

No. 9 of 2010

Tuesday, 22 June 2010

On the

Control of Weapons Amendment
Bill 2010

Courts Legislation Miscellaneous
Amendments Bill 2010

Electoral Amendment (Electoral
Participation) Bill 2010

Pharmacy Regulation Bill 2010

Personal Safety Intervention Orders
Bill 2010

Supported Residential Services (Private
Proprietors) Bill 2010

Working with Children Amendment
Bill 2010

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Glossary and Symbols



- ‘**Article**’ refers to an Article of the International Covenant on Civil and Political Rights;
- ‘**Assembly**’ refers to the Legislative Assembly of the Victorian Parliament;
- ‘**Charter**’ refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;
- ‘**child**’ means a person under 18 years of age;
- ‘**Committee**’ refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;
- ‘**Council**’ refers to the Legislative Council of the Victorian Parliament;
- ‘**court**’ refers to the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court as the circumstances require;
- ‘**Covenant**’ refers to the International Covenant on Civil and Political Rights;
- ‘**human rights**’ refers to the rights set out in Part 2 of the Charter;
- ‘**penalty units**’ refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (currently one penalty unit equals \$116.82).
- ‘**Statement of Compatibility**’ refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.
- ‘**VCAT**’ refers to the Victorian Civil and Administrative Tribunal;
- ‘[]’ denotes clause numbers in a Bill.

Useful provisions

Section 7 of the **Charter** provides –

Human rights – what they are and when they may be limited –

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

Section 35 (b)(iv) of the **Interpretation of Legislation Act 1984** provides –

In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.



Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are –

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –
 - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
 - (ii) within 10 sitting days after the Act receives Royal Assent —
whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

The Committee has considered the following Bills –

Control of Weapons Amendment Bill 2010
Electoral Amendment (Electoral Participation) Bill 2010
Personal Safety Intervention Orders Bill 2010
Supported Residential Services (Private Proprietors) Bill 2010
Working with Children Amendment Bill 2010

The Committee notes the following correspondence –

Courts Legislation Miscellaneous Amendments Bill 2010
Pharmacy Regulation Bill 2010



Role of the Committee

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

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

Alert Digest No. 9 of 2010

Control of Weapons Amendment Bill 2010

Introduced	24 May 2010
Second Reading Speech	26 May 2010
House	Legislative Assembly
Member introducing Bill	Hon. Bob Cameron MLA
Portfolio responsibility	Minister for Police and Emergency Services

The Committee considered this Bill on 7 June 2010 and tabled its report on 8 June 2010 in Alert Digest No. 8 of 2010.

Submissions received

The Committee has now received further written submissions from –

- Victorian Equal Opportunity and Human Rights Commission
- Young People's Legal Rights Centre Inc.

These submissions will be published on the Committee's website.

The Committee makes no further comment.

Electoral Amendment (Electoral Participation) Bill 2010

Introduced	8 June 2010
Second Reading Speech	10 June 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Background

The Bill amends the *Electoral Amendment Act 2002* (the 'Act') to –

- permit electoral enrolment on election day for persons qualified to vote who are not on the roll and subject to proof of identity permit those voters to cast a declaration vote at the election. **[10, 14]**
- enable the Victorian Electoral Commission (VEC) to automatically enrol 18 year olds from information obtained from registration from certain external databases such as the Victorian Curriculum and Assessment Authority. **[3 to 5]**
- require the VEC to publish how-to-vote cards on its website. **[8]**
- widen the eligible group of electors that may use electronic voting such as electors with a visual or a motor impairment or electors with insufficient literacy skills. **[16 to 18]**
- abolish the 'three month rule' which uses the elector's principal place of residence, three months prior to election day, as a measure of the elector's entitlement to vote. **[11, 12, 15]**

Extract from the Second Reading Speech –

Under these reforms, those electors who present to vote for a Victorian State election who are not on the roll will be able to enrol on the day and those electors whose stated address is different from their address on the roll will receive a ballot and may vote for the address that is on the roll. They will also be given a new form and asked to update their details so that the roll will reflect their accurate address.

- amend the Act in respect to provisions concerning the acceptance of postal vote declarations, the registration of group voting tickets with the VEC and the authorisation requirements to be carried on certain electoral matter. **[6, 7, 9, 13]**

The Committee makes no further comment.

Personal Safety Intervention Orders Bill 2010

Introduced	8 June 2010
Second Reading Speech	9 June 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill is for a new principal Act to make provision for personal safety intervention orders (an 'order') to protect the victims of assault, harassment, property damage or interference with property, stalking and serious threats. The Bill also makes provision for the resolution of disputes through mediation where mediation is considered appropriate.

The Bill repeals the *Stalking Intervention Orders Act 2008* and makes transitional arrangements consequent upon this repeal and further makes consequential amendments to the *Family Violence Protection Act 2008* and a number of other Acts.

Extracts from the Second Reading Speech –

Today the government introduces a new system of personal safety intervention orders. These will replace stalking intervention orders, and ensure that people in low-level neighbourhood disputes are encouraged to use mediation to find long-lasting solutions to conflict, while people at risk from future harm are kept safe by personal safety intervention orders, enforced by police and courts.

