

No. 13 of 2013

Tuesday, 15 October 2013

On the

Corrections Amendment
(Parole Reform) Bill 2013

Fire Services Levy Monitor Amendment
(Ensuring Fair and Equitable Levies)
Bill 2013

Local Government
(Rural City of Wangaratta)
Bill 2013

Radiation Amendment Bill 2013

Tobacco Amendment Bill 2013

Workplace Injury Rehabilitation and
Compensation Bill 2013

The Committee



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Member for Eastern Metropolitan



Deputy Chairperson
Hon. Christine Campbell MLA
Member for Pascoe Vale



Mr Colin Brooks MLA
Member for Bundoora



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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*

'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

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Corrections Amendment (Parole Reform) Bill 2013

Introduced	18 September 2013
Second Reading Speech	19 September 2013
House	Legislative Assembly
Member introducing Bill	Hon Kim Wells MLA
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

The Bill amends the *Corrections Act 1986* ('the Act') to:

- reform the membership of the Board by appointing a full time Chairperson, and introducing time limits for appointment to the Board of not more than 9 years. Notwithstanding the amendments, the current appointments to the Board will continue until the end of their term.
- provide for the appointment of a Deputy Chairperson from a class of persons who is eligible to be appointed Chairperson.
- broaden the class of persons eligible to be appointed as members of the Board to include sitting and retired Victorian Supreme and County Court Judges, as well as retired Superior Court Judges and retired Intermediate Court Judges from other Australian jurisdictions. A Judge from this class of persons is to be appointed the Chairperson of the Board.
- require the Parole Board to include in its annual report the number of persons convicted, during the reporting period, of a serious offence committed while on parole. Serious offence is to be a serious violent offence or a sexual offence as defined in section 77(9) of the Act which relates to the recently enacted automatic cancellation of parole provisions.¹
- provide for registered victims to be notified at least 14 days prior to the release of a prisoner on parole. The amendments provide that in certain unusual circumstances notice may be waived.

Charter report

The Corrections Amendment (Parole Reform) Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

¹ *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013*, Alert Digest No. 2 of 2013

Fire Services Levy Monitor Amendment (Ensuring Fair and Equitable Levies) Bill 2013

Introduced	18 September 2013
Second Reading Speech	18 September 2013
House	Legislative Council
Member introducing Bill	Hon John Lenders MLC
Private Members Bill	

Purpose

The Bill amends the *Fire Services Levy Monitor Act 2012* ('the Act') to —

- provide the Fire Services Levy Monitor with responsibilities to ensure the fair and equitable operation of the Act, particularly with respect to the imposition of the fire services property levy.
- to provide the Fire Services Levy Monitor with additional investigative powers in relation to the fair and equitable operation of the Act, particularly with respect to the imposition of the fire services property levy.
- to provide the Fire Services Levy Monitor with additional reporting requirements in relation to the fair and equitable operation of the Act, particularly with respect to the imposition of the fire services property levy.

Charter report

The Fire Services Levy Monitor Amendment (Ensuring Fair and Equitable Levies) Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Local Government (Rural City of Wangaratta) Bill 2013

Introduced	18 September 2013
Second Reading Speech	19 September 2013
House	Legislative Assembly
Member introducing Bill	Hon Jeanette Powell MLA
Portfolio responsibility	Minister for Local Government

Purpose

The purpose of the Bill is to:

- dismiss the Councillors of the Rural City of Wangaratta Council and provide for the continuity of the Council as constituted by the administrator or panel of administrators. **[5]**
- provide for the appointment of an administrator or a panel of administrators for the Rural City of Wangaratta Council by Order in Council. **[6]**
- provide for a general election for the Rural City of Wangaratta Council to be held on the fourth Saturday of October 2016 and provide for the expiry of the Order in Council on the commencement of the first meeting of the Council following the general election. **[10]**

Charter report

The Local Government (Rural City of Wangaratta) Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Tobacco Amendment Bill 2013

Introduced	17 September 2013
Second Reading Speech	18 September 2013
House	Legislative Assembly
Member introducing Bill	Hon Mary Wooldridge MLA
Portfolio responsibility	Minister for Community Services

Purpose

The Bill amends the *Tobacco Act 1987* ('the Act') to:

- prohibit smoking in certain public outdoor areas. The areas are; in the outdoor area of a public swimming pool complex; at or within 10 meters of an outdoor children's playground; at or within 10 meters of an outdoor skate park; and at or within 10 meters of an outdoor sporting venue (as defined by the Bill). The offences introduced by the Bill do not apply to persons under the age of 18 years [5]
- restrict further the promotion and display of tobacco products [6]
- cease the ability to apply for certification as a specialist tobacconist that have an exemption to the tobacco product display ban, from the commencement of the provisions in the Bill. Existing businesses will be exempt until such time as the business transfers ownership, ceases or moves location. Thereafter the business will not be able to apply for certification. [9]
- make it an offence for a person without reasonable excuse, to threaten, assault or intimidate an inspector who is exercising a power under Part 3A of the Act [10]
- allow greater use and disclosure of tobacco retailer information for communication and regulatory purpose [11]
- make other miscellaneous amendments. [7, 11, 12]

Rights and freedoms – Right to be presumed innocent – Reverse evidential onus – Reasonable excuse defence

The Act currently provides an offence to, without reasonable excuse, hinder or obstruct an inspector who is exercising a power (section 36Q).

This Bill inserts a new section 36QA to make it an offence, without reasonable excuse, to threaten, assault or intimidate an inspector who is exercising a power under Part 3A (powers of inspectors) of the Act.

The Committee notes the reverse evidentiary onus of this new provision.

Charter report

The Tobacco Amendment Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Workplace Injury Rehabilitation and Compensation Bill 2013

Introduced	18 September 2013
Second Reading Speech	19 September 2013
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MLA
Portfolio responsibility	Assistant Treasurer

Purpose

The purposes of the Bill are to:

- simplify the provisions applying to the rehabilitation of injured workers and compensation
- streamline the provisions of the *Accident Compensation Act 1985* ('the Act') which will continue to apply to injuries suffered before 1 July 2014
- provide a single gateway for claims for compensation under the Bill or the Act
- provide for the registration of employers and the payment of WorkCover premiums
- repeal the *Accident Compensation (WorkCover Insurance) Act 1993* and consolidate the substance into this Bill
- make consequential amendments to the Act, the *Workers Compensation Act 1958* and certain other Acts.

