No. 11 of 2012

Tuesday, 14 August 2012

On the

Civil Procedure Amendment Bill 2012

Criminal Procedure Amendment Bill 2012

Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Bill 2012

Health (Commonwealth State Funding Arrangements) Bill 2012

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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) introduced or tabled in the Parliament. The Committee does not make any comments on the policy merits 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.

Interpretive use of Parliamentary Committee reports

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.

When may human rights be limited

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 limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

Glossary and Symbols

'Assembly' refers to the Legislative Assembly of the Victorian Parliament;

'Charter' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;

'Council' refers to the Legislative Council of the Victorian Parliament;

'DPP' refers to the Director of Public Prosecutions for the State of Victoria;

'human rights' refers to the rights set out in Part 2 of the Charter;

'IBAC' refers to the Independent Broad-based Anti-corruption Commission

'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 $122.14).

'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.

Alert Digest No. 11 of 2012

Civil Procedure Amendment Bill 2012

Introduced	20 June 2012
Second Reading Speech	21 June 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Civil Procedure Act 2010.* It introduces additional specific powers and discretions for the courts in relation to costs and expert evidence. They are based on recommendations identified by the Victorian Law Reform Commission. The purpose is to further reduce delays and costs for persons involved in civil litigation. More specifically:-

- It gives the courts a discretionary power to order that a lawyer make costs disclosures to the lawyer's own client at any stage of the proceeding. It clarifies the courts' discretionary power to make other types of costs orders **[6].**

- It clarifies that the court can give any direction it considers appropriate in relation to expert evidence including limiting expert evidence to specific issues or limiting the number of experts who can give evidence on an issue. It also provides that the court may direct that two or more experts give evidence concurrently and be allowed to ask each other questions **[10]**.

- Contains transitional provisions. These include matters of an application or savings nature that arise as a result of the enactment of the Bill. The regulations dealing with transitional matters 'may have a retrospective effect to a day on or before or from the date that the Civil Procedure Amendment Act 2012 receives the Royal Assent' **[21].** Subsection 4 of new clause 84 will be repealed on 1 May 2014, reflecting the transitional nature of the power.

The Committee makes no further comment.

Criminal Procedure Amendment Bill 2012

Introduced	20 June 2012
Second Reading Speech	21 June 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The purpose of the Bill is to improve aspects of the operation of criminal procedure laws.

The Bill amends the:

- *Criminal Procedure Act* 2009 to make further provision for leave to appeal against sentence**.** A court of appeal may refuse leave where there is an error in an individual sentence but there is no reasonable prospect that the Court of Appeal would reduce the total effective sentence. There is still power to correct an individual sentence **[4-8].**

- *Criminal Procedure Act 2009* to expand the use of recorded evidence-in-chief to proceedings for offences involving child pornography and sexual performance involving a minor **[21-23].** 'Special hearings' are processes for taking evidence from children and cognitively impaired complainants in a separate room from the accused in sexual offence proceedings. Currently, in special hearings the complainant's evidence is pre-recorded and admitted into evidence at the trial. The amendments allow special hearings to be held before or during criminal trials **[21-29]**.

- *Criminal Procedure Act 2009* to clarify circumstances in which a trial judge may comment on a departure from the failure of an accused to adduce particular evidence in the course of a trial. It repeals section 237(3) of the *Criminal Procedure Act* 2009 which contains an express restriction on a trial judge's comment **[14].** The amendments add to the list of persons authorised to witness statements for use in full briefs, hand up briefs and preliminary briefs **[30]**.

- *Children, Youth and Families Act* 2005 in relation to appeals. This includes providing a new power to reserve a question of law for consideration by the Court of Appeal where a difficult legal issue arises in an appeal from the Children's Court to the County Court or the Trial Division of the Supreme Court **[35].**

- *Magistrates' Court Act* 1989 and the *Drugs, Poisons and Controlled Substances Act* 1981 to simplify procedures that must be followed after the execution of a search warrant. Amendments provide that all seized items (regardless of size) may satisfy the requirement to be brought before the court by giving evidence on oath as to their physical location and producing photographic evidence **[38].**

- *Sentencing Act* 1991 to clarify the use of aggregate sentencing in the County Court and the Supreme Court. When imposing an aggregate sentence of imprisonment, a sentencing judge will not be required to identify the separate events giving rise to specific offences or particular sentences or orders for each offence **[44].**

Charter report

Fair hearing – Closed-circuit testimony by child and cognitively impaired complainants – Jury warning

Summary: The Committee observes that clause 24(3), by permitting the option of the allowing the jury to view the complainant's closed-circuit testimony live, rather than via a recording, does not itself impose any limitation on the accused's Charter rights to a fair hearing and to confrontation. However, the Bill provides for different jury warnings for recorded and live closed-circuit testimony. The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 375A with the accused's Charter right to a fair hearing.

