No. 14 of 2011

Tuesday, 22 November 2011

On the

City of Melbourne Amendment Bill 2011

Criminal Procedure (Double Jeopardy and Other Matters) Bill 2011

Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Bill 2011

Education and Training Reform Amendment (Skills) Bill 2011

Emergency Management Legislation Amendment Bill 2011

Transport Legislation Amendment (Marine Safety and Other Matters) Bill 2011

Transport Legislation Amendment (Public Transport Development Authority) Bill 2011

Wills Amendment (International Wills) Bill 2011

The Committee

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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;

***Parliamentary Committees Act 2003*, section 17**

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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;

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (currently one penalty unit equals $122.14).

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.

'VCAT' refers to the Victorian Civil and Administrative Tribunal;

[ ] denotes clause numbers in a Bill.

Alert Digest No. 14 of 2011

City of Melbourne Amendment Bill 2011

Introduced	8 November 2011
Second Reading Speech	9 November 2011
House	Legislative Assembly
Member introducing Bill	Hon. Janette Powell MLA
Portfolio responsibility	Minister for Local Government

Background

The Bill amends the *City of Melbourne Act 2001* to enable electoral representation reviews for the City of Melbourne to be implemented by Orders in Council. Orders in Council will specify the number of councillors to be elected, whether the councillors will be elected at large or to represent wards and the location of ward boundaries, if required.

Extract from the Second Reading Speech:

> There will remain a difference between Melbourne and other councils. The councillors of the City of Melbourne are currently elected using an above-the-line voting system. This system will continue to be an option for the City of Melbourne but will not be available to other councils. In addition to other matters, orders in council will be able to specify whether or not above-the-line voting will be used.
>
> The Bill also makes minor amendments to the City of Melbourne Act to change the time when candidates must lodge particular electoral documents, from 4:00 p.m. to 12 noon on relevant days. This change is part of a process to bring City of Melbourne election processes into line with other council elections.

The Committee makes no further comment

Criminal Procedure (Double Jeopardy and Other Matters) Bill 2011

Introduced	8 November 2011
Second Reading Speech	9 November 2011
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Background

This Bill amends the *Criminal Procedure Act 2009* (the 'Act') to reform the law on double jeopardy based on a model approved by the Council of Australian Governments (COAG). The Bill makes other amendments to the Act and other Acts.

Notes:

Double jeopardy – the plea of 'autrefois acquit' (previous acquittal) – Bar to further proceedings

At common law the special plea of 'autrefois acquit' (previous or formerly acquitted) is a bar to a criminal prosecution on the basis that the prisoner has already been tried on the same charge on the same facts before a court and has been acquitted. The plea is available in circumstances where the accused was in jeopardy at a trial where the prosecution has placed evidence before a court and a decision made that the evidence was insufficient to support a conviction. The term 'double jeopardy', in essence, is the placing of an accused person at risk of being convicted of the same crime in respect of the same conduct on more than one occasion.

However, note that for the plea to operate the issues and the standard of proof must be identical.[1] A disciplinary hearing following a conviction in a criminal trial is not barred by any principle of double jeopardy.[2] Likewise, adverse disciplinary action is no bar to criminal proceedings that are based on the same facts.[3] Further, an acquittal at a criminal trial is not a bar to a disciplinary hearing arising out of the same facts.[4]

The *Criminal Procedure Act 2009* provides:

220 Form of plea of previous conviction or previous acquittal

(1) In a plea of previous conviction, it is sufficient for an accused to state that the accused has been lawfully convicted of the offence charged in the indictment.

(2) In a plea of previous acquittal, it is sufficient for an accused to state that the accused has been lawfully acquitted of the offence charged in the indictment.

(3) The rules of common law with respect to autrefois convict and autrefois acquit continue in force in respect of pleas of previous conviction and previous acquittal, respectively.

Note: The Bill provides that section 220(3) is to be subject to the new Chapter 7A. **[14]**

1 Cross on Evidence, Sixth Edition, [5130] at page 174

2 *Health Care Complaints Commission v. Litchfield* (1997) 41 NSWLR 630 at 634-5 (CA)

3 *Lewis v. Mogan* [1943] KB 376, *Health Care Complaints Commission v. Litchfield* (1997) 41 NSWLR 630 at 635 (CA)

4 *Bodica v. Deller and Public Service Appeals Tribunal* [1981] VR 183; *Basser v. Medical Board of Victoria* [1981] VR 953 at 972; *Health Care Complaints Commission v. Litchfield* (1997) 41 NSWLR 630 at 636 (CA)

The *Charter of Human Rights and Responsibilities Act 2006* provides:

> 26 Right not to be tried or punished more than once
>
> A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.
>
> **Note:** *Charter section 26* is modelled on article 14(7) of the *International Covenant on Civil and Political Rights (ICCPR)* which provides – *No one shall be liable to be tried or punished again for an offence for which he has been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

Double jeopardy in other jurisdictions

The Committee notes that a number of jurisdictions, including Canada and many continental systems, allow the reopening of trials that resulted in an acquittal in some circumstances. In a number of common law jurisdictions, similar limitations on the common law on double jeopardy to those in the present Bill have been proposed or enacted in recent years as follows:

- **New South Wales:** *Crimes (Appeal and Review) Act 2001,* Part 8
- **Queensland:** *Criminal Code 1899*, Chapter 68
- **South Australia:** *Criminal Law Consolidation Act 1935,* Part 10
- **Tasmania:** *Criminal Code 1924,* Chapter XLIV
- **Western Australia:** Criminal Appeals Amendment (Double Jeopardy) Bill 2011
- **New Zealand:** Criminal Procedure Bill 2010, ss. 151-156.
- **England and Wales:** *Criminal Procedure and Investigations Act 1996*, ss. 54-57; and *Criminal Justice Act 2003*, Part 10
- **Scotland**: *Double Jeopardy (Scotland) Act 2011*
- **Ireland:** *Criminal Procedure Act 2010,* Part 3

In 2007, the Council of Australian Governments issued an 'agreed model' on double jeopardy law reform. The ACT and Victorian governments reserved their position on the COAG recommendations. In 2001, the ACT Legislative Assembly considered an alternative limitation on double jeopardy, but the provision was not enacted.[5]

Extracts *from the Second Reading Speech:*

> The rule against double jeopardy is a longstanding common-law principle which provides that a person may not be tried for the same offence twice. Its purpose is to ensure that criminal proceedings can be brought to a conclusion and the outcome in a trial can be regarded as final. However, where a person has been acquitted, the rule against double jeopardy prevents that person from being retried even where important new evidence against them comes to light at a later date.
>
> … The Bill reforms the common law so that a new trial can be allowed in three situations.
>
> The first situation is where there is 'fresh and compelling' evidence against the person (for example, where new DNA evidence links a person to a murder or a person confesses to having committed a murder). The second situation is where the original acquittal was 'tainted' (for example, by the commission by the accused person or another person of an 'administration-of-justice offence' such as bribery of a witness or perjury). The acquittal will be tainted if it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted in the original trial. The third situation is where there is fresh evidence that the accused person has committed an administration-of-justice offence in respect of an acquittal and the prosecution seeks to bring charges for that offence notwithstanding the acquittal.

[5] Crimes Legislation Amendment Bill 2001, clause 68.