Extract from the Explanatory Memorandum:

The Bill will govern workers compensation insurance, payment of employer premiums, rehabilitation for injured workers, and compensation in relation to workplace injuries and deaths.

... The Bill has been prepared on the basis that it does not involve changes to injured workers' benefits nor to the way employers' premiums are calculated. The substance of various key provisions in the *Accident Compensation Act 1985* and the *Accident Compensation (WorkCover Insurance) Act 1993* have therefore been reproduced in the Bill.

The Bill includes a number of minor amendments aimed at removing ambiguities, clarifying the intention of various provisions, and correcting a number of drafting anomalies. The Bill also includes a small number of minor policy changes that improve administrative processes and reduce regulatory burden.

The wording of some of the more complex and heavily litigated provisions of the *Accident Compensation Act 1985* have been reproduced in the Bill.

Extract from the Second Reading Speech:

The Bill will apply to workplace injuries and deaths arising out of or in the course of employment on or after the commencement date. The existing benefits schemes in the *Accident Compensation Act* will be retained for workers with injuries arising before the commencement date.

In future all claims will be made under this Bill whether for compensation under the Bill or under the *Accident Compensation Act*.

Entitlements for claims will then be determined according to the relevant benefits scheme in place at the date of injury. A small number of claims for injuries that arose before 12 November 1997 will continue to be lodged under the *Accident Compensation Act*.

Content

The table attached to clause 622 of the Bill provides a useful guide to many of the re-enacted provisions in the Bill (with or without modifications), and the corresponding, or substantially similar provisions of the *Accident Compensation Act 1985*.

Explanatory Memorandum

The Committee notes that there are a number of brief references to the Bill correcting cross referencing errors or anomalies, for example in clauses 630, 635, 637 and 638. The explanatory memorandum goes no further than providing that characterisation.

In these instances the Committee considers that a clearer characterisation and explanation is required as to the actual error and the amendment needed to correct the error or anomaly.

The Committee takes this opportunity to republish Practice Note Nos. 1 and 2 as Appendix 4 in this Alert Digest.

The Committee draws attention to its Practice Note No. 1 in respect to insufficient or unhelpful explanatory memoranda and Practice Note No. 2 in respect to statute law revision type amendments and their explanatory notes.

The Committee will write to the Minister seeking further clarification in respect to clauses 630, 635, 637 and 638, and any other clauses where cross references or anomalies may exist.

Rights and freedoms – Retrospective application – Justification

Note: The extracts below are from the explanatory memorandum.

Accident Compensation Act 1985 ('the Act')

Subclause 626(7) amends the definition of 'relevant period' in section 8(5) of the Act to clarify that the definition applies in relation to services provided on or after 1 July 2010. This amendment is deemed to have come into operation on 1 July 2010. The change reflects current practice. **[626(7)]**

The amendments will be applied retrospectively in order to correct anomalies in the *Accident Compensation Act 1985*... **[2]**

The Committee considers that the explanatory memorandum should directly refer to the significance of 1 July 2010 as the retrospective date for commencement and whether the retrospective application adversely impacts on any entitlement or benefit.

Subclause 628(1) amends section 88(2) of the Act to correct a cross referencing error in that section. The amendment will be deemed to have commenced on 5 April 2010. **[628(1)]**

The provisions will be applied retrospectively in order to correct technical anomalies in provisions that were introduced or amended in the *Accident Compensation Act 1985* from 5 April 2010. **[2]**

The Committee considers that the explanatory memorandum should provide direct information in respect to the actual cross referencing error mentioned therein and whether the retrospective application adversely impacts on any entitlement or benefit.

Clause 630 Subclause 630(3) amends the definition of the term 'supplemental pension limit' in section 96(7) the Act to address a cross referencing anomaly. The amendment is deemed to have commenced on 1 July 2010. **[630(3)]**

The amendments will be applied retrospectively in order to correct anomalies in the *Accident Compensation Act 1985*... [2]

The Committee considers that the explanatory memorandum should provide an explanation for the significance of the retrospective date and provide direct details in respect to the cross referencing error mentioned therein and whether the retrospective application adversely impacts on any entitlement or benefit.

Subclause 630(6) amends the definition of supported accommodation in section 99AAA(1) of the Act to ensure that the section references the *Supported Accommodation Services (Private Proprietors) Act 2010*. The amendment aligns the definition with clause 223 of this Bill and the definition in the *Transport Accident Act 1986*. The amendment is deemed to have commenced on 1 July 2012.

Clause 641 amends section 313 of the Act which is a transitional provision relating to earlier amendments to section 93CD of the Act. The changes made by virtue of the substituted section 313 are to correct a number of technical anomalies relating to the application of section 93CD. The amendment is deemed to have commenced on 5 April 2010. [641]

The provisions will be applied retrospectively in order to correct technical anomalies in provisions that were introduced or amended in the *Accident Compensation Act 1985* from 5 April 2010. [2]

The Committee considers that the explanatory memorandum should provide information as to the significance of the retrospective date sought to be applied and information in respect to the technical anomalies referred to therein and whether the retrospective application adversely impacts on any entitlement or benefit

Clause 643 inserts a new transitional section 368A into the Act. The new section is intended to clarify any uncertainty about the application of section 91(3AAA) of the Act, by making clear that it applies in relation to a claim made on or after 1 November 2010, being the date on which the provision was inserted into the Act. The amendment is deemed to have commenced on 1 November 2010.

Retrospective provision – Accident Compensation (WorkCover Insurance) Act 1993 ('the Act')

Clause 647 amends section 87 of the *Accident Compensation (WorkCover Insurance) Act 1993* to clarify that the provisions in Part 2A of the Act will apply to the review of premium in respect of the 2010/2011, 2011/2012, 2012/2013 and 2013/2014 premium periods whether the notice that is the subject of review is issued before 1 July 2014 or after 1 July 2014. This provision is intended to ensure that the Act reflects the intent prior to its repeal. The amendment is deemed to have commenced on 1 July 2010. [647]

The amendments will be applied retrospectively in order to correct anomalies in the *Accident Compensation Act 1985*... [2]

The Committee considers that the explanatory memorandum should provide an explanation for the significance of the retrospective date.

