

# **No. 2 of 2013**

**Tuesday, 19 February 2013**

## **On the**

Accident Compensation Legislation  
(Fair Protection For Firefighters)  
Bill 2011

Co-Operatives National Law  
Application Bill 2013

Education And Training Reform  
Amendment (Teacher Registration  
And Other Matters) Bill 2013

Justice Legislation Amendment  
(Cancellation Of Parole And Other  
Matters) Bill 2013

Statute Law Amendment (Directors'  
Liability) Bill 2012

Tobacco Amendment (Smoking in  
Outdoor Areas) Bill 2012

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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.

# Alert Digest No. 2 of 2013

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## Accident Compensation Legislation (Fair Protection For Firefighters) Bill 2011

Introduced	7 December 2011
Second Reading Speech	6 February 2013
House	Legislative Council
Member introducing Bill	Ms Colleen Hartland MLC
Private Member's Bill	

### Purpose

The purpose of the Bill is to:-

- Amend the *Accident Compensation Act 1985*, the *Workers Compensation Act 1958* and the *Country Fire Authority Act 1958*.
- Simplify compensation claims by career and volunteer firefighters by deeming certain *prescribed* cancers to be caused by their career or volunteer work.

### Amendments to the *Accident Compensation Act 1985*, the *Workers Compensation Act 1958*, the *Country Fire Authority Act 1958*

- It provides that should a career firefighter sustain one of twelve primary site cancers after a specified number of years, the disease is deemed to be due to the nature of the employment as a firefighter, if firefighting made up a substantial portion of his or her duties. The relevant qualifying periods in terms of length of employment are set out. The firefighter would then be able to make a claim for compensation. It also makes specific provision for a Mr Brian Potter to make a claim in respect of disease he is suffering if that disease is one of the new twelve primary site cancers listed. **[3-4]**
- The same provisions are inserted in new Part VAA in the *Country Fire Authority Act 1958* which deems specified cancers to be due to the nature of firefighting for volunteer officers and members of the Country Fire Authority **[5]**. It provides that for an independent review of the amendments to be undertaken and completed by 31 December 2015. The person who undertakes the review must consider the review of the *Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Act 2011*.

**The Committee makes no further comment**

## Co-Operatives National Law Application Bill 2013

Introduced	5 February 2013
Second Reading Speech	7 February 2013
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Consumer Affairs

### Purpose

- The purpose of the Bill is to make provision for the application of a national law relating the formation, registration and operation of co-operatives. It repeals the *Cooperatives Act 1996*. The extract from the Second Reading Speech: - *'The introduction and operation of the Co-operatives National Law is being managed through the Australian uniform co-operatives law agreement made between all states and territories. This agreement provides that New South Wales, as the lead jurisdiction in the Co-operatives National law project will enact the Co-operative National Law in its jurisdiction and that, subsequently, each Australian state and territory is obliged to enact it in their respective jurisdictions through application legislation or alternative legislation that is consistent with it... These national regulations are to be made in New South Wales, at which point they will either be automatically applied in each state and territory or where a jurisdiction has an alternative established process for the implementation of national regulations they will enacted according to that process.'*

### Parts 1-7 – Schedules 1 and 2

- Clause [2] is the commencement provision. It does not have a default commencement date. The Explanatory memorandum comments: *'It does not identify a default commencement date as the commencement of the Co-Operatives National law is to be co-ordinated nationally'*. It applies the Co-operatives National Law (in force in NSW) to Victoria [4]. It provides that National Regulations must be tabled in the Parliament and are subject to the disallowance provisions of the *Subordinate Legislation Act 1994* [8].
- It specifies the Registrar as the designated authority for the payment of fees. The Minister is the designated authority for the appointment of inspectors. A magistrate is the designated authority for the purposes of obtaining a warrant [9]. It establishes the Registrar of Co-operatives [21]. It provides for the making of Regulations by the Governor in Council [28]. Proceedings for recovery of fines or penalties imposed by a co-operative may be commenced in the Magistrates' Court on application by the co-operative [26]. Schedule 1 prescribes the designated instruments and notices which must be used in the application of the Co-operatives National law. Schedule 2 sets out consequential amendments.

