

No. 16 of 2012

**Tuesday, 13 November
2012**

On the

Drugs, Poisons and Controlled
Substances Amendment Bill 2012

Education Legislation Amendment
(Governance) Bill 2012

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

Police Regulation Amendment
Bill 2012

Retirement Villages Amendment
(Information Disclosure) Bill 2012

Road Management Amendment
(Peninsula Link) Bill 2012

Road Safety Amendment (Operator
Onus) Bill 2012

State Taxation and Other Acts
Amendment Bill 2012

The Committee



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Terms of Reference - Scrutiny of Bills

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

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

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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. 16 of 2012

Education Legislation Amendment (Governance) Bill 2012

Introduced	23 October 2012
Second Reading Speech	24 October 2012
House	Legislative Assembly
Member introducing Bill	Hon. Martin Dixon MLA
Portfolio responsibility	Minister for Education

Purpose

The Bill amends the *Education and Training Reform Act 2006*. Its purposes generally are: -

- To abolish the Victorian Skills Commission;
- To repeal the provisions relating to industry training boards;
- To make provision for VET funding contracts between the Secretary and registered training organisations under which those organisations provide public vocational education and training programs and related services;
- To provide that non-compliance with a government training contract be taken into account in relation to the registration of training organisations;
- To provide for the disclosure of information and documents from the Victorian Registration and Qualifications Authority to the Secretary or to specified Commonwealth authorities or bodies in relation to VET funding contracts;
- To set out further governance provisions relating to TAFE institutes and adult education institutions;
- To make amendments to University Acts to provide for the membership of councils of universities.

Parts 2 and 3 – Abolition of Victorian Skills Commission and industry training boards – VET funding contracts

- It abolishes Victorian Skills Commission (VSC) and industry training boards (ITBs) from 1 January 2013 [3-6]. The Explanatory Memorandum extract:- *'In recent years the VSCs regulatory functions have all moved to the Victorian Registration and Qualifications Authority (VRQA)...The VSCs remaining role is advisory, but new advisory and consultative structures have been established...ITBs also date from the 1990 Act...Their main statutory function was to provide advice to the VSC and State and Commonwealth Governments on training needs in their respective sectors. This advisory and consultative role is now performed by other means.'* A standard power of delegation from the Minister to all directors of the board of a TAFE institute or all the members of the council of a university with a TAFE division is inserted [7].
- Amendments make provision for VET funding arrangements through VET funding contracts between the Secretary and a contractor for the provision of Government subsidised training places. The Secretary of the Department of Education and Early Childhood Development (DEECD) will allocate training funds to education providers [10]. A TAFE

institute board must perform its functions and exercise its powers subject to any VET funding contract between the Secretary and the TAFE institute [11].

VET funding contracts – contractual provisions

- Unusually, the VET funding contracts inserted by clause [10] may contain terms which take effect despite rules and principles of common law and equity. In particular they can include a specific performance provision which is generally not a remedy available in relation to government contracts. They may also include a monetary penalty for breaching a term of the contract. They may also provide that students who are not parties to the contract who have suffered a loss by way of a contractor's failure to deliver training or award a qualification may recover his or her loss.

The Second Reading Speech Extract: -

'The Bill proposed to allow VET funding contracts to include monetary penalties if the contract is breached or if standards are not met. This will be a strong incentive for RTOs to honour their contractual obligations. Secondly, the proposed amendments will permit a court to order a provider to carry out its contract where monetary compensation may not be a sufficient remedy. For example, say a provider has refused to allow its students to complete their courses and exams in a Government-funded course because of a dispute. In such a situation, enabling the students to complete their courses and exams may be as important or more important than a monetary penalty. This amendment will enable a court provider to allow the students to complete their courses or sit their exams.'

Third, the Bill proposes to enable VET funding contracts to specify that certain contractual terms are to operate directly for the benefit of the students. This would give students the right to claim against the provider if they suffer a loss as result of breaching such a term. The Bill needs to create this right because normally only parties to a contract can enforce it. While these are significant extensions of normal contractual principles, it should be kept in mind that these VET funding contracts are not arrangements only between commercial entities operating on purely commercial principals. These are arrangements for the delivery of public educational services on behalf of the State by providers that have agreed to perform this important public function on behalf of the State. It should also be kept in mind that these provisions are not of a regulatory nature that apply to all providers. They apply only to providers that have freely agreed to provide such services under terms arranged in advance.'

