

# **No. 5 of 2010**

**Tuesday, 13 April 2010**

**On the**

Education and Training Reform  
Further Amendment Bill 2010

Environment Protection Amendment  
(Landfill Levies) Bill 2010

Equal Opportunity Bill 2010

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

Members of Parliament (Standards)  
Bill 2010

Therapeutic Goods (Victoria)  
Bill 2010

Trustee Companies Legislation  
Amendment 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 –**

Education and Training Reform Further Amendment Bill 2010  
Environment Protection Amendment (Landfill Levies) Bill 2010  
Members of Parliament (Standards) Bill 2010  
Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010  
Therapeutic Goods (Victoria) Bill 2010  
Trustee Companies Legislation Amendment Bill 2010

## **The Committee notes the following correspondence –**

Equal Opportunity Bill 2010



### **Role of the Committee**

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

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

# Alert Digest No. 5 of 2010

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## Education and Training Reform Further Amendment Bill 2010

Introduced	23 March 2010
Second Reading Speech	25 March 2010
House	Legislative Assembly
Member introducing Bill	Hon. Bronwyn Pike MLA
Portfolio responsibility	Minister for Education

### Purpose

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

- enlarge the functions of the Victorian Institute of Teaching (the 'VIT') to include developing standards for higher levels of professional practice by teachers; **[5]**
- provide for police record checks to be carried out on prospective teachers; to streamline the qualification requirements for non-practising teachers who wish to return to full registration; **[6, 8 and 9]**
- require that certain information regarding the outcome of an adverse finding by a formal hearing panel or cancellation of a registration must be published on the VIT Register of Teachers (*note the written submission by Privacy Commissioner*); **[11]**
- require the institute to notify the Director of Transport of certain determinations made by formal hearing panels relating to teachers; **[12]**
- expand the class of potential authorised users of the Victorian student number. (*note the written submission by Privacy Commissioner*). **[15 and 16]**

The Bill updates the language of the *Mildura College Lands Act 1916* and re-enact those provisions in the *Education and Training Reform Act 2006*. The 1916 Act and two related amending Acts will be repealed. **[17 to 19]**

Extracts from the Second Reading Speech –

*The Bill will introduce a system of continuous police record checks on registered teachers on a very similar basis that police record checks are carried out on people who hold a working with children assessment notice. The institute will receive regular, current information about whether a registered teacher has been charged with, or committed for trial for, or been found guilty of a relevant offence in Victoria. The amendments in this Bill introduce a process whereby people who apply to become a registered teacher, and teachers who apply to renew their registration, consent to ongoing continuous Victorian police record checks. [6, 8 and 9]*

...

*This Bill amends the information included in the institute's public register of teachers. The inclusion of adverse outcomes of disciplinary action on the public register will result in greater transparency and improved client service to employers who are employing teachers and to people who employ or otherwise engage registered teachers in a non-teaching context. ... Balancing the public interest and the rights of the individual to privacy is best achieved by limiting information about adverse outcomes on the register to a description of the teacher's registration status. The institute will not publish any details about the circumstances that lead to the adverse outcome on the register. [11]*

... Requiring the institute to notify the Director of Public Transport of certain determinations made by a formal hearing panel relating to teachers will provide added protections for students and school communities. There are cases where a teacher who is subject to adverse outcomes of disciplinary action may be employed as a school bus driver. [12]

... This Bill extends the classes of authorised users of the VSN (Victorian Student Number) to those organisations and Victorian government departments that administer those education and training sectors. Skills Victoria, the Adult, Community and Further Education Board, and the Catholic Education Commission of Victoria all require the authority to access and utilise the VSN in order to ensure that the system operates efficiently and effectively. Importantly, the Bill maintains the safeguards that were put in place when the VSN was introduced. The Bill does not alter the operation of the VSN or change the way in which authorised bodies can access and use the VSN. [15 and 16]

... The Bill will update the language of the Mildura College Lands Act 1916, make a number of changes to improve its operation, and re-enact the provisions in the Education and Training Reform Act 2006. The 1916 Act and two amending Acts - the Mildura College Land (Ranfurly) Act 1992 and the Mildura College Lands (Amendment) Act 1995 – will be repealed. [17, 19, 23, 24 and 26]

## Submissions to the Committee

The Committee received a written submission from Ms Helen Versey, Privacy Commissioner, Office of the Victorian Privacy Commissioner. In brief the submission deals with two privacy concerns –

- (1) Information published about teacher registration on the Register of Teachers.
- (2) Access, use and disclosure of the Victorian Student Number (VSN) information by additional agencies and organisations.

The full text of the written submission will be made available on the Committee website.

## Content and Committee comment

### **Privacy – Teacher registration – Publicly available records – Information Privacy Act 2000**

The Bill provides that certain particulars in relation to each registered teacher will be included on the register of teachers such as whether the registration of the teacher is subject to a condition, limitation or restriction or has been suspended or cancelled as the result of a decision made by a formal hearing panel.

The Committee notes that the Victorian Teaching Institute (the ‘Institute’) must make an up-to-date copy of the register available for inspection by any person at the Institute's offices. The purpose of including these details on the register is to enable members of the public to confirm the fact that a teacher is registered in circumstances where a teacher may be working with children outside of his or her employment as a teacher.

The Committee further notes that no personal information will be contained on the register apart from the name of an individual and the state of his or her registration, including whether or not the registration is subject to a condition or has been cancelled or suspended. (Note the relevant extract of Second Reading Speech above) [11]

### **Cancellation and suspension of Teacher recorded and published on the Teachers Register – Whether unduly requires or authorises acts or practices that may have an adverse effect on privacy within the meaning of the Information Privacy Act 2000**

The summary of the written submission provided by the Privacy Commissioner states –

**The Bill provides for an expansion of information to be contained on the Register of Teachers ('the Register'). In relation to cancelled and suspended teachers, this proposal generates significant privacy concerns:**

- *The proposal (inclusion of 'cancelled' teachers on the Register) has the same practical effect of the current procedure (removal of 'cancelled' teachers from the Register) but does so in a way that affects the privacy of teachers.*
- *Publication of the fact a teacher has been cancelled may have a substantial prejudicial effect on an individual teacher, and may cause members of the public to unfairly speculate on the reasoning behind the cancellation. This could potentially cause prejudicial effects in non-teaching related areas.*
- *A cancelled teacher's personal information, and their status as a cancelled teacher, would remain on the Register indefinitely.*
- *Publication of a teacher's cancellation on the Register would occur before all appeal mechanisms are exhausted. As the Register is published online, search engines may store and cache cancellations which are subsequently overturned on appeal.*

**The Committee notes the submission of the Privacy Commissioner and will forward the Commissioner's full written submission to the Minister for further comment and advice.**

***Student identification number – access and use by wider group of agencies and organisations – Information Privacy Act 2000***

The Bill extends the classes of authorised users of the VSN to those organisations and Victorian government Departments that administer adult and vocational education and training such as Skills Victoria, the Adult, Community and Further Education Board, and the Catholic Education Commission of Victoria. (*Note the relevant extract of Second Reading Speech above*). [15 and 16]

***Unduly requires or authorises acts or practices that may have an adverse effect on privacy within the meaning of the Information Privacy Act 2000***

The summary of the written submission made by the Privacy Commissioner states –

***The Bill's expansion in the access, use and disclosure of Victorian Student Number (VSN) information to additional organisations:***

- *Does not sufficiently justify why each additional organisation requires access to VSN information.*
- *Should be limited to the actual unit(s) which require access to VSN information in each circumstance, rather than provide authorisation at a general Departmental level.*

**The Committee notes the submission of the Privacy Commissioner and will forward the Commissioner's full written submission to the Minister for further comment and advice.**

**The Committee makes no further comment.**

## **Environment Protection Amendment (Landfill Levies) Bill 2010**

<b>Introduced</b>	24 March 2010
<b>Second Reading Speech</b>	25 March 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Maxine Morand MLA
<b>Portfolio responsibility</b>	Minister for Energy and Resources

### **Purpose**

The Bill amends the *Environment Protection Act 1970* by inserting a new Schedule D to increase the amount payable as landfill levy for each tonne of municipal and industrial waste deposited on Schedule C premises and Non-Schedule C premises. The increases are in two increments, the first for waste deposited on or after 1 July 2010 and for then for waste deposited on or after 1 July 2011.

