

# **No. 12 of 2012**

**Tuesday, 28 August 2012**

**On the**

Criminal Procedure Amendment  
Bill 2012

Energy Legislation Amendment  
Bill 2012

Free Presbyterian Church Property  
Amendment Bill 2012

Primary Industries and Food  
Legislation Amendment Bill 2012

Residential Tenancies and Other  
Consumer Acts Amendment Bill 2012

Road Safety and Sentencing Acts  
Amendment Act 2012

# Table of Contents

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	<b>Page Nos.</b>
<b>Draft Alert Digest No. 12 of 2012</b>	<b>1</b>
Energy Legislation Amendment Bill 2012	1
Free Presbyterian Church Property Amendment Bill 2012	3
Primary Industries and Food Legislation Amendment Bill 2012	4
Residential Tenancies and Other Consumer Acts Amendment Bill 2012	8
Road Safety and Sentencing Acts Amendment Act 2012	10
<b>Ministerial Correspondence</b>	
Criminal Procedure Amendment Bill 2012	13
<b>Appendices</b>	
1 – Index of Acts and Bills in 2012	19
2 – Committee Comments classified by Terms of Reference	21
3 – Ministerial Correspondence 2012	23

# 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

'AAP' refers to the Administrative Appeals Tribunal

'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 \$140.84).

'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 2012

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## Energy Legislation Amendment Bill 2012

<b>Introduced</b>	14 August 2012
<b>Second Reading Speech</b>	15 August 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Mr Michael O'Brien MLA
<b>Portfolio responsibility</b>	Minister for Energy and Resources

### Purpose

The Bill makes various amendments to the *Electricity Industry Act 2000*, the *Gas Industry Act 2001*, the *Fuel Emergency Act 1977*, the *National Electricity (Victoria) Act 2005* and the *Energy Safe Victoria Act 2005*.

Amendments to the *Electricity Industry Act 2000* – proclaimed electricity supply emergency – Victorian law to apply where Corporations Act displacement provisions applied

- Existing Division 4 of Part 2 allows the Essential Services Commission (ESC) to appoint an administrator to the business of an electricity industry licensee where it considers that a contravention by the licensee of its licence condition threatens the security of electricity supply and other remedies to enforce compliance are not adequate. To the extent any inconsistency applies with the Commonwealth law, the Corporations Act displacement clause provides that the Victorian law applies [3]. This also extends to the duties of officers and employees of corporations (Chapter 2D of the *Corporations Law 2001 (Cth)* ) and the Victorian provisions as they relate to suppliers of last resort and electricity supply emergency provisions [5]. (This is allowed provided the State meets certain conditions as set out in section 5G of the *Corporations Law 2001 (Cth)* In this case a specific declaration that it is a Corporations legislation provision). The Minister may give directions during proclaimed emergencies [5].

Amendments to the *Gas Industry Act 2001* – proclaimed gas supply emergency – Victorian law to apply where Corporations Act displacement provisions apply

- The same amendments are made with respect to the *Gas Industry Act 2001*. In the event of a proclaimed gas supply emergency, the Victorian law applies. It applies with respect to retailers of last resort, employees of corporations and directions given by the Minister [6-8].

Amendments to the *Fuel Emergency Act 1977* – proclaimed fuel supply emergency – Victorian law to apply where Corporations Act displacement provisions apply

- The same amendments are made with respect to the *Fuel Emergency Act 1977*. In the event of a proclaimed fuel supply emergency, the Victorian law applies.

Amendments to the *National Electricity (Victoria) Act 2005*

- The Bill inserts new Division 4 of Part 3 into the *National Electricity (Victoria) Act 2005*. It specifies building block amounts to be applied by the Australian Energy Regulator when approving the pricing proposals of Victorian distribution network service providers (DNSPs)

under the distribution determinations that apply to those providers. It sets out the application of the pre-2011 service adjustment scheme and efficiency carryover mechanisms up to 31 December 2015 [10 and 11]. The reason for this is to overcome a recent decision of the Australian Competition Tribunal.

The Second Reading Speech comments: -

*'The Bill will amend the National Electricity (Victoria) Act 2005 to modify the operation of rules regulating electricity distribution network pricing, so as to preserve the intended operation of network performance incentive schemes put in place by the Essential Services Commission of Victoria. The relevant schemes are the Commission's 'efficiency carryover mechanism' adjustment of 'S-Factor scheme' and the Commission's 'efficiency carryover mechanism'. These schemes were designed to reward or penalise an electricity distribution business by increasing or reducing that business's allowed annual revenue where the business satisfied or failed to satisfy performance standards in previous years.....Responsibility for distribution network pricing transferred to the Australian Energy Regulator in 2009.....In January of this year, that determination of the Australian Energy Regulator, as it applied to certain distribution businesses was held to be invalid by the Australian Competition Tribunal. The Commission's network performance incentive schemes were designed to operate in the calendar years 2011 to 2015. The Tribunal's decision has not yet taken effect....The Bill will prevent this occurring by preserving the intended operation of the network performance incentives.....'*

Amendments to the Energy Safe Victoria Act 2005

- The amendments enable employees of Energy Safe Victoria to perform delegated functions, with the approval of the Minister in relation to the development and adoption of products that use less energy [12]. It is analogous to a standard delegation provision. It relates to the Commonwealth Greenhouse and Energy Minimum Standards scheme expected to commence nationally on 1 October 2012.

