No. 5 of 2012

Tuesday, 27 March 2012

On the

Accident Compensation Amendment (Repayments and Dividends) Bill 2012

Disability Amendment Bill 2012

Port Bellarine Tourist Resort (Repeal) Bill 2012

Victorian Inspectorate Amendment 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
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> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
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> (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. 5 of 2012

Accident Compensation Amendment (Repayments and Dividends) Bill 2012

Introduced	13 March 2012
Second Reading Speech	14 March 2012
House	Legislative Assembly
Member introducing Bill	Hon. Kim Wells MLA
Portfolio responsibility	Treasurer

Purpose

This Bill amends the *Accident Compensation Amendment Act 1985* to allow the Victorian WorkCover Authority to repay capital or pay dividends to the State of Victoria.

The Committee makes no further comment.

Port Bellarine Tourist Resort (Repeal) Bill 2012

Introduced	13 March 2012
Second Reading Speech	14 March 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Minister for Planning

Purpose

The Bill:

- terminates the agreement between the state and Grawin Pty Ltd (Grawin) that forms schedule 1 to the *Port Bellarine Tourist Resort Act 1981* (the 'Act'). **[5]**
- abolishes the committee of management created by the Act and terminates the Crown lease granted to Grawin by it in June 1985. **[6 to 9]**
- provides that no amount is payable by the State to any person for any loss or damage arising from or connected with the enactment of the Act, and the State is not liable for any claims arising from or connected with the termination of the agreement or the Crown lease. **[10]**
- repeals the *Port Bellarine Tourist Resort Act 1981.* **[4]**

The Committee makes no further comment.

Victorian Inspectorate Amendment Bill 2012

Introduced	13 March 2012
Second Reading Speech	14 March 2012
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister responsible for the establishment of an anti-corruption commission

Purpose

The Bill amends the *Victorian Inspectorate Act 2011* (the 'Act') to provide the Victorian Inspectorate (the 'VI') with duties, functions and powers in relation to oversight of the Independent Broad-based Anti-corruption Commission (IBAC) and the monitoring the compliance by a Public Interest Monitor (PIM) with the prescribed obligations as defined in the Bill.

The Bill also makes consequential amendments to the *Evidence (Miscellaneous Provisions) Act 1958* to allow VI Officers to witness statutory declarations.

Extracts from the Second Reading Speech:

> … This Bill amends the VI Act to give the Victorian Inspectorate powers, duties and functions to ensure that IBAC's use of its powers is both appropriate and proportionate. This complements the oversight role of the joint house committee of Parliament established under the IBAC legislation.
>
> This Bill will also give the Victorian Inspectorate the power to audit public interest monitors' compliance with certain statutory obligations.
>
> This Bill provides new inquiry powers to add to the Victorian Inspectorate's powers to question IBAC personnel and access IBAC documents…
>
> … this Bill contains provisions enabling the Victorian Inspectorate to conduct an inquiry for the purposes of an investigation. An inquiry, including any examination, will be conducted in private. The Victorian Inspectorate will be able to summons witnesses to give evidence under oath and produce documents or things. Those summonsed must attend the examination until excused, and will not, without reasonable excuse, be entitled to refuse to answer questions or produce documents or things required of them.
>
> … witnesses must be informed of their rights and obligations in advance of being examined or providing documents or things; witnesses will be entitled to legal representation; and provisions protecting witnesses who have language difficulties or a mental impairment or are aged 16 to 18.
>
> … Current and former Victorian Inspectorate officers will be exempt from any legal requirement to produce information, documents or things in a court, tribunal or another authority having power to require the production of documents or the answering of questions. The exception to this exemption is that a Victorian Inspectorate officer may produce information, documents or things for the purposes of a prosecution or disciplinary process or action or other proceeding instituted as a result of an investigation conducted by the Victorian Inspectorate.
>
> The Bill provides for a process by which the Victorian Inspectorate can issue a confidentiality notice to prevent a person (such as a witness) from disclosing specified restricted matters that would likely prejudice an investigation, the safety or reputation of a person, or the fair trial of a person.

> … The privilege against self-incrimination is specifically abrogated for all those summonsed or examined by the Victorian Inspectorate. … A 'use immunity' will apply, preventing self-incriminating evidence acquired through coercive Victorian Inspectorate questioning being used against a person in civil or criminal proceedings (except for an offence under the VI Act or the IBAC Act, perjury or a disciplinary process or action if the person is a public sector employee or a member of police personnel).
>
> Other privileges and statutory obligations to maintain secrecy are overridden for current and former IBAC officers and police personnel, except where claimed in their personal, not official, capacity.
>
> Under the current Bill, where the Victorian Inspectorate considers that the IBAC or its personnel have wilfully failed to provide such assistance, the Victorian Inspectorate will also have the power to enter and inspect IBAC premises and make copies or take possession of documents or things relevant to an inquiry.
>
> … This Bill contains appropriate procedural fairness protections for those who may be named or have adverse comments made about them in a Victorian Inspectorate report. The Victorian Inspectorate must not include in a report any information that would identify any person who is not the subject of any adverse comment or opinion unless the Victorian Inspectorate: has provided that person with the relevant material in relation to which the Victorian Inspectorate intends to name that person; is satisfied that it is necessary or desirable in the public interest to do so; and is satisfied that it will not cause unreasonable damage to the person's reputation, safety or wellbeing.
>
> The Victorian Inspectorate must also state in the report that the person is not the subject of any adverse comment or opinion.
>
> If the Victorian Inspectorate intends to include an adverse finding about a person in a report, the Victorian Inspectorate must give that person a reasonable opportunity to respond to the adverse material, and fairly set out each element of that response in the report. If the Victorian Inspectorate intends to include adverse findings about a public body in a report, the Victorian Inspector must give the relevant principal officer of that body an opportunity to respond to the adverse material and fairly set out each element of the response in its report.
>
> In addition to its existing functions to oversee IBAC, the Victorian Inspectorate will be granted a new function to monitor compliance by PIMs with specified obligations relating to document handling …

Content

Commencement by proclamation

The Bill provides that the amendments come into operation on proclamation. **[2]**

The explanatory memorandum provides:

> The date of proclamation is dependent on the passage of Commonwealth legislation to allow for telecommunication interception powers for IBAC and access to telecommunication interception material for the Victorian Inspectorate.

Monitor compliance of the Public Interest Monitor (PIM)

The Bill amends the Act by adding a new object, to monitor compliance by a PIM with the prescribed obligations (storage, disposal, transmission and return of documents) and to report to the Minister and Parliament on the results of the Victorian Inspectorate's performance of this new function. **[3, 5, 7 and 8]**

Disclosure by the VI or VI officers

The Bill inserts new section 28A in the Act to make it an offence for the VI or VI current or former officers to disclose information obtained in the course of their duties, functions or powers. New sections 28A and 28C provide for exceptions to this prohibition, where the disclosure is:

- in the exercise of the VI's duties, functions or powers under any Act
- authorised or required by the *Victorian Inspectorate Act 2011*
- to a person or body whom the VI may make a recommendation for the purpose of that person or body's duties, functions or powers
- for the purpose of prosecutions or disciplinary processes 'instituted as a result of an investigation conducted by the VI.