Part 4 – Governance of TAFE institutes and Adult Education Institutions – Part 5 – Savings provisions

- The amendments provide that the Governor in Council by Order may create, abolish, amalgamate or change the name of a TAFE institute. The objectives, functions and powers of a TAFE institute are set out. The functions of TAFE institute boards are set out. The Minister may make Ministerial Orders provided there has been a request for an Order or the TAFE institute has been consulted about the proposed Order [17]. The Explanatory memorandum extract: - *'Under the proposed amendments, governance arrangements for TAFE institutes will be more like those for comparable public statutory authorities with large scale operational responsibilities. Each institute will become a statutory corporation.'*
- Board directors with relevant skills and experience are appointed or may be removed by Order of the Governor in Council [20-22]. Amendments enable the board of a TAFE institute to oversee and govern an adult education institution [23]. The Second Reading Speech extract: - *'Initially, it is proposed to merge the boards of the Box Hill Institute of TAFE and of the Centre of Adult Education. These would remain separate educational institutions, with their own industrial agreements, staff, funding and revenue but with a common board and CEO. This will make it possible to achieve synergies and efficiencies in the delivery of educational services.'*

- Victoria has two adult education institutions, the Centre for Adult Education (CAE) and the Adult Multicultural Education Services (AMES). The amendments provide that the Governor in Council by Order may create, abolish or amalgamate adult education institutions. An adult education institution is a body corporate. The objectives, functions and powers of an adult education institution and the governing boards are set out. Board members are appointed and removed by the Governor in Council. **[26-28]**. Employees of the board will become employees of the institute. Transitional provisions preserve existing entitlements **[33]**.

Part 6 – Amendment of University Acts

- The Bill deals with the governance arrangements of the eight Universities: - Deakin University, La Trobe University, Monash University, The Royal Melbourne Institute of Technology, Swinburne University of Technology, University of Ballarat, University of Melbourne and Victoria University. It amends the University Acts in identical terms. It makes two major changes.
- First, from 1 January 2013 appointments to University Councils must be made on the basis of skills and experience and there will no longer be *elected* staff and student positions on University Councils. Elected positions will cease. Existing Government and Council appointed members will remain in office. The Second Reading Speech extract: - *'Appointments will be based on holding qualifications to perform the duties of the position of a director of a major institution. Staff and students will not be disqualified from appointment as Council members if they have the appropriate skills but they will not have guaranteed positions.'*
- The second change relates to the composition of the Council. The Second Reading Speech extract: - *'After discussions with University Chancellors, it is now desirable that Universities should have flexibility in the size and composition of their councils...The Bill proposes to amend each University Act to enable the number of Government-appointed and Council-appointed members to be increased or decreased without the need for legislation. At present they must be exactly the same number. Instead, the number of Government appointed members may be the same as or more than – but may not be less than – the number of Council appointed members. Such changes could only be made at the request of two-thirds of a University's Council with the approval of the Governor in Council. Any changes must be tabled in Parliament and would be subject to disallowance.'*
- In each University the Council will consist of a fixed number of members being three official members (Chancellor, Vice-Chancellor and the President of the Academic Board); and a fixed number of at least 4 government appointed members of whom- at least 2 must have financial expertise, 1 must have commercial expertise at a senior level and a minimum of 1 or a greater number of Council appointed members. The Explanatory Memorandum extract: - *'This means that the fewest members a Council could have would be 8, namely the 3 official members with at least 4 Government appointed members and at least one Council appointed member. No maximum number of Council members is prescribed by the Bill. The number of members would be fixed by Order in Council, but only in accordance with the Council's resolution (if approved) and subject to Parliamentary disallowance'*.

The Committee makes no further comment.

Police Regulation Amendment Bill 2012

Introduced	23 October 2012
Second Reading Speech	24 October 2012
House	Legislative Assembly
Member introducing Bill	Hon. Peter Ryan MLA
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

The Bill amends the *Police Regulation Act 1958*. The Second Reading Speech extract: - *'This Bill amends the Police Regulation Act 1958 to give effect to the Memorandum of Understanding (MOU) entered into by the Government, the Chief Commissioner of Police and the Police Association, which complements the 2011 Victoria Police Enterprise Agreement.'*

Its purposes are: -

- To establish a Police Registration and Services Board (PRS Board);
- To establish a Police Profession Register and provide for registration; and
- To amend the provisions for appointments, transfers, appeals and reviews.