**The Committee makes no further comment.**

## Free Presbyterian Church Property Amendment Bill 2012

<b>Introduced</b>	14 August 2012
<b>Second Reading Speech</b>	15 August 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Mr Robert Clark MLA
<b>Portfolio responsibility</b>	Minister for Finance

### Purpose

The Bill amends the *Free Presbyterian Church Property Act 1953*. A body corporate was originally created established under the *Free Presbyterian Church Property Act 1953* to manage property. It updates the title so it is renamed the *Presbyterian Church of Eastern Australia Property Act 2012*.

The amendments: -

- Confers additional powers on the Trustees for Victoria of the Presbyterian Church of Eastern Australia (body corporate) to pool trust funds for investment purposes. The body corporate may mix funds from individual bequests in a common fund and invest that fund, make advances of money for activity, service, institution or interest of the Church **[11]**;
- Provide that the body corporate can act as an administrator, executor or trustee **[11]**;
- Enable the body corporate to enter into the joint use of property with other denominations under schemes of co-operation **[11]**;

**The Committee makes no further comment.**

## Primary Industries and Food Legislation Amendment Bill 2012

<b>Introduced</b>	14 August 2012
<b>Second Reading Speech</b>	15 August 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Mr Peter Walsh MLA
<b>Portfolio responsibility</b>	Minister for Agriculture and Food Security

### Purpose

The Bill makes various amendments to the *Impounding of Livestock Act 1994*, the *Livestock Disease Control Act 1994*, the *Prevention of Cruelty to Animals Act 1986*, the *Local Government Act 1989* and the *Food Act 1984*.

Generally, the amendments provide for the establishment of a regulatory framework for the enforcement of the implementation and enforcement of national primary production and processing standards. In this particular instance the relevant standards are egg standards. The Bill also makes further provision for the regulation of wandering livestock and other matters.

#### Amendments to the *Impounding of Livestock Act 1984*.

- In addition to the current power in relation to abandoned stock, an authorised council officer may enter any land or building (excluding a residence) between 7 am and 7 pm if there is a reasonable belief that livestock are not adequately confined. Reasonable steps must be taken to inform the owner or occupier. Notices regarding inadequate confinement of livestock can be served and livestock can be impounded. Reasonable steps must be taken to notify the owner or occupier [4-8]. The council must hold livestock for at least 7 days before disposing of the livestock [13].
- It extends the existing right of a person to apply for the release of impounded livestock in respect of impounded livestock under new inadequate confinement provisions of section 5B [9]. Notice may be served directing the owner of the livestock, the owner of the land on which the livestock are kept or the occupier of the land to take measures to ensure livestock are adequately confined. Existing offences under section 25 relating to livestock extend to those persons served under inadequate confinement provisions [12] [14].

#### Amendments to the *Livestock Disease Control Act 1994*.

- It provides that a person must notify an inspector within 5 days (rather than 14) of becoming aware of unusual circumstances relating to livestock [18]. It inserts a new offence of providing cattle or pigs to be provided with recycled sewage water that has not been adequately treated [19]. The Secretary to the Department of Primary Industries can cancel a beekeeper's registration if the annual fee fixed by the Minister (set out in existing section 48) is not paid [20 and 21].
- It removes references to 'tuberculosis'. Compensation for tuberculosis is no longer paid under the *Livestock Disease Control Act 1994* [25]. Compensation is paid in respect of cattle destroyed under an order because of a disease subsequently declared to be an exotic disease but which is later found not to be an exotic disease [24]. It also removes references to Johne's disease in sheep and goat for which compensation is no longer paid under the Act [26]. A maximum penalty of 120 penalty units is set for a person who contravenes any provision of a treatment notice in respect of an exotic disease. New section 121A provides that the Secretary may make a written request to a Council for information relating to land in

that Council including the name, address and contact details of owners and occupiers of that land [29].

Amendments to the *Prevention of Cruelty to Animals Act 1986*.