New section 28D prohibits a current or former VI officer from being required by a court to disclose any information for the purpose of prosecutions or disciplinary processes instituted as a result of an investigation conducted by the VI.

New sections 28B provides for further disclosure prohibitions for information obtained in the course of the VI 's functions with respect to the Public Interest Monitor.

(Refer also to the Charter report below) **[10]**

Confidentiality notices

New section 28E provides for confidentiality notices that may be issued by the VI to a person prohibiting disclosure by that person of certain restricted matters during an investigation, including matters that may prejudice the investigation, the safety or fair trial of a person. The prohibition may be for up to 5 years but may be extended on application to the Supreme Court. The restricted matters also include the existence of a witness summons or the existence of the confidentiality notice itself. **[10]**

New section 28F deals with offences relating to the prohibition on disclosure of the prescribed matters provided for in a confidentiality notice and the exceptions to the prohibition. **[10]**

Investigations and inquiry powers

Clause 12 inserts new Divisions 2, 3 and 4 into Part 3 of the Act. The key provisions are summarised below.

Power to hold inquiry – Witness summons – new sections 33A to 33F to provide that the Victorian Inspectorate may hold examinations as part of an inquiry, and in doing so, may examine a person duly served with a witness summons. It also provides that in conducting the inquiry the Victorian Inspectorate is not bound by the rules of evidence, and that the Victorian Inspectorate can regulate the procedures of an inquiry. Examinations must be held in private.

Witness under the age of 16 years – new section 33G provides that a witness summons directed to a person under the age of 16 years at the date of issue of the witness summons has no effect. A person claiming to be 16 years of age must provide proof of age in accordance with regulations to the Victorian Inspectorate. *See also 33K and 33L for specific provisions for persons under 18 years.*

Summons may require immediate attendance - new section 33H provides that where the Victorian Inspectorate considers on reasonable grounds that a delay is likely to cause evidence being lost or destroyed, the commission of an offence, the escape of the person who is summoned, or serious

prejudice to the conduct of the investigation, then the Victorian Inspectorate may issue a witness summons requiring immediate attendance.

Substituted service – new section 33I enables the Victorian Inspectorate to apply to the Supreme Court for an order that the witness summons be served by another means than set out in section 33H, or an order for substituted service.

Right to legal representation – Practitioner of choice – Possible limitation – Charter section 25(2)(d) and ICCPR article 14(3)(d)

Legal representation – new section 33J provides for a witness to be represented at an examination by an Australian legal practitioner. The VI may direct a witness not to seek legal advice or representation in relation to a witness summons from a specified Australian legal practitioner if the VI considers on reasonable grounds that the inquiry would be prejudiced because the Australian legal practitioner is:

(a) a witness in the inquiry or another inquiry; or

(b) the representative of another witness in the inquiry or another inquiry; or

(c) a person involved, or suspected of being involved, in a complaint or matter being investigated by the IBAC or the Victorian Inspectorate; or

(d) the representative of a person involved, or suspected of being involved, in a complaint or matter being investigated by the IBAC or the Victorian Inspectorate.

The Committee notes that the proposed section may in some circumstances limit a person's right to choose their legal practitioner. The circumstances where that right may be limited are prescribed in 33J (a) to (d) and appear to the Committee to be appropriate in the circumstances.

Examination under oath or affirmation – new section 33M allows the VI to administer an oath or affirmation, require a person to answer question and or to produce a document or things.

Power of entry to IBAC premises – new section 33N provides authorised Victorian Inspectorate Officers with powers of entry to, and inspection and seizure of documents and things on, IBAC premises.

Offences – new sections 33O to 33R respectively create offences of (without reasonable excuse); failing, when summoned to do so to attend as a witness; refusing or failing to answer questions; failing to produce a document or other thing and; failing to take oath or make an affirmation.

Secrecy and confidentiality overridden by Act – new section 33S provides that the provisions of the Act in respect to police personnel or IBAC personnel, override any obligation to maintain secrecy or other restriction upon disclosure of information obtained in their official capacity. The Crown cannot claim any privilege in respect to such personnel.

Self-incrimination abrogated – new section 33T provides that the privilege against self-incrimination is abrogated, but limits the use of any coerced information against the person. *(Refer also to Charter report below)*

> Subsection (1) provides that a person is not excused from answering a question, giving information or producing a document in accordance with a witness summons on the grounds that to do so might tend to incriminate the person or make the person liable to a penalty.
>
> Subsection (2) provides that any information, answer, document or thing given or produced by a person at an examination in accordance with a witness summons that might tend to incriminate the person or make the person liable to a penalty is not able to be used against that person before any court or person acting judicially, except in proceedings for

- perjury or giving false information; or
- an offence against the VIA; or an offence against the IBAC Act; or
- a disciplinary process or action (for public sector employees and police personnel, as defined by section 3 of the Act).

(Refer to Charter report below)

Protection of legal practitioners and witnesses – new section 33U provides the same immunities for legal practitioners and witnesses as they would have if they appeared in proceedings before the Supreme Court.

Contempt of the Victorian Inspectorate – new sections 33V provide for a new offence of contempt of the Victorian Inspectorate. A person will also be guilty of contempt if they hinder or obstruct a Victorian Inspectorate Officer who is exercising a power under new section 10A of Part 3 of the VIA.

Charging and arresting a person for contempt – new section 33W provides for processes for the charging a person for contempt of the VI. The VI may also issue a warrant for the arrest of the person. Once arrested, a person must be brought before the Supreme Court without delay to be dealt with according to law, and may be detained in police custody until then.

Bail on arrest for contempt – new section 33X provides for bail for persons detained after being arrested for contempt where it is not practical to bring them before the Supreme Court immediately.

Custody pending court appearance for contempt – new section 33Y provides custody pending a court appearance for contempt in a prison or police gaol until a person's appearance before the Supreme Court. Detention is permissible where there are reasonable grounds that detention is necessary to prevent the person from escaping from police custody, or for the person's own safety. If required to be detained overnight, a person must be provided with accommodation and meals to a standard generally comparable to that provided to jurors being kept overnight.

Supreme Court power to deal with contempt – new section 33Z provides for the Supreme Court to deal with contempt of the VI as though the contempt were of an inferior court, and the certificate of charge were an application to the Supreme Court for punishment for the contempt.