Amendment of *Police Regulation Act 1958* – Appointment of full-time or part time members – Appeal provisions

- It provides that police members may be appointed on a full-time or part-time basis on a fixed term or ongoing basis [6]. New sections 9 and 9A provide for the appointment to the force of former police members and police members of other jurisdictions. The PRS Board provides advice to the Chief Commissioner who must consider it [10]. It sets out the authority of constables who are on leave without pay (other than excluded leave ie: maternity, paternity, study leave etc) for 28 days or more [11].
- New Division 4 of Part IV is inserted which sets out the provisions dealing with unfitness for duty. The Chief Commissioner may take action where a police member is incapable of performing his or her duties as a member of the police force. Review of a decision is provided for in new Part IVAA [14]. New Part IVAA sets out the provisions relating to appeals and reviews. Review of decisions is conducted by the PRS Board. Procedures on appeal are set out. The PRS Board is bound by the rules of natural justice in all appeals and reviews. Hearings are to be in public unless ordered otherwise [15].

The Second Reading Speech extract: -*'The Bill will insert a new Part IVAA which will set out a revised framework for appeals or review by the new Board...There is no change to fundamental appeal rights for members of police and Protective Service Officers other than those agreed to in the MOU. The new provisions will modify appeal rights for promotion and transfer decisions in accordance with streamlined arrangements agreed to in the MOU. Police and Protective Service Officers will be able to appeal a promotion or transfer decision only if they applied for the position and have not lodged four or more appeals in respect of promotions and transfers in the previous 12 months.*

Police members and protective services officers will also be able to apply to the Board for a review of other types of decisions including non-confirmation and disallowance of promotions, demotions, compulsory and directed transfers, termination of appointments and dismissals. The Bills will also streamline procedures for lodging and determining reviews and appeals. Applicants will now have strict timeframes in which to lodge an application for a review or an appeal – in most cases applications will need to be lodged within three days of being notified of a decision

and the Chief Commissioner of Police will have two days in which to lodge relevant files with the Board.Further the Board must determine matters within five days of receiving the relevant file from the Chief Commissioner....Appeals will be determined in accordance with superior efficiency and decisions relating to dismissals, demotions and directed transfers will be reviewable on the grounds that the decision is harsh, unjust or unreasonable.'

Amendment of Police Regulation Act 1958 – Police Registration and Services Board (PRS Board) – the Police Profession Register (PPR)

- The PRS Board is established as a body corporate. Its functions include keeping the Police Profession Register, advising the Chief Commissioner on proposed appointments and professional standards, the hearing and determination of appeals and to conduct reviews. Members are appointed by the Governor in Council and entitled to remuneration and allowances (if any) fixed from time to time by the Governor in Council. For the purposes of registration on the PPR, the PRS Board may conduct criminal record checks, conduct any investigations and make any enquiries it considers necessary [16].
- New Part VAA is inserted to provide for the operation of the PPR. It sets out the qualifications and eligibility required for registration on the PPR and for the registration process. The PRS Board may conduct hearings for the purposes of determining whether to grant or refuse an application for registration or cancel the registration. Written notice must be given to the applicant who has 21 days to respond and demonstrate why the registration should not be cancelled. Hearings are held in private unless otherwise ordered. The PRS Board must keep the PPR [17]. Additional standard regulation making powers are inserted into the Act to enable the prescription of minimum educational and training standards for former members seeking re-entry into the force or standards of ongoing professional development [21].

The Committee makes no further comment.

Retirement Villages Amendment (Information Disclosure) Bill 2012

Introduced	23 October 2012
Second Reading Speech	24 October 2012
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill amends the *Retirement Villages Act 1986*.

- It requires the owner or a manager of a retirement village to provide a factsheet being summary of information relating to the retirement village available for inspection to a prospective resident within 7 days of the request free of charge. Failure to do so attracts a penalty of 120 penalty units. The factsheet must also be included in any village marketing material sent or given to a retired person [4].
- The factsheet must also be given to a resident at least 21 days before a resident enters into a management contract with the manager of the retirement village [5]. A standard regulation making provision is included [7].

The Committee makes no further comment.

Road Safety Amendment (Operator Onus) Bill 2012

Introduced	23 October 2012
Second Reading Speech	24 October 2012
House	Legislative Assembly
Member introducing Bill	Hon. Terry Mulder MLA
Portfolio responsibility	Minister for Roads

Purpose

The Bill amends the *Road Safety Act 1986*.

