victorian Human Rights Charter.

In your letter, you state that the Committee notes that the definition of "protected information" in the Bill is wider than that considered, and upheld as legally valid, by the High Court in K-Generation Pty Limited v. Liquor Licensing Court [2009] HCA 4. But it does not necessarily follow that the Bill's definition would not similarly be considered valid by the court. Victoria, like other States, will continue to monitor relevant jurisprudence from the High Court and, if need be, will amend its legislation to conform with future case law. The COAG Agreement does not provide a definition of "criminal intelligence" and, accordingly, jurisdictions are at liberty to form their own parameters of what it is to constitute.

Further, the Committee notes that VCAT's determination of the weight to be given to the information will be made without reference to the applicant's response to the information and gives the example that VCAT will not be able to know whether a source relied on by the Chief Commissioner is biased against the applicant. However, VCAT, in such circumstances, would be likely to give substantial weight to factual information concerning the applicant and be cautious of mere opinion about him that is not referenced to demonstrable specifics. In any event, the special counsel would be able to cross-examine any witness relied on by the Chief Commissioner and so test his or her evidence for bias.

Finally, the Committee notes that "the special counsel is generally barred by new section 150B(4) from receiving instructions from his or her client". This is not so. Before becoming privy to the protected information, the special counsel can confer to an unlimited extent with his or her client. However, once the special counsel hears the protected information, he or she can approach the client only with leave of VCAT. The policy behind this rule is to ensure that the very questions themselves that the counsel poses the client to elicit further instructions do not disclose some or all of the subject matter criminal intelligence or the identity of the persons who have been involved in its formation.

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 and Emergency Services

25 August 2010

The Committee thanks the Minister for this response

Committee room
30 August 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
Occupational Licensing National Law Bill 2010 12

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

Transport Accident and Accident Compensation Legislation Amendment Bill 2010 11
Transport Integration Bill 2009 1

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

Transport Integration Bill 2009 1

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

Occupational Licensing National Law Bill 2010 12

(vi) inappropriately delegates legislative power

Justice Legislation Amendment Bill 2010 4
Marine Safety Bill 2010 12
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

Section 17(b)

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

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
Control of Weapons Amendment Bill 2010	Police and Emergency Services	08.06.10 *27.07.10*	8 of 2010 *11 of 2010*
Personal Safety Intervention Orders Bill 2010	Attorney-General	22.06.10 *27.07.10*	9 of 2010 *11 of 2010*
Superannuation Legislation Amendment Bill 2010	Finance	08.06.10 *27.07.10*	8 of 2010 *11 of 2010*
Firearms and Other Acts Amendment Bill 2010	Police and Emergency Services	27.07.10 *18.08.10*	10 of 2010 *12 of 2010*
Juries Amendment (Reform) Bill 2010	Attorney-General	27.07.10 *17.08.10*	10 of 2010 *12 of 2010*
Primary Industries Legislation Amendment Bill 2010	Agriculture	27.07.10 *19.08.10*	10 of 2010 *12 of 2010*
Personal Property Securities (Statute Law Revision and Implementation) Bill 2010	Attorney-General	10.08.10 *25.08.10*	11 of 2010 *12 of 2010*
Private Security Amendment Bill 2010	Police and Emergency Services	10.08.10 *30.08.10*	11 of 2010 *12 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
Civil Procedure Bill 2010	Attorney-General	27.07.10	10 of 2010
Plant Biosecurity Bill 2010	Agriculture	10.08.10	11 of 2010
Traditional Owner Settlement Bill 2010	Aboriginal Affairs	10.08.10	11 of 2010
Transport Accident and Accident Compensation Legislation Amendment Bill 2010	Finance, WorkCover and the Transport	10.08.10	11 of 2010

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Fair Trading Amendment (Australian Consumer Law) Bill 2010	Consumer Affairs	31.08.10	12 of 2010
Justice Legislation Further Amendment Bill 2010	Attorney-General	31.08.10	12 of 2010
Marine Safety Bill 2010	Roads and Ports	31.08.10	12 of 2010
Occupational Licensing National Law Bill 2010	Finance, WorkCover and the Transport	31.08.10	12 of 2010