

# **No. 15 of 2012**

**Tuesday, 23 October 2012**

**On the**

Classification (Publications, Films and  
Computer Games) (Enforcement)  
Amendment Bill 2012

Climate Change and Environment  
Protection Amendment Bill 2012

Justice Legislation Amendment  
(Miscellaneous) Bill 2012

Mineral Resources (Sustainable  
Development) Amendment Bill 2012

Offshore Petroleum and Greenhouse  
Gas Storage Amendment (NOPSEMA)  
Bill 2012

Road Management Amendment  
(Peninsula Link) Bill 2012

Tobacco Amendment (Shopper Loyalty  
Schemes) Bill 2012

Tobacco Amendment (Smoking at  
Patrolled Beaches) Bill 2012

Transport Legislation Amendment  
(Marine Drug and Alcohol Standards  
Modernisation and Other Matters) Bill  
2012

# The Committee



Chairperson  
Mr Edward O'Donohue MLC  
Member for Eastern Victoria



Deputy Chairperson  
Hon. Christine Campbell MLA  
Member for Pascoe Vale



Mr Colin Brooks MLA  
Member for Bundoora



Mr Michael Gidley MLA  
Member for Mount Waverley



Mr Don Nardella MLA  
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## Committee Staff

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## Terms of Reference - Scrutiny of Bills

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

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

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# Useful information

## Role of the Committee

The Scrutiny of Acts and Regulations Committee is an all-party Joint House Committee, which examines all Bills and subordinate legislation (regulations) introduced or tabled in the Parliament. The Committee does not make any comments on the policy merits of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced scrutiny of Bills in 1982. They are precedents and traditions followed by all Australian scrutiny committees. Non-policy scrutiny within its terms of reference allows the Committee to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.

The *Charter of Human Rights and Responsibilities Act 2006* provides that the Committee must consider any Bill introduced into Parliament and report to the Parliament whether the Bill is incompatible with human rights.

## Interpretive use of Parliamentary Committee reports

Section 35 (b)(iv) of the *Interpretation of Legislation Act 1984* provides –

In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.

## When may human rights be limited

Section 7 of the *Charter* provides –

Human rights – what they are and when they may be limited –

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
  - (a) the nature of the right; and
  - (b) the importance of the purpose of the limitation; and
  - (c) the nature and extent of the limitation; and
  - (d) the relationship between the limitation and its purpose; and
  - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

## Glossary and Symbols

'AAT' refers to the Administrative Appeals Tribunal;

'Assembly' refers to the Legislative Assembly of the Victorian Parliament;

'Charter' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;

'Council' refers to the Legislative Council of the Victorian Parliament;

'DPP' refers to the Director of Public Prosecutions for the State of Victoria;

'human rights' refers to the rights set out in Part 2 of the Charter;

'IBAC' refers to the Independent Broad-based Anti-corruption Commission

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (currently one penalty unit equals \$140.84).

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

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

[ ] denotes clause numbers in a Bill.

# Alert Digest No. 15 of 2012

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## Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2012

Introduced	10 October 2012
Second Reading Speech	11 October 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

### Purpose

The Bill: -

- Amends the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995*;
- Implements the decision of participating Ministers in the National Classification Scheme to introduce a new R 18+ classification for computer games in Australia;
- Inserts an exemption for law enforcement personnel and authorised persons from certain offences prohibiting the on-line publishing or transmission of objectionable material and child pornography.

### Part 2 – Offences and penalties relating to R 18+ computer games

It inserts various offences and penalties relating to the implementation of the new R 18+ classification scheme [8-16]. It establishes the offence of prohibiting the public demonstration of R 18+ computer games in a public place unless determined markings are exhibited. The penalty is 10 penalty units [4]. It also inserts references to section 39 to R 18+ computer games so as to prohibit the private demonstration in the presence of a minor of a computer game classified R 18+. The offence already applies to Refused Classification (RC) games. The penalty for a breach of this offence in the context of R 18+ computer games is 40 penalty units. It increases the existing penalty for private demonstration of RC material from 20 penalty units to 240 penalty units or imprisonment for 2 years [6]. It inserts a new offence for selling or delivering to a minor a computer game classified R 18+. The penalty is 60 penalty units or imprisonment for 6 months. (Two defences are set out.) [8].

### Part 3 – Amendments relating to law enforcement exemption

It inserts an updated definition of 'law enforcement agency' modelled on the definition in the *Crimes Act 1958* [17-20]. It provides a new exemption for persons authorised by Chief Commissioner of Police or law enforcement officers to securely transmit objectionable material for the purposes of law enforcement. This includes material that constitutes child pornography. The exemptions are for national law enforcement purposes and intelligence sharing data bases.

**The Committee makes no further comment.**

## Climate Change and Environment Protection Amendment Bill 2012

<b>Introduced</b>	9 October 2012
<b>Second Reading Speech</b>	10 October 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Ryan Smith MLA
<b>Portfolio responsibility</b>	Minister for Environment and Climate Change

### Purpose

The Bill amends the *Climate Change Act 2010* (CC Act) and the *Environment Protection Act 1970* (EP Act).

By way of background information the Explanatory memorandum states: - 'A review of the CC was section 19 of the Act by the introduction of the Commonwealth Government's Clean Energy Future Package into the Federal Parliament which provided for a national carbon price and greenhouse gas emissions trading scheme. Shortly after that a review of the CC Act (the Review) was conducted and tabled in the Victorian Parliament on 27 March 2012.

*The Review examined the impact of a national carbon price and emissions trading scheme on the Victorian Government's climate change policy objectives set out in the CC Act as well as the appropriate mechanisms for achieving the objectives. The Review made a series of recommendations for legislative change to improve the overall functionality of the legislation. The Victorian Government response to the Review, also tabled in the Victorian Parliament on 27 March 2012 endorsed the majority of the recommendations which are given effect in the Bill.'*

The Bill: -

- Repeals provisions with respect to the state-based emissions reduction target that duplicate Commonwealth Government measures which are redundant with the introduction of the national carbon pricing mechanism;
- Makes further provision with respect to the functionality relating to planning for, adapting to, climate change impacts and risks;
- Makes provision with respect to Victoria's participation in the Commonwealth Government's Carbon Farming Initiative;
- Amends the EP Act in relation to residential noise abatement directions, litter penalties, service fees issued for abatement, pollution abatement and clean up notices.

### Amendment to the *Climate Change Act 2010*

- Existing Victorian Greenhouse emissions targets of 20% are repealed [4]. Amended section 16 provides further guidance on the elements and preparation which form part of the Climate Change Adaptation Plan [6]. (This includes an assessment of climate change impacts and risks, the role of Government, strategic priorities etc.) The Minister may have regard to the guiding principles in the Climate Change Adaptation Plan in respect of the issue of Ministerial guidelines [5]. It updates definitions of forest carbon rights, carbon sequestration rights and soil carbon rights [9]. It ensures that native title interests are not extinguished by carbon sequestration agreements on Crown land in Part 5 of the Act [12]. It sets out requirements in relation to the granting of Carbon Sequestration Agreements by the Secretary [14-15]. A standard general regulation making power is inserted into the Act [39].

Amendment to the *Environmental Protection Act 1970*

- The Climate Communities Fund Account is renamed the Sustainability Fund Account [22]. It extends a noise abatement direction (which may be given by a member of the police force or a council officer) for any period of time for up to 72 hours. This is an increase from 12 hours to 72 hours [23]. It increases the infringement penalty for littering from 2 to 4 penalty units for cigarette butts. It increases the infringement penalty for depositing an extinguished cigarette or a ring pull from 1 to 2 penalty units [24].