Double jeopardy – Offence or contempt – new section 33ZA provides that if an act or omission constitutes both contempt of the Victorian Inspectorate and an offence under the Act, proceedings can be brought for the offence or contempt or both, but a person cannot be punished more than once for the same act or omission. **[12]**

Charter report

Fair hearing – Prohibitions on disclosure – Evidence relevant to court proceedings

Summary: Clause 10 makes it an offence for the Victorian Inspectorate or his or her officers to disclose information obtained in the course of their duties, functions or powers, with exceptions that include disclosure of information for the purposes of prosecutions that were instituted as a result of a Victorian Inspectorate investigation. The Committee will write to the Minister seeking further information as whether clause 10 bars the Victorian Inspectorate from disclosing information that is relevant to other court proceedings (including other prosecutions.)

The Committee notes that clause 10, inserting new section 28A, makes it an offence for the Victorian Inspectorate or his or her officers to disclose information obtained in the course of their

duties, functions or powers. New sections 28A and 28C provide for exceptions to this ban for disclosures:

- in the exercise of the Victorian Inspectorate's duties, functions or powers under any Act
- as authorised or required by the *Victorian Inspectorate Act 2011*
- to a person or body whom the Victorian Inspectorate may make a recommendation for the purpose of that person or body's duties, functions or powers
- for the purpose of prosecutions or disciplinary processes 'instituted as a result of an investigation conducted by the Victorian Inspectorate'

New section 28D bars an officer from being required or compelled by a court to disclose any information except for the last of these reasons. In addition, new sections 28B and 28F provide for further disclosure prohibitions for information obtained in the course of the Victorian Inspectorate's functions with respect to the Public Interest Monitor and information that is subject to a 'confidentiality notice', which do not include any express exception for disclosure for the purpose of prosecutions.

The Statement of Compatibility addresses the compatibility of clause 10 with the Charter's right to freedom of expression[1] as follows:

> All of these limitations on the right to free expression are direct, proportionate and balanced with the need to safeguard the confidentiality and integrity of VI operations (which may also involve the operations of IBAC, Victoria Police and other law enforcement agencies). The confidentiality provisions also serve the public interest in ensuring that investigations on foot are not affected, that trials are not prejudiced, and that personal safety or reputation are not compromised.
>
> In light of the fact that the confidentiality provisions effectively operate to preserve rights protected by the charter, the limitations are reasonable and demonstrably justifiable.
>
> I consider there are no less restrictive means reasonably available to achieve the intended purposes.

The Committee observes that clause 10 may also engage the Charter's right to a fair hearing.[2] That is because the Victorian Inspectorate may obtain, as part of its functions overseeing IBAC or the Public Interest Monitors, information that is relevant to other litigation, e.g. the defence in a criminal proceeding. For example, the Victorian Inspectorate may learn of misconduct associated with an IBAC investigation that led to a past or ongoing prosecution for corrupt conduct or of a process overseen by a Public Interest Monitor that produced evidence used in a past or ongoing prosecution for any crime. **However, new sections 28A-28D only expressly permit the disclosure of information for the purposes of prosecutions that were instated as a resulted of a Victorian Inspectorate investigation (rather than prosecutions that preceded, were the subject of or were independent of that investigation.)**

The Committee notes that prohibitions on disclosure similar to clause 10 are common in Australian integrity commission statutes.[3] However, other jurisdictions' statutes provide for further or wider

1 Charter s. 15(2).

2 Charter s. 24(1). The Committee previously discussed the compatibility of non-disclosure provisions (in relation to a body's conciliation, rather than investigative, functions) with the right to a fair hearing in its *Alert Digest No 4 of 2010*, pp. 21-22 (reporting on the Equal Opportunity Bill 2010).

3 *Law Enforcement Integrity Commissioner Act 2006* (Cth), s. 207; *Independent Commission Against Corruption Act 1988* (NSW), s. 111; *Crime and Misconduct Act 2001* (Qld), s. 213; *Corruption and Crime Commission Act 2003* (WA), s. 208.

exceptions that would appear to permit the disclosure of relevant information (e.g. to a criminal defendant) in a wider set of circumstances than may be permitted by clause 10.[4]

The Committee will write to the Minister seeking further information as whether clause 10 bars the Victorian Inspectorate from disclosing information that is relevant to a court proceeding (including prosecutions that were not instituted as a result of a Victorian Inspectorate investigation.) Pending the Minister's response, the Committee draws attention to clause 10.

Fair hearing – Abrogation of privilege against self-incrimination – use of evidence derived from compelled answers

Summary: Clause 12 provides that a person must comply with a request from the Victorian Inspectorate to answer a question or produce a document even if complying with that request may tend to incriminate him or her. The Committee will write to the Minister seeking further information as whether there are less restrictive alternatives reasonably available to achieve the clause's purpose of assisting the Victorian Inspectorate to undertake full and proper investigations.

The Committee notes that clause 12, inserting a new section 33T, provides that a person must comply with a request from the Victorian Inspectorate to answer a question or produce a document even if complying with that request may tend to incriminate him or her. The Committee observes that new section 33T engages the Charter's rights to a fair hearing and against compelled self-incrimination.[5]

The Statement of Compatibility remarks:

> The purpose of the provision is to assist the VI in its function as a truth-seeking body that is able to undertake full and proper investigations.
>
> It is not intended that the VI will compel a person to answer a question in relation to a matter where the person has been charged with a criminal offence in relation to the same matter. Where the VI is satisfied that the conduct of any IBAC personnel requires further investigatory or enforcement action it is able to recommend such action to the appropriate agency including the Chief Commissioner of Police.
>
> If a person has been charged in relation to a matter that the VI was investigating, it is likely to occur only after the VI has concluded its investigation, and further action is being undertaken by another agency. Accordingly it is not considered that the bill will engage the rights in criminal proceedings. In any event, clause 33T is limited by the operation of subclause 33T(2) which provides that any answer, information, document or thing is not admissible in

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4 *Law Enforcement Integrity Commissioner Act 2006* (Cth), ss. 207(5) (permitting disclosure 'required under another law of the Commonwealth') & 209 (permitting disclosure if 'it is in the public interest to do so'); *Independent Commission Against Corruption Act 1988* (NSW), ss. 111(3) & (4)(b) (disclosure 'for the purposes of a prosecution or disciplinary proceedings instituted as a result of an investigation conducted by the Commission'), 111(4)(c) (disclosure 'in accordance with a direction of the Commissioner or Inspector, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest') & 113 (disclosure of information subject to a confidentiality notice to any criminal defendant 'the court considers that it is desirable in the interests of justice'); *Crime and Misconduct Act 2001* (Qld), s. 213 (disclosure of 'relevant evidence for the defence' in any criminal proceeding unless a court orders 'that it would be unfair to a person or contrary to the public interest to do so'); *Corruption and Crime Commission Act 2003* (WA), ss. 208(4)(b) (permitting disclosure for the purposes of a prosecution 'instituted as a result of an investigation conducted by the Commission or the Parliamentary Inspector under this Act or any other prosecution or disciplinary action in relation to misconduct'), 208(5) (disclosure to a 'prescribed authority or person' relating to misconduct reported to the Inspector where the Inspector 'has certified that disclosure is necessary in the public interest') & 208(7) (court orders 'for the purposes of a prosecution or disciplinary action instituted as a result of an investigation conducted by the Commission or the Parliamentary Inspector'.)

