

No. 1 of 2013

Tuesday, 4 February 2013

On the

Assisted Reproductive Treatment
Amendment Bill 2012

Corrections Amendment Bill 2012

Courts Legislation Amendment
(Reserve Judicial Officers) Bill 2012

Crimes Amendment (Gross Violence
Offences) Bill 2012

Energy Legislation Amendment
(Flexible Pricing and Other Matters)
Bill 2012

Jury Directions Bill 2012

Statute Law Amendment (Directors'
Liability) 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

'*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 \$122.14).

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

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

[] denotes clause numbers in a Bill.

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Assisted Reproductive Treatment Amendment Bill 2012

Introduced	11 December 2012
Second Reading Speech	12 December 2012
House	Legislative Assembly
Member introducing Bill	Hon. Dr Denis Napthine MLA
Portfolio responsibility	Minister for Health

Purpose

The Bill amends the *Assisted Reproductive Treatment Act 2008*. Its purposes are: -

- To permit the Patient Review Panel, in exceptional circumstances to extend storage periods for gametes and embryos without the written approval of the person who produced the gametes or a person who produced gametes from which the embryo was formed;
- To permit the Patient Review Panel, in exceptional circumstances, to extend storage periods for gametes and embryos if the storage period has expired;
- To provide for a 20 year storage period for gametes obtained from a child or from an adult certified as at risk of premature infertility;
- To provide that gametes and embryos kept in storage on commencement of this Act are lawfully stored despite expiry of the storage period;
- To allow time for removal of gametes and embryos from storage after the storage period expires;
- To make other amendments to improve the operation of the Patient Review Panel.

The Second Reading Speech note: *'In June 2011 the Government became aware that gametes were being stored for longer than Victoria's permitted statutory period. This arose in the context of the Patient Review Panel handling of applications for extension of gamete storage that had been received following the expiry of the storage period ... The Minister for Health engaged Dr Andrew Perrignon to undertake an independent review of the issues in relation to long term storage of gametes ... Dr Perrignon completed his review in December 2011 making a number of recommendations for amendments to the Act to ensure a fair and patient-centred approach to the long term storage of gametes and that patients whose gamete stores have expired are not disadvantaged...The Bill adopts these recommendations and extends these to deal with embryos where appropriate.'*

Amendments to the Assisted Reproductive Treatment Act 2008

- It extends the statutory storage period from 10 to 20 years for gametes produced by children and persons who are certified by a doctor as being at reasonable risk of becoming prematurely infertile because of a medical condition or procedure [4]. The Patient Review Panel may approve the extended storage of embryos in exceptional circumstances (eg: such as the person's written approval cannot be obtained etc). Section 34A deals with the timeframe for removing embryos from storage after the expiry of the storage period [7, 8].
- The Patient Review Panel consists of a chairperson and other members appointed by the Governor in Council to enable more flexible and efficient operation [9-13]. Transitional provisions ensure gametes and embryos which have been kept in storage beyond the

statutory storage period and without further approval, are deemed to be lawfully stored for a period of 18 months after the commencement of the Act [14].

The Committee makes no further comment

Corrections Amendment Bill 2012

Introduced	11 December 2012
Second Reading Speech	13 December 2012
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister for Corrections

Purpose

The purpose of the Bill is to make a number of miscellaneous amendments to the *Corrections Act 1986* and the *Parole Orders (Transfer) Act 1983*. The Second Reading Speech extract: - ‘*This Bill implements recommendations from the Ombudsman Victoria 2012 Report into the Death of Carl Williams and the Sentencing Advisory Council’s Report on the Victorian Adult Parole System. The Bill also implements nationally agreed amendments to the model Parole Orders (Transfer) Act 1983 and makes a number of minor or technical amendments to the Corrections Act.*’

