# No. 6 of 2010

## Tuesday, 4 May 2010

## On the

Building Amendment Bill 2010

Courts Legislation Miscellaneous Amendments Bill 2010

Fair Trading Amendment (Unfair Contract Terms) Bill 2010

Gambling Regulation Amendment (Licensing) Bill 2010

Prahran Mechanics' Institute Amendment Bill 2010

Public Finance and Accountability Bill 2009

Severe Substance Dependence Treatment Bill 2009

Therapeutic Goods (Victoria) Bill 2010

# Table of Contents

## 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 –

Building Amendment Bill 2010
Courts Legislation Miscellaneous Amendments Bill 2010
Fair Trading Amendment (Unfair Contract Terms) Bill 2010
Gambling Regulation Amendment (Licensing) Bill 2010
Prahran Mechanics' Institute Amendment Bill 2010

## The Committee notes the following correspondence –

Public Finance and Accountability Bill 2009
Severe Substance Dependence Treatment Bill 2009
Therapeutic Goods (Victoria) 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. 6 of 2010

## Building Amendment Bill 2010

| | |
|---|---|
| **Introduced** | 13 April 2010 |
| **Second Reading Speech** | 15 March 2010 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Richard Wynne MLA |
| **Minister responsible** | Hon. Justin Madden MLC |
| **Portfolio responsibility** | Minister for Planning |

### Purpose

The Bill amends the *Building Act 1993* (the 'Act') to –

- increase maximum penalties for certain building and plumbing offences in the Act. **[3 to 38, 40 to 46, 49 to 53]**
- to allow registration or licensing in a class or classes of plumbing work or specialised plumbing work to be prescribed by regulation as a prerequisite to the registration and licensing in other classes of specialised plumbing work. **[39, 40, 47, 48]**
- amend the Act to specifically identify the Victorian Managed Insurance Authority (VMIA) as a designated insurer within the terms of section 137AA(2) to support the introduction of a government-underwritten domestic building insurance scheme, funded by builder premiums and operated by the VMIA. **[29]**

  > **Note:** From the Second Reading Speech – *A building practitioner that is required to obtain insurance must obtain this insurance from a 'designated insurer' as defined under section 137AA of the Building Act 1993, and it is unclear whether the VMIA currently satisfies the requirements under this section.*

- make a statute law revision to the *House Contracts Guarantee (HIH) Act 2001*. **[54]**

### Content and Committee comment

*Increase in penalties*

The Committee notes that the increases in penalties in most instances are very substantial. In many instances a five fold increase and in some instances up to a twenty fold increase in the penalty for a natural person or a body corporate. The Committee notes that in each instance the particular offence and the current penalty is provided as a comparator in the explanatory memorandum. The Committee also notes that the Second Reading Speech remarks that *the penalties associated with the offences have not been reviewed since the Act was passed in 1993 and since that time their deterrent effect has been reduced.*

*Contravention of emergency order or building order – Reverse onus – Evidentiary burden on defendant – Presumption of innocence*

The Bill amends section 118(1) and (2) of the Act to increase the maximum penalty in circumstances where a person contravenes an emergency order or building order made by a municipal building surveyor. The Bill increases the penalty from 100 penalty units for a natural person and 500 penalty units for a body corporate to 500 penalty units for a natural person and 2500 penalty units for a body corporate. The offence is a reverse onus defence

provision (section 118(3)). The penalty for the offence does not involve any term of imprisonment. **[24]** *(Refer to Charter report below)*

## Charter report

***Presumption of innocence – Person accused of contravening an order must satisfy court of reasonable lack of knowledge of the order – Whether legal onus on accused***

*Summary: Clause 24 increases the punishment for an offence governed by a reverse onus provision. The Committee is concerned that the provision places a legal onus on the accused to prove a defence on the balance of probabilities. It will write to the Minister seeking further information.*

The Committee notes that clause 24, amending existing s. 118 of the *Building Act 1993*, increases the penalty for offences of contravening an emergency order or a building order from 100 penalty units to 500 penalty units. The offences in s. 118 are subject to the following reverse onus provision in s. 118(3):

> *It is a sufficient defence to a prosecution under this section in relation to a public entertainment if the accused satisfies the court that he or she was unaware and ought not reasonably to have been aware of the fact that the public entertainment was the subject of an emergency order under this Part.*

**The Committee considers that clause 24, by increasing the punishment for an offence that is governed by this provision, engages the Charter's right to be presumed innocent until proved guilty.**[1]

The Statement of Compatibility remarks:

> *In accordance with section 72 of the Criminal Procedure Act 2009, this defence imposes an evidential onus on the defendant. This means that the defendant must present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish the defence. The prosecution must then rebut the defence beyond reasonable doubt in order to secure the conviction….*
>
> *Since knowledge of the factual basis of the defences will be within the possession of the defendant, it will not be unduly onerous for a defendant to point to sufficient evidence to discharge the evidential burden placed on him or her.*

**While the Committee agrees that placing an evidential onus on the accused with respect to this defence is compatible with the Charter's right to be presumed innocent, it is concerned that, contrary to the Minister's view, existing s. 118(3) may actually place a legal onus on the accused to prove the defence on the balance of probabilities.**

The Committee observes that the Court of Appeal recently ruled that the word 'satisfies' when applied to accused person always requires the accused to prove the relevant issue on the balance of probabilities.[2] The Committee considers that this position is not altered by s. 72(3) of the *Criminal Procedure Act 2009*, which repeals earlier statutory and common law rules that placed the burden of proof on accused persons in respect of all provisos to summary offences, but does not alter reverse onuses specifically imposed by any statute.[3]

---

1 Charter s. 25(1).

2 *R v Momcilovic* [2010] VSCA 50, [21]-[22], [113]. See also Legal & Constitutional Committee, *Report on the Burden of Proof in Criminal Cases*, Parliament of Victoria, November 1985, p. 19.

3 Section 72 of the *Criminal Procedure Act 2009* is the successor to s. 130 of the *Magistrates' Court Act 1989*, which overturned the earlier statutory rule in s. 168 of the *Magistrates Court (Summary Proceedings) Act 1975* and the common law's 'proviso rule'. See Legal & Constitutional Committee, *Report on the Burden of Proof in Criminal Cases*, Parliament of Victoria, November 1985, pp. 25-31, 33.

