

# **No. 12 of 2011**

**Tuesday, 25 October 2011**

**On the**

Children's Services Amendment Bill  
2011

Children, Youth and Families  
Amendment (Security of Youth Justice  
Facilities) Bill 2011

Gambling Regulation Amendment  
(Licensing) Bill 2011

Electricity Industry (Transitional Feed-  
in Tariff Scheme) Bill 2011

Resources Legislation Amendment  
Bill 2011

Sex Work and Other Acts Amendment  
Bill 2011

Victorian Responsible Gambling  
Foundation Bill 2011

Water Legislation Amendment (Water  
Infrastructure Charges) Bill 2011

# The Committee



Chairperson  
Mr Edward O'Donohue MLC  
Member for Eastern Victoria



Deputy Chairperson  
Hon. Christine Campbell MLA  
Member for Pascoe Vale



Mr John Eren MLA  
Member for Lara



Mr Michael Gidley MLA  
Member for Mount Waverley



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## Terms of Reference - Scrutiny of Bills

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;

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# Useful information

## 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*;

'*child*' means a person under 18 years of age;

'*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;

'*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 \$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. 12 of 2011

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## Children's Services Amendment Bill 2011

<b>Introduced</b>	13 October 2011
<b>Second Reading Speech</b>	13 October 2011
<b>House</b>	Legislative Council
<b>Member introducing Bill</b>	Hon. Wendy Lovell MLC
<b>Portfolio responsibility</b>	Minister for Children and Early Childhood

### Background

The Bill amends the *Children's Services Act 1996* and to the *Education and Care Services National Law Act 2010*, and makes consequential amendments to other Acts.

Extract from the Statement of Compatibility:

#### Overview of Bill

The Children's Services Amendment Bill 2011 makes various amendments to the *Children's Services Act 1996* (the Act) and the *Education and Care Services National Law Act 2010* (the national law) that are necessary in preparation for the commencement of the national law. The act is being retained as certain children's services in Victoria will be outside the scope of the national law, and so will continue to be regulated under the Victorian children's services legislation.

The amendments in this Bill ensure that children's services that are required to operate under the national law are not subject to two regulatory regimes (state and national), and clarify the relationship between the national law and the Victorian Act.

**The Committee may report on this Bill in Alert Digest No. 13 of 2011 in November 2011**

# Electricity Industry (Transitional Feed-in Tariff Scheme) Bill 2011

<b>Introduced</b>	11 October 2011
<b>Second Reading Speech</b>	12 October 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Michael O'Brien MLA
<b>Portfolio responsibility</b>	Minister for Energy and Resources

## Background

This Bill amends the *Electricity Industry Act 2000* and the *National Electricity (Victoria) Act 2005* to establish a new system to replace the current premium solar feed-in tariff scheme once it reaches its capacity. The Bill sets out the criteria for eligibility for the new transitional feed-in.

**The Committee makes no further comment**

## Sex Work and Other Acts Amendment Bill 2011

<b>Introduced</b>	11 October 2011
<b>Second Reading Speech</b>	12 October 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Michael O'Brien MLA
<b>Portfolio responsibility</b>	Minister for Consumer Affairs

### Background

The Bill:

- assigns and clarifies responsibility for monitoring, investigation and enforcement of provisions of the *Sex Work Act 1994* (the 'Act'). **[3 to 5]**
- continues the ban on street prostitution by extending the operation of the banning notice regime (due to sunset on 1 January 2012) in Part 2A of the *Sex Work Act 1994* for a further two years until 1 January 2014. The Chief Commissioner of Police will be required to report annually on the operation of and effects on the community of Part 2A. **[14 and 15]** (Refer to Statement of Compatibility)
- enhances Victoria Police's role in investigating and prosecuting the owners of brothels operating without a permit under the *Planning and Environment Act 1987* making provision for a search of premises without judicial warrant. **[9]** (Refer to Statement of Compatibility)
- tightens restrictions on persons with serious criminal backgrounds entering the sex work industry. **[6 to 8]**
- amends the *Confiscation Act 1997* to broaden the range of offences relating to illegal sex work to which that Act will apply. **[16 to 18]** (Refer to Statement of Compatibility)
- amends the *Confiscation Amendment Act 2010* in relation to declarations of property interests and applications for exclusion from civil forfeiture, and to extend the default commencement day of that Act. **[20]** (Refer to Statement of Compatibility)
- amends the *Confiscation Amendment Act 2010* (not yet in force) to change the test for exclusion from a civil forfeiture order or a civil forfeiture restraining order. **[22 and 23]** (Refer to Statement of Compatibility)