**The Committee makes no further comment.**

## Justice Legislation Amendment (Miscellaneous) Bill 2012

Introduced	9 October 2012
Second Reading Speech	10 October 2012
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Attorney-General

### Purpose

The Bill makes amendments to various pieces of legislation to generally improve the administration and operation of the justice system.

- It amends the *Accident Compensation Act 1985* to repeal the requirement for County Court judges to give detailed, extensive and complete reasons in deciding an application for leave to proceed with a common law claim for damages for a serious injury [3]. The Second Reading Speech extract:- *'Section 134AE requires judges of the County Court to give detailed, extensive and complete reasons when deciding a worker's application for leave to proceed with a common law claim for damages for a serious injury. The provision was inserted into the Act in 2000 and was intended to ensure that detailed reasons were given in applications for leave. However, the provision has created a significant and unnecessary burden on the judges of the Court and adds to the time taken for serious injury applications to be decided. The Court will still be required to provide clear, proper and adequate reasons for applications for leave to proceed. However, in future, reasons for decision will be appropriate for an application made by way of originating motion. Removing this requirement will assist the Court to resolve serious injury applications more quickly to the benefit of all concerned, particularly injured workers.'*
- It amends the *Judicial Remuneration Tribunal Act 1995* to require the Judicial Remuneration Tribunal to make recommendations to the Attorney-General in relation to judicial officers' conditions of service as it considers appropriate rather than every two years as was previously the case [5].
- It amends the *Supreme Court Act 1986* to provide that associate judges may refer particular matters to judicial registrars for determination. The Supreme Court has the power to make rules determining which classes of matters may be determined by a judicial registrar or referred to a judicial registrar [7].
- It amends the *Terrorism (Community Protection) Act 2003* to extend the date for the review of that Act from 30 June 2013 to 31 December 2013.

**The Committee makes no further comment.**

# Mineral Resources (Sustainable Development) Amendment Bill 2012

Introduced	9 October 2012
Second Reading Speech	10 October 2012
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Energy and Resources

## Purpose

The Bill amends the *Mineral Resources (Sustainable Development) Act 1990* (the Act).

The Bill strengthens the existing enforcement provisions of the Act in respect of mining activities to ensure compliance with notices issued under section 110.

The extract from the Second Reading Speech states: - *'The nature of mining activities can involve a significant level of risk....Enforcement options available include giving advice, issuing an instruction, giving a direction and the issuing of notices under section 110 of the Act....However there is currently no specific mechanism available under the Act to enforce compliance with a section 110 notice or to remedy significant safety or environmental risks or breaches of the Act or Regulations.'*

### Amendment of the *Mineral Resources (Sustainable Development) Act 1990*

- It extends the types of risks which may be taken into consideration by inspectors to include risks to public safety, land, property and infrastructure. (The risks are extended from that of the existing immediate risk to the environment to include *immediate risks to public safety, land, property or infrastructure.*) An inspector may enter any place that an inspector reasonably believes is a worksite at any time, if the inspector reasonably believes there is an immediate risk to public safety, the environment and land. An inspector may give oral or written directions if an immediate risk to public safety etc is perceived. **[4-5].**
- The Minister may by notice require the authority holder to remedy the contravention or non-compliance and take any action to avoid, minimise or remove the risk to public safety, the environment land, property or infrastructure. The maximum penalty is increased from 1000 to 2500 penalty units in the case of a corporation and from 200 to 500 penalty units in any other case. In addition to imposing a penalty for failure to comply with a notice, the court may also make any other order the court considers appropriate. Persons affected by the Minister's decision to vary a notice may apply to VCAT for review **[6].**
- New sections 110AA to 110AG provide that the Minister may apply for an injunction in the Supreme Court in the event of non-compliance with the notice served under section 110. If review of the Minister's decision to serve or vary the notice has commenced in VCAT, those proceedings are stayed until the Supreme Court determines the Minister's application or grants the injunction. It is an offence to hinder or obstruct remedial action. In the case of a corporation the penalty is 300 penalty units and in any other case, it's 60 penalty units. Compensation is payable by the Minister to the owner or occupier of private land for any loss or damage sustained as a direct, natural and reasonable consequence of actions taken under section 110AB **[7].**

**The Committee makes no further comment.**

## Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Bill 2012

Introduced	9 October 2012
Second Reading Speech	10 October 2012
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MLA
Portfolio responsibility	Minister for Energy and Resources

### Purpose

The Bill reflects recent changes to the Commonwealth *Offshore Petroleum and Greenhouse Gas Storage Act 2001*. It changes the name of the National Offshore Petroleum Safety Authority to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

It also expands the functions of NOPSEMA to include the regulation of the structural integrity of facilities, wells and well-related equipment for petroleum operations in the Victorian offshore area. (This is in addition to its current functions in relation to the regulation of occupational health and safety matters.)

### Amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2010* (the Act)

- It provides for the appointment of petroleum project inspectors by the Minister and the CEO of NOPSEMA who can exercise current powers of inspection, enforcement and entry set out in Part 6 of the Act [8]. (See Charter report below). Authorised inspectors must carry identity cards at all times [9]. It transfers powers and responsibility from the Minister to NOPSEMA in relation to the prohibition of vessels [11-14]. The main function of the NOPSEMA board is to give advice and recommendations to the Chief Executive Officer, Victorian and Commonwealth Ministers and the Standing Council on Energy and Resources about the operational policies and strategies in the performance of NOPSEMA's functions [17] and [25].
- Amendments to section 704 set out the new functions of NOPSEMA in relation to the investigation of accidents, occurrences and so forth in respect offshore petroleum operations. This also includes the investigation of the structural integrity of vessels and wells. [20]. NOPSEMA may refer matters to the National Oil and Gas Safety Advisory Committee [23]. The Minister may require NOPSEMA to prepare reports or give information about specified matters relating to its function [31].
- Standard personal immunity provisions are included for persons or inspectors acting under the direction or authority of NOPSEMA or the CEO in good faith in the performance of a function [34-36]. Clause [39] updates a reference to 'Fair Work Australia' from 'The Australian Industrial Relations Commission' which ceased operation on 31 December 2009. It substitutes all references from the 'Safety Authority' to NOPSEMA in Schedule 3 which sets out matters relating to occupational health and safety. This is in accordance with the changed names and functions [40-54].

## Charter report

### *Presumption of innocence – Exception to criminal offence – Whether legal onus on the accused*

Summary: The Committee will write to the Minister seeking further information as to whether or not new section 647A(4) places a legal onus on the accused.

The Committee notes that clause 8, inserting a new section 647A(4), creates an exception to a new offence of failing to return a NOPSEMA identification card where that card was lost or destroyed. The Committee has recently received correspondence referring to legal advice that an exception to a criminal offence may impose a legal onus of proof on the accused without express words to that effect.<sup>1</sup> The Committee observes that, if new section 647A(4) places a legal onus on the accused to prove on the balance of probabilities that the card was lost or destroyed, it may engage the Charter's right of criminal defendants to be presumed innocent until proved guilty according to law.<sup>2</sup>

**The Committee will write to the Minister seeking further information as to whether or not new section 647A(4) places a legal onus on the accused to prove on the balance of probabilities that the identification card was lost or destroyed. Pending the Minister's response, the Committee draws attention to clause 8.**

**The Committee makes no further comment.**

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<sup>1</sup> See *Alert Digest No. 14 of 2012*, p. 16 (Ministerial correspondence on the Primary Industries and Food Legislation Amendment Bill 2012, clause 33), referring to advice from the Office of the Chief Parliamentary Counsel and the Victorian Government Solicitors Office.

<sup>2</sup> Charter s. 25(1).

