

No. 6 of 2014

Tuesday, 27 May 2014

On the following Bills

Appropriation (2014-2015) Bill 2014
Appropriation (Parliament 2014-2015)
Bill 2014

Building Legislation Amendment
Bill 2014

Building a Better Victoria (State Tax and
Other Legislation Amendment) Bill 2014
Children, Youth and Families
Amendment Bill 2014

Corrections Amendment (Smoke-Free
Prisons) Bill 2014 (Assembly initiated)
Fines Reform Bill 2014

Gambling and Liquor Legislation
Amendment (Modernisation) Bill 2014

Local Government (Brimbank City
Council) Amendment Bill 2014

Treasury Legislation and Other Acts
Amendment Bill 2014

Water Amendment (Flood Mitigation)
Bill 2014

The Committee



Chairperson
Hon. Richard Dalla-Riva MLC
Member for Eastern Metropolitan



Deputy Chairperson
Hon. Christine Campbell MLA
Member for Pascoe Vale



Ms Ann Barker MLA
Member for Oakleigh



Mr Michael Gidley MLA
Member for Mount Waverley



Mr Don Nardella MLA
Member for Melton



Dr Bill Sykes MLA
Member for Benalla



Mr Graham Watt MLA
Member for Burwood

Parliament House, Spring Street
Melbourne Victoria 3002

Telephone: (03) 8682 2895

Facsimilie: (03) 8682 2858

Email: andrew.homer@parliament.vic.gov.au

Web: www.parliament.vic.gov.au/sarc

Committee Staff

Mr Andrew Homer, Senior Legal Adviser

Ms Helen Mason, Legal Adviser - Regulations

Mr Simon Dinsbergs, Business Support Officer

Ms Sonya Caruana, Office Manager

Terms of Reference - Scrutiny of Bills

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

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

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Useful information

Role of the Committee

The Scrutiny of Acts and Regulations Committee is an all-party Joint House Committee, which examines all Bills and subordinate legislation (regulations) introduced or tabled in the Parliament. The Committee does not make any comments on the policy merits of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan legislative scrutiny. These traditions have been developed since the first Australian scrutiny of Bills committee of the Australian Senate commenced scrutiny of Bills in 1982. They are precedents and traditions followed by all Australian scrutiny committees. Non-policy scrutiny within its terms of reference allows the Committee to alert the Parliament to the use of certain legislative practices and allows the Parliament to consider whether these practices are necessary, appropriate or desirable in all the circumstances.

The *Charter of Human Rights and Responsibilities Act 2006* provides that the Committee must consider any Bill introduced into Parliament and report to the Parliament whether the Bill is incompatible with human rights.

Interpretive use of Parliamentary Committee reports

Section 35 (b)(iv) of the *Interpretation of Legislation Act 1984* provides –

In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.

When may human rights be limited

Section 7 of the *Charter* provides –

Human rights – what they are and when they may be limited –

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
 - (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

Glossary and Symbols

'Assembly' refers to the Legislative Assembly of the Victorian Parliament

'Charter' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*

'Council' refers to the Legislative Council of the Victorian Parliament

'DPP' refers to the Director of Public Prosecutions for the State of Victoria

'human rights' refers to the rights set out in Part 2 of the Charter

'IBAC' refers to the Independent Broad-based Anti-corruption Commission

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (as from 1 July 2013 one penalty unit equals \$144.36)

'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. 6 of 2014

Appropriation (2014-2015) Bill 2014

Introduced	6 May 2014
Second Reading Speech	6 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MLA
Portfolio responsibility	Treasurer

Purpose

The Bill is for an Act to provide appropriation for payments of certain sums out of the consolidated revenue for the ordinary annual services of the Government for the financial year 2014-2015.

Charter report

The Appropriation (2014-2015) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Appropriation (Parliament 2014-2015) Bill 2014

Introduced	6 May 2014
Second Reading Speech	6 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MLA
Portfolio responsibility	Treasurer

Purpose

The Bill is for an Act to provide appropriation for payments of certain sums out of the consolidated revenue to the Parliament for the financial year 2014-2015.

Charter report

The Appropriation (Parliament 2014-2015) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Building Legislation Amendment Bill 2014

Introduced	6 May 2014
Second Reading Speech	8 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Minister for Planning

Purpose

The Bill amends the:

Building Act 1993 ('the Act') to:

- a) improve the regulation of building practitioners
- b) abolish the Building Practitioners Board and provide for its functions to be carried out by the Victorian Building Authority
- c) abolish the Building Appeals Board and provide for relevant proceedings to be dealt with by the Victorian Building Authority or VCAT
- d) provide for the establishment and operation of the Domestic Building Consumer Protection Fund
- e) make changes to the building permit system, including the building permit levy
- f) provide further in relation to the functions, conduct and appointment of building surveyors
- g) enhance enforcement powers, including powers of entry and information-gathering powers
- h) abolish the Building Advisory Council, the Plumbing Advisory Council and the Building Regulations Advisory Committee and provide for the establishment of the Technical Accreditation Committee and the Ministerial Advisory Committee
- i) improve generally the operation of that Act

Architects Act 1991 to abolish the Architects Registration Board of Victoria and provide for its functions to be carried out by the Victorian Building Authority and to improve generally the operation of the Act.

Domestic Building Contracts Act 1995 to provide for new processes for the conciliation of domestic building disputes and rectification of domestic building work, and confer functions on the Victorian Building Authority instead of the Director of Consumer Affairs Victoria.

