

# **No. 15 of 2011**

**Tuesday, 6 December 2011**

**On the**

City of Greater Geelong Amendment  
Bill 2011

Criminal Procedure Amendment  
(Double Jeopardy and Other Matters)  
Bill 2011

Members of Parliament (Serious  
Misconduct) Amendment Bill 2011

# The Committee



Chairperson  
Mr Edward O'Donohue MLC  
Member for Eastern Victoria



Deputy Chairperson  
Hon. Christine Campbell MLA  
Member for Pascoe Vale



Mr John Eren MLA  
Member for Lara



Mr Michael Gidley MLA  
Member for Mount Waverley



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## Terms of Reference - Scrutiny of Bills

The functions of the Scrutiny of Acts and Regulations Committee are –

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
  - (i) trespasses unduly upon rights or freedoms;
  - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
  - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
  - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
  - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
  - (vi) inappropriately delegates legislative power;
  - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
  - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
  - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
  - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
  - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

# Table of Contents

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	<b>Page Nos.</b>
<b>Alert Digest No. 15 of 2011</b>	
City of Greater Geelong Amendment Bill 2011	1
Members of Parliament (Serious Misconduct) Amendment Bill 2011	2
<b>Ministerial Correspondence</b>	
Criminal Procedure Amendment (Double Jeopardy and Other Matters) Bill 2011	3
<b>Appendices</b>	
1 – Index of Acts and Bills in 2011	11
2 – Committee Comments classified by Terms of Reference	13
3 – Ministerial Correspondence 2011	15

# 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. 15 of 2011

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## City of Greater Geelong Amendment Bill 2011

<b>Introduced</b>	22 November 2011
<b>Second Reading Speech</b>	23 November 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Janette Powell MLA
<b>Portfolio responsibility</b>	Minister for Local Government

### Background

The Bill amends the *City of Greater Geelong Act 1993* to reconstitute the Greater Geelong City Council under that Act and to provide for the direct election of the Mayor to represent the entire municipality and to make consequential and other minor amendments.

New section 7 provides that from the general election in October 2012 the Council will consist of a Mayor, elected to represent the entire municipality, and 12 Councillors, elected to represent 12 wards.

New section 8 provides that from the general election in October 2016 the Council will consist of a Mayor, elected to represent the entire municipality, and between 4 and 11 Councillors elected to either represent the entire municipal district or to represent wards.

New section 9 provides that, from the general election in October 2016 onwards, Orders in Council may be made in accordance with section 220Q of the *Local Government Act 1989* in respect to the election of Councillors (but not in respect to the election of the Mayor).

New section 11 provides that a candidate for the position of Mayor may not also be a candidate for a position of Councillor at the same election. [5]

The Bill makes provision for the Mayor and Deputy Mayor [6], and for electoral representation reviews and subdivision reviews [7]

**The Committee makes no further comment**

# Members of Parliament (Serious Misconduct) Amendment Bill 2011

Introduced	23 November 2011
Second Reading Speech	23 November 2011
House	Legislative Council
Member introducing Bill	Mr Greg Barber MLC
Private Member's Bill	

## Background

The Bill amends the *Members of Parliament (Register of Interests) Act 1978* (the 'Act') in order to create an offence for a Member of Parliament or a Minister who engages in serious misconduct through their position or office.

The Bill inserts a new section 3A, which creates an offence for a Member of Parliament or a Minister to wilfully engage in serious misconduct through their office or by virtue of their position. The Bill defines misconduct as a contravention of the code of conduct in the Act, or any other applicable code of conduct, legislative instrument or other public duties of the Member.

Criteria are also established, against which a court must use in its construction of whether the misconduct is serious enough to attract the statutory penalty of a Level 6 imprisonment (5 years maximum) and/or fine. The Bill provides that the proposed statutory offence does not prevent or derogate from any existing criminal or civil proceedings for which the Member may be liable. **[3]**

**Note:** Section 320 of the *Crimes Act 1958* provides a maximum penalty of Level 5 imprisonment (10 years maximum) for the common law offence 'misconduct in public offence'.

