

No. 7 of 2010

Tuesday, 25 May 2010

On the

Appropriation (2010/2011) Bill 2010

Appropriation (Parliament 2010/2011)
Bill 2010

Building Amendment Bill 2010

Child Employment Amendment
Bill 2010

Domestic Animals Amendment
(Dangerous Dogs) Bill 2010

Drugs, Poisons and Controlled
Substances Amendment (Prohibition of
Display and Sale of Bonges) Bill 2010

Education and Training Reform Further
Amendment Bill 2010

Justice Legislation Amendment
Bill 2010

Members of Parliament (Standards)
Bill 2010

Parks and Crown Land Legislation
(Mount Buffalo) Bill 2010

Pharmacy Regulation Bill 2010

State Taxation Acts Amendment
Bill 2010

Transport Legislation Amendment
(Ports Integration) 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 –

Appropriation (2010/2011) Bill 2010
Appropriation (Parliament 2010/2011) Bill 2010
Domestic Animals Amendment (Dangerous Dogs) Bill 2010
Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bong) Bill 2010
Parks and Crown Land Legislation (Mount Buffalo) Bill 2010
Pharmacy Regulation Bill 2010
State Taxation Acts Amendment Bill 2010
Transport Legislation Amendment (Ports Integration) Bill 2010

The Committee notes the following correspondence –

Building Amendment Bill 2010
Child Employment Amendment Bill 2010
Education and Training Reform Further Amendment Bill 2010
Justice Legislation Amendment Bill 2010
Members of Parliament (Standards) 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.

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Appropriation (2010/2011) Bill 2010

Introduced	4 May 2010
Second Reading Speech	4 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Responsible Minister	Hon. John Lenders MLC
Portfolio responsibility	Treasurer

Background

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund for the ordinary annual services of the Government for the financial year 2010/ 2011.

The Committee makes no further comment.

Appropriation (Parliament 2010/2011) Bill 2010

Introduced	4 May 2010
Second Reading Speech	4 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Responsible Minister	Hon. John Lenders MLC
Portfolio responsibility	Treasurer

Background

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund to the Parliament for the financial year 2010/2011.

Note: *In addition to appropriating money for the purposes of the Parliament the Bill appropriates money for the Auditor-General for the State of Victoria, being an independent officer of the Parliament pursuant to sections 94A to 94C of the Constitution Act 1975.*

The Committee makes no further comment.

Domestic Animals Amendment (Dangerous Dogs) Bill 2010

Introduced	4 May 2010
Second Reading Speech	6 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. Joe Helper MLA
Portfolio responsibility	Minister for Agriculture

Purpose

The Bill amends the *Domestic Animals Act 1994* to –

- allow the registration of restricted breed dogs under certain circumstances and to amend the definition of a restricted breed dog. **[3, 7]**
- provide that the Victorian Civil and Administrative Tribunal may review declarations of restricted breed dogs and to abolish any review panel currently constituted to review such declarations. **[14, 20, 21, 22, 26, 27, 28, 30]**
- increase penalties for certain offences. **[6, 8, 9, 10]**
- further enable the making of declarations in respect of dangerous dogs and menacing dogs. **[11, 12]**
- provide for dogs to be destroyed in certain circumstances. **[23]**
- make other miscellaneous amendments and consequential amendments to the act. **[5, 8, 13, 15, 16, 17, 18, 29, 31]**

Extracts from the Second Reading Speech –

...The Bill will give an authorised council officer power to destroy a dog 48 hours after seizure if the dog was straying, is unidentifiable and is considered a danger to the community.

The Bill will also allow an authorised officer to immediately destroy any dog that is behaving in such a manner or in such circumstances that the officer reasonably believes it will cause imminent serious injury or death to a person or other animal.

... In the case of dangerous dogs found at large, the Bill will give an authorised council officer power to destroy the dog 24 hours after confirming it is a declared 'dangerous dog' under the Act. This is a dog that has previously been proven to have attacked and caused serious injury.

...The Bill will double the penalties for not applying for registration and for an animal not wearing the council identification marker when off the owners' premises. As well, the Bill will give authorised officers explicit power to scan a dog for a microchip to identify it for enforcement purposes under the Act.

*... The Bill also provides new powers for the Magistrates' Court to order an owner guilty of an offence under the Act to attend a training course relating to responsible dog ownership, or for the dog and owner to attend an approved obedience training course. **[25]***

... In order to better regulate restricted breed dogs, in place of the current prohibition, the Bill provides for a two-year amnesty period to allow owners to register restricted breed dogs and thereby bring them under the existing strict controls. The amnesty will only apply to dogs in Victoria immediately before the amnesty begins.

*To ensure procedural fairness and transparency of process, the Bill provides for appeal to the Victorian Civil and Administrative Tribunal from a declaration of a restricted breed dog. This will replace the current provisions in the Act providing for an appeals panel. **[28]***

*Lastly, the Bill will clarify the authorisation requirements for the implanting of microchips and ensures that only veterinary practitioners can implant horses. **[16]***

The Committee makes no further comment.

Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bong) Bill 2010

Introduced	5 May 2010
Second Reading Speech	5 May 2010
House	Legislative Council
Member introducing Bill	Mr Peter Kavanagh MLC
Private Member's Bill	

Purpose and Background

The Bill amends the *Drugs, Poisons and Controlled Substances Act 1981* by inserting a proposed new Part VAA to prohibit the sale and display of bong.

Content and Committee comment

The Bill provides a reverse onus defence for the offence of displaying a bong or a component of a bong in a retail outlet (new section 80HB). (*Refer to Charter report below*) [3]

Charter report

Cultural rights – Presumption of innocence – Offence of displaying bong – Defendant must prove that bong designed for another purpose – Display of hookahs in shops

Summary: Clause 3 provides for criminal offences for the display and sale of bong and the display of hookahs, as well as enforcement provisions for those offences. The Statement of Compatibility addresses only the enforcement provisions. However, the Committee considers that the offence provisions also engage Charter rights. It will write to the Member seeking further information.

The Committee notes that clause 3, inserting new sections 80HA to 80HI, provides for criminal offences for the display and sale of bong and the display of hookahs, as well as enforcement provisions for those offences. The Statement of Compatibility addresses only the enforcement provisions. However, the Committee considers that the offence provisions also engage Charter rights, as follows:

First, bong and their components (including ordinary retail items such as buckets, hoses and bottles) have myriad uses, only some of which are unlawful. However, when someone is charged under new section 80HB's offence of displaying a bong or component in a retail outlet, the prosecution is only required to prove that a bong or component is 'capable of being used for administering a drug of dependence',¹ while the accused bears the burden of proving that the item is actually 'designed primarily to be used for' a lawful purpose.² Canadian courts, when rejecting a challenge under that nation's rights charter to a provision barring the sale of 'instruments... for illicit drug use' emphasised the importance of requiring the prosecution prove that the instrument had an illicit purpose.³ The Committee therefore

¹ New section 80HA defines 'bong' to mean: 'a device capable of being used for administering a drug of dependence by the drawing of smoke or fumes, resulting from heating or burning the drug in or on the device, through water or another liquid in the device'.