- It inserts a defence to the charge of aggravated cruelty if the person was carrying out the activity in accordance with a code of practice [33]. (See the Charter report below.) It gives the court the power to make an order disqualifying a person from being in charge of an animal where the person has been found guilty but not convicted or found not guilty by reason of mental impairment of an offence of a serious nature [34] (Serious offences are determined by the court pursuant to section 12 of the Act).
- By notice published in the Government Gazette, the Department Head may declare the welfare of a class of animals is at risk due to an existing emergency and appoint a general inspector for 30 days [37]. Application may be made to a magistrate based on reasonable belief for the issue of a search warrant to search and enter premises and take a copy of a document [38].
- There is a new power which enables an inspector with the written approval of the Department Head to serve a notice on person requiring the person to produce or make available for inspection a document which the inspector reasonably believes to be relevant to determining whether another person has committed an offence. Failure to comply attracts a penalty of 20 penalty units [41]. Three new offences relating to hindering authorized officers without reasonable excuse attract a maximum penalty of 60 penalty units [44].
- It amends the general cruelty offence (section 36) in relation to scientific procedures at licensed premises into a strict liability offence. A person charged with a strict liability offence has recourse to the common law defence of mistake of fact<sup>1</sup> [45].

***Section 17(a)(i) – rights or freedoms***

**Clause 45 engages the Committee’s terms of reference pursuant to section 17(a)(i) of the *Parliamentary Committee’s Act 2003*. The Committee draws the provision to the attention of the Parliament.**

Amendments to the *Food Act 1984*.

- To establish the regulatory framework, the definition of ‘handling of food’ is expanded include primary food production [47]. The Minister may declare by order published in the Government Gazette a person or body to be a ‘declared authority’ for the purposes of a specified primary production and processing standard of the Food Standards Code. [49].
- A specific exemption power is given to the Secretary in relation to primary production and processing standards. It provides the Secretary may exempt by order published in the Government Gazette a person or a specified person from complying with a specified requirement of the Food Standards Code. The exemption itself may be unconditional or subject to any condition specified in the order, may be limited in time or circumstances, amended, varied or revoked [50]. The Second Reading Speech comments: -

<sup>1</sup> An offence is one of strict liability where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. Someone is held to be legally liable for their conduct irrespective of their moral responsibility. A person charged with a strict liability offence has recourse to the common law defence of mistake of fact.

*‘Exemptions and Egg Stamping*

*The egg standard requires all eggs including duck and quail eggs to be stamped with a ‘unique identifier’ for the purposes of traceability. The standard also has a general requirement for traceability. All retailers would be required to sell stamped eggs only. The Victorian Government is concerned about the costs to industry and the limited public health benefits of stamping. This Bill will enable the Government to delay the introduction of egg stamping to give more time to industry to plan for and install the necessary equipment. In the case of duck and quail industries, a permanent exemption may be made depending on an evaluation of the impact and effectiveness of this requirement.*

*The Bill will permit the Secretary of the Department of Health or Secretary of the Department of Primary Industries to make an Order exempting relevant classes of persons from specified standards in the Food Standards Code. In the case of the Secretary, Department of Primary Industries, this power will be limited to primary production and processing standards. The exemptions may be limited in time or circumstances. As indicated, this will be used in the first instance to exempt relevant classes of persons from the requirement for egg stamping for a two year period. This is a power that would only be exercised in exceptional cases, where there are significant problems or issues for Victoria associated with a particular standard which cannot be resolved during the development of a standard.’*

- The Department of Primary Industries is responsible for primary food production and related activities [52]. The Bill applies the current powers of authorised officers (section 21) to include primary food production in addition to the current sale of food production [57]. This includes authorised officers from Dairy Food Safety Victoria (DFSV) and PrimeSafe [54]. References to ‘primary food production’ are inserted into the evidentiary provisions [61]. **(See the Charter report below.)** Consequential amendments are made in respect of evidentiary provisions to ensure evidentiary certificates may be signed by the Secretary of the DPI and the Chief Executive Officers of PrimeSafe and DFSV [62-65].
- The delegation clause provides that decisions in relation to directions that a premises or vehicles and machinery on premises cannot be used for specified purposes related to primary production can only be made by the council or the chief executive officer of the council [67]. A specific power of delegation is given to the Secretary of DPI, DFSV and PrimeSafe to delegate any power, duty or function to officers or employees. The power of delegation cannot itself be delegated [68]. Regulations may be made with respect to fees and charges [69].

## **Charter report**

### ***Statement of compatibility – Statutory defence***

Summary: Clause 33 provides a defence to persons charged with cruelty or aggravated cruelty. The Committee will write to the Minister seeking further information as to whether the new defence imposes a legal or evidential burden on the accused.

**The Committee notes that clause 33, inserting a new sub-section 11(2) into the *Prevention of Cruelty to Animals Act 1986*, provides a defence to persons charged with cruelty or aggravated cruelty in the following terms:**

It is a defence to a prosecution for an offence under section 9 or 10 in relation to an activity if the person charged was carrying out the activity in accordance with a code of practice prescribed for the purposes of this subsection (other than a Code of Practice made under section 7) that regulates that activity.

The Statement of Compatibility remarks:

New subsection 11(2) places a legal burden on an accused, by requiring an accused to prove on the balance of probabilities that he or she acted in accordance with a code of practice prescribed in the regulations.