Its purpose is to improve the effectiveness and efficiency of the operator onus system. It introduces a range of measures intended to discourage a corporation that is the operator of a motor vehicle or trailer involved in an operator onus offence from failing to nominate the person who was driving or in charge of the vehicle or trailer at the time of the offence.

The extract from the Second Reading Speech: - *'The operator onus system is used for enforcing offences where the identity of the offender is not known, such as road safety camera offences. The operator onus system applies to offences involving motor vehicles and trailers. The operator onus system is based on the principle that if the identity of the driver or the person in charge of the vehicle is not established at the time the offence is detected, the person last known to have possession or control of the vehicle should be generally liable for the offence.'*

Amendments to the *Road Safety Act 1986*

- It imposes a penalty of 120 penalty units in relation to a corporation where the offence relates to the driving of a heavy vehicle exceeding the speed limit by 35 kilometres per hour. The penalty for a natural person remains 30 penalty units. **[3] [6]**. A corporation which repeatedly fails to nominate the person involved in an operator onus offence that is committed in a motor vehicle or trailer for which the corporation is responsible may be liable for a penalty of 120 penalty units **[8]**.
- It increases the penalty for a corporation of the offence of providing false and misleading information in a statement from 60 to 120 penalty units. It also creates a new offence of failure to give an effective statement. The maximum penalty for a corporation is 120 units. **[9]** It also provides that persons convicted of providing false and misleading information may have their licence cancelled or disqualified **[10]**. It increases the maximum penalty from 100 to 120 penalty units in respect of regulations relating to corporations which are made by virtue of section 95D of the *Road Safety Act 1986*.
- It amends section 84BB so that an unknown user statement cannot be made in relation to an offence involving a taxi-cab **[5, 7]**. The Second Reading Speech comments: - *'The Transport (Compliance and Miscellaneous) Act 1983 and regulations under that Act require taxi-cab operators to keep a record of who is driving their taxis at all times, whereas the operator onus system, in its current form, allows taxi-cab operators to submit unknown user statements and taxi-cab drivers to renominate other drivers for operator onus offences. The Bills addresses this disparity...'*

The Committee makes no further comment.

State Taxation and Other Acts Amendment Bill 2012

Introduced	23 October 2012
Second Reading Speech	24 October 2012
House	Legislative Assembly
Member introducing Bill	Hon. Kim Wells MLA
Portfolio responsibility	Treasurer

Purpose

The Bill makes a series of amendments to the *Land Tax Act 2005*, the *Road Safety Act 1986*, the *Taxation Administration Act 1997* and the *Trustee Companies Act 1984*.

This includes: -

- clarifying tax exemptions in relation to the principal place of residence and limiting the amount of unpaid land tax which can be recovered;
- implementing the base light vehicle registration fee which was increased by \$35 on 1 April 2012 from \$191.60 to \$226.60; and
- making amendments which complements changes made to the *Corporations Act 2001* by the Commonwealth relating to ASIC taking over responsibility for prudential supervision of trustee companies from the States and Territories.

Amendments to the *Land Tax Act 2005*

- The Bill amends the exemption for land which is contiguous to the family home to clarify that it does not apply to contiguous land which contains a separate residence. It also clarifies that the principal place of residence exemption to be apportioned where a land owner rents out a separate residence on the same land as the family home [4-5]. A new land tax exemption is inserted so that a person can claim the principal place of residence for up to six years after they leave the family home to go into permanent care, provided the home is not rented out [8]. The Second Reading Speech extract: - '*This exemption will assist these Victorians transition to their new living arrangements*'.
- The amendments provide that the Tax Commissioner may also consider all relevant matters rather than a restricted prescribed list when determining whether a person is carrying on a 'substantial business activity' [13]. It provides that the Tax Commissioner can only recover the amount of land tax received from a lessee or occupier of the land to the amount of rent due [16].

Amendment of the *Road Safety Act 1986*

- It amends section 9(1A) to implement the base light vehicle registration fee increase of \$35 from 15.68 fee units (\$191.60) to 18.54 fee units (\$226.20). The increase is currently imposed by means of interim regulations made on 1 April 2012 [20].