The Committee draws attention to the Committee's Practice Note No. 1, items 1.1 and 1.4 respectively concerning unexplained retrospective provisions and insufficient or unhelpful explanatory memorandum.

The Committee will write to the Minister seeking further information in respect to clauses 626(7), 628(1), 630, 641 and 647.

Rights and freedoms – Presumption of innocence – Reverse evidentiary and legal onus

Reverse evidential onus relating to the offence of discriminatory conduct by employers for a prohibited reason – Dismiss or threaten to dismiss employee – alter or threaten to alter position of employee to their detriment – treat employee less favourably

Extract from the Statement of Compatibility:

Clause 575 provides that it is an offence for an employer or prospective employer to engage in discriminatory conduct for a prohibited reason. This covers circumstances where the employer or prospective employer has refused or failed to offer employment to an applicant, and the dominant reason was because the applicant has given an employer notice of an injury, or has taken steps to pursue a claim for compensation against an employer. If all the facts constituting the discriminatory conduct are proved, the employer (or prospective employer) bears the burden of adducing evidence that the reason alleged in the charge was not the dominant reason why the employer (or prospective employer) engaged in the conduct. ...pursuant to section 72 of the *Criminal Procedure Act 2009*, this onus is an evidential onus only.

Reverse evidential onus relating to offences against inspectorial powers

The Committee notes that there are a number of regulatory offence provisions that prohibit persons from engaging in particular conduct 'without reasonable excuse'.

They are:

- clauses 134(2) -refuse to produce a document or answer questions put by an inspector
- clause 142 – fail to provide reasonable assistance to an inspector
- clause 554(2) – fail to comply with requirement to provide information to the Authority or an inspector.

Reverse legal onus – Failure to comply with the provisions of an Act – Unable to meet inherent requirements of the employment – Fraud or dishonesty

Extract from the Statement of Compatibility:

Subclause 575(7) provides that it is a defence to a proceeding for discriminatory conduct if the employer or prospective employer proves that the conduct was necessary to comply with the Bill, the Accident Compensation Act, the Workers Compensation Act or the Occupational Health and Safety Act 2004 (OHS Act), that the worker or applicant was unable to perform the inherent requirements of the employment, or that the worker was engaged in fraud or dishonesty in relation to the giving of notice of the injury or the pursuit of the claim. This clause imposes a legal burden on the accused, by requiring that they prove certain matters in order to defend themselves against an allegation of discriminatory conduct.

... Where the employer relies on the conduct being necessary to comply with the Bill, the Act, the Workers Compensation Act or the OHS Act, or relies on the fact that the worker was unable to perform the inherent requirements of the employment, these are matters that will generally be in the particular knowledge of the employer, and proving these aspects of the defence (if genuine) should not be a difficult task for an employer. Where the employer seeks to rely on a defence based on a claim that the worker has engaged in fraud or dishonesty in relation to the claim, it is reasonable to require that the employer prove these aspects of the defence.

The Committee notes the reverse evidentiary and legal onus provisions.

Rights and freedoms – Privilege against self-incrimination

Clause 597 provides that a person may refuse to give information or do any other thing that the person is required to do by or under the Bill, the *Accident Compensation Act 1985* (the AC Act) or the *Workers Compensation Act 1958* (the WC Act) if to do so would tend to incriminate the person. The proviso in the clause is that the privilege does not apply to the production of a document that the person is required by the Bill or the Acts to produce.

The Committee notes the extract from the Statement of Compatibility provides that:

The primary purpose of the abrogation of the privilege in relation to documents is to assist the authority to enforce penalty provisions or to prosecute offences by employers and others who assist or facilitate the execution of responsibilities imposed on employers under the Bill.

Importantly, clause 597 provides a partial immunity, in that a document (or evidence obtained as a result of the production of that document) cannot be used in proceedings against the person other than criminal or civil proceedings under the Bill, the AC Act or the WC Act, or in relation to proceedings for an offence against the Crimes Act 1958 which arises in connection with a claim for compensation under the AC Act or the Bill. Any limitation on the right against self-incrimination is therefore appropriately tailored and minimal.

The Committee notes the limitation to the privilege against self-incrimination.

Repeal, alteration or variation of section 85² of the Constitution Act 1975 (unlimited jurisdiction of the Supreme Court)³

Clause 617 declares that it is the intention of sections 264, 265 and 266 to alter or vary section 85 of the *Constitution Act 1975*. These provisions confer exclusive jurisdiction on the County Court and bestow a like jurisdiction on the Magistrates' Court in respect of most questions or matters under the Bill, the *Accident Compensation Act 1985* or the *Workers Compensation Act 1958*.

Clause 618 declares the intention of clauses 6(3), 78(3), 80(4), 83(8), 208, 227(1), 243(10), 313(4), 313(5), 354, 355, 356, 369(9), 426, 456, 458, 463(4), 577(7), 604(4) and 607(7) to alter vary section 85 of the Constitution Act 1975.

Clause 640(2) declares the intention of clause 626(8) of the Bill to alter vary section 85 of the *Constitution Act 1975*. The clause inserts a new section 252P in the *Accident Compensation Act 1985* to provide the same limitation provision as is made by clause 313(5) of the Bill.⁴

Section 85 statement extracted from the Second Reading Speech:

Exclusive
jurisdiction

I make the following statement under section 85 of the Constitution Act 1975 of the reasons why it is the intention of a number of clauses in the Bill to alter or vary section 85 of the Constitution Act 1975. These clauses are consistent with the corresponding provisions of the

² Section 85 provides that the Supreme Court is created the superior court of Victoria with unlimited jurisdiction and further provides that where a provision of an Act seeks to repeal, alter or vary the courts unlimited jurisdiction, the provision(s) will not be effective unless certain procedures are followed. Briefly, these procedures require the relevant provisions that intend to limit the court's jurisdiction to be specifically identified by the Bill (the declaratory provision) and also requires the member of Parliament introducing the Bill to make a statement of the reasons for seeking to limit the court's jurisdiction. Section 18(2A) of the *Constitution Act 1975* further provides that a limitation amendment fails if it does not receive an absolute majority of the members in both Houses.