Part 2 – Amendments to the *Corrections Act 1986*

- The Bill provides that the Secretary can authorize a registered medical practitioner (who is not an employee of the Department of Justice) to act as principal medical officer for a prison [9]. It clarifies that an officer is required to provide oral and written information to the Secretary in relation to the security and good order of a prison or the safe custody and welfare of prisoners [10][30]. It amends section 30A to allow a victim to be given a copy of an order made under the *Serious Sex Offenders (Detention and Supervision) Act 2009* in relation to the perpetrator. It renames ‘official visitors’ as ‘independent prison visitors’ [13]. The Secretary must notify the Victorian Registrar of particular details in relation to prisoners including date of birth etc [19].
- It introduces a new Police Custody Transfer Orders scheme where permission is sought from the Supreme Court for a prisoner to be absent from prison to voluntarily provide information to Victoria police. A prisoner can only be authorised for absence under the order for a period not exceeding three days [5-6] [20]. It allows Associate Judges of the Supreme Court to be appointed to the Adult Parole Board including part-time members [22-26]. It clarifies the wording of section 77(5) and the date upon which an offence is taken to have been committed for the purposes of the cancellation of parole [29].
- It inserts a new section 99A which provides for the testing of offenders to assess whether they are under the influence of alcohol, poison or a drug of dependence if it is considered necessary for the management, good order or security of a location, the safety and welfare of offenders at a location and ensuring that the offender performs unpaid community work at a location [32]. It extends the search power of community corrections officers (currently limited to community corrections centres) to enable officers to conduct searches at places which offenders are required to attend by order [33].
- It inserts a new Part 9E which contains substantive provisions governing the ‘Disclosure of Information’. The penalty for unauthorised disclosure is 120 penalty units [35]. Regulations may be made relating to the expenditure of moneys from prisoner interest funds for the purposes of assisting victims of crime or their family members [36].

Part 3 – Amendments to the *Parole Orders (Transfer) Act 1983*

- It makes further provision for the interstate transfer of parole orders [38-48]. The Explanatory Memorandum note:- ‘A legislative scheme for the interstate transfer and registration of parole orders has existed since 1983, with participating jurisdictions enacting legislation based on a model Bill for this purpose. A model amendment Bill has been

prepared to address a number of operational and technical issues that have arisen since the scheme commenced.' It inserts a new 11A relating to the use of documents and information. For the purposes of making a determination the Minister may inform himself or herself by reference to specified documents and information [49].

The Committee makes no further comment

Courts Legislation Amendment (Reserve Judicial Officers) Bill 2012

Introduced	12 December 2012
Second Reading Speech	13 December 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The purposes of the Bill are: -

- To provide for reserve judicial officers in the Supreme, County and Magistrates' Courts;
- To repeal the office of acting judge and acting magistrate and make consequential amendments.

Amendments to the *Supreme Court Act 1986*, the *County Court Act 1958*, the *Magistrates' Court Act 1989* and the *Constitution Act 1975*

Section 17(a)(vi) legislative power

- The Bill provides that with the exception of clauses 62, 63 and 64 it commences on the day after Royal Assent [2]. The Explanatory memorandum states '*Since clauses 62, 63 and 64 amend provisions that are not yet in force, these clauses cannot come into operation before the provisions they amend are in force. The Bill therefore provides that clauses 62, 63 and 64 come into operation on a day or days to be proclaimed. There is no forced commencement provision for these clauses as the commencement date of the Acts being amended are not yet known and the commencement needs to be coordinated.*'

The Committee notes the explanation provided in the memorandum and draws the provision to the attention of the Parliament.

- The Bill provides for the appointment by the Governor in Council of reserve judges in the Supreme Court [12] and the County Court [25]. It also provides for the appointment by Governor in Council of reserve magistrates [35]. It repeals the office of acting Judge [10][24]. It repeals the office of acting magistrate [34]. It sets out the terms and conditions of the office of reserve judge [12][25]. It also sets out the terms and conditions for a reserve magistrate [39]. A standard transitional regulation making power is set out [21][30][51]. It also makes consequential amendments to various definitions in other Acts [Part 5]. Reserve judges may be appointed as alternative members of the Youth Residential Board and the Youth Parole Board [78-79].

The Committee makes no further comment

Crimes Amendment (Gross Violence Offences) Bill 2012

Introduced	12 December 2012
Second Reading Speech	13 December 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The purposes of the Bill are to: -

- Substitute new definitions of *injury* and *serious injury* into the *Crimes Act* 1958. It also amends the *Sentencing Act* 1991;
- Create two new indictable offences with a non-parole period of not less than four years.