## Road Management Amendment (Peninsula Link) Bill 2012

<b>Introduced</b>	9 October 2012
<b>Second Reading Speech</b>	10 October 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Terry Mulder MLA
<b>Portfolio responsibility</b>	Minister for Roads

### Purpose

The purpose of the Bill is to amend the *Road Management Act 2004* and the *Accident Towing Services Act 2007* to further facilitate the operation of the Peninsula Link Freeway (Peninsula Link) under the deed (deed) between Victoria and the company Southern Way Pty Limited (Southern Way) dated 20 January 2010. (Note Peninsula Link is a 27 kilometre freeway between EastLink and the Mornington Peninsula Freeway. Under the deed Southern Way is required to construct, operate and maintain a freeway standard road for a term of up to 25 years.)

#### Amendment of *Road Management Act 2004*

- It appoints Peninsula Link Freeway Corporation (PLFC) as the coordinating road authority [3]. It provides that PLFC is the responsible road authority for Peninsula Link [6]. VicRoads authorised officers can exercise the powers of authorised officers in respect of Peninsula Link as they currently do with EastLink [8].<sup>3</sup> It applies the same right to recover for damage to road in respect of Eastlink to PLFC [10].
- It sets out the power to make regulations in respect of freeways to Peninsula Link [11]. It inserts new sections 134C, 124D and 134 into the Act which clarify the responsibilities of VicRoads and Peninsula Link. The powers to remove, block a means of access, to erect and maintain fences, posts or other obstructions currently conferred on VicRoads in relation to a freeway are conferred on PLFC as part of its coordinating road authority role. Peninsula Link must be managed in a way as far as is practicable to minimise any adverse effects on the members of the public, to minimise damage to non-road structures and to minimise risk to the property of utilities or providers of public transport [12]. (See Charter report below).
- It amends the *Accident Towing Services Act 2007* to ensure that a tow truck driver does not commit an allocation offence where the PLFC has authorised the driver to attend road accident scenes on Peninsula Link.

### Charter report

#### ***Presumption of innocence – Exception to criminal offence – Whether legal onus on the accused***

Summary: The Committee will write to the Minister seeking further information as to whether or not new section 134D(8) places a legal onus on the accused.

The Committee notes that clause 12, inserting a new section 134D(8), creates an exception to an existing offence of placing advertisement or signs on road infrastructure where such placement is permitted under the Peninsula Link Project Deed. The Committee has recently received correspondence referring to legal advice that an exception to a criminal offence may impose a legal onus of proof on the accused without express words to that effect.<sup>4</sup> The Committee observes that, if

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<sup>3</sup> Sections 71-77 of the *Road Management Act 2004* set out the existing powers of authorised officers.

<sup>4</sup> See *Alert Digest No. 14 of 2012*, p. 16 (Ministerial correspondence on the Primary Industries and Food Legislation Amendment Bill 2012, clause 33), referring to advice from the Office of the Chief Parliamentary Counsel and the Victorian Government Solicitors Office.

new section 134D(8) places a legal onus on the accused to prove on the balance of probabilities, it may engage the Charter's right of criminal defendants to be presumed innocent until proved guilty according to law.<sup>5</sup>

**The Committee will write to the Minister seeking further information as to whether or not new section 134D(8) places a legal onus on the accused to prove on the balance of probabilities that the placement of an advertisement or sign on road infrastructure was permitted under the Peninsula Link Project Deed. Pending the Minister's response, the Committee draws attention to clause 12.**

**The Committee makes no further comment.**

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

## Tobacco Amendment (Shopper Loyalty Schemes) Bill 2012

<b>Introduced</b>	9 October 2012
<b>Second Reading Speech</b>	10 October 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Dr Denis Napthine MLA
<b>Portfolio responsibility</b>	Minister for Health

### Purpose

The purpose of the Bill is to further limit the operation of shopper loyalty schemes in relation to the sale of tobacco.

Amended section 7 narrows the application of defences in current shopper loyalty schemes. Extract from the Second Reading Speech: *'This step will extend a ban on the supply of any benefit, coupon or other thing under a shopper loyalty scheme operated by retail outlets in connection with the sale of tobacco products. There is already a ban that prohibits retailers giving away a non-tobacco product or other benefit with the purchase of tobacco. This prevents retailers from offering free gifts such as lighters and ashtrays or other benefits such as reward 'points' or vouchers that can be redeemed for goods, services or discounts with a tobacco purchase.*

*However the Act already allows a defence if it can be proven that the benefit was only incidentally connected with the purchase of tobacco, for instance when cigarettes are just one of a mixed range of purchases – including non-tobacco products – made by a shopper. The terms of the existing defence provision mean that it is presently lawful in Victoria to provide benefits with the purchase of tobacco products in conjunction with other non-tobacco products. The Bill will remove the defence taking away this last opportunity for retailers to provide inducements to customers to purchase tobacco products and will break the association between buying tobacco and the accrual of rewards and benefits such as discounted fuel.'*

**The Committee makes no further comment.**

## **Tobacco Amendment (Smoking at Patrolled Beaches) Bill 2012**

<b>Introduced</b>	10 October 2012
<b>Second Reading Speech</b>	11 October 2012
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon Dr Denis Naphthine MLA
<b>Portfolio responsibility</b>	Minister for Health

### **Purpose**

The Bill amends the *Tobacco Act 1987*.

It bans smoking between the flags and within a 50 metre radius of the flags at patrolled beaches. The infringement penalty for a breach of the offence is 1 penalty unit. The maximum penalty which may be imposed is 5 penalty units.

**The Committee makes no further comment.**

# Ministerial Correspondence

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## Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012

The Bill was introduced into the Legislative Assembly on 11 September 2012 by the Hon. Denis Napthine MP. The Committee considered the Bill on 8 October 2012 and made the following comments in Alert Digest No. 14 of 2012 tabled in the Parliament on 9 October August 2012.

### Committee Comment

#### Charter report

#### Fair hearing – Rights in criminal proceedings – Restrictions on conduct of defence

Summary: Clauses 4, 6 and 15 restrict how a person accused of some marine drug and alcohol offences may conduct his or her defence in some circumstances. The Committee will write to the Minister seeking further information as to the compatibility of clauses 4, 6 and 15 with defendants' Charter rights to a fair hearing, to call and examine witnesses and to not be compelled to testify against themselves.

The Committee notes that clauses 4, 6 and 15, amending existing ss. 27 & 28 and inserting new sections 32A and 32B into the *Marine (Drug, Alcohol and Pollution Control) Act 1988*, provide that, for certain marine drug and alcohol offences:

- an accused who wants a court to find that drugs found in a sample taken up to 3 hours after an alleged offence were due solely to use or consumption after his or her operation or control of a vessel underway or at anchor must both give sworn evidence and ensure that his or her evidence is corroborated by another person.<sup>i</sup>
- an accused is barred from calling evidence as to the effect of the consumption or use of a drug for purposes other than proving the above fact.<sup>ii</sup>
- an accused who has been served with an analyst's certificate stating that drugs were present in his urine or saliva is barred from calling the analyst to testify without the court's leave.<sup>iii</sup>

**The Committee observes that the effect of these provisions is to restrict how a person accused of some marine drug and alcohol offences may conduct his or her defence in some circumstances.** The Committee notes that these provisions are similar to existing provisions governing trials for drink- and drug-driving offences.<sup>iv</sup>

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<sup>i</sup> New section 27(1AA), (1B), governing charges under s. 28(1)(ba), (g) & (h). See also existing s. 27(1A), which is extended by clause 4(2).

<sup>ii</sup> New section 28(6A), governing charges under s. 28(1)(g) & (h). See also existing s. 28(5A), which is effectively extended by clauses 5(6) & 5(8).