However, the Committee observes that new subsection 11(2) does not contain any language expressly placing any burden of proof on the accused. The general rule is that defences that lack such language only impose an evidential burden on the accused (i.e. to raise or point to evidence suggesting a reasonable possibility of the defence) rather than a legal burden (i.e. to prove that the defence is true on the balance of probabilities.)<sup>2</sup>

**The Committee will write to the Minister seeking further information as to whether the defence introduced by clause 33 imposes a legal or evidential burden on the accused.**

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### ***Presumption of innocence – Reverse onus – Statutory presumption***

Summary: Clause 61 amends two existing evidentiary provisions in the *Food Act 1984*. The Committee will write to the Minister seeking further information as to the compatibility of clause 61 with the Charter right of defendants to be presumed innocent until proved guilty according to law.

**The Committee notes that clause 61 amends two existing evidentiary provisions in s. 50(1) of the *Food Act 1984* as follows:**

- (a) the onus of proof in any prosecution under this Act that any food was not sold, prepared for sale, conveyed or intended for sale or produced by way of primary food production for human consumption is on the person charged with the offence;
- (c) any food found in any premises or other place or vehicle used for the preparing for sale of food or for primary food production shall be presumed, until the contrary is proved, to be intended to be used in the preparation for sale of food or in primary food production;

The Committee observes that that existing s. 50(1)(a) places an onus of proof on an accused to disprove certain facts<sup>3</sup> and existing s. 50(1)(c) requires a court to presume a fact in some circumstances unless the accused discharges a legal onus to disprove it.<sup>4</sup> The Committee notes that clause 61 may extend the operation of these provisions.

The Statement of Compatibility does not address clause 61. In its *Practice Note No. 3*, the Committee remarks that for any provision of a Bill that ‘extends the operation of... a provision... that place[s] the legal onus of proof on an accused with respect to any issue in a criminal proceeding [or] deem[s] a fact to be proved in any circumstance’, 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 Minister seeking further information as to the compatibility of clause 61 with the Charter right of defendants to be presumed innocent until proved guilty according to law.<sup>5</sup> Pending the Minister’s response, the Committee draws attention to clause 61.**

**The Committee makes no further comment.**

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<sup>2</sup> *Criminal Procedure Act 2009*, s. 72.

<sup>3</sup> Section 50(1)(a) is in similar terms to clause 99(a) of the Model Food Bill agreed to by COAG in 2000 and enacted as *Food Act 2001* (ACT), s. 132(a); *Food Act 2003* (NSW), s. 127(a); *Food Act 2004* (NT), s. 119(a); *Food Act 2001* (SA), s. 102(a); *Food Act 2003* (Tas), s. 110(a); and *Food Act 2008* (WA), s. 132(a).

<sup>4</sup> Section 50(1)(c) is in similar terms to *Food Act 2001* (ACT), s. 132(b); and *Food Act 2003* (Tas), s. 110(g).

<sup>5</sup> Charter s. 25(1).

## Residential Tenancies and Other Consumer Acts Amendment Bill 2012

Introduced	14 August 2012
Second Reading Speech	15 August 2012
House	Legislative Assembly
Member introducing Bill	Mr Michael O'Brien MLA
Portfolio responsibility	Minister for Consumer Affairs

### Purpose

The Bill amends the *Residential Tenancies Act 1997*, the *Public Health and Wellbeing Act 2008* and the *Business Licensing Authority Act 1998*, the *Consumer Affairs Legislation Amendment (Reform) Act 2010* and the *Sale of Land Act 1962*. The Bill: -

- Establishes a State-wide register of rooming houses (the Rooming House Register);
- Makes further provision for the sale of manufactured dwellings located on residential parks.
- Gives the Business Licencing Authority additional delegation powers.

### Amendments to the *Residential Tenancies Act 1997* and the *Public Health and Wellbeing Act 2008*

- The Bill establishes the Rooming House Register [15-17]. New section 142F sets out the information to be included in the Rooming House Register [17]. An individual who is the proprietor of registered rooming house or an applicant for the issue of registration may apply to the Director to restrict public access to some or all of that individual's personal information. An individual affected by a decision may apply to VCAT for a review (new section 142L).
- A rooming house owner must comply with rooming standards (new section 120A). The *Residential Tenancies (Rooming House Standards) Regulations 2012* set the standards [4]. A resident may apply to VCAT for compensation or a compliance order for breach/non-compliance of a standard by the rooming house owner (including the person who conducts the business of operating a rooming house). VCAT must hear applications urgently within 5 days [6].
- Consumer Affairs is responsible for enforcing compliance with the rooming house standards. Local councils are responsible for registering rooming houses [21]. A council may require, before considering an application to registration, alterations or improvements so that the premises comply with the regulations [20]. Regulations may be made in respect of the Rooming House Register [18].
- By way of background, residential parks are areas of land, divided into sites on which manufactured dwellings can be located. Residents may enter into long-term leases known as 'site agreements', for particular sites on which to locate a manufactured dwelling. The Bill inserts a further protection for the site tenant. A site tenant may rescind a contract within 20 days after being provided with a proposed site agreement where it has been purchased from a residential park owner [8].