Amendment of the *Crimes Act* 1958 and the *Sentencing Act* 1991

- The Bill inserts amended definitions of *injury* and *serious injury* [3]. It creates two new indictable offences: The first offence is that of causing serious injury intentionally in a circumstance of gross violence. It attracts a maximum penalty of 20 years imprisonment and a non-parole period of not less than four years. The second offence is that of causing injury recklessly in a circumstance of gross violence. It attracts a maximum penalty of 15 years imprisonment and a non-parole period of not less than four years [4].
- It provides that the offence of causing serious injury will be an alternative verdict to the offence of causing serious injury intentionally in circumstances of gross injury if the jury is not satisfied that there were circumstances of gross violence [5]. It inserts the new gross violence offences in the definition of serious offence [8]. If a court finds that a *special reason* exists, the statutory minimum sentence does not applyⁱ [9].

The Committee makes no further comment

ⁱ See new Section 10A – Definition of impaired mental functioning means a mental illness, an intellectual disability, an acquired brain injury, autism spectrum disorder, a neurological impairment including but not limited to dementia. See the factors set out in Section 10A(2)(a) to (e); See also Section 10A(2)(e) – A court may make a finding that a special reason exists if there are ‘substantial and compelling circumstances that justify doing so’.

Energy Legislation Amendment (Flexible Pricing and Other Matters) Bill 2012

Introduced	11 December 2012
Second Reading Speech	12 December 2012
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Energy and Resources

Purpose

The purposes of the Bill are: -

- To repeal the electricity and gas industry cross ownership restrictions;
- To enable the implementation of consumer protections where energy retailers choose to make available flexible pricing plans to electricity consumers;
- To enable the Electricity Services Commission (ESC) to take enforcement action in respect of contraventions by gas and electricity distributors in relation to the provision of those services.

Amendment of *Electricity Industry Act 2000*, the *Gas Industry Act 2001*, the *National Electricity (Victoria) Act 2005*, the *National Gas (Victoria) Act 2008*

- The Bill removes the restrictions on cross ownership in the electricity and gas sectors. The Explanatory memorandum notes 'The provisions of the Competition and Consumer Act 2010 of the Commonwealth (formerly the Trade Practices Act 1974) will still apply' **[4][10]**. The Second Reading Speech: 'Victoria is ... upgrading to Advanced Metering Infrastructure, of which electricity smart meters are an integral part ... Victorians will have the option of moving to flexible pricing plans for electricity from the middle of 2013'. It enables by Order in Council published in the Government Gazette, the implementation of appropriate consumer protections where energy retailers choose to make available flexible pricing plans to their electricity consumers. Relevant entities must comply with advanced metering infrastructure (AMI) Orders in Council **[5-9]**.
- Ministerial Orders published in the Government Gazette may amend Chapter 7 of the National Electricity Rules relating to pricing proposals to ensure consistency within Victoria's metering regime **[13]**. Ministerial Orders published in the Government Gazette specify which regulatory laws may be enforced by the ESC rather than the Australian Energy Regulator in respect of contraventions by gas and electricity distributors **[15][21]**. New section 28 enables the Australian Energy Regulator to provide information to the ESC in relation to the enforcement of regulatory obligations **[19][25]**.

The Committee makes no further comment

Jury Directions Bill 2012

Introduced	12 December 2012
Second Reading Speech	13 December 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The purposes of the Bill are: -

- To reduce the complexity of jury directions in criminal trials;
- To simplify and clarify the issues that juries must determine in criminal trials;
- To simplify and clarify the duties of the trial judge in giving jury directions in criminal trials;
- To clarify that it is one of the duties of legal practitioners appearing in criminal trials to assist the trial judge in deciding which jury directions should be given;
- To assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible;
- To permit the trial judge to answer questions from the jury about the meaning of the phrase 'proof beyond reasonable doubt'; and
- To provide for simplified jury directions in relation to post-offence conduct.

Part 2 – General – Part 3 – Request for directions

- The guiding principles for the Bill which signifies a new simplified approach to jury directions are set out [5]. In giving directions to the jury, the trial judge need not use any particular form of words [6]. Part 3 of the Bill provides a new framework for determining the directions that the trial judge should give to the jury and the content of those directions. This can include the use of 'integrated directions'ⁱⁱ [8-16]. The Explanatory memorandum note: - *'It will encourage directions targeted to the issues in the trial as identified by counsel through discussion with the trial judge.'* Defence counsel must inform the trial judge of all the matters in issue [10]. It sets out what directions must be given if the accused is unrepresented [12].
- It abolishes the common law rule under which a trial judge is required to direct the jury about any defences and alternative offences open on the evidence but which have not been identified as such during the trial [16]. The Statement of Compatibility extract: - *'The jury direction request provisions in clauses 8-16 of the Bill are particularly relevant to the right to a fair trial. These clauses abolish the common law rules which require the trial judge to direct the jury on defences, alternative verdicts and any alternative basis of complicity that have not been raised by the accused during the trial but that are reasonably open on*