### Committee comment

#### **Entry to premises without a planning permit without search warrant – authority for entry may be issued by Chief Commissioner in urgent circumstances**

The Bill inserts new powers of entry (new sections 78A and 78B) where police believe on reasonable grounds that premises are being used for the purposes of operating a brothel in contravention of section 126 of the *Planning and Environment Act 1987*.<sup>1</sup>

Under new section 78B the Chief Commissioner of Police may authorise after hours entry if the Chief Commissioner believes that relevant evidence is likely to be lost if entry is delayed until a warrant can be issued under section 78A.

<sup>1</sup> *Planning and Environment Act 1987*, s. 126 (Offence to contravene a planning scheme, or permit or agreement (under section 173))

The Act currently provides<sup>2</sup> for entry without warrant of unlicensed premises. New section 78B applies a number of the existing procedural requirements for searches of unlicensed premises without warrant<sup>3</sup> to premises without planning permit. These applied provisions essentially deal with supervision of such entry and search powers without warrant by the Magistrates' Court.

The Bill also inserts a new section 78C regarding the inadmissibility for the prosecution of any evidence obtained where the conditions and procedures applicable to entry without a warrant have not been complied with. The Act currently includes a similar provision for entry without warrant of unlicensed premises.<sup>4</sup>

**Given the regulatory scheme imposed by the Act, the supervisory role of the Magistrates' Courts and the provision concerning inadmissibility of improperly obtained evidence, the Committee considers the entry of premises approved by the Chief Commissioner without a warrant in certain urgent circumstances is appropriate in all the circumstances.**

**The Committee makes no further comment**

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<sup>2</sup> *Sex Work Act 1994*, s. 64

<sup>3</sup> *Sex Work Act 1994*, s. 64(3), (4), (5), (6), (7), (8), (9) and (10)

<sup>4</sup> *Sex Work Act 1994*, s. 65

## Victorian Responsible Gambling Foundation Bill 2011

<b>Introduced</b>	11 October 2011
<b>Second Reading Speech</b>	12 October 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Michael O'Brien MLA
<b>Portfolio responsibility</b>	Minister for Gaming

### Background

The Bill establishes a body corporate known as the Victorian Responsible Gambling Foundation (the 'Foundation'). [4] The Bill also makes consequential amendments to the *Gambling Regulation Act 2003*. [25]

### Purpose and functions

The objectives of the Foundation are to reduce the prevalence of problem gambling and the severity of harm related to gambling and to foster responsible gambling. [5]

The functions of the Foundation are to:

- undertake preventative and other activities to address determinants of problem gambling
- conduct education and information programs to promote responsible gambling behaviours; and increase community awareness of the risks associated with gambling; and encourage people to seek help in relation to problem gambling
- provide treatment, counselling services and intervention services in relation to problem gambling
- provide information and advice in relation to issue or grant of licences, permits, approvals, authorisations, registration or allocations under gambling legislation and the regulation of gambling under gambling legislation
- provide information to enable persons to make submissions to and participate in inquiries and public consultations relating to gambling
- undertake research and evaluation activities related to its functions and objectives. [6]

### Membership

The Foundation will consist of 3 members who are Members of the Parliament elected by the Council and the Assembly jointly, and between 4 and 8 members appointed by the Governor in Council on the recommendation of the Minister.