> … The Bill provides that the police cannot carry out or authorise a police reinvestigation in relation to a person who has previously been acquitted of an offence if police propose to exercise certain powers that directly affect that person unless the DPP gives written authorisation. The DPP must be satisfied that the reinvestigation will, or is likely to, result in sufficient new evidence and that it would be in the public interest to authorise a reinvestigation, before giving authorisation. An exception is made where the police must act urgently to preserve evidence.
>
> … The Bill provides that the DPP may file a direct indictment but must apply to the Court of Appeal within 28 days for an order that the prosecution for the charge in the indictment may continue and for the court to set aside the accused's previous acquittal. Failure to apply to the Court of Appeal without an extension for good cause will mean that the proceedings are automatically discontinued. There are also limits on making multiple applications.
>
> … the Court of Appeal must be satisfied that one of the three exceptions applies. Secondly, the court must be satisfied that a fair new trial is likely.
>
> … the Bill ensures that retrial applications can be made only for appropriately serious offences. … the 'fresh and compelling evidence' exception applies only to the most serious categories of offences, such as murder, manslaughter, arson causing death, serious drug offences, and serious aggravated forms of rape and armed robbery. The 'tainted acquittal' exception applies to a broader category of offences, with a maximum penalty of 15 years imprisonment or more. Finally, the exception for 'administration-of-justice offences' will apply with respect to trials for all indictable offences. The range of offences to which this exception applies is broader because prosecutions for some, but not all, administration-of-justice offences can already take place under the existing law.

Content

Amendments to the Act relating to the limitations of the rules on 'Double Jeopardy'

The Bill inserts a new Chapter 7A[6] to reform the common-law rules against double jeopardy. The Chapter provides that a person may be tried again for the same offence in certain special circumstances despite a previous acquittal. **[17]**

The circumstances where the Court of Appeal may set aside an acquittal and allow the prosecution of a charge to continue

In each of the 3 exceptions below the DPP may apply to the Court of Appeal for an order setting aside the acquittal or removing the acquittal as a bar to further proceedings and authorising the continuation of the prosecution of the charge. An accused person has the right to appear at the hearing of the application and may be legally represented.[7]

1. fresh and compelling evidence

   The exception applies only to very serious categories of offences such as murder and other offences prescribed by the Bill.[8] The evidence must be reliable, substantial and highly

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6 New sections 327A to 327S – Limitation on rules relating to double jeopardy

7 New section 327H

8 The offences prescribed by section 327M(2) are - (a) murder; (b) murder contrary to section 3A of the *Crimes Act 1958* (unintentional killing in the course or furtherance of a crime of violence); (c) conspiracy to commit murder (section 321 of the *Crimes Act 1958*); (d) incitement to commit murder (section 321G of the *Crimes Act 1958*); (e) attempting to commit murder (section 321M of the *Crimes Act 1958*); (f) manslaughter; (g) arson causing death (section 197A of the *Crimes Act 1958*); (h) trafficking in a drug or drugs of dependence—large commercial quantity (section 71 of the *Drugs, Poisons and Controlled Substances Act 1981*); (i) cultivation of narcotic plants—large commercial quantity (section 72 of the *Drugs, Poisons and Controlled Substances Act 1981*); (j) rape (section 38 of the *Crimes Act 1958*), compelling sexual penetration (section 38A of the *Crimes Act 1958*) or armed robbery (section 75A of the *Crimes Act 1958*) if the offence is committed in circumstances where— (i) torture being the deliberate and systematic infliction over a period of time of severe pain on the victim) was involved in the commission of the offence; or (ii) the offender caused really serious injury to the victim; or (iii) the offender threatened to cause death or really serious injury to the victim; (k) a substantially similar offence against a previous enactment or the law of a place outside Victoria corresponding to an offence referred to in this subsection.

probative in the context of the issues in dispute at the trial of the offence. The evidence must not have been able to be produced at the original trial even with the exercise of reasonable diligence.[9]

(Refer to the Charter Report in respect to the categories of offences that fall under this exception)

2. tainted acquittals[10]

   The exception[11] is limited to serious offences where the penalty is or exceeds 15 years imprisonment. The exception arises where the person or another person has been convicted of an administration of justice offence in connection with the trial resulting in the acquittal. The Court of Appeal must be satisfied that it is more likely than not, but for the administration of justice offence, the accused person would have been convicted in the original trial.

3. administration of justice offence[12]

   The exception is broader than the other exceptions and applies to any indictable offence where the Court of Appeal is satisfied that there is fresh evidence of the commission of an administration of justice offence in relation to the previous acquittal of that indictable offence.

In each of the three exceptions above the Court of Appeal must also be satisfied that a new trial for the offence would be fair having regard to –

- the length of time since the commission of the alleged offence
- any failure on the part of police or prosecution to act with reasonable diligence or expedition in making the application
- any other relevant matter

Other important provisions in Chapter 7A

Police reinvestigation after acquittal – The DPP must first give written authorisation before police may reinvestigate an offence where there has been a previous acquittal in respect to that offence. An application for such reinvestigation may only be made at the level of Assistant Commissioner or above. This procedure may only be by-passed in necessitous circumstances requiring expeditious action to prevent the reinvestigation being prejudiced and where it is not reasonably practicable to apply to the DPP.[13]

Bail – If an accused is in custody following the filing of a direct indictment under new Chapter 7A there is a presumption of release on bail regardless of the offence charged, pending determination of the application by the Court of Appeal.[14] Where the Court makes an order that a new trial may proceed it may make an order for bail of the accused as it thinks appropriate.[15]

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9 New section 327M, New section 327C defines 'fresh and compelling evidence'

10 New section 327D defines *'tainted acquittal'* as one where the person or another person has been convicted of an administration of justice offence in connection with the trial resulting in the acquittal and it is more likely than not that, had it not been for the administration of justice offence the person would have been convicted at trial.

11 New section 327L

12 New section 327B defines '*administration of justice offence'* as perjury; subornation of perjury (procuring or inducing another person to give false evidence); perverting, attempting to pervert the course of justice, conspiracy to pervert the course of justice; bribery of a judge of the County Court or the Supreme Court; or a similar offence outside Victoria.

13 New section 327E

14 New section 327G

15 New section 327O(6)

Only one application permitted – The DPP may apply to the Court of Appeal only once in relation to a particular acquittal.[16]

Permanent stay where fair trial not likely – Where the Court of Appeal is not satisfied that a fair trial is likely, the court must order a permanent stay of the direct indictment.[17]

Right not to be punished more than once – *DPP must elect offence to prosecute* – If on a successful application by the DPP to the Court of Appeal, the DPP must elect whether to proceed on the administration of justice offence or the offence of which the accused has been acquitted.[18]

Prohibition on prosecutorial comment – Where a new trial is ordered under new Chapter 7A the prosecutor is prohibited from making comment that the Court of Appeal has been satisfied that there is fresh and compelling evidence against the accused or that it is more likely than not that but for the administration of justice offence the accused would have been convicted of the offence at the earlier trial.[19]

> Note: Section 18 of the *Supreme Court Act 1986* also makes provision for prohibition on publication of the whole or part of a proceeding.

Other amendments to the Act

The Bill amendments provisions relating to the early prosecution disclosure in summary proceedings at a first mention hearing. **[6]** The Bill also clarifies that deemed convictions from certain infringement notices form part of an offender's criminal record for the purposes of sentencing. **[3-5, 7-12, 15 and 16]**

Amendments to other Acts

The Bill amends the *Appeal Costs Act 1998* to provide that the Court of Appeal may grant an indemnity certificate, if it is in the interest of justice to do so, where the DPP applies to continue a prosecution after a previous acquittal pursuant to proposed Chapter 7A of the *Criminal Procedure Act 2009*. The certificate may cover the accused's own costs of the DPP's application to the Court and any additional costs that the accused pays as a consequence of the order allowing for the continuation of the prosecution. **[21]**

The Bill makes retrospective statute law revision amendments to the following Acts:

- *Confiscation Amendment Act 2010* retrospective to 12 October 2010 (the date that Act commenced operation) to correct section number references and the proper location of an insertion. **[2(2) and 22(5)]**
- *Equal Opportunity Act 201*0 retrospective to 27 April 2010 (the date of Royal Assent of that Act) to correct two erroneous reference in sections 4(1) and 56(5) to the *Owners Corporations Act 2006*. **[2(3) and 22(6)]**
- *Equal Opportunity Amendment Act 2011* retrospective to 21 June 2011 (the date of Royal Assent to that Act) to correct the terminology in an item of the amending Act to be consistent with the terminology for 'disability' as used in the principal Act. **[2(4) and 22(7)]**

[16] New section 327J

[17] New section 327O

[18] New section 327P

[19] New section 327R

Committee comments

Application of proposed double jeopardy limitations – to past acquittals – Whether retrospective application of law – Public interest in finality of proceedings

New section 441(4) is a transitional and provides that the new Part 7A applies on and from the commencement of the section to an acquittal, irrespective of whether the acquittal occurred before, on or after the commencement of new Part 7A. **[18]**

The Statement of Compatibility[20] provides that the transitional provision does not engage section 27 of the *Charter* concerning retrospective criminal laws as the double jeopardy limitations proposed by the Bill do not change criminal liability, rather they change the circumstances in which a person may be tried and convicted of an offence. The Committee notes that the Bill limits an application by the DPP to one application only in respect to an acquittal (new section 327J).