**The Committee will write to the Minister expressing its concern that s. 118(3) places a legal onus on accused persons and seeking further information as to:**

1. **Whether s. 118(3) should be amended to clarify that it places only an evidential onus on accused persons?**
2. **If not, whether or not clause 24, by significantly increasing the penalty for a criminal offence that potentially places a legal onus on accused persons, is compatible with the Charter's right to be presumed innocent until proved guilty?**

**Pending the Minister's response, the Committee draws attention to clause 24 and existing s. 118(3).**

**The Committee makes no further comment.**

# Courts Legislation Miscellaneous Amendments Bill 2010

| | |
|---|---|
| **Introduced** | 13 April 2010 |
| **Second Reading Speech** | 15 April 2010 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Rob Hulls MLA |
| **Portfolio responsibility** | Attorney-General |

## Purpose

The Bill amends the —

- *County Court Act 1958* to rectify an anomaly in relation to the pension entitlements of an associate judge (formerly Master) of the Supreme or County Court who is subsequently appointed a judge of the County Court of Victoria. **[3]**

  Extract from the Second Reading Speech –

  > *The first amendment amends the County Court Act 1958 to rectify an anomaly in relation to the pension entitlements of an associate judge (formerly master) of the Supreme or County Court who is subsequently appointed a judge of the County Court of Victoria.*
  >
  > *This amendment preserves the entitlement of an associate judge who was originally appointed to judicial office before the commencement of the Judicial Remuneration Tribunal Act 1995 (and who is therefore entitled to a pension at age 60, subject to accruing 10 years service), who is subsequently appointed as a judge of the County Court after the commencement of section 18 of the Judicial Remuneration Tribunal Act 1995 on 18 May 1995.*

- *Coroners Act 2008* (the 'new Act') retrospectively to the commencement of the new Act on 1 November 2009. The amendments are in relation to the salary paid to Acting Coroners and other minor statute law revision amendments. (*see below)*. **[2 and 4 to 6]**

- *Constitution Act 1975*, *Supreme Court Act 1986*, the *County Court Act 1958*, the *Children, Youth and Families Act 2005* and the *Coroners Act 2008* to provide for the office of judicial registrar in each of the Supreme, County, Children's and the Coroners Courts. **[7 to 49]**

  Extract from the Statement of Compatibility –

  > *Judicial registrars will not be judicial officers, but may be assigned some judicial functions by the heads of jurisdiction and under court rules. …Decisions of judicial registrars will be subject to review or appeal by a judicial officer of the courts by way of a rehearing de novo.*

## Content and Committee comment

*Retrospective commencement to commencement of Coroners Act 2008*

The Bill provides that Part 3 (clauses 4 to 6) is deemed to have come into operation on 1 November 2009 being the commencement of the *Coroners Act 2008* (the new Act). Part 3 makes amendments dealing with acting coroners and also amends a number of provisions by way of statute law revision amendments to correct typographical errors and to clarify the original intent of the new Act. **[2, 4 to 6]**

Extract from the Statement of Compatibility –

> *The Bill amends section 94(5) of the Coroners Act 2008 to provide that an Acting Coroner be paid the same salary and allowances as a Magistrate. This amendment will maintain the status quo in relation to salary and allowances for fixed term coroners under the old Coroners Act 1985 and*

*salary and allowances for Acting Coroners under the new Coroners Act 2008. This amendment addresses an unintended outcome of section 94(5).*

***The Committee accepts that the retrospective amendment is beneficial to persons appointed to judicial office under the Act.***

*Natural justice – Fair hearing – Delegation of judicial powers to judicial registrars – Exercise of judicial power by persons other than judges – Review of decisions of such persons by judges of the same court*

The Bill amends section 25 of the *Supreme Court Act 1986* provides that the Supreme Court judges may make Rules prescribing the civil and criminal proceedings that may be constituted by a judicial registrar and delegating the powers and jurisdiction of the Court to judicial registrars. **[19]** *(Refer to Charter report below)*

## Charter report

***Liberty – Fair hearing – Supreme Court permitted to delegate power to sentence to prison to judicial registrars***

*Summary: Clause 19, which provides for the Supreme Court to delegate powers to judicial registrar, differs from similar provisions for other courts that bar delegations of powers to imprison. The Committee will write to the Attorney-General seeking further information.*

The Committee notes that clause 19, amending existing s. 25 of the *Supreme Court Act 1986*, provides that the judges of the Court may make Rules prescribing 'the proceedings (whether civil or criminal)' that may be constituted by a judicial registrar and delegating to judicial registrars 'any of the powers of the Court… including, but not limited to, the exercise by judicial registrars of the jurisdiction of the Court'. **Clause 19 differs from similar provisions relating to the Magistrates' Court, County Court, Children's Court and Coroners Court, which all bar delegations to the judicial registrar of powers to imprison.**[4] The Committee considers that clause 19 may engage the Charter's rights to liberty and a fair hearing.[5]

Members of the High Court have held that, under the federal separation of powers, 'judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters'.[6] While the Committee is aware that all decisions by judicial registrars are subject to full review by judges, it is concerned that even a temporary imprisonment should not occur except by order of a constitutionally protected judicial officer.

**The Committee will write to the Attorney-General seeking an assurance that clause 19 does not permit a delegation of the power of imprisonment to a judicial registrar of the Supreme Court. Pending the Attorney-General's response, the Committee draws attention to clause 19.**

**The Committee makes no further comment.**

---

4 *Magistrates' Court Act 1989*, s. 16I(b); clause 35, inserting a new sub-section (fc) into s. 78(1) of the *County Court Act 1958*; clause 40, inserting a new sub-section (1B)(b) into s. 588 of the *Children, Youth and Families Act 2005*; clause 45, inserting a new sub-section (jb) (excluding delegations of powers under s. 103) into s. 105(1) of the *Coroners Act 2008*.

5 Charter ss. 21 and 24.

6 *Harris v Caladine* [1991] HCA 9 per Mason CJ & Deane J, para. 11.

# Fair Trading Amendment (Unfair Contract Terms) Bill 2010

| | |
|---|---|
| **Introduced** | 13 April 2010 |
| **Second Reading Speech** | 15 April 2010 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Tony Robinson MLA |
| **Portfolio responsibility** | Minister for Consumer Affairs |

## Purpose and Background

The Bill amends Part 2B of the *Fair Trading Act 1999* to ensure that the unfair contract terms provisions are consistent with national unfair contract terms provisions in the *Trade Practices Amendment (Australian Consumer Law) Bill 2010 (Cth).*

Extract from the Second Reading Speech –

> *As part of the application of the Australian Consumer Law in Victoria, Part 2B will ultimately be repealed, and replaced with the national unfair contract terms. This Bill ensures that the provisions of Part 2B and their national equivalents are consistent until this occurs.*

Provisions in the Bill will –

- amend the definition of consumer contract, for the purposes of Part 2B in line with the national definition; **[7]**
- amend the Part 2B definition of unfair term in line with the national definition; **[8]**
- introduce a rebuttable presumption that an unfair term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term;
- set out factors that must be taken into account in finding that a term of a consumer contract is unfair; **[7]**
- exclude certain types of terms and contracts from the operation of Part 2B; **[6]**
- include examples of the kinds of terms of a consumer contract that may be unfair; **[7]**
- limit the application of Part 2B to consumer contracts that are standard form contracts; **[12]**
- repeal the definition of standard form contract and instead sets out factors that a court must take into account in determining whether a contract is a standard form contract; **[14]**
- include a rebuttable presumption that a contract is a standard form contract; **[14]**
- modify the existing enforcement and remedies provisions under Part 2B to make them more consistent with the national provisions; and **[10, 11 and 13]**
- align the transitional provisions relating to the amendments with equivalent provisions in the Commonwealth Bill. **[15]**

In line with the national unfair contract terms and offence provisions the Bill will remove the current power for regulations to be made prescribing a term to be an unfair term for the purposes of Part 2B, and repeal existing Part 2B offences for using or attempting to enforce a prescribed unfair term. **[8, 9 and 16]**