**The Committee makes no further comment**

## Water Legislation Amendment (Water Infrastructure Charges) Bill 2011

<b>Introduced</b>	11 October 2011
<b>Second Reading Speech</b>	12 October 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Peter Walsh MLA
<b>Portfolio responsibility</b>	Minister for Water

### Background

The Bill amends the *Water Industry Act 1994* (the 'Act'):

- to apply certain provisions of the *Water Charge (Infrastructure) Rules 2010* (Cth) as a law of the State to enable the Essential Services Commission (ESC), established under the *Essential Services Commission Act 2001* to approve or determine charges for the provision of certain water services in the State
- to enable the ESC to apply for accreditation of those arrangements by the Australian Competition and Consumer Commission (ACCC).

The Bill also makes related and consequential amendments to the Act and other Acts.

Overview from the Statement of Compatibility:

Under the *Water Act 2007* (Cth) and the subordinate *Water Charge (Infrastructure) Rules 2010* (WCI rules) (collectively the Commonwealth scheme), the Commonwealth has established its own system for the making of price determinations for specific infrastructure services (basin water charges) within the Murray-Darling Basin (MDB) region of Victoria (northern Victoria). Under the Commonwealth scheme by 1 July 2013, two Victorian water corporations (the Lower Murray Water Corporation and Goulburn-Murray Water Corporation) will be required to calculate and impose basin water charges on its customers in accordance with the determinations of the ACCC made under the WCI rules.

The Bill will apply certain parts of the WCI rules, referred to as the applied provisions, as State law to enable the ESC to approve or determine Basin water charges for the provision of certain water services in northern Victoria.

To achieve this, the Bill will enable the ESC to apply to the ACCC for accreditation of arrangements to approve or determine these state Basin water charges. If the ESC is successful in its application for accreditation, the ESC will replace the ACCC as regulator and be required to approve or determine these Basin water charges in accordance with the WCI rules, which will operate through the applied Victorian provisions as state law. If the ESC is not successful in applying for accreditation, the applied provisions of the WCI rules will not operate as state law, and the ACCC will remain the regulator with the power to approve or determine Basin water charges in northern Victoria.

In addition, the Bill will make a number of other amendments to ensure it does not affect the ESC's powers and functions as the economic regulator of the water industry in relation to matters outside the Commonwealth scheme and/or the State applied law scheme. Lastly, the Bill amends the *Water Act 1989* (State Water Act) to make clear that the levying of water charges approved or determined for the purposes of the WCI rules (either by the ESC or the ACCC) is not subject to review by the Victorian Civil and Administrative Tribunal (VCAT).

## Charter report

### Practice Note No. 3 – National uniform legislation schemes – Procedures for determining water charges

Summary: New section 4K will apply various provisions of the Water Charge (Infrastructure) Rules 2010 (Cth) 'as a law of' Victoria. The Committee will write to the Minister requesting further information as to the compatibility of those rules with human rights, in particular the rights to privacy and a fair hearing.

**The Committee notes that clause 6, inserting a new section 4K into the *Water Industry Act 1994*, will apply various provisions of the *Water Charge (Infrastructure) Rules 2010 (Cth)* 'as a law of' Victoria.<sup>5</sup>**

While the statement of compatibility assesses the compatibility of other clauses of the Bill with human rights, it does not expressly address whether or not the Commonwealth provisions applied by new section 4K are compatible with human rights. The Committee's *Practice Note No. 3* states:

While the passage of national co-operative laws is a matter for Parliament, the Committee considers that the explanatory material to Bills creating or enhancing such schemes should fully explain their human rights impact.

The Committee would prefer that the explanation have two components: First, the Statement of Compatibility may assess the human rights compatibility of all existing non-Victorian laws that are to be applied in Victoria. Second, the explanatory material may set out whether, and to what extent, the Charter's operative provisions (including its provisions for scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities) will apply under the national cooperative scheme.

The Committee notes that the Bill's explanatory memorandum contains comprehensive information addressing the second of these components (i.e. the application of the Charter's operational provisions under the national scheme.)