5 Charter ss. 24(1) & 25(2)(k).

> evidence against the person before any court or person acting judicially, except in limited circumstances...
>
> Further protection for persons the subject of criminal proceedings is provided by clauses 36(3) and 38(3) of the VI act. These provisions state that if the VI is aware of a criminal investigation or criminal proceedings in relation to a matter or person to be included in a special report or annual report the VI must not include in that report any information which would prejudice the criminal investigation or criminal proceedings.

The Committee observes that clauses 36(3) and 38(3) do not prevent the Victorian Inspectorate from revealing compelled answers from IBAC personnel to IBAC, Victoria Police or other agencies for the purpose of initiating a prosecution in the future[6] and that, in common with similar provisions in other integrity commission statutes in Australia, new section 33T(2) does not prevent anyone from being prosecuted on the basis of information derived from self-incriminatory answers or documents they were compelled to provide.[7] For example, an IBAC officer and a public servant may both be compelled to identify anyone who they received cash from or gave cash to. Those names could then be supplied to the police, who could offer those people immunity for prosecution in exchange for their testimony against the IBAC officer and the public servant in a bribery prosecution.

In its Practice Note No. 3, the Committee remarked:

> Where a provision of any Bill either provides that a human being must answer questions or provide information or documents that may tend to incriminate that person, or creates new powers or extends existing ones that are subject to such a provision, the Statement of Compatibility should state whether and how that provision satisfies the test for reasonable limits on rights in Charter s. 7(2).
>
> The Committee would prefer that the analysis of reasonable limits set out the demonstrable justification for: the coercive power itself; any removal of the privilege against self-incrimination; any permission to use the answers or information derived from them in later proceedings; and any preconditions on the availability of protections against self-incrimination. The Statement's discussion of less restrictive alternatives reasonably available to achieve the purpose of the provision may address whether the privilege against self-incrimination could be abrogated in a narrower way.

The Committee will write to the Minister seeking further information as whether there are less restrictive alternatives reasonably available to achieve new section 33T's purpose of assisting the Victorian Inspectorate to undertake full and proper investigations. Pending the Minister's response, the Committee draws attention to clause 12.

The Committee makes no further comment.

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6 New section 28A(1)(a), (b) & (c) and existing s. 35. The Supreme Court of Victoria has held that the Charter's rights with respect to compelled self-incrimination apply whether or not the person being questioned is presently charged with an offence: *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [162].

7 See *Law Enforcement Integrity Commissioner Act 2006* (Cth), s. 96(3); *Independent Commission Against Corruption Act 1988* (NSW), s. 26(2); *Crime and Misconduct Act 2001* (Qld), s. 197(2); *Corruption and Crime Commission 2003* (WA), s. 145. By contrast, see clause 8, inserting a new section 10B(1)(b), which bars the use in a subsequent proceeding of 'any information or thing (including a document) obtained as a direct consequence' of a compelled answer.

Disability Amendment Bill 2012

The Bill was introduced into the Legislative Assembly on 28 February 2012 by the Hon. Mary Wooldridge MLA. The Committee considered the Bill on 9 March 2011 and made the following comments in Alert Digest No. 4 of 2012 tabled in the Parliament on 13 March 2012.

Committee comment

Charter report

Liberty – Fair hearing – Restrictive interventions other than restraint and seclusion

Summary: The Committee will write to the Minister seeking further information as to the compatibility of clauses 54 (which limits the existing regime for restrictive interventions to persons with a disability who are not on a treatment plan), 61 (which modifies the requirement for an independent person to explain all changes to behavioural support plans to the person with a disability) and 82 (which creates a new regime for restrictive interventions for persons with a disability who are on a treatment plan) with the Charter rights of persons with a disability who are or may be subject to restrictive interventions other than restraint or seclusion.

The Committee notes that clauses 82, inserting a new section 201A, and 54, substituting a new section 133(1), provide for separate regulation of 'restrictive interventions' respectively on persons for whom a treatment plan is in force and all other persons with a disability (who may be the subject of a behaviour support plan.) Existing s. 3 provides:

> restrictive intervention means any intervention that is used to restrict the rights or freedom of movement of a person with a disability including-
>
> (a) chemical restraint;
>
> (b) mechanical restraint;
>
> (c) seclusion;

Rather than engaging any specific right set out in Part 2 of the Charter, the Committee observes that, by definition, all restrictive interventions engage one or more Charter rights of persons with a disability who are subject to those interventions.

The Committee notes that the amending Bill retains the approach of the existing Act, where two sorts of restrictive interventions – restraints and seclusion – are subject to a variety of express statutory protections, while the regulation of other types of interventions (e.g. 1: 1 supervision of the person with a disability) is primarily left to the discretion of the Senior Practitioner. However, as a result of the Bill, restrictive interventions other than restraint and seclusion are regulated differently under the two regimes in some respects.

The Committee also notes that, in a substantive change to the existing Act, clause 61, amending existing s. 143, provides that an independent person is not required (outside of the annual review process) to explain changed behaviour support plans to persons with a disability that involve a more restrictive use or form of restrictive interventions other than restraint or seclusions. For example, even if the Senior Practitioner requires that 1:1 supervision of a person must be included in a behaviour support plan, a proposal (outside of

the annual review process) to introduce such supervision into a behavioural support plan or to extend existing 1:1 supervision in the community to include 1:1 supervision in the person's residence can occur without an independent person first explaining that proposal to the person with a disability.

The Statement of Compatibility remarks:

> Section 143(1)(c) of the Act currently requires an independent person to explain any change to a behaviour support plan, regardless of whether the change involves the use of restraint or seclusion. This has proved to be unduly onerous and unnecessary to protect rights, as behaviour support plans may be reviewed up to four times a year, including to reduce the use of restraint or seclusion.
>
> The Bill amends the Act to require than an independent person only has to be available to explain to a person with a disability the review of the person's behaviour or support plan annually or whenever there is a proposed increase in restraint or seclusion. The amendment retains the important role of the independent person in explaining amendments to behaviour support plans that restrict a person's liberty (and in relation to which they may wish to seek a review). Consequently, the amendment does not limit the right to a fair hearing, nor the right to liberty and security of the person.