Extract from the Second Reading Speech –

*Landfill levies serve two purposes.*

*Firstly, the levies act as an incentive to minimise waste and encourage greater reuse and recycling of resources while promoting investment in alternatives to waste disposal to landfill. Secondly, landfill levies play an important funding role to provide waste management infrastructure, support programs for industry, education programs and the resourcing of the bodies responsible for waste planning and management in Victoria.*

*... From 1 July 2010 the levy for every tonne of municipal waste (household and council) and commercial waste will increase.*

*Following two initial increases on 1 July 2010 and 1 July 2011, levies will progressively be increased over the following three years, to 2014-15.*

### **Charter report**

***Charter rights – Right to life – Arbitrary deprivation of life – Dumping of toxic, hazardous or dangerous goods – Impact on illegal dumping by increasing landfill levies***

*The Committee notes the comments made by the Minister in the Second Reading Speech concerning the overall policy objective of the Bill in respect to waste abatement.*

*The Committee expressed concern that a possible policy impact or implication of dramatically increased landfill levies may be the exacerbation of illegal dumping of toxic, hazardous or dangerous waste on private and public property. As a consequence public health issues arising from such illegal dumping may engage the ‘right to life’ Charter provision in the sense of any adverse impact on public health and therefore the right not to be arbitrarily deprived of life.*

***The Committee considers that the question of striking an appropriate balance and assessing the competing risks in respect to competing interests in regard to this matter is a matter for Parliament’s consideration.***

***The Committee draws attention to the provisions in the Bill.***

**The Committee makes no further comment.**

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

<b>Introduced</b>	23 March 2010
<b>Second Reading Speech</b>	25 March 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Portfolio responsibility</b>	Attorney-General

## Purpose and Background

The Bill amends the —

- *Sentencing Act 1991* and the *Children, Youth and Families Act 2005* in relation to victim impact statements to provide that victims may read aloud the victim impact statement in court, and to clarify that a victim impact statement may include non-written and other material such as photographs or drawings. The amendments will also allow the victim to nominate another person to read the statement. The amendments include provision for alternative arrangements for reading aloud a statement or the giving of evidence in relation to statements such as the use of CCTV or screens. **[3 to 10]**
- *Victims of Crime Assistance Act 1996* to enable the Chief Magistrate to delegate powers of the Victims of Crime Assistance Tribunal to judicial registrars and to provide for a category of reasonable safety-related expenses such as replacement safety locks or removal costs. **[11 to 16]**
- *Family Violence Protection Act 2008* with consequential amendments to the *Stalking Intervention Orders Act 2008*, to address operational issues and ensure the two schemes are procedurally aligned. **[17 to 40]**
- *Children, Youth and Families Act 2005* in respect to the Children and Young Persons Infringement Notice System and make similar amendments to the *Infringements Act 2006* concerning the commencement of proceedings in the Children's Court. **[41 to 47]**
- *Liquor Control Reform Act 1998* to increase the infringement penalty amount for the offence of a person who is drunk, violent or quarrelsome refusing or failing to leave licensed premises if requested to do so by a licensee, a permittee or a member of the police force and increase the period of banning order from 24 hours to 72 hours. **[48 and 49]** (Refer to Charter report below)
- *Summary Offences Act 1966* to increase the maximum penalties for the offences of being drunk in a public place, drunk and disorderly in a public place and behaving in a disorderly manner. The Bill also amends the Act to increase the infringement penalty amounts for those three offences along with the offence of behaving in a riotous, indecent, offensive or insulting manner. **[50 to 53]**

Extracts from the Second Reading Speech –

*Part 2 of the Bill amends the Sentencing Act 1991 and Children, Youth and Families Act 2005 in order to:*

- *clarify that a victim, or their chosen representative with the court's approval, may read their victim impact statement aloud in court;*
- *clarify that a statement may include non-written and other material;*
- *provide court discretion to allow alternative arrangements for reading statements or giving evidence by victims and witnesses in relation to the statements;*
- *update the definition of 'victim' in the Children, Youth and Families Act for consistency with the Sentencing Act.*

... The Criminal Procedure Act 2009 provides protections for particular categories of vulnerable victims when giving evidence, for example allowing evidence to be given by closed-circuit television. The Bill extends these protections, at the court's discretion, to victims and witnesses in relation to a victim impact statement.

Part 2 of the Bill also amends the Victims of Crime Assistance Act 1996 to:

- allow the Chief Magistrate to delegate powers to judicial registrars, with an appropriate review mechanism;
- create a new assistance award category of safety-related expenses.

... The VOCA Act provides an existing, but limited, delegation power in relation to registrars of VOCAT. The Bill's amendments enable the Chief Magistrate to delegate some or any of the powers of VOCAT to judicial registrars, other than the powers of review or delegation. ...An applicant may use the existing review provisions to seek further review of the final determination at the Victorian Civil and Administrative Tribunal.

VOCAT awards assistance under particular categories. There is no safety-related expenses category, and VOCAT currently awards safety-related expenses to victims of crime under the category for other expenses to assist recovery in 'exceptional circumstances'. ... The amendment inserts a specific award category for reasonable safety-related expenses arising as a direct result of the offence. This will enable victims of violent crime to access assistance for security measures and help prevent further victimisation. It will also facilitate access to urgent assistance through VOCAT's capacity to provide awards on an interim determination.

... The substantive amendments to the Family Violence Protection Act will:

- clarify existing police search powers to include appropriate seizure powers;
- enable the court to include a child as a protected person on an interim intervention order on its own initiative, consistent with the courts current powers in respect of final orders;
- enable the court to base interim orders on family violence safety notices (notices), which are certified by police officers.

... Finally, the Bill makes amendments to the Summary Offences Act 1966 and Liquor Control Reform Act 1998 to double specified maximum and infringement penalties for drunkenness and public disorder offences and increase the maximum possible duration of banning notices from designated areas or licensed premises from 24 hours to 72 hours. ...

## Content and Committee comment

The Bill proposes to increase the maximum period of a banning notice under the *Liquor Control Reform Act 1998* from 24 hours to 72 hours.

**Note:** Under section 148B of the Act a banning notice may be issued to a person by a relevant police member who suspects on reasonable grounds that the person is committing or has committed a specified offence wholly or partly in an area which has been declared by the Director of Liquor Licensing as a designated area under section 147. A banning notice bans the person from the designated area or all licensed premises in the designated area for the period specified in the notice. At present the period specified in the banning notice must not exceed 24 hours starting from the time the notice is given to the person to whom it applies.