In relation to the first component (i.e. the compatibility of the existing applied provisions with human rights), the Committee observes that the applied sections of the *Water Charge (Infrastructure) Rules 2010 (Cth)* may engage the following Charter rights:

- **Privacy** (Charter s.13(a)): Rules 42, 48, 52, 53 and 54 require the Regulator (including, potentially, the Essential Services Commission) to publish information supplied in applications, submissions or in response to requests for information relating to regulated charges, unless the supplier identifies the information as confidential and either the Regulator considers the information to be confidential or the supplier opts to withdraw it. The Committee notes that, if the application, submission or response contains private information about third parties, then its publication may affect the privacy rights of those parties. By contrast, s. 38 of the *Essential Services Commission Act 2001* requires the ESC to consult with and consider the detriment that the publication of such information may cause to other interested parties and s. 55(1)(b) permits an internal appeal of such decisions by any aggrieved person.
- **Fair hearing** (Charter s.24(1)): Rule 53 bars the Regulator from publishing confidential information and does not expressly address whether or not that information may still be considered in relation to the determination of a water charge. The Committee notes that, if the Regulator makes a determination on the basis of information that has not been made available to some parties, then those parties' inability to respond to that information may engage any fair

<sup>5</sup> The relevant provisions are divisions 2, 3 and 4 of Part 6; division 2 of Part 7, division 1 of Part 8 and Schedules 1, 2 and 3: see rule 59(2) of the *Water Charges (Infrastructure) Rules 2010 (Cth)*.

hearing right they have in respect of that determination. By contrast, s. 38 of the *Essential Services Commission Act 2001* permits the ESC to publish even confidential information if ‘the public benefit in disclosing it outweighs’ the detriment disclosure may cause (e.g. if disclosure is necessary to ensure a fair hearing of the determination of the water charge.)

The Committee notes that only human beings have rights under the Charter.<sup>6</sup> However, even where the applicant or submitter is a corporation, it is possible that the publication or non-publication of supplied information may affect the privacy or fair hearing rights of humans to whom the information or determination relates.

**The Committee will write to the Minister requesting further information as to the compatibility of the applied provisions of the *Water Charge (Infrastructure) Rules 2010 (Cth)* with human rights, in particular the rights to privacy and a fair hearing. Pending the Minister’s response, the Committee draws attention to new section 4K.**

**The Committee makes no further comment**

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<sup>6</sup> Charter s. 6(1).

# Ministerial Correspondence

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## Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011

The Bill was introduced into the Legislative Assembly on 13 September 2011 by the Hon. Mary Wooldridge MLA. The Committee considered the Bill on 10 October 2011 and made the following comments in Alert Digest No. 11 of 2011 tabled in the Parliament on 11 October 2011.

### Committee's Comments

#### Charter report

#### **Privacy – Humane treatment – Rights of children – Strip searches of detainees in youth justice facilities**

Summary: The Bill's provisions for strip searches of detainees in youth justice facilities lack some of the express protections presently applicable to strip searches of adult prisoners. The Committee will write to the Minister seeking further information.

The Committee notes that clause 7, inserting a new section 488AC into the *Children, Youth and Families Act 2005*, permits the officer in charge of Victorian Youth Justice Custodial Services to authorise (or, under new section 482B, to authorise others employed by the Department to authorise) a strip search of a detainee in a youth justice facility where the officer is of the opinion that the search is necessary in the interests of the security or good order of the facility or the safety or security of any person in the facility.

The Statement of Compatibility remarks:

Search powers, particularly searches of persons, engage the right to privacy. Further, depending upon the circumstances and manner in which they are carried out, searches of young people detained in youth justice facilities have the potential to engage a number of other rights including the right to human treatment when deprived of liberty (section 22), the rights of children (section 17) and the rights of children in the criminal process (section 23). This is particularly so in respect of strip searches. However, I consider that the powers in the bill are compatible with these rights having regard to: the circumstances in which searches may be conducted; the safeguards imposed; and the fact that they will be conducted by persons who are public authorities and therefore bound to act compatibly with those rights having regard to the individual circumstances.

The Committee notes that new section 488AD(6) provides that all searches in youth justice facilities must be carried out 'expeditiously' and 'with regard to the decency and self-respect of the person searched' and sets out some specific protections relating to strip searches.