ⁱⁱ Extract from the Second Reading Speech: - *'Under the traditional approach to giving jury directions, the trial judge will identify and explain the relevant law. Following this 'mini-lecture on the law, jurors are expected to understand and apply the law to the facts of the case and then assess whether they are satisfied that the facts and offences have been proved. With an integrated direction, the judge works through the first two steps and presents the jury with a series of questions which encapsulates the relevant issues for determination in the third step. Judges may do this by embedding the law in factual questions for the jury to consider and combining these questions with references to the way in which the prosecution and the accused have put their cases in relation to this issue. This can be further enhanced by adding relevant evidentiary directions at this point. Integrating these different components to address the issues, rather than leaving it to the jury to synthesise separate blocks of information, can be significantly more useful to jurors. Such directions are often given in New Zealand and are an effective way of presenting information to jurors.'*

the evidence. This rule is attributed to Pemble v The Queen (1971) 124 CLR 107 (the Pemble obligation). Although this rule was designed to protect the accused's right to a fair trial, problems with its application undermine this effect. In particular: it encourages judges to 'appeal proof' the charge by including unnecessary directions, making directions longer and more complex for the jury to understand which impacts on the integrity of the trial; it can operate contrary to the adversarial system because it can require directions that are contrary to the wishes of counsel, and; it can operate unfairly to the accused if the judge is required to give directions even where they operate to the detriment of the accused. The proposed provisions address these concerns and ensure that the trial is about the issues in the case as determined by the parties.'

Part 4 – Trial judge's summing up – Part 5 – Proof beyond reasonable doubt – Part 6 – Post –offence conduct

Part 4 sets out the obligations of the trial judge when giving the summing up to the jury. The trial judge is required to identify only so much of the evidence as the trial judge considers necessary to assist the jury in determining the issues in the trial [18]. A trial judge may explain the phrase 'proof beyond reasonable doubt' when the jury directly or indirectly asks a question about the meaning of the phrase [20]. It sets out the matters the trial judge may include in an explanation [21]. Part 6 abolishes complex common law requirements and sets out a new procedure for the giving of directions on post-conduct offence conduct. The Explanatory memorandum note: *'The current law on post-offence conduct or consciousness of guilt evidence has resulted in directions to the jury that are lengthy, complex, difficult to understand and prone to error. These problems can be attributed to cases such as Edwards v R [1993] HCA 63 and Zoneff v R [2000] HCA 28. This Part will abolish complex common law requirements and provide a new procedure for the giving of directions on post-offence conduct which will result in shorter and clearer directions that are less susceptible to error.'* Terms are clearly defined [22]. The prosecution must not rely on evidence of conduct as evidence of incriminating conduct unless it has given notice [24].

The Committee makes no further comment

Statute Law Amendment (Directors' Liability) Bill 2012

Introduced	11 December 2012
Second Reading Speech	12 December 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

- The Bill amends a number of Acts in relation to the criminal liability of officers of body corporate as a result of national reform items agreed to by the Council of Australian Governments (COAG), with the aim of increasing consistency and reducing complexity.

By way of further information the Second Reading Speech note: - *'This bill will implement reforms to legislation that imposes personal criminal responsibility on directors and officers of corporate entities for offences committed by those entities. This bill substantively implements one of the national regulatory reform items agreed to by the Council of Australian Governments (COAG) under the National Partnership Agreement to Deliver a Seamless National Economy 2008.*

Following a four-year review, the Commonwealth Corporations and Markets Advisory Committee released a report in 2006 commenting on the unsatisfactory manner in which Australian jurisdictions imposed, through legislation, personal criminal liability on directors and other officers of corporate entities. The report found that there was a need for a more consistent and more principled approach to imposing personal liability on directors and officers for corporate offences across commonwealth, state and territory laws. The review noted that such an approach would reduce complexity, aid understanding, increase certainty and predictability, and assist efforts to promote effective corporate compliance and risk management.