... This new Personal Safety Intervention Orders Bill is only for disputes that happen outside the family.

The Personal Safety Intervention Orders Bill 2010 has two aims:

- to better protect victims of serious inappropriate behaviour that threatens their safety where that behaviour occurs outside the family; and*
- to refer appropriate disputes to mediation services.*

The Personal Safety Intervention Orders Bill will encourage the use of free mediation services in appropriate circumstances. ... For the first time, magistrates will have a legislative power to direct parties to try to mediate appropriate disputes.

... A person will still be able to apply for a personal safety intervention order if he or she is being stalked, but the grounds for an intervention order have been expanded to explicitly recognise some of the other forms of behaviour that had come to be covered by stalking intervention orders - such as harassment and property damage or interference. The aim of this is to allow stalking to revert to its natural meaning.

... The Bill expressly protects persons with disabilities who may be threatened by their carer by making it clear that property damage or interference will encompass withholding access to a person's food or medication or withholding access to a person's wheelchair.

The Bill will also address harassment that is undertaken through a third party. This may occur through both willing and unwilling third parties.

Although there are more types of behaviour covered by the Bill, the aim is not to make the personal safety intervention orders system apply to more minor behaviour. ... the aim of this Bill is to divert non-dangerous behaviour to mediation in appropriate circumstances. Court hearings will be reserved, wherever possible, for serious matters that require court intervention.

The Bill will require the court to consider the impact of the proposed conditions of a personal safety intervention order made against a child on that child's education or training. In some cases, the court may form the view that the school should know that a personal safety

intervention order has been made. The Bill allows the court to order that a copy of the personal safety intervention order be given to a principal of the school.

... Whilst the Bill is a separate system to the Family Violence Protection Act, it adopts many of the procedural reforms of that Act. The aim is to have consistent processes under both Acts where appropriate.

The Personal Safety Intervention Orders Bill contains a new system of vexatious litigant orders, to mirror the system in the Family Violence Protection Act.

Content and Committee comment

Delayed commencement

The Bill provides a default commencement provision of not later than 1 January 2012. [2]

The Second Reading Speech provides –

This Bill has a default commencement date of 1 January 2012. This is to allow time to establish the systems and processes to support this new system of law – such as regulations, court rules and training and instructions to magistrates and registrars. This date is the last possible date that the Bill can commence, and it may commence earlier.

Coverage of Act – ‘prohibited conduct’

The Bill defines the forms of ‘prohibited behaviour’ covered by the Act and also provides specific definitions for those behaviours being, *assault and sexual assault, harassment, property damage or interference, serious threat and stalking*. [5 to 10]

Family violence intervention order to prevail

The Bill declares that to the extent of any inconsistency an order made under the *Family Violence Protection Act 2008* prevails over a personal safety intervention order. [134]

Interim orders in absence of party – Natural justice

The Bill provides for interim orders that may be made whether or not the respondent has been served with a copy of the application for an order and whether or not the respondent is present when the interim order is made. [37] (*Refer to Charter report below and the discussion in the Statement of Compatibility*).

Close of proceedings – exclusion of public – natural justice

The Bill provides a discretion to the presiding judge to order the court proceedings be closed to prevent undue distress or embarrassment to a party or a witness. The judge may permit certain persons or a class of persons to be present at a closed hearing. The Committee notes that *Charter* section 24(2) deals with permissible limitations on the general principle of a public hearing. [51] (*also note the discussion in the Statement of Compatibility*)

Vexatious litigants – Natural justice – citizens access to courts – leave to be sought to bring proceedings

Part 10 of the Bill makes provision for cases where a person is declared to be a vexatious litigant (a declared person) and once declared thereafter be prevented from commencing proceedings under the provisions of the proposed Act. A declared person must seek the leave of the court before making an application against a person under the proposed Act or an application against a person under the *Family Violence Protection Act 2008*. A declared person may appeal the vexatious litigant order. [160 to 173] (*also note the discussion in the Statement of Compatibility*)

Repeal, alteration or variation of section 85 of the *Constitution Act 1975* (unlimited jurisdiction of the Supreme Court)

The Bill declares that it is the intention of clauses 95 and 97 to alter or vary section 85 of the *Constitution Act 1975*. [182]

The Committee notes the section 85 statement made by the Minister during the Second Reading Speech justifying the proposed limitation to the jurisdiction of the Supreme Court.

Clause 95 provides that if the applicant for a personal safety intervention order was not the protected person and that applicant is appealing a decision, then the appeal cannot proceed unless the protected person or those with responsibility for the protected person (such as a parent or guardian) consents to the appeal. The reason for varying the Supreme Court's jurisdiction in this manner is to ensure that a protected person or a person with the responsibility for a protected person can decide what matters are appealed on their behalf or on behalf of those for whom they have responsibility. However, nothing in clause 95 prevents appeals on the grounds of jurisdictional error.

