

# **No. 3 of 2012**

**Thursday, 1 March 2012**

**On the**

Evidence (Miscellaneous Provisions)  
Amendment (Affidavits) Bill 2012



# Table of Contents

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	<b>Page Nos.</b>
<b>Alert Digest No. 3 of 2012</b>	
Evidence (Miscellaneous Provisions) Amendment (Affidavits) Bill 2012	1
<b>Appendices</b>	
1 – Index of Acts and Bills in 2012	9
2 –Committee Comments classified by Terms of Reference	11
3 –Ministerial Correspondence 2012	13

# 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. 3 of 2012

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## Evidence (Miscellaneous Provisions) Amendment (Affidavits) Bill 2012

Introduced	28 February 2012
Second Reading Speech	28 February 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

The Committee provides this Alert Digest as immediate advice and material for Members' information and may report further on a later occasion pursuant to section 17 of the *Parliamentary Committees Act 2003*.

### Purpose

This Bill amends the *Evidence (Miscellaneous Provisions) Act 1958*<sup>1</sup> (the 'Act') to respond to issues identified in County Court proceedings regarding the failure of members of Victoria Police to properly swear or affirm affidavits in support of search warrants. The procedural defects in the relevant affidavits resulted in evidence obtained pursuant to the search warrants being excluded from the proceedings under section 138 of the *Evidence Act 2008*.

The Bill will:

1. deem effective any affidavit made before 12 November 2011 in circumstances where certain procedural requirements were not met. **[5(1)]**
2. deem valid any warrant, summons or other legal process issued, or made, in reliance on affidavits deemed to be effective as a consequence of the validating provisions in the Bill. **[5(2)]**
3. declare that for the purposes of a prosecution of an offence the failure (but for the validating provision in the Bill) to properly swear or affirm affidavits in support of court processes is not to be taken into account when determining whether evidence obtained in reliance of such affidavits ought to be admitted. **[5(3)]**
4. declare that the provisions in the Bill do not affect the rights of the parties in certain legal proceedings commenced by the Director of Public Prosecutions. **[5(5)(a)]** The provisions also declare that the validating effect of the Bill does not apply in proceedings where a court has made a ruling on a relevant affidavit or resulting court process or where a court has made a ruling on the admissibility of evidence before the commencement of the provisions in the Bill. **[5(5)(b) and (c)]**
5. create a new offence in the Act (new section 126B) of providing false or misleading statements as to the circumstances in which an affidavit (or a document purporting to be an affidavit) was sworn or affirmed or as to whether the affidavit (or document purporting to be an affidavit) was sworn or affirmed. The new offence applies to affidavits made after commencement of the new offence. **[4]**

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<sup>1</sup> The *Evidence (Miscellaneous Provisions) Act 1958* provides for a range of miscellaneous matters relating to evidentiary issues, including oaths and affirmations outside court proceedings, statutory declarations and affidavits.

## Content

### ***Retrospective commencement***

With the exception of clause 5, the provisions in the Bill come into operation on the day it receives the Royal Assent, or in the case of clause 4 the day after Royal Assent.

Clause 5 is deemed to have retrospective operation and will be taken to have commenced on 12 November 2011.

**Note:** Clause 5 will have retrospective operation from 12 November 2011. This is the day after the Court of Appeal decision in *Director of Public Prosecutions v Marijancevic, Director of Public Prosecutions v Preece and Director of Public Prosecutions v Preece* [2011] VSCA 355. The explanatory memorandum provides that the retrospective operation of this clause will minimise the adverse impact of procedural defects in affidavits on the court system, victims of crime and community safety. The explanatory memorandum also states that ‘from 12 November 2011, Victoria Police members should have been aware of the requirements for the making of an affidavit on oath or by affirmation and the Bill will not remedy any defects in affidavits signed on or after 12 November 2011.