**The Committee makes no further comment**

# Ministerial Correspondence

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## Criminal Procedure Amendment (Double Jeopardy and Other Matters) 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 21 November 2011 and made the following comments in Alert Digest No. 14 of 2011 tabled in the Parliament on 22 November 2011.

### Committee comment

#### 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).

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 and seeking further information as to the inclusion of manslaughter but not child homicide in new sub-section 327M(2).**

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#### **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 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.

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
- (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; other investigatory acts that involve the listed powers; investigatory acts that occur with the acquitted person’s consent; and investigatory acts that do not rely on the police’s statutory and common law investigatory powers. 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.**

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**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 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 be 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. 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.

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. 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. 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.' 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.

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.**

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**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.

...

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. 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*)
- an application to set aside an acquittal can be made at any time after the acquittal (see new sections 327F and 327H)
- acquittals can be set aside without a finding that there was an error in the earlier proceedings (see new section 327M)

**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.

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. 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. 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 or that the taint of the original trial be remedied (or even remediable) at the retrial.

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’, 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 emerging’ 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 emerging’ 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 permitting a retrial unless it is in the interests of justice to make the order. 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.) 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.

**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.**

## Minister’s Response

Thank you for your letter of 22 November 2011 concerning the Criminal Procedure Amendment (Double Jeopardy and Other Matters) Bill 2011 (the Bill).

I respond to the Committee’s specific questions as set out below.

### **Child homicide**

The Committee notes the different treatment of manslaughter of a person aged 6 and over and manslaughter of a child under 6 may engage the Charter Act's equality rights and seeks further information as to the inclusion of manslaughter but not child homicide in new sub-section 327M(2).

#### *Response*

I thank the Committee for identifying this issue. The offence of child homicide contained in section 5A of the *Crimes Act 1958* has been added to the list of exceptions to which the fresh and compelling evidence exception applies in new section 327M(2) as a House amendment. The Bill, including this amendment, was passed by the Legislative Assembly on 24 November 2011.

### **Reinvestigation powers**

The Committee seeks 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.

#### *Response*

Although they are not specifically mentioned in new section 327E, administration of justice offences are not excluded from the definition of reinvestigation in that provision. Administration of justice offences may occur in the course of the trial for an offence of which the person has been acquitted (e.g. perjured evidence, attempted bribery of a witness). In such cases, these offences are often effectively 'in relation to an offence of which a person has previously been acquitted.'

This is because some administration of justice offences necessarily involve reinvestigating the original offence. For example, to determine whether perjury was committed, police may have to investigate whether the accused was guilty of the original offence. Indeed, in *Carroll's* case, the High Court found that the offence of perjury involved double jeopardy for the previous acquittal of murder. In these situations, the police would quite appropriately have to seek the DPP's authorisation to exercise the powers contained in new section 327E.

Cases where investigating the administration of justice offence does not involve reinvestigating the original offence and thereby potentially 'impugning' the original acquittal do not impinge on the rule against double jeopardy. In such cases, police need not rely on any exception to the double jeopardy principle and can therefore investigate these offences in the normal way without having to seek DPP approval. As the Committee points out, this follows the approach used in the South Australian *Criminal Law Consolidation Act 1935* (section 335).

With respect to the power of arrest, under new section 327F only the DPP can charge a person and this may only be done by way of a direct indictment. The police do not have the power to charge a person under these provisions. The power of arrest for these offences is consequential upon the power to charge a person. Since police do not have the power to charge, the power of arrest is not necessary to list in the definition of reinvestigation.

Following a direct indictment, a warrant may be issued for the person's arrest and the police may then arrest the person. However, this is at a later stage of the process (after the reinvestigation has taken place and the person has been charged by the DPP).

The list of powers included within the scope of reinvestigation was a policy decision made following careful consideration and consultation with key stakeholders. It was not considered necessary to specifically include any other investigative powers in the definition of reinvestigation.