Clause 97 provides that there is no further appeal from an appeal decision of the Supreme Court. This is appropriate, as the rights of the parties in such cases have been tested in a hearing by the President of the Children's Court and the Supreme Court and further appeals could result in a proliferation of proceedings.

This may result in the attendance of those subject to prohibited behaviour or stalking at numerous traumatic court hearings. If new facts and circumstances emerge, then the respondent for an order may seek a variation or revocation of the personal safety intervention order from the Magistrates Court. However, nothing in clause 97 prevents appeals on the grounds of jurisdictional error.

Constitution Act 1975, section 85 – Repeal, alteration or variation of the unlimited jurisdiction of the Supreme Court

*The Committee notes that clauses 95 and 97 provide some limitation in bringing proceedings before the Supreme Court and clause 182 declares that it is the intention of these limitation provisions to alter or vary section 85 of the *Constitution Act 1975*.*

*The Committee having reviewed the section 85 statement made in the Second Reading Speech, the enabling and declaratory clauses, and the Explanatory Memorandum is of the opinion that the proposed provisions altering or varying section 85 of the *Constitution Act 1975* are appropriate and desirable in all the circumstances.*

Charter report

Fair hearing – Interim orders imposed without a fair hearing – Limits on speedy listing for final hearing, reviews and re-hearings

Summary: *Clause 37 permits an interim order to be made without giving the respondent a fair hearing. While overseas courts have held that interim orders made without a fair hearing can be compatible with human rights if they are for a short-term, of fixed duration, of a mild nature and readily reviewable, the Committee is concerned that the Bill's interim orders scheme goes beyond this description. It will write to the Attorney-General seeking further information.*

The Committee notes that clause 35 provides for a court to make 'an interim order' that is 'necessary' to ensure an affected person's safety or preserve an affected person's property and 'is appropriate to make... in all the circumstances of the case'. The European Court of Human Rights has recently held that such orders fall within the ambit of the right to a fair hearing.¹ **Clause 37 permits an interim order to be made without notice to the**

¹ *Micallef v Malta* [2009] ECHR 1571, [87]

respondent and in the absence of the respondent. The Supreme Court has held that such a provision permits an interim order to be made without giving the respondent a fair hearing, even if the respondent is present in the court.² The Committee therefore considers that clause 37 engages the Charter's right to a fair hearing.³

The Statement of Compatibility remarks:

The extent of the limitation is confined because the duration of an interim order is limited. The order ceases to have effect as soon as the application is determined, which is likely to occur within a short period of time. ...In addition, the bill provides scope for an application to be made for the variation or revocation of an interim family violence [sic – personal safety] intervention order (clause 85)

While overseas courts have held that interim orders made without a fair hearing can be compatible with human rights if they are for a short-term, of fixed duration, of a mild nature and readily reviewable,⁴ the Committee is concerned that the Bill's interim orders scheme goes beyond this description, as follows:

- Clause 42 provides that, if a court makes a 'mediation direction', then the interim order does not need to be 'listed for a decision about the final order as soon as practicable'. Rather, any listing must allow 'a reasonable time' for mediation assessment and mediation.
- Clause 43 provides that an interim order continues until the interim order is revoked, or the application is withdrawn or resolved at a final hearing. There is no provision for a fixed expiry date (even for orders made after electronic applications and without sworn evidence.)
- Clause 67(2)(c) & (e) provides that orders may include conditions excluding the respondent from a shared residence or barring the respondent from other specified places.
- Clause 86 bars a respondent from seeking a variation or revocation of any order unless 'there has been a change in circumstances' and the court grants leave.⁵
- Clause 99(5)(a)'s provision for rehearing orders made without notice is limited to final (not interim) orders.

In 2002, the Supreme Court of Ireland unanimously struck down a scheme for interim orders excluding respondents from their homes and other places for 'failing to prescribe a fixed period of relatively short duration during which an interim barring order made *ex parte* is to continue in force', even though a respondent to such an order was permitted to apply to a court at any time to have the order discharged or varied.⁶

While the Committee appreciates that interim orders may be necessary to protect personal safety and are subject to court scrutiny, it observes that overseas jurisdictions' schemes for personal safety intervention orders provide for enhanced protections when intrusive interim orders are made *ex parte*, including fixed short-term expiry dates and unrestricted rights to have the interim orders reviewed or reheard.⁷

² *Zion-Shalom v Magistrates' Court of Victoria at Heidelberg (No 2)* [2009] VSC 477, [10]

³ Charter s. 24(1)

⁴ *M, R (on the application of) v Secretary Of State For Constitutional Affairs* [2004] EWCA Civ 312; *Baril v. Obelnicki* 2007 MBCA 40 c.f. *Y v X* [2003] 3 NZLR 261; *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49, [57]-[58], [89], [153]-[154], [159].

⁵ The Supreme Court has held that it will not stay an interim order unless there are 'exceptional circumstances': *Zion-Shalom v Magistrates' Court of Victoria at Heidelberg* [2009] VSC 476, [7].

⁶ *K v Crowley* [2002] IESC 66.