<sup>iii</sup> New sections 32A(9) and 32B(8), governing questions of the presence of a drug in the body of the accused that arise under s. 28(1) (as well as the offences of culpable and dangerous driving in the *Crimes Act 1958*, as they apply to the operation of vessels.) See also existing s. 32(2), which is extended by clause 14. The court must presume the analyst's certificate to be true unless there is evidence to the contrary: new sections 32A(3) and 32B(3). The accused is also completely barred from calling the analyst on the question of whether leave should be given: new sections 32A(11) and 32B(10).

<sup>iv</sup> *Road Safety Act 1986*, ss. 48(1AC), 48(1B), 49(6A), 57A(8) & 57B(8).

The Statement of Compatibility discusses whether some of the proof provisions in the Bill are compatible with the Charter's right to be presumed innocent until proved guilty according to law.<sup>v</sup> However, the Committee notes that the above provisions may engage further Charter rights of the accused: to a fair hearing of the determination of a marine drug or alcohol charge;<sup>vi</sup> to call and examine defence witnesses under the same conditions as prosecution witnesses;<sup>vii</sup> and to not be compelled to testify against himself or herself.<sup>viii</sup>

**The Committee will write to the Minister seeking further information as to the compatibility of clauses 4, 6 and 15 with defendants' Charter rights to a fair hearing, to call and examine witnesses and to not be compelled to testify against themselves. Pending the Minister's response, the Committee draws attention to clauses 4, 6 and 15.**

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#### **Privacy – Power to enter and search any vessel without warrant, consent or grounds**

Summary: New section 162B(2) provides police officers with the power to enter and search any vessel in Victoria without a warrant, consent or grounds to suspect a contravention. The Committee will write to the Minister seeking further information as to the compatibility of new section 162B with the Charter's right against arbitrary or unlawful interferences with privacy.

The Committee notes that clause 26, inserting a new section 162B(2) into the *Marine Safety Act 2010*, provides that '[a] member of the police force may enter and search a vessel... in order to determine whether this Act and the regulations are being complied with'. The Committee considers that new section 162B(2) may engage the Charter's right against arbitrary or unlawful interferences in privacy.<sup>ix</sup>

The Statement of Compatibility does not address new section 162B(2). **The Committee observes that new section 162B(2) applies to any vessel in Victoria;<sup>x</sup> provides police officers with powers of entry and search without a warrant or the consent of the vessel's owner or occupier; and does not require that the police officer have any reasonable grounds to suspect a contravention of any law.** However, the Committee notes that new section 162B is limited by requirements that the entry and search must be done 'at a reasonable time';<sup>xi</sup> and 'in order to determine whether' the *Marine Safety Act 2010* and *Marine Safety Regulations 2012* 'have been complied with'.

**The Committee will write to the Minister seeking further information as to the compatibility of new section 162B with the Charter's right against arbitrary or unlawful interferences with privacy. Pending the Minister's response, the Committee draws attention to clause 26.**

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

<sup>vi</sup> Charter s. 24(1), i.e. by requiring the accused to adduce corroborating evidence and barring the accused from adducing evidence about the effect of the consumption or use of a drug in some circumstances. The Committee notes that nearly all common law corroboration requirements (which generally applied to the prosecution) have been abolished in Victoria: see *Evidence Act 2008*, s. 164(1).

<sup>vii</sup> Charter s. 25(2)(h), i.e. by requiring the accused, but not the prosecution, to seek leave before calling an analyst to testify in some circumstances.

<sup>viii</sup> Charter ss. 25(2)(k), i.e. by requiring the accused to give sworn evidence (and thus expose himself or herself to cross-examination) in some circumstances.

<sup>ix</sup> Charter s. 13(a).

<sup>x</sup> 'Vessel' is defined in s. 3 to mean 'any kind of vessel that is used, or capable of being used, in navigation by water, however propelled or moved'. There is no requirement that the vessel be on 'State waters' (compare existing s. 162) or be, or have been or will be, operated on water (compare new section 162A and also the narrower power of a police officer under s. 216(1)(c) of the *Transport (Compliance and Miscellaneous) Act 1983* to 'request the driver of any motor vehicle.... to permit an inspection and examination' to assess compliance with transport legislation.)

<sup>xi</sup> New section 162B(3)(a). However, there are no requirements that the owner be notified of the entry or search, either before or after.

## Statement of Compatibility – Practice Note No. 2

Summary: The Committee will write to the Minister regarding the Statement of Compatibility.

The Committee notes that the Statement of Compatibility for the Bill:

- does not expressly or accurately identify the inserted or amended reverse onus provisions in its discussion of ‘Rights in criminal proceedings’;<sup>xii</sup>
- does not discuss a search and entry provision that may engage the Charter’s right against arbitrary or unlawful interferences in privacy in a significant respect.<sup>xiii</sup>

The Committee recalls its *Practice Note No. 2*, which states that the Committee will write to the Minister where, in the Committee’s opinion, a Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right.<sup>xiv</sup>

**The Committee will write to the Minister regarding the Statement of Compatibility.**

## Minister’s response

I refer to the matters raised in the Committee’s report on this Bill published in Alert Digest No.14 of 2012 tabled in Parliament on 9 October 2012 and to your letter to me of the same day.

The statement of compatibility for the Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012 tabled in Parliament on Wednesday, 12 September 2012 was prepared for my approval by the Department of Transport.

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<sup>xii</sup> The Statement’s discussion of ‘[c]lauses 4 and 6 of the bill’ only identifies ‘[n]ew sections 27(1AA) and 27(3) inserted by clause 4’ as ‘reverse onus provisions’. New section 27(3) is a definitional provision that is amended (not inserted) by clause 4 and contains no provisions governing proof. The Statement does not expressly identify other reverse onuses introduced by clauses 4 and 6, i.e. new sections 27(1), 27(1B) and 28(3C) (reversing the legal onus) and new section 28(3B) (reversing the evidential onus.) The Statement’s further discussion of ‘provisions set out in clause 11 and 13’ does not identify any of the inserted provisions expressly or by adequate description. Clause 11 relates to police powers and does not address any rules of proof. Clause 13 contains two evidential onuses in new sections 31AA(10) and 31AE(22), which provide for presumptions concerning authorisations to order drug analyses. On the need for the Statement of Compatibility to expressly identify relevant sections inserted or amended by complex Bills, see *Alert Digest No. 14 of 2007*, p. 6 (reporting on the Animals Legislation Amendment (Animal Care) Bill 2007.)

<sup>xiii</sup> See the above discussion of new section 162B of the *Marine Safety Act 2010*. On the importance of Statements of Compatibility addressing any provisions that fairly raise a Charter implication, see *Alert Digest No. 4 of 2007*, p. 10 (reporting on the Infertility Treatment Amendment Bill 2007).

<sup>xiv</sup> *Practice Note No. 2* states:

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

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

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

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

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

The statement was the culmination of considered analysis during the development of the Bill. The Department advised me that it consulted with other government agencies as part of the process, including those which specialise in *Charter*, human rights and drafting issues, before presenting the document to me for approval. The agencies included the Department of Justice, the Office of the Chief Parliamentary Counsel and Privacy Victoria.

Based on the advice given to me, in my view the statement correctly concludes that the Bill is compatible with the human rights protected by the *Charter of Human Rights and Responsibilities Act*. I am pleased that the Committee's report does not reach a different conclusion.

The Committee's report, however, expresses concerns about three matters arising from its review of the statement of compatibility and seeks further information about two of the matters. I deal with these matters in detail in the **Attachment** to this letter.

I note the broad nature of the *Charter* and its subject matter. Given this, it is fair to observe that the content and presentation of a statement of compatibility for many Bills will often be a matter on which reasonable minds may differ.