Whilst the Committee appreciates the distinction between substantive criminal law and procedural law it is nevertheless the case that the proposed changes will expose persons to criminal liability in circumstances where the current plea of autrefois acquit provides a bar or an estoppel to a second trial for the same offence based on the same or substantially the same facts.

The Committee observes that a major rationale in support of the current plea of 'autrefois acquit' is the proposition that the public interest is served in promoting finality and certainty to criminal proceedings. This proposition is recognised in the Statement of Compatibility and the Second Reading Speech.

The Statement of Compatibility and the Second Reading Speech also contend that the rights encompassed by the plea of 'autrefois acquit' may be subject to reasonable limitations.

The Committee observes that in contrast to the provisions in the Victorian Bill applying the provisions in new Chapter 7A to past acquittals, the legislative regime in Queensland[21] limiting the double jeopardy rule only applies to acquittals entered after the commencement of the legislation.

Subject to the Committee's Charter report below, the question whether the limitations on the special plea of 'autrefois acquit' as they may apply to past acquittals, are proportionate and reasonable, are matters for the consideration of the Parliament.

Charter report

Equality – Retrial for manslaughter where fresh and compelling evidence – Exclusion of manslaughter of children under 6

Summary: The Committee will write to the Attorney-General noting that the different treatment of manslaughter of a person aged 6 and over and manslaughter of a child under 6 may engage the Charter's equality rights and seeking further information as to the inclusion of manslaughter but not child homicide as offences that may be the subject of applications to set aside acquittals when there is fresh and compelling evidence.

The Committee notes that clause 17, inserting a new section 327M into the *Criminal Procedure Act 2009*, empowers the Court of Appeal, where there is fresh and compelling evidence of an acquitted person's guilt, to set aside an acquittal of an offence specified in sub-section 327M(2).

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[20] Note: The Statement of Compatibility as introduced in the Legislative Assembly on 9 November 2011 erroneously refers to clause 20 inserting 441(7) in the *Criminal Procedure Act 2009.* The correct reference should be to clause 18 inserting 441(4) into the *Criminal Procedure Act 2009.*

[21] *Criminal Code 1899* (Qld)

The Committee observes that, while new sub-section 327M(2) includes 'manslaughter' in the list of offences, it does not include child homicide, which is defined in s. 5A of the *Crimes Act 1958* as follows:

> *A person who, by his or her conduct, kills a child who is under the age of 6 years in circumstances that, but for this section, would constitute manslaughter is guilty of child homicide, and not of manslaughter, and liable to level 3 imprisonment (20 years maximum).*

The Committee will write to the Attorney-General noting that the different treatment of manslaughter of a person aged 6 and over and manslaughter of a child under 6 may engage the Charter's equality rights[22] and seeking further information as to the inclusion of manslaughter but not child homicide in new sub-section 327M(2).

Privacy – Reinvestigation of an offence of which a person has previously been acquitted – Investigation of administration of justice offences – Arrest and consensual and covert investigations

Summary: New section 327E, by supplementing the common law on double jeopardy with an express restriction on the reinvestigation of acquitted person, promotes the right in Charter s. 13(a) against arbitrary or unlawful interferences in privacy. However, some features of new section 327E may limit the protection for privacy that the section offers. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 17, inserting a new section 327E(2) into the *Criminal Procedure Act 2009*, prohibits a police officer from conducting or authorising a 'reinvestigation of an offence of which a person has previously been acquitted' (outside of situations of urgency) without written authorisation from the Director of Public Prosecutions. New section 327E(4)(a) requires that that the Director be satisfied that there 'is, or… is likely to be, sufficient new evidence of the commission of the offence' and that the reinvestigation 'is in the public interest'. **The Committee considers that new section 327E, by supplementing the common law on double jeopardy with an express restriction on the reinvestigation of acquitted persons, promotes the right in Charter s. 13(a) against arbitrary or unlawful interferences in privacy. However, the Committee notes that some features of new section 327E may limit the protection for privacy that the section offers.**

First, new section 327E(2) is limited to the reinvestigation of 'an offence of which a person has previously been acquitted'. This is narrower than similar bans in most other Australian jurisdictions, which also limit the reinvestigation of administration of justice offences associated with the earlier acquittal, e.g. an investigation into whether the acquitted person committed perjury at the trial that led to that acquittal.[23]

Second, new section 327E(1) defines 'reinvestigation' as follows:

> reinvestigation, in relation to an offence of which a person has previously been acquitted, means—
>
> (a) the questioning and search of the person; or

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[22] Charter s. 8(3) provides for 'equal protection of the law without discrimination.' ('Age' is an attribute for the purpose of the Charter's definition of discrimination: see Charter s. 3 and *Equal Opportunity Act 2010*, s. 6(a)). See also Charter s. 17(2), which provides every child with a right 'without discrimination, to such protection as is in his or her best interests and his needed by him or her by reason of being a child'.

[23] *Crimes (Appeal and Review) Act 2001* (NSW), s. 109(1) and see s. 99(1)(b); *Criminal Code 1899* (Qld), s. 678I(1) and see s. 678(2); *Criminal Code 1924* (Tas), s. 397AE(1); Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new section 46C(1)). South Australia has a similar limit to new section 327E(2): see *Criminal Law Consolidation Act 1935* (SA), s. 335.

(b) the conduct of a forensic procedure on the person and the taking of the person's fingerprints in accordance with the *Crimes Act 1958*

(c) the search of property or premises owned or occupied by the person and the seizure of anything found in or on the property or premises, including any vehicle; or

(d) the use of surveillance devices in accordance with the *Surveillance Devices Act 1999*; or

(e) the doing of anything authorised by a warrant issued under Part 2-5 of the *Telecommunications (Interception and Access) Act 1979* of the Commonwealth.

The explanatory memorandum for new section 327E remarks:

> This new section does not apply to an investigation generally. It concerns the exercise of specific investigative powers (eg search and seizure) in relation to the offence of which the person has previously been acquitted.

While the Committee considers that it may be appropriate for the police to reinvestigate whether an acquitted person has committed an offence, it notes that new section 327E(1) may be narrower than other similar Australian laws regulating reinvestigation in respect of its application to: arresting the acquitted person;[24] other investigatory acts that involve the listed powers;[25] investigatory acts that occur with the acquitted person's consent;[26] and investigatory acts that do not rely on the police's statutory and common law investigatory powers.[27] On the other hand, paras (d) and (e) of new section 327E(1) go further than most similar regulations of reinvestigation in other Australian jurisdictions and the COAG model on double jeopardy reform.

The Committee will write to the Attorney-General seeking further information as to the exclusion of administration of justice offences associated with the original trial from the regulation of reinvestigation in new section 327E; and the application of new section 327E to arrest, other acts that involve the listed powers and consensual and covert conduct. Pending the Attorney-General's response, the Committee draws attention to new section 327E.