⁷ *Crime and Disorder Act 1998* (UK), s. 1D(4)(a) & (b); *Magistrates' Courts (Anti-Social Behaviour Orders) Rules 2002* (UK), s. 5(8); *Domestic Violence Act 1996* (Ireland), s. 4(3)(c) & (d); *Domestic Violence Act 1995*

The Committee will write to the Attorney-General seeking further information as to whether, if an interim order excluding a respondent from a shared residence or other locations is made without notice to or hearing from the respondent, one or more of the following alternatives:

- ***providing for a swift final hearing without any delay for mediation***
- ***setting a fixed expiry date for the interim order***
- ***permitting the respondent to ask a court to vary or revoke the interim order without proving a change of circumstance***
- ***permitting the respondent to seek a rehearing of the interim order***

would be reasonably available to achieve the purpose of swiftly protecting affected persons from prohibited behaviour or stalking. Pending the Attorney-General's response, the Committee draws attention to clauses 37, 42(2), 43, 67(2)(c) & (e), 86 and 95(5)(a).

The Committee makes no further comment.

(NZ), ss. 13(4)(c), (d) & (e), 36, 46(5), 47(5), 60(4), (5), 70(6) & 76(3)(b) c.f. *Domestic and Family Violence Protection Act 1989* (Qld), s. 57; *Domestic Violence Act 1994* (SA), s. 9(6); *Family Violence Act 2004* (Tas), s. 23(2)(b), (3); *Restraining Orders Act 1997* (WA), s. 33(2).

Supported Residential Services (Private Proprietors) Bill 2010

Introduced	8 June 2010
Second Reading Speech	9 June 2010
House	Legislative Assembly
Member introducing Bill	Hon. Lisa Neville MLA
Portfolio responsibility	Minister for Community Services

Purpose and Background

The Bill is for an Act to regulate supported residential services and provides for minimum standards of accommodation and personal support for residents living in these facilities.

Note: From the Statement of Compatibility – *Supported residential services are a form of residential accommodation where personal support is provided to the residents for fee or reward.*

The Health Services Act 1988 currently regulates supported residential services.

The Bill repeals the current regulatory arrangements and creates a new system for the regulation of supported residential services.

The Bill also aims to simplify the requirements for registration and to clarify proprietor's obligations to residents of supported residential services, as well as establishing new rights for residents with respect to services and the tenure of their accommodation.

Content and Committee comment

The Bill –

1. provides that those facilities providing accommodation and support which are covered by other Acts or funding and service agreements with government or public bodies are **not** supported residential services for the purposes of the proposed Act. **[5]**
2. establishes requirements for supported residential services to be registered, and provide offences for operating without registration, set minimum requirements that proprietors must meet in providing accommodation and support to residents. Unless cancelled or revoked registration is on-going. **[Part 3]**
3. provides for mandatory police checks for all new supported residential services staff and for new day-to-day managers, who are not the proprietor, to be assessed as part of the registration process or on their appointment. **[66 and 68]**
4. provides that as between the proprietor (or close associate) and a resident it is an offence to engage in a prohibited transaction as defined by the Act. **[4, 84 and 88]**
5. establishes statutory limits on the amounts that can be charged for security deposits, fees paid in advance, and reservation and set-up fees, and sets requirements for the repayment of these amounts and providing that deposits and some other fees must be placed in trust accounts. **[79 to 106]**
6. provides statutory protection for residency occupancy rights by specifying notice periods for a range of circumstances and establishing a formal right of review of decisions by the VCAT. **[107 to 129]**
7. provides for standard enforcement powers by officers authorised under the Act to monitor compliance. The provisions include powers to enter premises (134), obtain search warrants (136 to 138), operate equipment and direct documents to be produced (144) and issue infringement notices for relevant offences. (155) The Bill provides a protection against self-incrimination except in the case of producing documents required

to be produced under the legislative regime or the giving of the person's name and address. (150)

8. provides additional enforcement options including powers for proprietors and the Department of Health to enter undertakings where less serious areas of non-compliance are identified and for compliance notices to be issued where there are more serious breaches of the law. A failure to comply with the terms of a compliance notice is an offence for which a penalty can be imposed. Other sanctions include censure, suspension of admissions and revocation of registration. (166 to 168) The Bill also proposes that a pattern of poor regulatory compliance may form grounds for an administrator to be appointed if it is necessary to protect the interests of residents. **[156, 157 and 170]**
9. establishes new obligations on supported residential services proprietors to report serious incidents (prescribed reportable incidents) to the Department of Health. **[77]**
10. continues the role of community visitors in visiting these services, with minor amendments made to clarify their function and powers. **[182 to 196]**
11. amends the *Crimes Act 1958* to make it an offence for people working at supported residential services to engage in sexual activities with residents who have cognitive impairments, unless the resident is the worker's spouse or domestic partner. **[227]**

The Committee makes no further comment.