In my view, this should be taken into account in the Committee's review of statements including the statement which accompanied the Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012.

If you have any queries, please contact Ian Shepherd, Deputy Executive Director, Regulation Governance and Law Division, Department of Transport on 9655 1701 or on [ian.shepherd@transport.vic.gov.au](mailto:ian.shepherd@transport.vic.gov.au).

**The Hon Dr Denis Naphine MP**

Minister for Major Projects

Minister for Ports

Minister for Racing

Minister for Regional Cities

18 October 2012

**ATTACHMENT**

**Consideration of specific matters raised in the Committee's report**

**Privacy and police powers**

**The Committee notes that the Statement of Compatibility for the Bill does not discuss a search and entry provision that may engage the Charter's right against arbitrary or unlawful interferences in privacy in a significant respect.**

**The Committee observes that new section 162B(2) applies to any vessel in Victoria; provides police officers with powers of entry and search without a warrant or the consent of the vessel's owner or occupier; and does not require that the police officer have any reasonable grounds to suspect a contravention of any law.**

The Committee drew attention to clause 26 of the Bill, which inserts new police powers into the Marine Safety Act 2010.

The power to enter vessels without consent or warrant was previously contained in section 77 of the *Marine Act 1988* as it was then titled; it is now the *Marine (Drug, Alcohol and Pollution Control) Act 1988* (the 1988 Act).

Section 77 of the 1988 Act provided both transport safety officers and members of the police force with powers to enter vessels without consent or warrant to check compliance with

requirements under the Act or the regulations, to search vessels, inspect any equipment or documents found on the vessel.

Section 13 of that Act also provided transport safety officers and members of the police force with power to inspect vessels.

In addition, section 18 of that Act provided authorised officers or members of the police force with power to require the owner of a vessel to give information leading to identification of any person in charge of the vessel on any occasion or to make reasonable enquiries to obtain that information.

When the previous Government introduced the *Marine Safety Act 2010*, a number of these powers were transferred to the *Transport (Compliance and Miscellaneous) Act 1988*. However, some powers previously provided to members of the police force under the 1988 Act were not included, presumably by error.

These previously available powers are reinstated by clause 26 of the Bill.

New section 162B(2) to be added by the Bill essentially restores the power previously provided by section 77 of the *Marine Act 1988*, with two important variations.

First, while the provision has the same effect as section 77 had, it is drafted in clearer and plainer English by the Office of the Chief Parliamentary Counsel which is to be expected following changes to the underlying regulatory regime made by the *Marine Safety Act 2010*.

Second, and importantly, the provision has been clarified as a result of the inclusion of a clear narrative example at the foot of new section 162B(2) which helps explain the types of documents which may be inspected when using the power.

In my view it is therefore clear that the purpose of the power is to ensure that a member of the police force can ascertain that existing statutory requirements have been satisfied.

As the Committee notes, the power is also limited temporally, that is – entry must be at a reasonable time.

This also helps to ensure that use of the power is reasonable and not arbitrary.

The documents identified in the narrative example are a licence, certificate of competency, certificate of survey, certificate of safe operation or log book which are each required to be held for relevant classes of vessels and persons as a result of the application of the *Marine Safety Act 2010* and the *Marine Safety Regulations 2012*.

The inclusion of the example arose from discussions between the Department of Transport and Victoria Police and was aimed at clarifying the nature and use of the power.

The examples of documents which may be sought in order to check compliance with the Act or regulations make it clear that the purpose of entry is simply to secure compliance with the Act and regulations.

While it could possibly be said that the power would engage the right to privacy where a person has an expectation of privacy in relation to a vessel, as noted the power is limited by its terms.

The Department of Transport has advised me that it does not consider this power interfered to any significant extent with the right against arbitrary or unlawful interferences with privacy.

As such the Department did not consider that the provision required specific reference in the statement of compatibility and it advised me accordingly.

However, to ensure the provisions aligned with Victoria's human rights and privacy legislation, the Bill was the subject of consultation by the Department of Transport with both the Department of Justice and Privacy Victoria.

I note that both agencies were comfortable with the proposal.

However, some additional points are relevant to the comments made in the Committee's report and merit attention.

#### **Prior review of these provisions**

First, the Department of Transport has advised that when the *Charter of Human Rights and Responsibilities Act* commenced on 1 January 2007 (the requirements for statements of compatibility commencing later on 1 January 2008), a review was undertaken of relevant transport legislation and these powers were considered to be compatible with the *Charter*. I am advised that section 77 of the *Marine Act 1988* was considered during that review process and assessed as compatible with the *Charter*.

Second, the powers are similar to provisions which were inserted into the *Transport (Compliance and Miscellaneous) Act 1983* by sections 399 and 409 of the *Marine Safety Act 2010* as enacted by the former government in September 2010.

Section 228Z(1)(c) of the *Transport (Compliance and Miscellaneous) Act 1983* gives transport safety officers power to board any vessel at any time it is in use.

Section 228Z(1)(d) of that Act gives transport safety officers power to enter, without consent, any marine premises at any time during which marine operations or other related activities are being carried out in or on the marine premises.

The *Marine Safety Act* The Department indicated that when transport safety officers were given these powers by the *Marine Safety Act*, enacted at the initiative of the former Government, these powers were considered compatible with the *Charter*.

Similarly, when the former government amended section 228ZM(1)(b) of the *Transport (Compliance and Miscellaneous) Act 1983* to direct a person, for compliance and investigative purposes, to provide information concerning the identify or location of the owner or master of a vessel, this power was also considered compatible with the *Charter*.

#### **Anomalous omission of police powers**

As noted, police officers were erroneously not given the powers outlined above when the previous Government changed the law. This includes the power highlighted in the Committee's report.

Victoria Police correctly brought the matter to the attention of the Department of Transport and the matter was included in the Bill to correct the anomaly as soon as possible.

The Government considers it anomalous that transport safety officers employed by Transport Safety Victoria and other agencies currently have this power, but members of the police force do not.

That is particularly the case because Victoria Police carry out the majority of on-water enforcement activity of marine safety laws on Victorian waters and they require this power for operational reasons.

By way of example, the water police have advised Department of Transport officers that police officers encounter regular incidents where owners of jet-skis have allowed unlicensed persons to 'test drive' a jet-ski or have loaned a jet-ski to one or more persons who are unlicensed.

The police indicated that it is often apparent when operators are unlicensed, because the unlicensed operators regularly do not know, or comply with, the normal waterway rules and often create safety risks for other water users.

Once I was made aware of these anomalies, I instructed the Department of Transport to address them and that is essentially why the Bill reinstates these police powers.

Currently, section 52 of the *Marine Safety Act 2010* makes it an offence for the owner of a registered recreational vessel to allow a person who does not have a marine licence to be the master of that vessel.

Regulation 43 of the Marine Safety Regulations 2012 makes it an existing licence condition that the licence holder must not allow an unlicensed person to operate a registered recreational vessel or a regulated hire and drive vessel while acting as the master of that vessel unless the licence holder is over the age of 18, and the licence holder is on board the vessel in a position where they are able to take immediate control of the vessel.

It is an existing offence under section 49 of the *Marine Safety Act 2010* to be the master of a regulated hire and drive vessel without a marine licence or in breach of conditions of a marine licence.

The reinstated police power referred to in the Committee's report supports the investigation of these offences. However, the power is currently limited by its terms and for the reasons set out above, the power does not, in my opinion, limit the right to privacy noting that it relates to compliance with and enforcement of already existing statutory powers.

#### **Conclusion - privacy**

I am satisfied that this regime is not inconsistent with the right to privacy. As such, no reference to privacy in connection with this provision was considered to be required in the statement of compatibility.