**However, the Committee observes that the Bill's provisions for strip searches of detainees in youth detention facilities lack a number of the express protections presently applicable (under the *Corrections Regulations 2009*) for strip searches of adult prisoners.**

The Committee notes that new section 488AD(6)(c) obliges officers carrying out any search of a juvenile to comply with 'any other prescribed requirement'. The Statement of Compatibility remarks that 'additional safeguards... may be incorporated in the regulations and operations manual, which are currently under review'.

**The Committee will write to the Minister seeking further information as to when further safeguards for strip searches of detainees will be incorporated into the *Children, Youth and Families Regulations 2007* and whether or not they will include express safeguards equivalent to those in the *Corrections Regulations 2009*. Pending the Minister's response, the Committee draws attention to new section 488AC.**

## Minister's Response

Thank you for your letter outlining the concerns of the Scrutiny of Acts and Regulations Committee regarding the Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011 (the Bill).

I provide the following response to the Committee's concerns that the Bill's provisions for strip searches for youth justice detainees lack some of the express protections explicitly applicable to strip searches of adult prisoners.

It is intended that once the amendment to the *Children Youth and Families Act 2005* (CYFA) and the Children, Youth and Families Regulations 2007 (the Regulations) have been passed, they will together provide youth justice detainees with more safeguards than those available in the current legislation. These protections will be equivalent to those for adult prisoners under the Corrections Regulations 2009.

Strip searches of youth justice detainees are currently allowed under section 486 of the CYFA and Schedule 5 of the Regulations. The Bill clarifies this existing power by introducing section 488AC into the CYFA, the power of the officer in charge of a facility to cause a detainee to be subjected to a strip search, if in his or her opinion it is necessary in the interests of the security, good order or safety of the facility, detainee or any other person in the facility.

The Bill includes protections for detainees by setting out in section 488AD the manner in which searches must be conducted, including the requirements currently in the Regulations that a strip search must only be conducted by an officer of the same sex as the person being searched, and that it must not include a body cavity search. Additional safeguards which are not currently in the legislation, are also included in the Bill, such as a strip search must always be conducted in the presence of another officer, who must generally be of the same sex of the detainee, and must be positioned in such a way that the detainee is not in view.

Searches under the new Bill must also be conducted expeditiously, with regard to the decency and self-respect of the person being searched, and in compliance with any other prescribed requirements (section 488AD (6) of the Bill).

Amendment regulations are currently being drafted to include further requirements applying to strip searches. These additional requirements are likely to include:

- That a strip search must be conducted in a private place or a place that provides reasonable privacy to the detainee.
- That a strip search, must not involve touching a detainee's body (unless reasonable force is required to carry out the search).
- That detainees are allowed to dress in private following the search.
- That appropriate clothing is provided if clothing is seized in the search.
- That a register is maintained to record details of the search.

My department is currently consulting with the Department of Premier and Cabinet and the Department of Justice on these regulations to ensure that the final legislative framework is consistent with those in the adult corrections environment.

I trust that the above information alleviates the Committee's concerns regarding safeguards for youth justice detainees who are subject to strip searches. If you have any further questions, please do not hesitate to contact Kathryn Anderson, Director, Youth Services and Youth Justice on 9096 7533.

**Hon Mary Wooldridge MP**  
**Minister for Community Services**

Received 21 October 2011

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

## Gambling Regulation Amendment (Licensing) Bill 2011

The Bill was introduced into the Legislative Assembly on 30 August 2011 by the Hon. Michael O'Brien MLA. The Committee considered the Bill on 10 October 2011 and made the following comments in Alert Digest No. 11 of 2011 tabled in the Parliament on 11 October 2011.

### Committee's Comments

#### Charter report

##### Presumption of innocence – Defence of inability to comply with order

Summary: The Committee will write to the Minister seeking further information as to whether or not new section 3.8.10(5), which provides a defence for defendants who do not know how to or unable to comply with an order made by the Minister or an authorised person, places a legal onus of proof on the defendant.