The Committee notes that clause 24(3), amending s. 370 of the *Criminal Procedure Act 2009*, permits a court to direct that a 'special hearing' be held 'during a trial'. The existing Division 6 of Part 8.2 of the Act requires that testimony from child or cognitively impaired complainants in trials of sexual offences be given in a 'special hearing' where the complainant and the accused are in separate rooms, linked via closed-circuit television or similar technology. While the existing law provides for a recording of such evidence to be played back during the trial, clause 24(3) permits an alternative option of the live transmission of the complainant's evidence to the room containing the accused and the jury.

The Statement of Compatibility for the Bill that enacted the existing Division 6 of Part 8.2 remarked:

> It is my view... that new division 6 is reasonable, circumscribed and ensures an appropriate balance between competing interests. There are important safeguards to protect the accused in this division. New section 374(3) provides that the court may rule the whole or any part of the recording inadmissible in a subsequent hearing. Further to this, the accused may apply to cross-examine the complainant at a subsequent hearing in particular circumstances (new section 376). The trial judge must also provide an appropriate jury warning regarding use of recorded evidence (new section 375). These measures ensure that the court makes an assessment of the appropriateness of admitting recorded evidence on a case-by-case basis, having regard to the fairness to the accused.

The Committee observes that clause 24(3), by permitting the option of allowing the jury to view the complainant's closed-circuit testimony live, rather than via a recording, does not itself impose any limitation on the accused's Charter rights to a fair hearing and to confrontation.

However, the Committee notes that the Bill provides for different jury warnings for recorded and live closed-circuit testimony. Where recorded testimony is admitted, existing s. 375 provides that:

> the trial judge must warn the jury-
>
> (a) that it is routine practice for the evidence of a complainant who is under the age of 18 years or has a cognitive impairment to be recorded at a special hearing before the trial; and
>
> (b) that no adverse inference may be drawn against the accused as a result of the evidence being recorded; and
>
> (c) that the evidence of the complainant is not to be given any greater or lesser weight as a result of the evidence being recorded.

This provision does not extend to live testimony. Rather, clause 29, inserting a new section 375A, provides that:

> If a special hearing is held during a trial, the trial judge must warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the arrangements put in place under section 372 for the special hearing.

The Committee notes that the warning for live testimony in new section 375A omits the warning in s. 375(a) that a special hearing is 'routine practice'.[1] The Committee observes that, while a similar approach is taken in the ACT, four other Australian jurisdictions require a 'routine practice' direction in both live and recorded closed-circuit television special hearings.[2] The Western Australian Court of Appeal has commented that the purpose of such a direction is to 'counter' the 'evident risk that it may occur to jurors that for some reason the child [or cognitively impaired complainant] had to be kept away from, or protected from, the accused'.[3]

The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 375A with the accused's Charter right to a fair hearing. Pending the Attorney-General's response, the Committee draws attention to clause 29.

Right to review – Aggregate sentences – No requirement for sentencing court to identify the events that gave rise to, or the sentence or order for cumulation of, individual charges

Summary: Clause 44 reverses a ruling of the Victorian Court of Appeal, which held that the inclusion of certain matters in the court's reasons for an aggregate sentence for a series of indictable offences is 'necessary for an appeal court to understand not only the penalty imposed, but the reasoning behind the imposition of each penalty'. The Committee will write to the Attorney-General seeking further information as to the compatibility of clause 44 with offenders' Charter right to have any sentence reviewed by a higher court in accordance with law.

The Committee notes that clause 44, amending existing s. 9 of the *Sentencing Act 1991*, extends existing s. 9(4), which limits what reasons must be given for an aggregate sentence for summary offences, to indictable matters. The effect of clause 44 is that a sentencing court imposing an aggregate sentence for a series of indictable offences:

> (a) is not required to identify separate events giving rise to specific charges; and
>
> (b) is not required to announce-
>
> (i) the sentences that would have been imposed for each offence had separate sentences been imposed; or
>
> (ii) whether those sentences would have been imposed concurrently or cumulatively.

This reverses a ruling of the Victorian Court of Appeal, which remarked that the inclusion of such matters in the court's reasons for an aggregate sentence for a series of indictable offences is

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1 The explanatory memorandum to clause 29 remarks that new section 375A 'is consistent with the jury warning given under section 361 of the *Criminal Procedure Act 2009* in relation to the use of alternative arrangements in the courtroom to allow a witness to give their evidence'. However, the Committee observes that s. 361 applies to exceptional arrangements made at the court's discretion; by contrast, a special hearing is mandatory for child and cognitively impaired complainants in sexual offence trials unless the complainant makes an informed decision to give testimony in a regular hearing: *Criminal Procedure Act 2009*, s. 370.