## Charter report

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

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

The Committee notes that clause 49, amending existing s.148B(2) of the Liquor Control Reform Act 1998, increases the period that may be specified in a banning notice from 24 to 72 hours. Under existing Division 2 of Part 8A, police can issue such notices to people who they reasonably suspect have committed an offence in a designated area if they reasonably believe that the notice may be effective in preventing a further offence carrying the risk of alcohol-related violence or disorder in that area.<sup>1</sup> Breaching a notice is punishable by a fine of over \$2000.<sup>2</sup>

The Statement of Compatibility remarks:

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

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

- Banning notices, which are short bans on the basis of suspected criminal behaviour, issued and reviewable by police officers.<sup>3</sup>
- Exclusion orders, which are lengthy bans imposed on the basis of proved criminal behaviour, issued and reviewable by courts.<sup>4</sup>

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

First, a 72-hour ban may extend well beyond the aftermath of a drunken evening and impinge on legitimate weekday activities. While existing s. 148B(6) prevents a full banning notice from being issued to a person who lives or works in the designated area, such a notice may still be issued to a person who needs to travel through that area to get to work, attend school or for other legitimate purposes. As current designated areas include the entire Melbourne CBD (including the city loop train stations and all CBD tramlines) and the centres of some towns,<sup>5</sup> the Committee considers that clause 49 engages the Charter's right to freedom of movement.<sup>6</sup>

<sup>1</sup> Liquor Control Reform Act 1998, s. 148B(3).

<sup>2</sup> Liquor Control Reform Act 1998, s. 148F(1).

<sup>3</sup> Liquor Control Reform Act 1998, Part 8A, Division 2.

<sup>4</sup> Liquor Control Reform Act 1998, Part 8A, Division 3.

<sup>5</sup> Present designated areas include the city centres of Melbourne, Ballarat, Bendigo, Frankston, Shepparton, Traralgon and Warrnambool. See:

The Committee observes that, in the case of exclusion orders, legitimate activities in designated areas are accommodated by permitting the courts who issue the orders to permit entry to designated areas for 'specified purposes'.<sup>7</sup> In his Statement of Compatibility to the Bill that introduced Part 8A, the Minister remarked that this provision ensured that the negative effects of a long order could be avoided 'such as through the imposition of a condition enabling the offender to travel through the area to attend work'.<sup>8</sup> By contrast, banning notices are less flexible, as the issuing officer must ban a suspect either from the entire designated area or from all licensed premises in the area.<sup>9</sup> More nuanced bans can only be achieved if a senior police officer decides to vary the notice.<sup>10</sup>

Second, the increased 'deterrent effect' of a potential 72-hour ban may give banning notices a punitive aspect, especially if they are used to deter people who have been given notices on 'multiple occasions'. The existing scheme permits courts to take account of an offender's past banning notices when making exclusion orders,<sup>11</sup> but bars police from extending an existing notice or issuing multiple banning notices on the basis of a single suspected offence.<sup>12</sup> The Committee is concerned that the use of 72-hour banning notices to deter people who are repeatedly suspected of offences in a designated area may amount to punishment of suspected criminal behaviour by police officers without a charge, trial or appeal and therefore may engage the Charter's rights with respect to criminal punishment, including a fair hearing by an independent tribunal, the presumption of innocence and the right to appeal to a court.<sup>13</sup>

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

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

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

**The Committee makes no further comment.**

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[http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/alcohol/alcohol+and+the+community/what+we\\_re+doing/justice+-+alcohol+-+designated+areas](http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/alcohol/alcohol+and+the+community/what+we_re+doing/justice+-+alcohol+-+designated+areas).

<sup>6</sup> Charter s. 12 provides: 'Every person lawfully within Victoria has the right to move freely within Victoria'.

<sup>7</sup> *Liquor Control Reform Act 1998*, s. 148I(5)(b).

<sup>8</sup> Statement of Compatibility, *Liquor Control Reform Amendment Bill 2007*.

<sup>9</sup> *Liquor Control Reform Act 1998*, ss. 148B(1) & 148C(g) & (h).

<sup>10</sup> *Liquor Control Reform Act 1998*, s. 148E(1).

<sup>11</sup> *Liquor Control Reform Act 1998*, s. 148I(6)(c).

<sup>12</sup> *Liquor Control Reform Act 1998*, ss. 148E(2) & 148B(8).

<sup>13</sup> Charter ss. 24(1), 25(1) and 25(4).

## Members of Parliament (Standards) Bill 2010

<b>Introduced</b>	23 March 2010
<b>Second Reading Speech</b>	25 March 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Minister responsible</b>	Hon. John Brumby MLA
<b>Portfolio responsibility</b>	Premier

### Purpose

The purpose of the Bill is to promote public trust and confidence in Members of Parliament by –

- establishing a Statement of Values for Members of Parliament [4];
- setting out a Code of Conduct for Members of Parliament [5 to 16]; and
- establishing a Register of Interests for Members of Parliament [17 to 29].

The Bill will also repeal the *Members of Parliament (Register of Interests) Act 1978*. [33]

### Submissions received by the Committee

The Committee received a written submission from Ms Helen Versey, Privacy Commissioner, Office of the Victorian Privacy Commissioner. The submission deals with two privacy concerns –

- (1) the code of conduct provided in the Bill inadequately deals with the privacy and the handling of personal information about Victorians by Members of Parliament.
- (2) Third parties may not be aware that their personal information (transactions and dealings with Members) may be published in the Member's Register of Interests.

The written submission will be made available on the Committee website.

### Content and Committee comment

Extract from the Second Reading Speech –

#### *The Register of interests*

... The Bill will require Members to declare a range of interests in the register. In essence, particular details of the following interests will need to be disclosed:

*outside income; investments; atypical debts<sup>14</sup>; gifts and contributions to travel outside of Victoria; estates; offices held; trusts (including family<sup>15</sup> trusts); memberships considered a potential conflict of interest; and; and any other interests where a conflict of interest could arise or could reasonably be seen to arise.*

*Members will be required to declare outside income, investments, land and debts if they are valued at more than \$2000. This threshold will be indexed and rounded to the nearest \$500. Gifts and travel contributions over \$500 will need to be declared. This threshold will be indexed and rounded to the nearest \$100. Gifts and travel contributions provided by family are*

<sup>14</sup> **debt** does not include a debt —

- owed to a member of the Member's family; or
- owed to an authorised deposit-taking institution; or
- owed to a person whose ordinary business includes the lending of money; or
- arising from the supply of ordinary household or office-related goods and services;

<sup>15</sup> **family**, in relation to a Member, means the Member's spouse, domestic partner, child, grandchild, parent or grandparent, or any other person reasonably considered to be a member of the Member's family;

*exempt from disclosure. ... the Bill provides that gifts provided by friends must be disclosed if over the threshold amount.*

*... if Members receive a number of gifts from the same source which are valued below the disclosure threshold, they will be required to declare them if the aggregate total of the gifts is above the threshold.*

*Members will not be required to register official hospitality, which is hospitality received as part of the regular and expected duties of a Member of Parliament. For example, this may include duties undertaken as part of the responsibilities of a local Member, a Minister or a Member of a Parliamentary Committee.*

*In relation to memberships and associations, Members will only need to disclose that they are a member of or associated with a particular organisation if a conflict of interest could arise, or could reasonably be seen to arise, because of that Membership. Members may also list memberships of or associations with organisations they are not required to disclose.*

*Street addresses of primary or secondary residences will no longer need to be disclosed ....*

*The address of land, or if there is no address, the precise description of land, owned by a Member which is not used as a primary or secondary place of residence by any person will need to be disclosed. While monetary values of interests will not need to be declared, the number of shares held in investments will.*

*In line with current practice, Members will be required to submit annual returns to the Clerks of the Parliament. Members must update their returns if there is a substantial change in their circumstances. Rather than publishing a summary of the returns, the Clerks will publish the returns in full.*

*The Clerk of the Parliament will be empowered to report a Member to the relevant Presiding Officer if a Member has failed to submit a return in accordance with the Act. The Clerk will, however, only exercise this power once they are satisfied the Member has been given reasonable opportunity to comply.*

### **Code of Conduct – Respect for others and personal conduct**

The Bill provides for a Member Code of Conduct. [5 to 16] The Code deals with such matters as conflicts of interest, using position for profit, outside employment, accepting gifts and other benefits, use of influence and public resources. The Part also deals with personal conduct and requires Members to treat all persons with respect and have due regard for their opinions, beliefs, rights and responsibilities and requires that Members ensure that their conduct as Members does not bring discredit to the Parliament. [7 and 14] (Refer to Charter report below)

### **Managing confidential and personal information – Privacy – Collecting, managing, storing and use of personal information by Members – Breach of privacy – Information Privacy Act 2000 – Introduction of Charter – Whether Bill sufficiently complies with Charter**

The Bill provides that Members must not use confidential information gained in the performance of their public duties to further their own interests or the interests of a prescribed person and must respect the confidentiality of information they receive in the course of their public duties. [15]

(Also refer to the full written submission made by the Privacy Commissioner and the Charter report below).

