

No. 7 of 2011

Tuesday, 28 June 2011

On the

Environment Protection Amendment
(Beverage Container Deposit and
Recovery Scheme) Bill 2011

Justice Legislation Amendment
(Infringement Offences) Act 2011

Sentencing Legislation Amendment
(Abolition of Home Detention)
Bill 2011

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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) presented to the Parliament. The Committee does not make any comments on the policy aspects 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*;

'*child*' means a person under 18 years of age;

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

'*court*' refers to the Supreme Court, the County Court, the Magistrates' Court or the Children's Court as the circumstances require;

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

'*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 \$119.45).

'*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. 7 of 2011

Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2011

Introduced	1 June 2011
Second Reading Speech	15 June 2011
House	Legislative Council
Member introducing Bill	Hon. Colleen Hartland MLC
Private Member's Bill	

Background and Content

The Bill amends the *Environment Protection Act 1970* (the 'Act') to make further provision for environmentally sustainable uses of resources and best practices in waste management by establishing a beverage container deposit and recovery scheme (proposed new Division 6 of Part IX of the Act) to be administered by the Environment Protection Authority.

Extract from the explanatory memorandum –

New section 52D provides that an importer or producer of a beverage container for the purpose of sale within Victoria is liable to pay the beverage container environmental levy, unless they are granted an exemption. Penalty: 2400 penalty units and in the case of a continuing offence a daily penalty of 1200 penalty units for each day the offence continues.

New section 52E sets the amount of the beverage container environmental levy at 10 cents. It enables a higher amount to be set by regulation. This section is consistent with the 10 cent levy in the South Australian and Northern Territory container deposit schemes.

New section 52G provides that all beverage containers must be labelled as refundable. The labelling requirements are similar to those required by the South Australian and Northern Territory beverage container schemes. Penalty: 100 penalty units.

New section 52H prescribes that a person must not sell a beverage container unless the container is labelled in accordance with the relevant labelling requirements. Penalty: 100 penalty units.

The Committee makes no further comment.

Justice Legislation Amendment (Infringement Offences) Act 2011

Introduced	3 May 2011
Second Reading Speech	5 May 2011
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General
Royal Assent	21 June 2011

Background

Note: *The Committee also reported on the Act when it was a Bill in Alert Digest No. 5 of 2011. The Committee reports on this Act pursuant to section 17(c) of the Parliamentary Committees Act 2003. The purpose of this report is draw attention to retrospective amendments introduced as House amendments after the initial introduction of the Bill.*

The Bill provided for the continued use of infringement notices for a number of offences on an ongoing basis, following the three-year trial period which is due to expire on 30 June 2011.

The Bill also provided for a further one-year trial period during which infringement notices will be able to be issued for the offence of shop theft of goods valued at up to \$600 under section 74A of the *Crimes Act 1958* and wilful damage of property valued at less than \$500 under section 9(1)(c) of the *Summary Offences Act 1966*.

The Bill also clarified that only a judicial officer (as opposed to a registrar) may cancel an infringement notice under the relevant provisions in the *Children, Youth and Families Act 2005*.

Submission

The Committee received a written submission in respect to the Bill from Dr Helen Szoke, Commissioner, Victorian Equal Opportunity and Human Rights Commission. The submission was posted on the Committee's website with the Committee's report.

House amendment

Explanation by the Attorney-General concerning House amendments made in the Legislative Council and agreed to by the Legislative Assembly –

In moving the motion let me briefly outline the amendments made by the Legislative Council for the benefit of the house. The amendments relate to four on-the-spot fine offences that were introduced in 2009 for alcohol-related and public order crimes and a further on-the-spot fine infringement offence that was introduced in 2010 for the offence of smoking in a motor vehicle with a passenger aged under 18 years. The aim in introducing these infringement offences, which had general support at the time, was to boost Victoria Police's ability to deal with drunkenness and disorder in public places and protect the health of children and young people -- in other words, to help keep the Victorian community safe.

Unfortunately none of these offences, although they were intended to be infringeable and therefore fully enforceable through the infringements court, were included in regulations that would allow those offences to be put before the infringements court where necessary.

Of the five offences concerned, four are under the Summary Offences Act 1966: under section 6, without reasonable excuse contravening a direction to move on; under section 13, being found drunk in a public place; under section 14, being found drunk and disorderly in a public place; and under section 17A, behaving in a disorderly manner in a public place. The offence under the Tobacco Act 1987 is in

section 5S, smoking in a motor vehicle with a passenger under the age of 18. It is clear that all of these five matters are valid infringement offences and that Victoria Police has had the power to issue fines for these offences since December 2009 and January 2010 respectively. I understand approximately 22 000 fines have been issued to people detected committing these offences.