### Annexure – Co-operatives (Adoption of National Law) Act 2012

- The Annexure sets out the Co-operatives National law which is set out in the Appendix to the *Co-operatives (Adoption of National Law) Act 2012* of New South Wales which is adopted by this Bill.
- Chapter 1 sets out preliminary matters. Chapter 2 provides for the formation, powers and constitutions of cooperatives. This includes the type of co-operatives and how they are formed at meetings and registered. It contains the rights and liabilities of members and sets out the legal capacity and powers of a co-operative. It sets out disclosure requirements for co-operatives. [Division 2]

- Chapter 3 provides for the management and operation of co-operatives including the election of directors, qualifications of directors, meetings of boards and the appointment of a secretary. The duties and liabilities of directors, officers and employees are set out [Division 4]. It sets out the registers and books which must be kept by co-operatives [Division 6]. Reporting requirements and the lodging of returns are set out [Division 8].
- Chapter 4 provides for the administration of a co-operative under the *Corporations Act* including the appointment of an administrator. It makes provision for mergers, schemes of arrangement, transfer of incorporation and the administrative powers of the registrar of co-operatives in the winding up process. Chapter 5 makes provisions for 'participating co-operatives' which carry on business across state and territory borders. It makes provision for the winding up of participating co-operatives. It also makes provision for mergers and transfers of participating co-operatives.
- Chapter 6 provides for the supervision and protection of co-operatives. It sets out the powers of the registrar of co-operatives, inspectors and special investigators and the procedure which must be used when conducting an investigation. It sets out the powers of inspectors subject to the directions of the Registrar. An inspector can only enter a place if there is consent; or the entry is authorised by a warrant or it is a place where the affairs or activities of a co-operative are managed.
- Chapter 7 sets out matters relating to legal proceedings. It sets out offences, the use of evidence in proceedings and appeals against administrative decisions. It makes provision for injunctions and undertakings in the Supreme Court. It applies the relevant part of the Corporations Act in respect of civil consequences of contravening civil penalty provisions. Criminal proceedings under the Corporations Act may be started after civil proceedings [533].
- Chapter 8 contains general administrative matters including the keeping of a register of co-operatives and the service of documents. It also contains the power to make Co-operative national regulations. It makes provision for the supply of information from the Registrar under participating jurisdictions. Schedule 1 sets out the matters about which co-operatives must make provision. Schedule 2 contains provisions which relate to associates and related corporations. Schedule 3 contains saving and transitional provisions. Schedule 4 sets out provisions which are to be used when interpreting the Co-operatives National law.

## Charter report

### *Freedom of expression – Offence to trade or carry on a business under a name containing the words 'cooperative' or 'coop'*

Summary: Section 225(1) of the Co-operatives National Law makes it an offence for anyone other than a co-operative to trade or carry on a business under a name or title containing the words 'co-operative', 'cooperative', 'co-op', 'coop' or words importing a similar meaning. The Committee will write to the Minister seeking further information as to the compatibility of s. 225(1) of the Co-operatives National Law with the Charter's right to freedom of expression.

**The Committee notes that s. 225(1) of the Co-operatives National Law (to be applied in Victoria by clause 4(1)) makes it an offence for anyone other than a co-operative to trade or carry on a business under a name or title containing the words 'co-operative', 'cooperative', 'co-op', 'coop' or**

**words importing a similar meaning.**<sup>1</sup> The Committee considers that s. 225 may engage the Charter's right to freedom of expression.<sup>2</sup>

The Committee notes that s. 225(2) provides that 'local regulations may... provide for the exemption of specified entities or kinds of entities' from s. 225(1). However, the Committee observes that this formulation may only apply to entities that are specifically named in the regulations or that fall within a class of entities that generally use these words<sup>3</sup> and therefore might not accommodate one-off, descriptive and innocuous uses of these terms by a small business e.g. 'Cooperative Canines'<sup>4</sup>.

