No. 14 of 2010

Tuesday, 5 October 2010

On the

Associations Incorporation Amendment Bill 2010

Education and Care Services National Law Bill 2010

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

Justice Legislation Further Amendment Bill 2010

Occupational Licensing National Law Bill 2010

Plant Biosecurity Bill 2010

Transport Legislation Amendment (Compliance, Enforcement and Regulation) 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 notes the following correspondence –

Associations Incorporation Amendment Bill 2010
Education and Care Services National Law Bill 2010
Justice Legislation Amendment (Victims of Crime and Other Matters) Bill 2010
Justice Legislation Further Amendment Bill 2010
Occupational Licensing National Law Bill 2010
Plant Biosecurity Bill 2010
Transport Legislation Amendment (Compliance, Enforcement and Regulation) 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. 14 of 2010

Ministerial Correspondence

Associations Incorporation Amendment Bill 2010

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

Committee's Comments

Charter report

Application of Commonwealth laws – Operation of the Charter

Summary: Clause 41 applies modified 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 41, inserting a new Part VIIIAA, has the effect of applying modified versions of Parts 9.4B, 5.2, 5.3A, 5.4, 5.4B, 5.5, 5.6, 5.7B, 5.8, 5.8A and 5.9 of the Corporations Act 2001 (Cth) 'as if they were… laws of' Victoria.

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.

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 laws applied in Victoria by clause 41.

Self-incrimination – Compelled examinations by the Supreme Court – Limitations on immunity – People who have not chosen to take on duties and obligations

Summary: Clause 41 applies a modified Commonwealth law on compelled self-incriminatory questioning to the affairs of associated incorporations, including question of people who have not chosen to participate in regulated activities in which they have assumed duties and obligations. The Committee considers that the applied scheme may be incompatible with the Charter's right against compelled self-incrimination.

The Committee notes that clause 41, inserting a new section 37AI, has the effect of applying a modified version of Part 5.9 of the Corporations Act 2001 (Cth) as a law of Victoria. The applied law allows the Supreme Court to summons people for compelled examination about an incorporated association's affairs and specifically requires examinees to answer self-incriminatory questions.

As the immunity in s. 597(12A) of the applied law is limited to the use of the examinee's answers, rather than information derived from those answers, its effect is to allow the Supreme Court to force examinees to lead investigators to information that may then be used to convict them of a criminal offence. The Victorian Supreme Court has held that schemes of this sort limit the Charter's rights against self-incrimination, subject to the test for reasonable limits on rights in Charter s. 7(2).

The Statement of Compatibility remarks:

> *This abrogation of the privilege against self-incrimination is limited to prescribed situations. The Supreme Court can only summon a person for examination about an incorporated association's examinable affairs and can only summon a person who is (or*

was) a member of the committee or provisional liquidator of the incorporated association. The people who will be subject to this power have chosen to participate in regulated activities in which they have assumed duties and obligations.

…[E]xperience of enforcing these laws has shown that granting immunities in a regulated commercial context to the type of individuals most likely to be examined and exposed to criminal and civil penalties leads to protracted investigations, with the result that those responsible for wrong doing and misconduct can ultimately escape liability. The limitation addresses this issue by allowing the regulator to effectively investigate and unravel the complex affairs of an association without jeopardising the success of any criminal or civil penalty proceedings which may be brought after all relevant information concerning a person's activities and dealings within an incorporated association have come to light.

The Committee observes that the applied provisions go significantly beyond the statements description of them as limited to people who 'have chosen to participate in regulated activities in which they have assumed duties and obligations', as follows:

- *s. 596B(b)(ii) of the applied law (which is not discussed in the Statement of Compatibility) allows the compelled examination of anyone who the Court is satisfied 'may be able to give information about the examinable affairs of the corporation'. This may include, for example, family members of officers or anyone who receives a service from a community or non-profit group.*
- *The matters about which a person may be examined include 'any affairs of' the association, including its membership, business, trading, transactions, dealings and property.*
- *The limited direct use immunity provided in the applied law only applies if the person first claims the privilege against self-incrimination before answering the question.*

In light of these factors and the Supreme Court's clear ruling that a more protective scheme relating to organised crime was incompatible with the Charter, the Committee considers that clause 41, by applying both ss. 596B(b)(ii) & 597(12A) of the Corporations Act 2001 (Cth) as laws of Victoria, may be incompatible with the Charter's right against compelled self-incrimination.

The Committee will write to the Minister expressing its concern about the Statement of Compatibility's failure to address the human rights effect of s. 596B(b)(ii) of the Corporations Act 2001 (Cth). Pending the Minister's response, the Committee draws attention to clause 41 and ss. 596B(b)(ii) and 597(12A) of the Corporations Act 2001 (Cth).

Presumption of innocence – Insolvent trading offences – Absolute liability – Reverse onus

Summary: Clause 41 applies modified versions of federal offences on insolvent trading to incorporated associations. The Statement of Compatibility does not address provisions in those offences providing for absolute liability and reversing the legal onus of proof. The Committee will write to the Minister seeking further information.

The Committee notes that clause 41, inserting a new section 37AJ(2) has the effect of applying modified versions of ss. 588G(3) & 592 of the Corporations Act 2001 (Cth) as a law of Victoria. These sections make it an offence to have been a member of the committee of an incorporated association that took on a debt when there were reasonable grounds to expect that the debt would not be paid.

The Committee observes that:

- *section 588G(3A) of the applied law provides that 'absolute liability applies to' the requirement that the company 'incurs a debt'. This means that the prosecution does not have to prove that the committee member knew that the debt was incurred and the member cannot rely on the defence of honest and reasonable mistake.*
- *section 588H of the applied law requires defendants to prove the defences of reasonable reliance on others, good reasons for non-involvement or due diligence on the balance of probabilities to avoid being found guilty*

- *section 592(2) of the applied law requires defendants to prove the defences of lack of consent or lack of reasonable cause to expect non-payment on the balance of probabilities to avoid being found guilty*

The Committee considers that clause 41, to the extent that it gives effect to these provisions, engages that the Charter's right to be presumed innocent until proved guilty according to law.

While the Statement of Compatibility addresses a number of mild evidential burdens in the applied law, it does not address the absolute liability provision in s. 588G(3A) or the reverse onus provisions in ss. 588H and 592(2).

The Committee will write to the Minister seeking further information as to the compatibility of ss. 558G(3A), 588H and 592(2) with the Charter's right to be presumed innocent until proved guilty according to law. Pending the Minister's response, the Committee draws attention to clause 41 and to ss. 588G(3), 588H and 592(2) of the Corporations Act 2001 (Cth).

Minister's Response

Thank you for your letter dated 9 June 2010 regarding the Scrutiny of Acts & Regulations Committee's (the Committee) consideration of the Associations Incorporation Amendment Bill 2010 (the Bill).

The Committee has sought further information regarding the operation and scope of certain provisions contained in the Bill. I have responded to each issue below.