² New section 80HB(2) provides that: 'It is a defence for the person to prove that the bong, or the component of a bong, is designed primarily to be used for a purpose other than administering a drug of dependence.'

³ *R v Spindloe* [2001] SKCA 58, [90]

considers that new section 80HB engages the Charter's right to be presumed innocent until proved guilty.⁴

Second, social smoking of tobacco using bong-like devices is significant in some cultures. While new section 80HA's definition of 'bong' specifically excludes a 'hookah', it does not define that term (unlike corresponding Queensland legislation⁵) and therefore may not exclude other bong-like devices used in cultural social smoking practices. As well, new section 80HD's creates an offence of displaying 'more than 3 hookahs' in a retail outlet and therefore may limit the particular cultural practice of social smoking in public cafes. So, the Committee considers that new sections 80HB and 80HD may engage the Charter right of '[a]ll persons with a particular cultural... background, in community with other persons of that background, to enjoy his or her culture'.⁶

The Committee refers to Parliament for its consideration the question of whether or not new sections 80HA and 80HD are compatible with the Charter's rights to be presumed innocent and for people of particular cultural backgrounds to enjoy their culture in community with others of that background. The Committee will also write to the Member noting these matters.

The Committee makes no further comment.

⁴ Charter s. 25(1).

⁵ *Tobacco and Other Smoking Products Act 1998* (Qld), Schedule, defining 'hookah' as a fully assembled device— (a) for smoking tobacco by the drawing of smoke or fumes, resulting from heating or burning the tobacco in the device, through water or another liquid in the device; and (b) that has— (i) 1 or more openings; and(ii) 1 or more flexible hoses, each with a mouthpiece, through which the smoke or fumes are drawn' and including an example diagram.

⁶ Charter s. 19(1).

Parks and Crown Land Legislation (Mount Buffalo) Bill 2010

Introduced	4 May 2010
Second Reading Speech	6 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Minister responsible	Hon. Gavin Jennings MLC
Portfolio responsibility	Minister for Environment and Climate Change

Purpose

The Bill will amend the *National Parks Act 1975* (the 'Act') to –

- extend the maximum lease term for designated areas in Mount Buffalo National Park and provide associated licensing powers. **[4 and 5]**

Extract from the Second Reading Speech –

A lease may be granted for a term of more than 21 years and up to 50 years if, in addition to meeting the other specified requirements, the Minister is satisfied that the proposed use, development, improvements or works are of a substantial nature and of a value which justifies the longer term, and the granting of the longer term lease is in the public interest.

- amend certain offence and enforcement provisions in the Act relating to marine national parks and marine sanctuaries. **[6, 8]**

Extract from the Second Reading Speech –

The Bill will amend the existing offence provisions to enable boats operating under a rock lobster fishery access licence carrying rock lobster to anchor overnight in a marine national park or marine sanctuary, provided that there are no rock lobster pots on board. ... An associated offence will be created to anchor or moor a boat in a marine national park or marine sanctuary with pots on board.

... The Bill will also create the offence of using commercial fishing equipment in a marine national park or marine sanctuary.

... The Bill will also enable an additional enforcement provision of the Fisheries Act – section 130 – to apply to serious fishing offences committed in marine national parks and marine sanctuaries under the National Parks Act as if they were offences under the Fisheries Act. Under section 130 of the Fisheries Act, a court is able to prevent a person who is convicted of a serious offence under that Act from carrying out various activities associated with fishing. *also refer to Statement of Compatibility for discussion concerning – 'freedom of movement – section 130 prohibition orders'*

- create new park and reserve areas under the Act and the *Crown Land (Reserves) Act 1978*, excise areas from existing parks and revoke certain permanent reservations. **[11 to 13, 17 to 23]**

The Bill also makes other miscellaneous amendments to several Acts, including the repealing of spent provisions and several statute law revisions. **[15, 24]**

Content and Committee comment

The Bill provides that the amendments made to the Act by the Bill are not intended to affect native title rights and interests other than where they are affected or are authorised to be affected by or under the *Native Title Act 1993 (Cth)*. **[10]**

The Committee makes no further comment.

Pharmacy Regulation Bill 2010

Introduced	4 May 2010
Second Reading Speech	6 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose and Background

The Bill –

- regulates the ownership and operation of pharmacy businesses, pharmacy departments and depots.
- establishes the Victorian Pharmacy Authority which will have the same functions as the current Pharmacy Board of Victoria.
- makes consequential amendments to other Acts.

Extract from the Statement of Compatibility –

The Bill has been prepared as a result of recent changes to introduce a national registration scheme of health professionals in Australia. While the national scheme will regulate the registration of pharmacists, it will not regulate pharmacies.

Currently, pharmacies are regulated by Part 6 of the Health Professions Registration Act 2005. A significant part of this Bill is modelled on the current legislation.

Of noteworthy significance, the Bill establishes a new Victorian Pharmacy Authority, which will be the responsible body for registering the premises of a pharmacy business, pharmacy departments and pharmacy depots. The authority will also license persons to carry on a pharmacy business or pharmacy department.

Content and Committee comment

Privilege against self-incrimination – Documents required under the Act must be provided but may not incriminate

The Bill provides a privilege against self-incrimination but the privilege does not extend to the production of documents that may incriminate where the document is required to be produced by or under the Act. If the person claims, before producing the document that the document may incriminate them it is not admissible against the person in criminal proceedings. [78]

Charter report

Freedom of expression – Offence for anyone other than licensed pharmacist to use the title ‘pharmacy’ without approval from the Victorian Pharmacy Authority – Non-misleading uses

Summary: Clause 34 makes it an offence to use the title “pharmacy” except in relation to a licensed pharmacy or pharmacy business. While the Committee appreciates the need to prevent unlicensed people from purporting to be licensed pharmacists, the Committee is concerned that clause 34 extends to uses of the word ‘pharmacy’ where this risk does not arise. It will write to the Minister seeking further information.