### ***Retrospective validating provision – Grant of court process based on defective affidavits – Use of evidence derived from court process***

Extract from the explanatory memorandum:

The Bill inserts a new section 165 which applies to affidavits (or documents purporting to be affidavits) made before 12 November 2011. New section 165 provides that where an affidavit signed before 12 November 2011 by a person and by a person authorised to administer oaths contains words indicating that the affidavit (or document purporting to be an affidavit) was made on oath or affirmation, compliance with certain procedures for the making of an affidavit is not, and was not, required.

New section 165 provides that it was not at any time necessary for the validity of the affidavit that—

- an oath or affirmation was made orally;
- the first person signed the affidavit in the presence of the person duly authorised to administer oaths;
- the person duly authorised to administer oaths signed the affidavit in the presence of the first person;
- the person duly authorised to administer oaths observed the first person signing the affidavit; or
- that the affidavit contained the statement required by section 126 of the *Evidence (Miscellaneous Provisions) Act 1958*.

The Bill provides that the words indicating that the first person states that the affidavit was made on oath or affirmation are taken to be effective even where the procedures for the making of an affidavit were not followed. This will only apply where the affidavit is signed by the first person and a person authorised to administer oaths and contains the written statement that the affidavit was made on oath or affirmation.

New section 165(2) provides that a warrant, order, summons or other process issued or made by a court or a judicial officer in reliance, directly or indirectly, on an affidavit is not invalid only by reason of the fact that the affidavit was not duly sworn or affirmed. There are a number of warrants, orders, summons and processes issued or made by a court or judicial

officer which may rely upon affidavits as the primary source of evidence in support of the relevant warrant, order, summons or process. New subsection (2) will ensure that these warrants, orders summons or processes are not invalid due to a failure to comply with certain procedures for the making of an affidavit.

New section 165(3) provides for the exercise of the discretion to admit evidence obtained on the basis of affidavits that are deemed to have been duly sworn or affirmed by the Bill. New subsection (3) provides that when considering whether to admit evidence obtained in reliance, directly or indirectly, on an affidavit, the court should not have regard to the fact that, but for the operation of new section 165(1) the affidavit was not duly sworn or affirmed.

Subsection (4) clarifies that, subject to subsection (3), the section is not intended to limit a discretion that a court has to exclude evidence in a criminal proceeding or to stay a criminal proceeding in the interests of justice.

New section 165(5) provides that the rights of the parties in the proceedings known as Director of Public Prosecutions (Vic.) v Marijancevic (No 264 of 2011), Director of Public Prosecutions (Vic.) v Preece (No 263 of 2011) and Director of Public Prosecutions (Vic.) v Preece (No 265 of 2011) in the Supreme Court of Victoria, Court of Appeal are not affected by the Bill.

In addition, new subsection (5) preserves all rulings made before the day on which the Bill receives the Royal Assent in relation to—

- the validity of an affidavit;
- the validity of a warrant, an order, a summons or a process issued or made in reliance, directly or indirectly, on an affidavit; or
- the admissibility of evidence obtained under a warrant, an order, a summons or other process issued or made in reliance, directly or indirectly, on an affidavit.

New section 165(6) clarifies that references to affidavits in new section 165 are intended to include documents purporting to be affidavits.

## **Committee comment**

Subject to the specific matters raised by the Committee in the Charter report the Committee considers that there may be appropriate circumstances for Parliament to enact legislation that applies to events and matters that have already occurred.

In appropriate circumstances validating and declaratory legislation may be necessary to cure defects or omissions that would otherwise leave open the possibility of legal challenge and uncertainty of outcome in legal proceedings based on the failure to observe some manner and form procedure or requirement.

The Committee takes note of the Attorney-General's Second Reading Speech and the explanatory materials accompanying the Bill.

In particular the Committee notes the following comments in the Second Reading Speech:

The Bill will not, however, excuse fraud or forgery. Nothing in this Bill will validate corruption or perjury in the making of an affidavit.