The Committee will write to the Minister seeking further information as to the compatibility of clauses 54 (which limits the existing regime for restrictive interventions to persons with a disability who are not on a treatment plan), 61 (which modifies the requirement for an independent person to explain all changes to behavioural support plans to the person with a disability) and 82 (which creates a new regime for restrictive interventions for persons with a disability who are on a treatment plan) with the Charter rights of persons who are or may be subject to restrictive interventions other than restraint or seclusion.

Minister's Response

Thank you for your letter on behalf of the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria (the Committee) requesting advice in relation to the amendments proposed to the *Disability Act 2006* (the Act) by the Disability Amendment Bill 2012 (the Bill).

As noted in the second reading of the Bill, the Bill seeks to fulfil the Government's commitment to protect the rights of people with a disability and reduce administrative burdens on disability service providers. In accordance with this commitment, clauses 55, 61 and 82, in addition to other provisions in the Bill, amend the Act to remove the requirement that a person who is subject to compulsory treatment have both a treatment plan and a behaviour support plan. A treatment plan will include all of the information contained in a behaviour support plan, as well as additional information relevant to the treatment of the person receiving compulsory treatment.

You have asked me to respond to the Committee's Charter report, in Alert Digest No. 4 of 2012, tabled in Parliament on 13 March 2012, and the concerns raised about particular provisions in the Bill relating to the use of restrictive interventions other than restraint and seclusion.

In this response to the Committee, I outline the provisions relating to restrictive interventions in the Act, as amended by the Bill, and explain how they are compatible with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). In doing so, I aim to clarify that:

1. In relation to the concerns raised by the Committee, the Bill does not alter the requirements of the Act, or diminish the rights of a person with a disability under the Act.

2. As such, the provisions that the Committee queries have previously been deemed to be compatible with the Charter.

3. The circumstances in which restrictive interventions are used are circumscribed to ensure that they are only applied to limit a person's rights when it is reasonable and justifiable to do so.

4. In addition, the Bill strengthens the rights of people with a disability by introducing additional protections, such as the right of a person to a review of an assessment order under clause 81 of the Bill.

Restrictive interventions

Restrictive interventions are practices used by disability service providers that are designed to prevent a person with a disability from physically harming themselves or others, including as a result of their destruction of property.

The Act defines restrictive interventions as interventions that are used:

to restrict the rights or freedom of movement of a person with a disability including:

(a) chemical restraint;

(b) mechanical restraint;

(c) seclusion.

The provisions in the Act relating to restrictive interventions focus on the use of restraint and seclusion. This is because these restrictive interventions were, and continue to be, almost without exception, the restrictive interventions used to prevent a person with a disability from causing harm to themselves or others, or destroying property and in the process, harming themselves or others.

Section 150 of the Act provides for restrictive interventions other than restraint or seclusion, known as 'other restrictive interventions'. This section was intended to address other interventions that might emerge in practice and that were not readily definable. This section ensures that these restrictive interventions are also scrutinised and regulated. The Senior Practitioner is responsible for overseeing the use of other restrictive interventions.

Other restrictive interventions may, for example, include interventions restricting a person's access to certain things in the person's environment, such as locking a cupboard door or requiring a person to be supervised by a disability service provider when in the community due to road safety concerns. Such other restrictive interventions may engage a person's human rights to privacy (section 13(a) in the Charter) and freedom of movement (section 12 in the Charter) and, depending on the extent of the intervention, a person's right to liberty (section 21 in the Charter).

More rigorous safeguards apply to the use of restrictive interventions on a person who is receiving compulsory treatment and who has a treatment plan. This is because a compulsory treatment order is an order that is made to detain a person in circumstances in which the person presents a serious risk of violence to others. The use of restrictive interventions is regularly required to prevent such people from physically harming themselves or others, or destroying property and in the process, harming themselves or others.

The Bill does not diminish any of the existing safeguards in the Act, and therefore does not effect any changes that would result in any incompatibility with human rights.

In relation to the points raised in your report, I provide the following response:

The **first point** queries why section 134, which creates a criminal penalty where a disability service provider uses a restrictive intervention without receiving approval to do so under

section 135, has not been replicated where a person is receiving compulsory treatment and has a treatment plan.

The amendments proposed by the Bill do not affect the substance or operation of these criminal penalty provisions in the Act. Criminal penalty provisions do apply under Part 8 of the Act if a disability service provider uses restrictive interventions without approval to use supervised treatment.

A disability service provider who proposes to use supervised treatment must, under section 185 of the Act, obtain the approval of the Secretary under section 186. Section 185 provides that it is an offence for a disability service provider to use supervised treatment without the approval of the Secretary. As a supervised treatment order involves the civil detention of a person with a disability and consequently entails the use of restrictive interventions, a disability service provider approved to use supervised treatment is also approved to use restrictive interventions.

The **second point** notes that while only restraint and seclusion must be documented in a behaviour support plan, the Act requires that all restrictive interventions must be documented in a treatment plan.

Once again, the Bill does not alter the requirements of the Act, or diminish the rights of a person with a disability under the Act.

All restrictive interventions must be included in a treatment plan, because a treatment plan is required to be prepared for a person who is subject to an order for compulsory treatment authorising the person's detention. By its nature, an order for compulsory treatment may involve the use of restrictive interventions that are beyond the definition of restraint and seclusion, such as supervision of a person in the community.

Where a person is not receiving compulsory treatment, but is subject to restrictive interventions other than restraint or seclusion, section 150 of the Act empowers the Senior Practitioner to regulate the use of these other restrictive interventions. Separate provision was made for the use of other restrictive interventions in respect of people who do not receive compulsory treatment, as the use of other restrictive interventions was considered a departure from the usual restrictive interventions used in practice in respect of these people, requiring the particular attention and flexible supervision of the Senior Practitioner.

The Bill does not affect the oversight of other restrictive interventions that the Senior Practitioner provides.

The **third point** raises the issue of an Independent Person's involvement in the review of a behaviour support plan outside of the annual review process.

The Act does not require an Independent Person to explain to a person with a disability any change to the person's behaviour support plan that involves the use of other restrictive interventions, including any increase in the use of other restrictive interventions.

Under section 150 of the Act, the use of other restrictive interventions in respect of a person with a behaviour support plan is directly scrutinised by the Senior Practitioner. The Senior Practitioner is empowered to monitor the use of other restrictive interventions by:

- requiring disability service providers to report on the use of other restrictive interventions;
- requiring disability service providers to develop behaviour support plans that specify other restrictive interventions proposed to be used on a person with a disability;
- developing guidelines and standards for the use of other restrictive interventions; and,
- prohibiting disability service providers from using specified other restrictive interventions.

I again emphasise that the Bill does not diminish the rights of a person with a disability. The Bill replicates provisions in the Act that have been deemed, and are still considered, compatible with the Charter.