2 *Evidence (Miscellaneous Provisions) Act 1991* (ACT), ss. 40U(2)(b) & 46; *Evidence Act 1939* (NT), s. 21A; *Criminal Procedure Act 1986* (NSW), s. 294B(7)(a); *Evidence Act 1977* (Qld), s. 21AW(2)(a); *Evidence Act 1906* (WA), s. 106P. The remaining Australian jurisdictions either don't require special hearings as a routine practice (*Evidence Act 1929* (SA), ss. 13, 13A) or don't specify any mandatory jury warnings for such hearings (*Crimes Act 1914* (Cth), s. 15YQ; *Evidence (Child and Special Witnesses) Act 2001* (Tas).)

3 *R v Hamilton* (1997) 97 A Crim R 373, 376.

'necessary for an appeal court to understand not only the penalty imposed, but the reasoning behind the imposition of each penalty'.[4]

The Committee notes that clause 44 may engage Charter s. 25(4), which provides that:

> Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.[5]

The Committee will write to the Attorney-General seeking further information as to the compatibility of clause 44 with offenders' Charter right to have any sentence reviewed by a higher court in accordance with law. Pending the Attorney-General's response, the Committee draws attention to clause 44.

The Committee makes no further comment.

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4 *DPP v Felton* [2007] VSCA 65, [48]. The Court distinguished summary offences because reviews of summary sentences typically occur via a rehearing, rather than an appeal.

5 In respect of the equivalent right in the *International Covenant on Civil and Political Rights,* the United Nations Human Rights Committee has remarked that 'in order to enjoy the effective use of this right, the convicted person is entitled to have, within reasonable time, access to written judgments, duly reasoned, for all instances of appeal': *Reid v. Jamaica*, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994) (emphasis added).

Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Bill 2012

Introduced	20 June 2012
Second Reading Speech	21 June 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The purpose of the Bill is to make amendments to the *Criminal Procedure Act* 2009 and the *Sentencing Act* 1991. It strengthens procedures for victims to be consulted about sentence indications and for offenders to be ordered to compensate their victims for property loss or damage. In particular, it: -

- Clarifies that the court may decide not to give a sentence indication if there is insufficient information before it about the impact of the offence on the victim **[4]**.

- Requires magistrates and judges to ask whether a compensation order relating to property damage, loss or destruction will be sought once a person is found guilty or convicted of an offence **[6].**

- Allows victims to provide a broader range of material to the court as evidence of quantum or particulars of loss **[7.4].** It is a matter for the court to decide what type of material is sufficient and appropriate.

- Provides that a court of its own motion may make a compensation order **[7.1].** This is in addition to the current power of the police prosecutor and the Director of Public Prosecutions to bring an application for compensation.

The Committee makes no further comment.

Local Government Legislation Amendment (Miscellaneous) Bill 2012

Introduced	19 June 2012
Second Reading Speech	20 June 2012
House	Legislative Assembly
Member introducing Bill	Hon. Jeanette Powell MLA
Portfolio responsibility	Minister for Local Government

Purpose

The Bill makes a variety of amendments to local Government legislation to improve the operation of councils.

It amends the *Local Government Act* 1989 to: -

- Insert the word 'only' after 'rateable property' in section 15(3) **[4].** By way of background section 15 of the Act sets out the circumstances in which occupier ratepayers may apply to be enrolled on the voters' roll of a Council. Section 15(3) sets out two circumstances when someone can be considered to 'liable to pay the rates' for the purposes of determining if they can be on the electoral role for a Council.

  The current section 15(3) is set out: -

  '(3) For the purposes of subsection (1), an occupier is liable to pay the rates in respect of that rateable property if-

  (a) The occupier is paying the rates to the Council; or

  (b) The lease under which the occupier occupies the rateable property specifies that the occupier is liable to pay the rates'

  The Explanatory Memorandum states that the amendment made by the insertion of the word 'only' after 'rateable property': -

  '*clarify that sections 15(3)(a)and (b) are exhaustive of the circumstances in which a person can be considered to be liable to pay the Council rates on land they occupy for the purpose of the section'*. In this respect the Explanatory Memorandum appears correct.

  However the Explanatory Memorandum also states: -

  '*This clarifies the entitlement of a person to be enrolled on the voters' roll as an occupier of rateable land within the meaning of section 15(1)(c). This reflects Justice Beach's judgment in Powell v Athanasopoulos [2010] VSC 558*.'