The Committee notes that clause 32, inserting a new section 3.8.10 into the *Gambling Regulation Act 2003*:

- permits the Minister or an authorised person to make reasonable directions to officers or employees of gaming operators to obtain information about monitoring systems (sub-s (1))
- creates an offence of refusing or failing to comply with such a direction (sub-s (4))
- provides that 'it is a defence if the defendant does not know how to, or is not able to, provide the assistance required under the direction.' (sub-s (5))

The Committee observes that the prosecution is generally required to prove the voluntariness of any alleged criminal acts or omissions.

The Statement of Compatibility remarks:

New section 3.8.10 limits the presumption of innocence because it places the onus of proving certain matters on the defendant....

The limitation requires the defendant to prove that he or she does not know how to, or is not able to, provide the assistance required.

The Committee observes that new section 3.8.10(5) makes no reference to questions of proof. Under s. 72 of the *Criminal Procedure Act 2009*, defendants who wish to rely on a defence are only required to 'present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish' the defence.

**The Committee will write to the Minister seeking further information as to whether or not new section 3.8.10(5), which provides a defence for defendants who do not know how to or unable to comply with an order made by the Minister or an authorised person, places a legal onus of proof on the defendant. Pending the Minister's response, the Committee draws attention to new section 3.8.10(5).**

### Minister's Response

Thank you for your letter in relation to the Gambling Regulation Amendment (Licensing) Bill 2011 (Bill) and for the Scrutiny of Acts and Regulations Committee's (Committee) request for further information as to whether or not section 3.8.10(5) of the Bill places a legal onus of proof on the defendant. I note SARC also made reference to new section 3.8.11 of the Bill.

*New section 3.8.10(5) imposes an evidential burden*

I will first note that new section 3.8.10(5) imposes only an evidential burden on the defendant and accordingly, it may limit the defendant's right to be presumed innocent under section 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Charter Act).

New section 3.8.10(1) provides that the Minister (in effect, the Minister's delegate) or an authorised person may direct a specified person to provide assistance to the delegate or authorised person, to enable the delegate or authorised person to effectively exercise a power under new section 3.8.8. The direction must be reasonable. It is an offence for a specified person to refuse or fail to comply with a direction under new section 3.8.10(1); however, under new section 3.8.10(5), it is a defence against a prosecution for that offence if the defendant does not know how to, or is not able to, provide the assistance required under the direction.

The purpose of new section 3.8.10 is to facilitate the powers that may be exercised upon service of an access notice, which include to search the recipient of the notice's business premises or anything on that premises, and to inspect, examine or test assets or documents in that premises.

This power is necessary so that the delegate or authorised persons can obtain all the necessary and relevant information held by the recipient of the access notice, regardless of where or how that information is held. It allows the delegate or authorised person to access legacy monitoring systems, assets, equipment, software or documents that the delegate or authorised person would not otherwise be able to access. For example, equipment or information that is securely stored, or is only accessible by certain persons in accordance with certain procedures, may require a person with appropriate knowledge and capabilities to access that equipment or information.

Without the defence provision in new section 3.8.10(5), a person may be guilty of the offence regardless of whether or not the person could provide that assistance as a matter of fact. The defence provision therefore provides a protection for specified persons. It also protects the specified persons' freedom from forced work as provided by section 11 of the Charter Act because it serves to limit the scope of what the person is required to do pursuant to a direction to what would be in the course of their ordinary work.

New section 3.8.11(5) is a provision to which section 72 of the *Criminal Procedure Act 2009* (CP Act) applies. Section 72(1) of the CP Act relevantly provides that where an Act creates an offence and provides any exception, proviso, excuse or qualification (collectively referred to for present purposes as a 'defence') and the accused wishes to rely on that defence, the accused must present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish the defence.

The effect of section 72 of the CP Act on new section 3.8.11(5) is that new section 3.8.11(5) imposes an evidential, rather than a legal or persuasive, burden of proof on the defendant.

Any limitation arising from the evidential burden of proof on the defendant may only be minor, given that the defendant could not be convicted in the face of a reasonable doubt as to his or her guilt. However, any such limitation would be justified in accordance with section 7 of the Charter Act for the reasons specified in the Statement of Compatibility that accompanied the Bill.