**The Committee will write to the Minister seeking further information as to the compatibility of s. 225(1) of the Co-operatives National Law with the Charter's right to freedom of expression. Pending the Minister's response, the Committee draws attention to clause 4(1).**

**The Committee makes no further comment**

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<sup>1</sup> Compare existing s. 252(4) of the *Co-operatives Act 1996* (Vic), which bars registration of a name containing 'Co-operative' or 'Co-op' by a body corporate.

<sup>2</sup> Charter s. 15(2). See *Davis v Commonwealth* (1988) 163 CLR 79.

<sup>3</sup> E.g. the various Cooperative Research Centres established within universities.

<sup>4</sup> See < <http://www.yellowpages.com.au/nsw/berrima/co-operative-canines-14528633-listing.html>>, a NSW business. Section 260(3) of the existing *Co-operatives Act 1992* (NSW) provides that any 'person or body may apply to the Registrar for exemption from' an identical offence provision.

# Education And Training Reform Amendment (Teacher Registration And Other Matters) Bill 2013

<b>Introduced</b>	5 February 2013
<b>Second Reading Speech</b>	7 February 2013
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Martin Dixon MLA
<b>Portfolio responsibility</b>	Minister for Education

## Purpose

The purposes of the Bill are to: -

- provide for an acting senior chairperson of the Merit Protection Boards;
- make further provision for the Victorian Curriculum and Assessment Authority;
- provide that the panel of a formal hearing into the conduct of a teacher may refer a matter to a medical panel hearing in certain circumstances;

### Amendments to the *Education and Training Reform Act 2006*

- It expands the definition of sexual offence including those under the Criminal Code of the Commonwealth so that the Victorian Institute of Teaching (VIT) can act in relation to a teacher charged with such an offence [3]. It allows the Ministers to appoint an acting chairperson when the senior chairperson is absent [4]. It inserts an additional function so that the Victorian Curriculum and Assessment Authority (VCAA) can receive information and investigate alleged breaches of national protocols or guidelines for the conduct of assessments against national standards [7].
- An applicant for registration as a Victorian teacher must provide information about any previous refusal to register the applicant or cancellation of the applicant's registration in Victoria or in another jurisdiction [9]. It provides that where a matter has been referred to a medical panel hearing by a formal hearing panel, the medical panel may make a finding but not a determination into that matter. It ensures that legislative instruments must be tabled in the Parliament and are subject to disallowance [19] (in keeping with the amended *Subordinate Legislation Act 1994*.)

**The Committee makes no further comment**

# Justice Legislation Amendment (Cancellation Of Parole And Other Matters) Bill 2013

Introduced	5 February 2013
Second Reading Speech	6 February 2013
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister for Corrections

## Purpose

The purposes of the Bill are: -

- To provide for the cancellation of parole in circumstances where a prisoner is charged with or convicted or found guilty of certain offences while on parole;
- To clarify the powers of the Adult Parole Board in relation to electronic monitoring;
- To amend the *Surveillance Devices Act 1999* in relation to electronic monitoring;
- To clarify the circumstances in which a child may be legally represented and when a child is sufficiently mature to give instructions to a legal practitioner.

## Parts 2 and 3

- It provides for the cancellation or variation of parole in circumstances where a prisoner is charged with or convicted of certain offences whilst on parole. This includes sexual offences or a violent offence. If the Board has cancelled a prisoner's parole it may by further order revoke the cancellation [3-4]. It inserts a new Schedule 3 list of offences for the definition of violent offence [5]. It clarifies the powers of the Adult Parole Board to impose a condition for electronic monitoring of the prisoner on parole [7-8].
- It provides that if a child who is aged 10 years or more is not separately legally represented, the court must adjourn the hearing of the proceedings to enable the child to obtain legal representation. If a child aged 10 years or more lacks sufficient maturity to instruct a legal representative, in exceptional circumstances, the Court may adjourn so that arrangements can be made for legal representation on a 'best interests' basis. A child under the age of 10 years may be separately represented if the Court determines that exceptional circumstances exist such that representation is required [10-11]. (See *Charter report*)