The application of sections 28, 29, 32, 36 and 38 of the Charter to the laws applied in Victoria by clause 41

The Committee seeks further information as to the application of sections 28, 29, 32, 36 and 38 of the Charter of Human Rights and Responsibilities (the Charter) to the laws applied in Victoria by clause 41 of the Bill. Clause 41 declares certain provisions to be applied Corporations matters for the purposes of the Corporations (Ancillary Provisions) Act 2001, and thus applies modified versions of Parts 9.4B, 5.2, 5.3A, 5.4, 5.4B, 5.5, 5.6, 5.7B, 5.8, 5.8A and 5.9 of the Corporations Act 2001 (Cth) as if they were laws of Victoria.

Section 28(1) of the Charter provides that a member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill. As the present Bill was introduced into a House of the Victorian Parliament, a statement of compatibility was required for the Bill. It was also necessary for the statement of compatibility to address the provisions applied by virtue of clause 41 of the Bill, as the substance of the Bill would not be intelligible without reference to the contents of the applied law, being the Corporations Act 2001 (Cth).

Section 29 accordingly also applies.

Section 32(1) of the Charter provides that, so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. Section 32(1) applies to 'statutory provisions'. 'Statutory provision' is defined in the Charter to mean "an Act…or a subordinate instrument or a provision of an Act…or of a subordinate instrument". Section 38 of the Interpretation of Legislation Act 1984 provides that an 'Act' "means an Act passed by the Parliament of Victoria". Section 32(1) of the Charter does not extend to the interpretation of legislation enacted by the Parliaments of other jurisdictions. Consequently, the relevant applied provisions of the Corporations Act 2001 (Cth) cannot be statutory provisions for the purposes of section 32(1) of the Charter.

Section 36 provides that the Supreme Court can make a declaration of inconsistent interpretation regarding a statutory provision. For the reasons discussed above, section 36 of the Charter will not extend to the modified provisions of the Corporations Act 2001 (Cth) applied under clause 41 of the Bill.

Section 38(1) of the Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Section 38 of the Charter will apply to public authorities within the meaning of section 4 of the Charter who carry out functions under the Bill, such as the Registrar of Incorporated Associations and the Director of Consumer Affairs.

The human rights effect of section 596B(b)(ii) of the Corporations Act 2001 (Cth)

Clause 41 of the Bill, which will insert a new section 37AI into Associations Incorporation Act 1981 (the Act), declares Part 5.9 of the Corporations Act 2001 (Cth) to be an applied Corporations legislation matter with modifications. Section 596B(b)(ii) of Part 5.9, as modified, provides that the Supreme Court may summon a person for examination about an incorporated association's examinable affairs if the Court is satisfied that the person may be able to give information about examinable affairs of the incorporated association.

Section 597(12A) provides a direct use immunity in relation to such examinations if the persons claims that the question being asked might tend to incriminate the person or make the person liable to a penalty.

The Statement of Compatibility concludes that new section 37AI limits the protection against self-incrimination, as a person who is compelled to be examined by the Court is not protected against the indirect use of that information in future criminal proceedings. However, the Statement provides that the limitation is reasonable under section 7(2) of the Charter.

The Committee is concerned that section 596B(b)(ii) may apply to family members of officers of an incorporated association, or to anyone who receives a service from a community or non-profit group. As stated above, this section provides the Court with the discretionary power to summon a person for examination if the Court considers that the person may be able to provide information about the 'examinable affairs' of the incorporated association, which is limited, under section 9 of the Corporations Act 2001 (Cth), to information concerning the promotion, formation, management, administration or winding up of the incorporated association; any other affairs of the incorporated association; or the business affairs of a connected entity of the incorporated association, in so far as they are, or appear to be, relevant to the incorporated association or to anything that is included in the incorporated association's examinable affairs.

In my view, it is highly unlikely that persons such as those referred to by the Committee would be at risk of incriminating themselves with the information which they provide to a Court through the operation of these provisions, given that such persons would not be office-holders of the incorporated association and so would not be subject to the relevant duties and associated penalties. Further, a person who applies to the Court for a summons to examine a person under section 596B must lodge an affidavit in support of his or her application as required by section 596C. This supports the requirement in section 596B that the Court "must be satisfied" that the person may be able to give information about the examinable affairs of the association. Consequently, there must be some information before the Court to indicate that a person may be able to give relevant information before a summons will be issued.

The Committee also raised the issue of whether the fact that the immunity will only apply if first raised by the person seeking to rely on the immunity renders the abrogation of the privilege against self-incrimination unreasonable. This issue is relevant to the mandatory examination power in section 596A of the Corporations Act 2001 (Cth) (which is discussed in the Statement of Compatibility) as well as to the discretionary power in section 596B.

I have given further consideration to this issue and have concluded that this does not cause the abrogation of the privilege to be unreasonable so as to breach the right in section 25(2)(k) of the Charter. In reaching that view, I have taken into account two factors in particular.

First, in order to exercise the privilege against self-incrimination (which is protected by section 25(2)(k)), a person surely needs to claim the privilege at the point of the refusal to testify. Here, the privilege has been abrogated but replaced with a direct use immunity. It is not clear to me why the fact that the person must still claim the privilege at the point of testimony itself renders the abrogation of the right unreasonable.

Additionally, I have also taken into account the fact that there is nothing in the relevant provisions which prevents the Supreme Court from providing a person who is subject to a summons under sections 596A or 596B with a warning or a caution regarding their need to claim the privilege against self-incrimination. Under section 6(2)(b) of the Charter, the Court must act in accordance with sections 24 and 25 of the Charter, and so could issue such a caution to prevent a breach of a person's rights in sections 24 and 25 of the Charter from occurring.

The right to be presumed innocent and sections 558G(3)(a), 588H and 592(2)

Clause 41 of the Bill also inserts a new section 37AJ(2) in the Act which applies modified versions of sections 588G(3) and 592 of the Corporations Act 2001 (Cth).

Section 558G(3)(a)

Section 588G(3) of the Corporations Act 2001 (Cth), as modified, provides that a committee member of an incorporated association commits an offence if the incorporated association was, or became, insolvent and the committee member suspected that the incorporated association was insolvent or would become insolvent as a result of incurring a debt. The first element of this offence, in section 588G(3)(a), is that the incorporated association incurs a debt at a particular time. Section 588G(3A) provides that absolute liability applies to this paragraph. Clause 37AK of Bill provides that the Criminal Code Act 1995 (Cth) does not apply to the applied offences and that a note to an applied provision that refers to the Criminal Code Act 1995 (Cth) must be disregarded.

Section 25(1) of the Charter provides that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. In my view, section 588G(3A) does not engage the right to the presumption of innocence in section 25(1) of the Charter, as it does not require a defendant to prove any element of the offence. The creation of section 588G(3)(a) as an absolute liability element of the offence means that there is no knowledge requirement regarding this element in relation to either the prosecution or the defendant - all that is required under section 558G(3)(a) is that the prosecution prove that the debt was incurred. As the defendant is thus not required to disprove an element of the offence, section 25(1) is not engaged.