...

The Government considers that retrospective legislation is a measure of last resort and brings this Bill before the House only after close consideration of the potential consequences of failing to act for victims of crime and the justice system more broadly.

If this legislation is not enacted, there would be an immense toll upon victims of crime, community safety and our court system associated with the disruption or abandonment of criminal proceedings as a result of procedural defects in affidavits.

The Committee has also considered the provisions of section 138(1) of the *Evidence Act 2008*, concerning the exclusion of improperly or illegally obtained evidence, namely:

Evidence that was obtained (a) improperly or in contravention of an Australian law; or (b) in consequence of an impropriety or of a contravention of an Australian law is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Section 138(1) of the Act and the remaining subsections of that section require considerations that weigh or balance the impropriety or illegality against the desirability or necessity to allow the evidence to be admitted. The main matters a court may consider whether to allow evidence notwithstanding the impropriety or illegality are listed in section 138(3)<sup>2</sup>.

***The question whether the retrospective validation of such procedural defects is justifiable and appropriate in all the circumstances is a matter for Parliament to determine.***

## Charter report

***Affidavits relied upon to exercise legal powers that engage human rights – Not necessary to swear certain affidavits – Not necessary to comply with statutory requirement for a jurat in certain affidavits – Whether reasonable limit***

*Summary: The Committee refers to Parliament for its consideration the question of whether or not any limits on human rights that result from clause 5's removal of the need for certain existing requirements for affidavits signed prior to 12 November 2011 are a reasonable and demonstrably justifiable way of achieving the purpose of avoiding negative consequences for the legal system according to the test set out in Charter s. 7(2).*

The Committee notes that clause 5, inserting a new section 165(1)(a), provides that various current common law and statutory requirements for affidavits are 'not, and [were] not at any time, necessary' so long as the affidavit was signed by the declarant and an authorised person prior to 12 November 2011 and contains words indicating that the declarant states that the affidavit was made on oath or affirmation.

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<sup>2</sup> 138(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

The Committee observes that affidavits are used in many legal and administrative processes, including to meet statutory preconditions for a variety of coercive powers (including warrants directed at people or property) and as substitutes for witness testimony in a variety of court proceedings, including urgent and interlocutory matters. Accordingly, the effect of new section 165(1)(a) may be to remove some current preconditions for some exercises of legal powers that may engage any of the human rights set out in the Charter.

The Statement of Compatibility remarks:

For example, the execution of a search warrant may engage the rights to privacy and property, and the execution of an arrest warrant will engage the right to liberty. However, interferences with these rights only require justification in circumstances where the relevant interference is “unlawful” or “other than in accordance with law”. The rights are not prescriptive as to the content of the laws governing the form of affidavits, or even whether an affidavit, statutory declaration or other document is required.

The Committee observes that, to the extent that new section 165(1)(a) removes the necessity for affidavit processes that support the integrity or fairness of legal and administrative processes that rely on them, it may engage certain internal requirements in particular Charter rights (such as the rights against ‘arbitrary’ interferences in privacy or deprivations of liberty) or affect some existing powers’ compliance with the test for reasonable limits on rights set out in Charter s. 7(2).

The Committee notes that the effect of new sections 165(1)(a)(i)-(iv) and 165(1)(b) is to treat a relevant affidavit as effectively sworn if it simply states that it was made by oath or affirmation and to remove the need for the signing to be accompanied by various actions (including making the oath or affirmation ‘orally’ and witnessing the declarant’s signature.) The impact of these provisions on human rights depends in part on whether the traditional actions are important to ensuring the accuracy of the statement or whether the mere requirement of a signature and written words is sufficient.<sup>3</sup>

By contrast, the Committee notes that new section 165(1)(a)(v), which removes the need for the affidavit to contain ‘the statement required by section 126’, is directed to a express statutory (rather than common law) requirement and relates to the affidavit document itself, rather than the actions of the people who signed it. Section 126 provides:

**Jurat to state where and when oath is taken**

Every person authorized by or under this Act to take affidavits before whom any affidavit is sworn or taken shall state truly in the jurat or attestation at what place and on what date the affidavit was sworn.