The concern, based on a survey of directors' liability provisions in various acts across and within jurisdictions, was that such provisions had blanket application to all offences without regard to the fact that corporations and directors are distinct legal persons, and without regard to the nature of the offence for which a director was being held liable and the relationship or proximity between the director and the activity resulting in the commission of the offence by the corporate entity.

In 2009, COAG agreed on six common principles that jurisdictions should take into account before imposing personal criminal liability on directors and officers. In summary, the six principles are as follows:

- 1. where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance;*
- 2. directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire act;*
- 3. a 'designated officer' approach to liability is not suitable for general application;*
- 4. the imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where there are compelling public policy reasons for doing so, the liability of the corporation is not likely on its own to sufficiently promote compliance and it is reasonable in all the circumstances for the director to be liable. In doing so, consideration should be given to whether the director has the capacity to influence the conduct of the corporation in relation to the offending and there are steps that a reasonable director might take to ensure a corporation's compliance with its legislative obligations;*

5. *where it is appropriate to impose liability on directors, they could be held liable where they have encouraged or assisted in the commission of the offence or have been negligent or reckless in relation to the corporation's offending;*
6. *in addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.*

In 2011, COAG established a dedicated reform committee under the COAG Business Regulation and Competition Working Group. The working group developed detailed guidelines around the six COAG principles setting out the circumstances in which it was appropriate to impose liability on directors and managers and when more stringent directors' liability provisions should apply.

These guidelines were approved by COAG on 25 July 2012.

In order to better reflect the COAG principles for directors' liability, the government has developed template provisions to ensure that as far as possible, the wording used in Victorian acts follows a uniform approach. These template provisions provide for four types of liability that can be used in acts where it is appropriate to impose criminal liability on directors or officers. These will form the standard tests for criminal liability for directors or officers in cases of corporate offending under Victorian legislation.

The first proposed type of liability -- officers' liability arising from a failure to exercise due diligence -- will require the prosecution to prove that the officer failed to exercise due diligence to prevent the commission of the offence. In determining whether or not an officer failed to exercise due diligence a court may have regard to a number of factors.

These factors are what the officer knew or ought reasonably to have known about the commission of the offence by the body corporate, whether or not the officer was in a position to influence the body corporate in relation to the commission of the offence, what steps the officer took or could reasonably have taken to prevent the commission of the offence and any other relevant factor. The officer could be prosecuted regardless of whether or not the body corporate is prosecuted or found guilty of an offence. However, the officer can rely on any defence that the body corporate could have relied on, had it been prosecuted. The COAG guidelines refer to this liability as a 'type 1' directors' liability provision.

The second proposed type of liability is officers' liability arising from a failure to exercise due diligence with an evidential burden of proof on the accused. This will presume that if the body corporate commits an offence the officer also commits the offence unless the officer presents or points to evidence suggesting a reasonable possibility that he or she exercised due diligence to prevent the commission of the offence by the body corporate. This provision requires the accused to show evidence that would suggest to a court that there was a reasonable possibility that he or she exercised due diligence with the applicable standard of proof for the accused being on the balance of probabilities. Once that evidence is raised by the accused, the burden will shift to the prosecution to prove, beyond reasonable doubt, that the officer did not exercise due diligence. In determining whether or not the officer exercised due diligence a court may have regard to the same factors that are listed for a type 1 directors' liability provision. The officer could be prosecuted regardless of whether or not the body corporate is prosecuted or found guilty of an offence. However, the officer can rely on any defence that the body corporate could have relied on, had it been prosecuted. The COAG guidelines refer to this liability as a 'type 2' directors' liability provision.

The third proposed type of liability is officers' liability arising from a failure to exercise due diligence with a legal burden of proof on the accused. This will presume that if the body corporate commits an offence the officer also commits the offence unless the officer proves he or she exercised due diligence to prevent the commission of the offence by the body corporate. This is a reverse onus provision. In determining whether or not the officer exercised due diligence a court may have regard to the same factors that are listed for a type 1 directors' liability provision. The officer could be prosecuted regardless of whether or not the body corporate is prosecuted or found guilty of an offence. However,

the officer can rely on any defence that the body corporate could have relied on, had it been prosecuted. The COAG guidelines refer to this liability as a 'type 3' directors' liability provision.