Amendments to the *Sale of Land Act 1962* – off-the-plan sales of land

- The current warning notice to purchasers is positioned on the ‘front page’ of a contract. The amendments ensure that the warning notice is included in a ‘conspicuous’ notice in the contract [26]. It also removes a purchaser’s right to rescind the contract before its completion due to non-compliance with this requirement [27].

The Second Reading Speech comments:-

*‘The Bill also removes a purchaser’s right – which would otherwise come into effect on 1 December 2012 – to rescind a contract for an off-the-plan sale of land where there has been a failure to include the notice in the contract, in recognition that rescission is a disproportionate remedy for a failure of this kind.’*

**Section 17(a)(i) – rights or freedoms**

**The Committee notes the removal of this right engages the Committee’s terms of reference pursuant to section 17(a)(i) of the *Parliamentary Committee’s Act 2003* and the explanation provided in the Second Reading Speech. The Committee draws the provision to the attention of the Parliament.**

Amendments to the *Business Licensing Authority Act 1998*

- The current delegation provision in respect of the Business Licensing Authority (the Authority) is broadened. Currently, the Authority may by instrument delegate to the Registrar, Deputy Registrar, any person employed under Part 3 of the Public Administration Act 2004, any of its powers and functions except the power to determine a licence application and the delegation power itself. The amendments mean that the Business Licensing Authority may by instrument delegate to the Registrar, Deputy Registrar, any person employed under Part 3 of the *Public Administration Act 2004* a *prescribed power* or function except the delegation power itself. A new standard regulation making provision is also inserted [25]. The Second Reading Speech comments: -

*‘To improve efficiency in licensing, the bill also includes amendments to broaden the delegation powers of the Business Licensing Authority. The Authority is responsible for the licensing of a range of occupations including estate agents, motor car traders and sex work service providers. Currently, all decisions about licence and permission applications must be made by members of the Authority. They cannot be delegated to its staff, no matter how basic. A number of these decisions are relatively straightforward and now, after the Authority’s years of operation, its experienced staff could be making them under delegation determined by the Authority. This bill will enable that to occur. Nevertheless, it is recognised that there are some licensing-related decisions that are of sufficient complexity that they should only be made by the Authority itself. Accordingly, the bill provides that particular decisions may be prescribed in the regulations made under the Business Licensing Authority Act 1998 as decisions that the Authority cannot delegate, that is, decisions that must be made by a member of the Authority.’*

**The Committee makes no further comment.**

## Road Safety and Sentencing Acts Amendment Act 2012

<b>Introduced</b>	14 August 2012
<b>Second Reading Speech</b>	14 August 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Mr Robert Clark MLA
<b>Introduced to Council</b>	14 August 2012
<b>Portfolio responsibility</b>	Minister for Road Safety

**Note:** The Committee reports on this Act pursuant to section 17(c)(ii) of the *Parliamentary Committees Act 2003*.

### Purpose

The Bill makes a number of amendments to the *Road Safety Act 1986* to remedy defects which have arisen in respect of the use of alcohol interlock devices. It also amends the *Sentencing Act 1991* to make several amendments in respect of sentencing options and community correction orders (CCO).

### Commencement provisions

#### ***Section 17(a)(i) – rights or freedoms – commencement provision – retrospectivity***

The commencement clause provides that section 12 is taken to have come into operation on 16 January 2012 [2(3)]. There is a common law assumption that legislation is not assumed to have a retrospective operation.<sup>6</sup> The effect of section 12 is that it retrospectively validates sentencing combinations of a CCO with a suspended sentence pursuant to section 44 of the *Sentencing Act 1991* which have been made since 16 January 2012. These matters are currently being considered by the Court of Appeal in the Victorian Supreme Court.

The Second Reading Speech remarks: -

*‘Alternative readings of the operation of section 44 have led courts to taking a different approach to the combination of a CCO with a suspended sentence. The result is that a number of sentences have been made since 16 January that contravene the terms of the Act. These sentences were imposed by courts exercising their sentencing discretion in accordance with the guiding principles of the Sentencing Act. It would unduly disrupt the courts and the community corrections systems if the legal status of these sentences were left unclear or offender needed to be re-sentenced. For this reason the Bill confirms that sentencing combination orders made since 16 January 2012 and the legal consequences flowing from those orders, are not invalid, by reason of a failure to comply with section 44. This retrospective validation will only apply to sentencing combinations that offend section 44 and that were imposed before the date this Bill commences.*

*In accordance with usual practice, the Bill will not apply to the case before the Court of Appeal. The validating provisions of the Bill reserve the rights and liabilities conferred or imposed in relation to validated CCOs and contraventions of those CCOs, including a right of appeal. For example, the offender and the Crown retain the right to appeal against a sentence that includes a CCO on any other ground.*

**The Committee notes the retrospective operation of clause 2 engages its terms of reference under section 17(a)(i) of the *Parliamentary Committees Act 2003* and the explanation provided in the Second Reading Speech. The Committee draws attention to the provision in the Bill.**

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<sup>6</sup> Maxwell v Murphy (1957) 96 CLR 261, Fisher v Hebburn Ltd (1960) 105 CLR 188

Amendments to the *Road Safety Act 1986*

The Bill amends the *Road Safety Act 1986*.

