No. 4 of 2010

Tuesday, 23 March 2010

On the

Accident Compensation Amendment Bill 2009

Child Employment Amendment Bill 2010

Crimes Legislation Amendment Act 2010

Crimes Legislation Amendment Bill 2009

Equal Opportunity Bill 2010

Health and Human Services Legislation Amendment Bill 2010

Justice Legislation Amendment Bill 2010

Justice Legislation Miscellaneous Amendments Bill 2009

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 has considered the following Bills –

Child Employment Amendment Bill 2010
Crimes Legislation Amendment Act 2010
Equal Opportunity Bill 2009
Health and Human Services Legislation Amendment Bill 2010
Justice Legislation Amendment Bill 2010
Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010

The Committee notes the following correspondence –

Accident Compensation Amendment Bill 2009
Crimes Legislation Amendment Bill 2009
Justice Legislation Miscellaneous Amendments Bill 2009

Scrutiny of Acts and Regulations Committee

Role of the Committee

The Scrutiny of Acts and Regulations Committee is an all-party Joint House Committee, which examines all Bills and subordinate legislation (regulations) presented to the Parliament. The Committee does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced scrutiny of Bills in 1982. They are precedents and traditions followed by all Australian scrutiny committees. Non-policy scrutiny within its terms of reference allows the Committee to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.

The *Charter of Human Rights and Responsibilities Act 2006* provides that the Committee must consider any Bill introduced into Parliament and report to the Parliament whether the Bill is incompatible with human rights.

Alert Digest No. 4 of 2010

Child Employment Amendment Bill 2010

Introduced	9 March 2010
Second Reading Speech	10 March 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Child Employment Act 2003* (the 'Act') to –

- substitute a new purposes section, other definitions and amends the definition of employment to ensure the focus of the act is to protect children under the age of 15 years in employment and employment-like activities; and substitutes a new definition for 'light work' in the context of child employment **[4 to 7]**
- substitutes provisions in respect to the process of applying for and issuing permits; **[11, 12, 15, 16 and 22]**
- repeal the current probity requirement of a police check and instead apply the provisions of the *Working with Children Act 2005* to the supervision of children in employment. **[14 and 20]**

Extracts from the Second Reading Speech –

> *The Permit system*
>
> *The permit system is the basis of regulation of child employment in Victoria. The Bill will improve the current permit system and will create special permit application arrangements for entertainment industry employers (such as for TV productions and advertising catalogues), who are high-volume users of the scheme.*
>
> *Definition of employment*
>
> *… The Bill amends the definition of employment. This is intended to focus coverage of the Act on employment and employment-like activities.*
>
> *Working-with-children checks*
>
> *Working-with-children checks will replace police checks under the Bill. Employers will have to ensure that anyone supervising a child holds a current assessment notice under the Working with Children Act 2005, unless they are exempt.*
>
> *Offences and penalties*
>
> *… The Bill proposes to increase the penalty for an employer who employs a child without a permit. This is currently set at $1168.20 for non-bodies corporate and $5841 for bodies corporate, which is lower than other substantive offences in the Act.*
>
> *… In order to provide an appropriate deterrent for failing to secure a permit, the Bill increases the penalty for an employer who employs a child without a permit to the standard penalties for bodies corporate ($11 682) and others ($7009.20).*
>
> *The Bill also proposes the introduction of some body corporate level penalties for existing offences, to reflect the fact that bodies corporate may also commit offences under the Act; and also introduces some new offences to support the powers and functions of child employment officers.*

Content and Committee comment

Permit for child employment – The Bill substitutes amended criteria (new sections 16 and 18) for the Secretary to consider concerning the grant of a permit application for a child to work and for the variation or cancellation of such a permit. The substituted provision omits the criteria that *the child is fit to be engaged in the proposed employment*. **[15 and 17]** *(Refer to Charter report below).*

Powers of entry – The Bill also provides (new section 43(c)) that authorised Child Employment Officers will have expanded powers to interview a broader range of persons connected with the employment of a child than provided under the current Act. **[27]**

Self-incrimination – The Bill inserts additional protections such as a warning that a person may refuse to comply in respect to self-incrimination provisions in Part 4 of the Act for persons required to answer questions or provide information or documents. The Committee notes the detailed Statement of Compatibility which in two parts deals with the expanded group of persons (clause 27) and the limitation on the privilege concerning the production records and documents required to be kept under the Act or regulations. **[31]**

Offences by body corporate – The Bill inserts new sections 50A and 50B concerning offences by a body corporate contravening any provision of the Act. Each person who is an officer of the body corporate is to be taken to have contravened the same provision if the person knew of, or knowingly authorised or permitted, the contravention. **[33]** *(Refer to Charter report below).*

Charter report

Protection of children – Removal of requirement for Secretary to be satisfied that child is fit to be engaged in the proposed employment

Summary: The Committee considers that clauses 15 and 17, by changing the test for when children may be permitted to work, engage their Charter right to protection. No explanation for the change has been provided. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clauses 15, substituting a new section 16(1), and 17, substituting a new section 18(2), list matters that a Secretary must be satisfied of in order to permit a child to engage in employment and whose absence necessitates the cancelling of permission:

> *(a) the health, safety, education and moral and material welfare of the child will not suffer from the proposed employment;*
>
> *(b) the child will not be subjected to any form of exploitation in the course of the proposed employment*
>
> *(c) the proposed employment is not prohibited employment; and*
>
> *(d) the child is of or over the minimum age permitted by section 10 for the proposed employment.*

This new list omits the existing requirement that 'the child is fit to be engaged in the proposed employment'.

The Committee considers that clauses 15 and 17, by changing the test for when children may be permitted to work, engage their Charter right 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.[1]

[1] Charter s. 17(2).

No explanation for these changes is provided in the statement of compatibility, second reading speech or explanatory memorandum. It may be that the explanation for the omission of the fitness requirement is the insertion of the word 'safety' into the first requirement, but the Committee is concerned that this may not be an equivalent test.

The Committee will write to the Attorney-General seeking further information as to the reason for the Bill's omission of the existing requirement that the child be fit to engage in the proposed employment and whether new sections 16 and 18 are compatible with children's right to protection under Charter s. 17(2).

Pending the Attorney-General's response, the Committee draws attention to clauses 15 and 17.

Fair hearing – Presumption of innocence – Corporate officers deemed to be guilty of corporate crimes if they know of those crimes

Summary: The Committee considers that new section 50A, by deeming a corporate officer to be liable for the corporation's crimes on mere proof of knowledge of those crimes, regardless of anything the officer did or failed to do, may engage the Charter's rights to a fair hearing and to be presumed innocent. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 33, inserting a new section 50A, provides:

> *If a body corporate contravenes any provision of this Act, each person who is an officer of the body corporate is to be taken to have contravened the same provision if the person knew of, or knowingly authorised or permitted, the contravention.*

Section 50A allows an officer to be convicted simply on the basis of knowledge of a contravention, regardless of what the officer did or didn't do. For example, an officer who learnt that an officer in a separate division of the corporation had employed a child without a permit and immediately alerted the rest of management (or the police) to the problem would still be guilty of the corporation's offence.

New section 50A differs from nearly all other Victorian corporate officer liability provisions, which either:

- are limited to officers who 'knowingly authorised or permitted the contravention' or similar formulations that link the officer's conduct to the contravention, thus protecting officers who had no influence over a contravention by others;[2] or
- provide for a due diligence defence, thus protecting officers who made reasonable efforts to prevent a contravention by others.[3]

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[2] *Accident Compensation Act 1985*, s. 250A; *Accident Towing Services Act 2007*, s. 221; *Architects Act 1991*, s. 68; *Bus Safety Act 2009*, s. 69; *Broiler Chicken Industry Act 1978*, s. 17(1)(b); *Building Act 1993*, s. 243; *Cemeteries and Crematoria Act 2003*, s. 178; *Children's Services Act 1996*, s. 48; *Conservation, Forests and Lands Act 1987*, s. 90; *Control of Genetically Modified Crops Act 2004*, s. 21; *Control of Weapons Act 1990*, s. 8EA; *Corrections Act 1985*, s. 105A(2); *Credit (Administration) Act 1984*, s. 92; *Dangerous Goods Act 1985*, s. 46; *Domestic Animals Act 1994*, s. 91; *Education and Training Reform Act 2006*, s. 5.8.7; *Electricity Safety Act 1998*, s. 146; *Equipment (Public Safety) Act 1994*, s. 31; *Fair Trading Act 1999*, s. 143; *Firearms Act 1996*, s. 142; *Food Act 1984*, s. 51; *Gas Industry Act 2001*, ss. 210 & 230; *Gas Safety Act 1997*, s. 115; *Health Services Act 1988*, s. 152A; *Heritage Act 1995*, s. 180; *Juries Act 2000*, s. 79(2); *Livestock Disease Control Act 1994*, s. 134; *Major Sporting Events Act 2009*, s. 189; *Non-Emergency Patient Transport Act 2003*; *Occupational Health and Safety Act 2004*, s. 144; *Plant Health and Plant Products Act 1995*, s. 68; *Prevention of Cruelty to Animals Act 1986*, s. 41AA; *Private Security Act 2004*, s. 159; *Racing Act 1958*, s. 66; *Racial and Religious Tolerance Act 2001*, s. 27; *Rail Safety Act 2006*, s. 98; *Summary Offences Act 1966*, s. 54; *Trade Measurement Act 1995*, s. 72; *Victorian Energy Efficiency Target Act 2007*, s. 70; *Victorian Renewable Energy Act 2006*, s. 109; *Water Industry Act 1994*, s. 178.

The lone exception appears to be s. 44 of the *Working with Children Act 2005*, which is in the same terms as new section 50A.

The Committee considers that new section 50A, by deeming a corporate officer to be liable for a corporation's crimes on mere proof of knowledge of those crimes, regardless of anything the officer did or failed to do, may engage the Charter's rights to a fair hearing and to be presumed innocent.[4]

The Committee will write to the Attorney-General seeking further information as to why section 50A differs from nearly all other corporate officer liability provisions in Victoria and whether new section 50A is compatible with the Charter's right to be presumed innocent. Pending the Attorney-General's response, the Committee draws attention to clause 33.

The Committee makes no further comment.

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3 *ANZAC Day Act 1958*, ss. 5, 5A & 5C; *Broiler Chicken Industry Act 1978*, s. 17(1)(c); *Dairy Act 2000*, s. 55; *Disability Act 2006*, s. 216; *Food Act 1984*, s. 51; *Guardianship and Administration Act 1986*, s. 81; *Local Government Act 1989*, s. 239; *Mental Health Act 1986*, s. 141; *Port Services Act 1995*, s. 94; *Shop Trading Reform Act 1996*, s. 8; *Surveillance Devices Act 1999*, s. 32; *Transport Act 1983*, s. 226. The Committee queried the adequacy of some of these defences in its report on the Labour and Industry (Repeal) Bill 2008 in *Alert Digest No 10 of 2008*.

4 Charter ss. 24(1) and 25(1). See *Salabiaku v France* [1988] ECHR 19, [28].

Crimes Legislation Amendment Act 2010

Introduced	8 December 2009
Second Reading Speech	10 December 2009
Royal Assent	16 March 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

> **Note:** *The Act received Royal Assent on 16 March 2010 and the Committee provides this supplementary report pursuant to section 17(c) of the Parliamentary Committees Act 2003. This report deals with House amendments made to the Bill as introduced.*

Charter report

Freedom of expression – No statement of compatibility – Expansion of Commissioners' suppression powers – Validation of purported suppressions – Amendment unrelated to purposes of Bill as introduced

Summary: The Committee observes that, as a result of amendments made to the Crimes Legislation Amendment Bill 2010 in the Legislative Council, the resulting Act contained two sections that were not considered by the Committee in its report on the Bill. The Committee considers that the section 8 may engage the Charter's right to freedom of expression and that section 9 may not be a 'lawful restriction' on freedom of expression.

The Committee observes that, as a result of amendments made to the Crimes Legislation Amendment Bill 2010 in the Legislative Council, the resulting Act contained two sections that were not considered by the Committee in its report on the Bill.[5] The Committee considers that it may report on these sections pursuant to its function, introduced by the Charter, to report on 'any Act that was not considered... when it was a Bill'.[6]

The Committee notes that section 8, which amended s. 19B of the *Evidence (Miscellaneous Provisions) Act 1958*, expanded the powers of commissioners presiding at hearings to suppress the publication of 'a report of the... proceedings of a hearing' or 'any information derived from the hearing' to include hearings where all members of the public were permitted to attend. Publication contrary to such an order is an offence punishable by three months imprisonment. **The Committee considers that the section 8 may engage the Charter's right to freedom of expression.**[7]

The member who introduced the amendments remarked:

> *These amendments mean that evidence can be taken and information can be gathered without necessarily excluding the public, and therefore the process of the royal commission can be tailored to meet the particular circumstances....*
>
> *The amendments are consistent with the powers exercised by royal commissions in other states and the commonwealth, so it is consistent with other jurisdictions, but it is also, I think, clear to note that royal commissions will not have an unfettered power to make these orders — that the orders can only be made where it is necessary to facilitate the conduct of an inquiry — so there need to be grounds consistent with the outcome that is being sought; and there need to be grounds consistent with the objectives of the royal commission.*

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5 *Alert Digest No 1 of 2010*.

6 *Parliamentary Committees Act 2003*, s. 17(c).

7 Charter s. 15(2).

While the Committee appreciates that a power to suppress some aspects of public hearings of commissions may be a reasonable limit on the Charter's right to freedom of expression, it is concerned about a number of aspects of section 8:

- The scope of amended s. 19B(2) appears to be broader than equivalent powers for commissioners in other jurisdictions, which are limited to banning publication of evidence, the contents of documents and information that may identify a witness.[8] By contrast, s. 19B(2), which extends to a 'report of' or 'information derived from' a hearing, would appear to permit the suppression of remarks of the commissioner, officers or professional participants, orders of the commission, or other events that occur during a public hearing.
- Amended s. 19B(2) permits orders that 'facilitate the conduct of the inquiry... or would otherwise be in the public interest'. This is a broader formulation than the suppression powers of the Supreme Court[9] and appears to authorise limitations on freedom of expression that go beyond those permitted by Charter s. 15(3).[10] For example, it may permit suppression orders to preserve commercial interests.
- Amended s. 19B(2) is not limited to orders 'necessary to' achieve particular goals, [11] but rather may be made in respect of orders that merely 'would facilitate' those goals. There is no requirement to balance these goals against the public interest in disseminating the information.[12] The Committee is therefore concerned that amended s. 19B(2) may not be a 'lawful restriction' on freedom of expression under Charter s. 15(3).[13]
- There is no express provision made for the lifting of a suppression order after the commission has ended.[14]

The Committee also notes that section 9, which inserted a new section 164 into the *Evidence (Miscellaneous Provisions) Act 1958*, provides that a current order purportedly made under s. 19B(2) is 'taken to have the same force and effect as it would have had if it had been validly made under section 19B(2)'. This formulation appears to be broader than other retrospective validation provisions in Victorian statutes, which only validate purported acts to the extent that they would have been valid if they were made under the amended provision.[15] The Committee is concerned that the effect of section 9 is to give force and effect to past purported orders that do not satisfy the requirements of s. 19B(2A) or s. 19B(3), or which are invalid because of another law (such as the Charter.) It may also prevent a court from reviewing the validity of such purported orders. **The Committee therefore considers that**

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8 *Royal Commissions Act 1982* (Cth), s. 6D(3); *Special Commissioners of Inquiry Act 1983* (NSW), s. 8; *Commissions of Inquiries Act 1950* (Qld), s. 16; *Royal Commissions Act 1917* (SA), s. 16A(1)(b), (c); *Commissions of Inquiries Act 1995* (Tas), s. 14; *Royal Commissions Act 1991* (ACT), s. 28(3)(b). Section 19B(5)(c),(d) of the *Royal Commissions Act 1968* (WA) is in broader terms than these other jurisdictions, but still appears to be narrower than amended s. 19B of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

9 *Supreme Court Act 1986*, s. 19, which is limited to the purposes of preventing endangering national security, prejudice to the administration of justice, endangering anyone's physical safety, offending public decency or morality or causing undue distress or embarrassment to witnesses in sexual cases.

10 Charter s. 15(3) provides that freedom of expression may be subject to restrictions 'to respect the rights and reputation of other persons' or 'for the protection of national security, public order, public health or public morality'.