As the Committee notes, by supplementing the common law on double jeopardy with an express restriction on the reinvestigation of an acquitted person, new section 327E generally promotes the right in section 13(a) of the Charter Act against arbitrary or unlawful interferences in privacy. While there are some differences among Australian jurisdictions as to which powers are included in the definition, Victoria's approach of specifying all of these investigation powers is a much more practical way of setting out rights and obligations.

### **The presumption of innocence, the right to a fair hearing and the right to be promptly informed**

The Committee seeks further information as to the compatibility of clause 17 with the Charter Act ss. 24 and 25, in particular the compatibility of new sections 327F(2)(b) and 327M(i)(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.

#### *Response*

The new sections referred to by the Committee concern direct indictments for rape and armed robbery under the fresh and compelling evidence exception. The Criminal Procedure Amendment (Double Jeopardy and Other Matters) Bill will ensure that the accused is promptly informed of the nature and the reason for the charge against them and does not limit the acquitted persons's right to a fair hearing (Charter Act, section 24) or rights in criminal proceedings (Charter Act, section 25). First, the person is promptly informed of the nature and reason for the charge in the direct indictment – the charge will be rape, compelling sexual penetration or armed robbery under the fresh and compelling evidence exception. It is doubtful that the 'reason for charge' would be interpreted as including specifying the aggravating circumstances.

Further information about the charge will be contained in the DPP's application which must be filed within 28 days of the filing of a direct indictment. This does not constitute an unreasonable delay to finding out the details of the aggravating circumstances, particularly considering that the details of the charge are already known and there will have been substantial disclosure through the previous trial process. This will usually mean that the accused will have more information at an early stage than a person going through the committal process.

Similarly, it is submitted that section 327H(4), which requires the DPP to file a notice of application within 28 days of the filing of the direct indictment, does not limit the presumption of innocence. According to the Committee, the effect of this provision is that the DPP must 'charge the acquitted person before any application can be made to set that acquittal aside.' However, as the Committee acknowledged, charging a person has no legal effect on the presumption that the acquitted person is innocent until proved guilty.

The requirement that the DPP directly indict an acquitted person before applying to the Court of Appeal within 28 days was a policy decision. The rationale was to use the processes available in the *Criminal Procedure Act 2009* while still in effect providing the same powers and processes as envisaged by the COAG model. By using the direct indictment process, the DPP will be required to give notice of the indictment to the accused (section 171 of the *Criminal Procedure Act*) and will have powers to compel the accused to attend court (section 174 of the *Criminal Procedure Act*) (by summons or warrant). For this reason, it is not necessary to provide the Court of Appeal a discretion to issue a summons to the acquitted person to appear in this Bill (the procedure proposed by the Western Australian double jeopardy reform legislation and cited by the Committee).

#### **The fair trial test**

The Committee seeks 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.

#### *Response*

The wording in the Bill 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," is the same as the South Australian legislation and is very close to the COAG model even though it does not use the exact words 'that it is in the interests of justice for an order to be made.' If the Court of Appeal does not consider that the trial would be fair then it would also necessarily have to conclude that it would not be in the interests of justice.

Importantly, the factors to which the Court of Appeal must have regard in determining whether 'it is likely that a new trial for that offence would be fair' and whether it is 'in the interests of justice for an order to be made' are identical under the Victorian and the COAG models. These are:

- the length of time since the offence is alleged to have been committed; and

- whether there has been a failure to act with ‘reasonable diligence or expedition’ with respect to making the application.

New sections 327L, 327M and 327N also specifically allow the Court to consider any other matter that it considers relevant. This, and the requirement to consider whether a new trial would be fair, gives the court a broad discretion that encompasses considering the interests of justice.

I trust this information addresses your concerns.