## Charter report

### ***Age discrimination – Protection of children – Fair hearing – Legal representation of children under 10 in Family Division proceedings***

Summary: The Committee refers to Parliament for its consideration the questions of whether or not clauses 10 and 11, by providing that the Family Division of the Children's Court may only adjourn proceedings to allow an unrepresented child under 10 to obtain legal representation 'in exceptional circumstances', limit the Charter rights of children under 10 to be protected and to access fair hearing rights without discrimination on the basis of age; and if so, whether or not those clauses reasonably limit those rights to facilitate the timely and effective protection of children in their best interests.

The Committee notes that clauses 10 and 11, amending existing ss. 524 and 525 of the *Children, Youth and Families Act 2005*, provide that the Family Division of the Children's Court may only

adjourn proceedings to allow an unrepresented child under 10 to obtain legal representation 'in exceptional circumstances'.<sup>5</sup> By contrast, the Court must adjourn such proceedings to allow an unrepresented child over 10 to obtain legal representation unless the Court determines that the child is not mature enough to give instructions.<sup>6</sup>

#### The Second Reading Speech remarks:

The proposed amendments provide that proceedings involving a child aged 10 or more are to be adjourned to enable the child to obtain legal representation unless a court determines that the child is not sufficiently mature to give instructions to a legal practitioner. The bill provides that the court may so determine based on consideration of the child's ability to form and communicate the child's own views and to give instructions in relation the primary issues in dispute. This approach is consistent with observations made in the Protecting Victoria's Vulnerable Children Inquiry report.

Where a child is aged under 10 or the court is of the view that a child aged 10 or more is not sufficiently mature, the child will generally not be legally represented. However, the court will continue to be empowered to make an order for the legal representation of children on a 'best interests' basis in exceptional circumstances.

Where a child is not directly legally represented, child protection officers will convey the wishes of the child to the court as well as their assessment of what is in the 'best interests' of the child. Consistent with the current interpretation of 'exceptional circumstances' in the family division, it is expected that orders for best interests representation will only be made in a small number of cases.

The Committee considers that clauses 10 and 11 may engage the Charter rights of children under 10 to be protected<sup>7</sup> and to access fair hearing rights<sup>8</sup> without discrimination on the basis of age.<sup>9</sup>

#### The Statement of Compatibility remarks:

[The] age-based distinction replaces the existing distinction of whether the child is mature enough to give instructions. The distinction based solely on maturity (which was undefined) led to contested evaluations of maturity and Supreme Court litigation as to the meaning of maturity which prolonged resolution of protection proceedings... Litigation on the matter of a child's maturity to give legal instructions had the potential to proliferate and delay proceedings.

It is generally accepted that at around 11 years of age, a child is better able to use logic and reason in abstract decision making, such as is required in the giving of legal instructions on sometimes complex issues. Prior to this age, abstract decision-making is limited. Accordingly, children who are young than 10 years of age are less likely to be able to provide direct legal instructions than those aged 10 or over. A distinction for separate representation based on an age of 10 or more is more consistent with the

<sup>5</sup> See clauses 10(1), restricting the existing power in s. 524(1) to adjourn Family Division proceedings if a child is unrepresented to children over 10; 10(3), removing Family Division proceedings from the existing rule in s. 524(2) mandating such adjournments for children who are mature enough to give instructions; 10(5)(a), including children under 10 in an existing rule in s. 524(4) providing for adjournments 'in exceptional circumstances'; 10(5)(b), making such adjournments discretionary rather than mandatory; and 11, restricting an existing requirement in s. 525(1) that all children must be represented in certain Family Division proceedings to children over 10.

<sup>6</sup> See clause 10(2).

<sup>7</sup> Charter s. 17(2) states: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.' However, the Statement of Compatibility remarks that this right 'does not require that a child is separately represented or represented by a lawyer at all, but rather, that the child has an opportunity to participate by having their views ascertained and taken into account'.