11 Unlike a suppression power of similar scope in ss. 18 and 19 of the *Supreme Court Act 1986*.

12 See *Commissions of Inquiry Act 1995* (Tas), s. 14(1).

13 Charter s. 15(3) provides that freedom of expression 'may be subject to lawful restrictions reasonably necessary' to achieve defined goals.

14 See *Royal Commissions Act 1968* (WA), s. 19B(6).

15 E.g. *Agricultural and Veterinary Chemicals (Victoria) Act 1994*, s. 28B: *Catchment and Land Protection Act 1994*, ss. 97 & 103; *Confiscation Act 1997*, Schedule 1A, s. 176; *Corrections Act 1986*, s. 112B; *Gas and Fuel Corporation (Heathane Gas) Act 1993*, s. 20A; *Human Tissue Act 1982*, s. 45A; *Public Prosecutions Act 1994*, s. 55; *Retail Leases Act 2003*, s. 97A; *Road Safety Act 1986*, s. 104; *Trade Measurement (Administration) Act 1995*, s. 28; *Transport Act 1983*, ss. 246CN(1)(d) & 246CT; *Victorian Institute of Forensic Medicine Act 1985*, s. 75; *Water Act 1989*, s. 305D.

section 9 may not be a 'lawful restriction' on freedom of expression under Charter s. 15(2).

The Committee observes that the amendments to the Crime Legislation Amendment Bill 2010 were introduced without a statement of compatibility. Charter s. 28 provides:

> *(1) 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.*
>
> *(2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.*

While Charter s. 28 only requires a statement of compatibility for Bills, not amendments, the Committee considers that a supplementary statement should be given where, as here, amendments are proposed that are unrelated to the purposes of the Bill as introduced. The Committee is concerned that, unless such a practice is adopted henceforth, the Charter's requirement of parliamentary human rights scrutiny of all new legislation may be significantly undermined in the future.

The Committee will write to the Attorney-General seeking further information as to the compatibility of ss. 8 and 9 of the *Crimes Legislation Amendment Act 2010* with Charter s. 15(2) and will inquire as to what arrangements may be made in future to ensure that Parliament is informed about the human rights compatibility of amendments to Bills that are unrelated to the Bill's purpose as introduced."

Equal Opportunity Bill 2010

Introduced	9 March 2010
Second Reading Speech	10 March 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill re-enacts and extends the law relating to equal opportunity and protection against discrimination, sexual harassment and victimisation; and amends the *Racial and Religious Tolerance Act 2001* in relation to dispute resolution; and makes consequential amendments to that Act, the *Victorian Civil and Administrative Tribunal Act 1998* and other Acts.

The Bill repeals the *Equal Opportunity Act 1995.* **[191]**

Content and Committee comment

Parts 4 and 5 – Exceptions and exemptions to the general prohibition against discrimination

These Parts provide for the exceptions and exemptions to the general prohibition against discrimination in areas such as employment, schools, clubs, accommodation and the provision of services and other matters. The Committee notes that the Statement of Compatibility characterises or groups these exceptions into 4 broad categories. These are –

A. Targeted measures. *These exceptions allow targeted measures to meet the special needs of groups with particular attributes.*

B. Conduct that falls within the private realm. *These exceptions are designed to ensure people's personal and private choices are infringed as little as possible.*

C. Competing rights. *Exceptions that limit the right to equality to balance other important rights.*

D. Other justifications. *Exceptions that are justified for another important reason, such as health and safety.*

Each exception is analysed or discussed by the Statement of Compatibility according to the test set out in section 7(2) (when human rights may be limited) of the Charter.

The Committee provides a synopsis of these exceptions or exemptions.

Glossary

'attribute' refers to the attributes in section 6 of the Act (age, sex, impairment and others).

'discrimination' is direct or indirect discrimination as defined by sections 7 to 11 of the Act.

'*the tribunal'* refers to the Victorian Civil and Administrative Tribunal (the VCAT)

A. Targeted measures

A.1. Clause 28 allows an employer to limit the offering of employment to people with a particular attribute where the employment is to provide services that are special measures to promote or realise substantive equality or services that meet the special needs of a group

with particular attributes if those services can be provided most effectively by people with that attribute. The exception applies to all attributes.

A.2. Clause 39 allows educational institutions that operate wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular impairment to exclude students without the particular attribute from the school or an educational program.

A.3. Clause 43 allows educational authorities to select students for a program on the basis of an admission scheme that has a minimum qualifying age or that imposes quotas in relation to students of different age groups.

A.4. Clause 60 allows hostels and similar institutions which are run wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief to refuse accommodation to people who do not have the particular attribute.

A.5. Clause 61 allows educational authorities that operate schools wholly or mainly for students of a particular sex, race, religious belief, age or impairment to provide accommodation wholly or mainly for students with the particular attribute. This exception operates in conjunction with clause 39 allowing for such educational authorities to exclude students without the targeted attribute.

A.6. Clause 66 allows for clubs that operate principally to preserve a minority culture to exclude from membership people who are not members of the minority culture.

A.7. Clause 67 allows clubs established for people of a particular age group to exclude from membership people who are outside that age group. It also allows clubs to provide different benefits to different members on the basis of their age where it is reasonable to do so.

A.8. Clause 87 allows benefits, including concessions to be provided to people based on age.

A.9. Clause 88(1) provides an exception for the establishment of services, benefits or facilities that meet the special needs of people with a particular attribute and allows eligibility for those services, benefits or facilities to be limited to people with the target attribute. Clause 88(3)(a) and (b) are specific examples of circumstances in which special needs may be met by targeted services. Clause 88(3)(a) allows rights, privileges and benefits to be offered in relation to pregnancy or childbirth. Clause 88(3)(b) allows holiday tours to be restricted to people of a particular age or age group.

B. Conduct that falls within the private realm

B1. Clause 24 allows people to discriminate in relation to employment to provide domestic and personal services, including child-care services, in their own home. The exception covers employers, such as agencies who provide staff to provide home-based domestic or personal care services where the person receiving the services requests this.

B.2. Clause 51 allows a person to discriminate against any person on the basis of any attribute in the disposal of land by will or gift.

B.3. Clause 59 allows a person to discriminate on the basis of any attribute in determining who is to occupy residential accommodation in which the person or their near relatives lives and intends to continue to live and that is to accommodate no more than three people in addition to the person or their near relatives.

B.4. Clause 62 provides that an accommodation provider may refuse to provide accommodation for or in connection with lawful sexual activity.

B.5. Clause 80 provides that the Bill does not affect deeds, wills or other instruments that confer charitable benefits.

C. Competing rights

C.1. Clause 26(1) allows employers to discriminate on the basis of sex where it is a genuine occupational requirement that employees be of that sex.

C.2. Clause 26(3) allows employers to discriminate on the basis of sex, age or race, or in favour of people with or without a particular impairment in relation to a dramatic or artistic performance, entertainment, photographic or modelling work or any other employment if it is required for authenticity or credibility. Clause 26(4) allows employers to discriminate on the basis of physical features in relation to dramatic or artistic performance or similar employment.

C.3. Clauses 30(2) and 31(3) and (4) provide that a person who intends to establish a firm of less than five partners and an existing firm of less than five partners can discriminate on any ground where this is reasonable.

C.4. Clause 82(1) allows discrimination in relation to the training and appointment of priests, ministers of religion or members of a religious order.

C.5. Clauses 82(2) and 83(2) allow religious bodies and religious schools to discriminate on the grounds of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in certain circumstances.

C.6. Clause 82(3) and 83(3) provide that nothing in part 4, which prohibits discrimination in certain circumstances, applies to anything done in relation to the employment of a person by a religious body or religious school where conformity with the doctrines of the religion is an inherent requirement of a position and the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that they do not meet that inherent requirement.

C.7. Clause 84 provides that nothing in part 4 (that is, none of the prohibitions against discrimination) applies to discrimination by a person against another person on the grounds of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity where this is reasonably necessary for the individual to comply with the doctrines, beliefs or principles of their religion.

D. Other justifications

D.1. Clauses 23, 34, 41 and 46 allow discrimination where reasonable adjustments for people with impairments cannot be provided or where the person could not do the job or participate in the educational program or service even if reasonable adjustments were provided. Clause 58 allows discrimination where a person who provides public premises could not reasonably be expected to avoid discrimination.

D.2. Clause 25 allows discrimination on the basis of any attribute by an employer against an employee or prospective employee if the employment involves the care, instruction or supervision of children and the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the children.

D.3. Clause 27 allows discrimination on the grounds of political belief or activity in the offering of employment to a person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

D.4. Clause 29 allows employers to take the age of an employee and their eligibility to receive a retirement benefit from a superannuation fund into account in deciding the terms on which to offer employees incentive to resign or retire through early retirement schemes.

D.5. Clause 37 allows qualifying bodies to set reasonable terms or make variations to reasonable terms where a person cannot meet the terms of a qualification to allow the person to practise their occupation.

D.6. Clause 42 allows educational authorities to set and enforce reasonable standards of dress, appearance and behaviour for students. Subclause 42(2) clarifies the views of the school community are a relevant factor in assessing the reasonableness of the standard.

D.7. Clause 47 allows insurance providers to discriminate on any attribute by refusing to provide an insurance policy to the other person, or on the terms on which an insurance policy is provided where it is allowed by a Commonwealth Act or where it is justified by actuarial or statistical data or where it is otherwise reasonable, if no such data exists and it is not reasonable to attain it.

D.8. Clause 48 allows credit providers to discriminate on the grounds of age by refusing to provide credit, or on the terms in which credit is provided, if the refusal is based on actuarial or statistical data on which it is reasonable for the credit provider to rely and is reasonable having regard to that data, or where no data is available, if the refusal or terms on which credit is provided are reasonable having regard to any other relevant factors.

D.9. Clause 49 allows a person providing goods and service to a child to require the child be accompanied or supervised by an adult if there is a reasonable risk that the child may cause a disruption or endanger himself or herself or another person.

D.10. Clause 68 allows clubs established for one sex only to exclude from membership people of the opposite sex.

D.11. Clause 69 allows clubs to provide equivalent but separate benefits to male and female members where it is not practicable for men and women to enjoy the same benefit together.

D.12. Clause 72(1) combined with clause 72(3) allows for single sex sporting competitions for people over the age of 12, where the strength, stamina or physique of the competitors is relevant. It also allows for the exclusion of people on the basis of gender identity from such competitions in those circumstances. Clause 72(2) allows competitive sporting activities to be restricted to people who can effectively compete, people of a specified age or age group or people with a general or particular impairment.

D.13. Clause 74 allows a councillor of a municipal council to discriminate against another councillor or member of a council committee in the performance of their public functions on the grounds of their political belief or activity.

D.14. Clause 75 allows a person to discriminate on any grounds where it is necessary to comply with or is authorised by an Act or enactment.

D.15. Clause 76 allows discrimination where this is necessary to comply with an order of VCAT or any other court or tribunal.

D.16. Clause 77 allows discriminatory provisions relating to pensions.

D.17. Clause 78 allows discrimination on any ground in relation to superannuation fund conditions existing prior to 1 January 1996.

D.18. Clause 79 allows discrimination in superannuation fund conditions after 1 January 1996 on the grounds of age, sex, marital status or impairment where this is allowed under Commonwealth Acts and in relation to age if it is based upon actuarial or statistical data on which it is reasonable for the person to rely and is reasonable having regard to that data and any other relevant factors; or in a case where no actuarial or statistical data is available and can not reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

D.19. Clause 85 allows discrimination against a person who is subject to a legal incapacity that is relevant to the transaction or activity in which they are involved.

D.20. Clause 86(1) permits discrimination on the grounds of impairment or physical features where this is reasonably required to protect the health, safety or property of any person. Clause 86(2) permits discrimination on the grounds of pregnancy where this is reasonably required to protect the health or safety of any person.

Other clauses that engage Charter Rights – Temporary exemptions

Clause 89 allows for the granting, revocation or renewal of applications to the tribunal for a temporary exemption from the Act. An exemption makes conduct that would otherwise be unlawful, lawful for the duration of the exemption.

Clause 90 provides that the tribunal must consider certain factors when making decisions to grant, renew or revoke an exemption.

Submissions

The Committee received 114 submissions in respect to the Bill. The majority of submissions concerned proposed sections 81 to 84 in respect to the new inherent requirement test in the religious exceptions.

Other submissions concerned –

- the absence of ‘irrelevant criminal record’ and ‘homelessness’ as protected attributes in the Act.
- the inclusion of clause 75 (things done with statutory authority) (current section 69).
- the new definition of ‘club’ in clause 4.
- the effect of including ‘volunteers’ within the meaning of definition of employment for the purposes of the Act.
- the absence of sufficient or appropriate provisions concerning transgender issues.
- the inclusion in the Bill of an investigation power by the Commission in clause 127.

The Committee will forward the submissions to the Attorney-General.

A list of persons and organisations making a comment or a submission is shown on the Committee Website.

Delayed commencement

The Committee notes that Part 17 (extension of the coverage of the Act to volunteers) (other than section 215 (an unrelated consequential amendment) comes into operation on 1 July

2012 and some other provisions may commence by proclamation but not later than by 1 August 2011. **[2]**

Part 17 provides for expanded definitions for employee, employer and employment to recognize that volunteers will come within the ambit of the Act as of 1 July 2012.

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

> *The Bill extends the existing protection against discrimination for employees to unpaid workers and volunteers. Victoria values the countless numbers of volunteers that contribute to the life of this community and this change recognises the simple fact that a person can experience discrimination or sexual harassment in the workplace even if they are not paid a wage. Most other Australian jurisdictions provide some protection against discrimination or sexual harassment for unpaid workers and volunteers, and have done so for many years.*
>
> *However, it is also recognised that this change will present challenges to some organisations, especially those in the community and not-for-profit sector that have limited resources. The bill therefore delays the commencement of these amendments until 1 July 2012. This will give organisations sufficient time to understand, and prepare for, the changes. It will also allow the commission to develop education material and to conduct training with affected organisations. It is anticipated that the commission will collaborate with a range of representatives from organisations that rely on volunteers in developing this material.*

In respect to the remaining provisions that may commence as late as 1 August 2011 the Second Reading Speech provides –

> *…we have recognised that an appropriate amount of time is required to prepare for commencement of the new legislation, which is why the Bill builds in a default commencement date of 1 August 2011.*

Presumption of innocence – Discriminatory advertising – Defence of reasonable precautions and due diligence to prevent publication or display

The Bill provides that it is a defence to the offence of discriminatory advertising if the defendant proves they took reasonable precautions and exercised due diligence to prevent the publication or display of the discriminatory advertisement. Penalty – 60 penalty units and 300 penalty units for a body corporate. **[182 and 183]**

Extract from the Statement of Compatibility –

> *The purpose of imposing a burden of proof on persons regarding the offence of discriminatory advertising is to ensure that these offences can be effectively prosecuted and that they operate as a deterrent to discriminatory advertising by imposing a duty on persons to take responsibility for the manner in which they advertise. … When an individual has engaged in discriminatory advertising, a burden is placed on that individual to prove that they have taken reasonable precautions and exercised due diligence to prevent the offence. By choosing to engage in a public activity, it is reasonable to expect individuals who are publishing advertisements to take steps to ensure that the advertisements are not discriminatory. If reasonable steps have been taken, proof ought not to be difficult. Whilst the prescribed penalty can involve low level fines, it does not involve imprisonment.*

Vicarious liability – Civil penalty – Defence of reasonable precautions

The Bill includes provisions concerning the vicarious liability of employers and principals for the conduct of their employees or agents that contravene the Act. An aggrieved person may proceed against both the employer (principal) and the employee (agent). The Bill provides an exception to the employer's (principal's) liability if they can prove on the balance of probabilities that they took reasonable precautions to prevent the contravening conduct. **[109 and 110]**

Part 3 of the Bill contains provisions concerning a '*Duty to eliminate discrimination, sexual harassment and victimisation'* providing, amongst other matters that a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible and sets out matters that may be considered in determining whether a measure is reasonable and proportionate including the person's resources and costs of the measures. **[14 and 15]**

Investigations and public inquiry – Self-incrimination – Power to compel attendance, production of information or documents

The Bill provides for investigations or public inquiries. The Commission may conduct an investigation in relation to any matter relating to the operation of the Act that raises a serious issue indicating a breach or possible breach of the Act that relates to a class or group of persons. **[127]** With the consent of the Attorney-General the Commission may hold a public inquiry and the VCAT may refer matters to the Commission for investigation or public inquiry. **[128 and 129]**

In conducting an investigation or public inquiry the Commission is bound by the principles of natural justice. **[130]** A public inquiry must be conducted in public but the Commission has a discretion to close a hearing in certain circumstances where the Commission has made an order under sections 136 and 137(see below). **[131]**

The Bill provides powers to compel attendance and for the production of information or documents **[132 and 133]** and provides a penalty for failure to comply without reasonable excuse. **[134]**

The Bill includes an express self-incrimination provision without any limitation as a reasonable excuse not to comply with. **[135]**

The Commission may make an order prohibiting the disclosure of the identity of a person or prohibiting or limiting the publication of any evidence or document given to the Commission at an investigation or public inquiry. **[136 and 137]**

The Commission may apply to the VCAT for an interim order pending the outcome of an investigation or public inquiry. **[138]** Following an investigation where an unlawful act has occurred, is or is likely to occur, the Bill provides that the Commission may accept an enforceable undertaking or issue a compliance notice. **[144 and 146]** A person may appeal to the VCAT against the making of a compliance notice. **[146(3)]**

On breach of an undertaking or the non-compliance of a compliance notice the Commission may make an enforcement application to the VCAT. **[147]**

Charter report

Privacy – Freedom of expression – Freedom of association – Political association barred from excluding members based on political belief or activity – Single-sex club must publish rules for membership eligibility

Summary: Clauses 64(c) and 65(d) bar some political associations from excluding members with contrary political beliefs or who engage in contrary political activities and therefore may engage the Charter's right to freedom of expression. Clause 68(2), by providing that a single-sex club 'must make its rules of eligibility for membership publicly available', may engage the Charter rights of members or prospective members of such clubs to privacy and freedom of association.