The Bill repeals the *House Contracts Guarantee Act 1987*. [193]

Content

Delayed commencement of more than 12 months

The Bill provides that some provisions may not commence before 1 July 2016. The Committee refers to its Practice Note concerning commencement provisions in excess of 12 months from Royal Assent and notes that no explanation justifying a commencement in excess of 2 years is provided in either the explanatory memorandum or the second reading speech. [2]

The Committee will write to the Minister seeking further information to justify such a provision.

Right to be presumed innocent – Legal burden to prove defence – Embargo notice

The Bill inserts a new section 231K into the *Building Act 1993* providing that a person who knows that an embargo notice relates to a thing must not sell, lease, move, transfer or otherwise deal with the thing or any part of the thing.

It is a defence to a prosecution for an offence against this section to prove that the accused moved the thing or the part of the thing for the purpose of protecting and preserving it.

The statement of compatibility provides:

The purpose of imposing a legal burden for this provision is to ensure the effectiveness of enforcement and compliance with the Building Act by enabling the offence to be effectively prosecuted and to thus operate as an effective deterrent and protection of the public.

The limit is imposed only in respect of the defence. The prosecution would first have to establish the elements of the offence. Although an evidential onus would be less restrictive than a legal onus, it would not be as effective because it could be too easily discharged. The inclusion of a defence with a burden on the accused to prove the matters on the balance of probabilities achieves an appropriate balance of all interests involved. [87]

Privilege against self-incrimination – Direct use immunity – Abrogation of privilege – Derivative use permissible

New sections 227G, 227H, 232E and 232F abrogate the privilege against self-incrimination. These sections only provide a direct use immunity by prohibiting the use of answers, information, and, in the case of section 227G, documents, from being admissible in evidence against the person in any other criminal proceedings. [86, 87] (*Refer to Charter report below*)

New sections 227G or 227H and 232F do not apply a 'derivative' use immunity. Derivative use occurs when, as a result of the compelled statement, further evidence is obtained that may incriminate the maker of the statement. The derivative evidence is permitted to be used in a criminal prosecution against the person.

The extracts from the statement of compatibility provides justification for denying derivative use immunity in a regulatory context:

... a lack of derivative use immunity is capable of justification in a regulatory context. The statutory purpose underlying the limits to the right against self-incrimination in sections 227G, 227H, 232E and 232F is to enable authorised persons to monitor compliance with the Building Act and to investigate potential contraventions. The effective monitoring of compliance and the investigation of potential contraventions are necessary to adequately protect consumers from detriment resulting from non-compliance with the regulatory scheme.

... Derivative use immunity would also place an excessive and unreasonable burden on the prosecution to prove that evidence it sought to tender in criminal proceedings against a person claiming the immunity was not obtained either directly or indirectly from the questioning of a person under these provisions.

Granting immunities in a regulated commercial context to individuals most likely to be questioned and exposed to criminal and civil penalties leads to protracted investigations, and those responsible for wrongdoing and misconduct may escape liability. The limitation on derivative use immunity addresses this issue by allowing authorised persons to effectively monitor compliance with the regulatory scheme without jeopardising the success of any proceedings which may be brought after all relevant information concerning a person's activities have come to light.

The availability of derivative use immunity, far from being a proper and balanced counterweight to the compulsory information-gathering powers, would give some persons a forensic advantage far in excess of what was ever contemplated under the privilege against self-incrimination. Accordingly, there are no less restrictive means reasonably available to achieve the purpose of this limitation.

Rights or freedoms – Fair hearing – Director liable to pay unpaid penalty imposed on body corporate

The Bill inserts a new section 243B in the Act providing that, if a body corporate is found guilty of an offence under the Act or regulations and any penalty imposed on the corporate is not paid within the time required for payment, then joint and several ‘liability to pay the penalty attaches to’ every director of the body corporate. The liability arises regardless of the status of the body corporate, for example, where the body corporate has been subsequently wound up. The liability is joint and several liability and is imposed on each director of the body corporate when the offence was committed and when the penalty is imposed. [95] (*Refer to Charter report below*)

Charter report

Fair hearing – Self-incrimination – Victorian Building Authority, municipal building surveyors and Energy Safe Victoria may require any person to lead them to information that may be used to prosecute them

Summary: The Committee refers to Parliament for its consideration the question of whether or not clause 86, by empowering the Victorian Building Authority, municipal building surveyors and Energy Safe Victoria to require any person to lead them to information that may be used to prosecute them, is compatible with the Charter’s rights to a fair hearing and against compelled self-incrimination.

The Committee notes that clause 86, inserting new sections 227G and 227H into the *Building Act 1993*, provides that, if the Victorian Building Authority, municipal building surveyors or Energy Safe Victoria believes that ‘a person is capable of providing information’:

- that may assist in monitoring compliance with the *Building Act 1993* or its regulations or the assessment of a person’s fitness to continue to practice as a registered building practitioner; or
- relating to a matter that constitutes, or may constitute, a contravention of the *Building Act 1993* or may assist in the assessment of a person’s fitness to practice as a registered building practitioner;

then that person may be required to provide the information in writing or to appear to give that information orally (or, in some instances, by oath or affirmation.) Sub-sections 227G(3) and 227H(4) provide that the person is required to give information even if it may tend to incriminate that person; however, 227G(4) and 227H(5) provide that ‘the answer by a person to any question asked... under this section or the provision by a person of any information... under this section is not admissible in evidence against the person’ in most proceedings.

The Statement of Compatibility remarks:

Neither sections 227G or 227H, or section 232F,¹ apply to ‘derivative’ use, which is when, as a result of the compelled statement, further evidence is uncovered that incriminates the maker of the statement. This means that such further evidence is permitted to be used in a criminal prosecution against the person, which arguably limits the right against self-incrimination...