However, last week the government was informed that, due to a failure that occurred under the previous government to have these offences included in relevant regulations, they had not been prescribed as lodgeable infringement offences under the Infringements (General) Regulations 2006. Because of that failure, if unpaid infringement notices are not lodged within 12 months from the date of issue, they will expire and will be unable to be enforced as infringement offences. I understand there are around 8700 outstanding infringement notices for the four Summary Offences Act 1966 offences that have not been paid or otherwise dealt with that will potentially expire and become unenforceable as infringement offences if the situation is not fixed. This would mean that individuals who were issued with notices for offences and failed to pay the relevant fine may effectively get away with their offence.

The Legislative Council introduced amendments that will deem all infringement notices issued for these offences since December 2009 to have been deemed lodgeable since that time. Of course amendments in these terms will not retrospectively prohibit any conduct that was not already prohibited; they will simply facilitate the enforcement of many thousands of infringement notices which were issued validly but which cannot be enforced currently through the infringement court.

Needless to say the government believes and trusts that there will be bipartisan support for the belief that it is appropriate to provide for the retrospective validation of the lodgeability of these matters. Parliament clearly intended that these offences would be lodgeable. The infringements are issued by members of Victoria Police, who routinely lodge a wide variety of unpaid infringement offences with the infringements court.

Of course one of the purposes of making these offences infringeable was to give police an efficient tool to enforce these offences without taking each matter to court. That tool would be significantly weakened if the offences were not lodgeable, because it would mean that the only way to enforce any unpaid infringement penalties, if that were possible at all, would be to take the matter to court. Furthermore, people who have had an enforcement order incorrectly applied as a result of the failure of the previous government will not be disadvantaged by the proposed amendments in that under the Infringements Act 2006 they had the right to seek a review or to elect to have their matter heard in court, and accepting the infringement penalty has allowed the offender the opportunity to clear their matter without a criminal conviction.

In short, the amendments made by the Legislative Council before us for our consideration this evening will ensure that the procedural oversight that occurred under the previous government will not enable these offenders to avoid paying a validly imposed penalty for drunken or disorderly conduct or conduct endangering the health of young people. I commend these amendments to the house.

Charter report

Retrospective criminal law – Reclassification of infringement offences as lodgeable infringement offences – Extension of limitation period – Penalties for default – Absence of statement of compatibility

Summary: Sections 2(3), 2(4), 7 and 8, by retrospectively converting five offences from mere infringement offences to lodgeable infringement offences, may engage the Charter's rights with respect to retrospective criminal laws. The Committee will write to the Attorney-General seeking further information.

The Committee notes that s. 7, which inserted a new section 63 into the *Summary Offences Act 1966*, and s. 8, which inserted a new section 47 into the *Tobacco Act 1987*, provided that five offences are and always have been 'lodgeable' infringement offences. Sections 2(3) and 2(4) made this change retrospective to the dates in late 2009 and early 2010 when these offences were first classified as 'infringement offences'.

The Committee notes that the *Infringements Act 2006* provides for two types of infringement offences:

- mere ‘infringement offences’, which (as an alternative to prosecution) can be dealt with by giving a suspected offender a penalty notice. Payment of the infringement notice will permanently end the proceeding without a conviction being entered. However, the only consequence for non-payment is that the suspected offender may still be charged and prosecuted in court.¹
- ‘lodgeable infringement offences’, which differ in that an alternative enforcement regime is available by lodging the notice with the infringements registrar. The registrar can then issue an enforcement order, breach of which can attract court-ordered sanctions ranging from seizure of property to, exceptionally, imprisonment.²

The Committee observes that ss. 2(3), 2(4), 7 and 8, by retrospectively converting the five offences from mere infringement offences to lodgeable infringement offences, may engage the rights with respect to retrospective criminal laws set out in Charter s. 27.³

The Member who moved the amendments that inserted ss. 2(3), 2(4), 7 and 8 into the Justice Legislation Amendment (Infringement Offences) Bill 2011 remarked:⁴

The amendment will not retrospectively prohibit any conduct that was not already prohibited. It will simply facilitate the enforcement of the thousands of infringement notices that were validly issued but currently cannot be enforced....

People who have had an enforcement order incorrectly applied as a result of this oversight will not be disadvantaged by the proposed amendment. They will have the right under the Infringements Act 2006 to seek a review or to elect to have the matter heard in court.