  The relevant extract of Beach J's judgment at paragraph 28 is set out: -

  '*Section 15(3) is not exhaustive of the circumstances in which an occupier might be liable to pay the rates in respect of a rateable property within the meaning of section 15(1)(c). Whilst the plaintiff submitted that in order to come within s 15(1)(c), a person claiming an entitlement must satisfy one of the limbs of s 15(3), I reject that submission. To uphold the plaintiff's submission, one would have to read the word 'only' into s 15(3) immediately before the word 'if'. Section 15(3) expands the operation of s 15(1)(c) in at least on respect when it provides that an occupier who is paying the rates to the council is (for the purposes of section 15(1)) a person 'liable to pay the rates in respect of that rateable property'.*

Section 15(3) is not intended to cut down the operation of section 15(1)(c). However, given the concession by the plaintiff that the word 'lease' in s 15(3)(b) includes a licence of the kind *here in existence, the two construction issues I have identified may be moot (subject to an additional argument of the plaintiff which I will deal with below).'*

- Provide for public reporting of election campaign donations including a summary on the Internet website of the Council. This includes the name of the donor and the value of the donations made by each donor **[9**]; specify that a majority of councillors (as opposed to all councillors) in a meeting must vote in favour of a motion before it passes **[16],** allow a councillor with conflicts of interests in sequential items before Council to make all disclosures before the first item rather than having to re-enter the meeting for each one **[11].** It also repeals section 101(2) of the Act which relates to long service leave **[17].** This is a redundant provision.

- Provide for the appointment of a probity auditor in relation to the handling by a Council of a complaint relating to the conduct of the Chief Executive Officer **[18].**

- Provide that Councils may raise general rates by the application of a differential rate if it uses the capital improved value system of the valuing land. The Minister may issue guidelines on the appropriate uses of different rates **[21].** It also sets out the method by which interest is charged on unpaid rates and charges **[22].** It amends Schedule 3 to allow councils to dispose of unregistered and abandoned vehicles. Reasonable steps must be taken to notify the owner. This mirrors provisions in the *Road Management Act* 2004 which apply to VicRoads **[28].**

It amends the *City of Melbourne Act* 2001 to: -

- Clarify the procedures for the process of serving infringement notices in respect of failure to vote at City of Melbourne elections.

It amends the *Victorian Civil and Administrative Tribunal Act* 1998 to: -

- Provide that the Council must bear costs to a proceeding referred to VCAT only if the Council is the applicant in VCAT or where the Council voluntarily becomes a party to the matter **[32].**

The Committee will write to the Minister seeking clarification of the Explanatory Memorandum and whether the amendment reflects Beach J's judgement in *Powell v Athanasopoulos* [2010] VSC 558.

Charter report

Right to vote and be elected at municipal elections – Occupier ratepayers

Summary: The effect of clause 4 may be to remove the entitlement to vote for or be elected to a Council for some ratepayers who are liable to pay rates for a property they occupy otherwise than pursuant to a lease. The Committee will write to the Minister seeking further information as to the compatibility of clause 4 with the Charter's rights with respect to voting and eligibility to stand for municipal elections.

The Committee notes that clause 4, amending existing s. 15 of the *Local Government Act 1989*, provides that an occupier of a rateable property can only be taken to be liable to pay rates if the occupier either paid the rates or is liable to do so under a lease. Section 15 provides an entitlement for non-resident, non-owner occupiers of a rateable property to be enrolled as ratepayers on the voters' roll if they 'are liable to pay the rates in respect of' the property they occupy. People on the

voters' roll are entitled to vote at Council elections and are qualified to be a candidate for the office of Councillor.[6] **The effect of clause 4 may be to remove the entitlement to vote for or be elected to a Council for some ratepayers who are liable to pay rates for a property they occupy otherwise than pursuant to a lease (e.g. if they are liable to pay rates under a licence to remain on the premises they occupy.[7])**

The Committee will write to the Minister seeking further information as to the compatibility of clause 4 with the Charter's rights with respect to voting and eligibility to stand for municipal elections. Pending the Minister's response, the Committee draws attention to clause 4.

The Committee makes no further comment.

6 *Local Government Act 1989*, ss. 22, 28.

7 *Powell v Athanasopoulos* [2010] VSC 558, [28], [38]. (The Court did not decide whether or not a licence is a lease for the purposes of s. 15(3).)