## Content and Committee comment

### *Commencement by proclamation*

The Bill does not provide a default commencement date. **[2]**

The Explanatory Memorandum provides – *'open-ended commencement is required to enable the amendments to Part 2B to be proclaimed to come into operation at the same time as the unfair contract terms provisions of the Australian Consumer Law are proclaimed to commence by the Commonwealth (scheduled for 1 July 2010).*

**The Committee makes no further comment.**

# Gambling Regulation Amendment (Licensing) Bill 2010

| | |
|---|---|
| **Introduced** | 13 April 2010 |
| **Second Reading Speech** | 15 April 2010 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Tony Robinson MLA |
| **Portfolio responsibility** | Minister for Gaming |

## Purpose

The Bill amends the –

- *Gambling Regulation Act 2003*, and the *Gambling Regulation Further Amendment Act 2009* to make further provision in relation to regulatory arrangements for gaming machine entitlements and the monitoring, wagering and betting and keno licences, and the regulation of associates of gambling industry participants. **[3 to 70]**
- *Casino Control Act 1991* to make further provision in relation to disciplinary action against the casino operator for offences involving minors. **[71]**
- *Confiscation Act 1997* to remove a redundant reference to minor gaming permits. **[72]**

Extracts from the Second Reading Speech –

> *… The Bill therefore provides that the monitoring licensee will manage these linked jackpot funds on behalf of the participating venues. In providing this service, the Bill requires the monitor to establish and maintain a trust account for the jackpot prize pool with the moneys held on trust for the venues.*
>
> *… The Gambling Regulation Act currently contains a range of provisions enabling the C*
>
> *ommission to conduct investigations into the associates of gambling licence-holders to ensure that the industry is free from criminal influence. These provisions are currently set out in various chapters of the Act. The Bill consolidates these provisions so that the regulation, and ongoing monitoring, of associates of gambling licensees is consistent across all gambling licences and is able to be conducted efficiently.*
>
> *… In addition to the changes to the regulation and monitoring of associates, the Bill removes the 10 per cent shareholder restrictions that are in place for the current gaming operators.*
>
> *… The Bill also makes a number of technical changes to the disciplinary action provisions in the Act to ensure consistency across all gambling licences. The changes will also provide that disciplinary action can be taken against the post-2012 licensees during the period in which they are authorised to undertake preparatory action before the commencement of the term of their licence.*
>
> *… The Bill also amends the Casino Control Act 1991 to ensure that disciplinary action against the casino operator can be taken for offences that are set out in the Gambling Regulation Act relating to gambling by minors.*

## Content and Committee comment

*Delayed commencement*

The Bill provides that some of the amending provisions may not commence until 1 September 2012. **[2]**

The Explanatory Memorandum provides –

> *The forced commencement date in subsection (2) is due to the fact that under the Gambling Regulation Act 2003, the new structure of the gaming industry will not commence until 2012. As many of the provisions in this Bill relate to the new structure of the gaming industry, those provisions cannot come into operation until that time.*

*Property rights – Minister may dispose of forfeited shares of person declared to be an unsuitable associate*

The Bill makes provision for the disposal of voting rights shares in a listed gambling industry by a person the Minister has declared to be an unsuitable associate. If the person does not dispose of the shares the shares are forfeited to the State and then may be sold by the State. Any proceeds from the sale of the shares, after the deduction of reasonable expenses, are then paid to the shareholder. A declaration by the Minister for the forfeiture of shares is appealable to the Supreme Court. *(Refer to discussion in the Statement of Compatibility)* **[58]**

*Natural justice – Fair hearing – Deemed refusal for failure to determine application within time – Full merits review by VCAT*

The Bill contains two provisions concerning a deemed refusal of an application respectively in circumstances where the Commission fails to determine an application for the approval of premises as suitable for gambling within the stipulated time in the Act and in respect of a determination of an application by a venue operator for amendments to licence conditions. In these circumstances the applicant may apply to the VCAT for a full merits review of the application. An applicant may also appeal a VCAT decision on a question of law to the Supreme Court or Court of Appeal. *(Refer to discussion in Statement of Compatibility).* **[64 and 68]**

**The Committee makes no further comment.**

# Prahran Mechanics' Institute Amendment Bill 2010

| | |
|---|---|
| **Introduced** | 13 April 2010 |
| **Second Reading Speech** | 15 April 2010 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Richard Wynne MLA |
| **Portfolio responsibility** | Minister for Local Government |

## Purpose and Background

The Bill amends the *Prahran Mechanics' Institute Act 1899* ('the Act') to provide the Prahran Mechanics' Institution and Circulating Library incorporated ('the Institution') the power to sell in whole or in part certain lands currently vested in it under the Act or any building upon the lands; to sell land it owns situated at 140 High Street, Prahran; to make up to three acquisitions of land, each of which may include unlimited adjoining parcels of land.

The Bill also clarifies the institution's objectives which include the power to sell and acquire land and that the funds from any such sale by the Institution are used for the purposes of the Institution's objectives.

Extract from the Second Reading Speech –

> *To ensure the granting of these powers is consistent with the original intention of the Prahran Mechanics' Institute Act 1899, the Bill provides that the Prahran Mechanics' Institution exercise such powers only in a manner that achieves the objectives of the Institution. This not only ensures the Bill is consistent with the original intention of the Act and is legally viable, but also offers protection to the Prahran Mechanics' Institution by ensuring that the proceeds from the sale cannot be diverted away from the core business activities of the institution.*
>
> *Accordingly, the Bill provides that the powers provided, and the use of the proceeds from any sale of land, can only be exercised by the Prahran Mechanics' Institution for the purpose of achieving its objectives.*
>
> *These objectives are now clearly stated in the Bill, which replicates the original objectives set out in an Order in Council which was gazetted in 2007. These include providing a circulating and reference library, organising and conducting educational activities, and encouraging research for the benefit of its members and general public.*

## Content and Committee comment

*Power to acquire land on commercial terms – No power of compulsory acquisition*

The Bill provides a power for the institution to make 3 separate acquisitions of land up to 5 years after the commencement of the amendment. The Bill makes it clear that the institution does not represent the Crown. **[5 and 7]**

Extract from the Statement of Compatibility –

> *New section 11A, to be inserted by clause 5 of the Bill, will enable the institution to make up to three acquisitions of land, each of which may include unlimited adjoining parcels of land.*
>
> *… The institution will not possess the power to compulsorily acquire land. Any acquisition will be pursuant to a commercial agreement with the owner of the land and at market value.*

***The Committee makes no further comment.***

# Public Finance and Accountability Bill 2009

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

## Committee comments

**[2]**

***The Committee refers to item 1.3 of its Practice Note No.1 of 2005***

***1.3 Unexplained Commencement by Proclamation or Delayed Commencement in excess of 12 months***

*Where a Bill provides for the commencement of an Act by proclamation and no forced commencement provision is provided OR where the commencement is more than 12 months from Royal Assent, the Committee expects that Parliament will be informed as to the reasons why it is desirable or necessary to employ such a commencement provision. Where there is insufficient information provided to the Parliament, the grounds for any initial adverse report by the Committee will be that such a provision may constitute an inappropriate delegation of legislative power within the meaning of section 17(a)(vi) of the Act.*

***The Committee draws attention to the Practice Note and will request further information from the Minister as to the necessity or desirability of such a delayed commencement provision.***