<sup>8</sup> Charter s. 24(1) states: 'A... party to a civil proceeding has the right to have the... proceeding decided... after a fair... hearing'. In *Secretary to the Department of Human Services v Sanding* [2011] VSC 42, [202] the Supreme Court held that this right applies to children who are the subject of protection proceedings in the Family Division of the Children's Court. However, the Statement of Compatibility remarks that this right 'does not require a child to be represented directly, or at all in every case.'

<sup>9</sup> The Charter provides that the rights in Charter s. 17(2) (expressly and when read with Charter s. 8(3)) and Charter s. 24(1) (when read with Charter s. 8(2)) are available 'without discrimination'. 'Discrimination' is defined in Charter s. 3(1) to mean discrimination 'on the basis of an attribute set out in s. 6' of the *Equal Opportunity Act 2010*, including 'age' at s. 6(a) of that Act.

timely and effective protection of children in their best interests than a rule based on contested evaluations of maturity.

While the Committee notes that some other Australian jurisdictions use age-based distinctions to reduce legal disputes about maturity in protection proceedings<sup>10</sup> and that a similar approach has been recommended by the *Protecting Victoria's Vulnerable Children Inquiry* (the Cummins Report),<sup>11</sup> it observes that no Australian jurisdiction presently limits the legal representation of children under a particular age in protection proceedings to 'exceptional circumstances'.<sup>12</sup>

**The Committee refers to Parliament for its consideration the questions of:**

- **whether or not clauses 10 and 11, by providing that the Family Division of the Children's Court may only adjourn proceedings to allow an unrepresented child under 10 to obtain legal representation 'in exceptional circumstances', limit the Charter rights of children under 10 to be protected and to access fair hearing rights without discrimination on the basis of age; and**
- **if so, whether or not those clauses reasonably limit those rights to facilitate the timely and effective protection of children in their best interests.**

### Submissions

The Committee received submissions from the Law Institute of Victoria, the Victorian Council of Social Service, Youthlaw and the Victorian Equal Opportunity and Human Rights Commission. The written submissions will be posted on the Committee's website.

**The Committee makes no further comment**

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<sup>10</sup> E.g. s. 99B of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which sets down 'a rebuttable presumption that a child who is less than 12 years of age is not capable of giving proper instructions to his or her legal representative' and provides that 'the Children's Court may, on the application of a legal representative for a child who is less than 12 years of age, make a declaration that the child is capable of giving proper instructions.'

<sup>11</sup> P Cummins et al, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (2012), 378, Recommendation 53: 'A child who is under 10 years of age is presumed not to be capable of providing instructions unless shown otherwise and a child who is 10 years and over is presumed capable of providing instructions unless shown otherwise'. The Committee notes that this recommendation is partially implemented in clauses 10(2) and 10(5)(a), but that the latter clause does not provide for the rebuttal of the presumption of incapacity in the case of children under 10.

<sup>12</sup> *Court Procedures Act 2004* (ACT), s. 74E; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s. 99(1); *Care and Protection of Children Act 2007* (NT), s. 101; *Child Protection Act 1999* (Qld), s. 110; *Children's Protection Act 1993* (SA), s. 48(1); *Children, Young Persons and their Families Act 1997*, s. 59(1); *Children and Community Services Act 2004* (WA), s. 148(2). For the current position in Victoria, see *A & B v Children's Court of Victoria & Ors* [2012] VSC 589, [100]: 'In my opinion, both the context and language of the [*Children, Youth and Families Act 2005* (Vic)], and the guidance available from authority and jurisprudence demonstrate that the concept of "maturity" does not involve assumptions based on age alone. It is the concept of maturity that is found in s 524 of the Act and not the age of the child alone. The Act recognises the need to have reference to each individual child's development as well as age in determining the child's best interests.'

# Ministerial Correspondence

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## Statute Law Amendment (Directors' Liability) Bill 2012

The Bill was introduced into the Legislative Assembly on 28 November 2012 by the Hon. Robert Clark MLA. The Committee considered the Bill on 4 February 2013 and made the following comments in Alert Digest No. 1 of 2013 tabled in the Parliament on 5 February 2013.