Additionally, the offence in section 588G(3) has five elements. While the element in section 588G(3)(a) is one to which absolute liability applies, this is not the case in relation to the other elements of the offence, one of which is that the prosecution must prove that the committee member's failure to prevent the debt from occurring was dishonest. It is difficult to see how the prosecution could prove this element of the offence if the relevant committee member was honestly and reasonably unaware that the debt was incurred.

Section 588H

Section 588H of the Corporations Act 2001 (Cth) is a defence to the civil penalty provision in section 588G(2) rather than to a criminal offence.

I accept that it is possible that the classification of a penalty as civil may not be determinative of whether or not the right to the presumption of innocence in section 25(1) of the Charter is engaged. Justice Wilson of the Canadian Supreme Court in R v Wigglesworth [1987] 2 SCR 541 held that the presumption applies if the matter involves the imposition of true penal consequences. In the present case, however, I do not consider that the penalty for breaching section 588G(2) can be classed as 'true penal consequences'. If a person is found liable for breaching a civil penalty under the applied legislation, they may be subject to a declaration of contravention under section 1317E, a pecuniary penalty order under section 1317G (which has been modified to be a maximum penalty of up to of $20,000) or a compensation order under sections 1317H or 1317HA. As the pecuniary penalty is a civil debt in the form of an order made in civil proceedings against the person, a person will not be imprisoned for a failure to discharge the debt.

Accordingly, I consider that the presumption of innocence does not apply to the reverse onus in section 588H.

Section 592(2)

Section 592(2) of the Corporations Act 2001 (Cth) provides a defence to the offence of fraudulent conduct in incurring certain debts in section 592(1). Section 592(2) requires defendants to prove to the balance of probabilities the defences of lack of consent or lack of reasonable cause to expect non-payment.

Section 592 relates to the incursion of debts prior to 23 June 1993 and it is unlikely that it will be used with any frequency, if at all.

Nevertheless, I accept that by placing a burden of proof on a defendant, the defences in this provision limit the right to be presumed innocent in section 25(1) of the Charter. However, I

consider that the limits upon the right are reasonable and justifiable in a free and democratic society for the purposes of section 7(2) of the Charter having regard to the following factors.

(a) The nature of the right being limited

The right to be presumed innocent is an important right that has long been recognised well before the enactment of the Charter. However, the courts have held that it may be subject to limits, particularly where, as here, the offence is of a regulatory nature; and a defence is enacted for the benefit of a defendant to escape liability where the person did not consent to the relevant debt being incurred, or where the person did not have reasonable cause to suspect that the incorporated association could not pay its debts.

(b) The importance of the purpose of the limitation

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. The importance of this purpose lies in the fact that it would be difficult and onerous for the Crown to investigate and prove these elements beyond reasonable doubt.

The purpose and effect of the defences in this provision is to provide a defendant with an opportunity, in appropriate circumstances, to escape culpability for the incorporated association incurring a debt in breach of obligations under the Bill, because the contravention was not deliberate.

(c) The nature and extent of the limitation

The burden of proof is imposed in respect of the defences. The prosecution would first have to establish that there were reasonable grounds at the relevant time to expect that the incorporated association would not be able to pays its debts.

The defendants seeking to rely on these defences will be officer holders of an incorporated association. Therefore, they should be well aware of the requirements of their position and, as such, should have processes and systems in place that enable them to effectively meet these requirements, including maintaining proper financial records and associated documents which would enable defendants to prove the elements of the relevant defence.

(d) The relationship between the limitation and its purpose

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 a suitable defence in circumstances where the contravention was not deliberate. Unless the defendant can satisfy the court that the debt was incurred without the defendant's consent, or that the defendant did not have reasonable cause to expect that the incorporated association cannot pay its debts or will not be able to pay its debts when they become due, he or she will be convicted.

(e) Less restrictive means reasonably available to achieve the purpose

Although an evidential onus would be less restrictive upon the right to be presumed innocent, it would not be as effective because it could be too easily discharged by a defendant, leaving the prosecution in the difficult position of having to prove whether the defendant consented to the incurrence of the debt or whether the defendant had reasonable cause to expect that the incorporated association would not be able to pay its debt. The inclusion of a defence with a burden on the accused to prove the matters on the balance of probabilities achieves an appropriate balance of all interests, bearing in mind, in particular, the fact that defendants will be office holders and, as discussed above, can reasonably be expected to have systems in place to enable them to discharge the burden.

Accordingly, section 592(2) of the applied legislation is compatible with the Charter.

HON TONY ROBINSON MP
MINISTER FOR CONSUMER AFFAIRS

16 September 2010

The Committee thanks the Minister for this response

Education and Care Services National Law Bill 2010

The Bill was introduced into the Legislative Assembly on 1 September 2010 by the Hon. Maxine Morand MLA. The Committee considered the Bill on 13 September 2010 and made the following comments in Alert Digest No. 13 of 2010 tabled in the Parliament on 14 September 2010.

Committee's Comments

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

The Committee notes that for the purposes of the National Quality Framework (the 'NQF') certain provisions allow regulations to modify two Commonwealth Acts, these are the Privacy Act 1988 (Cth), and the Freedom of Information Act 1982 (Cth). Further regulations may modify the application of the State Records Act 1998 (NSW) that will apply for the purposes of the NQF. The explanatory memorandum in introducing these sections provides –

> *In the interests of the nationally consistent application of this Law, Commonwealth information and privacy laws will be applied instead of separate laws in each participating jurisdiction.*

However, in respect to the relevant sections the explanatory memorandum does not provide any assistance as to the necessity or desirability to include provisions that allow a subordinate instrument to modify primary legislation. [263, 264 and 265]

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

Inappropriate delegation of legislative power

The Committee will write to the Minister seeking further advice whether she is satisfied that there is a need to include provisions in the National Law that permit regulations to modify an Act.

Minister's Response

Thank you for your letter concerning the Education and Care Services National Law Bill 2010 (the Bill). In the letter the Scrutiny of Acts and Regulations Committee (SARC) seeks further information on the necessity or desirability of provisions in the Bill for the modification by regulation of the Commonwealth Privacy Act 1988 and Freedom of Information Act 1992, and the New South Wales State Records Act 1998.

The Bill does provide for regulations (subordinate instruments) to modify primary legislation to achieve a national scheme that is able to be consistently applied across all jurisdictions.

The Bill borrows from previous examples of national applied laws legislation, and has been subject to negotiation and agreement by all jurisdictions at the Ministerial Council level and through the Australasian Parliamentary Counsel's Committee processes. Examples of other national applied laws legislation which contain similar provisions include the Health Practitioner Regulation National Law and the National Occupational Licensing Law.

SARC has previously recognised that this kind of approach may be a practical necessity of taking part in national scheme legislation to achieve uniformity.

Application of Commonwealth Privacy, Freedom of Information and Ombudsman Acts

After considering several options in relation to freedom of information, privacy and Ombudsman legislation, including the national application of Victorian laws and retaining the separate laws of each jurisdiction, it was concluded that, in the interests of national consistency, using Commonwealth legislation was the most desirable option.