Fair hearing – Presumption of innocence – Prompt notification of the nature and reason for the charge – Application to set aside or remove an acquittal as a barrier to a prosecution and trial

Summary: Clause 17 provides for an acquitted person to be charged with the offence he or she was acquitted of and for an application to set aside or remove the acquittal as a barrier to a retrial. The

[24] For example, in order to subject the acquitted person to an identification parade: *Crimes (Appeal and Review) Act 2001* (NSW), s. 109(2); *Criminal Code 1899* (Qld), s. 678I(2); *Criminal Law Consolidation Act 1935* (SA), s. 335(5)(a); *Criminal Code 1924* (Tas), s. 397AE(2); Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new section 46C(2)). The Western Australian provision does not expressly include arrest, but the law defines investigation in an inclusive manner that appears to include arrest: see new section 46C(1).

[25] For example, arranging for a DNA profile gathered from the acquitted person in relation to an unrelated to investigation to be compared to DNA profiles associated with the offence: compare *Crimes (Appeal and Review) Act 2001* (NSW), s. 109(2); *Criminal Code 1899* (Qld), s. 678I(2); *Criminal Law Consolidation Act 1935* (SA), s. 335(5)(a); *Criminal Code 1924* (Tas), s. 397AE(2); Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new section 46C(2)). The South Australian and Western Australian provisions do not expressly include an act that 'involves' a listed power, but they define investigation in an inclusive manner that appears to include such acts: see, respectively, s. 335 and new section 46C(1).

[26] For example, asking the acquitted person to provide a handwriting sample: compare *Crimes (Appeal and Review) Act 2001* (NSW), s. 109(2); *Criminal Code 1899* (Qld), s. 678I(2); *Criminal Law Consolidation Act 1935* (SA), s. 335(5)(a); *Criminal Code 1924* (Tas), s. 397AE(2); Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new section 46C(2)). The South Australian provision does not expressly include consensual investigations, but investigation is defined in an inclusive manner that would appear to extend to both consensual and covert investigations: see s. 335(5).

[27] For example, placing the acquitted person under visual surveillance, gathering shed DNA or conducting a covert operation to prompt the acquitted person to make an admission. The terms of the explanatory memorandum appear to confine new section 327E(1) to investigatory acts that can require authorisation by the common law or a statute.

Committee will write to the Attorney-General seeking further information as to the compatibility of clause 17 with the Charter's rights to a fair hearing and of people charged with criminal offences.

The Committee notes that clause 17, inserting new sections 327F and 327H into the Criminal Procedure Act 2009, provides for an acquitted person to be charged with the offence he or she was acquitted of and for an application to set aside or remove the acquittal as a barrier to a retrial. As a person (twice) charged with an offence, the acquitted person has the rights set out in Charter ss. 24 and 25 for people charged with criminal offences. The Committee observes that clause 17 may engage these rights in a number of ways:

First, the acquitted person has the right under Charter s. 24(1) to a fair hearing at the application to set aside or remove the acquittal as a limit to a retrial. While, under clause 17, most factual disputes relating to the offence the acquitted person is charged with will determined at the retrial itself in the same way as other criminal trials, the situation is different when an application is made for a retrial of an offence of rape, compelled sexual penetration or armed robbery based on fresh and compelling evidence. Under new section 327M(2)(j), an application based on fresh and compelling evidence can only succeed for these offences if the offence was committed in circumstances where either 'torture was involved' or the offender caused or threatened to cause really serious injury to the victim. New sections 327F(2)(b) and 327M(1)(b) provide that these circumstances must be determined at the application for a retrial, rather than the retrial itself.[28] The Committee notes that, while new section 327H(8) gives the acquitted person the right to appear and be represented at the hearing of the application, new Chapter 7A does not make express provision for how disputes of facts will be resolved by the Court of Appeal.[29]

Second, the acquitted person has the right under Charter s. 25(1) to be presumed innocent until proved guilty. Unless and until the acquittal is set aside, this right prohibits official acts casting doubt on the acquitted person's innocence of the offence.[30] However, similarly to the UK double jeopardy reform statute, new section 327H(4) requires the Director of Public Prosecutions to charge the acquitted person before any application can be made to set that acquittal aside.[31] The Committee notes that a charge has no legal effect on the presumption that the acquitted person is innocent until proved guilty and that a committee appointed by the Standing Committee of Attorneys-General described an arrest or charge as an 'important procedural step… required before an application for retrial can proceed.'[32] While the purpose of this procedure may be to ensure that the acquitted person appears at the hearing of the application, the proposed Western Australian double jeopardy reform law provides an alternative mechanism to achieve this end: giving the Court of Appeal a discretion to issue a summons to the acquitted person to appear.[33]

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28 It appears that an application under Chapter 7A (as part of a 'prosecution for an offence') is a 'criminal proceeding' under the *Evidence Act 2008* and therefore that these circumstances (comprising the 'case of the prosecution' at the hearing of the application) must be proved beyond reasonable doubt.

29 Sections 316-320 of the *Criminal Procedure Act 2009*, which regulate procedures for finding facts in appeals, do not apply to new Chapter 7A. (Compare *Crimes (Appeal and Review) Act 2001* (NSW), s. 105(6); *Criminal Code 1899* (Qld), s. 678G(9); *Criminal Code 1924* (Tas), s. 397AC(9); and Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new section 46G(2)(a)).)

30 See *Sekanina v Austria* [1993] ECHR 37, [30]; *Rushiti v Austria* [2000] ECHR 106, [31]. See also *Adams, R (on the application of) v Secretary of State for Justice* [2011] UKSC 1, [111].

31 See *Criminal Justice Act 2003* (UK), s. 80(2), requiring the acquitted person to be charged no later than two days after the application to set aside the acquittal.

32 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, November 2003, p. 117. The discussion links this procedure to the regulation of police reinvestigations of acquitted persons.

33 Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new sections 46D and 46F(1)(a)). The COAG model on double jeopardy reform and all other Australian jurisdictions allow the arrest of the acquitted person (or issuing a warrant for his or her arrest) as an alternative to charging the acquitted person prior to the hearing: see *Crimes (Appeal and Review) Act 2001* (NSW), s. 105(2); *Criminal Code 1899* (Qld), s. 678G(3); *Criminal Law Consolidation Act 1935* (SA), s. 337(2)(a); *Criminal Code 1924* (Tas), s. 397AC(3).

Third, the acquitted person has the right under Charter s. 25(2)(a) 'to be informed promptly and in detail of the nature and reason for the charge'. While clause 19, inserting a new clause 14 into Schedule 1 to the *Criminal Procedure Act 2009*, requires that the indictment state that an application will be made and to identify the relevant charges, new section 327H permits the DPP to not notify the acquitted person of the basis of that application (including whether it will rely on the earlier acquittal being tainted or on fresh and compelling evidence) until 35 days (or more, if there is an extension) after the charge. Also, in the case of a charge of rape, compelled sexual penetration or armed robbery, new section 327F(2)(a) permits the DPP to not specify in the charge which of the three circumstances in new section 327M(2)(j) (torture, injury and/or threats) will be relied upon to satisfy the precondition for retrials based on fresh and compelling evidence in new section 327MC(1)(b).

The Committee will write to the Attorney-General seeking further information as to the compatibility of clause 17 with the Charter ss. 24 and 25, in particular the compatibility of new sections 327F(2)(b) and 327M(1)(b) with the right to a fair hearing, new section 327H(4) with the right to the presumption of innocence and new sections 327F(2)(a) and 327H with the right to be promptly informed of the nature and reason for the charge. Pending the Attorney-General's response, the Committee draws attention to clause 17.