Thank you for the opportunity to respond to the Committee's concerns. I trust that this information is of assistance to the Committee. Should the Committee require any additional information or clarification of the effect of the amendments, please do not hesitate to contact my office.

Hon Mary Wooldridge MP
Minister for Community Services

26 March 2012

The Committee thanks the Minister for this response.

Water Amendment (Governance and Other Reforms) Bill 2012

The Bill was introduced into the Legislative Assembly on 28 February 2012 by the Hon. Peter Walsh MLA. The Committee considered the Bill on 9 March 2012 and made the following comments in Alert Digest No. 4 of 2012 tabled in the Parliament on 13 March 2012.

Committee comment

Charter report

Fair hearing – Presumption of innocence – Equipment presumed to be accurate and precise – Analytical evidence admissible use of hearsay – Samples presumed to be unaffected by storage

Summary: Clause 61 provides for rules relating to evidence and proof in proceedings (including criminal proceedings) relating to the discharge of anything into the Authority's works or sewerage system. The Committee refers to Parliament for its consideration the question of whether or not the admission of certain analysis based on hearsay is compatible with the Charter's fair hearing rights and will write to the Minister seeking further information as to the compatibility of presumptions of fidelity and robustness for certain analytical evidence with the Charter's right to be presumed innocent.

The Committee notes that clause 61, inserting a new section 303A, copies existing rules relating to evidence and proof in proceedings under the *Water Industry Act 1994* or regulations relating to the discharge of anything into the Authority's works or sewerage system, so that they also apply to similar proceedings under the *Water Act 1989* or its regulations. Those rules include the following:

- Equipment and installations used by water officers and analysis in connection with any evidence 'must be presumed, until the contrary is proved, to be accurate and precise': new sub-section (1)
- The results of analysis based on analytical techniques that infringe the hearsay rule 'by their nature' are 'admissible in evidence' despite that rule: new sub-section (2)
- Attributes of samples taken under the Act or regulations 'must be presumed, unless the contrary is proved, not to be materially affected by its method of storage or preservation': new sub-section (3).

The Committee observes that these provisions may apply in criminal proceedings under the *Water Act 1989*.

New-subsection (2) may engage the Charter's fair hearing rights. For example, the automatic admission of all analytical evidence, even though it depends on techniques that depend on observations (such as reports of smells or spot-testing) by people who do not testify, may be either arbitrary or unfair, at least when it is used to support the prosecution case in a criminal trial. The Statement of Compatibility remarks:

> While this engages section 24 of the charter act, it is fair and reasonable and does not limit the right to a fair hearing because:
>
> - the purpose of this provision is to ensure that parties to proceedings are able to utilise all available evidentiary technology; and
> - it is reasonable to expect that any such analysis would be carried out by appropriately qualified people to legally recognised standards

The Committee observes that the *Evidence Act 2008* makes hearsay admissible in a number of circumstances, including when the adducing party establishes that it 'was made in circumstances that make it highly probable that [it] was reliable', but also requires that hearsay admitted on this ground be first-hand and that reasonable notice be given to the other party. The Committee notes that clause 61 does not disturb trial protections for criminal defendants other than the rule against hearsay evidence.

As well, new-sub-sections (1) and (3) may engage the Charter's right to be presumed innocent until proved guilty of a criminal offence. For example, if Authority testing equipment indicates that a particular unauthorised substance (connected to the defendant) is in a sewer, then the defendant will be convicted unless he or she proves (on the balance of probabilities) that the equipment is fallible. By contrast, equivalent presumptions in the *Evidence Act 2008* and the *Environment Protection Act 1970* are displaced where 'evidence sufficient to raise doubt… is adduced' or 'evidence to the contrary is presented'.

The Committee refers to Parliament for its consideration the question of whether or not clause 61, inserting a new sub-section 303A(3) that permits the admission of certain analytical results based on hearsay (including as prosecution evidence in criminal trials), is a reasonable and demonstrably justified means of achieving the purpose of allowing parties in certain Water Act proceedings to utilise all available evidentiary technology.

The Committee will write to the Minister seeking further information as to the compatibility of new sub-sections 303A(1) & (3), which create presumptions of fact as to fidelity and robustness of certain analytical evidence that criminal defendants must disprove on the balance of probabilities, with the Charter's right to be presumed innocent. Pending the Minister's response, the Committee draws attention to clause 61.

Minister's Response

Thank you for your letter dated 13 March 2012 regarding Clause 61 of the *Water Amendment (Governance and Other Reforms) Bill 2012* (the Bill).

I also thank you for commending the Statement of Compatibility (SOC) for this Bill for its clarity and utility.

Subsection 303A(2) - exception to the hearsay rule

In response to the Committee's comment on subsection 303A(2), I confirm my opinion expressed in the SOC to the Bill that this subsection does not limit the right to a fair hearing in the Charter.

I share the view of the Committee that the hearsay rule, while not absolute, is fundamental in ensuring a fair trial process and that, in circumstances where hearsay evidence is admissible in evidence in proceedings, it is important that appropriate safeguards are in place to ensure there is no unfair prejudice to any party and that the fairness of the hearing is not jeopardised.

The Committee commented on the potential arbitrariness or unfairness of the automatic admission of analytical evidence that depends on observation made by people who do not testify.

My response to this is that any potential arbitrariness or unfairness would be eliminated by a number of other safeguards in the trial process that guard against the use of evidence that would result in an unfair trial, including the following:

- The operation of other rules of evidence not affected by subsection 303A(2) including the discretion of the court to exclude admissible prosecution hearsay evidence where its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to the party (e.g. section 135(a) of the *Evidence Act 2008*) or limit its

use if there is a danger a particular use might be unfairly prejudicial or misleading (e.g. section 165 of the *Evidence Act 2008*);

- The fact that subsection 303A(2) is a rule allowing all parties to a proceeding, not just the prosecution, to tender the results of any analysis based on analytical techniques, which by their nature infringe the hearsay rule. Further, that section 303A(2) is designed to reduce the time and cost for all parties to the proceeding; and
- That parties are allowed to tender evidence relating to the accuracy and precision of any instrument, equipment or installation used in connection with the analysis of evidence and to challenge the evidence on the basis of its sampling, storing, testing and interpretation.

Allowing for analysis results to be admissible despite the hearsay rule is necessary in proceedings under the Water Act that relate to discharges to Victoria's waterways or sewerage system because these cases by their nature hinge on the sampling and analysis of water.

Although the hearsay rule is one of the rules that ensure a fair trial process it is not the only rule and exceptions are sometimes necessary. This is demonstrated by the exceptions to the hearsay rule in the *Evidence Act 2008* and contemplated in paragraph 25(2)(g) of the Charter which states that a person is entitled to examine or have examined witnesses against him or her *unless otherwise provided for by law*.