The Committee notes that clauses 64(c) and 65(d) bar a club from limiting its membership on discriminatory grounds. In contrast to the existing Act, which is limited to 'social,

recreational, sporting or community service club[s]' or 'community service organisation[s]' that are publicly housed or funded, clause 4 defines a club to mean:

> *an association of more than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that:*
>
> *(a) has a licence… to supply liquor…; and*
>
> *(b) operates its facilities wholly or partly from its own funds.*

The Committee considers that clauses 64(c) and 65(d) may engage the Charter's right to freedom of association.[16]

The Statement of Compatibility remarks:

> *Defining clubs to be regulated by reference to size and whether they hold a liquor licence is a rational way of achieving the purpose of balancing the right to freedom of association with the right to equality. Smaller associations are more akin to a private gathering, whereas larger associations are more likely to be considered as operating in the public sphere. Having a liquor licence subjects the association to licensing regulation. This is an indication that the association is operating in the public sphere and should be subject to equal opportunity regulation.*

The Committee observes that the United States Supreme Court has held that these factors are an appropriate way of balancing conflicting rights to equality and association, as commercial operations are an indication that a club isn't private, which in turn is a circumstance when equality rights of individual members or prospective members of a club are significant.[17]

However, the Committee is concerned about two aspects of the Bill's regulation of clubs.

First, clause 4's definition of 'club', in contrast to the current definition,[18] extends to associations… for political… purposes' and clause 6's list of prohibited attributes for discrimination includes 'political belief or activity'. **So, clauses 64(c) and 65(d) bar some political associations from excluding members with contrary political beliefs or who engage in contrary political activities.** For example, an association that wants to abolish the death penalty cannot exclude a vocal supporter of the death penalty, and vice versa. The United States Supreme Court has held that 'The ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government' and, in particular, that an anti-discrimination law may infringe the right to freedom of expression if it is an obstacle to a club that 'seeks to exclude individuals who do not share the views that the club's members wish to promote'.[19]

The Committee therefore considers that clauses 64(c) and 65(d) engage the Charter's right to freedom of expression.[20] The Committee observes that the Bill does not prevent a political association from excluding members with contrary views if the association has fewer than 30 members, or if it is exclusively externally funded, or if it doesn't have (or relinquishes) its liquor licence. Similar rules apply in a number of other Australian jurisdictions.[21]

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16 Charter s. 16(2) provides: 'Every person has the right to freedom of association with others'.

17 *New York Club Ass'n v. City of New York*, 487 U.S. 1 (1988), 13.

18 *Geddes v Australian Labor Party (Victorian Branch)* [2009] VCAT 409

19 *New York Club Ass'n v. City of New York*, 487 U.S. 1 (1988), 13.

20 Charter s. 15(2).

21 *Discrimination Act 1991* (ACT), ss. 7(i), 22, Dictionary; *Anti-Discrimination Act 1992* (NT), ss. 4, 19(n) & 46; *Anti-Discrimination Act 1998* (Tas), ss. 3, 16(m),(n), 22(1)(e); *Equal Opportunity Act 1984* (WA), ss. 4 & 64(1).

The Committee also notes clause 68(2) provides that a club where membership is only available to one sex 'must make its rules of eligibility for membership publicly available'. The Committee considers that clause 68(2) may engage the Charter rights of members or prospective members of such clubs to privacy and freedom of association.[22] The publication of such rules may reveal private information about members, for example income, professional or educational qualifications or participation in charitable or social activities.

The Statement of Compatibility does not address clause 68(2). The Second-Reading speech remarks:

> *The bill also includes a new exception allowing single-sex clubs, one that has been included to avoid inconsistency with the commonwealth Sex Discrimination Act 1984.... In order to promote transparency and ensure that the exception is being applied in as narrow a way as possible, however, single-sex clubs will be required to make their membership rules publicly available.*

While the Committee accepts that Charter rights may be reasonably limited for the purpose of ensuring that discrimination exceptions are applied transparently and narrowly, it observes that there is no equivalent requirement in relation to other exceptions in the Bill (e.g. clause 66's exception for clubs established to preserve minority cultures and clause 67's exception for clubs that provide benefits to a particular age group), or in identical exceptions in other Australian anti-discrimination laws. If a single-sex club was subject to an inquiry for possible discrimination, then the Commission may require it to make relevant information or documents available to the Commission (with publication subject to consideration of the need to prevent 'the unreasonable disclosure of the personal affairs of any person'[23].)

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

1. **clauses 64(c) & 65(d) (read in conjunction with clause 4's definition of club and clause 6(k)), by requiring a political association (unless it has 30 or fewer members, or is wholly externally funded, or it relinquishes its liquor licence) to admit members with opposing political beliefs or activities, are compatible with the Charter's rights to freedom of expression and association?**
2. **clause 68(2), by requiring single-sex clubs to make their rules for membership eligibility publicly available, limits the Charter rights of members or prospective members of such clubs to privacy and freedom of association; and**
3. **if so, whether clause 68(2) is a reasonable limit on those rights to achieve the purpose of ensuring that discrimination exceptions are applied transparently and narrowly.**

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[22] Charter s. 13(a) provides: 'A person has the right... not to have his or her privacy... arbitrarily interfered with'.

[23] Clause 132 & 137(3)(h).

Equal and effective protection against discrimination – Discrimination permitted where authorised by education authority, enactment or VCAT – Whether reasonable limit

Summary: The Committee is concerned that three blanket exceptions in the Bill may be neither narrowly drawn nor limited by a requirement that is equivalent to Charter s. 7(2). It will write to the Attorney-General seeking further information.

The Committee notes that Parts 4 and 5 of the Bill provide for numerous exceptions to the Bill's various prohibitions against discrimination. These exceptions engage the Charter's right to 'equal and effective protection against discrimination'.[24]

The Statement of Compatibility usefully divides the Bill's exceptions into four categories: targeted measures, private realm, competing rights and other justifications. The Committee observes that it is the exceptions in the last category that require the closest attention to their compliance with Charter s. 7(2)'s test for reasonable limits on rights.[25] In its Final Report in its Inquiry into the Exceptions and Exemptions to the *Equal Opportunity Act 1995*, the Committee remarked:[26]

> *The Committee has not adopted rigid rules about what format is appropriate for exceptions, given the importance of providing the clearest guidance as well as ensuring competing rights are balanced effectively... For example, some blanket exceptions may be acceptable if they are expressed to cover a narrow area of activity or range of attributes... In other situations, the need for an exception should be assessed on the facts of the specific case, so that an assessment of the balance of the competing rights can be made in context of the reasonable limitations test set out in Charter s. 7(2).*

The Committee is concerned that three blanket exceptions in the Bill may be neither narrowly drawn nor limited by a requirement that is equivalent to Charter s. 7(2).

First, clause 42 permits an 'education authority' to 'set and enforce reasonable standards of dress, appearance and behaviour for students'. This exception, which is unique to Victoria, allows discrimination on any attribute. For example, a dress standard may discriminate on the basis of religious activity, an appearance standard may discriminate on the basis of gender identity or a behaviour standard may discriminate on the basis of impairment, sexual orientation or pregnancy. The only limit on such discrimination is whether or not it is 'reasonable' and the sole guidance on this test is that, for schools, the views of the school community are relevant.

The Statement of Compatibility remarks:

> *The exception is inherently limited by the requirement that any standard set by the school is reasonable. For public schools which are public authorities and therefore bound by the charter in their decision-making, any standard set must be a reasonable limit on any right that the standard engages.*

While the Committee accepts that clause 42 is a reasonable limit in relation to education authorities that fall within the Charter's definition of 'public authority',[27] it is concerned about its application to other education authorities. Clause 42's test of whether discrimination is 'reasonable' appears to differ from the test of whether discrimination is 'reasonably

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24 Charter s. 8(3).

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

26 Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995, Final Report*, November 2009, p. 6.

27 Charter ss. 4 & 38.

necessary' that is used for other broad exceptions in the Bill and which can be equated to the Charter's comprehensive test for limits on rights. The Supreme Court of Canada, in considering whether or not a ban on a Sikh student wearing a ceremonial dagger was compatible with the Canadian Charter's rights with respect to religion, held that a mere assessment of reasonableness is insufficient to ensure compliance with human rights, because it does not require a consideration of competing rights or whether there are less restrictive means reasonably available to achieve the purpose of the limitation.[28]

Second, clause 75 permits all discrimination that is 'necessary to comply with, or authorised by' any enactment.[29] The Committee observes that clause 75 is the broadest such exemption in Australia. It applies:

- not only to Acts, but to rules, regulations, by-laws, local law, orders, Orders in Council, proclamations or other instruments of 'legislative character'.[30]
- unlike most Australian jurisdictions,[31] not just to discriminatory acts that are necessary to comply with enactments, but also to discriminatory acts that are authorised by enactments.
- unlike the remaining jurisdictions, regardless of whether or not the enactment specifically permits discrimination or refers to the Act.[32]
- to enactments made after the Act commences and without any sunset clause.[33]

The Statement of Compatibility remarks:

> *[S]ince the commencement of the charter, there are a number of processes for ensuring human rights are taken into consideration in the development of new policy and legislation. These processes are designed to ensure new acts or enactments are charter-compatible, or that the decision to enact legislation that is not compatible is intended and explained.*
>
> *In addition:*
>
> - *all government departments undertook an audit of the existing legislation they administer in 2007 and 2008 to identify incompatible provisions*
> - *since 1 January 2008, section 32 of the charter requires courts and tribunals to interpret laws in a way that is human rights compatible as far as possible*
> - *section 38 of the charter requires public authorities to act in a manner that is compatible with human rights…*
> - *clause 156(2) of the bill provides the commission with a monitoring role and requires the commission to report… on any legislation that discriminates…*

The Committee observes that:

- Enactments that are incompatible with Charter rights may not be identified by, or may not be reformed as a result of, the Charter, audit and reporting processes.[34]

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28 *Multani v. Commission scolaire Marguerite‐Bourgeoys* [2006] 1 S.C.R. 25

29 The sole exceptions are regulations under the Act itself, s. 97 of the *Transfer of Land Act 1958* and the *Subdivision Act 1958*.

30 This contrasts with the s. 40 of the *Sex Discrimination Act 1984* (Cth), which is limited to particular provisions.

31 *Age Discrimination Act 2004* (Cth), s. 39; *Sex Discrimination Act 1984* (Cth), s. 40; *Disability Discrimination Act 1997* (Cth), s. 47; *Discrimination Act 1991* (ACT), s. 30; *Anti-Discrimination Act 1977* (NSW), s. 54; *Anti-Discrimination Act 1998* (Tas), s. 24; *Equal Opportunity Act 1984* (WA), s. 69

32 Clause 75(2). This contrasts with s. 53 of the *Anti-Discrimination Act 1992* (NT) and s. 106 of the *Anti-Discrimination Act 1991* (Qld), which are limited to discrimination necessary to comply with or '*specifically* authorised' by an enactment.

33 This contrasts with s. 39(2) of the *Age Discrimination Act 2004* (Cth); s. 40(2) of the *Sex Discrimination Act 1984* (Cth), s. 106 of the *Anti-Discrimination Act 1991* (Qld) and s. 69 of the *Equal Opportunity Act 1984* (WA).

- Charter s. 32's interpretation requirement has very recently been held by the Victorian Court of Appeal to be limited to the existing framework of interpretive rules.[35] The ruling expressly rejects the much more expansive approach advocated in court by the Attorney-General and may mean that laws previously thought to be capable of being interpreted consistently with the Charter will now be incompatible with the Charter.
- The Charter does not prevent public authorities from discriminating if an enactment makes it unreasonable to do otherwise and, in particular, if doing so is necessary to give effect to legislation that is incompatible with the Charter.[36]
- The Charter does not prevent discrimination by entities by private acts, religious authorities and entities that are not public authorities.[37]

The Committee considers that, to the extent that any existing or new enactments are incompatible with Charter rights, clause 75 will also be incompatible with those rights.

The Statement of Compatibility also remarks:

> *It may be argued that listing any provisions that are intended to discriminate in a schedule to the Act is a less restrictive means of achieving the purpose of the limitation, as such a schedule would be definitive. However, given the checks and balances already available to ensure legislation is charter-compatible, such a time and resource-intensive process may not be a reasonable alternative. Further, such a scheme may have unintended consequences for any discriminatory acts or enactments that have been overlooked and are not included in the schedule.*

The Committee observes that any time and resources involved in creating a schedule of discriminatory enactments may be defrayed by relying on the audit of enactments up to 2007 and the compliance mechanisms for new enactments since the Charter came into force. If there are 'any discriminatory acts or enactments that have been overlooked' by those processes, then their preservation by clause 75 may be incompatible with the Charter's equality rights.

Third, clause 89 permits VCAT to grant exemptions from any provisions of the Act, for a person, class of people, activity, class of activities or in any other circumstances, for up to five years. Again, this permits any sort of discrimination. Clause 89 does not specify any test for when VCAT can grant an exemption, but clause 90 sets out factors that VCAT must consider in making its decision.

The Statement of Compatibility remarks:

> *Clause 90 provides that the tribunal must consider certain factors when making decisions to grant, renew or revoke an exemption. One of these is whether the proposed exemptions [sic] is a reasonable limit on the right to equality in the charter. In this way, the exemption process ensures that all exemption applications will be assessed according to the reasonable limits test in section 7(2) of the charter and that all exemptions that are granted or renewed will be compatible with the charter.*

The Committee observes that clause 90(b)'s provision that VCAT 'must consider' the Charter's reasonable limits test may be less protective of the Charter's equality rights than the existing provision, which has been held by VCAT to only permit exemptions that are either a special measure under Charter s. 8(4) or that comply with the reasonable limits test in Charter s. 7(2).[38] The Committee is also concerned that the Bill does not specify any procedures for VCAT to reach its decision, other than notifying VEOHRC of the application.

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34 See Submission, Human Rights Law Resources Centre, p. 3.

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

36 Charter s. 38(2).

37 Charter s. 38(1), (3) & (4).

38 *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [299].

This may mean that a person may be lawfully discriminated against pursuant to an exemption decision that was made in private, or at a hearing where the only party to the proceeding is the person seeking to discriminate.

The Committee will write to the Attorney-General seeking further information as follows:

1. ***Is clause 42's requirement that an educational authority's standards for dress, appearance and behaviour must be 'reasonable' equivalent to Charter s. 7(2)'s test for reasonable limits on rights?***
2. ***Did the 'audit of… existing legislation' referred to in the Statement of Compatibility identify any Acts or enactments that are incompatible with the Charter's equality rights?***
3. ***Does the recent decision of the Victorian Court of Appeal in R v Momcilovic [2010] VSCA 50 (about the meaning of Charter s. 32) affect the Statement of Compatibility's assessment of whether or not clause 75 is compatible with the Charter's equality rights?***
4. ***Does clause 89 alter the test presently used by VCAT for granting exemptions set out in Lifestyle Communities Ltd (No 3) [2009] VCAT 1869, [299]?***

Pending the Attorney-General's response, the Committee draws attention to clauses 42, 75 and 89.