The Bill tailors the application by providing that a reference to the Commonwealth Office of the Privacy Commissioner in the Commonwealth Act is as if it were a reference to the Office of the National Education and Care Services Privacy Commissioner. Similar provisions apply to the

Commonwealth Freedom of Information Commissioner and Ombudsman. The Commonwealth law will apply as a state law with this modification and with any other modifications made by the National Law regulations. The regulations will be made prior to 1 January 2012, subject to the passage of the Bill.

This approach addresses concerns about having a state law purport to unilaterally give function to Commonwealth entities where there is no corresponding Commonwealth law providing for that entity to perform those functions for the purposes of the state law.

Application of New South Wales Records Legislation

The decision to apply the State Records Act 1998 was made in response to jurisdictions' concerns that the Commonwealth legislation inferred Commonwealth ownership of the records. The State Records Act 1998 applies only in relation to the Australian Children's Education and Care Quality Authority (ACECQA), the national authority, which will be based in New South Wales. Documents held by state and territory regulatory authorities will remain under the relevant legislation in each jurisdiction.

This approach provides certainty for the administration of the records held by ACECQA. The Bill does provide for the State Records Act 1998 to be modified by national regulations, as it will be applied as a law of each state.

In light of the above information, I consider the current provisions in the Bill to be necessary for the consistent application of freedom of information, privacy, Ombudsman and records laws to this national scheme legislation.

I f you have any queries in relation to the Bill please contact Karen Weston, Acting Assistant General Manager, Early Childhood Strategy Division, Department of Education and Early Childhood Development, on 9651 3256.

I trust this information is of assistance to you.

Maxine Morand MP
Minister for Children and Early Childhood Development

1 October 2010

The Committee thanks the Minister for this response

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

The Bill was introduced into the Legislative Assembly on 23 March 2010 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 12 April 2010 and made the following comments in Alert Digest No. 5 of 2010 tabled in the Parliament on 13 April 2010.

Committee's Comments

Charter report

Freedom of movement – Fair hearing – Police may ban crime suspects from city or town centres for up to 72 hours – Whether reasonable limit – Whether punishment or prevention

Summary: Clause 49 increases the period that may be specified in a banning notice from 24 to 72 hours. The Committee is concerned that clause 49 may qualitatively change the banning notice scheme.

The Committee notes that clause 49, amending existing s. 148B(2) of the Liquor Control Reform Act 1998, increases the period that may be specified in a banning notice from 24 to 72 hours. *Under existing Division 2 of Part 8A, police can issue such notices to people who they reasonably suspect have committed an offence in a designated area if they reasonably believe that the notice may be effective in preventing a further offence carrying the*

risk of alcohol-related violence or disorder in that area. Breaching a notice is punishable by a fine of over $2000.

The Statement of Compatibility remarks:

> *The extension of the maximum duration for which a banning notice may be made, to 72 hours, is reasonable and appropriate as there have been a number of people to whom the police have had to give a banning notice on multiple occasions. Police have used the banning notice system effectively since its inception; however its efficacy can be enhanced through enabling police, in appropriate circumstances, to give notices of a significantly longer duration. The amendment is intended to increase the deterrent effect of banning notices, reduce the incidence of alcohol-related violence and disorder and, consequently, enhance public safety.*

The Committee observes that there are presently two different schemes for managing alcohol-related violence or disorder in designated areas:

- *Banning notices, which are short bans on the basis of suspected criminal behaviour, issued and reviewable by police officers.*
- *Exclusion orders, which are lengthy bans imposed on the basis of proved criminal behaviour, issued and reviewable by courts.*

While the Committee appreciates that allowing banning notices to be issued for longer periods may be effective in reducing the incidence of violence or disorder, it is concerned that clause 49 may qualitatively change the banning notice scheme in two respects:

First, a 72-hour ban may extend well beyond the aftermath of a drunken evening and impinge on legitimate weekday activities. While existing s. 148B(6) prevents a full banning notice from being issued to a person who lives or works in the designated area, such a notice may still be issued to a person who needs to travel through that area to get to work, attend school or for other legitimate purposes. As current designated areas include the entire Melbourne CBD (including the city loop train stations and all CBD tramlines) and the centres of some towns, the Committee considers that clause 49 engages the Charter's right to freedom of movement.

The Committee observes that, in the case of exclusion orders, legitimate activities in designated areas are accommodated by permitting the courts who issue the orders to permit entry to designated areas for 'specified purposes'. In his Statement of Compatibility to the Bill that introduced Part 8A, the Minister remarked that this provision ensured that the negative effects of a long order could be avoided 'such as through the imposition of a condition enabling the offender to travel through the area to attend work'. By contrast, banning notices are less flexible, as the issuing officer must ban a suspect either from the entire designated area or from all licensed premises in the area. More nuanced bans can only be achieved if a senior police officer decides to vary the notice.

Second, the increased 'deterrent effect' of a potential 72-hour ban may give banning notices a punitive aspect, especially if they are used to deter people who have been given notices on 'multiple occasions'. The existing scheme permits courts to take account of an offender's past banning notices when making exclusion orders, but bars police from extending an existing notice or issuing multiple banning notices on the basis of a single suspected offence. The Committee is concerned that the use of 72-hour banning notices to deter people who are repeatedly suspected of offences in a designated area may amount to punishment of suspected criminal behaviour by police officers without a charge, trial or appeal and therefore may engage the Charter's rights with respect to criminal punishment, including a fair hearing by an independent tribunal, the presumption of innocence and the right to appeal to a court.

The Committee refers to Parliament for its consideration the questions of whether or not clause 49's extension of the maximum period for banning notices to 72 hours:

- ***by potentially allowing people to be banned by police from travelling through a city or town's centre for legitimate weekday activities, is a reasonable limit on the Charter's right to freedom of movement; and***
- ***by increasing the deterrent effect of banning notices, engages the Charter's rights with respect to the punishment of suspected criminal behaviour, including the right to a fair hearing by an independent tribunal, the presumption of innocence and appeal rights.***

The Committee will also write to the Attorney-General seeking further information as to whether clause 49 may lead to a person being prevented from travelling through a city or town centre for legitimate activities and whether the increased 'deterrent effect' of such bans amounts to the punishment of suspected behaviour or otherwise engages the Charter's right to a fair hearing. Pending the Minister's response, the Committee draws attention to clause 49.

Minister's Response

Thank you for your letter regarding the Committee's consideration of this Bill, and advising of the two matters on which the Committee has requested further advice. I apologise for the delayed response.

First, the Committee has sought my response in relation to whether clause 49 of the Bill may lead to a person being prevented from travelling through a city or town centre for legitimate weekday activities. As you will recall, clause 49 of the Bill increases the maximum period of time that may be specified in a banning notice under the Liquor Control Reform Act 1998 (the Act) from 24 hours to 72 hours.