The Committee notes that clause 34 makes it an offence to ‘use the title “pharmacy” except in relation to a licensed pharmacy or pharmacy business. The Committee considers that clause 34 engages the Charter’s right to freedom of expression.⁷

The Statement of Compatibility does not address clause 34. **While the Committee appreciates the need to prevent unlicensed people from purporting to be licensed pharmacists, the Committee is concerned that clause 34 extends to uses of the word ‘pharmacy’ where this risk does not arise.** For example, it criminalises naming a kid’s show ‘Fun Fun Pharmacy’⁸, a gallery ‘Art Pharmacy’⁹ or a music group ‘Jazz Pharmacy’¹⁰. It might also criminalise some uses of ‘pharmacy’ by critics, commentators or advocates, e.g. ‘Pharmacy Watch’.¹¹

While clause 34(2) provides exceptions for some uses of ‘pharmacy’¹² and for the Victorian Pharmacy Authority to give advance approval to other uses,¹³ it is nevertheless broader than current state and national provisions protecting health titles, which are limited to uses that could reasonably induce a belief that the user is registered to use that title in a health context.¹⁴ In *Davis v Commonwealth* (1998) 166 CLR 79 (a case concerning the regulation of terms associated with the Australian Bicentennial), the High Court held that blanket criminalisation of public uses of an ordinary word, is incompatible with freedom of expression, even where it is possible to obtain advance approval for uses of the word.

The Committee will write to the Minister seeking further information as to whether clause 34 is compatible with the Charter’s right to freedom of expression. Pending the Minister’s response, the Committee draws attention to clause 34.

The Committee makes no further comment.

⁷ Charter s. 15(2).

⁸ <http://www.toei-animation.com/en/catalog/fun_fun_pharmacy>

⁹ <<http://www.rhiz.eu/institution-36267-en.html>>

¹⁰ <<http://www.montrealmirror.com/ARCHIVES/2001/020101/cover.html>>

¹¹ <<http://www.pharmacywatch.com/>>, <<http://www.costcovebpharmacysucks.com/>>,
<<http://www.pharmacyerrorinjurylawyer.com/>>

¹² Clause 34(2)(a)-(c) permits certain uses by museums, teaching institutions and professional associations.

¹³ Clause 34(2)(d). Any approval must be notified in the Government Gazette and a publication circulated generally among registered pharmacists.

¹⁴ *Health Professions Registration Act 1995* (Vic), s. 80 provides for a variety of offences for use of titles, including any use of the word ‘pharmacist’ ‘which could be reasonably understood to induce a belief that the person is registered under this Act’ as a pharmacist. The *Health Practitioner Regulation National Law* s. 118(1)(b) bars taking or using a prescribed title for a health profession ‘in a way that could be reasonably expected to induce a belief the person is registered under this Law in the profession’.

State Taxation Acts Amendment Bill 2010

Introduced	4 May 2010
Second Reading Speech	6 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Minister for Finance, WorkCover and the Transport
Accident Commission	

Purpose and Background

The Bill amends the –

- *Duties Act 2000* to –
 - provide for the payment of duty in respect of dutiable transactions using an on-line duty payment system.
 - amend the dutiable value threshold for motor vehicle duty and makes.
 - make consequential amendments to the *First Home Owner Grant Act 2000*.
- *First Home Owner Grant Act 2000* to provide a first home bonus of \$13 000 for eligible transactions entered into on or after 1 July 2010 and before 1 July 2011 and provide a regional bonus of \$6500 for eligible transactions entered into on or after 1 July 2010 and before 1 July 2011.

Extract from the Second Reading Speech – *From 1 July 2010, the assistance available for first time buyers of new homes in Melbourne will increase from \$11 000 to \$13 000 and the assistance available for those purchasing a new home in regional Victoria will increase from \$15 500 to \$19 500. These bonuses are in addition to the current \$7000 first home owner grant. They bring the total assistance available to Victorian first home buyers to \$20 000 on the purchase of a new home in Melbourne and \$26 500 for new homes purchased in regional Victoria. The purchase of an established home will still attract the \$7000 first home owners grant.*

- *Land Tax Act 2005* to provide an exemption in relation to the construction of residential care facilities, supported residential services, residential services and retirement villages.
- *Payroll Tax Act 2007* to reduce the rate of payroll tax from 4.95% to 4.90% from 1 July 2010.
- *Taxation Administration Act 1997* to remove the power to authorise by regulation recipients of information obtained under or in relation to the administration of a taxation law.

Extract from the Second Reading Speech – *This amendment is intended to put beyond doubt that extending the scope of authorised disclosures is a matter for legislation, thereby guaranteeing the level of transparency and accountability expected where a law impacts on the rights of an individual. This is in line with the preferred approach advocated by the Office of the Victorian Privacy Commissioner.*

The Bill repeals the *Business Franchise (Tobacco) Act 1974* the *Debits Tax Act 1990* and the *Financial Institutions Duty Act 1982* and makes consequential amendments to other Acts.

Extract from the Second Reading Speech – *The various taxes, duties and fees imposed by those Acts have now been abolished and the legislation is no longer required.*

The Committee makes no further comment.

Transport Legislation Amendment (Port Integration) Bill 2010

Introduced	4 May 2010
Second Reading Speech	6 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

Purpose and Background

The Bill amends the *Transport Integration Act 2010* (the 'Act') to —

- continue the Port of Melbourne Corporation and the Victorian Regional Channels Authority under the Act with amended functions and object provisions that align with the new policy framework set out in the Act. **[8]**
- abolish the Port of Hastings Corporation. **[4, 8, 21]**
- provide that the Port of Melbourne Corporation is the successor in law of the Port of Hastings Corporation and integrate the management of the port of Melbourne and the port of Hastings. **[21]**
- change the name of the *Port Services Act 1995* to the *Port Management Act 1995* and makes consequential amendments to a number of Acts to give effect to the name change and the abolition of the Port of Hastings Corporation.

The Committee makes no further comment.

Ministerial Correspondence

Building Amendment Bill 2010

The Bill was introduced into the Legislative Assembly on 13 April 2010 by the Hon. Richard Wynne MLA. The Committee considered the Bill on 3 May 2010 and made the following comments in Alert Digest No. 6 of 2010 tabled in the Parliament on 4 May 2010.

Committee comments

[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.

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. 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.

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).

Minister's response

Thank you for your letter dated 5 May 2010

I provide the following advice in response to the Committee's concerns regarding the Building Amendment Bill.

Question 1 - Whether section 118(3) should be amended to clarify that it places only an evidential onus on accused persons?

Clause 24 of the Building Amendment Bill 2010 (the Bill) amends section 118(1) and (2) of the Building Act 1993 (the Act) to increase the maximum penalty for where a person contravenes an emergency order or building order 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.

Section 118(3) of the Act provides that it is a sufficient defence to a prosecution under section 118 if the defendant 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.

In accordance with section 72(1) of the Criminal Procedure Act 2009 (the Criminal Procedure Act), a defendant is required to present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish the defence. Accordingly, in my view, section 118(3) places an evidential burden on a defendant to point to evidence 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. As section 118(3) only places an evidential onus on accused persons, it does not require any further amendment.

Question 2- If not, whether or not clause 24 is compatible with the Charter's right to be presumed innocent until proven guilty?