Working with Children Amendment Bill 2010

Introduced	8 June 2010
Second Reading Speech	9 June 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose and Background

The Bill amends the *Working with Children Act 2005* (the 'Act') to make further provision for applications for working with children checks, the revocation and suspension of assessment notices and offences under the Act and to make consequential amendments to the *Child Employment Act 2003*.

The Bill amends the Act to –

1. clarify in the example at the foot of section 9(2) of the Act that the term 'direct supervision' extends to the supervision of volunteers. **[4]**
2. clarify that denominational hospitals will be prescribed as places where contact with children may result in child-related work for the purposes of the Act. **[4]**
3. allow the working-with-children-check card to be used as proof of identity by people who are renewing their assessment notice, given that the proof of identity documentation was previously provided when they first applied for an assessment notice. **[5]**
4. require the Secretary to notify employers and volunteer organisations when a person surrenders their assessment notice. **[19]**
5. creates an additional power for the Secretary to suspend an assessment notice if the person undergoing reassessment fails to provide requested information. The Bill will also require the Secretary to notify that person's employer, agency or volunteer organisation in writing of the suspension. A person who engages in child-related work while the assessment notice is suspended will be treated as if they do not have an assessment notice and will allow the reinstatement of the assessment notice upon the provision of the requested information so that an applicant does not have to reapply and incur an additional fee. **[17]**
6. clarify that charges that have been finally dealt with, such as by way of being withdrawn or dismissed, cannot be considered by the secretary in assessing an application or in deciding whether to revoke an assessment notice. **[3, 11, 14, 18]** (*Refer to Charter report below*).
7. add members of the Australian Federal Police to the category of exempt persons and carries with it an offence provision should a member be suspended or terminated from employment and fail to notify that person or agency with whom they are engaged in child related work. **[21]**
8. make it an offence (in proposed new section 39A) for sex offenders registered under the *Sex Offenders Registration Act 2004* and persons subject to extended supervision, supervision or detention orders to apply for an assessment notice under the Act. Currently, sex offenders are prohibited from obtaining a working-with-children check and the amendment extends the prohibition to make it an offence to even apply for an assessment. **[22]**
9. allow the Secretary to share information about negative notice holders to assist other jurisdictions in their assessment of the suitability of those people to work with children. **[23]**

10. amend the obligation on the Chief Commissioner of Police to notify the Secretary of a broader category of offences that present a significant risk to the safety of children. [12, 24]

To give effect to amendments proposed by clauses 17 and 21 the Bill amends the *Child Employment Act*. [25]

Charter report

Presumption of innocence – Refusal or revocation based on charges finalised without a finding of guilt

Summary: Clauses 11 and 18 prevent the Secretary from considering criminal charges that have been finally dealt without a finding of guilt when determining whether to refuse or revoke an assessment notice. The Committee welcomes this response to its previous reports and draws attention to clauses 11 and 18's removal of a potential incompatibility with human rights.

The Committee notes that clauses 11 and 18, amending ss. 17 and 23 of the Working with Children Act 2005, prevent the Secretary from considering criminal charges that have been finally dealt without a finding of guilt when determining whether to refuse or revoke an assessment notice. In its *Alert Digest Nos. 12 of 2007* and *4 of 2008*, the Committee reported that clauses of the Working with Children Amendment Bill 2007 that permitted the Secretary to consider such matters may be incompatible with the Charter's right to be presumed innocent.⁸

The Second Reading Speech remarks:

As identified by the Scrutiny of Acts and Regulations Committee, the interaction between the exceptional circumstances provisions of the act and when a charge is pending could possibly allow the secretary to issue a negative notice based on charges that had been withdrawn or dismissed.

The bill now amends the act to clarify that charges that have been finally dealt with, such as by way of being withdrawn or dismissed, cannot be considered by the secretary in assessing an application or in deciding whether to revoke an assessment notice.

The Committee welcomes this legislative response to its previous reports and draws attention to clauses 11 and 18's removal of a potential incompatibility with human rights.

The Committee makes no further comment.

⁸ Charter s. 25(1).

Ministerial Correspondence

Courts Legislation Miscellaneous Amendments Bill 2010

The Bill was introduced into the Legislative Assembly on 13 March 2010 by the Hon. Rob Hulls 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's Comments

Charter report

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

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

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

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

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

Minister's Response

Thank you for your letter of 5 May 2010 enclosing the Charter Report of the Scrutiny of Acts and Regulations Committee (SARC), as extracted from Alert Digest No. 6 of 2010.

Your letter –

- a. Asks whether clause 19 of the Courts Legislation Miscellaneous Amendments Bill 2010 (Vic) (the Bill) permits the delegation of the power to imprison to a judicial registrar of the Supreme Court; and
- b. Questions whether such a power of delegation, if exercised, would engage the rights to liberty and a fair hearing under ss 21 and 24 of the Charter of Human Rights and Responsibilities 2006 (Vic) (the Charter).

Under s 85 of the Constitution Act 1975 (Vic), the Supreme Court is a superior court of record with unlimited original and appellate criminal jurisdiction. As a matter of practice, the Supreme

Court tries at first instance only the most serious classes of proceeding, such as murder, treason, and terrorism charges, which lower courts may lack the jurisdiction to deal with. The Supreme Court may also, in its appellate jurisdiction, re-sentence offenders convicted on less serious offences tried in the lower courts.