## Minister's response

*I refer to your correspondence of 3 February 2010 to the Treasurer regarding comments made by your Committee in Alert Digest No. 1 of 2010 about the Public Finance and Accountability Bill 2009.*

*With reference to its Practice Note No. 1 of 2005, the Committee has requested further information on some of the Bill's provisions which come into operation on 1 July 2011, more than 12 months from the expected date of Royal Assent. I note that the commencement clause of the Bill ensures that a substantial number of provisions in the Bill become operational on 1 July 2010, and that all commencement dates are based on the assumption that the Bill receives Royal Assent prior to 30 June 2010.*

*The phased commencement of the Bill is necessary for effective change management across the public sector, including stakeholder engagement and adaptation of internal processes to adhere to new public finance requirements. The Bill creates a framework that makes outcomes and associated outputs the basis for whole of cycle planning, resource allocation, resource management and reporting. International best practice indicates that a shift to an output-outcomes framework is best reached progressively.*

*The phased implementation of the Bill over three years allows planning and reporting requirements to coincide with the relevant upcoming financial year. The Appropriation Bill for the 2011-12 financial year (introduced in May 2011) will be the first to feature appropriation by outcomes. This is an important trigger for the following elements of the Bill to commence beyond 1 July 2011:*

***Public Account*** *(Part 4)*

*Significant administrative improvements to the operation of the Public Account (comprising the Consolidated Fund, Departmental Working Accounts and Trust Funds), will require significant changes to processes, both at central agency and departmental levels. To allow sufficient time for the planning and implementation of these changes, the Public Account provisions will be implemented for the 2011-12 financial year.*

***Budget Management*** *(Part 5, Division 2)*

*The Appropriation Bill for the 2011-12 financial year will be the first to contain 'appropriations by outcome'. The supporting streamlined budget management provisions will be required in the same financial year.*

***Outcomes Progress Report*** *(Clause 39)*

*Under clause 26, the Government will be required to publish a statement of its current intended outcomes. The Government will also be required to publish an outcomes progress report specifying progress on the outcomes statement for the current financial year at least once during the following financial year (clause 39). The legislative requirement for the outcomes progress report is due to commence on 1 July 2011 to allow sufficient time between the publication of the statement of outcomes and the publication of the progress report, and to align with appropriation by outcomes in the 2011-12 financial year. Existing outcome reporting as part of Growing Victoria Together can continue in the interim.*

*I trust this information is of assistance.*

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

*15 April 2010*

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

# Severe Substance Dependence Treatment Bill 2009

The Bill was introduced into the Legislative Assembly on 8 December 2009 by the Hon. Daniel Andrews 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 comments

**Charter report**

***Non-consensual medical treatment – Privacy – Liberty – Detention and treatment order – Whether demonstrably justified – Whether under law – Whether reasonable***

*Summary: The Bill significantly limits the Charter rights of people with severe substance dependence against non-consensual medical treatment and to privacy and liberty. While the Committee considers that the goals of saving the life and welfare of such people are sufficiently important to justify such limitations, it has concerns about whether aspects of the Bill satisfy the Charter's test for reasonable limits on rights.*

*The Committee notes that Bill provides that people with severe substance dependence can potentially be:*

- *forcibly examined by a prescribed registered medical practitioner;*
- *searched, sedated and forcibly taken to a treatment centre*

- *detained at the treatment centre for 14 days and apprehended if they leave without permission*
- *forcibly provided with medically assisted withdrawal from dependence and symptom relief from that dependence*

***The Committee observes that the Bill significantly limits the Charter's rights of people with severe substance dependence against non-consensual medical treatment and to privacy and liberty.*** *However, it also aims to promote the Charter rights of such people to life and security.*

*The Statement of Compatibility remarks:*

> *The criteria for treatment in the Bill are such that only a small group of persons is likely to be captured by the Bill. These persons will be persons experiencing severe substance dependence to the extent that they no longer have an ability to make decisions not only about treatment for their substance use, but also decisions about their personal health, welfare and safety.*
>
> *In my opinion, the Bill's objectives are consistent with the principle of personal autonomy. The Bill aims to enhance the capacity of persons with a severe substance dependence to make their own decisions about their substance use and personal welfare. The provisions for detention and treatment are designed to give persons with severe substance dependence 'time out' from their substance use, creating an opportunity for the person to engage with services for voluntary treatment.*

***While the Committee considers that the goals of saving the life and welfare of people with severe substance dependence are sufficiently important to justify limiting other Charter rights of those people, it has concerns about whether aspects of the Bill satisfy the Charter's test for limiting rights, including its requirements that any limits be demonstrably justified, legally circumscribed and reasonable.***

*First, the Statement of Compatibility remarks that:*

> *Research has shown that for this very small group of people a brief period of civil detention and treatment can be beneficial and life-saving.*
>
> *The 2007 Turning Point Alcohol and Drug Centre Report on compulsory treatment prepared for the Australian National Council on Drugs (ANCD research paper 14, Pritchard, Mugavin and Swan) found that while the Australian and international civil commitment legislation has not been evaluated for its long-term effectiveness, there is evidence that compulsory treatment can be an effective harm reduction mechanism for some people. This finding is supported by a 2004 review of the ADDPA, undertaking for DHS by the Turning Point Alcohol and Drug Centre (Swan and Alberti) and a 2008 literature review of the effectiveness of compulsory residential treatment prepared by the NZ Ministry of Health (Broadstock, Brinson and Weston, Human Services Advisory Committee Report 2008.)*

*The Committee observes that the reports cited by the Statement emphasise the lack of scientific evidence for or against compelled treatment of non-offenders and refer only to 'mainly anecdotal' or 'largely anecdotal' evidence of harm reduction. The Committee is concerned that, in the case of such significant limits on human rights, anecdotal evidence may be insufficient to satisfy Charter s. 7(2)'s requirement that any limits be 'demonstrably justified'.*

*Second, the Committee is concerned that the Bill does not define 'substance' in the definition of 'severe substance dependence' and therefore does not limit the substances that people may be forced to withdraw from. This differs from the current Alcoholics and Drug-Dependent Persons Act 1968, which is limited to alcohol and drugs of dependence specified in Schedule 11 of the Drugs, Poisons and Controlled Substances Act 1985. It also differs from the otherwise identical NSW definition of 'severe substance dependence', which is limited to substances set out in a schedule of the Drugs and Alcohol Treatment Act 2007 (NSW). The Committee is concerned that, without a definition of 'substance', the Bill may not satisfy the requirement in Charter s. 7(2) that any rights limitation be made 'under law'.*

*Third, unlike in NSW, the court is not expressly required to determine whether detention and treatment is in the person's best interests or to find that the person has refused voluntary treatment. Indeed, non-consensual medically assisted withdrawal can be imposed without*

*compliance with the procedures for treating people with a disability under Part 4A of the Guardianship and Administration Act 1986 and contrary to a valid certificate of refusal of such treatment made under the Medical Treatment Act 1988.*

*Moreover, the Bill provides for detention and treatment orders lasting 14 days after admission, rather than 7 days (with the possibility of a 7 day extension) under the current Act. The Statement of Compatibility remarks:*

> *The duration of the detention (for up to 14 days) is based on evidence that medically supervised withdrawal commonly requires between 7 and 14 days.*