As stated, I consider that section 118(3) of the Act places an evidential onus on a defendant. For the reasons provided in the Statement of Compatibility, I consider that, while such an onus does limit the right to be presumed innocent under section 25(1) of the Charter, that limitation is justified. For this reason, I regard clause 24 as being compatible with the Charter.

*The Committee expressed concerns regarding section 118(3) in light of the decision of the Court of Appeal in *R v Momcilovic* [2010] VSCA 50, and the Court's ruling regarding the word 'satisfies' in section 5 of the Drugs, Poisons and Controlled Substances Act 1981 (the Drugs Act). The Committee considered that the Court's position was that the word 'satisfies' always requires an accused person to prove the relevant issue on the balance of probabilities, and that this position is not altered by section 72 of the Criminal Procedure Act.*

*Section 5 of the Drugs Act provides that an accused is deemed to be in possession of drugs "unless the person satisfies the court to the contrary". Possession is an element of various offences under the Drugs Act and section 5 shifts the burden of proving this element of those offences from the prosecution to the accused. Section 5 thus relates to a key element of offences and does not relate to satisfying the court in relation to a defence against charges in the Drugs Act. Consequently, section 5 of the Drugs Act is a very different provision to section 118(3) of the Act, and the Court's ruling in *Momcilovic* regarding the meaning of the word 'satisfies' does not extend to the use of the word in provisions such as section 118(3) of the Act.*

For these reasons, I remain of the view that clause 24 is compatible with section 25(1) of the Charter.

JUSTIN MADDEN MP
Minister for Planning

24 May 2010

The Committee thanks the Minister for this response.

Child Employment Amendment Bill 2010

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

Committee comments

[Charter report]

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

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

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

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

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

The Committee considers that clauses 15 and 17, by changing the test for when children may be permitted to work, engage their Charter right 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. No explanation for these changes is provided in the statement of compatibility, second reading speech or explanatory memorandum. It may be that the explanation for the omission of the fitness requirement is the insertion of the word 'safety' into the first requirement, but the Committee is concerned that this may not be an equivalent test.

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

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

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

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

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

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

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

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

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

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

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

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

Minister's response

I refer to your letter dated 24 March 2010, raising two matters in relation to the Child Employment Amendment Bill 2010 (the Bill). I am responding to the Committee's report as the Minister responsible for the Bill. This response was delayed due to the report being sent to the Attorney General, the Hon Rob Hulls MP, rather than to my office.

The first issue raised by the Committee is the amendments proposed by the Bill that will result in the omission of the existing requirement that a child be fit to engage in proposed employment (in determining a permit application or cancelling an existing permit). The Committee has asked whether this is comparable with a child's right to protection under section 17(2) of the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter).

The Bill and relevant clauses do not limit the right of a child, under the Charter, to "such protection as is in his or her best interests and is needed by him by reason of being a child".

The Bill amends existing sections 16 and 18, to require that the Secretary must be satisfied that a child's safety (in addition to his or her health, education and moral and material welfare) will not be compromised by the proposed employment.

These amended provisions will be consistent with the language of the light work protections in the Child Employment Act 2003 (the Act), and the new purpose which the Bill inserts into the Act, of protecting children under the age of 15 years from performing work that could be harmful to their health or safety or their moral or material welfare or development, or their attendance at school or capacity to benefit from instruction.

The Bill retains the strong investigative powers of the Secretary, on receipt of an application for a permit, to carry out all investigations and inquiries that he or she considers necessary to enable the proper consideration of the application.

Under the Bill, a permit will be refused or cancelled if the Secretary is not satisfied that the child's health, safety, education and moral and material welfare will not suffer from the employment. In view of this test, it is not necessary to have a separate factor of "fitness" and

the removal of this subsection will not reduce existing protections for children in employment or the rigour of current assessment processes for permit applications.

The second query concerns the new corporate officer liability provision and whether this is compatible with the Charter's right to a fair hearing and the right to be presumed innocent.

New section 50A(1) (clause 33) provides that where a body corporate contravenes a provision of the Act, an officer of that body corporate is taken to have contravened the same provision if the officer knew of, or knowingly authorised or permitted, the contravention.

Under the clause, the burden of proof rests on the prosecution to establish beyond reasonable doubt both that a body corporate has contravened a provision of the Act, and that an officer knew of the contravention.

As noted by the Committee, the new subsection is modelled on section 44 of the Working with Children Act 2005 (WWC Act). The Bill strengthens the alignment between these two legislative schemes, by replacing police check requirements with working with children checks for supervisors of child employees. Both legislative schemes are underpinned by similar policy objectives – the WWC Act introduced a minimum, state-wide standard to ensure that persons are not unsuitable to work with children. The Act (and Bill) regulates the employment of children by ensuring that work does not adversely affect a child's health, safety, moral or material welfare or education. In both instances, the schemes operate with the objective of preventing harm to children.

The key requirements – that a permit is obtained before a child commences employment and that a child is supervised in employment by a person who has been probity checked – are straightforward, and the corresponding offences are of a regulatory nature. The maximum fines in the Act for an individual are 60 penalty units (\$7009.20), and none of the offences involve imprisonment. The Department will update its prosecution policy to ensure that the new provision is applied in a consistent and transparent way.

The clause will not make an officer liable where the officer becomes aware of the contravention after it has occurred. It will only operate to impose liability on an officer where the officer becomes aware of a proposed or continuing breach of the Act, and does not prevent or stop it either by taking necessary actions him or herself or by notifying a child employment officer to do so.

The capacity of a court to impose a fine in the proposed circumstances should therefore promote compliance with the scheme. It must also be seen in the context of the risk of harm to a child should, for example, the child be engaged without a permit; that is, without the Department assessing whether the child's health, safety, moral or material welfare or education will suffer from the proposed employment.

In view of these matters, clause 33 is considered reasonable and appropriate, and is compatible with the Charter. By extending liability to officers of a body corporate who knew of the contravention, the Bill furthers the objectives of the Act to protect children from harm in employment.

I trust this information satisfies the Committee's queries.

MARTIN PAKULA MP
Minister for Industrial Relations

19 May 2010

The Committee thanks the Minister for this response.

Education and Training Reform Further Amendment Bill 2010

The Bill was introduced into the Legislative Assembly on 23 March 2010 by the Hon. Bronwyn Pike 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

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.

Minister's response

Thank you for your letter of 14 April 2010 containing the written submission made by the Privacy Commissioner to the Scrutiny of Acts & Regulations Committee (the Committee) in relation to the Education and Training Reform Further Amendment Bill 2010 (the bill).

The Privacy Commissioner's submission raised a number of concerns regarding the provisions in the bill related to the Victorian Institute of Teaching's (the Institute) Register of Teachers and to the Victorian student number.

As requested, I am providing comment and advice to the Committee in relation to the written submission of the Privacy Commissioner.