The impact of this requirement on human rights depends in part on whether an accurate, contemporaneous record of the time and place of the making of the affidavit is necessary to ensure that it can be subjected to appropriate scrutiny at the time that legal powers are exercised in reliance upon it and that people whose rights are affected by those legal powers are able to effectively test the validity and integrity of the affidavit at that time and in subsequent proceedings.

The Second Reading Speech remarks:

This bill does not purport to excuse nor endorse the failure of many Victoria Police members to follow proper procedural requirements for the making of affidavits. However, the government considers the potential consequences for the legal system of procedurally defective affidavits remaining unremedied to be so grave that legislation is required.

<sup>3</sup> See *DPP v Marijancevic, Preece & Preece* [2011] VSCA 355, [53]-[58], but compare New Zealand Law Commission, *Search and Seizure Powers*, [2007] NZLCR 97, [4.46]-[4.47]

The Committee refers to Parliament for its consideration the question of whether or not any limits on human rights that result from clause 5's removal of the need for certain existing requirements for affidavits signed prior to 12 November 2011 are a reasonable and demonstrably justifiable way of achieving the purpose of avoiding negative consequences for the legal system according to the test set out in Charter s. 7(2).

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***Retrospective validation of invalid affidavits – Whether lawful – Retrospective criminal law***

***Summary:*** *The Committee refers to Parliament for its consideration the question of whether or not any limits on Charter rights to lawful behaviour or against retrospective criminal liability that result from clause 5's retrospective validation of certain affidavits and processes is a reasonable and demonstrably justifiable way of achieving the purpose of promoting the interests of justice according to the test set out in Charter s. 7(2).*

The Committee notes that clause 5, inserting new section 165, has retrospective operation as follows:

- new section 165(1)(a) provides that 'it is not, and was not at any time, necessary that' relevant affidavits complied with various procedural requirements
- new section 165(1)(b) provides that certain words 'are and are taken always to have been effective by way of oath or affirmation'
- new section 165(2), validating court processes despite various procedural defects in affidavits, applies from 12 November 2011 (see clause 2(2))
- new section 165(3), requiring that various procedural defects in affidavits be disregarded in determining the admissibility of evidence obtained in reliance on that affidavit in criminal trials, applies from 12 November 2011 (see clause 2(2))<sup>4</sup>

The Committee observes that these provisions change the legal requirements for all affidavits except for those signed since 12 November 2011. In consequence, they may also affect the validity of any legal processes relying on otherwise invalid affidavits. In turn, they may affect the legality of any actions relying on otherwise invalid legal processes and the admissibility of any evidence obtained in consequence of otherwise unlawful actions.

The Statement of Compatibility remarks:

The effect of the bill is to validate affidavits made before 12 November 2011 that are tainted by certain procedural defects, and any warrant, summons or other process issued, or order made, in reliance on those affidavits. This validation in and of itself does not limit human rights. It does, however, have the result that interferences with human rights that may have otherwise been unlawful (due to being based on affidavits not made lawfully) are now lawful in retrospect.

...

It may be said that the execution of a warrant that was based on a defective affidavit is unlawful or other than in accordance with law. The effect of the bill is to remedy this situation by deeming the affidavit effective and the resultant instruments valid so that no unlawfulness arises.

The Committee observes that the various rights in the Charter to 'lawful' behaviour and Charter s. 7(2)'s provision that rights 'may be subject under law' to certain limits may be regarded as

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<sup>4</sup> Section 165(5) preserves the rights of parties in certain proceedings where rulings on validity or admissibility have been made before the Act received Royal Assent.

requiring that the lawfulness of any limit on rights be ascertainable in advance of that limitation.<sup>5</sup> Under that approach, clause 5's effect may be to limit Victorians from seeking some remedies for rights limitations that are due to actions that were unlawful when they occurred.