Under s148B of the Act, a banning notice may only be given by a relevant police member to a person who the member suspects on reasonable grounds has committed or is committing a specified offence, wholly or partly in a designated area. As required by s148B(3), a banning notice cannot be given, unless the member believes on reasonable grounds that the giving of the notice may be effective in preventing a person from continuing to commit a specified offence or in preventing a further a specified offence from being committed. Subsection (4) sets out a substantial range of matters the member must consider in determining whether there are reasonable grounds for such a belief. The member must also consider that the specified offences may involve or give rise to a risk of alcohol-related violence or disorder.

In effect, these provisions ensure that banning notices are only given where there are strong community protection grounds for doing so and they would be a proportionate response to a risk of alcohol-related violence or disorder. As such, while it is possible that a 72-hour banning notice issued on a weekend may now prevent a person from availing themselves of the most efficient or timely route to, for example, their place of work on the following Monday, in my opinion, the purpose that is fulfilled by such a notice outweighs any temporary inconvenience that may or may not be caused to that person.

The potential for any such inconvenience was also possible prior to these amendments, under the previous 24-hour maximum period. For example, a notice issued on a Friday night may have prevented a person from conveniently travelling to his or her place of work on the Saturday. As such, I do not consider that the extended duration of banning notices represents a significant qualitative change to the scheme, particularly given the continued requirement for proportionality, as outlined above, and the fact that 72-hours remains a relatively brief period.

I note that the Committee has drawn a comparison between banning notices and exclusion orders under s148I of the Act, whereby the courts may allow a person to enter a designated area or licensed premises for specified purposes during the period of an exclusion order. It is appropriate that courts are able to exercise such a discretion, given the possible 12-month duration of an exclusion order and therefore the potential for offenders to experience long-term inconvenience or hardship as a result of not being able to enter a designated area for legitimate purposes. However, such inconvenience or hardship is distinguishable from that which might briefly arise under the much shorter term of a banning notice.

A person wishing to have their notice varied or revoked can, of course, apply under s148E of the Act to a police member of or above the rank of sergeant, who could take into account hardship and inconvenience. Other critical safeguards continue to apply for persons who live or work in a designated area (s148B(6)), or in a licensed premises in the area (s148B(7)). Given this capacity to tailor banning orders appropriately to a person's individual circumstances, I do not consider that the increased duration of banning notices creates an unreasonable limitation on the right to freedom of movement.

Second, the Committee has expressed concern that the 'deterrent effect' of the increased period of a banning notice may amount to 'the punishment of suspected behaviour or otherwise engage the Charter's right to a fair hearing'.

As indicated by s148B(3) and (4), which I have discussed above, the purpose of banning notices is not to punish persons for 'suspected' offences. Instead, they are designed to protect the community against alcohol-related violence and disorder, and to enhance the freedoms and rights of community members, such as the rights to life, privacy, liberty and security of the person and rights in respect of property. As such, I do not believe they should be regarded as punishment of a person, notwithstanding any deterrent effect they may have. Moreover, since banning notices per se do not amount to a person being charged with a criminal offence or being a party to a civil proceeding, they do not engage the Charter right to a fair hearing. Finally, I note that police members must of course comply with s38 of the Charter when exercising their powers.

I trust this addresses the concerns of the Committee and thank you for drawing these matters to my attention.

ROB HULLS MP
Attorney-General

20 September 2010

The Committee thanks the Attorney-General for this response

Justice Legislation Further Amendment Bill 2010

The Bill was introduced into the Legislative Assembly on 10 August 2010 by the Hon. Tim Holding MLA. The Committee considered the Bill on 30 August 2010 and made the following comments in Alert Digest No. 12 of 2010 tabled in the Parliament on 31 August 2010.

Committee's Comments

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:

> *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.*

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.

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…*

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 and equivalent bans in Queensland, South Australia and Western Australia. Only New South Wales has a similar ban.

The Committee observes that devices 'capable of being used' to smoke methylamphetamine potentially include everyday objects such as aluminium foil, spoons and test tubes. 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.'

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.

Minister's Response

Thank you for the letter dated 31 August 2010 regarding the Committee's consideration of the Justice Legislation Further Amendment Bill 2010. As I am the Minister who introduced the Bill into the Parliament, I have prepared this reply to the Committee's concerns.

The Committee has sought further information regarding the amendments contained in the Bill to the Crimes Act 1958, in relation to digital evidence capture, and the Drugs, Poisons and Controlled Substances Act 1981, in relation to ice pipes.

In relation to the amendments to the digital evidence capture scheme, I am of the view that further amendment is not necessary. The Bill makes it clear that the further amendments will not apply retrospectively. The concern about the scheme as originally enacted in the Justice Legislation Miscellaneous Amendments Act 2009 ignores the well-known principle of statutory

interpretation that Parliament does not intend provisions to have a retrospective effect unless it explicitly says so or the provisions themselves lead only to that conclusion. In the case of the Bill and the amendments last year, there is nothing in the provisions to indicate retrospective application was intended. Indeed, this is also reflected in the second reading speech.

I note that the Committee has also raised concerns in relation to the amendments to the Drugs Poisons and Controlled Substances Act 1981 (the DPCS Act) to prohibit the display, sale and supply of 'ice pipes'. As the committee is aware, these amendments are intended to continue the existing ban on the supply of 'ice pipes' made pursuant to a ban order under the Fair Trading Act 1999 (the Fair Trading Act) which will cease to operate upon the introduction of the forthcoming Fair Trading Amendment (Australian Consumer Law) Bill 2010. This aim was reflected in the second reading speech.

In particular, the Committee has observed that the definition of 'ice pipe' outlined in section 80HA(a) of the amending legislation potentially captures everyday objects such as aluminium foil, spoons and test tubes. In the Committee's view, this was because the definition of 'ice pipe' includes, in part, '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..'. The Committee is concerned that the offence and forfeiture provisions may engage the Charter right 'not to be deprived of property other than in accordance with the law'.

As part of these concerns the Committee has noted that the inclusion of 'devices capable of being used' to smoke methylamphetamine goes beyond the existing ban order. The ban order, set out in Victorian Government Gazette No S 11 22 January 2004, currently prohibits the supply of goods described as 'objects' including but not limited to 'ice pipes' that are used, intended for use, or designed for use in smoking or inhaling into the human body methamphetamine crystals'. I note that this definition is broadly drafted to include items other than 'ice pipes' which are used to smoke 'ice'. This would arguably extend to everyday objects such as those identified by the Committee if they were or could be used for the purpose of smoking ice.

Moreover, I note that the term 'object' which is used in the ban order, is broadly defined in the dictionary to include 'something that may be perceived by the senses, especially by sight or touch; a visible or tangible thing'[1] or 'a material thing that can be seen and touched'.[2] In contrast, in order to fall within the definition of 'ice pipe' in section 80HA(a) an item must be a 'device'. The term 'device' is not defined in the DPCS Act however, the dictionary definition states that a 'device' is 'an invention or contrivance'[3] or more specifically, 'a thing made or adapted for a particular purpose especially a piece of mechanical or electronic equipment'.[4] It is unlikely that everyday items such as test tubes, spoons and aluminium foil can be said to be 'made or adapted' for the purpose of smoking methylamphetamine in its crystalline form. Accordingly, I consider these items will not be captured by the definition of 'ice pipe' in section 80HA(a) and am of the view that the definition of 'ice pipe' set out in this provision is not broader in scope than that under the existing ban order.