The Register of Teachers (the Register)

The Privacy Commissioner has expressed concern that a teacher whose registration is suspended or cancelled will have the status of the registration shown on the Register. The Privacy Commissioner has expressed the opinion that this amendment will have the same practical effect as the current procedure of removing the names of cancelled teachers from the Register, but that it does so in a way that affects the privacy of teachers, due to the fact that it may cause members of the public to unfairly speculate on the reasoning behind the cancellation.

As stated in the Statement of Compatibility, 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, or that the registration of a teacher is subject to conditions.

The Register will thus serve the important function of informing members of the public as to whether a teacher is in fact registered and therefore whether or not the teacher is fit to work with children in circumstances where the Working with Children Act 2005 will not otherwise apply.

I consider that it is important for members of the public to be able to quickly ascertain whether or not a teacher is currently registered and that the mere removal of the name of a teacher from the Register would provide less certainty as to the status of registration of the relevant teacher. In relation to the Privacy Commissioner's suggestion that the public will speculate as to the reasons for the cancellation, I do not consider that this is any different to the present situation where members of the public can speculate as to why a teacher's name is not on the Register.

Given that no personal information will be contained on the Register apart from the teacher's name and the state of his or her registration, and that it is reasonable for the information to be contained on the Register in order to enable members of the public to confirm that a teacher is registered, in my view the inclusion of such information on the Register will not impact adversely on the privacy rights of teachers.

I consider that the amendments strike the appropriate balance between the right to privacy of teachers and the right of a child to such protection as is in his or her best interests, which is recognised in section 17(2) of the Victorian Charter of Human Rights and Responsibilities.

The Victorian student number (VSN)

The Privacy Commissioner has expressed concern surrounding the rationale for extending the operation of the VSN in the bill. The VSN was designed to be progressively "rolled-out" throughout the education and training sectors over a number of years to ensure that it is successfully implemented. It is scheduled to be "rolled-out" to students in TAFE institutes, registered training organisations and Adult Community and Further Education providers over the coming months.

As students in these sectors are assigned the VSN, it becomes appropriate for those government departments responsible for administering these students to be able to access, use and disclose the VSN. As a result, this bill extends the types of authorised users of the VSN to the appropriate Victorian Government departments. As all Catholic school students now have a VSN, extension of access to, use and disclosure of the VSN is now also necessary and appropriate for the Catholic Education Commission of Victoria (CECV). The CECV is the system authority for Catholic schools in Victoria.

The Privacy Commissioner has also expressed concern surrounding the manner in which provisions expanding potential use of the VSN have been drafted. The Bill proposes to potentially extend the right to access, use or disclose the VSN to employees within the CECV, Skills Victoria (via the Department of Industry, Innovation and Regional Development (DIIRD)) and the Adult, Community and Further Education Division (via the Department of Planning and Community Development (DPCD) whose duties include the analysis and evaluation of information relating to students.

The provisions have been drafted with references to entire departments rather than divisions or business units in line with usual drafting procedures utilised by Parliamentary Counsel. The Office of the Chief Parliamentary Counsel has advised that it is not usual practice to make direct references to divisions or business units when drafting legislation. This is due to the propensity for name changes within departments and the redistribution of projects and programs within departments. Furthermore, division and business unit names fall beyond the reach of machinery of government changes, rendering any such redistribution of responsibilities via this method ineffective.

In the bill, access to the VSN is tempered by both reference to departments and the limitation that access is only granted to staff whose duties include the analysis and evaluation of information relating to students. I believe that this limitation is appropriate and effective to ensure that privacy of students in relation to use of the VSN is maintained.

Please contact Mr Greg Donaghue, Manager, Legislation Services Unit, Department of Education and Early Childhood Development, on 9637 3116 if you have any additional queries in relation to the bill.

Hon Bronwyn Pike MP

Minister for Education

Minister for Skills and Workplace Participation

7 May 2010

The Committee thanks the Minister for this response

Justice Legislation Amendment Bill 2010

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

Committee comments

[2]

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

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

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

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

The Committee refers to Practice Note No. 1 of 2005 which has now been in circulation for over 4 years. The Practice Note makes it clear that the Committee, on behalf of the Parliament, has certain expectations concerning the explanation for retrospective provisions and delayed commencement provisions in the explanatory material or the Second Reading Speech and also the desirability of avoiding needless Ministerial correspondence in respect to the reasonable explanation for such provisions.

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

[Charter report]

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

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

The Committee notes that:

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

Clause 23, inserting a new section 141 into the Sentencing Act 1991, provides that the first set of clauses applies to sentencing after the Bill commences ‘irrespective of when the offences were committed’ and that the second set of clauses applies to findings of contraventions made

after the Bill commences 'irrespective of when that contravention was committed'. The clear terms of new section 141 would appear to override existing s. 114(1), which bars retrospective increases in penalties. Therefore, **clause 23 may retrospectively apply both new regimes to offences committed before the Bill's commencement.**

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

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

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

The issue of the compatibility of clause 23, in its application to the new regime for sentencing order enforcement, with Charter s. 27(2) is more complex. The effect of clauses 9, 13, 14, 18 and 22 is to remove the previous requirement that a court first 'finds the offender guilty of' an offence of breaching the sentencing order 'without reasonable excuse' before it can cancel a sentencing order or resentence an offender. This change is partly beneficial to offenders, as the clauses also abolish the offence altogether, meaning that they can no longer be convicted or fined merely for breaching the order. However, the change may also be detrimental to offenders, as the new sections do not expressly provide for contraventions to be established beyond reasonable doubt or for a defence of reasonable excuse or for general principles of criminal responsibility. In the case of clause 14, the change carries the benefit of a court hearing (in place of a hearing before the Adult Parole Board) for contraventions, but carries the cost of the repeal of a lenient regime for 'minor' breaches.

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

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

Minister's response

Thank you for the letter of 24 March 2010 from the Scrutiny of Acts & Regulations Committee (Committee) in relation to the Justice Legislation Amendment Bill 2010 (Bill).

The Bill focuses on changes to the criminal law, ranging across sentencing laws, the provision of home detention and procedural reform that will continue our work to modernise and simplify Victoria's justice system. The Bill will also enhance the operation of Victoria's gaming and racing sector.