Equal and effective protection against discrimination – Freedom of religion – Exceptions for religious bodies, schools and people

Summary: The Committee notes that clauses 82, 83 and 84 permit religious bodies, religious schools and religious people to discriminate to conform with the religion's doctrines, beliefs or principles or to avoid injury to the religious sensitivities of adherent of the religion. While the Charter accepts that such exceptions balance the Charter's rights to equality and freedom of religion, it draws attention to two aspects of the Bill that differ from the equivalent exceptions in the current Act.

The Committee notes that clauses 82, 83 and 84 permit religious bodies, religious schools and religious people to discriminate on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity to conform with the religion's doctrines, beliefs or principles or to avoid injury to the religious sensitivities of adherent of the religion.

In relation to clauses 82 and 83, the Statement of Compatibility remarks:

> *The purpose of these exceptions is to allow religious bodies and schools to discriminate in certain circumstances where this is required to avoid conflict with their religious doctrines or where it is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. This is important in a pluralistic society that values freedom of religion.*

In relation to clause 84, the Statement of Compatibility remarks:

> *The purpose of this limitation is to allow individuals the freedom of express and demonstrate their religious beliefs, even if such beliefs are discriminatory, where this is reasonably necessary for the person to conform with religious doctrine, practice or belief.*

While the Committee accepts that such exceptions aim to balance the Charter's rights to equality and freedom of religion, it draws attention to two aspects of the Bill that differ from the equivalent exceptions in the current Act:

First, clause 81 changes the definition of 'religious body' to match the equivalent definition used to restrict the Charter's regime for obligations of public authorities.[39] This means that the existing definition of 'religious body' has been expanded to include:

> *an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is conducted in accordance with religious doctrines beliefs or principles.*

The government's response to the Committee's Final Report on Exceptions and Exemptions to the *Equal Opportunity Act 1995* remarked:[40]

> *The SARC majority… expressed the view in relation to this exception that the definition of 'religious body' in the Charter not be adopted in the Bill on the basis that this would extend the exception to organisations that have nothing to do with recognised or organised religion. While the Government acknowledges the concern raised by SARC in this regard, it notes that the current definition of religious body (that is, a body 'established for religious purposes') has generally been interpreted broadly by courts and tribunals and that adopting the Charter definition is unlikely to extend the coverage of the exception in practice.*

The Committee observes that the court and tribunal interpretations referred to by the Government were made in jurisdictions that lack (or lacked) a human rights Charter.[41] The effect of clause 81 is to prevent a Victorian court from interpreting clause 83 in a narrower way than those jurisdictions if that is necessary to ensure compatibility with the Charter.

Second, clauses 82, 83 and 84 differ from the existing exceptions by barring discrimination on some grounds, including race. Recently, the United Kingdom Supreme Court held that a similar regime meant that the exception did not permit a religious body to discriminate between people who converted to a religion and people who were religious by descent, even where such a distinction is necessary to conform to that religion's doctrines.[42] For example, an orthodox Jewish body could not discriminate against a convert on the basis that her conversion was non-orthodox. The Committee observes that the removal of race from the religious exception is partially limited by other exceptions in the Bill – notably clause 39, allowing educational institutions established wholly or mainly for students of particular groups to discriminate by excluding students from outside of those groups, and clause 82(1), allowing discrimination in relation to religious observance or practice – that may permit race discrimination in some circumstances. However, religious people and bodies may be barred from applying religious doctrines about descent in some situations, such as decisions about employment and the provision of goods and services.

The Committee therefore draws Parliament's attention to clause 81 and to the United Kingdom Supreme Court's decision in E, R (on the application of) v Governing Body of JFS [2009] UKSC 15.

Freedom of expression – Fair hearing – Secrecy of personal information obtained by the Commission – Exceptions limited to equal opportunity purposes

Summary: The Committee is concerned about a number of aspects of clause 176's provision for the secrecy of information obtained by VEOHRC. It will write to the Attorney-General seeking further information.

The Committee notes that clause 176(3) makes it an offence for anyone in VEOHRC to disclose personal information obtained under the Act unless it is necessary to do so under

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39 Charter s. 38(4).

40 Scrutiny of Act and Regulations Committee, *Inquiry into Exceptions and Exemptions to the Equal Opportunity Act 1995, Government Response*, March 2010, p. 25.

41 E.g. *OV v QZ (No.2)* [2008] NSWADT 115; *Jubber v Revival Centres International* [1998] VADT 62.

42 *E, R (on the application of) v Governing Body of JFS* [2009] UKSC 15.

the Act. Clause 176(4) bars a court or tribunal from requiring VEOHRC to disclose such information unless it is necessary for the purposes of (or prosecutions arising out of) the Act. The Committee considers that clause 176(3) engages the Charter right to freedom of expression and that clause 176(6) engages the Charter right to a fair hearing.

The Statement of Compatibility remarks:

> *The purpose of this limitation is to ensure that confidential information provided or obtained in the course of working for the commission is protected. This is important to protect the right to privacy of individuals or organisations to whom such information relates and to protect the integrity of the work of the commission….*
>
> *There are no less restrictive means reasonably available to achieve its purpose.*

While the need to protect privacy and confidentiality justifies some limits on Charter rights, the Committee is concerned that clause 176's provision for the secrecy of personal information obtained by VEOHRC:

- is not limited to confidential information
- unlike all other equivalent Australian provisions,[43] only permits publication for the purposes of Victorian equal opportunity legislation. Clause 176 therefore overrides all other legislation, including the Charter, the Freedom of Information Act 1982 and the Criminal Procedure Act 2009.
- contains no provision for a court to compel testimony by a VEOHRC employee in the interests of justice.[44] For example, a criminal defendant who alleges that a third party committed the crime charged could not compel a VEOHRC employee to testify that the third party and the victim had been involved in a failed conciliation.

The Committee will write to the Attorney-General seeking further information as to whether:

- **confining clause 176 to confidential information;**
- **expanding the exception to cover publications authorised by other statutes;**
- **allowing a court to override clause 176(6) in some circumstances**

would be less restrictive alternatives reasonably available to achieve clause 176's purpose.

Pending the Attorney-General's response, the Committee draws attention to clause 176.

The Committee makes no further comment.

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43 *Discrimination Act 1991* (ACT), s. 131(3)(a); *Anti-Discrimination Act 1977* (NSW), s. 124A(2); *Anti-Discrimination Act 1992* (NT), s. 108(2)(b),(c); *Anti-Discrimination Act 1991* (Qld), s. 220(2)(b); *Equal Opportunity Act 1984* (SA), s. 95(9); *Equal Opportunity Act 1984* (WA), s. 167(3).

44 E.g. *Evidence Act 2008* (Vic), s. 16(2); *Supreme Court Act 1989* (Vic), s. 24B(2) c.f. *Alert Digest No 11 of 2009*, pp. 10-11.

Health and Human Services Legislation Amendment Bill 2010

Introduced	9 March 2010
Second Reading Speech	10 March 2010
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose and Background

The Bill amends the *Public Health and Wellbeing Act 2008* to —

- establish a body corporate known as the Secretary to the Department of Health;
- abolish the body corporate known as the Secretary to the Department of Human Services;
- provide for the vesting of property held by the Secretary to the Department of Human Services body corporate in the Secretary to the Department of Health body corporate;
- provide the Secretary to the Department of Health body corporate with certain delegation powers;
- provide the Secretary to the Department of Health body corporate with certain powers in relation to intellectual property;

The Bill further amends the *Disability Act 2006* and the *Children, Youth and Families Act 2005* to —

- provide the Secretary to the Department of Human Services with certain powers in relation to land and intellectual property and to enter into agreements; and
- provide the Secretary to the Department of Human Services with certain powers of delegation;
- make consequential and other amendments to those Acts and other Acts.

Extracts from the Second Reading Speech –

> *On 12 August 2009 the Victorian Premier announced the creation of a new Department of Health (incorporating health, mental health and drugs, nurse policy and aged care) and a new Department of Human Services (which comprises disability, housing, children, youth and families). In essence, the health-related portfolios within the old Department of Human Services have been moved into a separate department.*
>
> *As a result of the establishment of the new Department of Health it is necessary to amend section 16 of the Public Health and Wellbeing Act 2008 which creates a body corporate known as the Secretary to the Department of Human Services.*
>
> *… With the creation of two separate departments it becomes necessary to separate out the contracting and land-holding powers formerly exercised by the body corporate, and the respective land ownership.*

The Committee makes no further comment.

Justice Legislation Amendment Bill 2010

Introduced	9 March 2010
Second Reading Speech	11 March 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose and Background

The Bill amends the —

- *Sentencing Act 1991* —
    - in relation to aggregate sentences of imprisonment and aggregate fines imposed by the Supreme Court or the County Court for summary offences. The amendments will allow these courts to impose aggregate sentences pursuant to the new provisions of the *Criminal Procedure Act 2009.* **[5, 19]**
    - to repeal the offence for the breach of an intermediate sentencing order (a combined custody and treatment order; an intensive correction order; a community-based order; and an adjourned undertaking) and to make further provision for the enforcement of an order for these sentencing options and make the necessary consequential and transitional provisions required on the repeal of the offence for breach of an order or sentence. **[9, 13, 18, 22 and 23]**
    - to make further provision for home detention orders. **[14]**
- *Children, Youth and Families Act 2005* —
    - in relation to the imposition of less severe sentences if an offender gives an undertaking to assist law enforcement authorities and to empower the Director of Public Prosecutions to appeal against such a sentence in the event of failure to fulfil an undertaking; **[30, 34, 37 and 39]**
    - to expand the range of sentences that a court may impose on certain appeals against sentence; **[101 and 104]**
    - to empower the prothonotary of the Supreme Court and the registrar of the County Court to issue warrants to detain in certain circumstances; **[36]**
    - to remove the power of an appellate court to set aside an order striking out an appeal made when an appellant abandons an appeal; **[35]**
    - to remove references to aggregate sentences of detention; **[31]**
    - to remove the requirement for the holding of a summary case conference if a preliminary brief is served on a child within 7 days after the filing of the charge-sheet;
    - to amend the rule-making power to enable the making of rules in relation to the Children and Young Persons Infringement Notice System; **[42]**
- *Corrections Act 1986 in relation to home detention orders;* **[47 to 54]**
- *Criminal Procedure Act 2009* —
    - in relation to summary case conferences; **[59]**
    - in relation to the transfer of related summary offences on or after committal; **[60]**

- to enable the transfer of a charge for an indictable offence from the Supreme Court or the County Court to the Children's Court; **[61]**
- to abolish the common law procedure of administering the allocutus; **[62]**
- to remove the power of the County Court to set aside an order striking out an appeal made when an appellant abandons an appeal; **[63]**
- to empower the prothonotary of the Supreme Court and the registrar of the County Court to issue a warrant to imprison in certain circumstances; **[64]**
- in relation to evidence sought to be admitted during a sentencing hearing in relation to a sexual offence; **[65]**
- in relation to alternative arrangements for giving evidence; **[66 to 70, 107]**
- to provide for personal service on a legal practitioner by delivery to a document exchange; **[71]**
- in relation to regulation-making powers; **[72]**
- to repeal sunset provisions for sentence indications in the Supreme Court and the County Court; **[56 and73]** *Note: The Scheme was due to sunset on 1 July 2010.*
- to insert additional transitional arrangements. **[75]**

- *Gambling Regulation Act 2003* to –
  - make further provision in relation to the payment of fees by wagering service providers who publish, use or otherwise make available race fields during the course of business. **[78 and 79]**
  - abolish the position of Executive Commissioner of the Victorian Commission for Gambling Regulation and to make consequential amendments to that Act and the *Casino Control Act 1991.* **[80 to 92]**

Extracts from the Second Reading Speech –

> *The Bill continues this work by implementing the Sentencing Advisory Council's recommendation that breach of an intermediate sentencing order should no longer constitute an offence. This unnecessary criminal offence has been repealed and instead, an administrative procedure, similar to the one that currently applies to suspended sentences, will operate to bring the offender back before the court and allow the court to re-sentence him or her.*
>
> *These amendments are modelled on the existing procedure in the Sentencing Act 1991 which provides for an offender who breaches a suspended sentence by further offending to be re-sentenced.*
>
> *This procedure will apply to breaches of other orders under the Sentencing Act 1991, including breaches of:*
>
> - *combined custody and treatment orders*
> - *intensive correction orders*
> - *home detention orders*
> - *community-based orders, and*
> - *orders for release on adjournment.*
>
> *… The Bill contains amendments to the Corrections Act 1986 and the Sentencing Act 1991 designed to extend and strengthen the home detention program by --*
>
> - *making home detention available as a stand-alone order;*
> - *giving judges and the Adult Parole Board greater discretion by allowing more flexibility within eligibility criteria through the application of certain past offences; and*

- *including a judicial veto preventing the Adult Parole Board from making the home detention orders in some cases. [6, 10, 15, 17]*

… The expanded Victorian home detention system will continue to operate as a sentencing option and a pre-release mechanism.

…

The Bill also has the effect of widening the number of offenders who will be eligible for home detention. Under the current provisions, an offender is automatically excluded from home detention where the offender has been found guilty at any time of a range of serious offences.

…

In relation to past offences, the amendments will provide the courts and the adult parole board with some discretion in allowing offenders with a history of currently excluded offences to undertake the program. However, prisoners or offenders who have convictions for sexual offences, violent offences and serious violent offences as listed in schedule 1 of the Sentencing Act will continue to remain ineligible for a home detention order.

…

In contrast to the current provisions that automatically exclude an offender who has a past conviction for drug offences listed in schedule 1 of the Sentencing Act, the Bill confers a discretion on courts and the adult parole board to make a home detention order in respect of drug offences.

…

Before a home detention order can be made the offender must undergo a comprehensive assessment by a trained supervising officer located within community correctional services.

Before a home detention order can be made the intended adult co-residents of the offender must have acknowledged that they understand the conditions that the offender must fulfil under a home detention order and must have given their written consent that an offender can reside in their home. In the case of a child who will reside with the offender, the court or the adult parole board must be satisfied that the child was consulted about the offender residing with him or her and that consideration was given to the child's view with due regard to the age of the child. Once an order is made, the currency of the co-residents' consent will continue to be regularly assessed by supervising officers throughout the life of the order.

Appropriate ongoing independent support will be extended to co-residents to ensure that, as far as practical, this consent is clearly informed and freely given. If consent is withdrawn by co-residents, the offender must cease living at the residence.

…

The expanded home detention program will continue to employ continuous, 24-hour-per-day electronic monitoring. The program will be delivered by the Department of Justice community correctional services.

The imposition of a curfew that requires the offender to remain at the approved residence continues as a central element of the program. Offenders will only be permitted to leave the residence where it is unsafe to remain due to immediate danger, or to engage in activities approved by a supervising officer. Approved activities will depend on the circumstances of the offender, but might include employment, education or training commitments.

… The curfew will continue to be monitored by an active system of electronic monitoring.

…

The Bill provides that at the time of sentencing, a court may order that a particular offender is not a suitable candidate for home detention. This order - or veto - will prevent the adult parole board from considering home detention as a pre-release option at the end of that offender's sentence. This is an important part of the home detention expansion program.

…

Amendments to the Criminal Procedure Act 2009

…

The Bill makes important changes to further protect complainants in sexual offence cases. The Bill achieves this through the following:

- *broadening the factors the court must have regard to, at a sentencing hearing, in determining whether to grant leave to cross-examine or admit evidence of a complainant's prior sexual activities, this includes having regard to the need to respect the complainant's personal dignity and privacy;*
- *expanding the range of offences for which a court can allow alternative arrangements for the giving of evidence by different categories of complainants and witnesses to now include the summary offences of obscene, indecent and threatening language and indecent exposure;*
- *broadening the circumstances in which a court can order that proceedings be closed in sex offence cases to include any proceeding that relates wholly or partly to a charge for a sexual offence so that witnesses have the same protections as complainants.*

Sentence indications

… The Bill amends the Criminal Procedure Act 2009 to allow for the continuation of the sentence indication scheme in the County and Supreme Court. … When the scheme was introduced it was made subject to a sunset clause causing it to lapse on 1 July 2010. [73]

Content and Committee comment

The Bill provides that clauses 44(2), 77 and 97(2) have retrospective operation and that it is possible that some provisions may not commence until 1 January 2012. **[2]**

Retrospective provisions – Delayed commencement – Inadequate explanatory material – Committee Practice Note No. 1 of 2005

The Committee notes that clauses 44(2), 77 and 97(2) commence operation retrospectively. The Committee further notes that clause 79 permits the charging and collection of fees back dated to 4 September 2008. The Committee observes that there is no explanation provided to the Parliament as to the significance of the retrospective provisions provided in the Bill for any of these provisions.