Right not to be retried if finally acquitted – Limitation on common law on plea of autrefois acquit – – Express requirement that retrial likely to be fair – No express requirement that retrial in the interests of justice – Whether reasonable limit

Summary: Clauses 14, 17 and 18 may limit the Charter's right not to be retried for an offence after being finally acquitted of it. The Committee will write to the Attorney-General seeking further information as to a requirement that a court may only order a retrial if it is satisfied that "in all the circumstances it is in the interests of justice for the order to be made", in comparison to the requirement in new sections 327L-327N that the Court of Appeal be satisfied that a new trial is likely to be fair.

The Committee notes that clause 14, amending existing s. 220(3) of the *Criminal Procedure Act 2009*, makes the common law on the plea of autrefois acquit (which presently operates to prevent a person who has been acquitted of an offence from being retried for that offence) subject to a new Chapter 7A inserted by clause 17. New section 327O(1)(a) permits the Court of Appeal to set aside or remove an acquittal as a bar to the acquitted person being tried for the offence they were acquitted of. In addition, new section 32O(1)(b) permits the Court of Appeal to remove an acquittal as a bar to the acquitted person being tried for an administrative of justice offence (i.e. so that the courts cannot rely on that acquittal as a basis for staying that trial as an abuse of process.)

Charter s. 26 provides:

> A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.

The Statement of Compatibility remarks:

> The primary right engaged by the proposed double jeopardy reforms is the right not to be tried or punished more than once in section 26 of the Charter Act. The proposed exceptions to the double jeopardy rule impose a limitation on the right in section 26 of the charter act but in my view they do so in a way that can be demonstrably justified under section 7(2). In summary, this is because of the tightly defined circumstances in which retrials are permitted, the limited categories of offences which may be retried, and the procedural protections in the proposals which guard against abuse of process by police or prosecuting authorities.
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> …

> This bill strikes an appropriate balance between the right of individuals not be [sic] tried twice for the same offence and the public interest in ensuring that serious offenders are brought to justice.

The Committee notes that Charter s. 26 allows retrials of acquitted persons, but only if the acquittal is first quashed through appellate procedures arising from the trial that led to the original acquittal.[34] However, under new Chapter 7A:

- past acquittals (i.e. prior to the commencement of clause 17) can be set aside through a procedure that did not exist at the time of the acquittal (clause 18, inserting a new section 440(4) into the *Criminal Procedure Act 2009*)[35]
- an application to set aside an acquittal can be made at any time after the acquittal (see new sections 327F and 327H)[36]
- acquittals can be set aside without a finding that there was an error in the earlier proceedings (see new section 327M)[37]

The Committee therefore considers that clauses 14, 17 and 18 may limit the Charter's right not to be retried for an offence after being finally acquitted of it.

The Statement of Compatibility remarks:

> The limitations on the double jeopardy rule proposed in the bill are exceptions relating to: (1) fresh and compelling evidence; (2) tainted acquittals; and (3) administration of justice offences. I consider that, together, these exceptions serve purposes that are valuable and important. Their primary purpose is to ensure that individuals acquitted of serious crimes are not able to escape punishment where compelling new evidence of guilt emerges or where it is clear that the original acquittal was 'tainted' in some way by an orchestrated perversion of the original trial which resulted in the acquittal. The exceptions also achieve other important goals such as promoting community safety, fair hearings and just outcomes, the interests of victims of crime and public confidence in the criminal justice system.
>
> The bill tightly defines the circumstances in which retrials may be allowed with respect to each of the three exceptions. In relation to all three exceptions to the double jeopardy rule, the DPP must apply to the Court of Appeal to set aside the previous acquittal or remove it as a bar to further proceedings. The Court of Appeal must be satisfied that one of the three exceptions applies and that a fair new trial is likely.

While the Committee considers that the purpose of ensuring that people who are acquitted of serious crimes are not able to escape punishment where compelling new evidence of guilt emerges (e.g. DNA evidence) or the acquittal was tainted by an orchestrated perversion of the original trial (e.g. intimidating a witness) may justify limits on Charter s. 26, it notes that new Chapter 7A may permit retrials in circumstances that fall outside these scenarios.

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34 *R v Morgentaler* [1998] 1 SCR 30, 155-156.

35 That is, through a process that was not 'in accordance with the law' that existed at the time of the acquittal.

36 The only bar on making an application is where a previous application under new Chapter 7A has already been made in relation to the acquittal or, in the case of applications on the basis of fresh and compelling evidence, where the acquittal arose in a retrial order under new Chapter 7A. See *Corp. professionnelle des médecins v. Thibault* [1988] 1 S.C.R. 1033, [24], rejecting an argument that 'the accused would have to go through two trials in addition to all the true appeals – before it could be said that he had been finally acquitted' on the basis that 'it contradicts the actual spirit' of Canada's equivalent to Charter s. 26.

37 See *Corp. professionnelle des médecins v. Thibault* [1988] 1 S.C.R. 1033, [24], holding that 'An accused who is acquitted by a judgment containing no error is "finally acquitted"' within the meaning of' the Canadian equivalent to Charter s. 26.

First, new section 327D defines an acquittal to be 'tainted' when the outcome of the original trial was changed by an administration of justice offence by any person.[38] The Committee notes that this may permit a retrial in circumstances other than the scenario of an 'orchestrated perversion of the original trial' referred to in the Statement of Compatibility and some overseas jurisdictions' provisions on tainted acquittals.[39] Also, there is no requirement in new section 327D that either that the acquitted person have been the intended beneficiary of the administration of justice offence[40] or that the taint of the original trial be remedied (or even remediable) at the retrial.[41]

Second, new section 327C(1)(a) defines 'fresh' in terms of whether or not the evidence was (or could have been) 'adduced at the trial' (rather than whether or not it was 'available'[42], to be adduced.) Also, new section 327C(2) provides:

> Evidence that would be admissible on a new trial under this Chapter is not precluded from being fresh or compelling only because it would not have been admissible in the earlier trial of the offence that resulted in the acquittal.

The effect of these provisions is that items of evidence that were in the possession of the prosecution at the original trial may become 'fresh' because the rules of evidence have since changed to make them admissible at a retrial. The Committee notes that the effect of new sections 327C(1)(a) and 327C(2) is that new section 327M may permit retrials in circumstances other than the scenario of 'compelling new evidence of guilt emerg[ing]' referred to in the Statement of Compatibility. For example, the enactment of the *Evidence Act 2008* (which generally widened the admissibility of evidence, for example hearsay evidence) may mean that there is now 'fresh and compelling' evidence in relation to many pre-2010 acquittals. Moreover, future changes to the rules of evidence (including changes prompted by a particular acquittal) may generate new grounds for retrials of past acquittals (including the particular acquittal that prompted the change.)

Third, new section 327N, which provides for the removal of an acquittal as a barrier to prosecuting the acquitted person for an administration of justice offence is available if the acquitted person stated in his or her testimony that he or she was not guilty and there is 'fresh' (rather than 'fresh and compelling') evidence that he or she was guilty. The Committee notes that this provision may provide for retrials in circumstances other than the scenarios of a 'perversion of the original trial' or 'compelling new evidence of guilt emerg[ing]' referred to in the Statement of Compatibility. For example, new section 327N therefore may permit the retrial of the question of an acquitted person's guilt of any indictable offence where the defendant testified at the original trial and some further evidence of guilt has since emerged (or become admissible), whether or not that evidence is substantial, reliable or highly probative.

The Committee notes these aspects of new Chapter 7A are consistent with the COAG model on double jeopardy reform and are reflected in all Australian double jeopardy reform statutes. However, the COAG model and all Australian statutes other than South Australia's expressly bar an order

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38 For example, a significant prosecution witness at the original trial may have committed perjury at his or her initiative, rather than the perjury being suborned by others.

39 See the *Criminal Procedure and Investigations Act 1996* (UK), s. 54, which limits the regime for tainted acquittals to 'an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness)' and the *Double Jeopardy (Scotland) Act 2011* (Scotland), s. 2(8), which excludes perjury and false statements, but includes subordination of perjury and complicity in false statements in its regime for tainted acquittals.