*The Committee is concerned that, in contrast to the current Act, the Bill automatically sets the length of the order at the maximum term and, in contrast to NSW, does not provide for a court to specify a shorter term.*

*While the Committee appreciates that the Bill requires a court to find that detention and treatment at a treatment centre is 'necessary' and sets out detailed principles governing treatment decisions by senior clinicians, it is concerned that the lack of express requirements for courts to determine both the patient's best interests and the order's duration may not satisfy Charter s. 7(2)'s requirement that any limits on rights be 'reasonable'.*

***The Committee refers to Parliament for its consideration the question of whether or not the Bill, by authorising substantial limits on people's rights against non-consensual treatment and to privacy and liberty but:***

- ***citing only anecdotal evidence for beneficial effects of compelled treatment;***
- ***not defining the substances that people can be forced to withdraw from;***
- ***not expressly requiring a court to determine whether treatment is in the person's best interests***
- ***not providing for a court to set a lower detention period than the statutory maximum***

***satisfies the test for reasonable limits on Charter rights in s. 7(2) of the Charter.***

---

***Fair hearing – Exemption from rules of evidence – Suppression of identity of parties and witnesses***

*Summary: The Committee has concerns about the compatibility of the Bill's procedural provisions with the Charter's right to a fair and public hearing.*

*The Committee notes that Part 2 of the Bill provides for the Magistrates' Court to make detention and treatment orders.* ***The Committee has concerns about Part 2's compatibility with the Charter right of people who are subject to an application for a detention and treatment order to a fair and public hearing:***

*First, clause 15(3) exempts the court from 'rules or practice as to evidence'. While the Committee appreciates that hearings in respect of detention and treatment orders may be conducted in circumstances of urgency, it is concerned about the removal of the protections of the law of evidence (including restraints on hearsay, opinion and tendency evidence) in light of the significant human rights at stake. The Committee notes that no substitute standards of procedure are provided by clause 15(3). Unlike in New Zealand, the ability of the person facing detention to 'lead evidence and cross-examine witnesses' depends on the court's discretion. Unlike in NSW, there is no explicit bar on proceeding where the subject of the proposed order wants or requires, but does not have, legal representation.*

*Second, clause 19(5) makes it an offence to publish the identity of the parties or any witness in the proceedings 'whether or not the Court makes an order'. Unlike the existing Act and the NSW statute, there is no exception for where a court authorises the publication or where the publication is of an official report of the proceedings. While the Committee appreciates that hearings in respect of detention and treatment orders involve highly sensitive matters and that confidentiality is ordinarily vital, it is concerned that an absolute bar on publication in all circumstances, without any option for a court to lift the requirement in the interests of justice, may prevent appropriate public scrutiny of such proceedings. For example, people who are subject to an order will be unable to publicise their own experiences or grievances about the process or the people involved unless they do so anonymously.*

***The Committee refers to Parliament for its consideration the question of whether or not the following rules governing proceedings for detention and treatment orders:***

- ***clause 15(3), excluding the rules of evidence;***
- ***clause 19(5), irrevocably barring publication of the identities of parties and witnesses; and***

***are compatible with the Charter right of subjects of an application for a detention and treatment order to a fair and public hearing.***

---

***Habeas corpus – Revocation of detention and treatment orders – Limited grounds for revocation – Onus of proof on detainee***

*Summary: The Committee is concerned about limitations that clause 22 places on the power of the Magistrates' Court to review the lawfulness of a person's detention in review proceedings. In light of the clear rulings on this topic from Europe, clauses 22(4) and 22(8) may be incompatible with the right to habeas corpus in Charter s. 21(7). The Committee will write to the Minister seeking further information.*

*The Committee notes that clause 22 provides for a person who is the subject of a detention and treatment order to apply to the Magistrates' Court for the order to be revoked. The Committee notes that clause 22 engages the right to habeas corpus (i.e. the right to go to court to test the lawfulness of anyone's detention) in Charter s. 21(7):*

> *Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must-*
>
> *(a) make a decision without delay; and*
>
> *(b) order the release of the person if it finds that the detention is unlawful.*

*Charter s. 21(7) is not limited to criminal proceedings and, in particular, applies to people detained for 'drug addiction'.*

***The Committee is concerned about limitations that clause 22 places on the power of the Magistrates' Court to review the lawfulness of a person's detention in review proceedings.***

*First, clause 22(4) provides:*

> *An application for the revocation of the order must be on the ground that one or more of the criteria for detention and treatment no longer applies to the person.*

*The Committee observes that clause 22(4) bars a detainee from seeking revocation on the ground that a further condition for the granting of such orders – that, 'having regard to all other relevant matters, the Court considers that the detention and treatment of the person at a treatment centre is necessary' – no longer applies. The English Court of Appeal, applying the equivalent European right to habeas corpus, has held that it is 'axiomatic that if the function of the tribunal is to consider whether the detention of the patient is lawful, it must apply the same test that the law required to be applied as a precondition to admission'.*

*Second, clause 22(8) provides:*

> *The onus of proof is on the person applying for the revocation of the detention and treatment order to establish on the balance of probabilities that one or more of the criteria for detention and treatment no longer applies to the person who is the subject of the order.*

*In 2002, the English Court of Appeal declared that such a reverse onus requirement imposed on detainees under that country's mental health legislation was incompatible with the European Convention's right to habeas corpus. That historic ruling (the first declaration of incompatibility under that nation's Human Rights Act 1998) was subsequently affirmed by the European Court of Human Rights and led to an amendment of the English legislation.*

*The Statement of Compatibility does not discuss the compatibility of clause 22 with Charter s. 21(7). While the Committee acknowledges that Victorians detained under detention and treatment orders will be able to apply for a common law writ of habeas corpus in the Supreme*

*Court, it observes that the European Court of Human Rights has held that 'a judicial review as limited as that available in the [common law] habeas corpus procedure… is not sufficient for a continuing confinement… as the reasons capable of initially justifying such a detention may cease to exist'.*

***In light of the clear rulings on this topic from Europe, the Committee considers that clauses 22(4) and 22(8) may be incompatible with the right to habeas corpus in Charter s. 21(7).***

***The Committee will write to the Minister seeking further information about the compatibility of clauses 22(4) and 22(8) with Charter s. 21(7). Pending the Minister's response, the Committee draws attention to clauses 22(4) and 22(8).***

## Minister's response

*Thank you for your letter of 3 February 2010 about the Severe Substance Dependence Treatment Bill 2009 (the Bill) and the attached Charter Report.*

*The Scrutiny of Acts and Regulations Committee has sought advice about a number of matters concerning the Bill raised by the Committee in its Alert Digest No 1 of 2010.*

***Whether or not the Bill, by authorising substantial limits on people's rights against non-consensual treatment and to privacy and liberty, satisfies the test for reasonable limitations on Charter rights set out in section 7(2) of the Charter.***

*The Committee has queried whether or not the Bill, by authorising substantial limits on people's rights against non-consensual treatment and to privacy and liberty but:*

- *citing only anecdotal evidence for beneficial effects of compelled treatment*
- *not defining the substances that people can be forced to withdraw from*
- *not expressly requiring a court to determine whether treatment is in the person's best interests*
- *not providing for a Court to set a lower detention period than the statutory maximum satisfies*