Amendment of *Taxation Administration Act 1997* and *Trustee Companies Act 1984*

- In relation to the valuations of property it extends the circumstances in which an objector is required to pay for a valuation to include where the objector has not provided any information to the Commissioner as to the value of the property [22]. It gives effect to the arrangements made by the Commonwealth to ASIC taking over responsibility for prudential supervision of trustee companies from the States and Territories and for the transfer of assets where appropriate [26-28].

The Committee makes no further comment.

Ministerial Correspondence

Drugs, Poisons and Controlled Substances Amendment Bill 2012

The Bill was introduced into the Legislative Assembly on 29 August 2012 by the Hon. Peter Ryan MP. The Committee considered the Bill on 10 September 2012 and made the following comments in Alert Digest No. 13 of 2012 tabled in the Parliament on 11 September 2012.

Committee Comment

Charter report

Presumption of innocence – Reverse onus

Summary: Clause 4 amends a definition relevant to a defence on which the defendant bears the onus of proof. The Committee will write to the Minister seeking further information as to the compatibility of clause 4 with the Charter right of defendants to be presumed innocent **until proved guilty according to law.**

The Committee notes that clause 4 amends the definition of ‘domestic animal’ for the purposes of the offence of laying poison baits in existing s. 52. Section 52(2) sets out several defences to this offence, but most of them are subject to a proviso that the defendant must take ‘all reasonable precautions to prevent access to’ the poison bait ‘by any domestic animal’. The defendant bears the onus of proving that such precautions were taken.ⁱ

The Committee observes that the present definition of ‘domestic animal’ in s. 52 is set out in s. 52(3) as follows:

In this section a reference to a domestic animal is a reference to any cattle within the meaning of the Pounds Act 1958 or any dog cat or fowl or any other animal of any other kind or species whatever (whether a quadruped or not) which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man.

Clause 4(1) removes the underlined words and clause 4(2) adds the following definition of ‘cattle’:

For the purposes of subsection (3), cattle includes any horse, mare, gelding, colt, filly, foal, bull, cow, ox, steer, heifer, calf, ram, ewe, sheep, lamb, ass, mule, goat or pig.

This newly inserted definition is in similar terms to the definition in the Pounds Act 1958 prior to its repeal in 1994.ⁱⁱ

However, the Committee notes that transitional provisionsⁱⁱⁱ may mean that, since 1994, the reference to ‘cattle within the meaning of the Pounds Act 1958’ picks up the equivalent definition in the Impoundment of Livestock Act 1994.^{iv}

ⁱ *Drugs, Poisons and Controlled Substances Act 1983*, s. 104.

ⁱⁱ Section 3 of the *Pounds Act 1958* provided: “‘cattle’ includes any horse mare gelding colt filly or foal and any full cow ox steer heifer or calf, and any ram ewe sheep or lamb, and any ass mule goat or pig.”

ⁱⁱⁱ Section 43(3) of the *Impoundment of Livestock Act 1994* provided: ‘On and after the commencement of this section, a reference to the *Pounds Act 1958* in any Act..., unless inconsistent with the context or subject-matter, is deemed to be a reference to the *Impounding of Livestock Act 1994*.’ Although s. 43 was repealed by the *Statute Law Revision Act*

livestock means an animal (including a bird) of any species used in connection with primary production or kept or used for recreational purposes or for the purposes of recreational sport, other than a dog or cat

The Committee observes that this modern language may differ in effect or clarity from the archaic language inserted by clause 4.^v

The Committee will write to the Minister seeking further information as to the compatibility of clause 4 with the Charter right of defendants to be presumed innocent until proved guilty according to law.^{vi} Pending the Minister's response, the Committee draws attention to clause 4.

Minister's response

I am writing in response to your letter of 11 September 2012 enclosing an Alert Digest report by the Scrutiny of Acts and Regulations Committee in relation to clause 4 of the Drugs, Poisons and Controlled Substances Amendment Bill 2012.

The Bill received assent on 16 October 2012. Section 4 of the Drugs, Poisons and Controlled Substances Amendment Act 2012 (the Amending Act) has yet to be proclaimed.

The Committee has sought further information about the compatibility of clause 4 of the Bill (now section 4 of the Amending Act) with the right of defendants under the Charter of Human Rights and Responsibilities Act 2006 (the Charter Act) to be presumed innocent until proved guilty.