Summary of written submission made by the Privacy Commissioner –

**The Bill's 'Code of Conduct' is a lost opportunity to protect the privacy rights of Victorians in the handling of personal information by Members of Parliament, as:**

- *The requirement that a breach of the Code be a 'willful contravention' is an extremely high standard requiring intentional conduct. Privacy breaches tend to occur through negligent or careless action.*

- ‘Confidential information’ is undefined in the Bill, and no protection is afforded to ‘personal information.’
- The Bill contains no defined complaint mechanism that members of the public can access in the case of a breach of the Code.
- The Bill contains no ability for a member of the public to redress or be compensated for damage or loss suffered as a result of mismanagement of confidential/personal information by Members of Parliament.
- Clause 15 (Managing confidential and personal information) is not as detailed or clearly defined as privacy requirements in the Information Privacy Act or the SARC Privacy Code of Conduct for MPs.

**The Committee notes the written submission made by the Privacy Commissioner and will forward a copy to the Premier.**

### **Publication of information from the Member’s Register of interests – Third party interests – Information Privacy Act 2000**

Part 4 of the Bill provides for the maintenance of a public register of Member’s interests. Members must provide a return each year. The Register records a range of information regarding pecuniary and non-pecuniary interests of the Member. [19] In respect to pecuniary interests the Bill provides certain thresholds that must be included in the Register and these monetary thresholds are to be indexed annually. [22 to 25] The Clerk of each House must table a return in the Parliament. [29] (Also refer to the full written submission made by the Privacy Commissioner).

Summary of written submission made by the Privacy Commissioner –

- Individuals who transact with MPs may be unaware that the relevant transaction and their personal information may be published in the way set out in the Bill. The Bill should require Members of Parliament take reasonable steps to inform third party individuals that this will occur in the relevant circumstances.
- Further consideration should be given to what information should be included on any online publication of the Register, including consideration of safety and security concerns of third parties.

**The Committee notes the written submission made by the Privacy Commissioner and will forward a copy to the Premier for further advice concerning this information privacy concern.**

### **Publication of information from the Member’s Register of Interests – Information Privacy Act 2000**

The Bill also restricts publication either inside or outside Parliament information derived from the Member’s Register of Interests unless the information amounts to a fair and accurate summary of the information on the Register and unless the comment on those matters is fair and published in the public interest without malice. [28] (Refer to Charter report below).

### **Punishment for a wilful contravention of code of conduct or Member’s Register requirement**

The Bill provides that a wilful contravention of a requirement under Parts 3 and 4 (Code of Conduct and the Member’s Register of Interests) is a contempt of the Parliament and a House of the Parliament may impose a punishment and in addition impose a fine of up to \$4,000. [30] In default of payment of the fine the seat of the Member becomes vacant. [31] (Refer to Charter report below).

## Charter report

### **Freedom of expression – Contempt of parliament – Lack of respect, discredit and lack of courtesy by Members – Unfair publications derived from the register of interests – Whether lawful restrictions reasonably necessary**

*Summary:* Clause 30(1) provides that a wilful contravention of the Bill is ‘a contempt of Parliament and may be dealt with accordingly’. While the Committee considers that the purposes of protecting Parliament and respecting the reputations of Members may justify restrictions on freedom of expression, it is concerned about two aspects of the scheme.

**The Committee notes that clause 30(1) provides that a wilful contravention of the Bill is ‘a contempt of Parliament and may be dealt with accordingly’.** Clause 30(1) applies to the following requirements of the Bill:

- clause 7, requiring Members to ‘treat all persons with respect and have due regard for their opinions, beliefs, rights and responsibility’
- clause 14(1), requiring that Members ‘ensure that their conduct as Members does not bring discredit upon the Parliament’
- clause 14(3), requiring that Members ‘must be fair, objective and courteous in their dealing with the community and, without detracting from the importance of robust public debate in a democracy, with their colleagues’
- clause 28(a), barring everyone from publishing information derived from the Register of Interests unless it ‘amounts a fair... summary’ of that information
- clause 28(b), barring everyone from publishing any comment on information from the Register ‘unless that comment is fair’

The common law provides that a contempt of parliament can be tried and punished (including by imprisonment) by Parliament itself. Clauses 30(2) and 31 provide that Members can be additionally fined over \$3500 and will lose their seat if they default. The Committee considers that clauses 30 and 31, as they apply to clauses 7, 14 and 28, engage the Charter’s right to freedom of expression.<sup>16</sup>

**While the Committee considers that the purposes of protecting Parliament and respecting the reputations of Members may justify restrictions on freedom of expression,<sup>17</sup> it is concerned about two aspects of the scheme:**

First, clauses 30 and 31, in combination with clauses 7 and 14, may expose Members of Parliament to penalties, including loss of their seat if they default on a fine, for expressing controversial political views. In a case involving a parliamentarian whose parliament barred him from his seat after finding that his public support of draft violators tended ‘to bring discredit to and disrespect of the House’, the United States Supreme Court held that political speech by elected representatives was so central to that nation’s right to freedom of speech that parliamentarians’ speech could not be subject to greater restrictions than are imposed on private citizens.<sup>18</sup>

Second, clause 30(1), in combination with clause 28, may impose more restrictions on public dissemination and commentary on the Register of Interests than are imposed on other topics

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<sup>16</sup> Charter s. 15(2).

<sup>17</sup> Charter s. 15(3) provides that: ‘Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary— (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.’

<sup>18</sup> *Bond v Floyd*, 385 US 116 (1966).

of public interest. The New Zealand Court of Appeal has held that the right to freedom of expression is especially important 'in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament' and that such statements can only be restricted compatibly with that right if they were made maliciously.<sup>19</sup>

The Statement of Compatibility remarks that clause 28 imposes:

*responsibilities reasonably necessary to preserve the privacy of information disclosed by members. The limitation is provided for by the bill and is therefore lawful.*

The Committee observes that returns submitted to the Register of Interests must be laid before Parliament.<sup>20</sup> Rather than protecting Members' privacy, clause 28 protects their reputation from unfair publicity about their interests.<sup>21</sup>

While the Committee appreciates that freedom of expression can be restricted to protect others' reputations, it is concerned that clause 28 is significantly more restrictive than the current law of defamation. Clause 28's requirement that publications be 'fair' applies even to summaries and comments derived from the register that are not defamatory, are reasonable in the circumstances, are honestly held opinions and are unlikely to cause any harm.<sup>22</sup> Moreover, it exposes potential publishers and commentators to trial by Parliament without any limitation on when an action can be brought and what punishment can be imposed.<sup>23</sup> Most other Australian jurisdictions have either omitted such protections from their registers of interests, limited them to publication by Members or abolished the law of contempt of parliament by defamation altogether.<sup>24</sup> In South Australia, the only other jurisdiction with a similar provision, the punishment that can be imposed is expressly limited by statute.<sup>25</sup>

***The Committee will write to the Premier to request further advice on the questions of whether or not:***

- ***clauses 7 and 14, by imposing restrictions on Members' expression that are not imposed on private citizens;***
- ***clause 28, by imposing a requirement of fairness on published summaries and comments about information from the Register of Interests that is more restrictive than the law of defamation;***
- ***clauses 30 and 31, by permitting Parliament to try such breaches itself at any time and to impose unlimited punishment, including a loss of a Member's seat if a fine is defaulted;***

***are lawful restrictions on the Charter's right to freedom of expression that are reasonably necessary to protect Parliament and respect the reputations of its Members.***

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***Privacy and reputation – Information Privacy Act 2000 (the Act) – Members exempt from Act – Introduction of Charter subsequent to Act – Members not a 'public***

<sup>19</sup> *Lange v Atkinson* [1998] 3 NZLR 424 & [2000] NZCA 95.