The final type of liability -- officers' accessorial liability -- will require the prosecution to prove that the officer either authorised or permitted, or was knowingly concerned in, the commission of the offence by the body corporate. The officer could be prosecuted regardless of whether or not the body corporate is prosecuted or found guilty of an offence. However, the officer can rely on any defence that the body corporate could have relied on had it been prosecuted ...

The COAG principles are clear that directors' liability provisions should not apply as 'blanket' provisions in any act.

This bill will amend 18 acts to either repeal directors' liability provisions or to replace these provisions with directors' accessorial liability. Where there is a policy justification for retaining directors' liability provisions, the bill will amend acts to ensure that the most stringent forms of directors' liability, such as type 2 and type 3 provisions, are restricted in application to those offences that are central to the regulatory objectives of the particular act and are sufficiently grave to warrant holding directors and officers to account for corporate offending. The scope of this bill is limited to amending the directors' liability provisions in these acts. It does not amend existing offences and existing penalties, and it does not amend the type of person or entity who is primarily capable of committing an offence.

As the COAG reform does not extend to the civil liability of directors and officers, this bill does not amend any civil liability arrangements for directors and officers.'

Amendment of Acts – Parts 2 to 14

- The Bill amends a number of Acts including the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992*, *Anzac Day Act 1958*, *Dairy Act 2000*, *Electoral Act 2002*, *Food Act 1984*, *Liquor Control Reform Act 1998*, *Livestock Disease Control Act 1994*, *Local Government Act 1989*, *Shop Trading Reform Act 1996*, *Surveillance Devices Act 1999*, *Taxation Administration Act 1997*, *Unclaimed Money Act 2008*, *Broiler Chicken Industry Act 1978*, *Business Franchise (Petroleum Products) Act 1979*, *Congestion Levy Act 2005*, *Disability Act 2006*, *Duties Act 2000* and *Payroll Tax Act 2007*.
- The amendments to the various Acts are outlined in the Explanatory memorandum. They: -
 1. Repeal some existing directors' liability provisions no longer required;
 2. Change the type of directors' liability provision that is to be imposed on officers of bodies corporate depending on the underlying offence;
 3. Change the scope of application of directors' liability provisions in some Acts so that these no longer apply to every underlying offence in an Act but only to those offences in which it is considered appropriate to apply such liability;
 4. Include where practicable, consistent terminology.

Section 17(a)(i) – rights or freedoms

- SARC traditionally comments on reverse onus provisions in bills which impose a legal (as opposed to an evidential) burden of proof on the accused. The Bill inserts new section 55C into the *Dairy Act 2000*ⁱⁱⁱ [14] and new section 51B into the *Food Act 1984*^{iv} [23]. It also

ⁱⁱⁱ The maximum penalty is a fine of 60 penalty units for the following offences in the *Dairy Act 2000*; conducting a business as a dairy farmer, manufacturer, food carrier or distributor or operating a vehicle that carries dairy products without a licence, where licensing requirements are to ensure that dairy products are handled safely (section 22); sale and delivery of dairy food that has not been pasteurised, packed or sealed as required (section 36); failure to comply with orders to handle dairy products safely (sections 50,53).

inserts new section 130C into the *Taxation Administration Act 1997*^v [45]. These clauses contain reverse onus provisions which impose a legal burden on the accused and are a 'type 3 provision'^{vi} (See *charter report*).

- The Second Reading Speech extract: - 'The COAG guidelines provide that as a general rule, where personal criminal liability is to be imposed on directors or officers, a directors' accessorial liability provision or a type 1 directors' liability provision is preferred as the prosecution should bear the burden of establishing the case against the accused. The use of a type 2 provision or a type 3 provision should be confined to circumstances where there are sound public policy reasons for using these provisions and where the relevant offences are central to the regulatory objectives of the particular act.'
- The Statement of Compatibility extract: - 'There are sound policy justifications for imposing ... type 3 DLPs on officers for these offences. The proposed provisions provide defences where officers have exercised due diligence. This limits the exposure of officers to cases where they have not taken reasonable care to prevent the commission of the offence by the body corporate ... For these offences which concern serious risks to public health and safety, and the integrity of the State taxation system, type 3 DLPs are justified to ensure that officers must affirmatively prove that they undertook due diligence'.