- It substitutes a new section 50AAA(1)(a) into the *Road Safety Act 1986*. It empowers a court to direct the Roads Corporation to impose an alcohol interlock condition on a driver licence or learner permit if the person has been convicted of a drink-driving offence under section 49. (An alcohol interlock is a device that prevents a motor vehicle from starting unless a sample of breath blown into the device is free from alcohol.) The new amendment also empowers a court to direct the Roads Corporation to impose an alcohol interlock condition on a driver licence if the person was previously disqualified from a drink-driving traffic infringement. This includes a first offence where a person's concentration of alcohol is less than 0.15 [3].

**Section 17(a)(i) – rights or freedoms – retrospectivity**

- It also retrospectively validates all court directions to impose an alcohol interlock condition on a person's licence or learner permit following disqualification under the old section 50AAA on or after 11 October 2006 and before the date of Royal Assent of the Bill [5].

The Explanatory Memorandum observes: -

*'New section 105A validates all court directions to impose an alcohol interlock condition on a person's driver licence or learner permit following a disqualification in accordance with section 89C of the Road Safety Act 1986 where the direction was purported to have been made under section 50AAA of the Road Safety Act 1986 on or after 11 October 2006 and before the date of Royal Assent of the Bill.*

...

*Clause 3 closes the legislative gap created by the Road Legislation (Projects and Road Safety) Act 2006 which had the unintended effect of distinguishing between offenders disqualified by infringement notice and offenders disqualified by court order.'*

The Committee notes that clause 3 amended sub-section 50AAA(1) of the *Road Safety Act 1986*. The previous sub-section 50AAA(1) provided for alcohol interlock conditions only for people who were disqualified from obtaining a driver licence or permit 'under s. 50' (which provides for disqualification by courts.) The Committee observes that sub-section 50AAA(1) was inserted in that form by the *Road Safety (Alcohol Interlock) Act 2002* and was not expressly amended by the *Road Legislation (Projects and Road Safety) Act 2006*.

The Committee will seek further information as to which provisions beyond those mentioned in the Explanatory Memorandum give rise to the concerns regarding interlocks as a result of the 2006 amendments.

**The Committee will write to the Minister seeking further information as to the provisions of past legislation that created the legislative gap referred to in the Explanatory Memorandum to clause 3 of the Bill for the Act.**

**The Committee notes the retrospective operation of clause 5 engages its terms of reference under section 17(a)(i) of the *Parliamentary Committees Act 2003* and the explanation provided in the Statement of Compatibility. The Committee draws attention to the provision in the Bill.**

Amendments to the *Sentencing Act 1991*

The Bill amends the *Sentencing Act 1991*.

- It substitutes a new section 44 into the *Sentencing Act 1991*. Section 44 states that a CCO can be combined with imprisonment where the offender is to serve actual imprisonment and the term of imprisonment is three months or less. The effect of the provision is that a CCO cannot be combined with a suspended sentence [8].
- It validates CCOs made by Court since 16 January 2012 including CCOs combined with a sentence of imprisonment [3] [13].

The Second Reading Speech observes: -

*'The Bill will also address issues arising from the case of DPP v Leys and Leys that is currently before the Court of Appeal. The Court is currently considering the power of the courts to impose a combined CCO and jail sentence under section 44 of the Sentencing Act. However, its final decision is yet to be handed down. The Court has also made a declaration as to the interpretation of the transitional provisions regarding the CCO and its availability.'*

**Section 17(a)(i) – rights or freedoms**

The Committee notes the retrospective effect of clauses [3] and [13] engages its terms of reference under section 17(a)(i) of the *Parliamentary Committees Act 2003* and the explanation provided in the Second Reading Speech. The Committee notes the comments made earlier.

The Committee makes no further comment.

# Ministerial Correspondence

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## Criminal Procedure Amendment Bill 2012

The Bill was introduced into the Legislative Assembly on 20 June 2012 by the Hon. Robert Clark MLA. The Committee considered the Bill on 13 August 2012 and made the following comments in Alert Digest No. 11 of 2012 tabled in the Parliament on 14 August 2012.

### Committee's Comments

#### 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'. 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. 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'.

**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.**

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**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 ‘necessary for an appeal court to understand not only the penalty imposed, but the reasoning behind the imposition of each penalty’.

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.

**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.**

## Minister’s response

Thank you for your letter of 14 August 2012 regarding the Criminal Procedure Amendment Bill 2012 (the Bill), seeking further information about the interaction of the fair hearing rights prescribed under the *Charter Act 2006* (Charter Act) with clauses 29 and 44 of the Bill.