³ Section 17(b) of the *Parliamentary Committees Act 2003* requires the Committee to report to the Parliament on any provision in a Bill that directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975* and to consider whether such provisions are in all the circumstances appropriate and desirable.

⁴ Refer to section 85 of the *Constitution Act 1975* statement concerning clauses 313(4) and 313(5).

existing legislation.

Clauses 264, 265 and 266⁵ set out the jurisdiction of the County Court and the Magistrates Court in respect of certain matters arising under the Bill, the Accident Compensation Act 1985 (Accident Compensation Act) and the Workers Compensation Act 1958.

The exclusive jurisdiction conferred on the courts by clauses 264(1), 266(1) and 266(3) is intended to prevent proceedings being brought directly in the Supreme Court in relation to a question or matter arising under the legislation (unless otherwise specified).

The limitation is intended to provide more efficient and accessible dispute resolution under the scheme and that disputes in connection with statutory benefits and the determination of serious injury are heard in the same forum. The limitation on the jurisdiction of the Supreme Court in clauses 264, 265 and 266 is necessary and proportionate.

Clause 264(3) prohibits proceedings being brought in relation to decisions of the authority regarding serious injury applications and the discretion of the authority to consent to common-law proceedings outside statutory time limits. The provisions do not relate to decisions about the merits of a claim. There are various other rights of review at different stages in the common-law process. For these reasons the limitation is a necessary and appropriate measure to ensure workers who comply with the serious injury determination process under the legislation have access to an efficient common-law process.

No proceedings for guidance or failure to give guidance

Clause 6(2) of the Bill provides that the authority may give guidance to a person whose claim is governed by the Workers Compensation Act 1958. Clause 6(3) provides that no action lies against the authority in the exercise of its discretion to provide such guidance. This is consistent with how claims under the Workers Compensation Act 1958 are dealt with in practice.

No proceedings for failure to give reasons for decision

Clause 78(3)⁶ limits proceedings that may be brought against the authority in connection with written reasons that may be requested by an employer for a decision to accept or reject a claim for compensation. This limitation only applies to a request for reasons for a decision and not the decision itself. The limitation is therefore reasonable as an employer has a right of review in connection with a decision to accept or reject a claim on certain grounds.

That right of review is set out in clauses 79 to 90 of the Bill. The process includes internal review by the authority followed by a right to appeal to the Supreme Court. This right is limited by clauses 80(4) and 83(8) where an employer makes an out-of-time application for review or is deemed to have withdrawn their application.

The limitations ensure the exercise of WorkCover's discretion to allow an objection that is made out of time is not reviewable. The discretion is meant to allow the authority to consider the reasons for a failure to lodge an objection within the period specified in the legislation. These limitations are reasonable because they reduce disputation and provide a degree of finality and certainty for the parties impacted by the decision, in particular, the injured worker. An employer who objects within time still has access to the Supreme Court.

No appeal against for determination as to degree of impairment

Clause 208⁷ states that no appeal lies to any court or tribunal from a determination or opinion as to the degree of permanent impairment resulting from an injury, or as to whether a worker has an injury which is a total loss injury.

The limitation ensures that there is finality in the medical opinion of the panels. This recognises that medical experts are best equipped to ultimately determine medical questions and avoids unnecessary costs of disputes involving medical determinations.

⁵ These sections re-enact sections 39, 40 and 43 of the *Accident Compensation Act 1985*.
⁶ The clause operates the same as section 109AA of the *Accident Compensation Act 1985*.
⁷ The clause operates the same as section 104B(12) of the *Accident Compensation Act 1985*.

No proceedings against worker for costs

Clause 227⁸ limits proceedings against workers for recovery of any costs which the Authority, self-insurer or employer is liable to pay in connection with medical and like services. The restriction on proceedings is necessary to protect workers from actions or proceedings that should be initiated against the Authority, employer or self-insurer, who is liable for the payments.

No proceedings against decision on provisional payments

Clause 243⁹ provides that no proceedings may be brought in respect of any decision relating to the discretion of the Authority to make provisional payments of certain death benefits where it appears a person may be entitled to compensation as a result of the death of a worker.

The nature of a decision under those provisions is preliminary and it is not ultimately determinative of an entitlement. A person who is not entitled to a provisional payment may still claim the same compensation under the other death benefits provisions, and the person would have full rights of review under those provisions. Allowing review of a preliminary decision under clause 243 would be inefficient and result in unnecessary legal costs being incurred. The limitation is therefore a reasonable and necessary restriction.

Medical Panel opinion to be final and conclusive and no proceedings on adequacy of reasons given by Medical Panel

Clause 313(4)¹⁰ sets out that a medical panel opinion is to be adopted and applied by any court and must be accepted as final and conclusive. The provision is intended to prevent any court reviewing the merits of a medical panel opinion, however does not limit the court's ability to hear matters reviewing questions of law.

Clause 313(5) provides that no proceedings may be brought in relation to a medical panel opinion on the basis that the statement of reasons given by the medical panel is inadequate and therefore give rise to an error of law. The same limitation is included in clause 626(8) to amend section 68 of the Accident Compensation Act in the same terms.

Each of these limitations on the right to bring proceedings is reasonable because members of a Medical Panel are medical experts who are best equipped to determine medical issues but they are not legally trained. Permitting a right to bring proceedings in connection with the adequacy of written reasons of a panel would mean that the standard of reasons required of it would be equivalent to that of a court. It would undermine the efficiency and timeliness of the medical panel process and impede the efficient delivery of compensation and timely resolution of disputes under the WorkCover scheme.

However, it is not the intention of this provision to limit the power of the Supreme Court to hear applications for judicial review in relation to reasons that are so inadequate as to amount to a jurisdictional error on their face.