40 For example, the definition of tainted acquittal would appear to be satisfied where the acquittal was due to the exclusion of prosecution evidence because of criminal conduct by an investigating officer.

41 For example, because a prosecution witness who committed perjury at the original trial may still commit perjury at the later trial. Alternatively, the prosecution witness may be unavailable at the original trial or the prosecution may not call the witness due to concerns about the witness's credibility.

42 See *Ratten v R* 1974) 131 CLR 510; *Mickelberg v R* (1989) 167 CLR 259.

permitting a retrial unless it is in the interests of justice to make the order.[43] By contrast, new sections 327L-327N require that the Court of Appeal consider whether the retrial is likely to be fair (including the effect of delay, the role of the police or prosecution in that delay and any other consideration relevant to fairness.)[44] The Committee observes that the Court of Appeal may consider other aspects of the interests of justice (e.g. whether the flaw in the original trial is sufficient to merit a retrial, whether subsequent developments properly merit setting aside a finalised acquittal and whether any retrial will further the public interest) when exercising its discretion on whether to allow an application.[45]

The Committee will write to the Attorney-General seeking further information as to a requirement that a court may only order a retrial of an acquitted person if it is satisfied that "in all the circumstances it is in the interests of justice for the order to be made", in comparison to the requirement in new sections 327L-327N that the Court of Appeal be satisfied that a new trial is likely to be fair. Pending the Attorney-General's response, the Committee draws attention to clauses 14, 17 and 18.

The Committee makes no further comment

[43] Compare *Crimes (Appeal and Review) Act 2001* (NSW), ss. 100(1)(b) & 101(1)(b); *Criminal Code 1899* (Qld), ss. 678B(1)(b) & 678C(1)(b); *Criminal Code 1924* (Tas), ss. 392(1)(b), 393(1)(b) & 394(1)(b); Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new sections 46H(2)(d) & (3)). The exception is South Australia, which has the same test as new sections 327L-327N: *Criminal Law Consolidation Act 1935* (SA), ss. 336(1)(b), 337(1)(b) & 338(1)(b).

[44] All Australian double jeopardy reform statutes also bar a retrial unless the retrial is likely to be fair: *Crimes (Appeal and Review) Act 2001* (NSW), s. 104(2); *Criminal Code 1899* (Qld), s. 678F(2); *Criminal Law Consolidation Act 1935* (SA), ss. 336(1)(b), 337(1)(b) & 338(1)(b); *Criminal Code 1924* (Tas), s. 397(2); Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (WA), s. 4 (new section 46K(2)).

[45] See *R v PL* [2009] NSWCCA 256, [87]-[90].

Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Bill 2011

Introduced	25 October 2011
Second Reading Speech	9 November 2011
House	Legislative Assembly
Member introducing Bill	Hon. Peter Walsh MLA
Portfolio responsibility	Minister for Agriculture and Food Security

Background

The Bill amends the *Domestic Animals Act 1994* to:

- amend the definition of 'domestic animal business' to capture breeding establishments with three or more fertile female dogs or three or more fertile female cats. **[3]**
- provide an offence for a person to advertise the sale of a dog or cat unless the microchip identification number of the animal or the council registered number for the domestic animal business and the name of the Council issuing the number is included in the advertisement or notice. **[5]**
- allow council authorised officers to enter and inspect premises to determine whether the premises comply with the relevant code of practice prior to a Council registering the premises as a domestic animal business. **[7]**
- allow an authorised officer to enter a breeding establishment and seize and dispose of dogs and cats if the premises are not registered following notices directing registration; where registration has been revoked; or where an operator has been found guilty of conducting a domestic animal business not in accordance with the relevant code of practice and a court has made prohibition orders against the operator. *The Statement of Compatibility discuses the right to property under Charter section 20.* **[11]**
- provide for the giving away of seized animals and for disposal in limited circumstances. **[12, 15, 19]**
- provide for new court orders to ban ownership or impose conditions on a person with regard to the ownership of dogs or cats or for operating or working in a domestic animal business. **[17]**
- increase a number of penalties for the offences of:
    - conducting a domestic animal business on unregistered premises **[6]**
    - conducting a domestic animal business not in compliance with the relevant code of practice **[8]**
    - selling a 'pet shop' animal other than from a registered domestic animal business or from a private residence **[22]**
- establish the Animal Welfare Fund to receive payments out of consolidated revenue. The Bill provides for payments out of the Animal Welfare Fund for the making of grants to organisations for animal welfare related purposes such as providing animal shelter services, or providing education programs on responsible ownership of animals. **[23]**

The Bill amends the *Prevention of Cruelty to Animals Act 199*4 to increase the penalties in respect to cruelty and aggravated cruelty to an animal. **[25 and 26]**

The Bill also amends the *Confiscation Act 1997* to provide that the offences under the:

- *Domestic Animals Act 1994* of conducting a domestic animal business on unregistered premises and a second or subsequent offence of conducting a domestic animal business not in accordance with the relevant Code of Practice
- *Prevention of Cruelty to Animals Act 1986* of cruelty and aggravated cruelty

  are offences in respect of which the Court may make orders to restrain property, freeze interests and seize and forfeit property where those offences relate to the conduct of a breeding domestic animal business. **[27]** *The Statement of Compatibility discusses forfeiture of property in context of Charter section 20 (Property rights)*

Content

Presumption of innocence – Reverse onus – Cruelty to animals – Avoidance of liability – Owner has legal burden to prove that animal in care of other person at time of offence

The Bill doubles the penalty for the offence of cruelty to animals in section 9(1) of the *Prevention of Cruelty to Animals Act 1986*. The offence contains a reverse legal onus in section 9(2) which allows an owner of an animal charged with cruelty to avoid liability if the owner can prove that, at the time of the alleged offence, the owner had entered into an agreement with another person whether the animal was being cared for by that other person. In the context of Charter section (Rights in criminal proceedings – presumption of innocence) the Statement of Compatibility discusses the rationale for the reverse legal burden rather than an evidentiary burden. **[25]**

The Committee makes no further comment

Education and Training Reform Amendment (Skills) Bill 2011

Introduced	8 November 2011
Second Reading Speech	10 November 2011
House	Legislative Assembly
Member introducing Bill	Hon. Martin Dixon MLA
Portfolio responsibility	Minister for Education

Background

The Bill amends the *Education and Training Reform Act 2006* (the 'Act') to:

- clarify and put beyond legal doubt that TAFE institutes and adult education institutions have the power to operate outside Victoria, whether interstate or overseas. The Bill also includes validation provisions for past actions of TAFE institutions and adult education institutions in conducting operations outside Victoria. Further, the Bills ensures that students who undertook placements
- overcome identified gaps and technical problems in the Act that authorise work placements and to ensure WorkCover protection to students and their host employers. The Bill ensures that students who undertook placements in the past, and their host employers, will have the same protection under WorkCover as if the amendments had been in force at that time.

The Bill amends the *Accident Compensation Act 1985* in respect to the application of WorkCover to students undertaking placements with a host employer.

Rights and freedoms – Retrospective application of amendments – Validation provisions – Delegation of legislative power – Commencement by proclamation

Sections 10, 11 and 15 apply retrospectively. Part 3 and section 17 commence on proclamation.

The Committee notes the following helpful extracts fro the Explanatory Memorandum:

> …
>
> Clauses 10 and 11 are taken to have come into operation on 1 April 2011, so as to correct omissions in amendments made to the Principal Act on that date by the *Education and Training Reform Amendment (Skills) Act 2010* and related matters. These amendments are beneficial in nature, in that they ensure the validity of past placements.
>
> …
>
> Clause 15 is taken to have commenced on 1 July 2007. This is to amend section 5F of the *Accident Compensation Act 1985*, which commenced on that day, to correct the omission of structured workplace learning placements from that section.
>
> The backdated provision is beneficial in nature, and is designed to ensure that students who have undertaken structured workplace learning placements since 1 July 2011 are not disadvantaged by its inadvertent omission from section 5F.
>
> …
>
> Part 3 and clause 17 are to come into operation on a date to be proclaimed. No forced commencement or forced repeal of these provisions is included in the Bill. The reason for this is as follows.