### Committee Comment

#### 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 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.<sup>i</sup>

The Committee observes that, while these clauses replace existing provisions that provide for similar forms of liability<sup>ii</sup> and that other clauses of the Bill reduce or remove a number of similar provisions,<sup>iii</sup> 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.<sup>iv</sup>

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<sup>i</sup> 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.

<sup>ii</sup> 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*.

<sup>iii</sup> 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.)

<sup>iv</sup> 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].

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.<sup>v</sup> 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 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'.<sup>vi</sup>

**The Committee will write to the Attorney-General seeking further information as to whether a requirement that the prosecution first prove than 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.**

## Minister's Response

I refer to your letter of 6 February 2013 in relation to the **Statute Law Amendment (Directors' Liability) Bill 2012** (the Bill) which reforms and standardises the law as to the circumstances in which an officer of a body corporate is criminally liable when the body corporate commits an offence.

The Committee noted in its *Alert Digest No.1 of 2013* that:

- clauses 14, 23 and 45 of the Bill impose, in relation certain offences, a reverse persuasive burden of proof on defendant officers who rely on a defence that they exercised due diligence to prevent the commission of the offence by the body corporate – the relevant offences are in the *Dairy Act 2000* (clause 14), the *Food Act 1984* (clause 23), the *Taxation Administration Act 1997* and the *Duties Act*

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<sup>v</sup> 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 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.

<sup>vi</sup> '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).

2000 (clause 45) (this type of reverse persuasive burden is referred to as a Type 3 directors' liability provision (DLP)); and

- clauses 4 and 27 impose a reverse evidential burden of proof ('Type 2 DLP') on defendant officers who rely on a due diligence defence in relation to certain offences under the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* and the *Liquor Control Reform Act 1998*.

The Committee notes that the definition of 'officer' in these provisions applies more widely than directors. An important aspect of these reforms is to employ a consistent definition of 'officer' in DLPs in Victorian Acts. 'Officer' is now defined to mean an officer as defined in section 9 of the *Corporations Act 2001* (Cth) (which includes directors and persons who have legal or de facto authority over the business of the corporation). The definition of officer also includes any person 'who is concerned in, or takes part in, the management of the body corporate' because this formulation has been used in Victorian statutes for many years to apply to persons with managerial control and responsibility in a body corporate whether or not they are directors. Historically in Victoria, statutes have imposed liability on officers and managers other than directors, in order to promote the purposes of the relevant statute and protect the public. The Bill is consistent with that long-standing position.

The Committee has sought my view as to whether an amendment to the Type 2 and Type 3 DLPs in the Bill which required the prosecution to prove that an officer was in a position to influence the conduct of the body corporate in relation to the contravening conduct, would be a less restrictive alternative to that proposed in the Bill.

For the reasons that follow, I am of the view that the suggested amendments are not necessary or appropriate for this Bill.

As the Bill is currently drafted, the prosecution bears the burden of establishing that the body corporate committed the offence, and that the accused satisfies the definition of 'officer', which is defined so as to include those members of a company with some control over aspects of the company's operations. If a court is not satisfied beyond reasonable doubt that the individual meets the definition of an 'officer', the prosecution against that individual fails.

It is a separate issue as to whether the defendant officer was in a position to influence the body corporate *in relation to the commission of the offence by the body corporate*. That is a factor the court may have regard to in determining whether an officer of a body corporate exercised due diligence. If an officer were not in a position to influence the body corporate in relation to the commission of the offence, then it is highly likely that the due diligence defence would be made out. I refer the Committee to the discussion on 'due diligence' in the explanatory memorandum accompanying the Bill.

The day to day allocation among officers within a corporation of management responsibilities for the operations of a corporation, and hence whether the accused officer was in a position to influence the conduct of the body corporate *in relation to the particular contravening conduct* at the relevant time, are matters of detail within the knowledge of the body corporate and its officers, not the prosecution. It is appropriate that the accused seek to bring the relevant evidence and in some cases prove the requisite control in the course of making out a due diligence defence.