The Committee considers that Parliament should be advised in clear words as the reason it is being asked to exercise retrospective legislative powers.

The Committee is further concerned that the explanatory memorandum in respect to clause 97 provides '*amends sections 5 and 56(2) of the Justice Legislation Miscellaneous Amendments Act 2009'.* Even if the provision were prospective in operation the Committee would still consider that this is an unsatisfactory explanatory note.

The Committee refers to Practice Note No. 1 of 2005 which 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 retrospective provisions and delayed commencement provisions in the explanatory material or the Second Reading Speech and also the desirability of avoiding needless Ministerial correspondence in respect to the reasonable explanation for such provisions.

The Committee will seek further advice from the Attorney-General.

Charter report

Retrospective penalties – Sentencing court can bar offenders from eligibility for home detention – New procedures for enforcing sentencing orders – Application to past offences

Summary: Clause 23 may retrospectively apply new regimes for sentencing orders that an offender is ineligible for home detention and for enforcement of sentencing orders to offences committed before the bill commenced. The Committee considers that any retrospective application of home detention conditions may be incompatible with the Charter's provision against retrospective increases in penalty and that any retrospective application of the regime for enforcement of sentencing orders may engage that provision. It will write to the Attorney-General seeking further information.

The Committee notes that:

- clauses 6, 8, 10, 12, 15 and 17 inserting new sections 14A, 18SA, 18ZGA, 21A, 27A and 41A into the *Sentencing Act 1991*, provide for a court to attach a condition to a sentence that 'the offender is not entitled to make a request' to the Adult Parole Board for a home detention order under s. 59 of the *Corrections Act 1986*.
- clauses 9, 13, 14, 18 and 22, inserting new sections 18WJ, 26J, 26ZK, 47J and 79J into the *Sentencing Act 1991*, permit a court to cancel a sentencing order and resentence an offender if 'the court finds the offender has contravened' the order.

Clause 23, inserting a new section 141 into the *Sentencing Act 1991*, provides that the first set of clauses applies to sentencing after the Bill commences 'irrespective of when the offences were committed' and that the second set of clauses applies to findings of contraventions made after the Bill commences 'irrespective of when that contravention was committed'. The clear terms of new section 141 would appear to override existing s. 114(1), which bars retrospective increases in penalties. Therefore, **clause 23 may retrospectively apply both new regimes to offences committed before the Bill's commencement.**

The Committee considers that clause 23 may engage Charter s. 27(2), which provides:

> *A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.*

In the case of clauses 6, 8, 10, 12, 15 and 17, clause 23 potentially allows offenders to be subject to a new category of sentencing order – ineligibility to ask the parole board to permit home detention – that was not applicable at the time they committed their offence. In several decisions, the New Zealand Court of Appeal has unanimously held that ineligibility to ask a parole board for parole, when imposed as part of a judicial sentence, is a penalty for the purposes of a New Zealand Bill of Rights provision to the same effect as Charter s. 27(2).[45] **In light of the clarity of these decisions and the fundamental nature of the right against retrospective penalties, the Committee considers that clause 23 (to the extent that it allows a sentencing court to prevent an offender from applying for home detention for which he or she was eligible when the offence was committed) may be incompatible with Charter s. 27(2).**

The issue of the compatibility of clause 23, in its application to the new regime for sentencing order enforcement, with Charter s. 27(2) is more complex. The effect of clauses 9, 13, 14, 18 and 22 is to remove the previous requirement that a court first 'finds the offender guilty of' an offence of breaching the sentencing order 'without reasonable excuse' before it can cancel a

[45] *R v Poumako* [2000] NZCA 69, [33], [54], [75], [107]. The relevant legislation was repealed as a result of the Court's decisions. See also *R v Pora* [2000] NZCA 403; *Chadderton v R* [2004] NZCA 29; *A v The New Zealand Parole Board* [2008] NZHC 1070.

sentencing order or resentence an offender.[46] This change is partly beneficial to offenders, as the clauses also abolish the offence altogether, meaning that they can no longer be convicted or fined merely for breaching the order. However, the change may also be detrimental to offenders, as the new sections do not expressly provide for contraventions to be established beyond reasonable doubt or for a defence of reasonable excuse or for general principles of criminal responsibility.[47] In the case of clause 14, the change carries the benefit of a court hearing (in place of a hearing before the Adult Parole Board) for contraventions, but carries the cost of the repeal of a lenient regime for 'minor' breaches.[48]

While clauses 9, 13, 14, 18 and 22 are compatible with the Charter rights in respect of determination of criminal charges (because contravention proceedings are an adjunct to trial and sentencing proceedings, where those rights are protected), **the Committee is concerned that clause 23, by retrospectively applying this new, potentially more onerous regime to enforcement proceedings in respect of sentences for past offences, may engage Charter s. 27(2).** The United States Supreme Court has held, in separate cases, that a similar ban on retrospective penalties is contravened when the regime for enforcement of a sentencing order is retrospectively made more onerous[49] and when significant changes are made to the rules of proof, to the offender's detriment.[50] Clause 23 may engage the combined effect of these decisions.

The Committee will write to the Attorney-General seeking further information as to the compatibility of clause 23, in its application to clauses 6, 8, 9, 10, 12, 13, 14, 15, 17, 18, and 22, with Charter s. 27(2). Pending the Attorney-General's response, the Committee draws attention to clause 23.

The Committee makes no further comment.

46 *Sentencing Act 1991*, ss. 18W(5), 26(3A), 47(3A), 79(3A).

47 However, it may be that these requirements still arise as a result of new sections18WK, 26K, 47K and 97K, which provide that '[t]he practice and procedure applicable to the hearing and determination of summary offences in the Magistrates' Court applies, so far as is appropriate, to the hearing and determination of a proceeding' for contravention.

48 *Sentencing Act 1991*, s. 18ZZH.

49 *Johnson v United States*, 529 US 644 (2000).

50 *Carmell v Texas*, 529 US 513 (2000).

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

Introduced	9 March 2010
Second Reading Speech	10 March 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Transport and Minister for Roads and Ports

Purpose and Background

The Bill amends the —

- *Transport Act 1983* to —
  - further provide for the enforcement of offences against, and breaches of the Act and the *Bus Safety Act 2009*, the *Rail Safety Act 2006* and the *Port Services Act 1995*. **[6, 7, 9, 10, 11, 12 and 15]**
  - improve the operation of the accreditation scheme relating to the provision of services in the taxi-cab industry. **[17 to 28]**
  - improve the operation of the accreditation scheme relating to drivers of commercial passenger vehicles. **[30 to 33]**
  - clarify the scope of certain regulation making powers.
  - allow for the charging of holiday surcharges as part of a taxi-cab fare or taxi-cab hiring rate. **[75 and 76]**
  - to empower courts to make adverse publicity orders against persons found guilty of an offence against that Act or the regulations made under that Act. **[13]**
- *Rail Safety Act 2006* to make further provision in relation to accreditation fees that are or were payable by accredited rail operators and for other purposes. **[37 to 43]**
- *Bus Safety Act 2009* to improve the operation of that Act. **[47 to 66]**
- *Working with Children Act 2005* to make amendments related to amendments being made to the *Transport Act 1983* by the Bill to improve the operation of the accreditation scheme relating to drivers of commercial passenger vehicles. **[35 and 36]**
- *Marine Act 1988* to empower courts to make adverse publicity orders against persons found guilty of an offence against that Act or the regulations made under that Act. **[16]**
- *Rail Corporations Act 1996* to make further provision in relation to an allocation statement allocating certain property, rights and liabilities of the former Public Transport Corporation to RailTrack. **[82]**
- *Road Safety Act 1986* to enable authorised officers under the *Transport Act 1983* to serve parking infringement advisory notices in relation to parking infringements committed in park and ride facilities. **[83]**
- *Public Transport Competition Act 1995* to extend the operation of the regulations made under that Act until 31 December 2010. **[71]**
- *Road Management Act 2004* and *Transport Legislation Amendment Act 2007* to insert notes to inform readers of certain provisions of the *Road Management Act 2004* of the interrelationship between those provisions and provisions of the *Rail Safety Act 2006* relating to safety interface agreements.

Extracts from the Second Reading Speech –

> *Transport safety law infringements are introduced for the rail and bus industries, providing the Safety Director with additional powers to deal with minor offences and enforce regulatory standards.*
>
> *Remedies for breaches of safety duties and other requirements are also extended by providing the courts with sentencing powers across the public transport portfolio.*
>
> *A range of sanctions are extended to the taxi and hire car industry. These include:*
>
> - *exclusion orders (which enable the court to prohibit persistent offenders from being involved in the industry in question);*
> - *supervisory intervention orders (which enable the court to order a person to improve his or her compliance with relevant safety laws); and*
> - *commercial benefits orders (which enable the court to require a person to pay a fine based on unlawful profit obtained from committing an offence).*
>
> *… The Bill introduces a new sanction – adverse publicity orders - into transport regulation in Victoria. …and allow courts to 'name and shame' offenders, in addition to imposing other penalties.*
>
> *… The Bill also introduces voluntary enforceable undertakings for the rail and bus sectors…*
>
> *… The Bill makes it clear that a person's driving record and compliance with the taxi and driver accreditation regimes can be taken into account when making decisions about their accreditation. Provisions are introduced to ensure that a person cannot carry out the functions of an accredited taxi operator if not accredited.*
>
> *The Bill clarifies the Victorian Civil and Administrative Tribunal's powers when reviewing accreditation and disqualification decisions. It also clarifies when a person who is exempt from a working-with-children check by reason of their completely clear record ceases to benefit from the exemption.*
>
> *Statutory recognition is given to the holiday surcharge that may be charged by taxi drivers and retained by them on certain public holidays.*
>
> *The Bill clarifies responsibilities for managing and enforcing fatigue management provisions associated with bus drivers.*
>
> *… Provision is made in the Bill for warning notices to be left on vehicles in designated park-and-ride facilities, giving early notice of breaches of parking restrictions to station car park users.*
>
> *The Bill makes it clear that public transport conduct offences can be enforced in the precinct of Southern Cross Station.*
>
> *The Bill also confirms that infringement penalties can differ on the basis of the age of the offender consistent with Victorian justice policies.*

Content and Committee comment

Self-incrimination

The Bill will amend various sections in Division 4B of the *Transport Act 1983* (*after the Transport Act 1983 is renamed the Transport (Compliance and Miscellaneous) Act 1983*) so that various inspection, inquiry, search and seizure powers are widened to encompass the ability to exercise those powers by transport safety officers on all 'public transport premises'. The extension of these powers to public transport premises engages the right not to be compelled to incriminate oneself and the presumption of innocence. **[5, 69 and 70]**

The Committee notes these extract from the Statement of Compatibility –

> *Section 228ZZP of the Transport Act 1983 provides that a person is not excused from complying with a direction under Division 4B on the ground that to do so would incriminate the person. For that reason, the amendment to section 228ZB (read with section 228ZL) engages*

the right not to have to incriminate oneself. … Section 228ZZP(2), however, goes on to provide an immunity to persons who have been compelled to provide incriminating information. As currently drafted, it protects against the direct use in criminal proceedings (other than in proceedings in respect of the provision of false information), or in any civil proceeding for a penalty, of any information obtained from a natural person under a direction given under Division 4B. Clause 5 of the Bill amends section 228ZZP(2) to extend the immunity to indirect use of the compelled information, i.e., to information obtained 'as a direct result or indirect consequence' of the information.

The immunity in subsection 228ZZP(2) is, however, subject to exceptions, as set out in subsections 228ZZP(3) and (4). They provide that the immunity does not apply in relation to the following two classes of compelled documents or real evidence:

- *documents or items that were required to be kept under a relevant transport safety law (section 228ZZP(3) and (4)(a));*
- *things obtained under section 228ZK(1)(b). That section empowers a transport safety officer to direct a relevant person (as defined in section 228S) to provide any documents, devices or other things in his, her or its possession or control 'relating to rail operations'.*

…

The two situations in which the immunity does not apply relate to pre-existing documents and real evidence.

… Considering further each of the two exceptions, the first relates only to documents that a person is required to keep under relevant transport safety laws. The second is limited by the concept of 'relevant person' as defined in section 228S, by the fact that the transport safety officer must be acting 'for compliance and investigative purposes', and by the fact that the document or thing must relate to 'rail operations'. The result is that only people participating in the regulated public transport industry can be compelled to produce items either that they are obliged to create and maintain, or that are related to and arise from their involvement in that activity.

The Committee notes that the amendments clarify use immunity as a consequence of the recent Supreme Court decision in *Re: Application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381 (per Warren CJ.)*.

(1) Presumption of innocence

The extension to Division 4B powers to encompass 'public transport premises' has the effect of extending the reach of a number of existing offence provisions. Several of these contain a defence of having a 'reasonable excuse' for non-compliance with the statutory requirement: sections 228ZD, 228ZL(3), 228ZR(3), and 228ZS(2). Section 228ZO(3) takes a different approach and lists four specific circumstances in which non-compliance is justified. In these cases, the relevant defence provisions have the effect of imposing an evidential onus on a defendant.

The Committee notes these extracts from the Statement of Compatibility –

In this case the limitation serves the important purpose of rendering prosecution an effective mechanism for ensuring cooperation with the activities of transport safety officers. A defendant's reason for non-compliance will be best known to him or herself. The imposition of an evidential onus ensures that the defendant must put any such reason at issue but still protects the presumption of innocence by requiring the prosecution to prove the absence of any such reason to the ordinary criminal standard.

…

The only offence provision in Division 4B that contains a complete reverse onus provision is section 228ZL(5). Section 228ZL(3) makes it an offence for a 'relevant person' to refuse or fail to comply with a direction under section 228ZL(1) unless the person has 'a reasonable excuse'. Section 228ZL(1) empowers transport safety officers to direct a relevant person to provide assistance to the transport safety officer to enable him or her effectively to exercise a power under Division 4B. In addition to the defence of 'reasonable excuse' in subsection (3),

section 228ZL(5) provides that it is also a defence if the person charged 'proves on the balance of probabilities that the direction or its subject-matter was outside the scope of the business or other activities of the person.'

This provision was amended by the Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009. It was the subject of correspondence between the Attorney-General and the Scrutiny of Acts and Regulations Committee (Alert Digests 4 and 9 of 2009). In that correspondence the Attorney-General advised that in his view the limitation that section 228ZL(5) imposed on the presumption of innocence in section 25(1) of the Charter was justified.

(2) Presumption of innocence – Defence to prosecution took all reasonable steps

The Bill introduces three new offences into the *Transport Act 1983* relating to the operation of a taxi by a person who does not have the proper authorisation to do so.

New section 158AA provides an offence for a person (other than an accredited operator or his or her employee) to permit another person to operate a taxi.

New section 158AB provides that if a taxi is operated by a person who does not have proper permission to do so, the accredited 'operator' of the taxi (being the holder of the licence under which the taxi is operated or, if the licence-holder does not operate the taxi, the person to whom the right to operate the taxi has been assigned) commits an offence.

New section 158AC provides that if a taxi is permitted to be operated by a person who is not entitled to give that permission, the person operating the taxi commits an offence.

Both new section 158AB and new section 158AC provide 'took all reasonable steps' defences. New section 158AB makes it a defence if the operator satisfies the court that he or she took all reasonable steps to stop the taxi being operated by a person who did not have permission. New section 158AC makes it a defence if the person who unlawfully operated the taxi satisfies the court that he or she took all reasonable steps to determine whether the person who purported to give him or her permission to operate the taxi was entitled to give that permission. **[28]**

The Committee notes these extracts from the Statement of Compatibility –

When a taxi is operated without the requisite permission, a burden is placed on both the accredited operator and the driver to prove that they have taken reasonable steps to prevent the offence. By choosing to engage in a regulated activity, it is reasonable to expect operators and drivers to take steps to ensure that taxis are only operated by people lawfully authorised to do so. If reasonable steps have been taken, proof ought not to be difficult.

….

