

# **No. 8 of 2011**

**Tuesday, 16 August 2011**

**On the**

Aboriginal Heritage Amendment Act  
2011

Farm Debt Mediation Bill 2011

Drugs, Poisons and Controlled  
Substances Amendment (Drugs of  
Dependence) Bill 2011

Justice Legislation Amendment  
(Infringement Offences) Act 2011

Justice Legislation Amendment  
(Protective Services Officers) Bill 2011

Local Government Amendment  
(Electoral Matters) Bill 2011

Transport Legislation Amendment  
(Public Transport Safety) 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. 8 of 2011

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## Aboriginal Heritage Amendment Act 2011

<b>Introduced</b>	28 June 2011
<b>Second Reading Speech</b>	28 June 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Janette Powell MLA
<b>Royal Assent</b>	29 June 2011
<b>Commencement</b>	30 June 2011

**Note:** *The Committee reports on this Act pursuant to section 17(c) of the Parliamentary Committees Act 2003.*

### Background and Content

The Act amended the *Aboriginal Heritage Act 2006* (the 'Act') by inserting provisions to retrospectively authorise approvals of cultural heritage management plans given in good faith by employees, officers or directors of registered Aboriginal parties ('RAP) for the purposes of the Act.

The amendment seeks to ensure that statutory authorisations made in reliance on these decisions are not rendered invalid. The amendment preserves the position of project proponents who relied on these decisions in progressing projects and also protect the State from potential legal liability.

The Committee notes the extract from the Second Reading Speech concerning the VCAT decision that identified the particular administrative error that has required this legislative response –

#### *VCAT decision*

*On 26 May 2011 the Victorian Civil and Administrative Tribunal found there was no approved cultural heritage management plan in respect of the activity that was the subject of the proceeding before the tribunal. This was on the basis that the employee of the relevant RAP who approved the plan in good faith did not have formal delegated authority from the board to approve the cultural heritage management plan as required under the organisation's constitution. This employee was employed by the RAP to undertake this work on its behalf and believed she was authorised to do so.*

*VCAT's finding has implications for 43 plans approved by employees of this RAP and, by extension, may possibly impact on the decisions of at least two other RAPs affecting a total of 67 plans altogether.*

*... The Victorian Government Solicitor's Office (VGSO) has advised that all statutory authorisations granted on the basis of an invalid approval of a cultural heritage management plan will also be invalid. This means that all statutory authorisations, including permits, issued in relation to the 67 impacted plans may be invalid. I am advised that some 15 of these are currently in progress with another 18 due to commence in the near future.*

*... VGSO has advised that retrospective legislative validation of the affected plans is the only mechanism that will provide this certainty.*

*While the proposed legislation will have retrospective effect, the result is simply to maintain the position that proponents are currently in and does not remove or affect rights.*

*The proposed amendment will have the effect of deeming that the person who has purported to make the decision to approve the plan had the authority to do so. It will not affect any rights a party may have in relation to other defects that may have occurred in the decision-making process.*

*... It is not intended that the proposed amendment will impact on any pending litigation.*

## **Committee comment**

### ***Retrospective validation of actions on commencement of provision***

The Committee notes that the provision will retrospectively validate certain actions taken in good faith by employees of certain corporate bodies (registered Aboriginal parties) referred to in the validating provision (proposed new section 197 of the Act).

The Committee notes the explanation provided by the Minister in the Second Reading Speech and accepts that in all the circumstances the validation provision is appropriate to provide legal certainty to project proponents and to protect the State from potential legal liability.

**The Committee makes no further comment.**

# Drugs, Poisons and Controlled Substances Amendment (Drugs of Dependence) Bill 2011

<b>Introduced</b>	28 June 2011
<b>Second Reading Speech</b>	29 June 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Mary Wooldridge MLA
<b>Portfolio responsibility</b>	Minister for Mental Health

## Background

The Bill amends the definition of 'drugs of dependence' in the *Drugs, Poisons and Controlled Substances Act 1981* (the 'Act') to create a new regulation-making power to enable temporary amendments to the definition of 'drug of dependence' to be made from time to time, where this is necessary for public safety. The purpose of the regulation-making power is to allow the making of regulations to enable control of new forms of illegal drugs of dependence that may appear on the market in Victoria for an interim period until legislation to ban them can be introduced into Parliament. Regulations made under the new regulation-making power will be effective for 12 months, and are to sunset automatically at the end of that period.