¹ The Committee notes that new section 232F does not abrogate the privilege against self-incrimination for compelled statements (see sub-section 232F(1)), but instead only does so for the compelled production of pre-existing documents (see sub-section 232F(2)).

Granting immunities in a regulated commercial context to individuals most likely to be questioned and exposed to criminal and civil penalties leads to protracted investigations, and those responsible for wrongdoing and misconduct may escape liability. The limitation on derivative use immunity addresses this issue by allowing authorised persons to effectively monitor compliance with the regulatory scheme without jeopardising the success of any proceedings which may be brought after all relevant information concerning a person's activities have come to light.

However, the Committee notes that new sections 227G and 227H are not limited to builders and other commercial operators. For example, the powers may be applied to the clients of builders, families, neighbours and any others who may have relevant information about compliance or fitness. The information derived from their answers may be used to prosecute those people for complicity in offences against the *Building Act* or for other general crimes, such as tax evasion or damage to property.

The Committee refers to Parliament for its consideration the question of whether or not clause 86, by empowering the Victorian Building Authority, municipal building surveyors and Energy Safe Victoria to require any person to lead them to information that may be used to prosecute them, is compatible with the Charter's rights to a fair hearing and against compelled self-incrimination.²

Fair hearing – Directors liable to pay penalty imposed on body corporate

Summary: New section 243B may make one person liable for a criminal punishment imposed on another, without that person being a party to the hearing where the punishment was imposed and without proof of that the person had any responsibility for the offending. The Committee will write to the Minister seeking further information.

The Committee notes that clause 95, inserting a new section 243B into the *Building Act 1993*, provides that, if a body corporate is found guilty of an offence under the Act or regulations and any penalty imposed on the corporate is not paid within the time required for payment, then joint and several 'liability to pay the penalty attaches to' every director of the body corporate (both when the offence was committed and the penalty was imposed.)

The Committee observes that new section 243B may make one person liable for a criminal punishment imposed on another, without that person being a party to the hearing where the punishment was imposed (or provision for that person to appeal the verdict or penalty imposed on the corporation) and without proof that the person had any responsibility for the offending.

The Committee notes that new section 243B differs from other common provisions that make corporate directors:

- criminally liable for offences committed by a body corporate, as such provisions generally require proof of (or the absence of defences to) each director's responsibility for such an offence.³
- liable to pay fines imposed on an insolvent body corporate, as such provisions require that the director was aware that the corporate could not pay the penalty or failed to take reasonable steps to require the corporate to pay.⁴

The Statement of Compatibility does not discuss new section 243B. The Committee observes that the provision appears to be based on s. 111C of the *Queensland Building and Construction Commission Act 1991* (Qld). When that provision was introduced, the accompanying explanatory notes stated:

² See Charter ss. 24(1) and 25(2)(k).

³ E.g. new sections 243 and 243A.

⁴ *Infringements Act 2006* (Vic), s. 91; *Sentencing Act 1991* (Vic), s. 55.

'The aim of this provision is to replace the Deeds of Guarantee and Indemnity currently required by the Authority from all directors of a company who is licensed.'⁵

The Committee will write to the Minister seeking further information as to the compatibility of new section 243B of the *Building Act 1993* with the Charter's right to have criminal charges decided after a fair hearing.⁶ Pending the Minister's response, the Committee draws attention to clause 95.

Fair hearing – Analyst certificate is proof of facts stated in the certificate unless defendant gives 14 days notice

Summary: New section 84 of the *Domestic Building Contracts Act 1995* provides that the production by a prosecutor of the certificate of an analyst is proof of the facts stated in the certificate in any proceedings for an offence under the Act unless the defendant gives 14 days notice. The Committee observes that nearly all other Victorian provisions for analyst certificates require the prosecutor to serve the certificate on the defendant or only make the certificate rebuttable evidence of the facts in the certificate. The Committee will write to the Minister seeking further information.

The Committee notes that clause 178, inserting a new section 84 into the *Domestic Building Contracts Act 1995*, provides that the 'production by a prosecutor of the certificate of an analyst is proof of the facts stated in the certificate' in any proceedings for an offence under the Act unless the defendant gives 14 days notice that he or she requires the analyst to be called as a witness.

The Statement of Compatibility does not address new section 84. The Committee notes that new section 84 is based on existing s. 214(3) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), which is in turn based on earlier provisions in s. 156 of the *Fair Trading Act 1999* and s. 67(2) of the *Consumer Protection Act 1972*.⁷ **However, the Committee observes that nearly all other Victorian provisions for analyst certificates require the prosecutor to serve the certificate on the defendant or only make the certificate rebuttable evidence of the facts in the certificate (rather than conclusive proof of those facts.)⁸**

The Committee will write to the Minister seeking further information as to the compatibility of new section 84 of the *Domestic Building Contracts Act 1995* with the Charter's right to have criminal charges determined after a fair hearing. Pending the Minister's response, the Committee draws attention to clause 178.

The Committee makes no further comment

⁵ Explanatory notes to the Queensland Building Services Authority Amendment Bill 1999, clause 35.

⁶ Charter s. 24(1).

⁷ The 1972 Act only required 24 hours notice.