Having regard to the purpose of the offences, it would be unduly difficult and onerous for the state to investigate and prove what steps the defendant took to discharge his or her responsibilities.

Delayed commencement – One year rule – Absence of explanation

The Committee notes that the provisions in the Bill come into force by proclamation and may not commence until 1 July 2011. **[2]**

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.

The Committee makes no further comment.

Ministerial Correspondence

Accident Compensation Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 8 December 2009 by the Hon. Tim Holding MLA. The Committee considered the Bill on 1 February 2010 and made the following comments in Alert Digest No. 1 of 2010 tabled in the Parliament on 2 February 2010.

Committee's Comments

[2]

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

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

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

The Committee draws attention to these provisions.

Explanatory memorandum

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

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

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

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

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

Minister's Response

I refer to correspondence dated 3 February 2010 in relation to the Scrutiny of Acts and Regulations Committee's (SARC) concerns regarding the Accident Compensation Amendment Bill 2009 (the Bill).

I am writing to advise that SARC's concerns have been considered and as requested, I have provided further information to clarify two specific concerns.

Firstly, in regards to concerns relating to the retrospective application of specific certain provisions contained in the Bill, I have included further detail about the need for retrospective commencement of the amendments affected by clauses 49(1),52,57(4) and 57(5) (Attachment 1). For completeness, I have also included information about other retrospective commencement dates that were not specifically highlighted by SARC. I trust that the information provided will address your concerns.

Secondly, I note the revision of penalties in the Act was conducted in line with the Hanks recommendation to review the adequacy of the enforcement regime. Whilst I consider that the explanatory memorandum provided adequate explanation, particularly in view of the length and complexity of this Bill, I have included substantially expanded information about the revised penalties (Attachment 2).

I trust the attached information will adequately address SARC's concerns and I thank you for bringing SARC's concerns to my attention. If you require further clarification please do not hesitate to contact Ms Linda Timothy, at WorkSafe, on (03) 9641 1373.

TIM HOLDING MP
Minister for Finance, WorkCover
and the Transport Accident Commission

9 March 2010

Attachment 1

Retrospective application of certain provisions in the Accident Compensation Amendment Bill 2009

SARC sought further advice "concerning the significance of the dates chosen for retrospective commencement and whether any person is adversely affected by these provisions."

Clauses 42 and 45(3)

Clauses 42 and 45(3) implement Hanks recommendation 43. These clauses amend sections 97 and 114 of the Accident Compensation Act 1985 (the Act) to clarify that workers in receipt of weekly payments are still able to access annual and long service leave without penalty or impact on their weekly payments.

Effect of Amendment:

Clauses 42 and 45(3) of the Bill provide that workers' compensation entitlements are not affected by the implementation of the Commonwealth Government's National Employment Standards (NES), which restricts workers from taking annual leave where they are in receipt of workers compensation, unless the relevant workers compensation legislation allows for the taking of leave.

Significance of retrospective commencement date

The commencement date for these provisions is 1 January 2010. This aligns the Act with the commencement of the NES.

Rationale

Aligning with the commencement of the NES will allow these provisions to apply to claims lodged from that date, ensuring that there is no detrimental effect to any worker that would otherwise arise if clauses 42 and 45(3) did not have retrospective application.

The actuarial estimation of the cost of the reforms incorporated the commencement date specified in this provision. Thus, the cost of this reform can be funded without increasing average premium rates.

Clause 49(1)

Clause 49(1) begins implementation of Hanks' recommendation to remove anomalies in the Act. Clause 49(1) inserts a reference to 'self-insurer' into sections 99(5A) to 99(5G) of the Act. These sections were originally introduced to clarify the extent of the liability for home and car modifications, ensuring that the most severely injured workers were provided with the assistance necessary to undertake the activities of daily living. The sections were inserted into the Act by section 22(2) of the State Taxation and Accident Compensation Acts Amendment Act 2007.

Due to an oversight the amendments did not explicitly apply to self-insurers and therefore created the potential for uncertainty about the extent to which self-insurers are liable for such modifications. Prior to this amendment, modifications to a home or car were part of the definition of "personal and household service" under section 5(1), which applied equally to scheme insured and self-insured employers.

Effect of amendment

This amendment will put the extent of self-insurer's liability for home and car modifications for eligible injured workers beyond any doubt and ensures that employees of self-insurers have access to the same potential benefits under the Act as employees of scheme insured employers.

Significance of retrospective commencement date

The commencement date for this provision is 12 December 2007. This aligns with the commencement date of the State Taxation and Accident Compensation Acts Amendment Act 2007.

Rationale

Clarifies the extent of a self-insurer's liability and rectifies an anomaly.

Clause 52

Clause 52 implements Hanks recommendation 56. This clause ameliorates the provisions in the Act that govern the payment of costs for supported accommodation for injured workers. These provisions are contained in sections 99(15) to 99(18) of the Act. Currently WorkSafe or a self-insurer is liable for certain costs associated with supported accommodation.

Eighteen months after an injured worker's discharge from hospital however, WorkSafe's liability to pay a portion of supported accommodation costs ceases. Currently, the injured worker is then liable for the portion of costs that is attributable to daily living expenses or those costs which would have incurred irrespective of their injury.

Effect of amendment

Clause 52 introduces a power for the Governor-In-Council to fix limits by Order on contributions payable by a worker towards the cost of supported accommodation.

Significance of retrospective commencement date

The commencement of this provision is 3 December 2003. This aligns with the commencement date of section 4 of the Accident Compensation and Transport Accident Acts (Amendment) Act 2003 ("the 2003 Amending Act"), the legislation which originally inserted subsections 99(15) to 99(18) in to the Act.

Rationale

Aligns with the commencement of the 2003 Amending Act and ensures all injured workers who are eligible for supported accommodation can benefit from this Order when it is ultimately made.

Given that a worker in supported accommodation has been liable to pay for their daily living expenses since 3 December 2003, the retrospective commencement of this amendment

gives certainty to injured workers about the scope of their liability and ensures that any injured worker who has been out-of-pocket for amounts greater than the "cap" set by the Governor-In-Council Order would be able to recoup their losses. In practice, this will apply in very few cases as WorkSafe has not ordinarily sought contributions from injured workers for daily living expenses.

Clauses 57(4) and 57(5)

Clauses 57 (4) and 57(5) implement Hanks recommendation 71. Clause 57(5) of the Bill amends the provisions governing the process for determining the legal costs consequences for parties when an action for common law damages is not resolved through the statutory offer process. Clause 57(4) provides that a worker who has made an application for leave to bring proceedings under section 134AB of the Act in relation to an injury is prohibited from making a further application for leave to bring proceedings under section 134AB of the Act for the same injury.

Effect of Amendment

Clause 57(5) provides that if a worker is in receipt of weekly payments after making a statutory counter offer in a common law proceeding, then these payments are not to be taken into account in determining whether the worker is entitled to the reimbursement of their party/party costs. This will benefit a small cohort of workers who make serious injury applications and is designed to address the effect of the Raeburn decision.

The reform implemented by clause 57(4) is consequential to this reform. It will ensure that new serious injury applications will be subject to the new cost rules implemented through the amendment in clause 57(5) and prevents withdrawal and re-application of existing serious injury applications. The cost of the Raeburn amendment was estimated on this basis.

Significance of retrospective commencement date

The commencement date of these clauses is 17 June 2009, which is the date on which the Victorian Government announced its response to the Hanks Review.

Rationale

The intent of this early commencement date was to obviate any potential for delays in proceedings (and hence damages payouts) that could arise through injured workers postponing their serious injury applications until the reforms were implemented.

The actuarial estimation of the cost of the reforms incorporated the commencement date specified in this provision. Thus, the cost of this reform can be funded without increasing average premium rates.

Various clauses

Clause 2(5) of the Bill refers to the commencement of a number of clauses which implement Hanks recommendations relating to Lump Sum Benefits (Part 6), Access to Justice for Seriously Injured Workers (Part 7), and Benefits for Family Members Following Work-Related Deaths (Part 8).

Effect of Amendment

These provisions work to expand the benefits available to injured workers, and also to family members of dependant workers.

Significance of retrospective commencement date

The commencement date for these provisions is 10 December 2009. This aligns these provisions with the date the Bill was second read in Parliament, resulting in many of the details of the Bill becoming public for the first time.

Rationale

As a result of the Bill entering the public domain, workers and dependants will be aware of the proposed changes. This may result in workers delaying lodgement of their claims. Giving these provisions, retrospective application to the date of second reading avoids the potential for disruptions to the delivery of benefits and ensures the benefits are available to a wider cohort of claimants.

The actuarial estimation of the cost of the reforms incorporated the commencement date specified in this provision. Thus, the cost of this reform can be funded without increasing average premium rates

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Attachment 2

Further explanation of the revision of penalties under the Accident Compensation Act 1985 (the Act)

SARC expressed "concern as to the adequacy of the explanatory memorandum about the penalty increases."

An expansion of the explanatory memorandum for Part 15 – Penalties is provided as follows:-

Clause 156 *This clause updates section 56(11) of the Act to increase the penalty from a maximum of 50 penalty units to a maximum of 180 penalty units or 6 months imprisonment, or both, for a natural person; and a maximum of 900 penalty units for a body corporate. Section 56(11) of the Act provides that it is an offence for person who, in connection with a dispute referred for conciliation, makes a statement in a material particular that the person knows to be false or misleading.*

Clause 157 *This clause updates section 58B of the Act to increase the penalty from a maximum of 50 penalty units to a maximum of 60 penalty units for a natural person; and a maximum of 300 penalty units for a body corporate. Section 58B of this Act provides that it is an offence for a person to not comply with a direction given by a Conciliation Officer under Division 2 (Conciliation of disputes) in Part III (Dispute Resolution) of the Act.*

Clause 158 *This clause introduces a specific penalty provision in section 101(1) and (2) of the Act, which increases the penalty from a maximum of 10 penalty units for a first offence and a maximum of 20 penalty units for each subsequent offence, to a maximum of 60 penalty units for a natural person and 300 penalty units for a body corporate. Section 101(1) of the Act provides that the employer must make accessible in the workplace summary information about a worker's rights to make a claim under the Act in a form approved by the Authority. Section 101(2) of the Act provides that the employer must keep a register of injuries accessible in the workplace in a form approved by the Authority.*

Subclause (2) substitutes sections 101(3) and 101(4) of the Act. New section 101(3) also introduces a specific penalty provision in section 101(3) which increases the penalty from a maximum of 10 penalty units for a first offence and a maximum of 20 penalty units for each subsequent offence, to a maximum of 60 penalty units for a natural person and 300 penalty units for a body corporate, if on receipt of a notice of injury otherwise than specified in section 102(3), an employer does not record the specified particulars in the register.

New section 101(4): This provides that a worker or any person acting on the worker's behalf may enter such particulars of injury as are specified by the Authority in the register of injuries.

Clause 159 *This clause introduces a specific penalty provision in section 108(1) of the Act where the employer fails to forward onto the Authority claims for compensation and relevant medical certificates within 10 days of the employer receiving the claim. The penalty for breaching section 108(1) of the Act is updated from a maximum of 10 penalty units for a first offence and a maximum of 20 penalty units for each subsequent offence, to a*

maximum of 40 penalty units for a natural person; and 240 penalty units for a body corporate.

Subclause (2) repeals section 108(2) of the Act.

Subclause (3) inserts a new penalty in section 108(3) the Act where the employer fails to forward onto the Authority claims of compensation under section 99 which do not exceed the employer's liability under the employer's excess. Clause 159(3) updates the penalty for breaching section 108(3) from a maximum of 10 penalty units for a first offence and 20 penalty units for each subsequent offence, to a maximum of 40 penalty units for a natural person; and 240 units for a body corporate. Subclause (4) repeals sections 108(5) and 108(5A) of the Act.

Clause 160 *Subclause 160(1) amends section 114D(2) of the Act which provides that it is an offence where an employer fails to make weekly payments to a worker, to make it subject to the requirements of section 114D(6) which prescribes when the weekly payments must be made to the worker.*

Subclause (2) introduces a specific penalty provision in section 114D(2) of the Act of a maximum of 60 penalty units for a natural person and 300 penalty units for a body corporate. This replaces the penalty for section 114D(6) which was a maximum of 10 penalty units for a first offence and a maximum of 20 penalty units for each subsequent offence.

Clause 161 *This clause introduces a specific penalty provision in section 123(1) which provides that an employer must notify the Authority in relation to a worker's return to work. Clause 161 updates the penalty from a maximum of 10 penalty units for a first offence and a maximum of 20 penalty units for each subsequent offence, to a maximum of 40 penalty units for a natural person and 240 penalty units for a body corporate.*

Clause 162 *This clause updates the penalties under section 129M(2) of the Act from a maximum of 100 penalty units, to a maximum of 100 penalty units for a natural person and 500 penalty units for a body corporate. Section 129M(2) provides that if, on or after 18 September 1987 and before the commencement of the Accident Compensation (Further Amendment) Act 1988, a person entered into, or after that commencement, a person enters into, an arrangement or transaction for the purpose, or for purposes which include the purpose, of securing, either generally or for a limited period, that a contributor (whether or not a party to the arrangement or transaction) will be unable, or will be likely to be unable, having regard to other debts of the contributor, to pay the amount payable under an assessment under this Division or to pay an amount which may become payable in the near future by reason of this Division, the person is guilty of an offence.*

Clause 163 *This clause inserts a new section 177 in the Act which provides penalties for failure of a non-WorkCover employer to comply with a provision of Part VIA (Non-WorkCover employers) of the Act.*

New section 177 provides for maximum penalties of 120 units for a natural person; and 600 penalty units for a body corporate. It also provides maximum penalties for a continuing offence of 60 penalty units for a natural person; and 300 penalty units for a body corporate for each day the contravention continues after a finding of guilt in relation to the offence. A continuing offence is defined as where a non-WorkCover employer continues to fail to comply with a provision of Part VIA of this Act after the non-WorkCover employer is found guilty of failing to comply with that provision.

Clause 164 *This clause updates the penalty in section 181 of the Act for an agent who engages in prohibited conduct, from a maximum of 20 penalty units for a first offence and a maximum of 50 penalty units for each subsequent*

offence, to a maximum of 60 penalty units for a natural person, and 300 penalty units for a body corporate.

Clause 165 *This clause updates the penalty in section 183(1) of the Act for a legal practitioner who engages in prohibited conduct, from a maximum of 20 penalty units for a first offence and a maximum of 50 penalty units for each subsequent offence, to a maximum of 60 penalty units in the case of a natural person; and 300 penalty units in the case of a body corporate.*

Clause 166 *This clause updates the penalty applying to section 184(5) of the Act from a maximum of 20 penalty units for a first offence and a maximum of 50 penalty units for each subsequent offence, to a maximum of 60 penalty units for a natural person; and 300 penalty units for a body corporate. Section 184(5) of the Act provides that it is an offence for a legal practitioner or agent who gives a certificate under section 184(5) about a claim, if the legal practitioner or agent—*

(a) knew or had reasonable cause to suspect that an agent had engaged in prohibited conduct that involved encouraging the person to make the claim; and

(b) did not disclose that fact in the certificate.

Clause 167 *This clause updates the penalty in section 186(3) of the Act from a maximum of 200 penalty units, to a maximum of 60 penalty units for a natural person; and 300 penalty units for a body corporate. Section 186(3) of the Act provides that it is an offence for an agent to act in contravention of the Authority's direction restricting or prohibiting the agent from engaging in prohibited conduct.*

Clause 168 *This clause updates section 240A of the Act and the penalties for breach of that section to ensure they are more proportionate by providing for a staged approach to increasingly serious offences.*

New section 240A(4) provides that a person must not obstruct or hinder a person employed or acting in the execution or under the Authority of a warrant under subsection (1) or aiding or assisting in its execution. It provides for a maximum of 60 penalty units for a natural person; and 300 penalty units for a body corporate.

New section 240A(5) provides that a person must not refuse to permit to a search or seizure authorised by a warrant issued under subsection (1). It updates the penalty from a maximum of 25 penalty units or 6 months imprisonment, to a maximum of 100 units or 6 months imprisonment, or both, for a natural person; or 600 penalty units for a body corporate.

New section 240A(6) provides that a person must not assault, or attempt to assault a person employed or acting in the execution or under the Authority of a warrant issued under subsection (1) or aiding or assisting in its execution. It updates the penalty from a maximum of 25 penalty units or 6 months imprisonment, to a maximum of 240 units or two years imprisonment, or both, for a natural person; or 1200 penalty units for a body corporate.