*the test for reasonable limitations on Charter rights set out in section 7(2) of the Charter.*

*<u>Citing only anecdotal evidence for beneficial effects of compelled treatment</u>*

*The Committee has observed the fact that scientific evidence for or against compelled treatment is scarce and expressed concern that this may mean that the rights limited by the legislation may not be 'demonstrably justifiable' as required by the Charter of Human Rights and Responsibilities Act 2006 (the Charter).*

*In the recent decision of R v Momcilovic, the Victorian Supreme Court of Appeal emphasised the need to demonstrate, by evidence, that interference with a right is reasonable and demonstrably justified under section 7(2) of the Charter. Under the Bill, the compulsory detention and treatment of persons is supported by evidence based policy. However, given the extremely small cohort of persons who are civilly detained for compulsory treatment, the volume of research into the effectiveness of civil involuntary detention and treatment is necessarily limited. We note that a review of the use of this type of order under the Victorian Alcoholics and Drug-dependent Persons Act 1968 (ADDPA) in the five-year period 1998 – 2002 found that an average of eight orders were made per year affecting on average, a total of six clients per year statewide.*

*The few studies that do exist have indicated that a brief period of civil detention and treatment can be beneficial and life-saving for the very small group of people targeted by the Bill. For example, in a report commissioned by the New Zealand Ministry of Health which included a review of the evidence for the effectiveness of compulsory treatment, it was found that while alcohol and drug abuse is generally viewed as a chronic condition, acute emergency situations do occur and if compulsory civil commitment is one mechanism to prevent deaths and minimise harm, then it can be considered to play a useful role. (Marita Broadstock, David Brinson and Adele Weston, A systemic review of the literature: The effectiveness of compulsory, residential treatment of chronic alcohol or drug addiction in non-offenders (2008)).*

*It is recognised that the success or otherwise of compulsory treatment may be due to many interrelated factors, which are difficult to measure with any empirical accuracy. The evidence is, of its nature equivocal, due to the small numbers of people affected. However, it is considered that the scope and objectives of the Bill are consistent with the available research evidence. The scope of the Bill is strictly limited to people who require immediate treatment as a matter of urgency to save their life or prevent serious damage to their health. The period of detention is strictly limited to a maximum of 14 days. Treatment is restricted to medically assisted withdrawal. The narrow application of the Bill, coupled with evidence that medically assisted withdrawal can be beneficial and life-saving, means that the Bill is compatible with the requirement for limitations on rights to be demonstrably justifiable under the Charter.*

*Not defining the substances that people can be forced to withdraw from*

*The Committee has raised the concern that by failing to define 'substance' there is no limit on the substances that people may be 'forced to withdraw from'. The Committee is concerned that this is at odds with the previous definition and also with legislation in New South Wales. The Committee is also concerned that this means that the legislation may not satisfy the Charter requirement that human rights limitations be 'under law'.*

*Rather than focus on the substance causing dependence, the Bill has instead focused on defining 'severe substance dependence' and the threshold test for detention. It is the severity of the dependence rather than the nature of the substance that is at issue. This ensures that only those people with the most severe substance dependence who urgently require treatment to save their life or prevent serious damage to their health will come under the legislation.*

*Clause 5 of the Bill provides a clear definition of severe substance dependence–*

- *(a) the person has a tolerance to a substance; and*
- *(b) the person shows withdrawal symptoms when the person stops using, or reduces the level of use of, the substance; and*
- *(c) the person is incapable of making decisions about his or her substance use and personal health, welfare and safety due primarily to the person's dependence on the substance.*

*Another consideration has been to ensure that the Bill does not become inapplicable if and when new or variant drugs or substances become available, and to ensure that substances in common use which are not scheduled poisons (such as petrol and household paint) are not excluded from the Bill. The primary challenge in developing lists or schedules of substances is to keep them up to date.*

*This approach also provides certainty to medical practitioners, the Courts, police and other groups when they make decisions or exercise powers and functions under the Bill. These groups should not need to refer to extensive lists of drugs and substances, or question the name, nature or chemical structure of a substance with which they may be unfamiliar, before making a decision. They should only need to be satisfied that a person is severely substance dependent and that the criteria for detention and treatment apply.*

*Not expressly requiring a court to determine whether treatment is in the is in the person's best interests*

*The Committee has raised the concern that the lack of express requirements for courts to determine the patient's best interests may mean that the limitation on their liberty is not reasonable.*

*Although the Bill does not expressly require the Court to determine whether treatment is in the person's best interests, the factors which the Court must consider pursuant to clauses 20(2) and 3(2) have the effect of requiring the Court to only make a detention and treatment order in circumstances where it is in the person's best interests to do so.*

*Clause 20(2) provides that a Court must not make a detention and treatment order unless the Court is satisfied that each of the criteria in clause 8 applies to the person and, having regard to all other relevant matters, the Court considers the detention and treatment of the person at a treatment centre is necessary. The criteria in clause 8 include the requirement that immediate treatment is necessary as a matter of urgency to save the person's life or prevent serious damage to the person's health and that detention is the only means by which*

*treatment can be provided. Further, in making a detention and treatment order, clause 3(2) requires that the Court apply the following principles:*

*(a) detention and treatment is a consideration of last resort; and*

*(b) any limitations on the human rights and any interference with the dignity and self-respect of a person subject to an action under the Bill are to be kept to the minimum necessary to achieve the objectives of the Bill.*

*Not providing for a Court to set a lower detention period than the statutory maximum*

*The Committee is concerned that the fact there is no legislative provision allowing a Court to set a lower period of detention may mean that the limitation on the person's liberty is not reasonable. In particular, the Committee has referred to the fact that the New South Wales legislation has such a provision.*

*It is important to note that the New South Wales legislation allows for detention for up to 28 days and allows detention to commence after the issuing of a 'dependency certificate' by a medical practitioner. In contrast, the maximum period in Victoria is significantly shorter and can only commence after a Court order is granted.*

*In the case of the Bill, the 14-day time limit aims for shortest possible period of detention, while also allowing enough time for withdrawal to take place safely and assessments to be made to inform discharge planning and follow up care options. The 14 days maximum is based on evidence that medically supervised withdrawal commonly requires between 7 and 14 days. For people with the most severe long-term drug or alcohol dependence, withdrawal is often protracted and complicated by other medical issues. The Court is not in a position to predict the course of the withdrawal in advance or the time it might take. It is only after withdrawal occurs that an adequate assessment can be made of the person's capacity to make decisions about their substance use and their need for further treatment.*

*Although the Court is not able to specify a lesser term of detention than 14 days, it is important to note that at any time during the period of the order, the Senior Clinician of the treatment centre must discharge the person if they are of the opinion that the criteria no longer apply. The Bill also allows for applications for revocation to be made to the Court at any time during the 14-day period and the Court must revoke the order if satisfied that one or more of the criteria no longer apply.*

***Whether or not clauses 15(3) and 19(5) which govern proceedings for detention and treatment orders are compatible with the right to a fair hearing in the Charter***

*Clause 15(3) excluding the rules of evidence*

*Clause 15(3) provides that the Court is not bound by rules or practice as to evidence but may inform itself in relation to any matter in such manner as it thinks fit. The Committee has expressed concern that this provision may not be compatible with the Charter right to a fair hearing.*