The power to sentence and make other coercive orders when trying state and federal offenders in the Supreme Court is conferred by existing legislation such as Parts 3, 3A, 4, 5, 6 of the Sentencing Act 1991 (Vic) (the Sentencing Act) and s 68 of the Judiciary Act 1903 (Cth).

Clause 19 of the Bill (by inserting ss 25(1)(de) and (df) in the Supreme Court Act and ss 75(2B) and (5) in the Constitution Act 1975 (Vic)) will provide that such statutory powers may be conferred on judicial registrars only by rules of court.

Rules of court are subordinate legislation which are made under s 26 of the Supreme Court Act 1986 by a majority of the judges (excluding associate judges) who meet for that purpose. The judges have not traditionally conferred functions which interfere with personal liberties on lower ranking officers such as masters, associate judges, and the Prothonotary.

Clause 19 of the Bill has been drafted in light of this history.

Were a rule of court, contrary to this historical experience, to delegate the power to imprison to a judicial registrar, such a rule would be ultra vires the rule making power under the proposed s 25(1) of the Supreme Court Act to the extent that the delegation, in the circumstances, would impermissibly limit or destroy a human right protected by the Charter.

This is because under s 32(3)(b) of the Charter, subordinate legislation may validly interfere with a human right provided that the subordinate legislation “is empowered to be [incompatible] by the Act under which it is made.”

This means that a rule-making power such as s 25(1) of the Supreme Court Act must expressly, or by necessary implication, authorise the making of rules of court which themselves are not Charter compliant.

This implied limitation on the Supreme Court’s rule making power is consistent with the principle that, in the absence of clear words or necessary implication to the contrary, courts will presume that general words are intended to be subject to the basic rights of the individual.¹ In the broader context of the Charter, the statutory power to delegate powers under s 25(1) of the Supreme Court Act must be construed, consistently with s 32(1) of the Charter “as far as possible [consistently] with [s 25(1)’s] purpose, in a way that is compatible with human rights”.

The proposed amendments to s 25(1) of the Supreme Court Act will not expressly, or by necessary implication, allow rules of court which would limit or curtail the rights to liberty and a fair hearing under ss 21 and 24 of the Charter.

As any rule of court purporting to delegate powers which must, under the Charter, be exercised by tenured judicial officers would be ultra vires s 25(1) of the Supreme Court Act, I do not consider cl 19 of the Bill to be inconsistent with the Charter.

In any case, rules of court which delegate powers to judicial registrars are disallowable by Parliament under s 27 of the Supreme Court Act and are “statutory rules” for the purposes of s 3 of the Subordinate Legislation Act 1994 (Vic) (the Subordinate Legislation Act).

¹ *Coco v R* (1993) 179 CLR 427 at 436-438 per Mason CJ, Brennan, Gaudron, McHugh JJ; as to the operation of the same principle in relation to a regulation making power conferred by legislation governed by a statutory human rights instrument, see *Tucker v Secretary of State for Social Security* [2001] EWHC Admin 260 at [10] – [14] per Kay LJ

As “statutory rules”, SARC would be authorised to report to Parliament recommending disallowance after considering a range of matters under s 21 of the Subordinate Legislation Act and the Guidelines under s 26 - Subordinate Legislation Act 1994.

These matters include that the rule of court:

- a) does not appear to be within the powers conferred by the Supreme Court Act;
- b) appears to be inconsistent with the general objectives of the Supreme Court Act (including those stated legislative objectives of the Bill);
- c) contains any matter or embodies any principles which should properly be dealt with by the Supreme Court Act and not by subordinate legislation;
- d) is incompatible with the human rights set out in the Charter;
- e) relates to matters of substance or important procedural matters (particularly where also affecting individual rights and liberties); and
- f) relates to matters which have a significant impact on individual rights, or deals with property rights or traditional liberties and freedoms.

Any rule of court which delegates any of the substantive powers of the Supreme Court’s criminal jurisdiction would be unlikely to survive the statutory disallowance process as the conferral of such powers would not generally be appropriate for subordinate legislation.

I trust that my response sufficiently assists SARC in its deliberations.

If SARC requires clarification on any of the matters raised, please do not hesitate to contact myself or Ms Ruth Andrew, Courts and Tribunals Unit, Department of Justice (Ph: (03) 8608 6119).

ROB HULLS MP
Attorney-General

10 June 2010

The Committee thanks the Attorney-General for this response

Pharmacy Regulation Bill 2010

The Bill was introduced into the Legislative Assembly on 4 May 2010 by the Hon. Daniel Andrews MLA. The Committee considered the Bill on 24 May 2010 and made the following comments in Alert Digest No. 7 of 2010 tabled in the Parliament on 25 May 2010.

Committee's Comments

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.

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', a gallery 'Art Pharmacy' or a music group 'Jazz Pharmacy'. It might also criminalise some uses of 'pharmacy' by critics, commentators or advocates, e.g. 'Pharmacy Watch'.