Clause 169 *This clause updates section 241 of the Act and the penalties for breach of that section to ensure they are more proportionate by providing for a staged approach to increasingly serious offences.*

New section 241(1) provides that a person must not obstruct or hinder a person exercising powers under section 239 or section 240 of this Act. It updates the penalty from a maximum of 25 penalty units or 6 months imprisonment, to a maximum of 60 penalty units for a natural person; and 300 penalty units for a body corporate.

New section 241(2) provides that a person must not without reasonable excuse refuse or fail to comply with a requirement made by a person exercising powers under section 239 or 240 of this Act. It updates the penalty from a maximum of 25 penalty units or 6 months imprisonment, to a maximum of 60 penalty units for a natural person; and 300 penalty units for a body corporate.

New section 241(3) provides a person must not assault, intimidate or threaten, or attempt to assault, intimidate or threaten, a person exercising powers under section 239 or section 240 of this Act. It updates the penalty from a maximum of 25 penalty units or 6 months imprisonment, to a maximum of 240 units or 2 years imprisonment, or both, for a natural person; or 1200 penalty units for a body corporate.

Clause 170 *This clause repeals sections 242(4), (7), (9), (10), (11) and (12) of the Act as these offences have been replaced by specific penalty provisions.*

Clause 171 *This makes it an offence for a person employed in the administration of this Act or the Accident Compensation (WorkCover Insurance) Act 1993 (ACWI Act) to corruptly ask for, receive or obtain, or agree to receive or obtain, any money property or benefit of any kind in the performance of the person's duties (engage in bribery). Section 248AA(2) makes it an offence to induce a person employed in the administration of this Act or the ACWI Act to engage in bribery. Clause 171 repeals the penalty in section 248AA of the Act of a maximum of 100 penalty units or imprisonment for 2 years for engaging in bribery, and inserts in sections 248AA(1) and (2) maximum penalties of 1000 penalty units or imprisonment for 2 years for a natural person; and 5000 penalty units for a body corporate.*

Clause 172 *This clause updates the penalty in section 248 of the Act which makes it an offence to obtain, or attempt to obtain, or assist in obtaining or attempting to obtain fraudulently any payment under this Act or the ACWI Act from a maximum of 100 penalty units or 2 years imprisonment, to a maximum of 1000 penalty units or 2 years imprisonment for a natural person; and 5000 penalty units for a body corporate.*

Clause 173 *This clause updates the penalty in section 248A(1) of the Act which makes it an offence for a service provider to provide false and misleading information in connection to a claim, from 20 penalty units or 1 months imprisonment, to 180 penalty units or 6 months imprisonment or both for a natural person; and 900 penalty units for a body corporate. Clause 173 also updates the penalty in section 248(2) of the Act which makes it an offence to obtain or attempt to obtain fraudulently any payment under this Act or the ACWI Act for any other person, or knowingly assist any other person to obtain fraudulently any payment under this Act or the ACWI Act, from 20 penalty units or 1 months imprisonment, to 180 penalty units or 6 months imprisonment or both for a natural person; and 900 penalty units for a body corporate.*

Clause 174 *This clause updates the penalty provisions in section 249(1) of the Act, which provides that it is an offence to provide false or misleading information under this Act or the ACWI Act, from 20 penalty units or 1 months imprisonment, to a maximum of 120 penalty units for a natural person; or 600 penalty units for a body corporate. Clause 174 updates the penalty provision in section 249(2) of the Act which provides that it is an offence to make a false or misleading statement in a notice, claim, medical certificate or declaration under this Act or the ACWI Act, from 50 penalty units of 12 months imprisonment or both, to a maximum of 180 penalty units, or both, for a natural person; or 900 penalty units for a body corporate.*

Clause 175 *This clause updates the penalty in section 250 of the Act which provides that it is an offence to obstruct or hinder a person acting in the administration of this Act or the regulations or the ACWI Act or regulations under that Act, from 15 penalty units, to a maximum of 60 penalty units for a natural person; and 300 penalty units for a body corporate.*

Clause 176 *This clause repeals the general penalty provision in section 251 of the Act and substitutes a new section 251 which provides for an administrative action in the form of enforceable undertakings available to the Authority as an alternative to prosecution of certain offences under this Act or the ACWI Act.*

New section 251(1) confers on the Authority the power to accept a written undertaking in connection with a matter relating to a contravention or an alleged contravention under subsection (7) by the person who is alleged to have contravened this Act or the ACWI Act.

New section 251(2) sets out the matters that must be specified in the undertaking.

New section 251(3) provides that the person may withdraw or vary the undertaking at any time but only with the Authority's written consent.

New section 251(4) provides that the Authority may not prosecute an offence against the person who gave the undertaking for an offence in relation to the matter referred to in subsection (1).

New section 251(5) provides that if the Authority considers the person who gave the undertaking has breached any of its terms, the Authority may apply to the Magistrates' Court for an order under subsection (6).

New section 251(6) provides that if the Magistrates' Court is satisfied that the person has breached a term of the undertaking, the Court may make an order that the person must comply with the undertaking, take specified action to comply with the undertaking, or any other order it considers appropriate.

New section 251(7) provides for undertakings to be given in respect of contraventions or alleged contraventions of penalty provisions where the maximum penalty is no more than 180 penalty units for a natural person and no more than 900 penalty units for a body corporate, under this Act or the ACWI Act.

Clause 177 *This clause inserts a new section 251A in the Act.*

New section 251A(1) enables a court to make an adverse publicity order if the court convicts or finds a person guilty of an offence against this Act or the Accident Compensation Regulations 2001, or the ACWI Act or regulations made under that Act. The court may order an adverse publicity order to—

- *require the offender to publicise in a specified way the offence and its consequences, the penalty imposed and any other related matter within a specified period; and/or*
- *require the offender to notify a specified person or class of persons in a specified way of the offence, its consequences, the penalty imposed and any other related matter within the specified period; and*
- *give the Authority evidence of the action(s) the offender has taken in accordance with the order, within 7 days of the end of the period specified in the order.*

New section 251A(2)—provides that the court may make an adverse publicity order on its own initiative or on the application of the prosecutor.

New section 251A(3)—provides that if the offender fails to provide to the Authority evidence of taking the actions specified in the adverse publicity

order under subsection (1), the Authority (or a person authorised in writing by the Authority) may take the action(s) specified in the adverse publicity order.

New section 251A(4)—if the Authority is not satisfied that the evidence given by the offender demonstrates that the offender has taken the action(s) specified in the adverse publicity order, the Authority may apply to the court for an order authorising the Authority (or a person authorised in writing by the Authority) to take said action(s).

New section 251A(5)—provides that the reasonable expenses of taking the action(s) under subsection (3) or (4) is a debt due by the offender to the Authority.

New section 251A(6)—provides that the court must not make an adverse publicity order if the costs of complying with the order exceed the maximum penalty amount that the court may impose on the offender for the offence concerned.

New section 251A(7)—provides that the court may make an adverse publicity order in addition to, or instead of, imposing a penalty on the offender or making any other order that the court may make in relation to the offence.

Division 2—Amendment of penalties in the ACWI Act.

Clause 178 *This clause updates the penalties under section 7(1) of the ACWI Act which provides it is an offence for an employer not to obtain and keep in force a WorkCover insurance policy with the Authority or to at any one time keep in force more than one such policy unless permitted to do so by the Authority, from a maximum of 100 penalty units to a maximum of 240 penalty units for a natural person; and 1200 penalty units for a body corporate.*

Clause 179 *This clause updates the penalties under section 10(1) of the ACWI Act which provides it is an offence for a person other than the Authority, to issue or renew a WorkCover insurance policy or a purported WorkCover insurance policy, from 100 penalty units to a maximum of 180 penalty units for a natural person; and 900 penalty units for a body corporate.*

Clause 180 *This clause updates the penalties under section 12(3) of the ACWI Act which provides it is an offence for a person not to comply with a notice served on it by the Authority under this section, from 20 penalty units to a maximum of 40 penalty units for a natural person; and 200 penalty units for a body corporate. It also updates the penalties under section 12(4) of the ACWI Act to a maximum of 60 penalty units for a natural person; and 300 penalty units for a body corporate.*

Clause 181 *This clause updates the penalties under section 18(2) of the ACWI Act which makes it an offence for an employer not to provide the Authority an estimate of rateable remuneration in a form approved by the Authority, from a maximum of 20 penalty units, to a maximum of 120 units for a natural person; and 600 penalty units for a body corporate.*

Clause 182 *This clause updates the penalty under section 20(1) of the ACWI Act where the employer fails to advise the Authority of its changed circumstances and submit a revised estimate of rateable remuneration in a form approved by the Authority within 28 days of becoming aware of its changed circumstances, from a maximum of 20 penalty units, to a maximum of 120 penalty units for a natural person; and 900 penalty units for a body corporate. Clause 182 updates the penalty under section 20(2) of the ACWI Act which provides that the employer must advise the Authority and submit a revised estimate of rateable remuneration in a form approved by the Authority within 28 days of the actual rateable*

remuneration exceeding the estimate, from a maximum penalty of 20 penalty units, to a maximum of 120 units for a natural person; and 600 penalty units for a body corporate. Clause 182 repeals section 20(3) of the ACWI Act.

Clause 183 *This clause substitutes a new section 23(3) of the ACWI Act which updates the penalty, where an employer does not comply with a notice by the Authority requiring the employer to provide a certified statement of rateable remuneration in a form approved by the Authority, from a maximum of 20 penalty units, to a maximum of 120 units for a natural person; and 600 penalty units for a body corporate.*

This clause also inserts a new section 23(3A) which provides that for the purposes of subsection (3), an employer is taken not to comply with a notice received under subsection (1) or (2) if the rateable remuneration specified in a certified statement provided by the employer is incorrect.

Clause 184 *This clause amends section 39(4) of the ACWI Act which provides that a former insurer must disclose information and records to the Authority under section 39 in the manner and within the time specified by the Authority's written requirement, to update the maximum penalty from 100 penalty units, to maximum penalties of 100 penalty units for a natural person; and 500 penalty units for a body corporate.*

This clause also inserts a new section 39(4A) in the ACWI Act which provides that it is a defence to a charge of an offence against subsection (4) if the defendant proves that it was not within the power of the defendant to comply with the requirement.

Clause 185 *This clause updates the penalty in section 42(1) of the ACWI Act, which makes it an offence for failing to pay premium under a WorkCover insurance policy, from a maximum of 50 penalty units, to a maximum of 240 penalty units for a natural person; and 1200 penalty units for a body corporate.*

Clause 186 *This clause updates the penalty in section 57(2) of the ACWI Act which makes it an offence not to forward to the Authority a claim for compensation to which section 7(1A) applies within 5 days of receiving it, from a maximum of 10 penalty units for a first offence and 20 penalty units for each subsequent offence, to update the maximum penalties to 60 penalty units for a natural person; and 300 penalty units for a body corporate. Clause 186 also repeals section 57(5).*

Clause 187 *This clause updates section 60(2) of the ACWI Act which makes it an offence not to comply with the Authority's notice to disclose information relating to a claim under Part 5 (Uninsured Employers and Indemnity Scheme), from a maximum of 20 penalty units, to maximum penalties of 60 penalty units for a natural person; and 300 penalty units for a body corporate.*

Clause 188 *This clause inserts a new section 68(2A) in the ACWI Act which provides that for the purpose of section 5 of the Limitations of Actions Act 1958, the date on which a cause of action accrues in respect of the recovery of a premium or penalty imposed under the ACWI Act is any day or date on which the premium or penalty is payable under the arrangement under a payment arrangement between the Authority and employer, or otherwise, the date specified in a notice given by the Authority under Part 2 as the date on which the premium or penalty is payable.*

Clause 189 *This clause updates section 69(1) of the ACWI Act which makes it an offence for a person who is, or was an employer, who is required to obtain and keep in force a WorkCover insurance policy under this Act, not to keep proper books and preserve those books for a period of not less than 5*

years after the completion of the transactions to which they relate. The maximum penalties are updated from a maximum of 10 penalty units, to maximum penalties of 60 penalty units for a natural person; and 300 penalty units for a body corporate.

Clause 190 *This clause updates section 70(4) of the ACWI Act and inserts new subsections (5) and (6) to ensure the penalties are more proportionate and to provide for a staged approach to increasingly serious offences.*

New section 70(4) provides that a person must not obstruct or hinder a person employed or acting in the execution or under the Authority of a warrant under subsection (1) or aiding or assisting in its execution. The maximum penalties for breaching subsection (4) are updated from a maximum of 100 penalty units, to 60 penalty units for a natural person; and 300 penalty units for a body corporate.

New section 70(5) provides that a person must not refuse to permit a search or seizure authorised by a warrant issued under subsection (1). The maximum penalties for breaching subsection (5) are updated from 100 penalty units, to 100 penalty units or 6 months imprisonment, or both, for a natural person; and 600 penalty units for a body corporate. New section 70(6) provides that a person must not assault or attempt to assault a person employed or acting in the execution or under the authority of a warrant issued under subsection (1) or aiding or assisting in its execution. The maximum penalties for breaching subsection (6) are updated from 100 penalty units, to 240 penalty units or two years imprisonment, or both, for a natural person; and 1200 penalty units for a body corporate.

The Committee thanks the Minister for this response.

Crimes Legislation Amendment Bill 2009

The Bill was introduced into the Legislative Assembly on 8 December 2009 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 1 February 2010 and made the following comments in Alert Digest No. 1 of 2010 tabled in the Parliament on 2 February 2010.

Committee's Comments

Charter report

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

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

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

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

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

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

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

> *the accused was not more than 2 years older than the child.*

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

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

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

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

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

The Committee makes no further comment.

Minister's Response

Thank you for your letter dated 3 February 2010 in which you raise concerns identified by the Scrutiny of Acts & Regulations Committee (the Committee) concerning the Crimes Legislation Amendment Bill 2009 (the Bill). I have considered each of the concerns raised by the Committee.

A key purpose of the Bill is to amend the Crimes Act 1958 to alter the structure of the penalty provisions established in section 45 for the offence of sexual penetration of a child. This amendment will apply the maximum penalty available under that section (25 years jail) to all offences involving a victim aged under 12. This penalty currently applies to all offences against children under 10. This amendment will also mean that there can be no defence of marriage, mistaken age or consent to an offence against a child under 12.

The amendments to section 45 of the Crimes Act 1958 contained in the Bill reflect recommendations made by the Sentencing Advisory Council, in their report, "Maximum Penalties for Sexual Penetration with a Child under 16" (September 2009).

The Sentencing Advisory Council's Report, in chapter 7, discusses the rationale behind its recommendation to raise the 'no-defence' age from under 10 years of age, to under 12 years of age.

The Sentencing Advisory Council's Report states, "the professional experiences of some people consulted indicated that children under 12 generally did not become involved in consensual sexual relationships with other children close to their own age, however, as they got older, it became a 'grey area'" [at paragraph 7.21]. In data compiled by the Council, they found that, "between July 2006 and June 2008, there were no instances where the court characterised the offending as 'consensual' where the victim was aged under 12. However the court identified consensual cases where the victim was 12 (8.3% of cases) and 13 (14.8% of cases)" [at paragraph 7.21].

The decision to increase the 'no-defence' age in section 45 of the Crimes Act from 10 to 12 years of age, reflects the findings and recommendations of the Sentencing Advisory Council.

SARC has asked:

A. whether or not clause 3(5)'s removal of the defence of reasonable mistake of age in the case of sexual penetration of children aged 10 or 11 limits the Charter's rights in respect of fundamental justice.

B. whether or not clause 3(5)'s removal of the defence of similar age in the case of sexual penetration of children aged 10 or 11 limits the Charter right of children to such protection as is in their best interests.

C. if so, whether or not clause 3(5) is a reasonable limit on these Charter rights and, in particular, whether there are less restrictive means reasonably available to achieve the purpose of preventing sexual abuse of children aged 10 and 11.