⁸ See *Dangerous Goods Act 1985*, s. 24A; *Drugs, Poisons and Controlled Substances Act 1981*, s. 120; *Environment Protection Act 1970*, s. 59AB; *Evidence Act 2008*, s. 177; *Food Act 1984*, s. 50 c.f. s. 45; *Marine (Drug, Alcohol and Pollution Control) Act 1988*, ss. 32, 32A, 32B; *Public Health and Wellbeing Act 2008*, s. 224; *Radiation Act 2005*, s. 13; *Rail Safety Act 2006*, ss. 83, 84; *Road Safety Act 1986*, ss. 55E, 57, 57A, 57B; *Water Act 1989*, s. 302; *Water Industry Act 1984*, s. 177A. The exception is s. 71(4) of the *Agricultural and Veterinary Chemicals (Control of Use) Act 1991*.

Building a Better Victoria (State Tax and Other Legislation Amendment) Bill 2014

Introduced	6 May 2014
Second Reading Speech	7 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MLA
Portfolio responsibility	Treasurer

Purpose

The Bill amends the:

Duties Act 2000 to abolish life insurance duty and make amendments to the general insurance duty and to increase the rates of duty on the registration and transfer of vehicles by \$0.40 per \$200 from 1 July 2014. **[3-10]**

First Home Owner Grant Act 2000 to permit the State Revenue Office to disclose certain information to Centrelink; the Child Support Registrar; the Foreign Investment Review Board; and the IBAC **[11-12]**

Land Tax Act 2005:

- a) in relation to the determination of the taxable value of land
- b) to make miscellaneous amendments in relation to land held on trust, including a retrospective amendment **[18]**
- c) to make miscellaneous amendments in relation to primary production land
- d) to provide that a person is not required to give notice of acquiring land if the acquisition is effected electronically. **[13-28]**

Payroll Tax Act 2007 to reduce the rate of payroll tax from 4.90% to 4.85% with effect from 1 July 2014. **[29]**

Planning and Environment Act 1987 to impose a levy from 1 July 2016 for the privilege of making certain planning permit applications. The levy will be \$1.30 for every \$1000 of the estimated cost of a development of over \$1 million (to be CPI adjusted), for which the permit is required. **[30-37]**

Road Safety Act 1986 to increase the fee payable for registration or renewal of registration of a motor vehicle or trailer from 18.54 to 20.42 fee units from 1 July 2014. **[38]**

Taxation Administration Act 1997 to:

- a) permit the disclosure of information obtained under or in relation to the administration of a taxation law in connection with the administration of the First Home Owner Grant in another Australian jurisdiction
- b) permit the disclosure of information obtained under or in relation to the administration of a taxation law to additional government agencies for specified purposes. **[39]**

Content

Retrospective application

The Bill provides that section 46E (land tax for excluded trusts and administration trusts) of the *Land Tax Act 2005* is amended with retrospective effect to 12 December 2007.

The explanatory memorandum for clauses 2 and 18 relevantly provides:

Clause 18 amends section 46E of the *Land Tax Act 2005* to provide that a trustee of an administration trust is to be assessed for land tax separately from any other land held by the trustee for a different trust or in a different capacity. This ensures that land held under an administration trust is not aggregated with the trustee's other landholdings, which may otherwise increase the amount of land tax payable on that land.

This provision was inadvertently omitted when the administration trust provisions were enacted on 12 December 2007. As it has always been the administrative practice of the Commissioner of State Revenue to assess land held under an administration trust separately from land held by the trustee for a different trust or in a different capacity, the operation of this amendment is made retrospective from 12 December 2007 by clause 2 of the Bill. **[18]**

The Committee considers the amendment seeks to clarify the current practice and is beneficial to taxpayers in its application.

Charter report

The Building a Better Victoria (State Tax and Other Legislation Amendment) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Children, Youth and Families Amendment Bill 2014

Introduced	6 May 2014
Second Reading Speech	7 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Mary Wooldridge MLA
Portfolio responsibility	Minister for Community Services and the Attorney-General

Purpose

The Bill amends the *Children, Youth and Families Act 2005* ('the Act') to:

- a) insert a new Part 4.6A in the Act to provide for child safety conferences without the need to attend formal court hearings, and to make provision for child safety agreements in respect of children who are in need of protection.

Note: Legal representatives may attend child safety conferences on behalf of a parent or the child but their role will be limited to advising their client of any legal implications arising from any agreement or the conference itself. Conferences will be non-adversarial and informal in character. Solutions will not be able to be imposed on the parties. [5]

- (b) make further provision in relation to the authorisation of a principal officer of an Aboriginal agency. [7-13]

Extract from the second reading speech:

Limitations with the current wording of section 18 prevent implementing of these authorisations. Specifically, this Bill will clarify the meaning of the term 'principal officer' for the purposes of section 18 authorisations as the chief executive officer or equivalent. It will empower a chief executive officer who has been authorised under section 18 to delegate their authorised functions and powers to suitable employees of their agency. It will also establish appropriate arrangements for sharing information in relation to section 18 authorisations, and provide for the review of decisions made in the context of a section 18 authorisation that are equivalent to the review provisions that apply to decisions made by the Secretary of the Department of Human Services.

Charter report

The Children, Youth and Families Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Corrections Amendment (Smoke-Free Prisons) Bill 2014⁹ (Assembly initiated)

Introduced	6 May 2014
Second Reading Speech	7 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Kim Wells MLA
Portfolio responsibility	Minister for Corrections

Purpose

The Bill amends the *Corrections Act 1986* ('the Act') to allow regulations to be made which will prohibit smoking in prisons and regulate the entry, possession and use of tobacco products and tobacco related paraphernalia in prisons. [5]

The Act will be amended to make it clear that tobacco products and tobacco smoking accessories can be seized. [4]

The Bill will also amend the *Tobacco Act 1987* to remove exemptions to the offence of smoking in an enclosed workspace that apply to prisons. [6, 7]

Extracts from the second reading speech:

... The regulations prohibiting smoking in prisons, and the amendments to the Tobacco Act will both commence on 1 July 2015.