In particular this Bill will:

- *give effect to recommendations in Part Two of the Sentencing Advisory Council's Final Report on Suspended Sentences, that enable courts to hear a breaches of intermediate*

- sentencing orders promptly and resentence offenders without prosecuting an unnecessary, additional offence.*
- *amend the Sentencing Act 1991 to ensure that the County and Supreme Courts may use aggregate sentences when they are sentencing offenders pursuant to their new powers under the Criminal Procedure Act 2009.*
 - *amend the Corrections Act 1986 and the Sentencing Act 1991 to extend and strengthen Victoria's home detention program, and to ensure that it will, interact appropriately with the Family Violence Protection Act 2008.*
 - *make further improvements on the landmark reforms introduced by the Criminal Procedure Act 2009, consistent with the Government's commitment to modernise and simplify Victoria's justice system, including its criminal procedure laws.*
 - *amend the Criminal Procedure Act 2009 to give effect to the Sentencing Advisory Council's recommendation that the sentence indication scheme should continue to operate in the County and Supreme Court.*
 - *amend the race fields provisions of the Gambling Regulation Act 2003 to remove any doubt about the capacity of the Victorian racing industry to charge and collect fair and reasonable fees for the use of its product from overseas and interstate wagering service providers.*
 - *vary the structure of the Victorian Commission for Gambling Regulation to enhance its capacity to meet its existing regulatory responsibilities as well as the challenges associated with transitioning to the new venue operator gaming industry model.*

I now turn to the Committee's comments and queries.

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

As noted in the Committee's Charter report, clauses 6, 8, 10, 12, 15 and 17 of the Bill enable the sentencing court to direct that an offender is not entitled to make a request under section 59 of the Corrections Act 1986 for a home detention order. Clause 23 of the Bill provides that the new regime applies to the sentencing of a person on or after the commencement of the amendments, irrespective of when the offence was committed or the finding of guilt was made. The Committee has expressed concern that the sentencing judge's power to restrict requests for home detention orders comprises a retrospective penalty and may be incompatible with section 27(2) of the Charter.

*I note the Committee's reference to New Zealand case law. The authoritative position in New Zealand is the Supreme Court's decision in *Morgan v The Superintendent, Rimutaka Prison* [2005] NZSC 26 which considered whether changes to the parole regime amounted to a retrospective penalty. Mr Morgan had been sentenced to a term of three years imprisonment and under the new regime was eligible for parole after serving one-third of that sentence, but failing a grant of release on parole at the discretion of the Adult Parole Board would serve the full term of his sentence in prison. At the time he committed the relevant offence the legislation provided for an automatic entitlement to release on parole after serving two thirds of his sentence. The majority of the Supreme Court held that 'penalty' means the maximum penalty applicable for an offence. This approach is consistent with case law from England¹ and the European Court of Human Rights.² In *Morgan*, Tipping J adopted a broader approach, and considered that the maximum penalty prescribed by Parliament could effectively be reduced by reason of another legislative provision that provides for a non-discretionary entitlement to release. Therefore, an amendment that does not increase the maximum penalty or period of imprisonment which applied to the offender at the time of his or her sentencing does not offend the retrospective rule, unlike an amendment to the increase in the maximum sentence that could have been imposed at the time of offending.*

¹ *Flynn v Her Majesty's advocate* [2004] UKPC D1 and *R (Uttley) v Secretary of State for the Home Department* [2004] WLR 2278.

² *Coeme v Belgium* [2000] 2 NZLR 695.

Applying the reasoning in Morgan to the home detention regime in the Bill, it cannot be said that the removal of the right to make a request under section 59 of the Corrections Act amounts to a retrospective penalty so as to engage the right in section 27(2) of the Charter. There is no change to the maximum penalty applicable for an offence nor, applying the approach of Tipping J, to the 'effective maximum'.

Even if a broader view were taken to the scope of the right in s 27(2), I do not consider it would be infringed by the Bill. At present, the sentencing judge imposes the sentence of imprisonment while the Adult Parole Board has a discretion to grant or refuse an application to serve that sentence in home detention. The provisions merely change the identity of the decision maker in some cases, through enabling the sentencing judge to refuse home detention.

For the reasons given, I do not consider that the application of clause 23 in relation to clauses 6, 8, 10, 12, 15 and 17 of the Bill imposes a retrospective penalty on offenders that is greater than the penalty that applied to the offence when it was committed.

The Committee has noted that clauses 9, 13, 14, 18 and 22 of the Bill permit a court to cancel a sentencing order and resentence an offender where an offender has contravened that sentencing order. The Bill provides that the new regime applies to any proceeding for a breach of a sentencing order held on or after the commencement of the amendments, irrespective of when the breach of that order occurred. The Committee has expressed concern that, while clauses 9, 13, 14, 18 and 22 are compatible with the Charter rights in respect of determination of criminal charges (because breach proceedings are an adjunct to trial and sentencing proceedings) clause 23, by retrospectively applying this new regime to sentencing orders for offences committed before the commencement of the Bill, may engage Charter section 27(2).

I note the Committee's acknowledgement that the Bill repeals the separate offence of breach of a sentencing order and allows the courts to deal with the breach and resentence the offender. The Bill ensures that the benefit of the amendments will apply to all breach proceedings heard after the relevant provisions commence, regardless of when the breach actually occurred. It is also consistent with the approach taken in the Sentencing (Suspended Sentences) Act 2006 to the commencement of the provision that abolished the offence of breach of a suspended sentence.

The Committee is concerned that the amendment actually removes rights from offenders as in removing the various offences of breach of a sentencing order the Bill also removes the procedures that support the bearing of that offence. However, as the Committee notes in footnote 3, the Bill expressly preserves these procedures by stating that the same practice and procedures applicable to the hearing and determination of summary offences in the Magistrates Court apply, as far as appropriate, to the hearing and determination of proceedings for contraventions³. These provisions ensure that the new regime for dealing with breaches of sentencing orders is not more onerous than the present, offence based, system.

For the reasons given, the commencement is structured to bring as many offenders under the scope of the new regime as possible. I do not consider that the operation of clause 23 in relation to clauses 9, 13, 14, 18 and 22 of the Bill engages s27(2) of the Charter.

Retrospective operation and commencement – clauses 44(2), 77 and 97(2)

The Committee refers to the retrospective operation of clauses 44(2), 77 and 97(2) of the Bill and notes that Parliament should be advised in clear words as to the reason it is being asked to exercise retrospective legislative powers.

Clause 44(2) of the Bill is a statute law revision provision which makes a technical amendment to section 426(3) of the Children, Youth and Families Act 2005 to replace a reference to "424" with "section 424". Section 426(3) of the Children, Youth and Families Act 2005 was inserted by section 69 of Act No. 68/2009 which came into operation on 1 January 2010. Clause 44(2) of the Bill is therefore deemed to commence on 1 January 2010 to ensure that section 426(3) of the Children, Youth and Families Act 2005 is correct from the date of commencement section 69 of Act No. 68/2009.

³ These provisions can be found at clauses 18W(5), 26K, 47K and 97K. The explanatory memorandum to the Bill notes the purpose of these sections as being to apply the practice and procedure of the Magistrates' Court to the hearing and determination of a hearing for breach of each of the relevant sentencing orders.