<sup>20</sup> Clauses 26(2) & 29.

<sup>21</sup> Parliament of Victoria Law Reform Committee, *Review of the Members of Parliament (Register of Interests) Act 1978*, December 2009, pp. 78-79.

<sup>22</sup> *Defamation Act 2005*, ss. 30, 31 & 33

<sup>23</sup> C.f. *Limitation of Actions Act 1958*, s. 5(1AAA); *Defamation Act 2005*, s. 35.

<sup>24</sup> *Parliamentary Privileges Act 1987* (Cth), s. 6; *Constitution (Disclosures by Members) Regulation 1983* (NSW); *Legislative Assembly (Disclosure of Interests) Act 2008* (NT); *Parliament of Queensland Act 2001* (Qld), s. 37(2); *Parliamentary (Disclosure of Interests) Act 1996* (Tas); *Members of Parliament (Financial Interests) Act 1992* (WA), s. 19.

<sup>25</sup> *Members of Parliament (Register of Interests) Act 1983* (SA), s. 6. The maximum penalty for individuals is \$5000 or three months imprisonment.

***authority' within the meaning of Charter section 4 and not subject to conduct requirements of Charter section 38 – Provision in current Bill limited to 'confidential information' – Whether provisions in Bill and the Act have sufficient regard to or are Charter compliant***

The Committee observes that when the Information Privacy Bill was originally drafted Members of Parliament were included within the Bills ambit. However, an amendment moved after the Bills introduction exempted Members from the Bills information privacy obligations including compliance with the Information Privacy Principles<sup>26</sup> (the 'IPPs') and the complaint mechanism proposed by the Act.<sup>27</sup>

The then Minister for State and Regional Development, Mr Brumby, stated –

*'The government has indicated that it will refer a series of matters relating to Members of Parliament, including their use of personal information, privacy, emerging communications and the complex interactions between legislation and parliamentary privilege, to the Scrutiny of Acts and Regulations Committee for inquiry.'*<sup>28</sup>

Subsequently the Committee received a reference to inquire into this issue in 2000 and the Committee tabled a final report ('Privacy Code of Conduct for Members of the Victorian Parliament') in March 2002. In the report the Committee recommended adoption of a voluntary code, which specified how Members should 'handle personal information.'<sup>29</sup>

The proposed code of conduct drew upon the IPPs and directed Members to consider collection, use and disclosure, data quality, data security, openness, access and correction and accountability issues with respect to personal information.

The Committee further observes that in 2003, the Government released its response to the Committee's report and considered that implementation of the code was the responsibility of the Presiding Officers or individual Members.<sup>30</sup> The Committee observes that the Minister's response to the Committee's recommendations was made prior to the introduction of the Charter.

The Committee has considered the written submission of the Privacy Commissioner and considers that the current provisions in clause 15 of the Bill may not have sufficient regard to privacy and reputation rights found in *Charter* section 13.

***Whilst the Committee understands that Members are not a 'public authority' within the meaning of Charter section 4(1) and therefore not subject to the conduct requirements in Charter section 38, nevertheless the Committee considers that in light of –***

- ***the recent history of the question whether Members should be included within the regime of the Information Privacy Act and its compliance requirements, and***
- ***the subsequent commencement of the Charter in January 2007, and***
- ***the limitation within the proposed section 15 of the Bill to cover only 'confidential information'***

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<sup>26</sup> *Information Privacy Act 2000* (Vic), Schedule 1

<sup>27</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 5 September 2000, 488 (Mr Brumby, Minister for State and Regional Development).

<sup>28</sup> *Ibid.*

<sup>29</sup> Scrutiny of Acts and Regulations Committee, *Final Report on a Privacy Code of Conduct for Members of the Victorian Parliament*, March 2002.

<sup>30</sup> Whole of Government response to the final report of the Scrutiny of Acts and Regulations Committee on a Privacy Code of Conduct for Members of the Victorian Parliament, accessed at: [http://www.parliament.vic.gov.au/sarc/Information\\_Privacy/government\\_response.pdf](http://www.parliament.vic.gov.au/sarc/Information_Privacy/government_response.pdf)

***the Committee will seek further advice from the Premier as to whether the Bill has sufficient regard for the privacy of personal information collected, stored and used by Members of Parliament within the meaning of Charter section 13.***

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***Privacy and reputation – Register of Member’s Interests – Third party information – Whether proposed Bill has due regard to privacy obligations under the Charter***

The Committee notes the submission made by the Privacy Commission concerning the privacy rights of third parties who may have information recorded and published as a requirement of the tabling of returns made by Members in the Member’s Register of Interests. The Committee is concerned that without notice being given to third parties the Register may be incompatible with a third parties privacy rights under the Charter.

***The Committee will forward the Privacy Commissioner’s written submission to the Premier and seek further advice on the matters raised in that submission concerning third party interests.***

**The Committee makes no further comment.**

## Therapeutic Goods (Victoria) Bill 2010

<b>Introduced</b>	23 March 2010
<b>Second Reading Speech</b>	25 March 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Daniel Andrews MLA
<b>Portfolio responsibility</b>	Minister for Health

### Purpose and Background

The Bill repeals the *Therapeutic Goods (Victoria) Act 1994* and provides for the application of a national scheme for the regulation of therapeutic goods by applying the *Therapeutic Goods Act 1989 (Cth)* (the 'Commonwealth Act') as law of Victoria.

The Bill also provides for the regulation of therapeutic goods in Victoria in limited circumstances where the Commonwealth Act does not apply such as the supply of therapeutic goods by hawking and through vending machines.

Extracts from the Second Reading Speech –

*The Commonwealth Act sets out the legal requirements for the import, export, manufacture and supply of medicines. It details the requirements for listing or registering all medicines on the Australian Register of Therapeutic Goods.*

*Other aspects of the Commonwealth Act include regulating advertising, labelling, and product appearance. The Commonwealth Act is supported by the regulations, and various orders and determinations.*

*The Therapeutic Goods Administration commonly known as the TGA is part of the Australian government Department of Health and Ageing and has responsibility for administering the Commonwealth Act.*

### Content and Committee comment

#### ***Regulations may modify applied laws – Inappropriately delegates legislative power***

The Committee notes that the Bill applies Commonwealth therapeutic goods laws as a law of Victoria and further provides that regulations may modify those laws. [6]

***The Committee notes that the provision appears to be a Henry VIII clause allowing a subordinate instrument to modify primary legislation. Whilst there may be good reason to include such a provision the Committee considers that this should be noted and explained in the explanatory memorandum or Second Reading Speech.***

***The Committee will seek further advice from the Minister as to the desirability or necessity to employ such a provision in the Victorian Act.***

#### ***Search and seizure based on reasonable suspicion***

Part 6 of the Commonwealth Act and Part 8 of the Bill deal with enforcement powers including powers of entry, search and seizure. These provisions allow authorised officers to exercise powers on the lower threshold of 'reasonable grounds for suspicion' of a contravention of the Act. [35]. The Victorian Act also provides for search warrants to be issued by a magistrate based on reasonable grounds. [37]

### **Privilege against self-incrimination does not apply to documents**

The Bill provides a privilege against self-incrimination but the privilege does not extend to the production of documents a person is required to produce under the Victorian Act. [42]

### **Presumption of innocence – Offences under the Commonwealth Act imposing an evidential or legal burden on a defendant**

The Committee notes the Statement of Compatibility (the 'Statement') discusses the offence provisions in the Commonwealth Act that shift an evidentiary or legal burden to the defendant.