In the context of ensuring compliance with regulation involving food and health safety and protection, if the defendant officer chooses to show as part of a due diligence defence that the officer was not in a position to influence the conduct of the body corporate in relation to the contravening conduct, it is appropriate that the officer, not the prosecution, have the persuasive or evidential burden in relation to that matter.

Accordingly, I consider that amending the five Type 2 and Type 3 DLPs to require the prosecution to first prove that an officer was in a position to influence the conduct of the body corporate in relation to the contravening conduct would impose an impractical and unnecessary burden on the prosecution. To impose this requirement would defeat the purpose of the five DLPs.

I note that the Committee's report contrasted the approach taken in New South Wales (NSW), South Australia (SA) and the Australian Capital Territory (ACT), which all impose a requirement that the prosecution prove that the officer was in a position to influence the conduct of the corporation in relation to the commission of the offence. However, these jurisdictions only impose the requirement in relation to Type 1 DLPs, so they are not a relevant comparator as to the drafting of Type 2 and Type 3 DLPs. The NSW and ACT statutes do not contain any Type 2 or Type 3 DLPs; the SA legislation

imposes Type 3 DLPs but these do not contain a requirement for the prosecution to prove that the accused was in a position to influence the conduct of the corporation in relation to the contravening conduct.

**ROBERT CLARK MP**  
Attorney-General

18 February 2013

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

## Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012

The Bill was introduced into the Legislative Assembly on 28 November 2012 by the Ms Colleen Hartland MLC. The Committee considered the Bill on 10 December 2012 and made the following comments in Alert Digest No. 18 of 2012 tabled in the Parliament on 11 December 2012.

### Committee Comment

#### Charter report

#### **Presumption of innocence – Defences to offences relating to designated outdoor smoking areas and smoking near public transport stops – Legal onus of proof on the accused**

Summary: The effect of clauses 6 and 8 is to require people who claim a statutory defence to offences relating to designated outdoor smoking areas and smoking near public transport stops to prove that defence in court on the balance of probabilities. The Committee will write to the Member seeking further information as to the compatibility of new sub-sections 5EB(3) and 5RE(2) with the Charter right of defendants to be presumed innocent until proved guilty according to law.

The Committee notes that:

- clause 6, inserting a new section 5EB, creates a number of offences in relation to occupiers of premises containing designated outdoor smoking areas, including for failing to ensure that children and food do not enter those areas. New sub-section 5EB(3) provides for defences 'if the accused proves that the accused' either didn't and couldn't reasonably have known that the child or food had entered the area or had requested that the child or person possessing food leave it.
- clause 8, inserting a new section 5RE, creates an offence of smoking at or within 4 metres of various public transport stops. New sub-section 5RE(2) provides for a defence 'if the accused proves that he or she' was only passing and did not remain at the stop.

The Statement of Compatibility remarks that the Bill 'does not raise any human rights issues.' **However, the Committee observes that the effect of clauses 6 and 8 is to require people who claim a statutory defence to offences relating to designated outdoor smoking areas and smoking near public transport stops to prove that defence in court on the balance of probabilities.**

In its *Practice Note No. 3*, the Committee states that for any provision of a Bill that 'place[s] a legal onus of proof on an accused with respect to any issue in a criminal proceeding', the Statement of Compatibility 'should state whether and how that provision satisfies the Charter's test for reasonable limits on rights' and 'may address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision's purpose'.<sup>vii</sup>

**The Committee will write to the Member seeking further information as to the compatibility of new sub-sections 5EB(3) and 5RE(2) with the Charter right of defendants to be presumed innocent until proved guilty according to law.**<sup>viii</sup> Pending the Member's response, the Committee draws attention to clauses 6 and 8.