Common law claims legal costs to be determined according to costs orders

Clauses 354, 355 and 356¹¹ provide that legal costs in certain common-law matters must only be recovered in accordance with the relevant legal costs order made under those provisions by the Governor in Council. This has the effect of limiting the courts usual jurisdiction with regard to costs.

The provisions provide for certainty in legal costs and help to maintain the overall costs of the common-law scheme at a sustainable level, for the benefit of workers, employers and the broader community. The relevant legal costs order sets out specific processes for recovery of legal costs in common-law matters and incentives to encourage parties to

⁸ The clause operates the same as section 99(10) and (11) of the *Accident Compensation Act 1985*.

⁹ The clause operates the same as section 92D of the *Accident Compensation Act 1985*.

¹⁰ The clause substantially operates the same as section 68 of the *Accident Compensation Act 1985* but changes the effect of that section to confirm when the timeframe for a Medical Panel to form its opinion begins, and also introduces new provisions in subclauses (5) and (6) to confirm that the provision of inadequate reasons by a medical panel does not in of itself provide a basis for legal challenge.

¹¹ Clauses 354, 355 and 356 respectively operate substantially in the same manner as sections 134AG, 13AGA and 134AGB of the *Accident Compensation Act 1985*.

<p>No challenge to be made against decision to disburse third party liability recovered by Authority</p>	<p>resolve disputes. These arrangements can only be effective if the usual jurisdiction of courts with regard to costs is limited.</p>
<p>No proceedings against assessment of tail claims liability</p>	<p>Clause 369¹² states that the Authority has discretion to issue proceedings to seek recovery of compensation costs against negligent third parties.</p>
<p>Process for refund of premium</p>	<p>The Authority also has a discretion to disperse costs that are recovered including the excess that an employer must pay to a worker who makes a claim for compensation. Clause 369(8) provides that no proceedings may be brought to challenge the exercise of those discretions by the Authority. This limitation is reasonable as the employer's liability to pay an excess is limited to a worker's income for 10 days and it would be counterproductive to allow for disputation for such a small sum of money.</p>
<p>Mandatory internal review of premium notice before court review</p>	<p>Clause 426¹³ states that no proceedings may be brought in respect of any assessment of tail claims liability relating to the non-WorkCover employer provisions.</p>
<p>No proceedings against Authority's discretion to allow review of premium out of time</p>	<p>The limitation is necessary to ensure that an incentive remains for employers who exit from Victorian insurance arrangements to effectively manage their tail liabilities incurred prior to their exit. If the employer could dispute the assessment of their liability incurred prior to exiting, then it may decrease the incentive to effectively manage these claims. Any assessments are unlikely to be significantly greater than those under the premium system, and the restriction applies equally to the employer and the Authority, meaning that the Authority is also bound by the actuarial assessment.</p>
	<p>Clause 456¹⁴ sets out a process under which employers may apply for a refund of part or all of their WorkCover premium. This is a mandatory process that must be completed before an employer can bring proceedings in court. The limitation on the right to bring proceedings is reasonable because an employer who is dissatisfied with the outcome of their application can then bring proceedings for a refund.</p>
	<p>Clause 458¹⁵ provides that the right of an employer to bring proceedings in connection with their WorkCover premium notice is governed exclusively by Part 10 of the Bill. Part 10 of the Bill provides for an internal review process for employers who wish to dispute their premium notice. The limitation on the right to bring proceedings is reasonable because an employer who is dissatisfied with the outcome of their application for review, can bring proceedings in connection with that notice at the Victorian Civil and Administrative Tribunal or the Supreme Court. The provision of a mandatory internal review process allows for improved timeliness and efficiency in the resolution of disputes regarding premium notices.</p>
	<p>Clause 463¹⁶ confers discretion on the Authority to allow an employer to make an application for review of the premium notice outside of the required 60-day period. No proceedings may be brought in connection with the exercise of this discretion by the Authority. The limitation on the right to bring proceedings is reasonable because the discretion would operate to prevent an employer from being unfairly excluded from making an application for internal review because of circumstances beyond their control. However, for applications for review that are made out of time that do not invite the exercise of the Authority's discretion, the limitation is reasonable so as to allow certainty and finality in the resolution of disputes about premium.</p>

¹² The clause operates the same as section 138 of the *Accident Compensation Act 1985*.

¹³ The clause re-enacts section 173 of the *Accident Compensation Act 1985*.

¹⁴ The clause consolidates and operates the same as sections 22A and 22B of the *Accident Compensation (WorkCover Insurance) Act 1993*.

¹⁵ The clause operates the same as section 35 of the *Accident Compensation (WorkCover Insurance) Act 1993*.

¹⁶ The clause operates the same as section 36A of the *Accident Compensation (WorkCover Insurance) Act 1993*.

Discretion whether to bring prosecution not to be challenged

Clauses 577 and 607¹⁷ set out a specific process for a worker to request the Authority to pursue a prosecution in relation to unlawful discriminatory conduct or a breach of return to work obligations under the Bill. Clauses 577(7) and 607(7) limit the ability to challenge a decision by the Authority to bring or not to bring such a prosecution.

No proceedings against person where enforceable undertaking imposed as alternative to prosecution

The limitation on the right to bring proceedings is reasonable as the Bill already provides an appropriate mechanism whereby the exercise of the Authority's discretion under this provision may be subject to scrutiny by the Director of Public Prosecutions.

Clause 604¹⁸ allows the Authority to accept a written undertaking in connection with an alleged contravention of the Bill as an alternative to criminal prosecution. Clause 604(4) provides that no proceedings may be brought against the exercise of the Authority's discretion to accept a written undertaking. This limitation on the right to bring proceedings is reasonable as the ability to challenge such a decision would unfairly impinge on the Authority's prosecutorial discretion.

The Committee notes that reference to section 266(1) (underlined) at the beginning of the statement is incorrect and the reference should be to section 265(1). The Committee has been advised by the Office of Chief Parliamentary Counsel that the error will be corrected in the Second Reading Speech in the second House.

The Committee has reviewed the declaratory provisions in clauses 617 and 618, the substantive provisions in clauses referred therein, the explanatory memorandum and the section 85 statement of the member introducing the Bill in the Second Reading Speech.