In this instance the admissibility of evidence despite the hearsay rule can be demonstrably justified because there are other mechanisms in place in these proceedings, described above, to ensure the right to a fair hearing is not limited.

Subsection 303A(1) and (3) - reverse onus provisions

I note that you have sought further information as to the compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) of new sections 303A(1) and (3) that clause 61 of the Bill would insert into the *Water Act 1989*; specifically, on the issue that they create presumptions of fact as to the fidelity and robustness of certain analytical evidence that criminal defendants must disprove on the balance of probabilities.

Subsections 303A(1) and (3) are modelled on subsections 177C(1) and (3) of the *Water Industry Act 1994*. When those provisions were inserted to the Water Industry Act they were designed to reduce the time and cost for all parties of litigation involving a retail water licensee, and to strengthen a licensee's ability to deal with the problem of dangerous and unauthorised discharges to sewers. The illegal use of a sewer to get rid of dangerous material can have very significant impacts on the environment, the health and safety of sewer workers, sewage treatment processes and the life of a sewer. These provisions support the ability of water businesses to take necessary enforcement action.

I take on notice the concerns expressed regarding subsections 303A(1) and (3)and will request the Department of Sustainability and Environment to review these provisions in consultation with the water businesses. The review will assess the viability of alternative options that will meet policy objectives and I anticipate that it will take some time to complete. Once the analysis has been completed, any amendments would be dealt with at the next available opportunity.

Thank you for raising this matter with me.

PETER WALSH MLA
Minister for Water

22 March 2012

The Committee thanks the Minister for this response.

Water Legislation Amendment (Water Infrastructure Charges) Bill 2011

The Bill was introduced into the Legislative Assembly on 11 October 2011 by the Hon. Peter Walsh MLA. The Committee considered the Bill on 24 October 2011 and made the following comments in Alert Digest No. 12 of 2011 tabled in the Parliament on 25 October 2011.

Committee comment

Practice Note No. 3 – National uniform legislation schemes – Procedures for determining water charges

Summary: New section 4K will apply various provisions of the Water Charge (Infrastructure) Rules 2010 (Cth) 'as a law of' Victoria. The Committee will write to the Minister requesting further information as to the compatibility of those rules with human rights, in particular the rights to privacy and a fair hearing.

The Committee notes that clause 6, inserting a new section 4K into the Water Industry Act 1994, will apply various provisions of the *Water Charge (Infrastructure) Rules 2010 (Cth)* 'as a law of' Victoria.

While the statement of compatibility assesses the compatibility of other clauses of the Bill with human rights, it does not expressly address whether or not the Commonwealth provisions applied by new section 4K are compatible with human rights. The Committee's *Practice Note No. 3* states:

> While the passage of national co-operative laws is a matter for Parliament, the Committee considers that the explanatory material to Bills creating or enhancing such schemes should fully explain their human rights impact.
>
> The Committee would prefer that the explanation have two components: First, the Statement of Compatibility may assess the human rights compatibility of all existing non-Victorian laws that are to be applied in Victoria. Second, the explanatory material may set out whether, and to what extent, the Charter's operative provisions (including its provisions for scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities) will apply under the national cooperative scheme.

The Committee notes that the Bill's explanatory memorandum contains comprehensive information addressing the second of these components (i.e. the application of the Charter's operational provisions under the national scheme.)

In relation to the first component (i.e. the compatibility of the existing applied provisions with human rights), the Committee observes that the applied sections of the *Water Charge (Infrastructure) Rules 2010* (Cth) may engage the following Charter rights:

- **Privacy** (Charter s. 13(a)): Rules 42, 48, 52, 53 and 54 require the Regulator (including, potentially, the Essential Services Commission) to publish information supplied in applications, submissions or in response to requests for information relating to regulated charges, unless the supplier identifies the information as confidential and either the Regulator considers the information to be confidential or the supplier opts to withdraw it. The Committee notes that, if the application, submission or response contains private information about third parties, then its publication may affect the privacy rights of those parties. By contrast, s. 38 of the *Essential Services Commission Act 2001* requires the ESC to consult with and consider the detriment that the publication of such information may cause to other interested parties and s. 55(1)(b) permits an internal appeal of such decisions by any aggrieved person.

- **Fair hearing** (Charter s. 24(1)): Rule 53 bars the Regulator from publishing confidential information and does not expressly address whether or not that information may still be considered in relation to the determination of a water charge. The Committee notes that, if the Regulator makes a determination on the basis of information that has not been made available to some parties, then those parties' inability to respond to that information may engage any fair hearing right they have in respect of that determination. By contrast, s. 38 of the *Essential Services Commission Act 2001* permits the ESC to publish even confidential information if 'the public benefit in disclosing it outweighs' the detriment disclosure may cause (e.g. if disclosure is necessary to ensure a fair hearing of the determination of the water charge.)

The Committee notes that only human beings have rights under the Charter. However, even where the applicant or submitter is a corporation, it is possible that the publication or non-publication of supplied information may affect the privacy or fair hearing rights of humans to whom the information or determination relates.

The Committee will write to the Minister requesting further information as to the compatibility of the applied provisions of the *Water Charge (Infrastructure) Rules 2010* (Cth) with human rights, in particular the rights to privacy and a fair hearing. Pending the Minister's response, the Committee draws attention to new section 4K.

Minister's Response

Thank you for your letter of 28 February 2012 regarding the matters identified in the Scrutiny of Acts and Regulations Committee (SARC) Alert Digest No.12 of 2011 in relation to the Water Legislation Amendment (Water Infrastructure Charges) Bill 2011 (the Bill).

The Bill received Royal Asset on 15 November 2011 and the *Water Legislation Amendment (Water Infrastructure Charges) Act 2011* commenced on 16 November 2011.

Section 6 of the Act inserted new Part 1B – *Approval or Determination of Basin Water Charges into the Water Industry Act 1994*. This Part, in particular 4K applies the provisions of the *Water Charge (Infrastructure) Rules 2010 (Cth)* (WCI Rules) as law of the State, in respect to Basin water charges. The specific applied provisions of the WCI Rules are: Divisions 2, 3, and 4 of Part 6; Division 2 of Part 7; Division 1 of Part 8; Schedules 1, 2, and 3; and Part 1, so far as it is relevant to the interpretation of the provisions.

SARC has requested further information as to the compatibility of the applied provisions of the WCI Rules with human rights, with particular interest in respect of the rights of privacy and a fair hearing.

Compatibility of the Applied Commonwealth Provisions

I am advised that the applied provisions, as well as all other provisions of the legislation, were reviewed for compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter Act). The Statement of Compatibility discussed the sections of the legislation deemed to engage human rights. In my opinion, the Bill, including the applied provisions of the WCI Rules, is compatible with the human rights protected by the Charter Act.

I respond to the Committee's specific issues as set out below.