... In addition, prisoners will have access to smoking cessation programs and nicotine replacement therapy products.

Charter report

The Corrections Amendment (Smoke-Free Prisons) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

⁹ The Committee reported on the identical Legislative Council initiated Bill (introduced on 25 March 2014) in *Alert Digest No. 5 of 2014* tabled on 6 May 2014.

Fines Reform Bill 2014

Introduced	6 May 2014
Second Reading Speech	8 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill is for a principal Act to provide for the:

- establishment of a new administrative body, Fines Victoria within the Department of Justice to replace the Infringements Court
- appointment, powers and functions of the Director, Fines Victoria
- collection of court fines and infringement fines by the Director, Fines Victoria
- enforcement of court fines and infringement fines under one Act
- consolidate fines into a single account

The fines regime introduced by the Bill include attachment of earnings; charges over and sale of real property; detention, immobilisation and sale of motor vehicles; removal of number plates; community work permits and; infringement offenders and imprisonment.

Enforcement warrants – In respect to court fines and infringement fines, the Bill provides for registrars of the Magistrates' Court to issue, recall and cancel enforcement warrants directed to the Sherriff for execution.

Children – Fines and infringements imposed on or issued to children will be enforced under the current legislative regimes.

Victim compensation orders – The Bill waives certain fees relating to the execution of civil warrants to enforce victims compensation orders.

Civil warrant enforcement – The hours during which the Sherrif may use reasonable force to execute a civil warrant at residential premises, are extended to between the hours of 7 am and 9.30 pm. Further, the Bill provides that where the Sheriff executes a criminal warrant outside the hours of 7 am to 9.30 pm the Sherrif may also execute a property seizure warrant at those residential premises.

Infringement enforcement periods – The Bill reduces the current statutory timeframes for steps in the process involved in enforcing infringements.

The Bill amends the *Infringements Act 2006* to repeal Parts 4 to 12 and make other amendments to that Act such as removing the option for a prisoner to serve a term of imprisonment in lieu of paying outstanding infringement fines. The Bill makes provision for a 'work and development permit scheme' to provide more options for vulnerable people and people in acute financial hardship to clear their infringement debts through approved activities, medical or mental treatment, unpaid work, financial counselling, drug and alcohol treatment, and for persons under 25 years of age, mentoring. **[203-247]**

The Bill amends the *Sheriff Act 2009* and makes consequential amendments to other Acts.

Extract from the explanatory memorandum:

In particular, the Bill will—

- establish a single administrative model for the collection and enforcement of infringement fines and court fines;
- make payment options, engagement with the system, and access to justice quicker, easier and more cost-effective for people with fines;
- enable the consolidation of infringement fines and court fines into single manageable accounts;
- reduce the administrative and hearing workloads of the courts;
- make it more affordable for victims of crime to enforce compensation orders by waiving some prescribed Sheriff warrant fees;
- improve civil warrant execution powers to enable better enforcement of victims compensation orders and civil judgment debts; and
- expand the use of sanctions available to enforce compliance with the law.

Content

Delayed commencement

The Bill provides that if a provision of the Bill does not come into operation before 30 June 2016, it comes into operation on that day.

Extract from the explanatory memorandum:

The default date for the Bill is longer than 12 months after the Bill is expected to receive Royal Assent to allow for operational and ICT¹⁰ infrastructure to be put in place and to enable consultation with the courts, enforcement agencies and other stakeholders. The courts and enforcement agencies will need time to make changes in order to transition to the new model.

In the circumstances the Committee considers the delayed commencement is justified.

Charter report

The Fines Reform Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

¹⁰ Information communication technology

Local Government (Brimbank City Council) Amendment Bill 2014

Introduced	7 May 2014
Second Reading Speech	7 May 2014
House	Legislative Council
Member introducing Bill	Hon Mathew Guy MLC
Portfolio responsibility	Minister for Local Government

Purpose

The Bill amends the *Local Government (Brimbank City Council) Act 2009* to provide that the next general election of Councillors for the Brimbank City Council is to be held on the fourth Saturday in October 2016. [5]

Charter report

The Local Government (Brimbank City Council) Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Treasury Legislation and Other Acts Amendment Bill 2014

Introduced	6 May 2014
Second Reading Speech	7 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MLA
Portfolio responsibility	Treasurer

Purpose

The Bill amends the:

- *Emergency Services Superannuation Act 1986* to require ESSSuper to comply with prudential standards approved by the Governor in Council and published in the Government Gazette [3]
- *State Superannuation Act 1988* and the *Parliamentary Salaries and Superannuation Act 1968* to allow former members of public sector superannuation funds to commute a pension to meet a Commonwealth taxation liability [4, 5]
- *Workplace Injury Rehabilitation and Compensation Act 2013* and the *Accident Compensation Act 1985* to improve the operation of those Acts; correct a number of commencement provisions; and correct a number of minor typographical and cross-referencing errors [6-30] (*Refer to retrospective application amendments below*)
- *Victorian Managed Insurance Authority Act 1996* to improve the operating efficiency of the Victorian Managed Insurance Authority (the VMIA). The amendments will enable the board of the VMIA to delegate to a holder of a named office of the authority, rather than to a named person who is the holder of that office; and clarify the board's power to delegate to the chief executive officer (or any other person or persons) to appoint or engage other officers and employees and to set the terms and conditions of appointment or engagement. [31-32]