Section 4 of the Amending Act amends section 52 of the Drugs, Poisons and Controlled Substances Act 1981 (the Drugs Act). Section 52(1) of the Drugs Act prohibits the setting of poison baits and section 52(2) provides exceptions to this offence. For many of those exceptions, section 52(2) requires that reasonable precautions be taken to prevent access to the baits by domestic animals, including cattle. In accordance with section 104 of the Drugs Act the defendant bears the onus of proving that such precautions were taken. Section 52(3) specifies that "domestic animal" includes "cattle within the meaning of the Pounds Act 1958".

The Pounds Act was repealed by the Impounding of Livestock Act 1994 (the Livestock Act). To correct the outdated reference to the Pounds Act and preserve the intended scope of section 52(3), section 4 of the Amending Act removes the phrase "within the meaning of the Pounds Act 1958" and inserts a definition of the term "cattle", which reproduces the definition that was used in the Pounds Act.

The Committee's report queries whether section 4 of the Amending Act alters the scope of section 52(3) of the Drugs Act and, as a consequence, the scope of matters for which a defendant must prove the taking of reasonable precautions under section 52(2). Specifically, the Committee's report suggests that transitional provisions under section 43(3) of the Livestock Act may mean that since 1994, the reference to "cattle within the meaning of the

2007, its continuing effect is ensured by s. 14(2A) of the *Interpretation of Legislation Act 1984*. See also s. 16(a) of the *Interpretation of Legislation Act 1984*.

^{iv} *Impoundment of Livestock Act 1994*, s. 3. (The words 'or for the purposes of recreational sport' were added in 2007.)

^v The Committee notes that the original definition of 'cattle' in the *Pounds Act 1958* is an 'includes' definition that extended the term's natural meaning (see *Mackay v Davies* [1904] 1 CLR 483.) It may also be unclear whether or not the definition in new sub-section 52(4) is qualified either by the express limitation concerning 'sufficiently tamed' animals in s. 52(3) or an implicit limitation to animals used for primary production (derived from 'cattle') or recreational purposes (derived from 'domestic animals'). For example, clause 4 may affect whether or not a person who sets poisons baits must prove that he or she took reasonable precautions to prevent access by feral livestock (e.g. wild pigs or goats, or brumbies.)

^{vi} Charter s. 25(1).

Pounds Act 1958” in section 52(3) has picked up the equivalent definition of “livestock” in the Livestock Act, which differs from the older definition of “cattle”.

I am satisfied that the definition of “livestock” in the Livestock Act does not apply to section 52(3) of the Drugs Act and hence section 4 of the Amending Act does not alter the scope of section 52(3), for the following reasons.

Section 43(3) of the Livestock Act is a reconstruction provision applying to outdated references to the Pounds Act. (As noted in the Committee's report, the effect of that provision is preserved, despite its repeal, by section 14(2A) of the Interpretation of Legislation Act 1994.) Section 43(3) provided:

“On and after the commencement of this section, a reference to the Pounds Act 1958 in any Act ... unless inconsistent with the context or subject-matter, is deemed to be a reference to the Impounding of Livestock Act 1994.” (italics added)

This reconstruction provision only expressly changes the construction of the words “Pounds Act 1958”. Applying the reconstruction provision to section 52(3) of the Drugs Act would yield a reference to “cattle within the meaning of the Impounding of Livestock Act 1994”. However, the word “cattle” is not defined in the Livestock Act and so this reference is meaningless. This indicates that the reconstruction provision does not operate for section 52(3), as reconstructing that reference would be “inconsistent within the context” of it.

Additionally, there is nothing in section 43(3) that authorises reconstructing a reference to a defined term as a reference to an equivalent term. In any event, cattle and livestock are not equivalent. The new definition of “livestock” is significantly different from the old definition of “cattle”. The latter definition is inclusive whereas the new definition of “livestock” is exclusive. The definition of “livestock” is also wider as it applies to “an animal” generally, “including a bird”, and extends to animals “kept or used for recreational purposes or for the purposes of recreational sport”. The old definition of “cattle” does not indicate such breadth. Reconstructing the reference to the Pounds Act in section 52(3) is thus also “inconsistent with the subject-matter” of that reference. This again indicates that the reconstruction provision does not affect section 52(3) of the Drugs Act. To so reconstrue section 52(3) would extend the class of animal to which the reference applies.