**ROBERT CLARK MP**

Attorney-General

2 December 2011

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

**Committee Room**

**5 December 2011**

# Appendix 1

## Index of Acts and Bills in 2011

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	<b>Alert Digest Nos.</b>
Aboriginal Heritage Amendment Act 2011	8
Accident Towing Services Amendment Bill 2011	5
Appropriation (2011/2012) Bill 2011	5
Appropriation (Parliament 2011/2012) Bill 2011	5
Building Amendment Bill 2011	1, 2
Bushfires Royal Commission Implementation Monitor Bill 2011	1
Business Names (Commonwealth Powers) Bill 2011	13
Children's Services Amendment Bill 2011	12
Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011	11, 12
City of Greater Geelong Amendment Bill 2011	15
City of Melbourne Amendment Bill 2011	14
Civil Procedure and Legal Profession Amendment Bill 2011	1
Civil Procedure Bill 2010	1
Commercial Arbitration Bill 2011	9
Consumer Acts Amendment Bill 2011	6
Country Fire Authority Amendment (Volunteer Charter) Bill 2011	2
Crimes Amendment (Bullying) Bill 2011	4
Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011	11
Criminal Procedure (Double Jeopardy and Other Matters) Bill 2011	14, 15
Dental Hospital Land Bill 2011	4
Domestic Animals Amendment (Puppy Farm Enforcement and Other Matters) Bill 2011	14
Domestic Animals Amendment (Restricted Breeds) Act 2011	10
Drugs, Poisons and Controlled Substances Amendment (Drugs of Dependence) Bill 2011	8
Drugs, Poisons and Controlled Substances Amendment (Prohibition of Display and Sale of Cannabis Water Pipes) Bill 2011	10
Education and Training Reform Amendment (School Safety) Bill 2010	1, 3
Education and Training Reform Amendment (Skills) Bill 2011	14
Electricity Industry (Transitional Feed-in Tariff Scheme) Bill 2011	12
Electronic Transactions (Victoria) Amendment Bill 2011	10
Emergency Management Legislation Amendment Bill 2011	11, 14
Energy Legislation Amendment (Bushfire Mitigation and Other Matters) Bill 2011	11
Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011	7
Environment Protection Amendment (Landfill Levies) Bill 2011	5
Equal Opportunity Amendment Bill 2011	5
Extractive Industries (Lysterfield) Amendment Bill 2011	10
Family Violence Protection Amendment (Safety Notices) Bill 2011	4
Farm Debt Mediation Bill 2011	8
Fisheries Amendment Bill 2011	3
Gambling Regulation Amendment (Licensing) Bill 2011	10, 11, 12
Health Practitioner Regulation National Law (Victoria) Amendment Bill 2011	6
Health Services Amendment (Health Innovation and Reform Council) Bill 2011	3
Independent Broad-based Anti-corruption Commission Bill 2011	13
Justice Legislation Further Amendment Bill 2011	13
	11