Clause 77 of the Bill is a statute law revision provision which makes technical amendments to the Criminal Procedure Act 2009. Clause 77(1) replaces two incorrect cross-references in the definition of “**public official**” in section 3 of the Criminal Procedure Act. Section 24(1) of the Prevention of Cruelty to Animals Act 1986 was amended by Act number of 65 of 2007, which commenced after the Criminal Procedure Bill 2008 was introduced into Parliament. Clause 77(2) replaces an incorrect cross-reference in section 328(d)(ii) of the Criminal Procedure Act 2009. Section 3 and section 328(d)(ii) of the Criminal Procedure Act 2009 (Act No. 7/2009) both commenced on 1 January 2010. Clause 77 of the Bill is therefore deemed to commence on 1 January 2010 to ensure that section 3 and section 328(d)(ii) of the Criminal Procedure Act 2009 are correct from the date of commencement of the Criminal Procedure Act 2009.

Clause 97(2) of the Bill is a statute law revision provision which makes a technical amendment to section 56(2) of the Justice Legislation Miscellaneous Amendment Bill 2009 to replace an incorrect cross-reference to "section 161(2)" with "section 161A(2)". Section 56(2) of the Justice Legislation Miscellaneous Amendment Bill 2009 made a technical amendment to section 161A of the Infringements Act 2006 to replace "(1)" (wherever occurring) with "(1A)". This amendment to the Infringements Act 2006 came into operation on 1 January 2010. Clause 97(2) of the Bill is therefore deemed to commence on 1 January 2010 to ensure that section 161A of the infringements Act 2006 is correct from the date of commencement of section 56(2) of the Justice Legislation Miscellaneous Amendment Bill 2009.

In regard to the Committee's concerns with the default commencement date of 1 January 2012 in clause 2(5) of the Bill, the Bill will require a number of technological changes to court procedures which require proper development, and testing before commencement. The majority of clauses are anticipated to commence by proclamation in 2010 and early 2011. However, following extensive consultation with the Courts, the 1 January 2012 commencement date is required to ensure there is sufficient time to resolve any technical issues.

ROB HULLS MP
Attorney-General

6 May 2010

The Committee thanks the Attorney-General for this response

Members of Parliament (Standards) Bill 2010

The Bill was introduced into the Legislative Assembly on 23 March 2010 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 13 April 2010 and made the following comments in Alert Digest No. 5 of 2010 tabled in the Parliament on 14 April 2010.

Committee comments

[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.

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:

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.

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 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.

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. Rather than protecting Members' privacy, clause 28 protects their reputation from unfair publicity about their interests.

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. 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. 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. In South Australia, the only other jurisdiction with a similar provision, the punishment that can be imposed is expressly limited by statute.

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.

Privacy and reputation – Information Privacy Act 2000 (the Act) – Members exempt from Act – Introduction of Charter subsequent to Act – Members not a 'public 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 (the 'IPPs') and the complaint mechanism proposed by the Act.

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.'

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.'

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. 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'**

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.

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.

Premier's response

Thank you for your letter dated 14 April 2010 regarding the Committee's consideration of the Members of Parliament (Standards) Bill 2010, as noted in Alert Digest No. 5 of 2010.

Responses to the matters raised by the Committee are set out below:

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 (raised by the Privacy Commissioner via a written submission).

With respect to the engagement of the right to privacy in the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter), clauses 19 and 20 of the Bill are likely to engage but not unlawfully limit the right to privacy because the interference with the right to privacy is proportionate, lawful and not arbitrary.

The clauses serve an important public interest by ensuring the transparency and accountability of Members of Parliament (Members). Members are required to make public their personal financial and other interests with a view to making public any conflict of interest or impropriety. In the absence of such legislative obligations, these matters are unlikely to be made public. Achieving this important objective will necessarily result in personal information relating to a limited class of members of the public also being made publicly available.

Importantly, clause 15 of the Bill limits the extent of the interference by placing obligations on Members' use of confidential and personal information and clause 28 places restrictions on the extent to which information can be published. The Government notes that obligations on Members found in other privacy laws, including to varying degrees, the Information Privacy Act

2000 (Vic) (IPA), the Health Records Act 2001 (Vic) (HRA) and the Privacy Act 1988 (Cth), are not affected by the Bill.

Indeed, the Act is not intended to replace the IPA. The obligations in the IPA will continue to apply to Ministers and any Parliamentary Secretary. All Members continue to be covered by the HRA. The obligations on Members in relation to confidential information in clause 15 of the Bill are also more onerous than the confidentiality obligations on Members in the current Members of Parliament (Register of Interests) Act 1978 (Vic) (the Act), because the Bill now also prevents Members from using confidential information to further the interests of a prescribed person.

The Government does not consider the Bill to be the appropriate means by which to address Members' responsibilities for privacy and the handling of personal information because it may be difficult for Members to differentiate those of their activities that would be subject to the Bill from those that may be subject to other privacy laws.

The Government notes that the Law Reform Committee (LRC) recommended that the Parliament of Victoria establish a complaints process under which members of the public can write to the Presiding Officer in the accused Member's house if they believe a Member has breached the Act. The Government has deferred consideration of this recommendation, and enforcement mechanisms generally, until the release of the Public Sector Standards Commissioner's review into Victoria's integrity and anti-corruption system (PSSC Review).

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 is concerned that without notice being given to third parties the Register may be incompatible with a third party's privacy rights under the Charter.

The publication of the Register of Interests (Register) is an essential component of ensuring transparency and, accordingly, Members' accountability to the Victorian public. There is a strong public interest in ensuring such transparency and accountability. However, the Government recognises that the public interest served by the publication of the Register must be balanced against individuals' right to privacy.

Having regard to the intent of the Bill and the important public interest it serves, clause 28 of the Bill also arguably gives third parties and members some protection because it prevents the publication of material on the Register unless it is fair and accurate, and prevents a person from commenting on that material unless the comment is fair and published in the public interest.

The Committee is concerned that 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 of public interest. It is concerned that clause 28 is significantly more restrictive than the current law of defamation.

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. 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. In South Australia, the only other jurisdiction with a similar provision, the punishment that can be imposed is expressly limited by statute.

Is the restriction on published summaries a lawful restriction on the Charter's right to freedom of expression that is reasonably necessary to protect Parliament and respect the reputations of its Members?

As noted above, the Government has deferred consideration of enforcement mechanisms in the Bill pending completion of the PSSC Review. Instead, the Government has included mechanisms in the Bill that are largely consistent with the approach taken in the Act. In this regard, clause 30 is consistent with clause 9 of the Act (except for an increase in the upper limit of the fine payable) which provides:

9 Failure to comply with Act

Any wilful contravention of any of the requirements of this Act by any person shall be a contempt of the Parliament and may be dealt with accordingly and in addition to any other punishment that may be awarded by either House of the Parliament for a contempt of the House of which the Member is a Member the House may impose a fine upon the Member of such amount not exceeding \$2000 as it determines.