Clause 3(5) in the Bill states: ***'In section 45(4) of the Crimes Act 1958 for "10" substitute "12"'****.*

Section 45(4) of the Crimes Act 1958, as amended by the Bill, will read:

> *Consent is not a defence to a charge under subsection (1) unless at the time of the alleged offence the child was aged* ***12 or older*** *and—*
>
> *(a) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or older; or*
>
> *(b) the accused was not more than 2 years older than the child; or*
>
> *(c) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child.*

SARC Question A: *whether or not clause 3(5)'s removal of the defence of reasonable mistake of age in the case of sexual penetration of children aged 10 or 11 limits the Charter's rights in respect of fundamental justice. (SARC's Charter Report defines fundamental justice as Charter subsections 21(1) (liberty), 21(2) (arbitrary detention), 24(1) (fair hearing) and 25(1) (presumption of innocence)).*

The effect of the proposed amendment is to remove the defence of reasonable mistake of age, in the case of sexual penetration of children aged 10 or 11. The decision of the majority in the High Court case of CTM v The Queen [2008] HCA 25 states: "the common law principle in question (reasonable mistake of age) reflects fundamental values as to criminal responsibility" [at paragraph 35]. In this same judgement [at paragraph 27], it states, "the belief (reasonable mistake of age), to be exculpatory, must be reasonable. The greater the gap between the child's true age and the age of 16 years, the less likely it may be, in practice, that such a belief was reasonable".

The removal of the defence of reasonable mistake of age in the case of sexual penetration of children aged 10 or 11 may limit the Charter right to presumption of innocence but this is a reasonable limitation justified in the circumstances. Although an accused will still be presumed to be innocent of the offence of sexual penetration of a child under 16; if the child victim aged is 10 or 11 years, the accused will no longer be able to argue that the child consented and that the accused reasonably believed that the child was over 16 years of age. Of course, if the actual age of the child victim is 10 or 11 years of age, it would be difficult to show that this belief was reasonable.

This limitation must be balanced against the need to protect young children from sexual exploitation. The amendment will prevent the question of the 10 or 11 year old child's consent from becoming an issue in any criminal proceeding. It sends a clear message that children aged under 12 cannot legally consent to sex.

Under the proposed amendments to section 45 of the Crimes Act 1958, the defence of reasonable mistake of age remains available where the child victim is aged 12 years or older. The age limit on this defence fits with the Sentencing Advisory Council's findings in respect of the age in which children begin to engage in consensual sexual relationships. As the Sentencing Advisory Council has found, children aged under 12 generally do not become involved in consensual relationships. Indeed, the Council, in its consideration of data taken between July 2006 and June 2008 found no instances where the court characterised the offending as 'consensual' where the victim was aged under 12. The Council explicitly states:

> *The Council has not recommended that the lower age include children aged 12 because of the risk, albeit small, of capturing children in consensual relationships with people of a similar age within the higher penalty category, and therefore exposing young offenders to the second highest criminal penalty known to the law [at paragraph 7.28].*

As expressed by the High Court in its decision in CTM v The Queen, cited above, for the belief (reasonable mistake of age), to be exculpatory, it must be reasonable. The age level at which this defence becomes available will now match the age level at which it has been found that children begin to become involved in consensual relationships. In the very small number of cases in which this may involve a limitation on the presumption of innocence, the limitation is reasonable and justifiable.

***SARC Question B:** whether or not clause 3(5)'s removal of the defence of similar age in the case of sexual penetration of children aged 10 or 11 limits the Charter right of children to such protection as is in their best interests.*

The Charter right of children to such protection as is in their best interests may be limited by the removal of the defence of similar age in the case of sexual penetration of children aged 10 or 11 but that limitation is reasonable and justified in the circumstances. The Sentencing Advisory Council's report found that children aged 10 or 11 generally did not become involved in consensual sexual relationships with other children close to their own age. In data compiled by the Council, it found that, "between July 2006 and June 2008, there were no instances where the court characterised the offending as 'consensual' where the victim was aged under 12.

This limitation will only affect children aged between 10 and 13. If, under the amended section 45, circumstances arise where a child victim is 10 or 11 years age and the accused is not more than 2 years older than the child, there are at least two protections in law available to the accused child. The first, known in the law as 'doli incapax', is described in the Supreme Court of Victoria case of R (A Child) v Whitty (1993) 66 A Crim R , where His Honour Justice Harper states:

> *By a combination of the statutory provision and the common law, the present position in Victoria is that a child of 10 or more but under 14 is presumed not to know the difference between right and wrong and therefore to be incapable of committing a crime because of lack of mens rea. Although the presumption is rebuttable, the burden of rebutting it is of course on the prosecution…In order to discharge that burden, the prosecution must show that when the child committed the act in question, he or she knew that what was being done was not merely wrong but seriously wrong [at 462-463].*

Secondly, Victoria Police and the Director of Public Prosecutions may exercise their respective discretions not to prosecute a matter in circumstances where there is a consensual relationship between very young children of a similar age.

Again, this limitation is balanced against the need to protect young children from sexual assault. This amendment makes it clear that children aged less that 12 cannot legally consent to sex. In so far as this may impinge on the rights of 10 -13 year olds who have consensual sex with one another, this can be managed through the application of the principle of doli incapax and the sensible exercise of the discretions that exist in the criminal justice system.

***SARC Question C:** if so, whether or not clause 3(5) is a reasonable limit on these Charter rights and, in particular, whether there are less restrictive means reasonably available to achieve the purpose of preventing sexual abuse of children aged 10 and 11.*

SARC provides two possible alternatives to clause 3(5), including making the statutory defences available in all cases (as in the offence of indecent acts with children) and providing that children aged 13 or under cannot be convicted of a child sexual offence except in special circumstances (as in Canada).

The reasons given above in responses to questions A and B provide justification for not making the statutory defences available in all cases. That the age level at which the defences become available will now match the age level at which it has been found that children begin to become involved in consensual relationships, is a very reasonable outcome.

Making the statutory defences available in all cases would infer that children of any age could legally consent to sex with adults in some circumstances. That would not be appropriate.

Further, in respect to the suggestion that children aged 13 or under cannot be convicted of a child sexual offence except in special circumstances, children in Victoria who are aged under 14 years have the general protection ('doli incapax'), described above, as expressed in the Supreme Court case of R (A Child) v Whitty (1993) 66 A Crim R.

Thank you for bringing your concerns to my attention.

ROB HULLS MP
Attorney-General

Received 15 March 2010

The Committee thanks the Attorney-General for this response.

Justice Legislation Miscellaneous Amendments Bill 2009

The Bill was introduced into the Legislative Assembly on 13 October 2009 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 9 November 2009 and made the following comments in Alert Digest No. 13 of 2009 tabled in the Parliament on 10 November 2009.

Committee's Comments

Charter report

Expression – Fair hearing – Regulation of recordings of police questioning

Summary: Clause 4 introduces new offences of possessing, playing, supplying, copying, modifying or publishing recordings of police questioning. Aspects of clause 4 may engage the Charter's right to a fair hearing or may be arbitrary limits on freedom of expression. The Committee will write to the Minister seeking further information.

The Committee notes that clause 4 introduces new offences of possessing, playing, supplying, copying, modifying or publishing recordings of police questioning.

The Statement of Compatibility remarks:

> *As these provisions restrict a person's freedom to seek, receive and impart records of interview, the right to freedom of expression is engaged. However, to the extent that the right is engaged, it is clear that these provisions would fall within the permissible limitations set out in s 15(3) for the protection of the rights and reputation of other person and for the protection of public order. Restricting the proliferation of these records is reasonably necessary to protect the privacy of persons connected with police interviews, such as the identity of victims and witnesses which may be revealed during the course of an interview, as well as the identities of the interviewee and police investigators themselves. As the records of interview now incorporate a visual medium, it is much easier for a person's identity to be revealed than on the older audio-only analogue recordings. There is also the possibility that trials may be jeopardised if jurors are exposed to material published on the internet, especially if such records have been manipulated or doctored using digital editing software.*

While the Committee considers that protecting privacy and trials are purposes that justify limiting Charter rights to freedom of expression, it has a number of concerns about the details of clause 4.

First, in relation to distribution of recordings within the justice system, while clause 4 authorises numerous state employees to possess, play, receive or copy recordings without court permission, the only private persons who are similarly authorised are lawyers who represent the interviewee or a co-accused. So:

- *All non-state parties or prospective litigants in both criminal and civil matters will need to apply to a court for permission to supply a recording to any private individual other than their own legal representative (e.g. supplying the recording to an expert for analysis or emailing a copy of it to a witness, colleague or friend for advice.) Indeed, although the recording can be supplied to a co-accused's legal representative, a court's permission will be needed before anyone (including that representative) can supply a recording to the co-accused himself or herself.*
- *New section 464JA(4) may interfere with the obligations of police and prosecutors to disclose relevant recordings to criminal defendants other than the interviewee (e.g. unrepresented co-accused, persons charged instead of the interviewee, or persons charged in separate matters where the recording is nonetheless relevant.)*
- *There is no provision for unrepresented co-accused or any other potential litigants other than the interviewee to ask a court to extend the period for mandatory period for recordings that are relevant in their proceedings.*

Clause 4 may therefore engage the Charter's right to a fair hearing for criminal defendants and parties to civil proceedings.

Second, in relation to distribution outside the justice system:

- *New section 464JA(7)'s prohibition on publishing recordings uses a broad definition of 'publish' that includes 'insert in a newspaper or other publication' or 'bring to the notice of the public... by any other means'. It may therefore limit, not only the distribution of recordings themselves, but also the distribution of information they contain, e.g. transcripts of the interview and summaries of what was said.*
- *New section 464JB's provision for a court to make directions permitting the distribution of recordings doesn't provide any criteria on how that discretion is to be applied. In Western Australia, judges have taken divergent approaches in applying a similar provision and have accordingly differed on matters such as the release of a tape of a deceased suspect to his grieving family and the publication of a police interview that led to a notorious miscarriage of justice.*
- *Clause 4 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.*

Clause 4 may therefore operate in an arbitrary or disproportionate fashion, contrary to the Charter's requirement that restrictions on freedom of expression be 'lawful'.

The Committee observes that the Western Australian law that clause 4 broadly resembles has been criticised by the Chief Justice of Western Australia as 'unusual when compared to analogous legislation in other comparable jurisdictions'. In South Australia, the problem of dissemination of recordings outside of the criminal justice system is dealt with through a significantly less restrictive provision:

> *A person must not play to another person a videotape or audiotape containing an interview or part of an interview recorded under this Part except where the videotape or audiotape is played—*
>
> *(a) for purposes related to the investigation of an offence; or*
>
> *(b) for the purposes of, or purposes related to, legal proceedings, or proposed legal proceedings, to which the interview is relevant; or*
>
> *(c) with the permission of a court before which the videotape or audiotape has been tendered in evidence*

Moreover, the Western Australian provisions are themselves less restrictive than clause 4 in that they:

- *ban only the 'broadcast' of a recording, not other forms of publication.*
- *contain specific exceptions for police and prosecutors' discovery obligations.*
- *permit anyone to apply for an extension of the mandatory retention period for recordings.*
- *With the exception of the broadcasting offence, are punishable only by fine.*

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

1. ***Does clause 4 interfere with police and prosecutors' disclosure obligations in relation to defendants other than the interviewee?***
2. ***Does clause 4 restrict the publication of transcripts or summaries of recordings?***
3. ***What criteria will govern the exercise of the discretion in new section 464JB?***
4. ***Does clause 4 apply to recordings made before the commencement of the Act?***

Pending the Minister's response, the Committee draws attention to clause 4.

The Committee makes no further comment.

Minister's Response

Thank you for your letter dated 11 November 2009 regarding the Committee's consideration of the Justice Legislation Miscellaneous Amendments Bill 2009. I apologise for the delay in responding to your letter.

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

1. Does clause 4 interfere with police and prosecutors' disclosure obligation in relation to defendants other than the interviewee?

No. Clause 4 does not affect the provisions governing the creation and service of briefs of evidence. The Criminal Procedure Act 2009 sets out disclosure obligations of the prosecution case in summary (ss 35-49), committal (ss 107-117) and trial proceedings (ss 182-191). Relevantly, the prosecution is required to provide the accused with the record of interview of the accused as well as any audiovisual recording of any admissions or confessions made by the accused in accordance with subdivision (30A) of Division 1 of Part III of the Crimes Act 1958. The Criminal Procedure Act 2009 does not obligate prosecutors to disclose the record of interview to criminal defendants other than the interviewee.

Instead, the Act requires the prosecution to disclose any information or document that is in their possession and is relevant to the alleged offence, including statements made by witnesses upon which they intend to rely, evidentiary material relating to a confession or admission made by the accused relevant to the charge and statements or summaries of evidence given by witnesses that the prosecution does not intend to call. As clause 4 does not restrict the disclosure of transcripts or summaries of recordings (as discussed below), the obligations of police and prosecutors to disclose relevant recordings to criminal defendants under the Criminal Procedure Act 2009 and the Crimes Act 1958 remain the same.

The right to a fair hearing under section 24 of the Charter encompasses the principle of 'equality of arms'. An accused must be informed of the case against him or her and be permitted to respond to it. While this right is not absolute and may be reasonably limited in the interests of public order, national security or protecting the privacy rights of others, proper steps should be made to provide the accused with all material genuinely relevant to the charges, including that which may assist the defence. As clause 4 does not prevent the transcripts or summaries of relevant recordings from being disclosed to the accused, it cannot be said that the right is limited as the accused still has access to the substantive information conveyed in the recordings.

Accordingly, new section 464JA(4) does not limit the Charter's right to a fair hearing as the accused will have access to any statements, transcripts or summaries of relevant records of interview that may be relied upon by the prosecution or otherwise relevant to the offence.

2. Does clause 4 restrict the publication of transcripts or summaries of recordings?

No. Clause 4 restricts the use and publication of an audio or audio visual recording only. The offence of publishing a recording targets the inappropriate dissemination of an audiovisual recording only. This means the publication of the actual visual images, in either moving picture or still image, and the broadcasting of the audio stream. The clause does not restrict the publication of transcripts or summaries of recordings. The definition of publish is deliberately defined very broadly to capture the multitude of ways in which video recordings can be made available to others. The definition is intended to capture new and emerging technologies such as video sharing websites as well as existing methods of distribution. The intention of these restrictions is to protect the privacy of persons connected with the interviews, restrict the distribution of these recordings to authorised persons only and to prevent these recordings from being manipulated or used to corrupt investigative or judicial processes.

While the restrictions on the use and publication of an audio or audio visual recording do engage the right to freedom of expression, the scope of these restrictions do not extend to

the publication of transcripts or summaries of recordings. It is my opinion that these restrictions fall within the permissible limitations set out in s 15(3) for the protection of the rights and reputation of other persons and for the protection of public order as I set out in the Statement of Compatibility.

3. What criteria will govern the exercise of the discretion in new section 464JB?

There are no set criteria and the court's discretion is at large. A court will take into account the provisions, the objectives of the legislation and the circumstances of any given case in deciding what order is appropriate or necessary. New section 464JB is intended to grant the court flexibility in deciding whether to permit the distribution of a recording so that the legislation is applied fairly in a given circumstance and does not operate in a disproportionate, unfair or arbitrary fashion. I consider the imposition of restrictions or directions upon the exercise of this discretion to be counterproductive to this aim.

4. Does clause 4 apply to recordings made before the commencement of the Act?

No. The new provisions will take effect from the commencement date and will only apply to those records of interview conducted on or after that date. The courts have frequently declared that, in the absence of some clear statement to the contrary, an Act will be assumed not to have retrospective operation (Maxwell v Murphy (1957) 96 CLR 261). An amending enactment that inserts new sections in the principal Act is prima facie to be construed as having a prospective operation only and those inserted sections are not to be regarded as having been included in the Act from the outset. Accordingly, transitional arrangements were not considered necessary for the proper operation of these provisions.

That said, I acknowledge that the drafting of clause 5, which expressly specifies that section 464H of the Crimes Act 1958 applies to a recording made on or after the commencement of the Bill, is confusing as the Bill is silent on the retrospective application of the new offence provisions inserted by clause 4. 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.

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

Bob Cameron MP
Minister for Police & Emergency Services

16 March 2010

The Committee thanks the Minister for this response

Committee Room
22 March 2010

Appendix 1
Index of Bills in 2010

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Appendix 2
Committee Comments classified by Terms of Reference

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

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Section 17(a)

(i) trespasses unduly upon rights or freedoms

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

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

Transport Integration Bill 2009 1

(vi) inappropriately delegates legislative power

Justice Legislation Amendment Bill 2010 4
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(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities

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Section 17(b)

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

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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*

Outstanding correspondence

Public Finance and Accountability Bill 2009	Treasurer	02.02.10	1 of 2010
Severe Substance Dependence Treatment Bill 2009	Mental Health	02.02.10	1 of 2010
Child Employment Amendment Bill 2010	Attorney-General	23.03.10	4 of 2010
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