The purpose of these provisions is to enable students of providers registered under the Commonwealth NVR Act[46] to undertake placements under the Principal Act and to be eligible for WorkCover under the *Accident Compensation Act 1985*. However, that Commonwealth Act presently provides that providers registered under it are not required to comply with Victorian laws on vocational education and training. This would, at present, prevent the amendments to be made by the Part 3 from having full effect. Clause 17 will make related amendments to the *Accident Compensation Act 1985*, and must commence at the same time as Part 3.

On 1 November 2011, a National Vocational Education and Training Regulator Amendment Bill 2011 passed both Houses of the Commonwealth Parliament. Under amendments proposed by that Bill, regulations may, with the consent of the Ministerial Council, be made that specify a State vocational education and training law. A specified State vocational education and training law will be binding on Commonwealth-registered vocational education and training providers.

Once the Commonwealth Act has been amended, it is intended to seek Ministerial Council approval for a Commonwealth regulation to be made that specifies the amendments to be made by Part 3 of this Bill. This will enable students of Commonwealth-registered providers to undertake practical placements, and will validate all such placements since 1 July 2011.

For these reasons, the timing of the commencement of Part 3 (or whether it commences at all) will depend on Ministerial Council consent and the making of Commonwealth regulations. If and when this consent is obtained, and the required regulations are made, Part 3 will be proclaimed so as to commence at the same time as those regulations.

For the reasons explained above, the amendments to be made to the *Accident Compensation Act 1985* by clause 17 need to commence at the same time as Part 3.

The Committee notes the detailed and helpful explanatory memorandum concerning matters that engage the Committees terms of reference and on the other provisions in the Bill.

The Committee will express its appreciation to the Minister.

The Committee makes no further comment

[46] *National Vocational Education and Training Regulator Act 2011(Cth)*

Transport Legislation Amendment (Marine Safety and Other Matters) Bill 2011

Introduced	25 October 2011
Second Reading Speech	8 November 2011
House	Legislative Assembly
Member introducing Bill	Hon. Dennis Napthine MLA
Portfolio responsibility	Minister for Ports

Background

The Bill amends the *Marine Safety Act 2010* (not yet in force) to:

- ensure that operators of hire and drive vessels are covered by the same statutory duty of care as operators of recreational vessels
- allow Victoria to recognise marine licences and certificates issued by international authorities which are recognised by the Commonwealth
- facilitate better renewal procedures for marine licences and permissions
- clarify responsibilities and cost recovery provisions for marine pollution functions
- extend the scope of the hoon boating scheme so that the sanctions of embargo, impoundment and forfeiture apply to a broader range of antisocial offences, including the active pursuit of marine wildlife
- remove the power of the Essential Services Commission to invoke highly prescriptive ports regulation
- align the regulatory framework for the issuing of marine and marine (drug and alcohol) infringement notices with the framework for other transport infringement schemes under the *Transport (Compliance and Miscellaneous) Act 1983*.

The Bill amends the *Port Management Act 1995* to:

- repeal the Victorian Channels Access Regime
- narrow the scope of port services regulated by the Essential Services Commission
- remove the power of the Essential Services Commission to invoke highly prescriptive ports regulation
- repeal the three year sunset clause on the regulation of towage operations at the Port of Melbourne.

The Committee makes no further comment

Wills Amendment (International Wills) Bill 2011

Introduced	8 November 2011
Second Reading Speech	9 November 2011
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Background

The Bill amends the *Wills Act 1997* to adopt the Uniform Law contained in the UNIDROIT Convention providing a Uniform Law on the Form of an International Will 1973 (the Convention).**[5 and 6]**

Extract from the Explanatory Memorandum:

> The primary objective of the Convention is to eliminate problems that arise when cross border issues affect a will, for example where a will deals with assets located overseas or where the will-maker's country of residence is different to the country in which the will is executed.
>
> The Convention's Uniform Law provides for an additional form of will—an international will—that sits alongside other local forms of will. An international will that complies with the Uniform Law will be recognised as a valid form of will by courts of other States party to the Convention, irrespective of where the will was made, the location of assets or where the will-maker lives, and without the court having to examine the internal laws operating in foreign countries to determine whether the will has been properly executed.
>
> The Uniform Law sets out requirements for the form of the will and the process for its execution—it does not deal with issues such as the capacity required of the will-maker or the construction of the terms of a will. These are matters that will continue to be dealt with by local law. … all Australian States and Territories have agreed to adopt the Uniform Law into their local legislation to allow Australia to formally accede to the Convention and to provide a consistent approach to the recognition of international wills across Australian jurisdictions. The Bill is based on a model Bill although, as required by the Convention, the Schedule to the Bill reproduces the text of the Uniform Law.

The Bill also makes a statute law revision amendment to correct punctuation. **[7]**

Committee comment

Commencement by proclamation – Delegation of legislative power

In respect to the commencement by proclamation provision the Second Reading Speech provides:

> Australia will not accede to the International Wills Convention until States and Territories have the necessary implementing legislation in place. Further, the Convention provides for a mechanism so that entry into force of the Convention occurs six months after accession. The Victorian amendments will therefore not commence operation until the Convention comes into force in Australia, which may not be until 2013.

The Committee accepts that in the circumstances it is appropriate to provide a commencement by proclamation provision. **[2]**

The Committee makes no further comment

Emergency Management Legislation Amendment Bill 2011

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

Committee's Comments

Wide delegation provision – Insufficient explanatory material to justify provision – Makes rights, freedoms or obligations dependent on insufficiently defined administrative powers – Parliamentary Committees Act 2003, section 17(a)(ii)

The Bill substitutes a new section 7 in the *Emergency Management Act 1986* to provide that the Minister may by instrument delegate to the State Emergency Response Coordinator or any other person any power or function of the Minister under the Act or the regulations other than the power of delegation. [6]

The Committee refers to item 1.2 of its Practice Note No. 1 of October 2005. The Committee there stated that where a wide or undefined delegation of powers or functions is provided in an Act the Committee will seek further information from the Minister to justify such a provision.

The Committee will seek further advice from the Minister.

Minister's Response

Thank you for your letter of 11 October 2011 regarding the Emergency Management Legislation Amendment Bill 2011 (the Bill), which recently passed through both houses of Parliament.

The Bill amends section 7 of the *Emergency Management Act 1986* to provide that the Minister for Police and Emergency Services may, by instrument, delegate to the State Emergency Response Coordinator or any other person any power or function of the Minister under the Act or the regulations, other than the power of delegation.

The Scrutiny of Acts and Regulations Committee has requested further information on this provision, as item 1.2 of the Committee's Practice Note No.1 of October 2005 states that, where a wide or undefined delegation of powers or functions is provided in an Act, the Committee will seek further information from the Minister to justify such a provision.

The Bill seeks to implement recommendation 11 of the final report of the 2009 Victorian Bushfires Royal Commission, which was established to investigate the causes of, and responses to, the bushfires that swept through parts of Victoria in early 2009. The Government has committed to implementing all 67 recommendations made by the Commission in its final report delivered on 31 July 2010.

Recommendation 11 provides that the State consider amending the Emergency Management Act and the Emergency Management Manual Victoria to achieve the following:

- Remove the title of Coordinator in Chief of Emergency Management from the Minister for Police and Emergency Services.

- Clarify the function and powers of the Minister.
- Designate the Chief Commissioner of Police as Coordinator in Chief of Emergency Management, who would have primary responsibility for keeping the Minister informed during an emergency.