I note that in discussing the potential impact of section 43(3) of the Livestock Act on section 52(3) of the Drugs Act, the Committee's report refers to section 16(a) of the Interpretation of Legislation Act 1984. Relevantly, section 16 provides:

“Where ... a provision of an Act is repealed and re-enacted (with ... modification) then, unless the contrary intention expressly appears- (a) any reference in any Act ... to the repealed ... provision shall be construed as a reference to the re-enacted ... provision”

For the reasons outlined above, the definition of “livestock” is not considered to be a re-enactment with modifications of the definition of “cattle”. It is a new definition of a different term with a different scope. Accordingly, section 16(a) of the Interpretation of Legislation Act 1984 is not considered to affect section 52(3) of the Drugs Act.

In summary, my opinion is that the definition of “livestock” in the Livestock Act does not apply to section 52(3) of the Drugs Act. In my view, therefore, section 4 of the Amending Act does not affect the scope of matters for which a defendant must prove the taking of reasonable precautions, and no issues are raised in terms of the section's compatibility with the right under the Charter Act of defendants to be presumed innocent until proved guilty according to law.

I hope the above information is of assistance to the Committee. If you wish to discuss any of the advice in this letter please do not hesitate to contact me.

The Committee thanks the Minister for this response.

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

The Bill was introduced into the Legislative Assembly on 9 October 2012 by the Hon. Michael O'Brien MP. The Committee considered the Bill on 22 October 2012 and made the following comments in Alert Digest No. 15 of 2012 tabled in the Parliament on 23 October.

Committee Comment

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. 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.^{vii}

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.

Minister's Response

The Scrutiny of Acts and Regulations Committee (the Committee) has sought further information as to whether the exception introduced by clause 8 of the Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Bill 2012 (the Bill) imposes a legal or evidential burden on an accused.

Clause 33 inserts a new section 647A into the *Offshore Petroleum and Greenhouse Gas Storage Act 2010*. The new section provides that the National Offshore Petroleum Safety and Environmental Management Authority must issue an identity card to a petroleum project inspector. Subsection 647A(3) provides that a person who ceases to be a petroleum project inspector must immediately return the identity card to NOPSEMA or to a person specified by NOPSEMA. It is an offence to fail to do so, punishable by 5 penalty units. Subsection 647A(4) provides that subsection 647A(3) does not apply if the identity card was lost or destroyed.

Subsection 647A(4) is an exception to the offence in subsection 647A(3). Section 72 of the *Criminal Procedure Act 2009* provides that if an Act creates an offence and provides an exception, and an accused wishes to rely on the exception, then the accused must present or point to evidence that suggests the reasonable possibility of the existence of facts that would establish the exception. Consequently, the new subsection 647A(4), when read with section 72 of the *Criminal Procedure Act 2009*, imposes an evidential onus on an accused. It follows

^{vii} Charter, s. 25(1).

that an evidential onus in these circumstances does not limit the right to be presumed innocent in subsection 25(1) of the *Charter of Human Rights and Responsibilities Act 2006*.

I thank the Committee for its careful consideration of the Bill.

HON. MICHAEL O'BRIEN MP
Minister for Energy and Resources

8 November 2012

The Committee thanks the Minister for this response.

Road Management Amendment (Peninsula Link) Bill 2012

The Bill was introduced into the Legislative Assembly on 9 October 2012 by the Hon. Terry Mulder MP. The Committee considered the Bill on 22 October 2012 and made the following comments in Alert Digest No. 15 of 2012 tabled in the Parliament on 23 October.

Committee Comment

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.^{viii} The Committee observes that, if 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.^{ix}

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.

Minister's Response

Thank you for your letter of 23 October 2012 requesting information on the matter raised by the Committee in Alert Digest No. 15 of 2012 in relation to the Road Management Amendment (Peninsula Link) Bill 2012.

The Committee has drawn my attention to new section 134D(8) to be added to the Road Management Act 2004 (the Act) by clause 12 of the Bill.

New section 134D(8) disapplies section 66 of the Act where advertising hoardings and like matters are permitted to be erected under the Peninsula Link project deed.

Section 66(1) creates an offence of placing any advertisement or like thing on a road or road infrastructure without the consent of the coordinating road authority.

The Committee suggests that this provision may reverse the legal onus of proof – that is requires a person to prove their innocence – and may therefore engage the right to be presumed innocent until proven guilty.

In my view, the Bill does not have this effect either substantially or in practice. My detailed response to the Committee is provided at **Attachment 1**.

^{viii} 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.

^{ix} Charter s. 25(1).