The Bill also amends certain other Acts to update the operation of indexation provisions in or under those Acts to reflect current Australian Bureau of Statistics publication practices and references. [33]

Content

Retrospective application¹¹

A number of provisions in the Bill have retrospective application. In respect to these provisions the explanatory memorandum relevantly provides:

Division 1 of Part 3 (other than clauses 17, 18, 19 and 25) is to be taken to have come into operation on 12 November 2013. The provisions apply retrospectively in order to amend provisions that were introduced in the *Workplace Injury Rehabilitation and Compensation Act 2013* from 12 November 2013 when the Act received the Royal Assent. The retrospective application of these provisions will not adversely affect any person's existing benefits. [2, 6-16, 20-24]

Division 2 of Part 3 (other than clause 30) is to be taken to have come into operation on 13 November 2013. The provisions apply retrospectively in order to amend provisions that were introduced or amended in the *Accident Compensation Act 1985* by the *Workplace Injury Rehabilitation and Compensation Act 2013* from 13 November 2013. The retrospective

¹¹ The *Workplace Injury Rehabilitation and Compensation Act 2013* received Royal Assent on 12 November 2013 and comes into operation on 1 July 2014.

application of these provisions will not adversely affect any person's existing benefits. [2, 26-29]

Clause 30 is to be taken to have come into operation on 5 April 2010. The amendment applies retrospectively in order to amend section 313 of the *Accident Compensation Act 1985* which was introduced into that Act by the *Accident Compensation Amendment Act 2010* from 5 April 2010. The retrospective application of this clause will not adversely affect any person's existing benefits. [2, 30]

Clause 6 of the Bill amends the retrospective application of certain provisions in the commencement section (2) of the *Workplace Injury Rehabilitation and Compensation Act 2013*.

Section 630(3) will be deemed to have come into operation on 5 April 2010. Section 630(3) of the *Workplace Injury Rehabilitation and Compensation Act 2013* amends the definition of supplemental pension limit in section 96(7) of the *Accident Compensation Act 1985* to correct a cross-referencing error and to expressly provide a means of indexing the pre-injury average weekly earnings amount referenced in the definition. Section 2 of the *Workplace Injury Rehabilitation and Compensation Act 2013* incorrectly specifies that section 630(3) applies from 1 July 2010. The provision will now apply from 5 April 2010, when the definition was inserted. The retrospective application of the amendment will not adversely affect any person's existing benefits.

Section 628(1) will be deemed to have come into operation on 20 October 2010. Section 628(1) of the *Workplace Injury Rehabilitation and Compensation Act 2013* amends section 88(2) of the *Accident Compensation Act 1985* to provide that compensation for industrial deafness is to be in accordance with Division 2B (compensation for medical and like services). Section 2 of the *Workplace Injury Rehabilitation and Compensation Act 2013* specifies that the amendment applies retrospectively from 5 April 2010. The amendment will now apply from 20 October 2010 when Division 2B was inserted into the *Accident Compensation Act 1985*. The retrospective application of the amendment will not adversely affect any person's existing benefits.

Section 643 will be deemed to have come into operation on 20 October 2010. Section 643 of the *Workplace Injury Rehabilitation and Compensation Act 2013* will insert a new transitional provision (section 368A) into the *Accident Compensation Act 1985* which provides that section 91(3AAA) of the *Accident Compensation Act 1985* applies to assessments of deafness on or after 20 October 2010. Section 2 of the *Workplace Injury Rehabilitation and Compensation Act 2013* specifies that the amendment applies retrospectively from 1 November 2010. Section 368A of the *Accident Compensation Act 1985* will now apply retrospectively from 20 October 2010 being the date that section 91(3AAA) was inserted into the *Accident Compensation Act 1985*. The retrospective application of the amendment will not adversely affect any person's existing benefits.

Section 626(7) will come into operation on 1 July 2011. Section 626(7) of the *Workplace Injury Rehabilitation and Compensation Act 2013* amends the definition of relevant period in section 8(5) of the *Accident Compensation Act 1985* to specify that the definition applies "in relation to services provided on or after 1 July 2011". Section 2 of the *Workplace Injury Rehabilitation and Compensation Act 2013* specifies that the amendment applies retrospectively from 1 July 2010. This amendment will now apply from 1 July 2011, when the definition was inserted. The retrospective application of the amendment will not adversely affect any person's existing benefits. [6]

Charter report

The Treasury Legislation and Other Acts Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Water Amendment (Flood Mitigation) Bill 2014

Introduced	6 May 2014
Second Reading Speech	7 May 2014
House	Legislative Assembly
Member introducing Bill	Hon Peter Walsh MLA
Portfolio responsibility	Minister for Water

Purpose

The Bill amends the:

Water Act 1989 to insert a new Part 5AA to provide for the regulation by way of a discretionary Ministerial permit, to access land and carry out maintenance work on existing levees on certain Crown land that are not maintained by a public body. [3-7]

Crown Land (Reserves) Act 1978; Forests Act 1958; Land Act 1958; National Parks Act 1975; and the Wildlife Act 1975 to insert offences relating to the unauthorised construction, removal, alteration or maintenance of a levee.

Conservation, Forests and Lands 1987 to allow for the delegation of certain functions under new Part 5AA of the *Water Act 1989* to Parks Victoria or its employees.

Extract from the second reading speech:

... this Bill will enable a person, who considers that they will benefit from maintaining a levee on Crown land to minimise damage caused by flooding, to obtain a permit to do so.

The permit will only allow for the maintenance of existing levees. It will not authorise existing levees to be lengthened or made higher or wider, nor allow for the construction of new levees on Crown land.