#### **Reverse onus provisions**

**The Committee notes that the Statement of Compatibility for the Bill does not expressly or accurately identify the inserted or amended reverse onus provisions in its discussion of 'Rights in criminal proceedings'.**

The Committee suggests that more information could have been provided in the statement in respect of the reverse onus provisions in its discussion of the rights of persons in criminal proceedings and in respect of those rights generally.

The Committee considers that each reverse onus provision should have been specifically identified. Further detail (drawn primarily from the detailed clause notes to the Bill) is provided below.

The Department advises me that due consideration was given to each provision in the Bill, including each reverse onus provision.

In my opinion, there are no incompatibilities with section 25 of the Charter and in each case, I consider that the procedures provided in the Bill are appropriate to the nature of the particular matters and interests that are at stake. Insofar as the provisions limit the rights of a person in criminal proceedings, in my opinion the limitations are reasonable and justified in accordance with the matters set out in section 7(2) of the Charter.

In each case where a reverse onus provision has been adopted in the Bill, I consider them justified for the reasons set out in my statement.

Insofar as the statement does not expressly identify each reverse onus provision by reference to the inserted or amended provision, I note that work on the Bill was complex and continued until close to the time of the Bill's introduction. It was desirable that each

provision be addressed and as a result I have drawn the matter to the attention of the Department of Transport and this will influence the Department's practices and procedures in settling statements for Ministers' consideration in the future.

In this case, I observe that it is of the utmost importance that a number of provisions in the Bill become operational as early as possible in the 2012-13 boating season. I strongly consider that that view aligns with community expectations.

While the Committee may have a view about the level of detail contained in the statement and may consider that a more detailed statement could have been prepared in respect of the rights of persons in criminal proceedings, including in respect of reverse onus provisions, the Department of Transport has advised me that it considers that the statement dealt adequately with the provisions in the Bill.

Despite this, I have relayed the Committee's views to the Department and which assures me that the comments will influence the way the Departments develops such statements for Ministers' consideration in the future.

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### **Fair hearing right and rights in criminal proceedings**

**The Committee observes that the effect of these provisions is to restrict how a person accused of some marine drug and alcohol offences may conduct his or her defence in some circumstances.**

**The Committee will write to the Minister seeking further information as to the compatibility of clauses 4, 6 and 15 with defendants' Charter rights to a fair hearing, to call and examine witnesses and to not be compelled to testify against themselves. Pending the Minister's response, the Committee draws attention to clauses 4, 6 and 15.**

Clauses 4, 6 and 15 of the Bill introduce new provisions into the 1988 Act which relate to presumptions concerning the presence of alcohol or drugs in blood, breath, urine and oral fluid samples.

The Committee drew attention to the section 24 *Charter* right to a fair hearing in the context of restrictions on the conduct of a defence.

The section 24 right to a fair hearing requires that a person charged with a criminal offence has the right to have the charge decided by a competent, independent and impartial court after a fair and public hearing.

The Committee also draws attention to the right of an accused person to call and examine witnesses and the right to not be compelled to testify against himself or herself.

The section 25 rights in criminal proceedings include the right to examine, or have examined, witnesses against him or her unless otherwise provided for by law.

The section 25 rights also include the right of a person not to be compelled to testify against himself or herself or to confess guilt.

Insofar as clauses 4, 6 and 15 – discussed further below – engage *Charter* rights, I consider that each provision is compatible with the *Charter*. That is, in my opinion, insofar as the Bill engages *Charter* rights, any limitation is justified.

In my view, the Bill is compatible with that right and any limitations are justified in accordance with section 7(2) of the *Charter*, taking into account the factors detailed in that section. While *Charter* rights are engaged, insofar as there is a limitation on *Charter* rights I consider that the limitation is justified and the Bill is therefore considered compatible with the *Charter*.

#### Clause 4

Clause 4 makes changes to section 27 of the 1988 Act. Clause 4 contains interpretative provisions which enable presumptions to be made where a certain concentration of alcohol or drugs is found to be present in a person's blood, breath, body or oral fluid within a certain time after an alleged offence, unless the contrary is proved.

New subsection (1) provides that, for the purposes of Part 4 of the 1988 Act—

- if it is established that at any time within 3 hours after an alleged offence against paragraph (a) or (b) of section 28(1) a certain concentration of alcohol was present in the blood or breath of the person charged with the offence it must be presumed, until the contrary is proved, that not less than that concentration of alcohol was present in the person's blood or breath (as the case requires) at the time at which the offence is alleged to have been committed;
- if it is established that at any time within 3 hours after an alleged offence against paragraph (ba) of section 28(1) a certain drug was present in the body of the person charged with the offence it must be presumed, until the contrary is proved, that the drug was present in the person's body at the time at which the offence is alleged to have been committed; and
- if it is established that at any time within 3 hours after an alleged offence against paragraph (bb) of section 28(1) a certain drug was present in the blood or oral fluid of the person charged with the offence it must be presumed, until the contrary is proved, that that drug was present in the person's blood or oral fluid at the time at which the offence is alleged to have been committed.

These provisions are drawn from section 48(1) of the *Road Safety Act 1986*, inserted or amended in 2000 and 2003 by the former government.

New sections 27(1AA) and (1AB) provide that a presumption of guilt must be made if an analyst finds presence of a drug in a sample of a person's oral fluid, blood or urine unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person. However, a master, pilot or person operating a vessel is not taken to be impaired unless, in the case of a person operating a vessel, his or her behaviour or appearance is such as to give rise to a reasonable suspicion that he or she is unable to operate a vessel properly and, in the case of a master or pilot, his or her behaviour or appearance is such as to give rise to a reasonable suspicion that he or she is unable to direct the proper operation of the vessel.

New section 27(1AA) provides that, for the purposes of an alleged offence against new paragraph (ba) of section 28(1) of the 1988 Act, it must be presumed that a drug found by an analyst to be present in the sample of blood or urine taken from the person charged was not due solely to the consumption or use of that drug after operating a vessel or being the master or pilot of a vessel underway or at anchor unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person.

These provisions are drawn from section 48(1AC) and 48(1AD) of the *Road Safety Act 1986*, inserted in 2000 by the former government.

Clause 4(2) of the Bill amends section 27(1A) of the 1988 Act by inserting the words "operating a vessel or being a master or pilot of a vessel underway or at anchor". The effect of the amendment is that, for the purposes of an alleged offence against paragraph (e) or (f) of section 28(1) of the 1988 Act, it must be presumed that the concentration of alcohol indicated by an analysis to be present in the breath of the person charged or found by an analyst to be present in the sample of blood taken from the person charged (as the case requires) was not due solely to the consumption of alcohol after operating a vessel or being

the master or pilot of a vessel underway or at anchor unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person.

These provisions are drawn from section 48(1A) of the *Road Safety Act 1986*, inserted in 1989 and amended by the former government in 2003.

Clause 4(3) of the Bill inserts new section 27(1B) into the 1988 Act which provides that, for the purposes of an alleged offence against new paragraphs (g) or (h) of section 28(1) of the 1988 Act, it must be presumed that a drug found by an analyst to be present in the sample of blood or oral fluid provided by, or taken from, the person charged was not due solely to the consumption or use of that drug after operating a vessel or being the master or pilot of a vessel underway or at anchor unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person.

This provision is drawn from section 48(1B) of the *Road Safety Act 1986*, inserted by the former government in 2003.

The detailed explanation provided about each clause appears in the clause notes to the Bill.

It can be seen that presumptions about a person's guilt are made on the basis that alcohol or a drug is found to be present in their oral fluid, blood or urine. Unless the person is able to prove otherwise, it is presumed that the accused consumed the drug prior to operating a vessel or being the master or pilot of a vessel underway or at anchor. However, the presumptions are rebuttable by evidence to the contrary.