The Committee is satisfied that the limitation provisions are in all the circumstances appropriate and desirable.

Charter report

The Workplace Injury Rehabilitation and Compensation Bill 2013 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

¹⁷ These clauses respectively re-enact sections 242AC and 252AA of the *Accident Compensation Act 1985*.

¹⁸ The clause re-enacts section 251 of the *Accident Compensation Act 1985*.

Ministerial Correspondence

Radiation Amendment Bill 2013

The Bill was introduced into the Legislative Assembly on 20 August 2013 by the Hon. Mary Wooldridge MLA. The Committee considered the Bill on 2 September 2013 and made the following comments in Alert Digest No. 11 of 2013 tabled in the Parliament on 3 September 2013.

Committee Comment

Charter report

Practice Note No 4 – Reverse legal onus without express words – Summary offence

Summary: The Statement of Compatibility remarks that the proposed offences in new sections 36C and 36D place a legal burden of proof on the defendant and may limit the right to be presumed innocent. The Committee will write to the Minister seeking further information as to whether or not new sections 36C and 36D displace the milder reverse evidential onus in s. 72 of the *Criminal Procedure Act 2009* and, if so, whether express words to that effect would be a less restrictive alternative reasonably available to achieve that purpose.

The Committee notes that clause 13 inserts new sections 36C and 36D:

A person must not issue a security compliance certificate in relation to a security plan or a transport security plan unless he or she holds an assessor's approval that is in force.

A person must not directly or indirectly represent that he or she is an approved assessor unless the person is an approved assessor.

The Committee observes that new sections 36C and 36D appear to create summary criminal offences and do not contain express words placing a legal onus on the accused.

The Statement of Compatibility remarks:

The proposed offences place a legal burden of proof on the defendant by requiring them to prove, on the balance of probabilities, the relevant defence. In doing so, the provisions may be considered to limit the right to be presumed innocent. However, in my opinion, any limitation on the right is reasonable and demonstrably justified in a free and democratic society having regard to the factors set out in section 7(2) of the charter act.

The Statement of Compatibility states that new section 36C 'will be an indictable offence'. The Committee notes that 52(c) of the *Interpretation of Legislation Act 1984* provides that: 'If an Act or subordinate instrument... does not provide a form or mode of procedure for the hearing and determination of a proceeding or matter... then, unless the contrary intention appears, the proceeding or matter must be heard and determined only by or before the Magistrates' Court.' The Committee observes that clause 13 does not make any provision for the form or mode of procedure for new sections 36C and 36D.

The Committee recalls its *Practice Note No. 4*, which 'addresses provisions which create exceptions to criminal offences where such exceptions may place a legal onus on an accused without express words to that effect'. The Practice Note remarks:

For exceptions to summary offences, the explanatory material may address the effect of s. 72 of the *Criminal Procedure Act 2009*.

For exceptions that impose a legal onus on the accused without express words to that effect, the statement of compatibility may address whether or not the inclusion of express words would be a less restrictive alternative reasonably available to achieve the exception's purpose.

The Committee observes that s. 72 of the *Criminal Procedure Act 2009* generally provides that, where legislation creates a summary offence and provides any exception, exemption, proviso, excuse or qualification, an accused who wishes to rely on that exception must 'present or point to evidence that suggests a reasonable possibility of the existence of facts' that establish that exception. That is, the accused must satisfy a mild 'evidential' burden on such exceptions, rather than a legal burden to prove the exception on the balance of probabilities.

The Committee will write to the Minister for Health seeking further information as to:

- **whether or not new sections 36C and 36D displace the milder 'evidential' burden in s. 72 of the Criminal Procedure Act 2009 and, if so, whether express words to that effect would be a less restrictive alternative reasonably available to achieve that purpose. Pending the Minister's response, the Committee draws attention to clause 13; and**
- **whether or not new section 36C creates an indictable offence.**

Minister's Response

I write in response to queries raised by the Committee in Alert Digest No 11 of 2013 in relation to the Radiation Amendment Bill 2013 (the Bill) .

Do sections 36C and 36D displace the milder 'evidential' burden in section 72 of the Criminal Procedure Act 2009 and, if so, would express words to that effect be a less restrictive alternative reasonably available to achieve that purpose?

Clause 13 of the Bill introduces a new Part SA into the **Radiation Act 2005** which includes offences in relation to approved assessors. Proposed section 36C states that a person must not issue a security compliance certificate in relation to a security plan or a transport security plan unless they hold an assessor's approval that is in force. Proposed section 36D makes it an offence for a person to directly or indirectly represent that they are an approved assessor unless they actually are an approved assessor.

The Committee correctly observes that new sections 36C and 36D create summary criminal offences and do not contain express words placing a legal onus on the accused. Instead, these offences place an evidential burden on the accused. The Committee notes that section 72 of the *Criminal Procedure Act 2009* generally provides that, where legislation creates a summary offence and provides any exception, exemption, proviso, excuse or qualification, an accused who wishes to rely on that exception must 'present or point to evidence that suggests a reasonable possibility of the existence of facts' that establish that exception. That is, the accused must satisfy a mild 'evidential' burden on such exceptions, rather than a legal burden to prove the exception on the balance of probabilities.

I confirm that proposed sections 36C and 36D do not seek to displace the evidential burden in section 72 of the *Criminal Procedure Act 2009*. However, an evidential burden arguably still derogates from the right to be presumed innocent because the obligation is on the accused to present evidence of something which the prosecution then has to disprove. However, in my opinion, any limitation on the right is reasonable and demonstrably justified in a free and democratic society.

In the Statement of Compatibility made with respect to this Bill I expressed my reasons for coming to this view. In my opinion, the inclusion of a reverse evidentiary onus in the proposed new offences is a proportionate means of achieving a legitimate aim. Whilst the

provisions arguably limit the right to be presumed innocent, the limitation is justifiable because the conduct in the offences poses a grave danger to public health or safety, and there is no alternative means available to reduce that risk.

Impersonating an approved assessor or issuing a security compliance certificate without the requisite approval could result in significant harm to the public. The role of an approved assessor is to ensure that security plans meet the security standards that have been set by the Secretary. If this role is not performed in the proper manner, high consequence sealed sources could be subject to inferior security plans, leading to increased security risks.