Planning and Environment Amendment (VicSmart Planning Assessment) Bill 2012

Introduced	7 June 2012
Second Reading Speech	19 June 2012
House	Legislative Council
Member introducing Bill	Hon. Matthew Guy MLC
Portfolio responsibility	Minister for Planning

Purpose

The purpose of the Bill is to introduce a dedicated assessment process called 'VicSmart' for simple, straightforward planning permit applications. The operational aspects of VicSmart will be set out in detail in planning schemes and regulations. The Second Reading Speech comments:-

'*The new permit process will not be suitable for all permit applications. To be suitable, it must be possible to write clear assessment criteria and to be satisfied that, if those criteria are met, a permit will be issued….'*

The bill amends the *Planning and Environment Act* 1987 (the Act) to: -

- Establish VicSmart and enable planning schemes to set out different procedures for particular classes of permit applications **[3-4].**
- Provide that all applications handled by council will be recorded in a single register **[5].**
- Set out the delegation provision from a council officer to another council officer in the event of a conflict of interest **[8].**
- Enable specified applications to be exempted from certain review criteria (eg: regional strategy plans etc) when reviewed by AAT under sections 77 and 84B of the Act **[7 and 9].**

Extract from the Second Reading Speech: -

'These changes will ensure that decision-making criteria in the new permit process is focused on the assessment standards set out in the planning scheme rather than on broader planning issues that are not relevant to straightforward proposals.'

The Committee makes no further comment.

Racing Legislation Amendment Bill 2012

Introduced	19 June 2012
Second Reading Speech	20 June 2012
House	Legislative Assembly
Member introducing Bill	Hon. Denis Napthine MLA
Portfolio responsibility	Minister for Racing

Purpose

The Bill amends the *Racing Act* 1958 (the Act). It:-

- Provides for bookmakers to accept telephone and electronic bets at approved off-course premises **[6-7].** This removes the current restriction on Victorian bookmakers who can only accept bets whilst they are physically located on a licensed racecourse. The bookmaker must be issued with a licence, using a method of communication approved by the Minister **[7].** A registered bookmaker who holds an approval for approved off-course betting must not carry on the business of bookmaking at those premises unless it is in accordance with the relevant conditions of the approval. The penalty for a first offence is 15 penalty units or 3 months imprisonment or both. For a second offence, the penalty is 25 penalty units or imprisonment or both. A third offence carries a penalty of 12 months imprisonment **[7].** The functions and powers of gambling and liquor inspectors including those of entry and seizure are set out in respect of approved off-course premises **[17].**

- Provides for the removal of the 1% turnover cap which currently applies to the bookmaker's licence levy. Extract from the Second Reading Speech: - "*In November 2008, RVL introduced a new model for charging a fee to interstate totalisers, bookmakers and betting exchanges betting on Victorian thoroughbred racing. Under this model, fees are calculated on the basis of a wagering provider's gross revenue (ie: profit) rather than its wagering turnover. Racing Victoria has recently announced that it intends to return to a turnover based pricing model. There is currently no regulatory impediment to implementation by RVL of its new policy in respect of bookmakers registered outside of Victoria. The removal of the ceiling on the Bookmakers Licence Levy will enable RVL to implement its new pricing model on a consistent basis regardless of the location of the wagering operator*."

- Provides that the Racing Integrity Commissioner may disclose integrity related with four further bodies, namely the Australian Crime Commission, the Australian Securities and Investment Commission, the Commonwealth Services Delivery Agency (Centrelink) and Ombudsman Victoria **[8].**

- Provides that the Racing Integrity Commission has a further 30 days to table his Annual Report from 31 August every year to 30 September **[9].**

- Provides for appeals by a registered bookmaker in respect of approvals for approved off-course premises to the HRV Racing Appeals and Disciplinary Board **[11].**

The Committee makes no further comment.

Health (Commonwealth State Funding Arrangements) Bill 2012

The Bill was introduced into the Legislative Assembly on 22 May 2012 by the Hon. Denis Napthine MLA. The Committee considered the Bill on 4 June 2012 and made the following comments in Alert Digest No. 9 of 2012 tabled in the Parliament on 5 June 2012.

Committee's Comments

Inappropriately delegates legislative power – Applied Acts of the Commonwealth may be modified by Commonwealth regulations – Parliamentary Committees Act 2003, section 17(vi)

The Bill provides that certain Victorian Acts do not apply to the powers or functions exercised or performed by the Administrator established under this legislative scheme. [30 and 31] Instead the Bill provides that certain Commonwealth Acts apply (the applied Acts). [32(2)] The applied Acts may be subject to modifications made by regulations made under the *National Health Reform Act 2011* (Cth) with the agreement of all the members of the Standing Council of Health.

The Committee notes this extract from the Second Reading Speech:

> Similarly, to ensure the Administrator, as an officer of nine jurisdictions, is not subject to nine different administrative law schemes, the Bill also disapplies the *Freedom of Information Act 1982*, the *Health Records Act 2001*, the I*nformation Privacy Act 2000*, the *Interpretation of Legislation Act 1984*, the *Ombudsman Act 197*3 and the *Subordinate Legislation Act 1994* to the office of the Administrator and adopts the relevant Commonwealth laws, as modified by the Commonwealth regulations. These regulations may only be made with the agreement of all relevant State ministers.