The provisions imposing a legal burden on a defendant are section 19B (criminal offences for dealing with unlawful therapeutic goods which are not included in the Register), and section 41MI (criminal offences of dealing with a medical device not included in the Register). Under these offences it is an offence to import, export, manufacture and supply unlawful therapeutic goods or medical devices. It is a defence to a prosecution if the person was not the sponsor (manufacturer, importer or exporter as defined by the Commonwealth Act) of the goods / device at the time of the relevant dealing. In these instances the defendant bears a legal burden to establish the defence on the balance of probabilities.

The Committee notes these extracts from the Statement of Compatibility –

*The requirement for the defendant to prove that he or she was not the 'sponsor' at the relevant time was included in the TGA to address difficulties experienced in initiating prosecutions against 'sponsors' under previous versions of the act. The explanatory memorandum for the amending legislation stated that:*

*... in proceedings under this provision, to establish that a person is a sponsor the Crown is required to show, among other things, that there is no agency arrangement. However, it is not possible to establish something that does not exist and a fact that is within the knowledge of the sponsor.*

*The effect of the introduction of the reverse legal onus was to require a 'sponsor' in such a situation to establish that there was an agency arrangement, and that therefore the person did not act as a principal in unlawfully importing, exporting, supplying or manufacturing therapeutic goods. The purpose of the limitation is important – namely to ensure that responsibility for offences under these provisions is not evaded due to unduly onerous burdens on the prosecution.*

## **Charter report**

### **Operation of Charter – Commonwealth laws applied in Victoria – Administrative matters and offences under applied laws taken not to be under Victoria law – Whether Charter applies**

Summary: *The Bill facilitates a national cooperative scheme. The Statement of Compatibility does not address whether or not the Bill reduces the operation of the Charter. The Committee will write to the Minister seeking further information.*

**The Committee observes that the Bill facilitates a national cooperative scheme by applying the Commonwealth's therapeutic goods laws to Victorian matters that are beyond Commonwealth power, such as wholly intrastate dealings by natural persons.** Previous Alert Digests have noted the potential for such schemes to reduce the operation of the Charter's protection for Victorians' human rights and have voiced the Committee's expectation that the statement of compatibility for such bills will address any such

reduction.<sup>31</sup> **The Statement of Compatibility for this bill does not address these matters.**

The Committee notes that Parts 4 and 5 of the Bill differ from the existing *Therapeutic Goods (Victoria) Act 1994* (and other schemes that apply non-Victorian laws without a referral of powers) by also applying the Commonwealth's administrative and criminal laws in Victoria. The Committee is concerned that clauses 14(2) and 16(2), which provide that administrative matters and offences arising under the applied laws are 'taken not to be' matters arising in relation to and offences against the 'laws of Victoria', may exclude the Charter altogether from administrative appeals and criminal prosecutions arising under the applied laws.

***The Committee will write to the Minister seeking further information as to the application of the Charter in relation to the Commonwealth's therapeutic goods laws as applied in Victoria by the Bill and, in particular, whether or not the Charter will apply in administrative appeals and criminal prosecutions arising under the applied laws. Pending the Minister's response, the Committee draws attention to clauses 14(2) and 16(2).***

**The Committee makes no further comment.**

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<sup>31</sup> See the reports on the National Gas (Victoria) Bill 2008 (*Alert Digests Nos. 6 & 9 of 2008*); the Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 (*Alert Digests Nos. 6 & 8 of 2009*); the Fair Work (Commonwealth Powers) Act 2009 (*Alert Digests Nos. 7 & 12 of 2009*); the Personal Property Securities (Commonwealth Powers) Bill 2009 (*Alert Digests Nos. 10 & 12 of 2009*); the Health Practitioner Regulation National Health (Victoria) Bill (*Alert Digest No. 13 of 2009*); and the Credit (Commonwealth Powers) Bill 2010 (*Alert Digest No. 3 of 2010*).

## Trustee Companies Legislation Amendment Bill 2010

<b>Introduced</b>	23 March 2010
<b>Second Reading Speech</b>	25 March 2010
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Minister responsible</b>	Hon. Tim Holding MLA
<b>Portfolio responsibility</b>	Minister for Finance, WorkCover and Transport Accident Commission, Minister for Consumer Affairs and Attorney-General
<b>General</b>	

### Purpose and Background

The Bill –

- complements the passage by the Commonwealth Parliament of legislation that will implement regulation of trustee companies by Commonwealth agencies.
- repeals sections of the *Trustee Companies Act 1994* that implement regulation of trustee companies by Victorian agencies, while retaining those sections that relate to general powers and obligations of trustee companies.
- makes consequential amendments to the *Administration and Probate Act 1958* and the *Guardianship and Administration Act 1986* to preserve certain powers under those Acts of the Supreme Court and the VCAT as they apply to trustee companies, subject to certain provisions of the Commonwealth legislation.
- amends the *State Trustees (State Owned Company) Act 1994* to provide that State Trustees Limited, a trustee company wholly owned by the State of Victoria, will continue to be regulated under Victorian law.

Extract from the Statement of Compatibility –

*The Bill itself removes trustee companies, other than State Trustees Ltd, from prudential supervision by Victorian government institutions. It does not alter the property rights of those companies, nor the property rights of those whose estates or other assets are managed by those trustee companies, or the beneficiaries of those estates and other assets. Similarly, it does not alter the protections in respect of estates or assets management that are provided by legislation for children or others without legal capacity to manage their own affairs.*

Extracts from the Second Reading Speech –

*This Bill will facilitate the transfer of responsibility for the regulation of private sector trustee companies from the State to the Commonwealth. As part of the reforms of the financial system during the 1980s and early 1990s, the States and the Commonwealth agreed in principle that responsibility for regulation of deposit-taking and funds management activities should lie with the Commonwealth.*

*... The Commonwealth is relying on its corporations powers for this assumption of responsibility and so does not require a referral of powers from the States.*

*... The Commonwealth legislation is expected to commence on 1 May 2010, although this date has not yet been proclaimed. If no commencement date is proclaimed, the legislation will automatically commence on 6 May 2010.*

*The principal purposes of the Bill are to ensure –*

- *continued smooth operation for trustee companies of provisions of Victorian probate and estate administration law, including the jurisdictions of the Victorian Civil and Administrative Tribunal (VCAT) and the Victorian courts in these matters, without conflict with the operation of Victorian laws in respect of unincorporated trustees;*

- *repeal of provisions of Victorian law that regulate certain aspects of trustee companies, such as setting of fees and requirements to provide accounts, that will now come under commonwealth regulation, to avoid either imposing additional superfluous duties on trustee companies or retaining redundant and spent provisions in Victorian legislation; and*
- *continued retention of current provisions applying Victorian government regulation of State Trustees Ltd, which is a corporation wholly-owned by the State that the State and the Commonwealth have agreed will not be subject to Commonwealth regulation.*

*... The similarity between the regulatory regimes of the State and the Commonwealth means that there will be no commercial advantage or disadvantage in respect of those activities of State Trustees Ltd that are not of a public trustee-like nature and are undertaken in competition with private sector trustee companies.*

**The Committee makes no further comment.**

# Ministerial Correspondence

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## Equal Opportunity Bill 2010

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

[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.*

*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.*

*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, 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'.