Clause 28 of the Bill is also consistent with the current clause 8 of the Act (Restrictions on Publications).

The Bill requires that Members of Parliament publish private information on the Register to an extent not required of members of the public. As this information may be sensitive and is published in the public sphere, it is considered that Members require additional protection from unfair or malicious comment. It is considered that general defamation laws would not offer the same level of protection to Members of Parliament as clause 28. For example: under the Defamation Act 2005 (Vic), individual Members would need to take private legal action themselves; clause 28 places different and more suitable requirements on the comments that may be made about the facts in the Register; and there is no time limit on an action under clause 28.

Parliament already has the power to find journalists in contempt of Parliament, and clause 28 does not affect that power, except by allowing Parliament to fine rather than imprison or admonish. The Government does not consider that it would be appropriate to curtail Parliament's constitutional powers in this context.

In relation to the suggestion that the restriction on published summaries is inconsistent with the freedom of expression in the Charter, section 15(3) of the Charter allows the Parliament to place lawful restrictions on the right to freedom of expression that are reasonably necessary to respect the rights and reputation of other persons. In the circumstances, the Government considers that clause 28 is a reasonably necessary restriction, having regard to the need to protect the reputations of Members of Parliament (who are particularly vulnerable to attack) and third parties whose information is contained on the Register. The Law Reform Committee, in its Review of the Members of Parliament (Register of Interests) Act 1978, expressed its view that the equivalent section to clause 28 in the current Act imposes a limitation reasonably necessary to respect the rights and reputation of those affected. Clause 28 seeks only to restrict comment on the information entered into the Register that is unfair and published maliciously. The restriction is imposed for this particular purpose and achieves it effectively without impeding publication of fair and accurate extracts or any comment that is fair and in the public interest. In addition, the particular and narrow restriction on the freedom of expression promotes the right to privacy contained in the Charter.

The Committee is concerned that clauses 30 and 31 (sanctions) in combination with clauses 7 (Members must treat all persons with respect) and 14 (Members must ensure their conduct does not bring discredit upon the Parliament) may expose Members of Parliament to penalties, including loss of their seat if they default on a fine, for expressing controversial political views. Does this unjustly restrict freedom of expression under the Charter?

Clauses 7 and 14(1) of the Bill are intended to restrict Members' "conduct" (i.e. ensure that their actions do not fall below a particular standard) rather than their opinions. The Government considers that these clauses do not unreasonably restrict Members' ability to express opinions (including controversial opinions) in Parliament.

A robust democracy necessarily includes a sphere in which people, regardless of background, can freely discuss and identify issues and, through that discussion, influence political action. Democratic governance rests on the capacity for the public to engage in debate and the Government considers that freedom of expression is an essential component of this. However, unfettered freedom of expression can permit speech and conduct in the public realm that has a denigrating effect on other members of the public and which silences and restricts their participation in public discussion.

Under section 18 of the Charter, every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. Clauses 7 and 14 of the Bill are intended to protect this right. They also promote the right of freedom of expression of the community broadly,

particularly those who may be underrepresented in public discussion because of their background. Clause 7 only restricts a Member's freedom of expression where it does not demonstrate respect and due regard for the opinions, beliefs, rights and responsibilities of others. It does not seek to limit Members' freedom to express controversial opinions; rather, it merely seeks to restrict behaviour of Members that unfairly and unreasonably denigrates others or their opinions.

Clauses 7 and 14 are aimed at ensuring that Members' conduct is of a high standard, which is in turn aimed at promoting the important public interest in maintaining public faith in Victoria's democratic system of government. Indeed, clause 14(3) of the Bill is specifically intended to ensure that the need for robust public debate in a democracy is not limited by the requirement that Members be fair, objective and courteous.

It is relevant that breaches of the Code of Conduct are enforced by Parliament. Parliament already has the power to regulate the conduct of its Members (including, for example, to find them in contempt) and the Government therefore considers that clause 14 is consistent with current practice. To this extent the Code provides signposts for the type of conduct that is required of Members in contemporary times. Importantly, it remains at Parliament's discretion whether it finds a Member to have wilfully contravened a provision of the Code, and therefore in contempt.

I thank the Committee for its comment on the Bill.

HON JOHN BRUMBY MP
Premier of Victoria

13 May 2010

The Committee thanks the Premier for this response.

Committee room
24 May 2010

Appendix 1

Index of Bills in 2010

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Appendix 2

Committee Comments classified by Terms of Reference

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

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Section 17(a)

(i) trespasses unduly upon rights or freedoms

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

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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

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Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bonges) Bill 2010 7

Equal opportunity Bill 2010 4

Justice Legislation Amendment Bill 2010 4

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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

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

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Electricity Industry Amendment (Critical Infrastructure) Bill 2009	Energy and Resources	10.11.09 03.03.10	13 of 2009 3 of 2010
Justice Legislation Miscellaneous Amendments Bill 2009	Police and Emergency Services	10.11.09 16.03.10	13 of 2009 4 of 2010
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Transport Integration Bill 2009	Transport	02.02.10 22.02.10	1 of 2010 2 of 2010
Equal Opportunity Bill 2010	Attorney-General	23.03.10 13.04.10	4 of 2010 5 of 2010
Public Finance and Accountability Bill 2009	Treasurer	02.02.10 15.04.10	1 of 2010 6 of 2010
Severe Substance Dependence Treatment Bill 2009	Mental Health	02.02.10 21.04.10	1 of 2010 6 of 2010
Therapeutic Goods (Victoria) Bill 2010	Health	13.04.10 29.01.10	5 of 2010 6 of 2010
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Child Employment Amendment Bill 2010	Attorney-General	23.03.10 19.05.10	4 of 2010 7 of 2010
Justice Legislation Amendment Bill 2010	Attorney-General	23.03.10 05.05.10	4 of 2010 7 of 2010
Education and Training Reform Further Amendment Bill 2010	Education	13.04.10 07.05.10	5 of 2010 7 of 2010
Members of Parliament (Standards) Bill 2010	Premier	13.04.10 13.05.10	5 of 2010 7 of 2010

Outstanding correspondence

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue
Crimes Legislation Amendment Act 2010	Attorney-General	23.03.10	4 of 2010
Transport Legislation Amendment (Compliance, Enforcement and Regulation) Bill 2010	Transport, Roads and Ports	23.03.10	4 of 2010
Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Bill 2010	Attorney-General	13.04.10	5 of 2010
Courts Legislation Miscellaneous Amendments Bill 2010	Attorney-General	05.05.10	6 of 2010
Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Bongs) Bill 2010	Mr Peter Kavanagh MLC	25.05.10	7 of 2010
Pharmacy Regulation Bill 2010	Health	25.05.10	7 of 2010