Further, I consider that the limitation on the right to be presumed innocent is not unreasonable in this instance. That is, the burden in the proposed offences relates to facts which are readily provable by the defendant as matters within their own knowledge. For example, the proposed offence of impersonating an approved assessor would not be made out if the defendant can prove that they are, in fact, an approved assessor. Accordingly, the defendant possesses the requisite knowledge to establish the defence, and it is not unduly onerous for them to give sufficient evidence to discharge the burden placed upon them. In light of the serious consequences of the behaviour that the offences seek to prevent, this achieves an appropriate balance of all interests.

Does new section 36C create an indictable offence?

I confirm that both proposed sections 36C and 360 are summary criminal offences, rather than indictable offences. Both proposed offences will carry a penalty of 60 penalty units. Proceedings or matters in relation to these proposed offences will be heard or determined by the Magistrates' Court

I trust this advice has addressed the Committee's concerns.

Hon David Davis MP
Minister for Health

19 September 2013

The Committee thanks the Minister for this response.

Appendix 1

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Education and Training Reform Amendment (Teacher Registration and Other Matters) Bill 2013	2
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Gambling Regulation Amendment Bill 2013	5
Heavy Vehicle National Law Application Bill 2013	6, 7
Integrity Legislation Amendment Bill 2013	5
Jury Directions Bill 2012	1
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Scrutiny of Acts and Regulations Committee

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Appendix 2

Committee Comments classified by Terms of Reference

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

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Section 17(a)

(i) trespasses unduly upon rights or freedoms

Plant Biosecurity Amendment Bill 2013	11
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(viii) is incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006*

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Justice Legislation Amendment Act 2013	8
Marine (Domestic Commercial Vessel National Law Application) Bill 2013	7
Plant Biosecurity Amendment Bill 2013	11
Radiation Amendment Bill 2013	11
Rail Safety National Law Application Bill 2013	4
Statute Law Amendment (Directors' Liability) Bill 2012	1
Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	4

Section 17(b)

Appendix 3

Ministerial Correspondence 2013

Table of correspondence between the Committee and Ministers and members during 2012-13

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	Ms Colleen Hartland MLC	11-12-12 06-02-13	18 of 2012 2 of 2013
Statute Law Amendment (Directors' Liability) Bill	Attorney-General	05-02-13 18-02-13	1 of 2013 2 of 2013
Co-operatives National Law Application Bill 2013	Consumer Affairs	19-02-13 28-02-13	2 of 2013 3 of 2013
Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013	Corrections	04-03-13	[i] 4 of 2013
Adoption Amendment Bill 2013	Community Services	19-03-13 04-04-13	4 of 2013 5 of 2013
Rail Safety National Law Application Bill 2013	Public Transport	19-03-13 01-04-13	4 of 2013 5 of 2013
Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	Public Transport	19-03-13 01-04-13	4 of 2013 5 of 2013
Fortification Removal Bill 2013	Attorney-General	07-05-13 24-05-13	6 of 2013 7 of 2013
Heavy Vehicles National Law Application Bill 2013	Roads	07-05-13 27-05-13	6 of 2013 7 of 2013
Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013	Attorney-General	17-05-13	[ii] 7 of 2013
Justice Legislation Amendment Bill 2013	Attorney-General	11-06-13 22-06-13	8 of 2013 9 of 2013
Marine (Domestic Commercial Vessel National Law Application) Bill 2013	Ports	28-05-13 13-06-13	7 of 2013 9 of 2013

ⁱ The Committee's report on the Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013 appeared in Alert Digest No. 2 of 2013.

ⁱⁱ The Committee's report on the Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2013 appeared in Alert Digest No. 6 of 2013.

Scrutiny of Acts and Regulations Committee

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Plant Biosecurity Amendment Bill 2013	Agriculture and Food Security	03-09-13 16-09-13	11 of 2013 12 of 2013
Radiation Amendment Bill 2013	Health	03-09-13 17-09-13	11 of 2013 13 of 2013

Appendix 4 – Practice Notes

Practice Note No. 1

The Practice Note advises legal and legislation officers of the Committee's expectations in respect to information that should be provided to the Parliament concerning provisions in Bills that test or invoke the Committee's terms of reference.

In its scrutiny of Bills the Committee may initially make an adverse report to Parliament in its Alert Digest in respect to a number of legislative practices included in a Bill that appear to test or invoke the Committee's terms of reference in section 17 of the Parliamentary Committees Act 2003 (the 'Act').

Where the Committee makes an initial adverse comment it will draw the provision to the attention of Parliament and will note that further advice will be sought from the responsible Minister. The Minister's response is published in the next Alert Digest upon receipt. To avoid needless Ministerial correspondence the Committee strongly prefers that explanatory material be provided at the time a Bill is introduced in Parliament in either the Second Reading Speech and or the explanatory memorandum.

Provisions frequently of concern to the Committee include –

1.1 Unexplained Retrospective Provisions

Where a Bill contains a provision that has retrospective operation (deeming, validating or backdated to the time of an announcement or 'press release') the Committee would expect that the Parliament will be provided with an explanation why it is desirable or necessary for the provision to be retrospective. The explanation should include the reason why a specific retrospective date is chosen, and provide sufficient information whether the retrospectivity may detrimentally affect any person. Where there is insufficient information provided to the Parliament, the grounds for an initial adverse report by the Committee will be that such a provision may constitute an undue trespass to rights and freedoms within the meaning of section 17(a)(i) of the Act.

1.2 Unexplained Wide Delegation of Powers and Functions Provisions

Where a Bill provides for a delegation of powers or functions in wide or unlimited terms, such as a delegation to 'any person', the Committee expects that Parliament will be informed as to the reasons why it is desirable or necessary to employ such a wide or unlimited delegation of powers. Where there is insufficient information provided to the Parliament the grounds for an initial adverse report by the Committee will be that such a provision may make rights, freedoms or obligations dependent upon insufficiently defined administrative powers within the meaning of section 17(a)(ii) of the Act.