I note that the Department of Health has advised the Department of Justice that items such as spoons, and aluminium foil are not commonly used to smoke methylamphetamine. In particular, these items are not preferred because the smoke is too widely dispersed. Therefore, in practice these items are not likely to be sold for the purpose of smoking 'ice'.

Finally, I note that as a matter of practice Victoria Police will not target persons selling or displaying everyday objects such as those described by the Committee in their operations. Victoria Police understand that the intention of the Bill is to continue the operation of the existing prohibition on the supply of 'ice pipes' under the ban order. If necessary, instructions may be provided to operational members to ensure that devices such as spoons, test tubes and aluminium foil will not be the subject of prosecutions under the provisions of the amending legislation. Rather, it is intended that the focus will be on glass pipes and similar glass implements that are used for smoking 'ice' as has been the case under the Fair Trading Act ban order.

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1 Macquarie Dictionary.

2 Oxford English Dictionary

3 Macquarie Dictionary.

4 Oxford English Dictionary.

For the reasons set out above I have concluded that the definition of 'ice pipes' in section 80HA(a) will not capture everyday objects and therefore the offence and forfeiture provisions do not engage the Charter right 'not to be deprived of property other than in accordance with the law'.

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

16 September 2010

The Committee thanks the Minister for this response

Occupational Licensing National Law Bill 2010

The Bill was introduced into the Legislative Assembly on 10 August 2010 by the Hon. Tim Holding MLA. The Committee considered the Bill on 30 August 2010 and made the following comments in Alert Digest No. 12 of 2010 tabled in the Parliament on 31 August 2010.

Committee's Comments

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)?***

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.

Minister's Response

Thank you for your letter of 31 August 2010 forwarded to the Honourable Tim Holding MP, Minister for Finance on behalf of the Scrutiny of Acts and Regulations Committee (the Committee) concerning the Occupational Licensing National Law Bill 2010 (the Bill). The Minister for Finance has referred your correspondence to me for response.

The Committee notes in its report that certain provisions of the Bill allow regulations to modify a number of Commonwealth Acts. The relevant Acts are the Privacy Act 1988 (Cth), the Freedom of Information Act 1982 (Cth), the Archives Act 1983 (Cth) and the Ombudsman Act 1976 (Cth). These Commonwealth Acts have been applied as laws of Victoria for the purposes of the national licensing system, except where functions are being exercised by Victorian entities under delegation from the National Occupational Licensing Authority. For Victorian entities exercising functions under delegation, the relevant Victorian Acts will continue to apply (except for functions relating to the national registers, which the Commonwealth Privacy Act will apply to).

These Commonwealth Acts have been applied as laws of Victoria to provide for the application of nationally consistent privacy, freedom of information, archives and ombudsman regimes to the national licensing system. The power for the regulations to modify these Commonwealth Acts as they apply to the national licensing system is necessary to ensure that these Acts will work in practice in all jurisdictions, including Victoria. For example, the Acts will need to be modified to apply as if references in the Acts to the Commonwealth Government were references to the Government of a participating jurisdiction (e.g. the Victorian Government).

The making of regulations will be important in the context of modifying these Commonwealth Acts as they apply to the national licensing system. The Bill provides for the national regulations to be tabled in each House of Parliament and allows the Parliament of each participating jurisdiction to disallow the regulations. If a majority of States and Territories disallow a regulation, the regulation will cease to have effect in all jurisdictions.

The Committee has also sought advice about whether the National Privacy Principles or the Information Privacy Principles will apply in any modified provisions of the Commonwealth Privacy Act. The Ministerial Council for Federal Financial Relations will make a decision about which set of privacy principles are most appropriately applied to the national licensing system. As Victoria's representative on the Ministerial Council, I will be seeking to ensure through this process that the most appropriate privacy protections are applied and will consult the Victorian Privacy Commissioner about this matter.

In its report, the Committee inquired about the implications of the absence of a Victorian spent convictions legislative regime for Victorian applicants. The explanatory memorandum accompanying the Bill makes it clear that the national regulations will be developed to require that a case-by-case assessment is undertaken of a person's particular criminal history. In assessing an application for a national licence, the National Occupational Licensing Authority will have to have regard to all the relevant circumstances of an applicant's criminal history in determining their eligibility to hold a licence. This includes considering the nature of the offence and how long ago the offence was committed.

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

JOHN LENDERS MP
Treasurer

24 September 2010

The Committee thanks the Treasurer for this response

Plant Biosecurity Bill 2010

The Bill was introduced into the Legislative Assembly on 27 July 2010 by the Hon. Joe Helper 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

Self-incrimination – People can be compelled to lead inspectors to evidence of their criminal conduct – Whether reasonable limit – Practice Note No 3

Summary: Clauses 117 & 118 allow a person to be compelled to lead an inspector to evidence of their criminal conduct. The Committee considers that the clauses may be incompatible with the Charter's right against compelled self-incrimination. It will write to the Minister seeking further information.

The Committee notes that clauses 117(1)(a) and 118(1) provide that an inspector may require anyone to answer any question bearing on the prevention, control or eradication of an exotic pest or disease, including answers that might tend to incriminate the person. Although clause 118(2) provides that those answers aren't admissible in most criminal proceedings, it does not bar the use of information derived from those answers in proceedings against the person. ***So, clauses 117 & 118 allow a person to be compelled to lead an inspector to evidence of their criminal conduct.*** *The Victorian Supreme Court has held that schemes of this sort limit the Charter's right against self-incrimination, subject to the test for reasonable limits on rights in Charter s. 7(2).*

The Statement of Compatibility remarks:

> *[T]he questioning powers may only be used for the regulatory purpose of preventing, controlling or eradicating an exotic pest or disease or any plant or product that the inspector has reasonable grounds for suspecting is infected or infested with an exotic pest or disease. To the extent that incriminating evidence may be derived from those answers, it is incidental to that purpose.*
>
> *…Answers to questions posed by an inspector… are likely to be information in the sole knowledge of the questioned. The abrogation of the privilege facilitates compliance with the act by enabling an inspector to access to [sic] information and evidence that is difficult or impossible to ascertain by alternative evidentiary means. There is a significant public interest in maintaining Victoria's biosecurity, and in prosecuting any regulatory breaches.*
>
> *There are very real difficulties with the inclusion of a derivative use immunity in the context of these regulatory powers. In particular, it would risk exclusion of the principal evidence of an offence, namely the actual exotic plant or disease. A person could effectively immunise themselves against prosecution simply by disclosing to inspectors the location of an exotic plant of disease.*

While the Committee agrees that protections against self-incrimination can be reasonably limited in narrow regulatory contexts, it is concerned that clause 117 is not limited to people who have voluntarily engaged in regulated activities and that clause 118(2)'s abolition of derivative use immunity is not limited to prosecutions under the Act.