While the Committee agrees that the reclassification of the offences neither criminalised previously lawful conduct nor altered the maximum penalty for any offending, it observes that the change had two possible retrospective consequences:

First, ss. 2(3), 2(4), 7 and 8 may retrospectively permit prosecution for some suspected offences despite the expiry of the one-year limitation period for prosecutions of summary offences.⁵ That is because lodgeable infringement offences can be referred to a court for prosecution upon revocation of an enforcement order, notwithstanding the expiry of the limitation period.⁶ The United States Supreme Court has held that a retrospective extension of a limitation period is a breach of that nation’s constitutional ban on ex post facto laws.⁷ Although the European Court of Human Rights has held that such an extension is not a breach of the narrower European equivalent to Charter s. 27 ‘where the relevant offences have never become subject to limitation’, its ruling was expressed not to apply if ‘a legal provision were to restore the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation’.⁸

Second, ss. 2(3), 2(4), 7 and 8 may retrospectively expose recipients of a penalty notice to court sanctions for breaches of enforcement orders, a regime which couldn’t be applied to mere

¹ *Infringements Act 2006*, s. 7(2).

² *Infringements Act 2006*, s. 7(1).

³ Charter s. 27 relevantly provides: ‘(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.’

⁴ Parliament of Victoria, *Daily Hansard*, Legislative Council, Tuesday 14 June 2011, pp. 1840-1841.

⁵ *Criminal Procedure Act 2009*, s. 7(1).

⁶ *Infringements Act 2006*, s. 71(2). See also s. 55, allowing lodgement despite expiry of the limitation period in some circumstances.

⁷ *Stogner v California*, 539 U.S. 607 (2003)

⁸ *Coëme v Belgium* [2000] ECHR 250. [149].

infringement offences. The European Court of Human Rights has held that retrospective increases to such a regime (in that case, an extension to the maximum term of imprisonment for default on customs fines) breached the European equivalent to Charter s. 27.⁹ The Committee notes that, while a person who has been issued a penalty notice for one of the five offences can avoid the enforcement regime by electing to have the matter heard in court, that right is not available once an enforcement order has been made.¹⁰ Enforcement orders can only be revoked at the request of the recipient if there are 'sufficient grounds' for revocation.¹¹ Revocation is unavailable once certain enforcement actions have been imposed.¹²

The Committee notes that the statement of compatibility for the Justice Legislation Amendment (Infringement Offences) Bill 2011 did not address ss. 2(3), 2(4), 7 and 8, as they were the result of amendments in the Legislative Council. Those amendments also amended the Bill's purpose provision. This Committee's predecessor made the following remarks when the same circumstance arose last year:¹³

While Charter s. 28 only requires a statement of compatibility for Bills, not amendments, the Committee considers that a supplementary statement should be given where, as here, amendments are proposed that are unrelated to the purposes of the Bill as introduced. The Committee is concerned that, unless such a practice is adopted henceforth, the Charter's requirement of parliamentary human rights scrutiny of all new legislation may be significantly undermined in the future.

The Committee will write to the Attorney-General seeking further information as to whether or not ss. 2(3), 2(4), 7 and 8 are compatible with the Charter's rights with respect to retrospective criminal law. Pending the Attorney-General's response, the Committee draws attention to ss. 2(3), 2(4), 7 and 8.

The Committee makes no further comment.

⁹ *Jamil v France* [1995] ECHR 17.

¹⁰ *Infringements Act 2006*, s. 16(1). Sections 7 and 8 provide for the retrospective validation of past enforcement actions 'taken on the basis that the infringement offence was a lodgeable infringement offence'.

¹¹ *Infringements Act 2006*, s. 66(2).

¹² *Infringements Act 2006*, s. 65(2).

¹³ *Alert Digest No. 4 of 2010*, p. 7, reporting on the *Crimes Legislation Amendment Act 2010*.

Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011

Introduced	14 June 2011
Second Reading Speech	16 June 2011
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister for Corrections

Background and Content

The Bill amends the *Corrections Act 1986* and the *Sentencing Act 1991* to repeal provisions relating to home detention orders and for other purposes.

Extract from the Second Reading Speech –

The Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011 will amend the Sentencing Act 1991 and the Corrections Act 1986 to remove home detention from the Victorian statute book.

There are currently two types of home detention orders that may be made.

The first may be made under the Sentencing Act 1991, where a court may order that a sentence of imprisonment of not more than a year is to be served by way of home detention.

The second is available under the Corrections Act 1986, where the Adult Parole Board may order that a minimum security rated prisoner who has served at least two-thirds of their minimum term of imprisonment and are within six months of their earliest release date may serve the remainder of their sentence under home detention.

Charter report

Fair hearing – Abolition of parole board’s power to order home detention in last six months of a minimum term of imprisonment – Application to existing sentences

Summary: The effect of clause 6 is to remove home detention as a discretionary option in the final six months of prisoners’ minimum term of imprisonment. The Committee observes that retrospective changes to the effect of sentences that are currently being served may engage the Charter right of criminal defendants to have their sentence determined by a court after a fair hearing.