*While clause 34(2) provides exceptions for some uses of 'pharmacy' and for the Victorian Pharmacy Authority to give advance approval to other uses, 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. 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.

Minister's Response

Thank you for your letter of 26 May 2010 about the Pharmacy Regulation Bill 2010 (the Bill).

The Scrutiny of Acts and Regulations Committee has sought advice about a matter concerning the Bill which was raised by the Committee in its Alert Digest No 7 of 2010.

Whether clause 34 of the Bill is compatible with the Charter's right to freedom of expression?

Relevant Provisions

Section 15(2) of the Charter provides that every person has the right to freedom of expression which includes the right to seek, receive and impart information and ideas orally, in writing, in print, by way of art or in any other medium. The right encompasses a freedom not to express. Section 15(3) qualifies this right. It provides that the right be subject to lawful restrictions

reasonably necessary to respect the rights and reputation of others or for the protection of national security, public order, public health or public mortality.

Clause 34(1) of the Bill provides that a person must not intentionally or recklessly use the title “pharmacy”, “pharmacy practice” or “pharmacy business” except in relation to a pharmacy or pharmacy business to which a license applies.

We acknowledge that the provision in clause 34 of the Bill engages the right to freedom of expression, however, I take the view that it satisfies the exception set out in clause 15(3)(b) of the Charter. It is my view that the right is subject to a lawful restriction that is reasonably necessary for the protection of public health.

The Scheme

The regulatory scheme established under the Bill provides for the regulation of the pharmacy industry and also establishes the Victorian Pharmacy Authority which will issue standards to be met in relation to pharmacy practice. The regulatory scheme aims to provide consumers with confidence that the services with which they are provided meet certain standards.

The Victorian Pharmacy Authority established under the scheme will publish standards in relation to good pharmacy practice. It will also maintain a public register of licensed providers of pharmacy services and appropriately registered premises and it will also receive and investigate complaints and apply sanctions if necessary. The regulatory scheme can therefore provide consumers with confidence that when they are accessing pharmacy services, high industry standards will apply.

Restriction necessary for operation of scheme

The restriction on the use of the title “pharmacy”, “pharmacy department” and “pharmacy business” is essential to the operation and integrity of the scheme. In my view, consumers of these services should be entitled to a high level of confidence that when they attend a pharmacy business they are accessing a regulated provider of pharmacy services which is subject to the scrutiny of the regulatory authority described above.

How the restriction will operate

For consumers to be assured they are accessing services subject to the regulatory scheme, the Bill has provided for a restriction on the use of three specific titles; “pharmacy”, “pharmacy practice” or “pharmacy business”. It is to be noted that the restriction on the use of the titles “pharmacy”, “pharmacy department” and “pharmacy business” is a restriction only on their use as titles and not on the use of the those words in a broader sense.

The restriction is also to be understood within the context of the Bill which establishes an occupational licensing scheme. It should be noted that the restriction is for the direct purpose of ensuring that consumers of pharmacy services are appropriately informed.

Restricting the use of the terms “pharmacy”, “pharmacy department” and “pharmacy business” as a title, is designed to ensure that members of the public are afforded appropriate consumer knowledge. The restriction aims to address the information asymmetry between the providers of pharmacy services and the consumer. It is my view that when a member of the public attends at a place where the titles “pharmacy”, “pharmacy department” or “pharmacy business” are used they should be entitled to be confident that they are accessing a business which is subject to the scrutiny of the regulatory authority.

In my view, the public would not be adequately protected if the title “pharmacy”, “pharmacy department” and “pharmacy business” were used in an unrestricted manner. Restricting the use of these titles protects public health by ensuring that members of the public are not misled when accessing pharmacy services.

The practice of placing restriction on the use of certain titles is not unique to this Bill. It is consistent with other occupational licensing schemes. A similar provision is often used in respect of professions regulated under a statutory framework such as: “Registered Medical Practitioner”, “Registered Nurse”, “Architect” etc.

It is based on these reasons that I take the view that that the restriction on the titles “pharmacy”, “pharmacy department” and “pharmacy business” is necessary in order to protect public health.

Davis v Commonwealth (1998) 166 CLR 79

I note that you also raise the decision of Davis v Commonwealth (1988) 166 CLR 79 (Davis) to demonstrate that the High Court has 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 Pharmacy Bill however intends to protect three specific titles, not numerous expressions, namely “pharmacy”, “pharmacy practice” and “pharmacy business”. These titles are of a much more specific nature than the general expressions that were examined in Davis.

Conclusions

I conclude that the restriction on the use to the title “pharmacy”, “pharmacy department” and “pharmacy business” in section 34 of the Bill is necessary for the protection of public health.

I base this on the fact that the restriction on the use of the titles “pharmacy”, “pharmacy department” and “pharmacy business” is a restriction on the use of titles within the context of an occupational regulatory scheme and not on the use of the words in a broader sense. I further note that the restriction is consistent with other occupational schemes and is necessary in order to protect the operation and integrity of this scheme. The restriction will give consumers knowledge about the standard of the services they are receiving and the restriction of the use of titles is limited for that direct purpose.