### Member's Response

I refer to the letter received from the Scrutiny of Acts and Regulations Committee dated 11 December 2012 regarding the Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012. In it the Committee states that it considers clauses 6 and 8 may require people who claim a statutory defence to offences relating to the designated outdoor smoking areas and smoking near public transport stops to prove

<sup>vii</sup> Compare *Smoke-Free Public Places Act 2003* (ACT), ss. 9H(2) & 9H(3), placing evidential onuses on the an accused charged with failing to ensure that a child or food does not enter a designated outdoor smoking area to present or point to evidence that suggests a reasonable possibility of a honest and reasonable mistake of fact or reasonable lack of knowledge about the food – see *Criminal Code 2002* (ACT), ss. 23(1)(b), 58(2) & 58(3); but see *Smoke-Free Environment Act 2000* (NSW), s. 6A(5) (to be inserted by the *Tobacco Legislation Amendment Act 2012* (NSW), schedule 1, clause 8), placing a legal onus on an accused charged with smoking at a public transport stop to 'establish' that he or she was passing through and did not remain.

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

the defence in court on the balance of probabilities. The Committee is seeking more information about the compatibility of the new subsections 5EB(3) and 5RE(2) with Section 25(1) of the Charter Of Human Rights And Responsibilities Act 2006, which states "A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law."

Under Australian law, placing the burden on the prosecution is not an absolute rule. There are many examples of this in various Victorian statutes. Furthermore, proposed sections 5EB(3) and 5RE(2) of the Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012, contain similar wording and the same meaning and effect as provisions already in the Tobacco Act 1987 in section 5B(2), relating to the defence by the occupier if they are accused of an offence in respect to no smoking in enclosed workplaces; in section 5D(2), relating to the offence by the occupier if they are accused of an offence in respect to smoking restrictions in outdoor dining or drinking areas; and Section 15G(2), relating to the offence by the occupier if they are accused of an offence in respect to no smoking at underage music/dance events.

Provisions 5EB(3) and 5RE(2) of the Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012 are compatible with the Charter due to s7 which allows for the right to be presumed innocent to be limited where those limits are reasonable.

The purpose of the limitation and the seriousness of the offences involved are relevant considerations when determining whether the limits on the right to be presumed innocent are reasonable. Both 5EB(3) and 5RE(2) have been proposed to ensure effective prosecution of the offences that they relate to given that the health hazards created by smoking in public spaces is a serious community issue.

In the case of provision 5EB(3) the issue of the accused not being aware of a child or food being brought into a designated area is a fact peculiarly within the knowledge of the defendant and therefore, it would be unduly burdensome for the state to discharge its onus. Furthermore, the reverse onus under this provision is reasonable due to the ease of access to information required to discharge the burden by the defendant. The defendant will be able to discharge this burden by providing evidence that they were not aware and could not reasonably have been aware that a person under the age of 18 years had entered the designated outdoor smoking area or that food was brought into the area; that they had requested a person under 18 years to leave; or requested a person possessing food to leave the designated outdoor smoking area. It would not be unduly difficult for the defendant to provide such evidence if he or she was innocent.

In the case of provision 5RE(2) it is envisaged the accused will be able to discharge this burden of proof by providing evidence that they were only passing and did not remain within 4 meters of the relevant location. It would not be unduly difficult for the defendant to provide such evidence such as through witness statements.

To date the operations of this reverse onus in similar offenses, such as the offence by the occupier of allowing smoking in enclosed workplaces under the Tobacco Act 1987, had not lead to a situation where innocent people are being brought to trial or have difficulty in escaping conviction. Therefore the test of proportionality whereby the curtailment of the right under s25(1) of the Charter must be reasonable is upheld.

Please let me know if any further information is required.

Colleen Hartland MLC  
Western Metropolitan Region

4 February 2013

**The Committee thanks the Ms Colleen Hartland MLC for this response.**

**Committee Room  
18 February 2013**

# Appendix 1

## Index of Acts and Bills in 2012-13

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## **Appendix 2**

### Committee Comments classified by Terms of Reference

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

#### **Alert Digest Nos.**

#### **Section 17(a)**

**(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

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

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	Ms Colleen Hartland MLC	11-12-12 06-02-13	18 of 2012 2 of 2012
Statute Law Amendment (Directors' Liability) Bill	Attorney-General	05-02-13 18-02-13	1 of 2013 2 of 2013