*Offence under section 3.8.11*

In relation to the inclusion of an offence under new section 3.8.11, I note that the offence would only apply in strictly limited circumstances; viz, in the course of the exercise of certain due diligence powers under clause 32 of the Bill (such as the inspection of legacy monitoring systems at a business premises).

As the Minister will not be personally exercising these powers, the protections created by the proposed offence will not apply to the Minister (notwithstanding misinformed and erroneous media commentary to the contrary).

Instead, the powers will be exercised by a delegate of the Minister or an authorised person. It is these persons to whom the protections will apply.

However, as the authority to exercise the powers formally rests with the Minister, in order for a delegate of the Minister to receive the protections conferred by the Bill, it is technically necessary for the legislation to refer to the source of the authority (that is, the Minister).

As the functions under clause 32 of the Bill will be exercised by a delegate of the Minister or authorised person, rather than the Minister personally, any protections in clause 32 will apply to the Minister's delegate or authorised person.

It is reasonably necessary to protect said delegates and authorised persons given the purpose and context of the provisions, as well as the nature of the powers to be exercised.

The inclusion of the term 'insult' seeks to protect the delegate and authorised officers from abuse in exercising the due diligence powers. I note that the ninth edition of the Concise Oxford Dictionary defines insult as, *inter alia*, "*to...treat with scornful abuse*".

The Government does not regard it as appropriate that delegates and authorised persons, acting in accordance with the law to ensure the integrity of Victoria's gaming operations, should be lawfully subjected to abuse which may interfere with the discharge of their duties.

I would expect that the Committee and the majority of Victorians regard ensuring the integrity and transparency of gaming operations as an important goal of gaming regulation. This requires that gaming inspectors etc have appropriate powers and are appropriately protected in the proper exercise of those powers.

The provision is intended to protect against conduct that is designed to 'bully' the delegate or authorised persons, in ways that would not otherwise fall within the other behaviours prohibited by new section 3.8.11.

A specific protection of this type is necessary given the context and purpose of the delegate's or authorised person's task. It is reasonable to consider that the delegate and authorised person will perform their functions in difficult circumstances, given that they would have functions to enter the business premises of another person and conduct broad and thorough searches of that premises for information that might be commercially sensitive.

The Committee noted that the criminalisation of insults may capture behaviour that is unlikely to hinder the exercise of powers or impinge on anyone's rights or reputations. In relation to the Bill, the scope of behaviour that would amount to an insult for the purpose of new section 3.8.11 may be determinable based upon the particular provisions in the legislation and the individual circumstances of the case.

In the case of new section 3.8.11, it is of note that the provision purports to protect the delegate and authorised person in the exercise of their powers and to facilitate those powers. The nature of the offence is one that is specifically limited to the exercise or attempted exercise of the powers specified in new section 3.8.11. The behaviour that may be subject to section 3.8.11 could be determined in light of these matters.

I also note that section 10.5.15(a) of the Act – a provision introduced by the previous Government – uses the term "insult" in relation to an offence against inspectors or members of the police force. It is this section which established the precedent for the use of the term "insult".

I trust this further information addresses the Committee's query and I thank the Committee for raising this matter with me.

**HON. MICHAEL O'BRIEN MP**  
**Minister for Gaming**

21 October 2011

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

## Resources Legislation Amendment Bill 2011

The Bill was introduced into the Legislative Assembly on 16 August 2011 by the Hon. Michael O'Brien MLA. The Committee considered the Bill on 29 August 2011 and made the following comments in Alert Digest No. 9 of 2011 tabled in the Parliament on 30 August 2011.

### Committee's Comments

#### **[2] – Delayed commencement – Delegation of legislative power – 12 months rule**

The Committee notes that the Bill has a default commencement provision of 31 December 2012. There appears to be no explanation given for this delayed commencement clause, therefore the Committee draws attention to its *Practice Note No. 1* of October 2005 dealing with the inclusion of provisions in Bills that allow for delayed commencement of more than one year after introduction. Such provisions should be accompanied by explanatory material justifying the delayed commencement. [2]

**The Committee will seek further advice from the Minister.**

### Minister's Response

I refer to your letter dated 30 August 2011.