*This provision was included in recognition of the fact that the matter may be urgent given the serious and imminent risk to the person's health or safety, that the person may be unable to attend Court or give instructions to legal counsel due to the seriousness of their condition, or the medical practitioner is unable to attend the hearing because of other business.*

*This does not preclude the Court from hearing evidence under oath or allowing evidence to be tested by cross examination. It does, however, allow flexibility in the way the Court can be informed about the facts to suit the circumstances of the case. For example, the Court might permit the medical practitioner to give evidence over the telephone. Clause 15(3) is compatible with the Charter, when taken in the context of the Bill as a whole. The Bill seeks to put a number of safeguards in place to protect the person who is being detained and ensure that they are only detained as a measure of 'last resort'.*

*Clause 19(5) irrevocably barring publication of the identities of parties and witnesses*

*Clause 19(5) prohibits the publication or broadcast of anything in relation to a hearing which may identify the parties or witnesses in the hearing. While the Committee recognises the sensitivity of proceedings relating to this kind of detention, it is concerned that the absolute bar on publication may prevent public scrutiny.*

*It is important to note that nothing in the legislation prevents a person from making a complaint about the manner in which they were dealt with as part of Court proceedings either to the Office of the Public Advocate or to the Ombudsman. It is also important to note that there is nothing in the Bill to prevent a person going to the media to tell their story in relation to the same experiences. The bar is on the publication of the details of their identity. The reason for this provision is to protect the privacy of the person subject to the application given that the matters being considered by the Court relate to the person's health and welfare, are personal and private, and relate to their medical treatment rather than public policy issues.*

*The Charter protects privacy as well as the right to a fair hearing. In situations where the two rights are in tension, the Charter provides for the balancing of these rights. The importance of protecting people's privacy in situations where they are subject to detention of this kind is sufficiently important to outweigh the public interest in such cases.*

***Clauses 22(4) and 22(8) of the Bill may be incompatible with the right to habeas corpus in section 21(7) of the Charter***

*The Committee has expressed concern that clauses 22(4) and 22(8) of the Bill may be incompatible with the right to habeas corpus in section 21(7) of the Charter. This is because on the balance of probabilities that the criteria for detention are no longer applicable.*

*The Committee's concern is that this requirement is at odds with section 21(7) of the Charter, which allows a person who has been deprived of their liberty to apply to a court for a declaration or order regarding the lawfulness of his or her detention.*

*These two clauses are considered separately below.*

*Clause 22(4)*

*The Committee's concern regarding clause 22(4) is that an application may only be made on the ground that one or more of the criteria for detention and treatment no longer applies. The Committee notes that the Court cannot make an initial detention and treatment order unless the Court is satisfied both that each of the criteria applies and, having regard to all other relevant matters, treatment is necessary. The Committee considers that application for review under clause 22(4) should also be permitted on the basis of "other relevant matters".*

*The Committee has incorrectly viewed the Court's ability to have regard to other relevant matters as a further precondition to the making of an order. In fact, the Court's ability to consider other relevant matters provides the Court with discretion **not** to make an Order even though all the criteria may be satisfied. This discretion is likely to have fairly limited application. For example, it is conceivable that an established religious belief may be a sufficient reason not to make an order requiring treatment.*

*The policy intention of the Bill is that review and discharge should occur where there has been a change in circumstances. The Bill separately provides, in clause 35, that the senior clinician at the treatment centre must discharge a person from a treatment and detention order if the clinician is satisfied that one or more of the criteria for treatment and detention no longer applies.*

*The review process afforded by section 22(4) is not intended to be an avenue for appeal of the appropriateness of the initial order, as this can properly be achieved through application for judicial review. The review process set out in section 22(4) is, like the requirement imposed on the clinician under section 35, intended to ensure that prompt discharge will occur where there has been a change in the circumstances of the individual. If the criteria no longer apply, this will mean one of the following:*

- *(a) The person is no longer severely substance dependent*
- *(b) The person's life is no longer at risk, or there is no longer a risk of serious damage to their health*
- *(c) There are other places available to provide treatment; or*
- *(d) There are other less restrictive means of treatment.*

*Fundamentally, if the person achieves the realisation that they need to take personal responsibility for their treatment, the person will no longer be severely substance dependent. This is because the Bill provides that a person has a severe substance dependence if, inter*

*alia, the person is incapable of making decisions about his or her substance use and personal health, welfare and safety due primarily to the person's dependence on the substance. In such a case, there will also be less restrictive means of treatment, and the person will therefore fall outside of the scope of the Bill.*

*Clause 22(8)*

*The Committee states that a number of cases have determined that provisions such as clause 22(8) are not compatible with the right to habeas corpus. Of particular relevance is the case of R (H) v Mental Health Review Tribunal [2001] EWCA Civ 415 [31]. That case involved a person who had been detained following a conviction for manslaughter subject to the provisions of the Mental Health Act 1983 (UK). The provisions relating to detention in the Mental Health Act placed the burden of proof on a person detained to prove that the conditions that lead to their detention were no longer being met. The UK Court of Appeal held that these provisions were incompatible with the right to liberty in Article 5(1) of the European Convention on Human Rights. This article is very similar in substance to section 21(7) of the Charter.*

*The provisions in the Bill are distinguishable from the European case law. The European cases relate to situations where a person is seeking review of an order for detention made by a medical practitioner. In contrast, the Bill only allows detention of a person for compulsory treatment in the first instance after a court has issued an order in accordance with the provisions of the legislation. In other words, in contrast to the European cases, the requirements of the Charter and of common law Habeas Corpus are satisfied in the Bill by the way in which the order is initially made.*

*The clauses referred to by the Committee refer to situations where 'one or more of the criteria for detention and treatment no longer applies to the person'. This provision provides an additional safeguard for detained people, which allows them to apply to a court for an order to be revoked in situations where the legislative criteria no longer apply. In situations where a person believed that the initial order had been wrongly made because the criteria were not met, then they would be at liberty to appeal the order on that basis according to established procedures.*

*In conclusion, it is considered that the Bill is compatible with the Charter.*

*I trust that this advice answers the Committee's concerns,*

***Hon. Lisa Neville MP***
***Minister for Mental Health***

*21 April 2010*

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

---

### *Habeas corpus – Revocation of detention and treatment orders – Limited grounds for revocation – Onus of proof on detainees*

In its Alert Digest No. 1 of 2010, the Committee raised concerns about the compatibility of clauses 22(4) and 22(8) with the Charter's right to *habeas corpus* on the basis of European cases involving detention in hospitals that held that the equivalent right in Europe is not satisfied by a review procedure that does not cover the same criteria as the original order,[7] requires a detainee to prove that any ground for detention isn't established[8] or is merely a review of the legality of the initial decision.[9]

The Minister remarks:

---

7 *R (H) v Mental Health Review Tribunal* [2001] EWCA Civ 415, [31].

8 *Reid v United Kingdom* [2003] ECHR 94, [74].