**The Committee therefore considers that clauses 64(c) and 65(d) engage the Charter's right to freedom of expression.** 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.

**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. 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'.)

**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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**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'.

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. In its Final Report in its Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995, the Committee remarked:

*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', 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 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.

**Second, clause 75 permits all discrimination that is 'necessary to comply with, or authorised by' any enactment.** 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'.
- unlike most Australian jurisdictions, 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.
- to enactments made after the Act commences and without any sunset clause.

*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.*
- 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. 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.*
- The Charter does not prevent discrimination by entities by private acts, religious authorities and entities that are not public authorities.*

*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). 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. 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.**

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### **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. 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:

*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. 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. 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*.**

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### **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 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, 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. 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.***

## **Minister's Response**

*Thank you for your letter of 24 March 2010 enclosing a copy of the report of the Scrutiny of Acts and Regulations Committee (the Committee) in Alert Digest No. 4 of 2010 regarding the Equal Opportunity Bill 2010 (the Bill).*

*The Bill was introduced into Parliament on 9 March 2010. It is intended that the Bill replace the Equal Opportunity Act 1995 (the 1995 Act).*

*The Committee has asked for further clarification regarding certain exceptions and the exemption process. The Committee has also asked for further clarification regarding the secrecy provision in the Bill.*

### **Issues for clarification**

#### **Exception for standards of dress, appearance and behaviour in schools**

*The exception in clause 42 allows educational authorities to set reasonable standards of dress, appearance and behaviour for students. The Committee asks whether the requirement in clause 42 that the standard of dress, appearance and behaviour be 'reasonable' is equivalent to the 'reasonable limitations' test in section 7(2) of the Charter.*

*A standard of dress, appearance and behaviour could directly or indirectly discriminate. When considering whether a requirement directly discriminates, the requirement in section 32 of the Charter that statutory provisions be interpreted in a way that is compatible with human rights means that an assessment of whether the standard is a 'reasonable' will require an assessment of whether the standard is a reasonable limitation on any Charter rights. In this respect, the requirement that the standard be 'reasonable' is equivalent to the 'reasonable limitations' test in section 7(2) of the Charter.*

*When considering whether a standard indirectly discriminates, the reasonableness of the standard will be assessed against the factors in clause 9(3) of the Bill. These factors include consideration of the nature and extent of the disadvantage resulting from the imposition or the proposed imposition of the requirement, condition or practice (clause 9(3)(a)), whether the disadvantage is proportionate to the result sought by the person who imposes or proposes to impose the requirement, condition or practice (clause 9(3)(b)) and whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing or proposing to impose the requirement, condition or practice but would result in less disadvantage (clause 9(3)(e)).*

*While these factors do not replicate the factors in section 7(2) of the Charter, the guidance provided by these factors is sufficient to ensure that competing rights will be considered, that consideration will be given to any less restrictive means reasonably available to achieve the purpose of the limitation and consequently that the term 'reasonable standards of dress, appearance and behaviour' in clause 42 will be interpreted in a way that is compatible with the Charter.*

#### Statutory authority exception

*Clause 75 permits discrimination that is necessary to comply with or authorised by any enactment. The Statement of Compatibility noted that all Government departments undertook an audit of the existing legislation they administer in 2007 and 2008 to identify provisions that may be incompatible with the Charter. The Committee asks whether the audit identified any Acts or enactments that may be incompatible with the Charter's equality rights. The review did identify some provisions that may be incompatible with the Charter's equality rights. For example, the review identified that section 2.4.31(2) of the Education and Training Reform Act 2006 contained a provision which discriminated on the ground of age. This provision was removed by the Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009.*

*The Committee also asks whether the decision in *R v Momcilovic* [2010] VSA 50 affects the Statement of Compatibility's assessment of the compatibility of clause 75 with the Charter's equality rights. The Statement of Compatibility does not assert that discrimination in an enactment allowed by clause 75 will be compatible because of the requirement in section 32 of the Charter to interpret statutory provisions in a way that is compatible with human rights. Therefore, the *Momcilovic* decision does not affect the Statement of Compatibility's assessment that the clause 75 is compatible with the Charter.*

*Although clause 75 provides an exception for discriminatory behaviour authorised by another enactment, it is not itself incompatible with the Charter and the question of compatibility must be considered by reference to the specific enactment.*

#### The exemption process

*Clause 89 provides that VCAT may grant exemptions from any provisions of the Bill. Clause 90 sets out the factors that VCAT must consider in assessing exemption applications. The Committee asks whether clause 89 alters the test presently used by VCAT for granting exemption applications. The test to be applied by VCAT is contained in clause 90, so I am responding on the basis that this is the clause the Committee intends to refer to.*

*As the Committee notes, following Justice Bell's decision in *Lifestyle Communities Ltd (no 3) (Anti-Discrimination)* [2009] VCAT 1869, when assessing exemption applications VCAT currently considers whether the conduct is a special measure under section 8(4) of the Charter or whether the conduct is a reasonable limitation on the right to equality in the Charter. Clause 12 of the Bill is similar to section 8(4) of the Charter. It provides that special measures for the purpose of promoting or realising substantive equality for members of a group with a particular attribute do not constitute discrimination. Consequently, where conduct amounts to a special measure, no exemption is required as the conduct is not prohibited-discrimination. Clause 90(a)(ii) provides that VCAT must consider whether the proposed exemption is unnecessary because the conduct sought to be exempted would not amount to prohibited discrimination.*

*This would require VCAT to consider, among other things; whether the conduct that the application seeks to exempt from the Act constitutes a special measure. Clause 90(b) provides that when considering an exemption application, VCAT must consider whether the proposed exemption is a reasonable limitation on the Charter. Therefore, the test in clauses 90(a)(ii) and 90(b) does not alter the test currently used by VCAT in assessing exemption applications.*

### Secrecy

*Clause 176 of the Bill re-enacts section 192 of the 1995 Act and exhibits the following elements:*

- *protection of information concerning the affairs of any person that was obtained in the course of performing functions or duties or exercising powers under the Act*
- *regulation of every person who is or has been an appointed member of the Board, the Commissioner, a member of staff of the Commission, a person acting under the authority of the Commission, Commissioner or Board*
- *prohibition on making a record of, disclosing or communicating to any person the protected personal information*
- *exceptions to the requirement of secrecy where disclosure is necessary for the purposes of:*
  - *or in connection with, the performance of a function or duty or the exercise of a power under the Act*
  - *a prosecution arising out of the Act.*

*The purpose of including such a provision is to encourage frank and fearless disclosure in the context of inquiries from members of the public and in the context of individual's dealings with the Commission in the performance of its functions.*

*The Committee has raised concerns that clause 176 unnecessarily limits the right to freedom of expression and the right to a fair hearing.*

### *Freedom of expression*

*The Committee is concerned that clause 176:*

- *protects from disclosure information concerning the personal affairs of a person, instead of limiting non-disclosure to confidential information*
- *only permits disclosure where required under the Act, and not where permitted or required by other Acts.*

*The secrecy provision in clause 176 strikes an appropriate balance between the right to privacy and the right to freedom of expression.*