The provisions are limited by their terms.

The sworn evidence required is to rebut a presumption that the consumption or use of a drug was not due solely to the consumption or use of that drug after operating a vessel or being the master or pilot of a vessel underway or at anchor. The sworn evidence is to be assessed on the lower, balance of probabilities, test.

In my opinion, there are no incompatibilities with section 25 of the Charter. I consider that the procedures provided in the Bill are appropriate to the nature of the particular matters and interests that are at stake. In my opinion the limitations are reasonable and justified in accordance with the matters set out in section 7(2) of the Charter.

As explained, section 48 of the *Road Safety Act 1986* contains similar interpretative provisions and forms the model for the new provisions.

## **Clause 6**

Clause 6 makes changes to section 28 of the 1988 Act.

Section 28 sets out penalties for offences involving alcohol or drugs.

New section 28(3B) of the 1988 Act establishes elements of proof in proceedings for certain offences.

New section 28(3B) is based on section 49(3A) of the *Road Safety Act 1986*, inserted by the former government in 2000 and amended in 2009.

New section 28(3B) of the 1988 Act provides that, in the case of an offence against new section 28(1)(ba), proof that—

- the person operated or was the master or pilot of a vessel underway or at anchor; and
- one or more drugs were present in the person's body at the time at which he or she operated or was the master or pilot of a vessel underway or at anchor; and

- the behaviour of the person on an assessment of drug impairment carried out under new section 31AA was consistent with the behaviour usually associated with a person who has consumed or used that drug or those drugs; and
- the behaviour usually associated with a person who has consumed or used that drug or those drugs would result, in the case of a person operating the vessel, being unable to operate the vessel properly or, in the case of a master or pilot, being unable to direct the proper operation of the vessel—

is, in the absence of evidence to the contrary but subject to new subsections (3C) and (3D), proof that the accused operated or was the master or pilot of a vessel underway or at anchor while impaired by a drug.

New sections 28(3C) and 28(3D) of the 1988 Act provide for defences in respect of permissible non-prescription drugs and prescription drugs. The amendment made by the Bill to section 28(5) also ensures that it is a defence to a charge under amended paragraph (f) and new paragraphs (g) and (h) of section 28(1) of the 1988 Act for a person charged to prove that the result of an analysis was not a correct result.

These provisions also have an equivalent in Victoria's road safety scheme: sections 49(3B) and 49(3C) of the *Road Safety Act 1986*, inserted in 2000.

New section 28(6A) of the 1988 Act provides that an accused may only call evidence as to the effect of the consumption or use of a drug for purposes for the purpose of proving that the accused had consumed the drug after he or she had operated a vessel or had been the master or pilot of a vessel underway or at anchor. That is, evidence is admissible for the purpose of rebutting the presumption created by new section 27(1B) but is otherwise inadmissible.

These provisions similarly engage the *Charter*, as they provide that the accused is permitted to call for expert evidence as to the effect of the consumption or use of a drug to rebut the presumption in new section 27(1B) – that is, to prove that the drug was consumed after he or she had operated the vessel or been the master or pilot of a vessel underway or at anchor.

Insofar as the provisions engage *Charter* rights, in my opinion, there are no incompatibilities with section 25 of the *Charter*. I consider that the procedures provided in the Bill are appropriate to the nature of the particular matters and interests that are at stake. In my opinion the limitations are reasonable and justified in accordance with the matters set out in section 7(2) of the *Charter*.

Section 49 of the *Road Safety Act 1986* contains a similar provision - section 49(6A) of the *Road Safety Act 1986*, inserted by the former government in 2003 and amended in 2009.

#### **Clause 15**

Clause 15 inserts new provisions into the 1988 Act which set out evidentiary provisions for urine and oral fluid tests.

These are drawn from sections 57A and 57B of the *Road Safety Act 1986*, inserted in 2000 and 2003 by the former government and amended on various occasions (section 57A in 2001, 2003, 2006, 2008 and 2009 and section 57B in 2006 and 2009).

As explained in the clause notes to the Bill, new section 32A(3) of the 1988 Act provides that a certificate containing the prescribed particulars purporting to be signed by a registered medical practitioner or an approved health professional is admissible in evidence in any hearing referred to in new section 32A(2) of the 1988 Act and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

New section 32A(4) of the 1988 Act provides that a certificate containing the prescribed particulars purporting to be signed by an approved analyst as to the presence in any sample

of urine analysed by the analyst of a substance that is, or is capable of being, a drug for the purposes of the 1988 Act is admissible in evidence in any hearing referred to in new section 32A(2) of the 1988 Act and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

New section 32A(5) of the 1988 Act provides that a certificate containing the prescribed particulars purporting to be signed by an approved expert as to the usual effect of a specified substance or substances on behaviour when consumed or used (including its effect on a person's ability to operate a vessel properly or, in the case of a master or pilot, to direct the proper operation of a vessel) is admissible in evidence in any hearing referred to in new section 32A(2) of the 1988 Act and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

New section 32A(9) of the 1988 Act provides that an accused who has been served with a copy of a certificate given under new section 32A may, with the leave of the court and not otherwise, require the person who has given the certificate or any person employed, or engaged to provide services at, the place at which the sample of urine was furnished, to attend at all subsequent proceedings for cross-examination and that person must attend accordingly.

New section 32A(10) of the 1988 Act provides that, for the court to grant leave, there must be a reasonable possibility that the urine was not of the accused or that it had become contaminated, had not been taken in the relevant time period or for some other reason the evidence would materially assist the court to ascertain the relevant facts. New section 32A(10) provides that the medical practitioner, expert or analyst may not be called to attend court on an application for leave.

The provisions are equivalent to sections 57A(3), (4), (5), (8) and (9) of the *Road Safety Act 1986*.

Section 57A of the *Road Safety Act* was inserted by the former government in 2000 and was amended in 2001, 2003, 2006, 2008 and 2009 by the former government.

New section 32B contains comparable provisions in respect of oral fluid tests. New sections 32B(3), (4), (8) and (9) of the 1988 Act are equivalent to sections 57B(3), (4), (8) and (9) of the *Road Safety Act 1986*.

Section 57B of the *Road Safety Act* was inserted by the former government in 2003 and was amended in 2006 and 2009 by the former government.

In my opinion, there are no incompatibilities with section 25 of the *Charter* and I consider that the procedures provided in the Bill are appropriate to the nature of the particular matters and interests that are at stake. In my opinion the limitations are reasonable and justified in accordance with the matters set out in section 7(2) of the *Charter*.

#### **Summary – clauses 4, 6 and 15**

While clauses 4, 6 and 15 of the Bill insert or amend provisions which engage the *Charter*, including the right to a fair hearing and the rights of persons in criminal proceedings, the Department of Transport advised me both before the settling of the statement and again in relation to the preparation of this response to the Committee that any limitations are demonstrably justified for the purposes of section 7(2) of the *Charter*.

I agree with the Department's advice and the statement reflects that.

As the Committee noted in its report, the provisions are comparable to Victoria's road safety scheme which were reviewed following the introduction of the *Charter* and which are also considered compatible with the *Charter*.

These include the testing and evidentiary provisions introduced by the former Government in 2003 on which the provisions in the Bill are based.

Given this analysis and the Department's advice and in accordance with section 28 of the *Charter*, a statement of compatibility was caused to be prepared and, in my opinion, based on the advice given to me by the Department of Transport, the statement accurately assesses the Bill to be compatible with the *Charter*.