The Committee also notes that a possible effect of new section 165 may be to remove potential obstacles to causes of action to the extent that those causes rely or relied on proof that an affidavit or consequent process was effective or valid. In the case of criminal offences that may depend on such proof (e.g. perjury<sup>6</sup> or resisting an arrest<sup>7</sup>), new section 165's retrospective operation may allow someone to be convicted (or to remain convicted) of a criminal offence that could not (or ought not to have been) charged under the law applicable at the time the offence was committed. Such an effect may limit the Charter's right against retrospective criminal liability.<sup>8</sup>

The Second Reading Speech remarks:

The government considers that retrospective legislation is a measure of last resort and brings this bill before the house only after close consideration of the potential consequences of failing to act for victims of crime and the justice system more broadly.

***The Committee refers to Parliament for its consideration the question of whether or not any limits on Charter rights to lawful behaviour or against retrospective criminal liability that result from clause 5's retrospective validation of certain affidavits and processes is a reasonable and demonstrably justifiable way of achieving the purpose of promoting the interests of justice according to the test set out in Charter s. 7(2).***

**The Committee makes no further comment**

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<sup>5</sup> *Sunday Times v UK* [1979] ECHR 1, [45].

<sup>6</sup> *Crimes Act 1958*, s. 314, variously requires proof that 'person... takes or makes any oath affirmation or declaration', speaks falsely 'upon such oath affirmation or declaration' or does various things relating to 'such' oath or affidavit. Arguably, these requirements are not satisfied where the purported oath, affirmation or affidavit was ineffective or invalid due to a lack of a necessary procedure, although the defendant may be prosecuted for attempted perjury. However, the effect of new section 165(2) may be to newly permit or uphold a perjury conviction in these circumstances for affidavits that were signed prior to 12 November 2011 and contain a statement that the affidavit was made on oath or affirmation.

<sup>7</sup> E.g. where the arrest was pursuant to a warrant that relied on an affidavit.

<sup>8</sup> Charter s. 27.



# Appendix 1

## Index of Acts and Bills in 2012

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	<b>Alert Digest Nos.</b>
Associations Incorporation Reform Bill 2011	1
Australian Consumer Law and Fair Trading Bill 2011	1
Building Amendment Bill 2012	2
Carers Recognition Bill 2012	2
City of Melbourne Amendment (Environmental Upgrade Agreement) Bill 2012	2
Control of Weapons and Firearms Acts Amendment Bill 2011	1
Emergency Services Legislation Amendment Bill 2011	1
Evidence (Miscellaneous Provisions) Amendment (Affidavits) Bill 2012	3
Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011	1
Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011	1
Port Management Amendment (Port of Melbourne Corporation Licence Fee) Bill 2011	1
Road Safety Amendment (Car Doors) Bill 2102	2
Road Safety Amendment (Drinking While Driving) Act 2011	1



## **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***

Associations Incorporation Reform Bill 2011	1
Australian Consumer Law and Fair Trading Bill 2011	1
Control of Weapons and Firearms Acts Amendment Bill 2011	1

#### **Section 17(b)**

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

Australian Consumer Law and Fair Trading Bill 2011	1
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## Appendix 3

### Ministerial Correspondence 2012

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

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Associations Incorporation Reform Bill 2011	Minister for Consumer Affairs	07-02-12	1 of 2012
Australian Consumer Law and Fair Trading Bill 2011	Minister for Consumer Affairs	07-02-12	1 of 2012
Control of Weapons and Firearms Acts Amendment Bill 2011	Minister for Police and Emergency Services	07-02-12	1 of 2012

**Table of Ministers responses still pending**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	25-10-11	12 of 2011