Clauses 14, 23 and 45 contain reverse onus provisions which impose a legal burden on the accused. They engage the Committee's terms of reference pursuant to section 17(a)(i) of the Parliamentary Committees Act 1968. The Committee draws the provisions to the attention of the Parliament.

Charter report

Presumption of innocence – Individual criminal liability for body corporates' offences – Defendants must present or point to evidence or prove that they exercised due diligence to prevent the offence

Summary: Clauses 4, 14, 23, 27 and 45 provide that all officers of a body corporate are criminally liable for certain offences committed by that body corporate unless they either present or point to evidence or prove that they exercised due diligence to prevent the offence. The Committee will write to the Attorney-General seeking further information as to whether requiring that the prosecution first prove that an officer was in a position to influence the conduct of the corporation in relation to the contravening conduct would be a less restrictive alternative reasonably available to achieve the purpose ensuring that officers point to evidence of or affirmatively prove the due diligence they undertook.

The Committee notes that clauses 4 (inserting a new section 72C into the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992*), 14 (inserting a new section 55C into the *Dairy Act 2000*), 23 (inserting a new section 51B into the *Food Act 1984*), 27 (inserting a new section 53C into the *Liquor Control Reform Act 1998*) and 45 (inserting a new section 130C into the *Taxation*

^{iv} In the case of the most serious offences against the *Food Act 1984* (sections 8, 9 and 10) which essentially involve a food business knowingly selling or handling for sale, food that is unsafe, the maximum penalty is two years imprisonment.

^v In the case of the most serious offences against the *Taxation Administration Act 1997* (sections 57 and 61) ie: tax evasion and intentionally or negligently giving false or misleading information and the *Duties Act* (section 268), the unauthorised endorsement of instrument, the maximum penalty is two years imprisonment.

^{vi} See Second Reading Speech: '*The third proposed type of liability is officers' liability arising from a failure to exercise due diligence with a legal burden of proof on the accused. This will presume that if the body corporate commits an offence the officer also commits the offence unless the officer proves he or she exercised due diligence to prevent the commission of the offence by the body corporate. This is a reverse onus provision. In determining whether or not the officer exercised due diligence a court may have regard to the same factors that are listed for a type 1 directors' liability provision. The officer could be prosecuted regardless of whether or not the body corporate is prosecuted or found guilty of an offence. However, the officer can rely on any defence that the body corporate could have relied on, had it been prosecuted. The COAG guidelines refer to this liability as a 'type 3' directors' liability provision.*'

Administration Act 1997) provide that all officers of a body corporate are criminally liable for certain offences committed by that body corporate unless they either present or point to evidence (clauses 4 and 27) or prove (clauses 14, 23 and 45) that they exercised due diligence to prevent the offence. The corporate offences that officers may be criminally liable for unless they prove that they exercised due diligence to prevent them include four offences that are punishable by imprisonment.^{vii}

The Committee observes that, while these clauses replace existing provisions that provide for similar forms of liability^{viii} and that other clauses of the Bill reduce or remove a number of similar provisions,^{ix} clauses 4, 14, 23, 27 and 45, by enacting new model provisions for this form of criminal liability, engage the Charter right of accused persons to be presumed innocent until proved guilty according to law.^x

The Statement of Compatibility remarks:

The proposed provisions provide defences where officers have exercised due diligence. This limits the exposure of officers to cases where they have not taken reasonable care to prevent the commission of the offence by the body corporate.

Whether and, if so, how an officer exercised due diligence to prevent the commission of the offence by the body corporate is a matter peculiarly within the knowledge of the officer. Officers are best placed to prove whether they exercised due diligence. It would be very difficult for the prosecution to have to negative every possible due diligence action the officer might have taken without requiring the officer to point to evidence of the due diligence they undertook... or affirmatively prove the due diligence they undertook.

For those offences which concern serious risks to public health and safety, and the integrity of the state taxation system, [reverse legal onuses] are justified to ensure that officers must affirmatively prove that they undertook due diligence.