The issuing of a permit is at the discretion of the Minister. This will ensure that where a levee on Crown land is already being maintained by, for example, local government, a water corporation or a statutory Crown land manager, the application for a permit can be refused.

Charter report

The Water Amendment (Flood Mitigation) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Ministerial Correspondence

Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014

The Bill was introduced into the Legislative Council on 2 April 2014 by the Hon. Edward O'Donohue MLC. The Committee considered the Bill on 5 May 2014 and made the following comments in Alert Digest No. 5 tabled in the Parliament on 6 May 2014.

Committee Comments

Charter report

Freedom of expression – Prohibition of advertising associated with unauthorised gambling

Summary: The Committee observes that new section 2.2.8 may prohibit some educational, literary and political advertising on the subject of unauthorised gambling. The Committee will write to the Minister seeking further information.

The Committee notes that clause 9, inserting a new section 2.2.8(1) into the *Gambling Regulation Act 2003*, provides:

A person must not publish, or cause to be published, any advertising that contains any information, term, expression, symbol or other thing associated with unauthorised gambling.

Penalty: 100 penalty units.

Additional sub-sections provide that the test for association is what a reasonable resident of Victoria would consider to be associated and that 'publish' includes dissemination by any means. The word 'advertising' is not defined.

The Committee observes that new section 2.2.8 is not limited to advertising that promotes unauthorised gambling. It may therefore prohibit some educational, literary and political advertising, for example:

- a television commercial that warns of the risks of unauthorised gambling
- a newspaper advertisement for a book, television show or film on the topic of unauthorised gambling
- an internet site that promotes a political view about the proper regulation of unauthorised gambling

The Committee considers that new section 2.2.8 may engage the Charter's right to freedom of expression.ⁱ

The Statement of Compatibility does not address new section 2.2.8. The explanatory memorandum remarks:

New section 2.2.8 of the GRA prohibits the advertising of unauthorised gambling. The provisions are based on the prohibition on gaming machine advertising inserted at section 3.5.34AA in 2009. A penalty of 100 penalty units applies to this offence. This is the same penalty that applied to the advertising of a prohibited lottery.

ⁱ Charter s. 15(2).

The Committee notes that existing s. 3.5.34AA (unlike new section 2.2.8) is limited to advertising by or on behalf of venue or casino operators. By contrast, existing s. 3.5.34, which governs advertising by anyone else, defines ‘gaming machine advertising’ in a narrow way as ‘any form of advertising that promotes or is intended to promote the playing of gaming machines’. Both definitions expressly exempt ‘information about, or the advertisement of services relating to, problem gambling’. The Committee also notes that the existing s. 2.2.3’s prohibition on lottery advertising is limited to publishing ‘information related to a lottery’, rather than information concerning lotteries in general.

The Committee observes that other prohibitions on gambling advertising in Australia are limited to advertising that either promotes gambling or provides information about a particular gambling event or venue.ⁱⁱ For example, the federal prohibition of ‘interactive gambling service advertisements’ is limited to a publication ‘that gives publicity to, or otherwise promotes or is intended to promote’ an interactive gambling service or services in general, and contains express exemptions for political communications and anti-gambling advertisements.ⁱⁱⁱ

The Committee will write to the Minister seeking further information as to the compatibility of new section 2.2.8 with the Charter’s right to freedom of expression. Pending the Minister’s response, the Committee draws attention to clause 9.

Minister’s response

Thank you for the opportunity to respond to your letter dated 6 May 2014 in relation to consideration of the Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014 (the Bill) by the Scrutiny of Acts of Regulations Committee (Committee).

I note that the Committee has requested further information on the operation of new section 2.2.8 of the Gambling Regulation Act 2003 (GRA) observing that it may prohibit some educational, literary and political advertising on the subject of unauthorised gambling.

Section 2.2.8 is intended to prohibit the advertisement of unauthorised gambling and is not intended to prohibit or otherwise limit educational, literary and political advertising on the subject of unauthorised gambling.

In my view, the preferable interpretation of the provision is that it only prohibits advertising that promotes unauthorised gambling.

The new section 2.2.8 of the GRA states that a person is prohibited from publishing advertising that contains any information, term, expression, symbol or other thing associated with unauthorised gambling.

For the purposes of the prohibition, information or other thing is taken to be associated with unauthorised gambling if a reasonable person with ordinary knowledge who is a resident of Victoria would consider it to be associated with gambling and the gambling with which it would be considered to be associated is unauthorised gambling.

Notably, the prohibition only applies to advertising that a reasonable person would consider to be associated with gambling.

ⁱⁱ *Gaming Machine Act 2004* (ACT), s. 152(1); *Interactive Gambling Act 1998* (ACT), ss. 20(a), 127(1), 138(2)(a) & 152(1); *Casino Control Act 1982* (NSW), s. 70A(5); *Gaming Machines Act 2001* (NSW), s. 43(6) (compare s. 44(6), prohibiting ‘gambling-related signs’ and see also *Gaming Machines Regulation 2010* (NSW), reg 46); *Gaming Control Act 1993* (NT), ss. 36(e) & 58; *Interactive Gambling (Player Protection) Act 1998* (Qld), ss. 23(a), 164(1) & 183(1)(b); *Lottery and Gaming Act 1936* (SA), ss. 8, 10, 60(c), 93 & 94; *Gambling Regulation Act 2003* (Vic), ss. 2.5.45(1) & 7.2.2(1)(c); *Gaming and Wagering Commission Act 1987* (WA), ss. 43A & 106(2)(c).

ⁱⁱⁱ *Interactive Gambling Act 2001* (Cth), Part 7A, Division 2.