The Committee notes that a provision in a Bill that permits subordinate legislation to amend an Act may constitute an inappropriate delegation of legislative power. Such provisions are commonly referred to as a Henry VIII clause.

The Committee has previously accepted that in limited circumstances such provisions may be justifiable for example, where the power to modify primary legislation is for a limited time to facilitate transitional arrangements, or in necessitous circumstances to accommodate rapidly evolving technologies or developments where frequent amendments to primary legislation may be considered to be impracticable.

Where a Bill includes a power to modify primary legislation by means of subordinate legislation it is the practice of the Committee to seek an explanation justifying their inclusion for the advice of the Parliament.

The Committee will seek further information from the Minister.

Minister's response

Thank you for your letter of 5 June 2012 regarding the *Health (Commonwealth State Funding Arrangements) Bill 2012* (the Bill).

The Scrutiny of Acts and Regulations Committee (the Committee) has sought further information justifying the inclusion of a power to modify primary legislation by means of subordinate legislation.

The Committee notes that the Bill refers to regulations being made by the Commonwealth to modify the text of a number of Commonwealth Acts, being the *Archives Act 198*3 (Cth), the *Australian Information Commissioner Act 2010* (Cth), the *Freedom of Information Act 198*2 (Cth), the *Ombudsman Act 1976* (Cth) and the *Privacy Act 1988* (Cth).

These modifications will be for the purposes of application of those laws to the Administrator to be established by the Bill.

The Commonwealth Acts are to be applied as laws of Victoria to provide for the application of nationally consistent privacy, freedom of information, archives and ombudsman regimes to the Administrator. As noted by the Committee, this is necessary to ensure that the Administrator, as an officer of nine jurisdictions, is not subject to nine different administrative law schemes.

The Commonwealth power to make regulations to modify these Commonwealth Acts as they apply to the Administrator is contained in the Commonwealth National Health Reform Act 2011 and is necessary to ensure that these Acts will work in practice in all jurisdictions, including Victoria. For example, the Acts will need to be modified to apply as if references in the Acts to the Commonwealth Government were references to the Government of a participating jurisdiction (e.g. Victoria).

The making of regulations will be important in the context of modifying these Commonwealth Acts as they apply to the Administrator. These regulations will be made with the agreement of all the members of the Standing Council on Health.

However, as the regulations are to be made by the Commonwealth the provisions of the Bill do represent an applied law arrangement only, not a delegation of legislative power.

The Committee has previously noted that this approach may be necessary to achieve uniformity in national scheme legislation. Examples of other national applied laws legislation which contain similar provisions include the Education and Care Services National Law and the Health Practitioner Regulation National Law.

Hon David Davis MP
Minister for Health

19 June 2012

The Committee thanks the Minister for this response.

Marriage Equality Bill 2012

The Bill was introduced into the Legislative Assembly on 6 June 2012 by Ms Sue Pennicuik MLC. The Committee considered the Bill on 18 June 2012 and made the following comments in Alert Digest No. 10 of 2012 tabled in the Parliament on 19 June 2012.

Committee's Comments

Charter report

Presumption of innocence – Bigamy – Defendant must prove that he or she honestly and reasonably believed that his or her spouse was dead

Summary: The Committee will write to the Member seeking further information as to the compatibility of the reverse onus in clause 19(2) with the Charter right of defendants to be presumed innocent until proved guilty according to law.

The Committee notes that clause 19 provides that it is an offence for a married person to go through a form or ceremony of same-sex marriage. Clause 19(2) provides for a defence for a defendant who 'proves' that he or she believed that his or her spouse was dead and that there were reasonable grounds for that belief. The Committee observes that the effect of clause 19(2) is to reverse the onus of proof on the issue of whether the defendant honestly and reasonably believed that his or her spouse was dead when he or she went through a form or ceremony of same-sex marriage.

The Statement of Compatibility does not address clause 19(2). In its *Practice Note No. 3*, the Committee remarks that for any provision of a Bill that 'place[s] a legal onus of proof on an accused with respect to any issue in a criminal proceeding', the Statement of Compatibility 'should state whether and how that provision satisfies the Charter's test for reasonable limits on rights'.

The Committee will write to the Member seeking further information as to the compatibility of the reverse onus in clause 19(2) with the Charter right of defendants to be presumed innocent until proved guilty according to law. Pending the Member's response, the Committee draws attention to clause 19(2)

Protection of children – Dissolution of same-sex marriage – Proper arrangements for children of the marriage

Summary: The Committee considers that the absence of a provision in clause 30 barring the dissolution of a same-sex marriage unless a court is satisfied that proper arrangements have been made for the children of the marriage may engage the Charter right of such children 'without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.' The Committee will write to the Member seeking further information.