9 *X v United Kingdom* [1981] ECHR 6, [58]

*The provisions in the Bill are distinguishable from the European case law. The European cases relate to situations where person is seeking review of an order for detention made by a medical practitioner. In contrast, the Bill only allows detention of a person for compulsory treatment in the first instance after a court has issued an order in accordance with the provisions of the legislation. In other words, in contrast to the European cases, the requirements of the Charter and of common law Habeas Corpus are satisfied by the Bill by the way in which the order is initially made.*

However, it is the Committee's understanding that the European cases referred to by the Committee all relate to people who were detained pursuant to court orders.[10] So, the Committee considers that the European rulings appear to be directly applicable to clause 22, which similarly governs applications for review by people detained pursuant to court orders.

**The Committee therefore restates its view that, in light of the clear rulings from Europe, clauses 22(4) and 22(8) may be incompatible with the right to habeas corpus in Charter s. 21(7).**

# Therapeutic Goods (Victoria) Bill 2010

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

## Committee comments

**[6] – Regulations may modify applied laws – Inappropriately delegates legislative power**

*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.*

**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.* ***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*

[10] See *R (H) v Mental Health Review Tribunal* [2001] EWCA Civ 415, [1], [11] (c.f. *Mental Health Act 1983* (UK), s. 41(1)); *Reid v United Kingdom* [2003] ECHR 94, [10] (c.f. *Mental Health (Scotland) Act 1960* (UK), ss. 55(1) & 60(1); *Criminal Procedure (Scotland) Act 1995* (UK), ss. 58 & 59); *X v United Kingdom* [1981] ECHR 6, [8]-[11] (c.f. *Mental Health Act 1959* (UK), ss. 60(1) & 65(1).) A further (non-medical) case mentioned in the Alert Digest similarly concerned detention pursuant to a court order: *Kadem v Malta* [2003] ECHR 19, [10] (c.f. *Extradition Act 1978* (Malta), s. 15(3)).

*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).***

## Minister's response

***Response to Two Issues Raised by Scrutiny of Acts & Regulations Committee in Alert Digest No 5***

***Regulations may modify applied laws-inappropriately delegates legislative power***

1. *SARC notes that clause 6(3) of the TGV Bill, (which provides that regulations made under Act may modify the Commonwealth therapeutic goods laws for the purposes of this section) permits a subordinate instrument to modify the primary legislation. The Committee seeks the Minister's advice as to the reasons for taking this approach.*

2. *As noted in the Second Reading Speech, this Bill forms part of a national regulatory scheme which derives from the Commonwealth Therapeutic Goods 1989 and depends on application of that law as a law of the State. The purpose of the clause 6(3) is to provide an efficient means of enabling Victoria to adapt the national scheme for the regulation of therapeutic goods to local requirements should the circumstances arise. The clause is consistent with the way other jurisdictions have applied the Commonwealth provisions. By achieving consistency of approach with other jurisdictions, Victoria ensures that there is consistency for businesses regulated under the Commonwealth and State legislation.*

***Charter Report***

3. *SARC notes that it has previously expressed concern that national legislative schemes have the potential to reduce the operation of the Charter's protection for Victoria's human rights. SARC notes its expectation that the statement of compatibility for such bill will address this issue. In particular, SARC is concerned that clause 14(2) and 16(2) of the Bill may "exclude the Charter altogether from administrative appeals and criminal prosecutions arising under the applied laws".*

4. *The government recognises that the application of national legislative schemes in Victoria has the potential to impact on the implementation of the Charter and is currently working on the issues.*

***HON. DANIEL ANDREWS MP***
***MINISTER FOR HEALTH***

*29 April 2010*

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

## Committee room
## 3 May 2010

# Appendix 1
## Index of Bills in 2010

**Alert Digest Nos.**

# Appendix 2
## Committee Comments classified by Terms of Reference

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

**Alert Digest Nos.**

## Section 17(a)

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

Accident Compensation Amendment Bill 2009 1

### (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

Building Amendment Bill 2010 6
Child Employment Bill 4
Courts Legislation Miscellaneous Amendments Bill 2010 6
Crimes Legislation Amendment Act 2010 4
Crimes Legislation Amendment Bill 2009 1
Equal opportunity Bill 2010 4
Justice Legislation Amendment Bill 2010 4
Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010 5
Livestock Management Bill 2009 1
Members of Parliament (Standards) Bill 2010 5
Severe Substance Dependence Treatment Bill 2009 1
Therapeutic Goods (Victoria) Bill 2010 5

## Section 17(b)

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

Accident Compensation Amendment Bill 2009 1

# Appendix 3
## Ministerial Correspondence 2009-10

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

| Bill Title | Minister/ Member | Date of Committee Letter / *Minister's Response* | Alert Digest No. Issue raised / *Response Published* |
|---|---|---|---|
| Electricity Industry Amendment (Critical Infrastructure) Bill 2009 | Energy and Resources | 10.11.09<br>*03.03.10* | 13 of 2009<br>*3 of 2010* |
| Justice Legislation Miscellaneous Amendments Bill 2009 | Police and Emergency Services | 10.11.09<br>*16.03.10* | 13 of 2009<br>*4 of 2010* |
| Constitution (Appointments) Bill 2009 | Premier | 24.11.09<br>*12.01.10* | 14 of 2009<br>*1 of 2010* |
| Serious Sex Offenders (Detention and Supervision) Bill 2009 | Corrections | 24.11.09<br>*16.12.09* | 14 of 2009<br>*1 of 2010* |
| Summary Offences and Control of Weapons Acts Amendment Bill 2009 | Police and Emergency Services | 24.11.09<br>*07.01.10* | 14 of 2009<br>*1 of 2010* |
| Consumer Affairs Legislation Amendment Bill 2009 | Consumer Affairs | 08.12.09<br>*15.02.10* | 15 of 2009<br>*2 of 2010* |
| Accident Compensation Amendment Bill 2009 | Finance, WorkCover and the Transport Accident Commission | 02.02.10<br>*09.03.10* | 1 of 2010<br>*4 of 2010* |
| Crimes Legislation Amendment Bill 2009 | Attorney-General | 02.02.10<br>*15.03.10* | 1 of 2010<br>*4 of 2010* |
| Transport Integration Bill 2009 | Transport | 02.02.10<br>*22.02.10* | 1 of 2010<br>*2 of 2010* |
| Equal Opportunity Bill 2010 | Attorney-General | 23.03.10<br>*13.04.10* | 4 of 2010<br>*5 of 2010* |
| Public Finance and Accountability Bill 2009 | Treasurer | 02.02.10<br>*15.04.10* | 1 of 2010<br>*6 of 2010* |
| Severe Substance Dependence Treatment Bill 2009 | Mental Health | 02.02.10<br>*21.04.10* | 1 of 2010<br>*6 of 2010* |
| Therapeutic Goods (Victoria) Bill 2010 | Health | 13.04.10<br>*29.01.10* | 5 of 2010<br>*6 of 2010* |

### Outstanding correspondence

| Bill Title | Minister/ Member | Date of Committee | Alert Digest No. Issue |
|---|---|---|---|
| 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 |

| Bill Title | Minister/ Member | Date of Committee | Alert Digest No. Issue |
|---|---|---|---|
| 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 |
| Building Amendment Bill 2010 | Planning | 05.05.10 | 6 of 2010 |
| Courts Legislation Miscellaneous Amendments Bill 2010 | Attorney-General | 05.05.10 | 6 of 2010 |