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

**Committee Room  
22 October 2012**

# Appendix 1

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Control of Weapons and Firearms Acts Amendment Bill 2011	1, 4
Courts and Sentencing Legislation Amendment Bill 2012	7
Criminal Procedure Amendment Bill 2012	11, 12
Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Bill 2012	11
Disability Amendment Bill 2012	4, 5
Drugs, Poisons and Controlled Substances Amendment Bill 2012	13
Drugs, Poisons and Controlled Substances Amendment (Supply by Midwives) Bill 2012	4
Duties Amendment (Landholder) Bill 2012	8
Education Legislation Amendment (VET Sector, Universities and Other Matters) Bill 2012	8
Emergency Services Legislation Amendment Bill 2011	1
Energy Legislation Amendment Bill 2012	12
Evidence Amendment (Journalist Privilege) Bill 2012	10
Evidence (Miscellaneous Provisions) Amendment (Affidavits) Bill 2012	3
Fire Services Property Levy Bill 2012	13
Forests Amendment Bill 2012	7
Free Presbyterian Church Property Amendment Bill 2012	12
Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011	1
Gambling Legislation Amendment (Transition) Bill 2012	7
Health (Commonwealth State Funding Arrangements) Bill 2012	9, 11
Health Professions Registration (Repeal) Bill 2012	6
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	7, 8
Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011	1
Justice Legislation Amendment Bill 2012	4
Justice Legislation Amendment (Miscellaneous) Bill 2012	15
Land (Revocation of Reservations) Bill 2012	6
Legal Profession and Public Notaries Amendment Bill 2012	4
Local Government (Brimbank City Council) Amendment Bill 2012	9
Local Government Legislation Amendment (Miscellaneous) Bill 2012	11, 14
Marriage Equality Bill 2012	10, 11
Mineral Resources (Sustainable Development) Amendment Bill 2012	15
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Monetary Units Amendment Bill 2012	8
National Energy Retail Law (Victoria) Bill 2012	6, 8
Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Bill 2012	15
Parliamentary Salaries and Superannuation Amendment (Salary Restraint) Bill 2012	8
Planning and Environment Amendment (General) Bill 2012	13
Planning and Environment Amendment (VicSmart Planning Assessment) Bill 2012	11
Police and Emergency Management Legislation Amendment Bill 2012	8
Port Bellarine Tourist Resort (Repeal) Bill 2012	5
Port Management Amendment (Port of Melbourne Corporation Licence Fee) Bill 2011	1
Port Management Further Amendment Bill 2012	7
Primary Industries and Food Legislation Amendment Bill 2012	12, 14
Primary Industries Legislation Amendment Bill 2012	7
Residential Tenancies Amendment Bill 2012	9
Residential Tenancies and Other Consumer Acts Amendment Bill 2012	12
Retail Leases Amendment Bill 2012	14
Racing Legislation Amendment Bill 2012	11
Resources Legislation Amendment (General) Bill 2012	13
Road Management Amendment (Peninsula Link) Bill 2012	15
Road Safety Amendment Bill 2012	8
Road Safety Amendment (Car Doors) Bill 2102	2
Road Safety Amendment (Drinking While Driving) Act 2011	1
Road Safety and Sentencing Acts Amendment Act 2012	12, 14
Royal Women's Hospital Land Bill 2012	6
State Taxation Acts Amendment Bill 2012	8
Serious Sex Offenders (Detention and Supervision) Amendment Bill 2012	14
Statute Law Repeals Bill 2012	4
Statute Law Revision Bill 2012	4
Tobacco Amendment (Shopper Loyalty Schemes) Bill 2012	15
Tobacco Amendment (Smoking at Patrolled Beaches) Bill 2012	15
Traditional Owner Settlement Amendment Bill 2012	14
Transport (Compliance and Miscellaneous) Amendment (Fares) Bill 2012	6
Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012	14, 15
Victorian Inspectorate Amendment Bill 2012	5, 6
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	5
Water Amendment (Governance and Other Reforms) Bill 2012	4, 5
Working with Children Amendment Bill 2012	9, 10

## Appendix 2

### Committee Comments classified by Terms of Reference

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

#### Alert Digest Nos.

#### Section 17(a)

##### (i) Rights or freedoms

Road Safety and Sentencing Acts Amendment Act 2012 12

##### (vi) inappropriately delegates legislative power

Health (Commonwealth State Funding Arrangements) Bill 2012 9

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

Associations Incorporation Reform Bill 2011	1
Australian Consumer Law and Fair Trading Bill 2011	1
Control of Weapons and Firearms Acts Amendment Bill 2011	1
Criminal Procedure Amendment Bill 2012	11
Drugs, Poisons and Controlled Substances Amendment Bill 2012	13
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	7
Local Government Legislation Amendment (Miscellaneous) Bill 2012	11
Marriage Equality Bill 2012	10
National Energy Retail Law (Victoria) Bill 2012	6
Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Bill 2012	15
Primary Industry and Food Legislation Amendment Bill	12
Road Management Amendment (Peninsula Link) Bill 2012	15
Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012	14
Victorian Inspectorate Amendment Bill 2012	5
Water Amendment (Governance and Other Reforms) Bill 2012	4
Working with Children Amendment Bill 2012	9

#### Section 17(b)

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

Australian Consumer Law and Fair Trading Bill 2011 1



## Appendix 3

### Ministerial Correspondence 2012

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

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Associations Incorporation Reform Bill 2011	Minister for Consumer Affairs	07-02-12 24-02-12	1 of 2012 4 of 2012
Australian Consumer Law and Fair Trading Bill 2011	Minister for Consumer Affairs	07-02-12 24-02-12	1 of 2012 4 of 2012
Control of Weapons and Firearms Acts Amendment Bill 2011	Minister for Police and Emergency Services	07-02-12 29-02-12	1 of 2012 4 of 2012
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	28-02-12 14-03-12	12 of 2011 5 of 2012
Disability Amendment Bill 2012	Minister for Community Services	13-03-12 26-03-12	4 of 2012 5 of 2012
Water Amendment (Governance and Other Reforms) Bill 2012	Minister for Water	13-03-12 27-03-12	4 of 2012 5 of 2012
Victorian Inspectorate Amendment Bill 2012	Minister responsible for the establishment of an anti-corruption commission	27-03-12 16-04-12	5 of 2012 6 of 2012
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	Minister responsible for the establishment of an anti-corruption commission	01-05-12 21-05-12	7 of 2012 8 of 2012
National Energy Retail Law (Victoria) Bill 2012	Minister for Energy and Resources	17-04-12 01-05-12	6 of 2012 8 of 2012
Working with Children Amendment Bill 2012	Attorney-General	05-06-12 16-06-12	9 of 2012 10 of 2012
Health (Commonwealth State Funding Arrangements) Bill 2012	Minister for Health	05-06-12 19-06-12	9 of 2012 11 of 2012
Marriage Equality Bill 2012	Ms Sue Pennicuik MLC	19-06-12 10-08-12	10 of 2012 11 of 2012
Criminal Procedure Amendment Bill 2012	Attorney-General	14.08.12 23.08.12	11 of 2012 12 of 2012
Primary Industries and Food Legislation Amendment Bill 2012	Minister for Agriculture and Food Security	28.08.12 13.09.12	12 of 2012 14 of 2012
Road Safety and Sentencing Acts Amendment Act 2012	Attorney-General	28.08.12 20.09.12	12 of 2012 14 of 2012
Local Government Legislation Amendment (Miscellaneous) Bill 2012	Minister for Local Government	14.08.12 04.10.12	11 of 2012 14 of 2012

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Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012	Minister for Ports	09.10.12 18.10.12	14 of 2012 15 of 2012
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### Table of Ministers responses still pending

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Drugs, Poisons and Controlled Substances Amendment Bill 2012	Minister for Police and Emergency Services	11.09.12	13 of 2012