The Committee notes that clause 30 provides that a dissolution order (permitting parties to a same-sex marriage to remarry) generally takes effect one month after the making of the order.

The Committee observes that the equivalent provision in the *Family Law Act 1975* (Cth) for opposite-sex marriages is subject to a provision that a divorce order cannot take effect until a court orders that, for all children of the marriage (including children treated by the parties to the marriage as a child of their family) who are under 18, the court is satisfied that:

(i) proper arrangements in all the circumstances have been made for the care, welfare and development of those children; or

(ii) there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.

The Committee considers that the absence of a provision in clause 30 barring the dissolution of a same-sex marriage unless a court is satisfied that proper arrangements have been made for the children of the marriage may engage the Charter right of such children 'without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'

The Committee will write to the Member seeking further information as to the compatibility of clause 30 with the Charter rights of children to such protection as is in their best interests. Pending the Member's response, the Committee draws attention to clause 30.

Member's response

Thank you for your letter of the 19th of June 2012 seeking my views on the issues raised in Alert Digest No. 10 of 2012 regarding the reverse onus clause 19(2) of the Marriage Equality Bill, and the absence of a provision in clause 30 barring the dissolution of a same-sex marriage unless a court is satisfied that proper arrangements have been made for the children of the marriage.

Clause 19(2) provides in relation to the offence of bigamy:

It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that—

(a) at the time of the alleged offence, the defendant believed that his or her spouse was dead; and

(b) the defendant had reasonable grounds for the belief under paragraph (a), having regard to the time for which the defendant's spouse had been absent from the defendant and the circumstances of that absence.

The Committee has stated in Alert Digest that it seeks further information as to:

"the compatibility of the reverse onus in clause 19(2) with the Charter right of defendants to be presumed innocent until proved guilty according to law."

The reverse onus in clause 19(2) for the offence of bigamy is consistent with section 94(2) of the federal Marriage Act 1961 which reinforces that under Australia law, placing the burden on the prosecution is not an absolute rule. Whilst the reverse onus conflicts with the right of the presumption of innocence in criminal proceedings under s25(1) of the Charter, s7 of the Charter does allow for the right to be limited where those limits are reasonable.

Given that the right to the presumption of innocence is not an absolute right and the importance of the purpose of the limitation of the presumption in relation to the offence of bigamy, clause 19(2) is compatible with the Charter by virtue of section 7.

Bigamy is a serious offence that involves the crime of deception and fraud and as some commentators have stated may be viewed also as a sexual offence.[1] As outlined by the European Court of Human Rights[2] and Australian case law[3] the seriousness of the offence is a relevant consideration when viewing the right being curtailed and the purpose of the limitation.

1 Samuel Chapman presents these points of view amongst other opinions in his article: Polygamy, Bigamy and Human Rights Law 2001 Xlibris Corp, at 2, 5,60-70.

2 Salabiaku v France (1988) 13 EHRR 379

3 Momvilovic v The Queen and Ors [2011] HCA 34

The importance of bigamists not escaping effective prosecution, which is the aim of the reverse onus, is a purpose which does not conflict with the values underlying an open and democratic society which the Charter upholds. The offence requires the defendant to have the belief that his or her spouse was alive at the time of the alleged offence. Such a presumed fact is peculiarly within the knowledge of the defendant, and therefore it would be unduly burdensome for the state to discharge its onus.

An additional consideration as to whether the reverse onus is reasonable or not, is in relation to the ease of access to information required to discharge the burden by the defendant.[4] Sufficient proof required for the defendant that he or she had reasonable grounds to believe that his or her spouse was dead are outlined in clause 19(3) (a) and (b) whereby the defendant must prove:

- his or her spouse had been continually absent from him or her for 7 years preceding the date of the offence; and
- at the time of the alleged offence, the defendant had no reason to believe that the defendant's spouse had been alive at any time within that period.

Such evidence would not be unduly difficult for a defendant to provide if he or she was innocent. To date the operation of this reverse onus for the offence of bigamy under the Federal Marriage Act 1961, has not led to a situation where innocent people are being brought to trial or have had difficulty in escaping conviction. Therefore the test of proportionality whereby the curtailment of the right under s25(1) of the Charter must be reasonable is upheld.

The Committee noted in Alert Digest in relation to the protection of the welfare of children:

"that the absence of a provision (in the Bill) barring the dissolution of a same-sex marriage unless a court is satisfied that proper arrangements have been made for the children of the marriage may engage the Charter right of such children 'without discrimination, to such protection as is in his or her best interests and is needed by him by reason of being a child.'"

Furthermore, section 55A(1)(b) in the Family Law Act 1975 (Cth) states that a divorce order in relation to a marriage does not take effect unless the court has, by order, declared that it is satisfied that the only children of the marriage who have not attained 18 years of age are the children specified in the order and that:

(i) proper arrangements in all the circumstances have been made for the care, welfare and development of those children; or

(ii) there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.