The Committee notes that clauses 4, 14, 23, 27 and 45 adopt a definition of ‘officer’ that includes not only defined managerial positions, but also anyone who either participates in decisions affecting a substantial part of the corporation’s business, has the capacity to substantially affect the corporation’s financial standing, makes instructions or wishes that the directors are accustomed to act upon or is otherwise concerned with, or takes part in, the corporation’s management.^{xi} The Committee observes that the guidelines for interpreting the COAG principles on directors’ liability state the more stringent forms of directors’ liability should not be applied to ‘officers who are not

^{vii} The offences are ss.8 (knowingly handling food in unsafe manner), 9 (knowingly selling unsafe food) and 10 (knowingly falsely describing food) of the *Food Act 1984*, and s. 61 (tax evasion) of the *Taxation Administration Act 1997*, each subject to a maximum penalty of two years imprisonment for individuals. Section 53 of the *Food Act 1984* provides for employers to be vicariously liable for any food offences committed by their employees unless they prove that they exercised due diligence.

^{viii} See existing s. 72, *Agricultural and Veterinary Chemicals (Control of Use) Act 1992*; s. 55(3)-(4), *Dairy Act 2000*; s. 51(1)-(2), *Food Act 1984*; s. 53(2), *Liquor Control Reform Act 1998*; s. 130, *Taxation Administration Act 1997*.

^{ix} E.g. clause 9 repeals s. 5C(5) of the *ANZAC Day Act 1958*, which this Committee’s predecessor reported on in *Alert Digest No. 10 of 2008* (reporting on the Labour and Industry (Repeal) Bill 2008.)

^x Charter s. 25(1). Overseas courts examining similar provisions have held that requiring all officers of an offending body corporate to establish a ‘defence’ of due diligence to avoid conviction is equivalent to requiring them to establish the absence of an essential element of an offence, e.g. *S v Coetzee* [1997] ZACC 2, [39].

^{xi} See new sections 72A(5) of the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992*; 55A(5) of the *Dairy Act 2000*; 51A(5) of the *Food Act 1984*; 53A(5) of the *Liquor Control Reform Act 1998*; and 130A(5) of the *Taxation Administration Act 1997*, each adopting the definition of ‘officer’ in s. 9 of the *Corporations Act 2001* (Cth). By contrast, none of the existing provisions adopt this extended definition. While the existing agriculture, dairy and food provisions apply generally to anyone concerned in the management of a body corporate, existing s. 53 of the *Liquor Control Reform Act 1998* is limited to directors and existing s. 130(5) of the *Taxation Administration Act 1997* is limited to defined corporate or administrator roles.

directors' unless prosecutors are expressly required to prove 'that the officer was in a position to influence the conduct of the corporation in relation to the contravening conduct'.^{xii}

The Committee will write to the Attorney-General seeking further information as to whether a requirement that the prosecution first prove that an officer was in a position to influence the conduct of the corporation in relation to the contravening conduct would be a less restrictive alternative reasonably available to achieve the purpose of ensuring that officers must point to evidence of or affirmatively prove the due diligence they undertook. Pending the Attorney-General's response, the Committee draws attention to clauses 4, 14, 23, 27 and 45.

The Committee makes no further comment

**Committee Room
4 February 2013**

^{xii} 'Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles', available at <<http://www.coag.gov.au/node/434>>, Appendix A, Criterion 4c. Of the five other jurisdictions that have introduced Bill implementing the COAG principles, three will generally require that the prosecution prove that any non-director was in a position to influence the conduct of the body corporate in relation to the offence before directors' liability can apply: see Directors Liability Legislation Amendment Bill 2012 (ACT); *Miscellaneous Act Amendment (Directors' Liability) Act 2012* (NSW); Statutes Amendment (Directors' Liability) Bill 2012 (SA). However, such a requirement does not appear in the Directors' Liability Reform Amendment Bill 2012 (Qld) and the Directors' Liability (Miscellaneous Amendments) Bill 2012 (Tas).

Appendix 1

Index of Acts and Bills in 2012-13

	Alert Digest Nos.
Assisted Reproductive Treatment Amendment Bill 2012	1
Corrections Amendment Bill 2012	1
Courts Legislation Amendment (Reserve Judicial Officers) Bill 2012	1
Crimes Amendment (Gross Violence Offences) Bill 2012	1
Energy Legislation Amendment (Flexible Pricing and Other Matters) Bill 2012	1
Jury Directions Bill 2012	1
Statute Law Amendment (Directors' Liability) Bill 2012	1

Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

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

Statute Law Amendment (Directors' Liability) Bill 2012

1

Section 17(b)

Appendix 3

Ministerial Correspondence 2012-13

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

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	Ms Colleen Hartland MLC	11-12-12	18 of 2012