## Committee comment

***Delegation of legislative power – Henry VIII clauses – Amendment to Act to allow subordinate legislation to modify or extend reach of Act – Provisions more appropriate to be provided for in primary legislation – Parliamentary Committees Act 2003, section 17(vi)***

The Committee notes that from time to time provisions are introduced that allow the extension of the reach or effect of primary legislation by means of regulations. This particular measure allows for a drug of dependence to be prescribed for the purposes of Part 1 to 3 of Schedule Eleven of the Act. The Schedule prescribes drugs of dependence and the respective threshold quantities of those drugs that attract certain criminal penalties such as for large commercial, commercial and trafficable quantities of drugs of dependence.

In the ordinary course, measures that result in the imposition of a criminal sanction for breach should be provided in primary legislation. However, there are recognised exceptions to this general principle. One exception may be to overcome the rapid development of new designer drugs. For the efficacy of the Act, in such circumstances it is desirable to capture their use and trafficking within the prohibitions provided in the Act on the grounds of public health and safety. Where such regulatory power is provided the Committee would seek to ensure that sufficient oversight, monitoring or sun setting of these provisions was included as part of the package of measures justifying their use.

New proposed section 132AA(2) provides that a regulation may not be made unless the Minister is satisfied that the drug is a significant risk to the health of a consumer or a significant risk to the public safety. Further, new proposed section 132AA(3) of the Act provides that regulations made under the power expire 12 months after the regulation is made. The automatic expiry will enable the amendment of the Act within a reasonable period and that in the interim the regulation itself is subject to Parliamentary oversight in the usual manner.

**The Committee makes no further comment.**

## Farm Debt Mediation Bill 2011

Introduced	28 June 2011
Second Reading Speech	29 June 2011
House	Legislative Assembly
Member introducing Bill	Hon. Peter Walsh MLA

### Background and Content

The Bill deals with the resolution of farm debt disputes (a dispute) by requiring that a creditor provide a farmer with the option to mediate a dispute before taking possession of property or other enforcement action under a farm mortgage. The Bill proposes to confer this function on the Small Business Commissioner.

Extracts from the Second Reading Speech –

*[the Bill] ..will provide a legislative basis to require financial institutions and other creditors to undertake a mediation process with farmers before enacting debt recovery processes. The need for this legislation has been highlighted by the impact of drought over the past decade, followed by recent floods across much of northern Victoria.*

*... The Bill will require a creditor, usually being a bank or other financial institution, that is seeking to commence enforcement action over a farm debt, which is wholly or partly secured by a farm mortgage, to provide a farmer with the option to mediate before the creditor may take enforcement action, for example to commence the process of foreclosure.*

*... The Bill only deals with farm debt. This is defined in the Bill as debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage.*

*Key features of the Victorian model in relation to the availability of mediation are:*

*(a) A creditor seeking to commence enforcement action over a farm mortgage is required to give the farmer the option to mediate.*

*(b) The farmer has 21 days to accept the offer to mediate; if not, enforcement action can proceed as normal.*

*(c) In the event that a creditor refuses to meet the obligation to initiate mediation, or refuses an invitation from a farmer who is in default to mediate, the scheme regulator can prohibit the creditor from taking recovery action for six months.*

*(d) A farmer does not have to be in default to request mediation with their creditor concerning the farm debt but in this instance there is no obligation for the creditor to accept.*

*(e) Mediation continues until a mutual agreement is reached or the small business commissioner is of the view that an agreement cannot be reached despite both parties mediating in good faith.*

*... This Bill provides for a mediation process. It is not arbitration. Settlements will not be imposed on farmers or financial institutions by a third party.*

*... This scheme has been modelled on the New South Wales Farm Debt Mediation Act 1994.*

*... A close alignment to the NSW model was adopted to support consistency across state boundaries and minimise implementation costs to financial institutions that operate in both jurisdictions.*