The Committee observes that the Victorian Supreme Court rejected similar arguments to those in the Statement of Compatibility in relation to court-supervised investigations of organised crime and, in particular, held that derivative use immunity would only prevent the admission of evidence that 'could not have been obtained' without compelling the defendant to speak. All other evidence that the investigators discover would remain admissible. The balance of Australian statutes on plant biosecurity, including Victoria's current statute, either leave the privilege untouched or expressly provide for a derivative use immunity.

In light of these factors and the Supreme Court's clear ruling that a more protective scheme relating to organised crime was incompatible with the Charter, the Committee considers that clauses 117 and 118 may be incompatible with the Charter's right against compelled self-incrimination.

The Committee draws attention to its Practice Note No 3, published during the last sitting, which remarked:

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

The Committee observes that the Statement does not address the reasonableness of clause 118(2)'s provision that a person will only be immune from having their answers used against them at a later criminal proceeding if the person claimed the privilege prior to answering the question. Also, the discussion of less restrictive alternatives only addresses the options of complete retention or complete abolition of derivative use immunity, rather than a narrower abrogation, such as retaining derivative use immunity but expressly permitting the admission of the actual plant or disease.

In addition, the Committee notes that clause 118's terms may be ineffective for two reasons. First, clause 118(1), abolishing the privilege, appears to be in conflict with clause 132(2), retaining the privilege. Second, on current Victorian authority, Charter s. 32(1) would require clause 118(2) to be read as including derivative use immunity, even if a narrower immunity would be a reasonable limit of the Charter's right against self-incrimination.

In accordance with its Practice Note No 3, the Committee write to the Minister seeking further information as to whether or not:

- ***clause 118(2)'s provision that a person will only be immune from having their answers used against them at a later criminal proceeding if the person claimed the privilege prior to answering the question is a reasonable limit of the Charter's right against self-incrimination***
- ***a narrower abrogation of derivative use immunity (such as retaining it but expressly permitting admission of evidence of the actual exotic plant or disease) would be a less restrictive alternative reasonably available to achieve the purpose of clause 118(2)***

The Committee will also seek information as to the relationships between clause 118(1) and clause 132(2); and between clause 118(2) and Charter s. 32(1). Pending the Minister's response, the Committee draws attention to clauses 117 & 118.

Presumption of innocence – Deeming provision – Practice Note No 3

Summary: The Committee will write to the Minister seeking further information as the compatibility of the deeming provision in clause 129 with the Charter's right to be presumed innocent until proved guilty.

The Committee notes that clause 129 provides that, 'in any prosecution… under this Act… a contravention… proved in regard to any sample… is deemed to have been proved with regard to the lot from which the sample was taken.' This provision appears to create an irrebuttable factual presumption. Similar provisions elsewhere allow the presumption to be refuted by evidence to the contrary. The Committee considers that clause 129 engages the Charter's right to be presumed innocent until proved guilty.

The Committee draws attention to its Practice Note No 3, published during the last sitting, which remarked:

> *The Statement of Compatibility for any Bill that creates… a provision that reduces the prosecution's burden to prove the accused's guilt… should state whether and how that provision satisfies the Charter's test for reasonable limits on rights. Examples of such provisions include ones that… deem a fact to be proved in any circumstance…*

The Committee will therefore write to the Minister seeking further information as the compatibility of clause 129 with the Charter's right to be presumed innocent until proved guilty.

Minister's Response

Thank you for your letter of 11 August 2010, regarding the Committee's consideration of the Plant Biosecurity Bill 2010 (the Bill).

The Committee has sought further information regarding the compatibility of certain provisions contained in the Bill. I would like to respond to each issue as outlined:

The compatibility of clauses 11 7 and 118 with the right against self-incrimination

The Committee has sought further information as to:

- *whether clause 118(2), which provides that a person will only be immune from having their answers used against them at a later criminal proceeding if the person claimed the privilege prior to answering the question, is a reasonable limit on the right against self-incrimination;*
- *whether a narrower abrogation of derivative use immunity (such as providing for such an immunity but expressly permitting admission of evidence of the actual exotic plant or disease) would be a less restrictive alternative reasonably available to achieve the purpose of clause 11 8(2);*
- *the relationship between clause 11 8(1) and clause 132(2); and*
- *the relationship between clause 118(2) and section 32(1) of the Charter.*

I will address each of these issues in turn

First, in my view, abrogating the privilege against self-incrimination and replacing it with an immunity where the person asserts the privilege prior to questioning is a reasonable limit upon the right. This is because, under clause 117(2), an inspector is required to bring a person's ability to avail themselves of the use immunity to that person's attention before making any requirement under clause 117(1). This necessarily includes that the person cannot decline to answer a question or produce a document on the ground that the answer or information may incriminate that person (clause 118(1)) and that, if that person claims the answer, record or information may incriminate them before answering, then the question itself, any answer, record or document produced is not admissible in evidence against the person in criminal proceedings (clause 118(2)).

Second, providing for evidence of the actual exotic plant or disease to be admissible would not, in my view, achieve the purpose of clause 11 8(2), which is to properly balance a person's interest in the right against self-incrimination (the core aspects of which are protected by the use immunity) and the public interest in ensuring that persons who put Victoria's biosecurity at risk, do not escape liability.

In my view, a qualified derivative use immunity that only allowed for the actual exotic plant or disease to be adduced in evidence (but not any other derivative evidence) would significantly undermine the ability to effectively prosecute breaches of the proposed Act. In the majority of cases, the evidence of the actual exotic plant or disease will be unlikely, without more, to enable effective prosecution.

Excluding all other derivative evidence (which is, in any event, evidence that exists independently of the person who has provided the relevant answer and/or produced the relevant document) would jeopardise the success of proceedings which may be brought after all the relevant information about the exotic pest or disease in question has come to light. In that context, even a qualified derivative use immunity could have a detrimental effect on the way inspectors conduct themselves because they would be placed in the difficult position of having to weigh up the potential impact that a requirement to answer questions and/or produce documents may have on a subsequent prosecution with the importance of obtaining that information so as to ensure the protection of Victoria's biosecurity.

Third, clause 118(1) abrogates a person's right against self-incrimination in respect of requirements to answer questions and/or produce documents relating to the prevention, control or eradication of exotic pests or diseases whereas clause 132(2) expressly preserves the ability to refuse to answer questions and/or produce documents on the grounds that the answer or information may incriminate that person in respect of enforcement under the proposed Act generally.

These provisions are not in conflict. Clause 132(2) reflects the approach to inspectors' powers under the proposed Act generally where the privilege against self-incrimination is expressly preserved. In contrast, clause 118(2) abrogates the privilege against self-incrimination where an exotic pest or disease exists or an inspector has reasonable grounds to suspect a plant or plant product is infested with an exotic pest or disease. The abrogation of the privilege in these circumstances reflects the heightened risk posed to Victoria's biosecurity by exotic pests or diseases. The distinction will be clear in practice because, as discussed above, under clause 117(2), an inspector requiring answers andlor production of documents in the context of exotic pests or diseases is required to inform the person of whom the requirement is made of the abrogation of the privilege against self-incrimination and its replacement with a use immunity.