1.3 Unexplained Commencement by Proclamation or Delayed Commencement in excess of 12 months

Where a Bill provides for the commencement of an Act by proclamation and no forced commencement provision is provided OR where the commencement is more than 12 months from Royal Assent, the Committee expects that Parliament will be informed as to the reasons why it is desirable or necessary to employ such a commencement provision. Where there is insufficient information provided to the Parliament, the grounds for any initial adverse report by the Committee will be that such a provision may constitute an inappropriate delegation of legislative power within the meaning of section 17(a)(vi) of the Act.

1.4 Insufficient or Unhelpful Explanatory Material

The Committee will write to Ministers where, in the Committee's opinion, explanatory material (clause notes and/ or the Second Reading Speech) are unhelpful in describing the purpose or effect of a key provision. On one occasion the Committee noted a clause note concerning professional disciplinary matters stated that '*Clause 3 amends section 23*'. The Committee considers that there would be very few, if any, circumstances where such brevity could be appropriately characterised as 'explanatory'. The Committee considers that clause notes are critical, particularly where the provision deletes or substitutes certain words in a section where it would be problematic comprehending the amendment in its full context without some aide memoir as to its purpose and intent.

The Committee endorses the following remarks from a recent report of the Senate Standing Committee for the Scrutiny of Bills –

The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In particular, the committee expects that an explanation will be given for any provision within a bill that appears to test or infringe the committee's terms of reference and provide reasons or justification for this.

*Senate Standing Committee for the Scrutiny of Bills – "The Quality of Explanatory Memoranda Accompanying Bills, 24 March 2004"

In particular the Committee will comment on deficient or inaccurate explanatory material provided in respect to the following types of legislative provisions –

- Powers of arrest, detention and deprivation of liberty
- Search and seizure powers without judicial warrant
- Creation of strict or absolute liability offences
- Reversal of onus of proof in criminal (or civil penalty) offences
- Abridgment of the right to silence or the privilege against self-incrimination
- Freedom of communication, assembly, movement, association, religion or conscience
- Infringement of the right to vote
- Denial of or failure to advise of, judicial or merits review of administrative decisions
- Denial or abridgment of the principle of 'fair trial' or the principles of natural justice
- Acquisition of property without adequate compensation
- Privacy of information and health records
- Inappropriately delegates legislative power (ie. allow regulations to alter the provisions of an Act, or allow regulations to establish a tax (as distinct from a fee for service or penalty)).

The grounds for an adverse report where an explanatory memorandum is plainly deficient or inadequate is that such a provision may test or invoke one or more of the Committee's terms of reference.

**Committee Room
17 October 2005**

Practice Note No. 2

The Practice Note advises Victorian Government legislation officers of the Committee's expectations in respect to information that should be provided to the Parliament concerning provisions in Bills that engage the Committee's terms of reference.

In its scrutiny of Bills the Committee may initially make an adverse report to Parliament in its Alert Digest in respect to a number of legislative practices included in a Bill that appear to engage or infringe the Committee's terms of reference in section 17 of the *Parliamentary Committees Act 2003*.

Where the Committee makes an initial adverse comment it will draw the provision to the attention of Parliament and will note that further advice will be sought from the responsible Minister. The Minister's response is published in the next Alert Digest. To avoid needless Ministerial correspondence the Committee strongly prefers that explanatory materialⁱⁱⁱ be provided at the time a Bill is introduced in Parliament.

The Committee notes the following matters –

2.1 Statement of Compatibility – section 28 of the Charter^v

The Committee will write to Ministers where, in the Committee's opinion, a Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right.

The Committee has determined that it will characterise a Statement of Compatibility as a form of explanatory memoranda equivalent in status to an explanatory memorandum accompanying a Bill.

The Committee considers that the provision to Parliament of reasonable explanatory material is critical to the Parliament's exercise of legislative power in an informed manner.

The Committee once again endorses the following remarks from a report of the Senate Standing Committee for the Scrutiny of Bills –

The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In particular, the committee expects that an explanation will be given for any provision within a bill that appears to test or infringe the committee's terms of reference and provide reasons or justification for this.

** Senate Standing Committee for the Scrutiny of Bills – "The Quality of Explanatory Memoranda Accompanying Bills, 24 March 2004"

2.2 Statute law revision type amendments and their explanatory notes

The Committee frequently encounters provisions in Bills that include one or more house keeping amendments in the form of statute law revision amendments. These amendments typically correct minor spelling, grammatical or cross-reference errors. On other occasions they may repeal spent or redundant provisions in Acts.

The Committee observes that often the explanatory memorandum in respect to such amendments will simply provide 'Clause 27 – makes statute law revision amendments'. The Committee does not consider this is a useful explanation of the purpose of the statute law revision. By way of contrast, when the Committee deals with Statute Law Revision Bills an explanation is always provided for each

ⁱⁱⁱ Explanatory material includes: (1) a Statement of Compatibility made under section 28 of the *Charter of Rights and Responsibilities Act 2006*; (2) an explanatory memorandum (clause notes) and (3) Ministerial correspondence.

^{iv} Charter of Human Rights and Responsibilities Act 2006.

item sought to be amended. Some examples found in a recent statute law revision Bill will demonstrate this point –

Item 26 – *Firearms Act 1996* – amends section 3 to repeal the definition of airgun as it is not in the correct alphabetical order.^v

Item 75 – *Water Act 1989* – amends section 33U(1)(e) to remove an unnecessary full stop; section 64GB(8) to remove an unnecessary hyphen; section 259(1)(c) to remove an unnecessary comma, and section 306(1)(b) to remove an unnecessary word.^{vi}

In the future scrutiny of Bills the Committee will seek reasoned explanatory material which succinctly characterises the revision or correction sought to be made.

Example:

Clause 13 makes statute law revision amendments. – Unhelpful

Clause 13 removes an unnecessary word /punctuation / corrects a cross reference in section 128 OR repeals section 128 as the provision is now spent and any remaining transitional or savings effect is preserved by the operation of section 14 of the Interpretation of Legislation Act 1984. – Acceptable

**Committee Room,
6 August 2007**

^v Statute Law Revision Bill 2006, Schedule.

^{vi} Statute Law Revision Bill 2006, Schedule.