I have considered the matter carefully and note that children are adequately provided for and protected under Part VII of the Family Law Act regardless of whether the parents are recognised as married by the Commonwealth.

I trust this information will be of assistance to you.

Sue Pennicuik MLC

10 August 2012

The Committee thanks the member for this response.

Committee Room
13 August 2012

[4] Momvilovic v The Queen and Ors [2011] HCA 34

Extract from the Proceedings

The Minutes of the Committee show the following Division that took place during consideration of the *Alert Digest No 11 of 2012* on Monday 13 August 2012.

Motion—That Alert Digest No 11 of 2012, as amended, be accepted as the report of the Committee and be printed.

Moved Mr Graham Watt MLA

Seconded Mr Michael Gidley MLA

The Committee divided.

Ayes, 4 Noes, 3

Mr Edward O'Donohue MLC	Mr Colin Brooks MLA
Mr Michael Gidley MLA	Hon. Christine Campbell MLA
Mr David O'Brien MLC	Mr Don Nardella MLA
Mr Graham Watt MLA	

And so it was resolved in the affirmative.

Appendix 1
Index of Acts and Bills in 2012

Alert Digest Nos.

Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(vi) inappropriately delegates legislative power

Health (Commonwealth State Funding Arrangements) Bill 2012 9

(viii) is incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006*

Associations Incorporation Reform Bill 2011 1
Australian Consumer Law and Fair Trading Bill 2011 1
Control of Weapons and Firearms Acts Amendment Bill 2011 1
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012 7
Marriage Equality Bill 2012 10
National Energy Retail Law (Victoria) Bill 2012 6
Victorian Inspectorate Amendment Bill 2012 5
Water Amendment (Governance and Other Reforms) Bill 2012 4
Working with Children Amendment Bill 2012 9

Section 17(b)

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

Australian Consumer Law and Fair Trading Bill 2011 1

Appendix 3
Ministerial Correspondence 2012

Table of correspondence between the Committee and Ministers during 2012

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Associations Incorporation Reform Bill 2011	Minister for Consumer Affairs	07-02-12 *24-02-12*	1 of 2012 *4 of 2012*
Australian Consumer Law and Fair Trading Bill 2011	Minister for Consumer Affairs	07-02-12 *24-02-12*	1 of 2012 *4 of 2012*
Control of Weapons and Firearms Acts Amendment Bill 2011	Minister for Police and Emergency Services	07-02-12 *29-02-12*	1 of 2012 *4 of 2012*
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	28-02-12 *14-03-12*	12 of 2011 *5 of 2012*
Disability Amendment Bill 2012	Minister for Community Services	13-03-12 *26-03-12*	4 of 2012 *5 of 2012*
Water Amendment (Governance and Other Reforms) Bill 2012	Minister for Water	13-03-12 *27-03-12*	4 of 2012 *5 of 2012*
Victorian Inspectorate Amendment Bill 2012	Minister responsible for the establishment of an anti-corruption commission	27-03-12 *16-04-12*	5 of 2012 *6 of 2012*
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	Minister responsible for the establishment of an anti-corruption commission	01-05-12 *21-05-12*	7 of 2012 *8 of 2012*
National Energy Retail Law (Victoria) Bill 2012	Minister for Energy and Resources	17-04-12 *01-05-12*	6 of 2012 *8 of 2012*
Working with Children Amendment Bill 2012	Attorney-General	05-06-12 *16-06-12*	9 of 2012 *10 of 2012*
Health (Commonwealth State Funding Arrangements) Bill 2012	Minister for Health	05-06-12 *19-06-12*	9 of 2012 *11 of 2012*
Marriage Equality Bill 2012	Ms Sue Pennicuik MLC	19-06-12 *10-08-12*	10 of 2012 *11 of 2012*

Table of Ministers responses still pending

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***

Minority report on Planning and Environment Amendment (VicSmart Planning Assessment) Bill 2012

The Scrutiny of Acts and Regulations Committee is under the Parliamentary Committees Act 2003 required to report on whether a Bill directly or indirectly-

trespasses unduly upon rights or freedoms, s. 17(a) (i)

makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers s. 17(a)(ii)

makes rights freedoms or obligations dependents upon non-reviewable administrative powers. s. 17(a)(iii)

The bill provides no definition of or limits to the definition of "permit".

Currently, adjoining landowners and detrimentally affected residents and parties have existing rights to notification of a planning permit.

The Bill removes those notification protection provisions. The Bill also removes their existing provisions of access to VCAT.

Colin Brooks, Christine Campbell, Don Nardella