I respond to each of the Committee’s specific questions below.

### Clause 29 – Jury warning as to special hearing held during trial

The Committee seeks further information as to the compatibility of the jury direction required under clause 29 with the accused’s Charter Act right to a fair hearing, given that the jury direction does not state that it is ‘routine practice’ for evidence to be given in this way.

Clauses 24 to 29 of the Bill introduce reforms to the *Criminal Procedure Act 2009* in relation to the way special hearings are conducted, so as to allow special hearings to be held during trials. Clause 29 inserts a new section 375A which sets out the jury direction that must be given in relation to the conduct of a special hearing held during a trial. New section 375A states:

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.

Section 372 refers to the arrangements made for the conduct of a special hearing. Clause 27 of the Bill amends this section to provide that when a special hearing is held during a trial, the jury is to be present in the courtroom.

A ‘routine practice’ warning is currently given to a jury under section 375 of the *Criminal Procedure Act* when a pre-trial special hearing has been conducted. This is because, when a pre-trial special hearing is conducted the jury is presented with a recording of the evidence. Sometimes the counsel for the accused and the prosecution that are present at the trial will be different from the counsel who appear in the recording of the evidence that was given pre-trial. The ‘routine practice’ warning is therefore necessary because the jury needs to be informed that, while this procedure is different from trials generally, it is standard procedure for a complainant’s evidence to be provided in this way in a sexual offence case.

Consistent with the approach already adopted by the *Criminal Procedure Act* in relation to live versus recorded testimony, the ‘routine practice’ warning is not given under new section 375A when the complainant provides live testimony (via CCTV) at a special hearing conducted during the trial. This is because the warning against the drawing of an adverse inference against the accused is sufficient.

The explanatory memorandum to the Bill notes that the jury warning inserted by clause 29 is consistent with the jury warning that must be provided under section 361 of the *Criminal Procedure Act* when alternative arrangements are made for the provision of a witness or complainant’s evidence (including giving evidence by CCTV).

In Alert Digest No. 11, the Committee stated that the warning under section 361 applies to the making of 'exceptional arrangements' for giving evidence (at the court's discretion) whereas the conduct of a special hearing is mandatory, unless the prosecution applies for the complainant to give direct testimony.

However, the warning under section 361 is, in fact, regularly given in sexual offence proceedings because it arises in the following situations.

- First, if a witness is an adult complainant (who is not cognitively impaired) the court must direct that the complainant is to give evidence by CCTV unless the prosecution applies for the complainant to give evidence in the courtroom and the court is satisfied that the complainant is aware of their right to give evidence by CCTV and is able to do so (see section 363 of the *Criminal Procedure Act*).
- Secondly, the alternative arrangements are available to all witnesses (who are not complainants) in sexual offence proceedings as a matter of course (see section 359 of the *Criminal Procedure Act*).

#### **Clause 44 – Aggregate sentences**

The Committee seeks further information concerning the compatibility of clause 44 with section 25(4) of the Charter Act, 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.

Clause 44 of the Bill applies to the imposition of aggregate sentences in relation to indictable offences tried in the County Court and Supreme Court. This clause amends the *Criminal Procedure Act* to provide that, when imposing an aggregate sentence of imprisonment, a sentencing judge is not required to identify separate charges, or to articulate the sentences that the judge would have imposed for each charge had separate sentences been imposed, or whether those sentences would have been imposed concurrently or cumulatively. As the Committee notes, this amendment reverses a ruling of the Court of Appeal (*DPP v Felton* [2007] VSCA).

This amendment does not limit the right of a person to appeal against an aggregate sentence imposed by the County Court or Supreme Court. The amendment clarifies and simplifies the task of the sentencing judge by removing the technical requirement to identify the separate events which give rise to the separate charges and the requirement to articulate the sentences that would have otherwise been imposed (including relevant orders as to concurrency or cumulation were separate sentences imposed). The amendment makes no change to the need for the court to give reasons for the sentence it imposes.

There are already a number of other circumstances in which a sentencing judge is not required to identify separate sentences for individual offences. For example, when an accused is convicted and sentenced in relation to a rolled-up charge (where there are multiple charges within a single charge). This is currently used for pleas of guilty for multiple offences that are related offences.

Traditionally the most commonly argued ground of appeal by an offender is that the sentence is manifestly excessive and, when the Crown appeals, that the sentence is manifestly inadequate. In 2008, 71% of offender appeals involved a ground that the sentence was manifestly excessive and 97% of Crown appeals were on the ground that the sentence was manifestly inadequate. These common grounds of appeal, among others, will continue to operate effectively when an aggregate sentence of imprisonment is imposed.

I trust this information addresses your concerns.