I therefore conclude that the restriction falls within the exception to the right set out in section 15(3)(b) and is compatible with the Charter.

I trust that this advice answers the committee’s concerns.

HON DANIEL ANDREWS MP
MINISTER FOR HEALTH

8 June 2010

The Committee thanks the Minister for this response

**Committee room
21 June 2010**

Appendix 1

Index of Bills in 2010

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Child Employment Amendment Bill 2010	4, 7
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Trustee Companies Legislation Amendment Bill 2010	5
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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.

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Accident Compensation Amendment Bill 2009 1

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

Transport Integration Bill 2009 1

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

Transport Integration Bill 2009 1

(vi) inappropriately delegates legislative power

Justice Legislation Amendment Bill 2010 4

Public Finance and Accountability Bill 2009 1

Transport Integration Bill 2009 1

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

Water Amendment (Victorian Environmental Water Holder) Bill 2010 8

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

Associations Incorporation Amendment Bill 2010 8

Building Amendment Bill 2010 6

Child Employment Bill 4

Control of Weapons Amendment Bill 2010 8

Courts Legislation Miscellaneous Amendments Bill 2010 6

Crimes Legislation Amendment Act 2010 4

Crimes Legislation Amendment Bill 2009 1

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

Equal opportunity Bill 2010 4

Justice Legislation Amendment Bill 2010 4

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

Livestock Management Bill 2009 1

Members of Parliament (Standards) Bill 2010 5

Personal Safety Intervention Orders Bill 2010 9

Pharmacy Regulation Bill 2010 7

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Severe Substance Dependence Treatment Bill 2009	1
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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
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Appendix 3

Ministerial Correspondence 2009-10

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

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Electricity Industry Amendment (Critical Infrastructure) Bill 2009	Energy and Resources	10.11.09 03.03.10	13 of 2009 3 of 2010
Justice Legislation Miscellaneous Amendments Bill 2009	Police and Emergency Services	10.11.09 16.03.10	13 of 2009 4 of 2010
Constitution (Appointments) Bill 2009	Premier	24.11.09 12.01.10	14 of 2009 1 of 2010
Serious Sex Offenders (Detention and Supervision) Bill 2009	Corrections	24.11.09 16.12.09	14 of 2009 1 of 2010
Summary Offences and Control of Weapons Acts Amendment Bill 2009	Police and Emergency Services	24.11.09 07.01.10	14 of 2009 1 of 2010
Consumer Affairs Legislation Amendment Bill 2009	Consumer Affairs	08.12.09 15.02.10	15 of 2009 2 of 2010
Accident Compensation Amendment Bill 2009	Finance, WorkCover and the Transport Accident Commission	02.02.10 09.03.10	1 of 2010 4 of 2010
Crimes Legislation Amendment Bill 2009	Attorney-General	02.02.10 15.03.10	1 of 2010 4 of 2010
Transport Integration Bill 2009	Transport	02.02.10 22.02.10	1 of 2010 2 of 2010
Equal Opportunity Bill 2010	Attorney-General	23.03.10 13.04.10	4 of 2010 5 of 2010
Public Finance and Accountability Bill 2009	Treasurer	02.02.10 15.04.10	1 of 2010 6 of 2010
Severe Substance Dependence Treatment Bill 2009	Mental Health	02.02.10 21.04.10	1 of 2010 6 of 2010
Therapeutic Goods (Victoria) Bill 2010	Health	13.04.10 29.01.10	5 of 2010 6 of 2010
Building Amendment Bill 2010	Planning	05.05.10 24.05.10	6 of 2010 7 of 2010
Child Employment Amendment Bill 2010	Attorney-General	23.03.10 19.05.10	4 of 2010 7 of 2010
Justice Legislation Amendment Bill 2010	Attorney-General	23.03.10 05.05.10	4 of 2010 7 of 2010
Education and Training Reform Further Amendment Bill 2010	Education	13.04.10 07.05.10	5 of 2010 7 of 2010
Members of Parliament (Standards) Bill 2010	Premier	13.04.10 13.05.10	5 of 2010 7 of 2010

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Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Courts Legislation Miscellaneous Amendments Bill 2010	Attorney-General	05.05.10 08.06.10	6 of 2010 9 of 2010
Pharmacy Regulation Bill 2010	Health	25.05.10 08.06.10	7 of 2010 9 of 2010

Outstanding correspondence

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
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
Associations Incorporation Amendment Bill 2010	Consumer Affairs	08.06.10	8 of 2010
Control of Weapons Amendment Bill 2010	Police and Emergency Services	08.06.10	8 of 2010
Superannuation Legislation Amendment Bill 2010	Finance	08.06.10	8 of 2010
Water Amendment (Victorian Environmental Water Holder) Bill 2010	Water	08.06.10	8 of 2010
Personal Safety Intervention Orders Bill 2010	Attorney-General	22.06.10	9 of 2010