The Committee raised concerns in respect of the delayed commencement of the Resources Legislation Amendment Bill 2011 (the Bill).

The Committee noted that the Bill has a default commencement provision of 31 December 2012 and drew attention to its Practice Note No. 1 of October 2005 dealing with the inclusion of provisions in Bills that allow for delayed commencement of more than one year after introduction.

The answer to the question raised by your letter is provided below.

#### **Answer to Question Raised by the Committee**

The default commencement date is 31 December 2012 in order to allow sufficient time for regulations and guidance materials to be prepared to support the operation of new Division 8A – Decommissioning.

The provisions in the Bill may be proclaimed to commence prior to the default commencement date, should the requisite regulations and guidance material be ready to commence before 31 December 2012.

**Hon. Michael O'Brien MP**

Minister for Energy and Resources

15 September 2011

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

**Committee Room**

**24 October 2011**

# Appendix 1

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## Appendix 2

### Committee Comments classified by Terms of Reference

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

#### Alert Digest Nos.

#### Section 17(a)

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

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

Emergency Management Legislation Amendment Bill 2011 11

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

Justice Legislation Amendment Bill 2011 2

**(iv) unduly requires or authorise 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 authorise 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**

Sentencing Amendment (Community Correction Reform) Bill 2011 11

Transport Legislation Amendment (Public Transport Development Authority) Bill 2011 11

**(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 Act 2006***

Building Amendment Bill 2011 1

Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011 11

Education and Training Reform Amendment (School Safety) Bill 2010 1

Gambling Regulation Amendment (Licensing) Bill 2011 11

Justice Legislation Amendment Bill 2011 2

Justice Legislation Amendment (Infringement Offences) Act 2011 7

Liquor Control Reform Amendment Bill 2011 3

Sentencing Amendment Act 2010 1

Water Legislation Amendment (Water Infrastructure Charges) Bill 2011 12

**Section 17(b)**

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

Commercial Arbitration Bill 2011

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## Appendix 3

### Ministerial Correspondence 2011

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**Table of correspondence between the Committee and Ministers during 2011**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Building Amendment Bill 2011	Minister for Planning	01.03.11 21.03.11	1 of 2011 2 of 2011
Education and Training Reform Amendment (School Safety) Bill 2010	Minister for Education	01.03.11 28.03.11	1 of 2011 3 of 2011
Justice Legislation Amendment Bill 2011	Minister for Consumer Affairs	22.03.11 04.04.11	2 of 2011 3 of 2011
Sentencing Amendment Act 2010	Attorney-General	01.03.11 05.04.11	1 of 2011 4 of 2011
Liquor Control Reform Amendment Bill 2011	Consumer Affairs	05.04.11 21.04.11	3 of 2011 4 of 2011
State Taxation Acts Amendment Bill 2011	Treasurer	25.05.11 09.06.11	5 of 2011 6 of 2011
Justice Legislation Amendment (Infringement Offences) Act 2011	Attorney-General	28.06.11 12.08.11	7 of 2011 8 of 2011
Resources Legislation Amendment Bill 2011	Minister for Energy and Resources	30-08-11 15-09-11	9 of 2011 12 of 2011
Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011	Minister for Community Services	11-10-11 21-10-11	11 of 2011 12 of 2011
Gambling Regulation Amendment (Licensing) Bill 2011	Minister for Gaming	11-10-11 21-10-11	11 of 2011 12 of 2011

**Table of Ministers responses still pending**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Emergency Management Legislation Amendment Bill 2011	Minister for Police and Emergency Services	11-10-11	11 of 2011
Sentencing Amendment (Community Correction Reform) Bill 2011	Attorney-General	11-10-11	11 of 2011
Transport Legislation Amendment (Public Transport Development Authority) Bill 2011	Minister for Public Transport	11-10-11	11 of 2011

## Scrutiny of Acts and Regulations Committee

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<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	25-10-11	12 of 2011