Fourth, in my view, applying section 32(1) of the Charter as explained in R v Momcilovic [2010] VCSA 50 to clause 118(2) will not necessarily mean that clause 11 8(2) is read as including derivative use immunity.

In Momcilovic, the Court of Appeal held that:

- *section 32(1) of the Charter does not create a 'special' rule of interpretation (in the sense described in some of the United Kingdom cases), but rather forms part of the body of interpretive rules to be applied at the outset in ascertaining the meaning of the provision in question;*
- *under section 32(1), statutory provisions must be interpreted consistently with human rights "so far as it is possible to do so consistently with their purpose" - the test is one of consistency with the purpose of the provision(s) in question, rather than the legislation as a whole; and*
- *compliance with the section 32(1) obligation means exploring all 'possible' interpretations of the provision in question and adopting that interpretation which least infringes Charter rights providing that the preferred interpretation is consistent with the intention of the enacting Parliament; what is 'possible' is determined by the existing framework of interpretive rules, including the presumption against interference with rights.*

As I have previously clarified in my Statement of Compatibility dated 28 July 2010, the purpose of clause 11 8(2) is to abrogate the privilege against self-incrimination and replace it with a use immunity only. I would expect this to be taken into account by any Court required to consider the intention of the enacting Parliament in including this provision in the proposed Act.

In any event, in my view, clause 118(2) is compatible with the privilege against self-incrimination because, in the context of a regulatory scheme designed to protect Victoria's biosecurity and where access to information about exotic pests and diseases is likely to be difficult or impossible to ascertain by alternative evidentiary means, it appropriately balances a person's interest in the right against self-incrimination (the core aspects of which are protected by a use immunity) and the public interest in ensuring that persons who put Victoria's biosecurity at risk, do not escape liability. It is also relevant that committing an offence under the proposed Act does not result in imprisonment.

The statutory context here is therefore materially different from that considered in Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381. That case concerned the interpretation compulsory questioning powers in the context of investigating criminal offences.

The compatibility of clause 129 with section 25(1) of the Charter - the right to be presumed innocent until proven guilty

The Committee has sought further information as to the compatibility of clause 129 with the right to be presumed innocent until proven guilty in section 25(1) of the Charter.

Clause 129 provides that if in any prosecution under the proposed Act a contravention of the new Act's provisions is proved in regard to any sample, the contravention is deemed to have been proved with regard to the lot from which the sample was taken. In my view, this provision does not engage the right to he presumed innocent in section 25(1) of the Charter. It is a method of proof of the offence, and does not impose any onus on the accused.

The deeming mechanism in clause 129 ensures that, where contravention of a provision of the proposed Act has been proved in respect of a sample, it is not necessary to go through that process again in respect of the rest of the lot from which the sample was taken. Not only

would such a process he incredibly time-consuming but, by their very nature, pests and/or diseases are: (i) likely to have infected and/or infested more than just the sample from which they were taken; and (ii) extremely difficult to prevent (or contain) from spreading throughout Victoria. The deeming mechanism therefore ensures that inspectors' powers to prevent and, if necessary, contain potential biosecurity threats are actually workable in practice. In my view, to the extent clause 129 could be said to limit the right, any such limit would be reasonable in the circumstances.

JOE HELPER MP
Minister for Agriculture

27 September 2010

The Committee thanks the Minister for this response

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

The Bill was introduced into the Legislative Assembly on 9 March 2010 by the Hon. Tim Pallas MLA. The Committee considered the Bill on 22 March 2010 and made the following comments in Alert Digest No. 4 of 2010 tabled in the Parliament on 23 March 2010.

Committee's Comments

Delayed commencement – One (1) year rule – Inadequate explanatory material – Committee Practice Note No. 1 of 2005

The Committee notes the delayed commencement provision and draws attention to Committee Practice Note No. 1 of 2005. The Committee notes that this Practice Note has now been in circulation for over 4 years. The Practice Note makes it clear that the Committee on behalf of the Parliament has certain expectations concerning the explanation for delayed commencement provisions of over one (1) year from a Bills introduction in the Parliament.

The Committee will draw this to the attention of the Minister and will seek further advice concerning this delayed commencement provision.

Minister's Response

I am writing to you in response to the request for an explanation as to why the default commencement date of 1 July 2011 for the above Act is more than one year after 18 May 2010, the date on which the Act received the Royal Assent.

The reason for this is that the Act was developed in tandem with the Transport Integration Act 2010, and a number of provisions relied on the commencement of that Act. Therefore, it was appropriate for both Acts to have the same default commencement date of 1 July 2011 in order to ensure consistency. An explanation of the reason for the default commencement date of 1 July 2011 was provided on page 2 of the Explanatory Memorandum to the Bill.

If you have any further queries, please contact Peter Parsons on 9655 2064 or email peter.parsons@transport.vic.gov.au

MARTIN PAKULA MP
Minister for Public Transport

28 September 2010

The Committee thanks the Minister for this response

Committee room
5 October 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

Education and Care Services National Law Bill 2010 13
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*
Marine Safety Bill 2010	Roads and Ports	31.08.10 *13.09.10*	12 of 2010 *13 of 2010*
Traditional Owner Settlement Bill 2010	Aboriginal Affairs	10.08.10 *28.08.10*	11 of 2010 *13 of 2010*
Transport Accident and Accident Compensation Legislation Amendment Bill 2010	Finance, WorkCover and the Transport	10.08.10 *03.09.10*	11 of 2010 *13 of 2010*
Associations Incorporation Amendment Bill 2010	Consumer Affairs	08.06.10 *16.09.10*	8 of 2010 *14 of 2010*
Education and Care Services National Law Bill 2010	Children and Early Childhood Development	14.09.10 *01.10.10*	13 of 2010 *14 of 2010*
Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010	Attorney-General	13.04.10 *20.09.10*	5 of 2010 *14 of 2010*
Justice Legislation Further Amendment Bill 2010	Attorney-General	31.08.10 *16.09.10*	12 of 2010 *14 of 2010*
Occupational Licensing National Law Bill 2010	Finance, WorkCover and the Transport	31.08.10 *24.09.10*	12 of 2010 *14 of 2010*
Plant Biosecurity Bill 2010	Agriculture	10.08.10 *27.09.10*	11 of 2010 *14 of 2010*
Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010	Transport, Roads and Ports	23.03.10 *28.09.10*	4 of 2010 *14 of 2010*

Outstanding correspondence

Crimes Legislation Amendment Act 2010	Attorney-General	23.03.10	4 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
Civil Procedure Bill 2010	Attorney-General	27.07.10	10 of 2010
Fair Trading Amendment (Australian Consumer Law) Bill 2010	Consumer Affairs	31.08.10	12 of 2010
Judicial Commission of Victoria Bill 2010	Attorney-General	14.09.10	13 of 2010