*The importance of the principle of confidentiality in the context of the functions of the Commission was recognised in Morgan v Equal Opportunity Commission Victoria (General) [2006] VCAT 1965. Member Davis in considering section 192 of the Act (clause 176 of the Bill) noted that "[i]n fact confidentiality is the cornerstone of the way that the [Commission] is required to operate. It is important that people should not be inhibited in giving information to the [Commission] for fear that that information may be later disclosed."*

*In Re Downey and Commissioner for Equal Opportunity (1991) 5 VAR 248 Member Howie noted:*

*"I accept that secrecy about, or confidentiality of, information provided to the [Commission], is a fundamental and essential part of the process that is envisaged by the Equal Opportunity Act. I accept that it is important for citizens that they should not be inhibited from making a complaint by fear of disclosure of that complaint. I accept that it is important for respondents that they should not be inhibited from providing information, or answering questions, or making admissions or concessions or apologies or any other response, by fear of such a response being disclosed and used against them...I accept also that both the assurance of that response being confidential, and being able to fulfil*

*that assurance, is an essential and fundamental part of the responsibilities that the Act imposes upon the [Commission]."*

#### *Confidential information*

*Most other equal opportunity jurisdictions in Australia take the same approach as Victoria in protecting from disclosure information about a person's personal affairs. In particular, I note that in the ACT the Human Rights Act 2004 (ACT) recognises the right to freedom of expression in a similar manner to that of the Victorian Charter and the secrecy provision in the Discrimination Act 1991 (ACT) protects "information about a person" rather than confidential information.*

*The current approach in clause 176 is also consistent with other Victorian regulators such as the Privacy Commissioner and the Disability Services Commissioner that are both prohibited from disclosing information relating to the affairs of any individual or organisation.*

*By way of Commonwealth comparison, the Australian Law Reform Commission recently released a report entitled *Secrecy Laws and Open Government in Australia*. The report notes that out of the 506 secrecy provisions identified in Commonwealth legislation, only 8% protect confidential information, which, in any event, is not always defined to be information provided in confidence.\* In the context of equal opportunity, the Australian Human Rights and Equal Opportunity Act 1986 (Cth) also protects information concerning "personal affairs" rather than confidential information. Given the importance of candid disclosure for the effective discharge of the Commission's functions, it is preferable to ensure that a broader rather than a narrower approach is taken to the protection of disclosed information.*

#### *Disclosure for the purposes of other Acts*

*The Committee has said that "all other equivalent Australian provisions" permit publication for the purposes of other Acts. However, the secrecy provision in South Australia prohibits disclosure in the context of legal proceedings even where required by another Act, while most jurisdictions provide that anything said or done in the course of conciliation is inadmissible, regardless of any exceptions to the secrecy provisions.*

*It is also useful to consider the secrecy requirements of other Victorian regulators that are operating in the same regulatory and human rights framework as the Victorian Commission. Although several Victorian regulators are permitted to disclose protected information in circumstances beyond that of the Commission, such as where the parties' consent or where the Minister has authorised disclosure in the public interest, none have a blanket exception for disclosure required or permitted by other Acts.*

*Given the importance of confidentiality in the context of the Commission's functions, it is not considered that the right to freedom of expression is unreasonably limited by clause 176.*

#### *Right to a fair hearing*

*The Committee considers that there should be more circumstances where a court can require the Commission to disclose information in the context of court proceedings (other than just in the context of prosecutions under the Act as provided for currently).*

*Clause 176 permits disclosure in the context of legal proceedings where the proceedings are in connection with a prosecution arising out of the Act. It is important to note that clause 117 of the Bill renders anything done in the course of dispute resolution inadmissible in court or tribunal proceedings regardless of any exceptions to clause 176.*

*The fact that there are not any other circumstances where a court can compel disclosure is considered to engage but not limit the right to a fair hearing contained in s 24 of the Charter.*

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\* Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, p. 73.

*The purpose of the right to a fair hearing is to ensure procedural fairness. It includes the principle of equality of arms: everyone who is a party to a proceeding must have a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-a-vis his or her opponent. A fair balance must be struck between the parties. Further, the focus of the right is on the relative equality of the proceedings, on an ability of each party to present their case; it is not on the power of the court to override an express provision of the kind contained in clause 176 of the Bill.*

*Where neither party has an opportunity to call a witness from the Commission or obtain evidence in the possession of the Commission, the risk of an unfair outcome is minimal. The situation should be distinguished from cases where only one side can rely on a particular witness, information or evidence. In practice it is difficult to imagine a situation where the information or evidence in the possession of the Commission would not be able to be obtained from another source. It is equally difficult to see how the evidence of a person employed at the Commission could be of such importance that without that testimony the proceeding can be said to be potentially unfair.*

*The right guarantees no more than a reasonable opportunity to present one's case. It does not grant a right to seek information, evidence or documents that may be useful in advancing one's case. In the case of *Pisano v Italy* (judgment of 27 July 2000) the European Court of Human Rights said that Art 6 seeks to achieve equality of arms and does not guarantee the right to call and examine all witnesses.*

*In its letter SARC specifically refers to a "criminal defendant" seeking to compel someone from the Commission to testify. Section 25(2)(g) of the Charter provides that an accused person has the right to examine witnesses "unless otherwise provided for by law". The words "unless otherwise provided for by law" would clearly encompass a secrecy provision such as clause 176 of the Bill.*

*The level of procedural fairness required under s 25, including s 25(2)(g), of the Charter is set higher than in relation to s 24 because of the potentially more serious consequences for an accused person in criminal proceedings compared to a civil litigant. Therefore s 24 should not give an unrestricted right to a person in civil proceedings to call any witness while s 25(2)(g) imposes an express limitation. The same implied limitation should be read into the provision of information of documents in possession of the Commission.*

*Thank you for the opportunity to respond to the issues raised by the Committee in relation to this Bill. If you would be assisted by a further briefing from officers from my Department, please contact Ms Anna Brown from my office (9651 1149) to arrange a suitable time.*

**ROB HULLS MP**  
Attorney-General

12 April 2010

**The Committee thanks the Minister for this response.**

**Committee room**  
**12 April 2010**



# Appendix 1

## Index of Bills in 2010

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Constitution (Appointments) Bill 2009	1
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# Appendix 2

## Committee Comments classified by Terms of Reference

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

### Alert Digest Nos.

#### Section 17(a)

##### (i) trespasses unduly upon rights or freedoms

Accident Compensation Amendment Bill 2009 1

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

Transport Integration Bill 2009 1

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

Transport Integration Bill 2009 1

##### (vi) inappropriately delegates legislative power

Justice Legislation Amendment Bill 2010 4

Public Finance and Accountability Bill 2009 1

Transport Integration Bill 2009 1

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

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

Child Employment Bill 4

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Equal opportunity Bill 2010 4

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

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#### Section 17(b)

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

Accident Compensation Amendment Bill 2009 1



## Appendix 3

### Ministerial Correspondence 2009-10

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

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
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
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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
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#### **Outstanding correspondence**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee</b>	<b>Alert Digest No. Issue</b>
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
Crimes Legislation Amendment Act 2010	Attorney-General	23.03.10	4 of 2010
Justice Legislation Amendment Bill 2010	Attorney-General	23.03.10	4 of 2010

## Scrutiny of Acts and Regulations Committee

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<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee</b>	<b>Alert Digest No. Issue</b>
Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010	Transport, Roads and Ports	23.03.10	4 of 2010
Education and Training Reform Further Amendment Bill 2010	Education	13.04.10	5 of 2010
Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010	Attorney-General	13.04.10	5 of 2010
Members of Parliament (Standards) Bill 2010	Premier	13.04.10	5 of 2010
Therapeutic Goods (Victoria) Bill 2010	Health	13.04.10	5 of 2010