## Scrutiny of Acts and Regulations Committee

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Justice Legislation Amendment Bill 2011	2, 3
Justice Legislation Amendment (Infringement Offences) Bill 2011	5
Justice Legislation Amendment (Infringement Offences) Act 2011	7, 8
Justice Legislation Amendment (Protective Services Officers) Bill 2011	8
Leo Cussen Institute (Registration as a Company) Bill 2011	13
Liquor Control Reform Amendment Bill 2011	3, 4
Liquor Control Reform Further Amendment Bill 2011	13
Local Government Amendment (Electoral Matters) Bill 2011	8
Members of Parliament (Serious Misconduct) Amendment Bill 2011	15
Mines (Aluminium Agreement) Amendment Bill 2011	13
Multicultural Victoria Bill 2011	3
Parks and Crown Land Legislation Amendment Bill 2011	13
Parliamentary Committees Amendment Bill 2011	2
Parliamentary Salaries and Superannuation Amendment Bill 2011	3
Parliamentary Salaries and Superannuation Further Amendment Bill 2011	9
Planning and Environment Amendment (Hoon Driving and Other Matters) Bill 2011	6
Planning and Environment Amendment (Schools) Bill 2011	13
Police Regulation Amendment (Protective Services Officers) Bill 2010	1
Public Holidays Amendment Bill 2011	4
Public Interest Monitor Bill 2011	13
Public Prosecutions Amendment Bill 2011	13
Regional Growth Fund Bill 2011	2
Residential Tenancies Amendment (Public Housing) Bill 2011	3
Resources Legislation Amendment Bill 2011	9, 12
Road Safety Amendment (Hoon Driving and Other Matters) Bill 2011	6
Road Safety Camera Commissioner Bill 2011	6
Sentencing Amendment Act 2010	1, 4
Sentencing Amendment (Community Correction Reform) Bill 2011	11, 13
Sentencing Further Amendment Bill 2010	1
Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011	7
Serious Sex Offenders (Detention and Supervision) Bill 2011	13
Sex Work and Other Acts Amendment Bill 2011	12
Shop Trading Reform Amendment (Easter Sunday) Bill 2011	1
Shrine of Remembrance Bill 2011	1
State Taxation Acts Amendment Bill 2011	5
State Taxation Acts Further Amendment Bill 2011	13
Statute Law Revision Bill 2011	1
Terrorism (Community Protection) Amendment Bill 2011	6
Transport Legislation Amendment (Marine Safety and Other Matters) Bill 2011	14
Transport Legislation Amendment (Port of Hastings Development Authority) Bill 2011	6
Transport Legislation Amendment (Public Transport Development Authority) Bill 2011	11, 14
Transport Legislation Amendment (Public Transport Safety) Bill 2011	8
Transport Legislation Amendment (Taxi Services Reform and Other Matters) Bill 2011	6
Victoria Law Foundation Amendment Bill 2011	1
Victorian Commission for Gambling and Liquor Regulation Bill 2011	11
Victorian Inspectorate Bill 2011	13
Victorian Responsible Gambling Foundation Bill 2011	12
Victorian Urban Development Authority Amendment (Urban Renewal Authority Victoria) Bill 2011	6
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	12
Wills Amendment (International Wills) Bill 2011	14

## Appendix 2

### Committee Comments classified by Terms of Reference

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

#### Alert Digest Nos.

#### Section 17(a)

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

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

Emergency Management Legislation Amendment Bill 2011 11

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

Justice Legislation Amendment Bill 2011 2

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

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

**(vi) inappropriately delegates legislative power**

Sentencing Amendment (Community Correction Reform) Bill 2011 11

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

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

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

Building Amendment Bill 2011 1

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

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

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

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Building Amendment Bill 2011	Minister for Planning	01.03.11 21.03.11	1 of 2011 2 of 2011
Education and Training Reform Amendment (School Safety) Bill 2010	Minister for Education	01.03.11 28.03.11	1 of 2011 3 of 2011
Justice Legislation Amendment Bill 2011	Minister for Consumer Affairs	22.03.11 04.04.11	2 of 2011 3 of 2011
Sentencing Amendment Act 2010	Attorney-General	01.03.11 05.04.11	1 of 2011 4 of 2011
Liquor Control Reform Amendment Bill 2011	Consumer Affairs	05.04.11 21.04.11	3 of 2011 4 of 2011
State Taxation Acts Amendment Bill 2011	Treasurer	25.05.11 09.06.11	5 of 2011 6 of 2011
Justice Legislation Amendment (Infringement Offences) Act 2011	Attorney-General	28.06.11 12.08.11	7 of 2011 8 of 2011
Resources Legislation Amendment Bill 2011	Minister for Energy and Resources	30-08-11 15-09-11	9 of 2011 12 of 2011
Children, Youth and Families Amendment (Security of Youth Justice Facilities) Bill 2011	Minister for Community Services	11-10-11 21-10-11	11 of 2011 12 of 2011
Gambling Regulation Amendment (Licensing) Bill 2011	Minister for Gaming	11-10-11 21-10-11	11 of 2011 12 of 2011
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
Criminal Procedure (Double Jeopardy and Other Matters) Bill 2011	Attorney-General	22-11-11 02-12-11	14 of 2011 15 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