The Committee notes that clause 6, repealing Division 4 of Part 8 of the *Corrections Act 1986*, abolishes the parole board’s power to order the release of eligible prisoners into home detention during the final six months of their minimum term of imprisonment. The Committee notes that, under existing Victorian law, a sentence of imprisonment may include both prison detention and home detention.¹⁴ **The Committee observes that the effect of clause 6 is to remove home detention as a discretionary option in the final six months of prisoners’ minimum term of imprisonment.**

The Committee notes that clause 11, inserting a transitional provision for clause 6, only preserves existing parole board orders. The Second Reading Speech remarks:

Where no order has been made at the commencement date of this legislation in relation to an offender, including but not limited to circumstances where the court has sought an assessment report, or the offender has applied to the Adult Parole Board for a home detention order, the bill provides that a home detention order cannot be made.

The Statement of Compatibility remarks:

¹⁴ *Sentencing Act 1991*, s. 26M(1).

In my opinion the bill does not infringe the protection against a retrospective penalty for two reasons.

Firstly, the home detention scheme is not a penalty in itself, but rather a means of administering the penalty set by the sentencing judge...

Secondly, the words 'penalty that applied' in s 27(2) of the charter act have been interpreted by comparative jurisdictions as referring to the maximum penalty which a court was authorised to impose at the time an offence was committed...

While the Committee notes that, according to the balance of overseas decisions, retrospective abolition of how a sentence can be administered do not limit Charter s. 27(2),¹⁵ it observes that retrospective changes to the effect of sentences that are currently being served may engage the Charter right of criminal defendants to have their charge (including their sentence) determined by a court after a fair hearing.¹⁶

The Committee notes that, since the start of 2004, sentencing judges have fixed non-parole periods in the knowledge that eligible offenders may be able to spend the last six months of their minimum terms of imprisonment in home detention.¹⁷ Indeed, since the start of 2011, sentencing judges have been able to make directions as to whether offenders are eligible for home detention in that period.¹⁸ The Committee observes that, given these regimes, sentencing judges may have assessed the onerousness of non-parole periods for eligible offenders in light of their eligibility for home detention orders.¹⁹ The existence of these regimes may also have led eligible offenders to decline to appeal sentences that they might otherwise have appealed.

The Committee refers to Parliament for its consideration the question of whether or not clauses 6 and 11, by potentially making some current sentences of imprisonment more onerous retrospectively, by removing home detention as a discretionary option in the final six months of a minimum term of imprisonment, are compatible with the Charter right of offenders to have their sentence determined by a court after a fair hearing.

The Committee makes no further comment.

**Committee Room
27 June 2011**

¹⁵ The authorities and differing views on the effect of the right against retrospective increases in penalty are described in *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26.

¹⁶ Charter s. 24(1) provides that: 'A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.'

¹⁷ *Corrections and Sentencing Acts (Home Detention) Act 2003*, ss. 2(5), 14.

¹⁸ *Justice Legislation Amendment Act 2010*, s. 6; *Government Gazette* 28.10.10, p. 2583.

¹⁹ Section 5(2AA) of the *Sentencing Act 1991* bars sentencing judges from considering the likelihood that a parole board will make a home detention order. However, it does not bar sentencing judges from considering the mere eligibility of the offender for such an order: *R v Nunno & Lunt* [2008] VSCA 31, [79].

Appendix 1

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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)

(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

Justice Legislation Amendment Bill 2011

2

(iv) unduly requires or authorise 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 authorise 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 Act 2006*

Building Amendment Bill 2011

1

Education and Training Reform Amendment (School Safety) Bill 2010

1

Justice Legislation Amendment Bill 2011

2

Justice Legislation Amendment (Infringement Offences) Act 2011

7

Liquor Control Reform Amendment Bill 2011

3

Sentencing Amendment Act 2010

1

Section 17(b)

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

Appendix 3

Ministerial Correspondence 2011

Table of correspondence between the Committee and Ministers during 2011

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Building Amendment Bill 2011	Minister for Planning	01.03.11 21.03.11	1 of 2011 2 of 2011
Education and Training Reform Amendment (School Safety) Bill 2010	Minister for Education	01.03.11 28.03.11	1 of 2011 3 of 2011
Justice Legislation Amendment Bill 2011	Minister for Consumer Affairs	22.03.11 04.04.11	2 of 2011 3 of 2011
Sentencing Amendment Act 2010	Attorney-General	01.03.11 05.04.11	1 of 2011 4 of 2011
Liquor Control Reform Amendment Bill 2011	Consumer Affairs	05.04.11 21.04.11	3 of 2011 4 of 2011
State Taxation Acts Amendment Bill 2011	Treasurer	25.05.11 09.06.11	5 of 2011 6 of 2011

Table of Ministers responses still pending

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Justice Legislation Amendment (Infringement Offences) Act 2011	Attorney-General	28.06.11	7 of 2011