If you require further information, please contact Ian Shepherd, Deputy Executive Director, Regulation Governance and Law Division of the Department of Transport by telephone (03) 9655 1701 or ian.shepherd@transport.vic.gov.au.

Hon Terry Mulder MP

Minister for Roads

31 October 2012

Attachment 1

**RESPONSE TO THE COMMITTEE –
ROAD MANAGEMENT AMENDMENT (PENINSULA LINK) BILL 2012**

Background

The Committee has drawn my attention to new section 134D(8) to be added to the *Road Management Act 2004* (the Act) by clause 12 of the Bill.

New section 134D(8) disapplies section 66 of the Act where advertising hoardings and like matters are permitted to be erected under the Peninsula Link project deed.

Section 66(1) of the Act creates an offence of placing any advertisement or like thing on a road or road infrastructure without the consent of the coordinating road authority.

Section 66(2) of the Act provides that the offence established in subsection (1) does not apply if the advertisement or suchlike is authorised by any other Act.

The Committee suggests that this provision may reverse the legal onus of proof – that is requires a person to prove their innocence - and may therefore engage the right to be presumed innocent until proven guilty.

Prosecutions under section 66

The Peninsula Link project deed is a contract between the State and Southern Way Pty Limited to support the opening of the new road and its ongoing operation and maintenance.

Southern Way (the Peninsula Link Freeway Corporation under the Bill), the private operator, will be the coordinating road authority for specified purposes. This does not include bringing prosecutions under section 66 of the Act because Southern Way is a private corporation and it would be inappropriate to confer statutory power on the corporation to prosecute Victorian laws.

Accordingly, under the Bill Southern Way may request VicRoads to exercise its coordinating road authority powers and this could include a request to prosecute offences relating to the Peninsula Link Freeway.

Response

The issue raised by the Committee flowed from the response by the Minister for Agriculture and Food Security to a comment in Alert Digest No. 14 of 2012. In that case, it was (the Minister said) intended that a legal onus be placed on an accused and express words were not required to clarify this point.

The whole purpose of the provision in the Bill is to ensure that it is not an offence to place an advertisement hoarding or suchlike along the new road where the manager of the road has already given consent for the advertisement hoarding or related matter to be placed. So the question of legal burden of proof being on the accused will not arise in a practical sense and accordingly the point is essentially theoretical.

I appreciate the Committee's concern, however, I am advised in this case that there is no intention to cast any onus of proof on a defendant to a prosecution. Rather, the intention and effect is to limit application of the offence provision and to reduce the number of cases where a prosecution could be sustained – that is, the provision makes it clear when an offence is, or is not, committed. The burden is with the prosecution to prove both that a sign had been erected and that it was not authorised by the Peninsula Link project deed. This therefore does not reverse the legal onus of proof.

In the event that there is a marginal technical argument that the rights of persons in criminal proceedings are engaged by this provision, my Department has advised that this is not such as to engage the charter right in any meaningful way. That is because a prosecution brought in circumstances in which new section 134D(8) and, consequently, section 66(2) applies would be wrongly brought. Since prosecutors would consider the provisions before laying charges I am advised that it would be highly unlikely that a prosecution would be commenced in the circumstances contemplated by the Committee's report. However, if that were the case, the prosecution would have a duty to draw the relevant matters to the court. As such, I do not think the circumstances envisaged by the Committee would arise.

I would add that Southern Way would be most unlikely to ask VicRoads to prosecute a person under section 66(1) for advertising along the road in circumstances where Southern Way itself had already granted permission to that person to place the advertisement hoarding or like thing.

I also note that any permission granted by Southern Way in respect of advertising must meet the specific requirements set out in the project deed in respect of size, dimensions and other relevant matters.

In those circumstances, in my view, it was unnecessary to refer to the right and the relevant provision in my statement of compatibility. The legal scenario appears quite different to that referred to in Alert Digest No. 14 of 2012.

The Committee thanks the Minister for this response.

**Committee Room
12 November 2012**

Appendix 1

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Appendix 2

Committee Comments classified by Terms of Reference

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

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Section 17(b)

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

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Appendix 3

Ministerial Correspondence 2012

Table of correspondence between the Committee and Ministers during 2012

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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
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National Energy Retail Law (Victoria) Bill 2012	Minister for Energy and Resources	17-04-12 01-05-12	6 of 2012 8 of 2012
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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
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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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Table of Ministers responses still pending

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published