The Bill implements recommendation 11 by amending the Emergency Management Act to remove the title of 'Coordinator in Chief of Emergency Management' from the Minister and clarify that the Minister is not responsible for operational matters in relation to emergency management. The Bill implements the substance of the recommendation in relation to the Chief Commissioner's responsibility for keeping the Minister informed during an emergency by expanding the functions of the Chief Commissioner in his role as State Emergency Response Coordinator. This approach avoids the potential confusion that could arise through the continued use of the expression 'Coordinator in Chief'.

The Bill subsequently amends section 7 of the Emergency Management Act by substituting references to 'Co-ordinator in Chief' with 'Minister', and 'Deputy Co-ordinator in Chief' with 'State Emergency Response Coordinator'.

The power of the Minister to delegate to any person has been in place since the Emergency Management Act came into operation in 1986. This broad power of delegation allows the Minister to fulfil his role under the Emergency Management Act to ensure that satisfactory emergency management arrangements are in place to facilitate the prevention of, response to and recovery from emergencies. This flexible delegation power recognises the breadth of emergencies that could occur in Victoria, such as bushfires, floods, acts of terrorism or an epidemic, and the wide-ranging persons and agencies that would be involved in the management of such emergencies.

On 12 September 2011, the Government released the Green Paper, '*Towards a More Resilient and Safer Victoria*', as the first step in the process of reforming Victoria's crisis and emergency management arrangements. Following consultation on the Green Paper (and the release of the final report of the Victorian Floods Review due 1 December 2011), a policy proposal will be developed and released in the form of a White Paper in 2012, with the ultimate aim of introducing major reforms to emergency management and governance arrangements in 2012. The Emergency Management Act will be reviewed as part of this process and amended to reflect any new arrangements.

I trust this information addresses your concerns.

Peter Ryan MLA
Minister for Police and Emergency Services

9 November 2011

The Committee thanks the Minister for this response.

Transport Legislation Amendment (Public Transport Development Authority) Bill 2011

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

Committee's Comments

Delayed commencement – Delegation of legislative power – One year rule

The Bill provides that the provisions of Part 5 (Abolition or dissolution of Transport Bodies) may not come into force until 30 June 2013. The Committee once again draws attention to Practice Note No. 1 of 2005 concerning delayed commencement of legislation of more than one year from introduction. Where delayed commencement is considered necessary or desirable SARC would prefer some explanation to be provided in either the explanatory memorandum or the second reading speech. **[2]**

The Committee will seek further advice from the Minister.

Minister's Response

The Scrutiny of Acts and Regulations Committee is seeking additional information about the *Transport Legislation Amendment (Public Transport Development Authority) Bill 2011* ('the Bill') through its request made in Alert Digest 11 on 11 October 2011.

Specifically, the Committee noted that Part 5 of the Bill (Abolition or Dissolution of Transport Bodies) may not come into operation until 30 June 2013. This issue is relevant to Practice Note No. 1 issued by the Committee which concerns commencement of Bills more than one year from their introduction.

I expect that much of the PTDA Bill, including the establishment of the Public Transport Development Authority (PTDA) itself, will commence well within a year of its introduction. However, the establishment of the Authority and the effects on existing agencies are commercially complex. As a result, some provisions of the Bill require more than 12 months lead time due to the extensive work required to implement the matters which they provide.

For example, the Bill provides for the transfer of staff, assets and liabilities from existing transport agencies such as the Director of public Transport, the Secretary of the Department and the Transport Ticketing Authority (TTA) to the PTDA. The Bill also provides for the negotiated transfer of Metlink staff and functions to the PTDA. These transfers require an involved due diligence process which may take longer than a year to complete.

In addition, the TTA will be abolished once it has completed the implementation of the new ticketing system with ongoing ticketing functions to be then transferred to the PTDA. However, the full implementation of the new ticketing system is likely to take some time and therefore one year would provide insufficient lead time for the commencement of relevant provisions.

In essence, the establishment of the PTDA is a major and complex public undertaking which the Government has designed carefully and is managing carefully in order to get the best public transport services for all Victorians. The undertaking is such that the enabling legislation needs to have a commencement window which is longer than is customarily the case.

I trust that this response sufficiently addresses the Committee's concerns. Should you have further queries please contact Ian Shepherd, Deputy Executive Director, DOT Legal, Department of Transport on 9655 1701.

Terry Mulder MP
Minister for Transport

4 November 2011

The Committee thanks the Minister for this response.

Committee Room
21 November 2011

Appendix 1
Index of Acts and Bills in 2011

Alert Digest Nos.

Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

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

Emergency Management Legislation Amendment Bill 2011 11

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

Justice Legislation Amendment Bill 2011 2

(iv) unduly requires or authorise acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;

(v) unduly requires or authorise acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;

(vi) inappropriately delegates legislative power

Sentencing Amendment (Community Correction Reform) Bill 2011 11
Transport Legislation Amendment (Public Transport Development Authority) Bill 2011 11

(vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

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

Building Amendment Bill 2011 1
Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011 11
Criminal Procedure (Double Jeopardy and Other Matters) Bill 2011 14
Education and Training Reform Amendment (School Safety) Bill 2010 1
Gambling Regulation Amendment (Licensing) Bill 2011 11
Justice Legislation Amendment Bill 2011 2
Justice Legislation Amendment (Infringement Offences) Act 2011 7
Liquor Control Reform Amendment Bill 2011 3
Sentencing Amendment Act 2010 1
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011 12

Section 17(b)

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

Commercial Arbitration Bill 2011 9

Appendix 3

Ministerial Correspondence 2011

Table of correspondence between the Committee and Ministers during 2011

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Building Amendment Bill 2011	Minister for Planning	01.03.11 *21.03.11*	1 of 2011 *2 of 2011*
Education and Training Reform Amendment (School Safety) Bill 2010	Minister for Education	01.03.11 *28.03.11*	1 of 2011 *3 of 2011*
Justice Legislation Amendment Bill 2011	Minister for Consumer Affairs	22.03.11 *04.04.11*	2 of 2011 *3 of 2011*
Sentencing Amendment Act 2010	Attorney-General	01.03.11 *05.04.11*	1 of 2011 *4 of 2011*
Liquor Control Reform Amendment Bill 2011	Consumer Affairs	05.04.11 *21.04.11*	3 of 2011 *4 of 2011*
State Taxation Acts Amendment Bill 2011	Treasurer	25.05.11 *09.06.11*	5 of 2011 *6 of 2011*
Justice Legislation Amendment (Infringement Offences) Act 2011	Attorney-General	28.06.11 *12.08.11*	7 of 2011 *8 of 2011*
Resources Legislation Amendment Bill 2011	Minister for Energy and Resources	30-08-11 *15-09-11*	9 of 2011 *12 of 2011*
Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011	Minister for Community Services	11-10-11 *21-10-11*	11 of 2011 *12 of 2011*
Gambling Regulation Amendment (Licensing) Bill 2011	Minister for Gaming	11-10-11 *21-10-11*	11 of 2011 *12 of 2011*
Sentencing Amendment (Community Correction Reform) Bill 2011	Attorney-General	11-10-11 *03-11-11*	11 of 2011 *13 of 2011*
Emergency Management Legislation Amendment Bill 2011	Minister for Police and Emergency Services	11-10-11 *09-11-11*	11 of 2011 *14 of 2011*
Transport Legislation Amendment (Public Transport Development Authority) Bill 2011	Minister for Public Transport	11-10-11 *04-11-11*	11 of 2011 *14 of 2011*

Table of Ministers responses still pending

Bill Title	Minister/ Member	Date of Committee Letter / *Minister's Response*	Alert Digest No. Issue raised / *Response Published*
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	25-10-11	12 of 2011
Criminal Procedure (Double Jeopardy and Other Matters) Bill 2011	Attorney-General	22-11-11	14 of 2011