Clause 3 of the Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014 inserts a definition of “gambling” in the GRA.

Gambling is defined as an activity in which a prize of money or something else of value is offered or can be won and a person pays or stakes money or some other valuable consideration to participate and the outcome involves, or is presented as involving, an element of chance.

It is not envisaged that a reasonable person would consider the following things to be advertisements associated with an activity in which a person stakes money with a chance to win a prize:

- advertisements for gambling help services to assist people with gambling problems associated with unauthorised gambling;
- advertisements for a book about the history of unauthorised gambling; or
- an internet website, brochure or publication promoting a view about the proper regulation of unauthorised gambling.

I note that extrinsic materials that can be used to aid interpretation, including the objectives of the GRA, the previous provisions of the legislation, the second reading speech and explanatory memorandum, all support this interpretation.

Importantly, the provision should be interpreted within the context of the objectives of the GRA and the purposes of the relevant Chapter. The relevant objectives of the GRA are to:

- foster responsible gambling in order to minimise harm caused by problem gambling and accommodate those who gamble without harming themselves or others; and
- ensure that other forms of gambling permitted under this or any other Act are conducted honestly and that their management is free from criminal influence and exploitation.

The objectives of the GRA do not relate to educational, literary or political advertising. Indeed, the advertising of educational, literary and political material relating to unauthorised gambling may assist to foster responsible gambling and eliminate criminal influence from the gambling industry, and the provision should be construed in this context.

I also note that the provision is intended to create a prohibition that will replace the existing prohibition of advertising of lotteries under section 2.2.3 of the GRA. I note that the existing provisions have not been used to ban literary works on topics such as illegal lotteries and two-up conducted during wartime, even though two-up falls within the definition of “a lottery”.

Finally, the second reading speech and explanatory memorandum make clear that the amendments are not intended to prohibit activities that were previously permitted or to permit those previously prohibited. The explanatory memorandum in relation to new section 2.2.8 of the GRA provides that the new section “prohibits the advertising of unauthorised gambling”. These statements support an interpretation that the provision does not prohibit educational, literary or political advertising.

As such, it is my view that the new section 2.2.8 of the GRA only prohibits advertising that promotes unauthorised gambling, which is activity that is unlawful in Victoria.

The right to freedom of expression may be limited in accordance with section 15(3) and section 7 of the Charter of Human Rights and Responsibilities Act 2006 (Charter Act). Section 15(3)(b) of the Charter Act provides that the right of freedom of expression may be subject to lawful restrictions reasonably necessary for the protection of national security, public order, public health or public morality.

I have formed the view that the prohibition of advertising of unauthorised gambling, within the context of its intention, is consistent with section 15(3) of the Charter Act as it is:

- lawful;
- imposed to protect the public order (namely preventing advertisements to the general public to engage in unlawful activity); and
- reasonably necessary to protect the public order because the prohibition on unauthorised gambling is likely to be undermined unless there is a specific prohibition on the advertising of unauthorised gambling.

I also consider that the prohibition represents a reasonable limitation under section 7 of the Charter Act as the prohibition is reasonable and its imposition is demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

I trust this information addresses the issue raised by the Committee. If I can provide any further information, please do not hesitate to contact me.

Edward O'Donohue MLC
Minister for Liquor and Gaming Legislation

Received 23 May 2014

The Committee thanks the Minister for this response.

Committee Room
26 May 2014

Appendix 1

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Appendix 2

Committee Comments classified by Terms of Reference

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

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Section 17(a)

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

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Appendix 3

Ministerial Correspondence 2014

Table of correspondence between the Committee and Ministers and members during 2013-14

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Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	Education	18-02-14 26-02-14	2 of 2014 3 of 2014
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Building Legislation Amendment Bill 2014	Planning	27-05-14	6 of 2014

Appendix 4

Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 26 May 2014

Statutory Rules Series 2014

- SR No. 10 – Supreme Court (Administration and Probate) Rules 2014
- SR No. 11 – Magistrates’ Court General Civil Procedure and Miscellaneous Civil Proceedings (Trans-Tasman Proceedings Amendment) Rules 2014
- SR No. 13 – Victims of Crime Assistance Amendment No.1 Rules 2014
- SR No. 14 – County Court (Chapter III Amendment No.3) Rules 2014
- SR No. 15 – Drugs, Poisons and Controlled Substances (Poppy Cultivation and Processing) Regulations 2014
- SR No. 16 – Sentencing Amendment Regulations 2014
- SR No. 18 – Magistrates’ Court (Arbitration)(Professional Costs) Amendment Regulations 2014
- SR No. 19 – Adoption Amendment Regulations 2014
- SR No. 20 – Corrections Amendment (Firearms) Regulations 2014
- SR No. 21 – Serious Sex Offenders (Detention and Supervision) Amendment Regulations 2014
- SR No. 22 – National Gas (Victoria)(Declared System Provisions) Regulations 2014
- SR No. 23 – Road Safety (Vehicles) Amendment (Heavy Vehicle National Law) Regulations 2014
- SR No. 24 – Magistrates’ Court Criminal Procedure (Amendment No.5) Rules 2014
- SR No. 5 – Fisheries (Fees, Royalties and Levies) and Fisheries Amendment Regulations 2014
- SR No. 7 – Major Crime (Investigative Powers) Amendment Regulations 2014
- SR No. 8 – Tobacco Amendment Regulations 2014
- SR No. 9 – Gas Safety (Gas Installation) Amendment Regulations 2014

Legislative Instruments (2014)

- Greyhound Racing Victoria – Rule Amendments