**ROBERT CLARK MP**

Attorney-General

Received 23 August 2012

**The Committee thanks the Attorney-General for this response.**

**Committee Room**

**27 August 2012**



# Appendix 1

## Index of Acts and Bills in 2012

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	<b>Alert Digest Nos.</b>
Accident Compensation Amendment (Repayments and Dividends) Bill 2012	5
Appropriation (2012/2013) Bill 2012	8
Appropriation (Parliament 2012/2013) Bill 2012	8
Associations Incorporation Reform Bill 2011	1, 4
Australian Consumer Law and Fair Trading Bill 2011	1, 4
Building Amendment Bill 2012	2
Carers Recognition Bill 2012	2
City of Melbourne Amendment (Enrolment) Act 2012	10
City of Melbourne Amendment (Environmental Upgrade Agreement) Bill 2012	2
Civil Procedure Amendment Bill 2012	11
Community Based Sentences (Transfer) Bill 2012	10
Control of Weapons and Firearms Acts Amendment Bill 2011	1, 4
Courts and Sentencing Legislation Amendment Bill 2012	7
Criminal Procedure Amendment Bill 2012	11, 12
Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Bill 2012	11
Disability Amendment Bill 2012	4, 5
Drugs, Poisons and Controlled Substances Amendment (Supply by Midwives) Bill 2012	4
Duties Amendment (Landholder) Bill 2012	8
Education Legislation Amendment (VET Sector, Universities and Other Matters) Bill 2012	8
Emergency Services Legislation Amendment Bill 2011	1
Energy Legislation Amendment Bill 2012	12
Evidence Amendment (Journalist Privilege) Bill 2012	10
Evidence (Miscellaneous Provisions) Amendment (Affidavits) Bill 2012	3
Forests Amendment Bill 2012	7
Free Presbyterian Church Property Amendment Bill 2012	12
Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011	1
Gambling Legislation Amendment (Transition) Bill 2012	7
Health (Commonwealth State Funding Arrangements) Bill 2012	9, 11
Health Professions Registration (Repeal) Bill 2012	6
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	7, 8
Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011	1
Justice Legislation Amendment Bill 2012	4
Land (Revocation of Reservations) Bill 2012	6
Legal Profession and Public Notaries Amendment Bill 2012	4
Local Government (Brimbank City Council) Amendment Bill 2012	9
Local Government Legislation Amendment (Miscellaneous) Bill 2012	11
Marriage Equality Bill 2012	10, 11
Monetary Units Amendment Bill 2012	8
National Energy Retail Law (Victoria) Bill 2012	6, 8
Parliamentary Salaries and Superannuation Amendment (Salary Restraint) Bill 2012	8
Planning and Environment Amendment (VicSmart Planning Assessment) Bill 2012	11
Police and Emergency Management Legislation Amendment Bill 2012	8
	19

## Scrutiny of Acts and Regulations Committee

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Port Bellarine Tourist Resort (Repeal) Bill 2012	5
Port Management Amendment (Port of Melbourne Corporation Licence Fee) Bill 2011	1
Port Management Further Amendment Bill 2012	7
Primary Industries and Food Legislation Amendment Bill 2012	12
Primary Industries Legislation Amendment Bill 2012	7
Residential Tenancies Amendment Bill 2012	9
Residential Tenancies and Other Consumer Acts Amendment Bill 2012	12
Racing Legislation Amendment Bill 2012	11
Road Safety Amendment Bill 2012	8
Road Safety Amendment (Car Doors) Bill 2102	2
Road Safety Amendment (Drinking While Driving) Act 2011	1
Road Safety and Sentencing Acts Amendment Act 2012	12
Royal Women's Hospital Land Bill 2012	6
State Taxation Acts Amendment Bill 2012	8
Statute Law Repeals Bill 2012	4
Statute Law Revision Bill 2012	4
Transport (Compliance and Miscellaneous) Amendment (Fares) Bill 2012	6
Victorian Inspectorate Amendment Bill 2012	5, 6
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	5
Water Amendment (Governance and Other Reforms) Bill 2012	4, 5
Working with Children Amendment Bill 2012	9, 10

## 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) Rights or freedoms

Road Safety and Sentencing Acts Amendment Act 2012 12

##### (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

Criminal Procedure Amendment Bill 2012 11

Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012 7

Local Government Legislation Amendment (Miscellaneous) Bill 2012 11

Marriage Equality Bill 2012 10

National Energy Retail Law (Victoria) Bill 2012 6

Primary Industry and Food Legislation Amendment Bill 12

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

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**Table of correspondence between the Committee and Ministers during 2012**

<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>
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
Criminal Procedure Amendment Bill 2012	Attorney-General	14.08.12 23.08.12	11 of 2012 12 of 2012

**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>
Local Government Legislation Amendment (Miscellaneous) Bill 2012	Minister for Local Government	14.08.12	11 of 2012
Primary Industries and Food Legislation Amendment Bill 2012	Minister for Agriculture and Food Security	28.08.2	12 of 2012
Road Safety and Sentencing Acts Amendment Act 2012	Attorney-General	28.08.2	12 of 2012