Right to Privacy

Section 13 of the Charter Act protects against unlawful or arbitrary interference with privacy, including publication of personal information and mandatory disclosure of information. A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Privacy is bound up with conceptions of personal autonomy and human dignity. An interference with privacy will not be unlawful provided if it is permitted by law, is certain, and is appropriately circumscribed.

Summary

SARC's concern is that the applied Commonwealth provisions 42, 48, 52, 53 and 54, relating to the publishing of information supplied in applications, submissions, and in response to information requests, may affect the privacy rights of third parties, through the potential publication of confidential third party information contained in these documents.

Response

Applications and Requests for Further Information

Applications of Part 6 operators to the regulator to levy regulated charges would include limited information related to natural persons and limited information, if any, of third parties. The type of information to be included in applications under Rule 27 and 42 is set out in Schedule 1 of the WCI Rules. Potential third party information could include information collected in consultation with customers, information related to demand or consumption for services, and regulated charges. It is envisioned however, that this information would be produced in aggregate form and would not disclosure individualist or personal information.

Similarly, applications of Part 7 operators would include limited information related to natural persons and limited information, if any, of third parties. The type of information to be included in applications under Rule 42 is set out in Schedule 3 of the WCI Rules. Potential third party information could include information related to regulated charges, demand or consumption for services, and details related to distributions made to related customers. It is not envisioned, however, this information would disclose personal information.

Under Rules 26, 35, 41 and 47, the regulator before making a decision, may request further information relating to an application for regulated charges (Rules 26, 47) or relating to an application for annual review or variation of regulated charges of a Part 6 operator (Rules 35 and 41). It is envisioned that such a request would be related to the information of the applicant and not that of third parties, and would be produced in aggregate form.

Under the applied provisions, the regulator has appropriate discretion as to whether to publish confidential information and the requirement to disclose information in applications is relevant for transparent decision-making of the regulator. The applied provisions also contain safeguards prohibiting the publication of confidential information for which a claim is made under Rule 53, and prohibit the publication of information related to an exempt contract. Under Rule 55, if an infrastructure operator has a contract with a customer, the regulator cannot publish any information to which the exemption relates other than the names of the parties to the contract and date on which the exemption was granted.

Specifically, Rule 9 exempts an infrastructure operator from including regulated charges as part of a contract with a customer from its "schedule of regulated charges." The regulator must grant the exemption if it is satisfied that the disclosure of information would have a material and adverse effect for the infrastructure operator or customer.

Therefore, the information disclosure requirements under the applied provisions are not arbitrary and are clearly lawful. Therefore, the right to privacy is not limited by the requirement.

Submissions

Part 8 of the WCI provides comprehensive requirements for the disclosure of information, in particular the regulators' obligations in relation to the disclosure of confidential information. Under Rule 52, the regulator must publish submissions received, which have been invited in response to applications and draft regulator decisions. The person making the submission may make a claim of confidentiality under Rule 53 and Rule 54, to protect the release of confidential information.

While the applied provisions require compulsory disclosure of information, the requirements are not arbitrary and are clearly lawful, and Rule 53 and Rule 54 provides a safeguard for the disclosure of confidential information. Therefore, the right to privacy is not limited by the requirement.

Right to Fair Hearing

The Charter Act right to a fair hearing is substantially concerned with matters of procedural fairness (access to courts and tribunals, alternations to jurisdiction, reverse burdens of proof) and not substantive fairness of a decision or judgment of a court or tribunal. In this regard, the issues discussed within the Statement of Compatibility covered the extent of which the Act engages the right to a fair hearing within the context of the Charter Act.

Summary

SARC's concern is that the regulator in its reason for decisions may still consider confidential information, which is omitted from applications or submissions, and therefore inhibits a party's ability to respond to the withheld information engaging a right to a fair hearing.

Response

In responding to SARC's concern regarding a right to a fair hearing under Rule 53 of the applied provisions, I note that the process under the applied provisions to make a determination or approval of basin water charge is very transparent. Regulated entities in Victoria make an application to the regulator setting out pricing proposals; the regulator publishes a notice of a draft decision, reasons for the decision and invites submissions from business and customers; submissions are considered by the regulator; and then the regulator publishes its final decision and reasons for decision.

In addressing SARC's specific point raised, the Department of Sustainability and Environment does not interpret Rule 53 to achieve the result suggested by SARC. Rule 53(1) states that a regulator must not publish an application or a submission "or include any information from an application or submission in its reasons for its decision". The plain wording on this rule suggests that confidential information in such applications or submissions must not be included in its reasons for its decision.

Similarly, Rule 54 states that when the regulator disagrees with a claim that information is confidential and wishes to publish the application or submission, the information claimed to be confidential is omitted from the application or submission and a placeholder for information must be inserted and the "regulator must not have regard to omitted information when approving or determining regulated charges." Rule 53 is interpreted as not to allow consideration of confidential information in reasons for decision. As such, the concern raised by SARC is ameliorated.

However, even if confidential information *could* be used in a regulator's reasons for decision, such a decision could be challenged through judicial review.

For completeness, I note that an application for approval or determination of regulated charges will be made by a water corporation who are not afforded human rights under the Charter Act.

I trust this information addresses your concerns.

PETER WALSH MLA
Minister for Water

14 March 2012

The Committee thanks the Minister for this response.

Committee Room
26 March 2012

Appendix 1
Index of Acts and Bills in 2012

Alert Digest Nos.

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*

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
Victorian Inspectorate Amendment Bill 2012	5
Water Amendment (Governance and Other Reforms) Bill 2012	4

Section 17(b)

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

Australian Consumer Law and Fair Trading Bill 2011	1

Appendix 3

Ministerial Correspondence 2012

Table of correspondence between the Committee and Ministers during 2012

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Associations Incorporation Reform Bill 2011	Minister for Consumer Affairs	07-02-12 *24-02-12*	1 of 2012 *4 of 2012*
Australian Consumer Law and Fair Trading Bill 2011	Minister for Consumer Affairs	07-02-12 *24-02-12*	1 of 2012 *4 of 2012*
Control of Weapons and Firearms Acts Amendment Bill 2011	Minister for Police and Emergency Services	07-02-12 *29-02-12*	1 of 2012 *4 of 2012*
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	28-02-12 *14-03-12*	12 of 2011 *5 of 2012*
Disability Amendment Bill 2012	Minister for Community Services	13-03-12 *26-03-12*	4 of 2012 *5 of 2012*
Water Amendment (Governance and Other Reforms) Bill 2012	Minister for Water	13-03-12 *27-03-12*	4 of 2012 *5 of 2012*

Table of Ministers responses still pending

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Victorian Inspectorate Amendment Bill 2012	Minister responsible for the establishment of an anti-corruption commission	27.03.12	5 of 2012