*The Office of the Small Business Commissioner is considered well placed to manage the mediation services provided for in this proposed scheme.*

**The Committee makes no further comment.**

## Justice Legislation Amendment (Protective Services Officers) Bill

<b>Introduced</b>	28 June 2011
<b>Second Reading Speech</b>	29 June 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Peter Ryan MLA
<b>Portfolio responsibility</b>	Minister for Police and Emergency Services

### Background

The Bill amends a number of Acts to provide Protective Service Officers (PSO) who are on duty at designated places certain powers in order to combat crime and antisocial behaviour occurring in those public places. The Acts to be amended are the:

- *Police Regulation Act 1958;*
- *Bail Act 1977;*
- *Control of Weapons Act 1990;*
- *Crimes Act 1958;*
- *Drugs, Poisons and Controlled Substances Act 1981;*
- *Environment Protection Act 1970;*
- *Graffiti Prevention Act 2007;*
- *Liquor Control Reform Act 1998;*
- *Magistrates' Court Act 1989;*
- *Mental Health Act 1986;*
- *Road Safety Act 1986;*
- *Summary Offences Act 1966;* and
- *Transport (Compliance and Miscellaneous) Act 1983.*

Extracts from the Second Reading Speech:

*Unlike police members, who may exercise their powers 24 hours a day, PSOs will only be able to exercise the powers they are being given while on duty at places designated by regulation.*

*... PSOs will be able to exercise these powers in respect of incidents that occur at and in the vicinity of designated places, that is, places designated in the Police Regulations 2003 as places where PSOs may be deployed. ... PSOs will also be subject to the same complaint and discipline system as applies to police officers and are subject to investigation by the Office of Police Integrity. ... The power to arrest an offender who is wanted on a warrant issued by a court will extend to cover all PSOs while on duty, not just those PSOs on duty at railway stations.*

### Submission

The Committee received a submission from the Deputy Privacy Commissioner, Dr Anthony Bendall. The written submission will be posted on the Committee's website.

**The Committee makes no further comment.**

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<sup>1</sup> 539 U.S. 607 (2003).

## Local Government Amendment (Electoral Matters) Bill 2011

<b>Introduced</b>	28 June 2011
<b>Second Reading Speech</b>	29 June 2011
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Janette Powell MLA
<b>Portfolio responsibility</b>	Minister for Local Government

### Background

The Bill proposes to –

- bring forward the date of local government general elections from the last Saturday in November to the fourth Saturday in October; and
- make the City of Melbourne subject to regular independent electoral representation reviews in the same way as all other Victorian councils.
- broaden the range of circumstances when an Order in Council may be made to set another election date for one or more Councils, which avoids overlaps with school holiday periods or state or commonwealth elections or other events or circumstances such as natural disasters, which may adversely impact on the conduct of the election in the future.
- make consequential amendments to the *Local Government Act 1989* regarding the timing of other statutory processes which will be affected by the change of election date.

**The Committee makes no further comment.**

# Transport Legislation Amendment (Public Transport Safety) Bill 2011

Introduced	28 June 2011
Second Reading Speech	29 June 2011
House	Legislative Assembly
Member introducing Bill	Hon. Terry Mulder MLA
Portfolio responsibility	Minister for Public Transport

## Background and Content

The Bill amends the –

- *Transport Integration Act 2010* to provide a mechanism for the resolution of conflicts arising from the exercise by the Director, Transport Safety and a road authority of their respective statutory functions
- *Transport (Compliance and Miscellaneous) Act 1983* and the *Rail Safety Act 2006* to promote public transport safety to—
  - provide a shorter period in which incidents involving authorised officers are to be reported by passenger transport companies.
  - establish an improvement notice scheme for the management of authorised officers by passenger transport companies.
  - require the accreditation of drivers of commercial minibus services.
  - require that the loading and unloading of goods or freight onto or from rolling stock be carried out safely.
  - enable the Minister to enter into an agreement with a Minister of another jurisdiction for the exercise of reciprocal powers of rail safety officers of each jurisdiction.
- *Rail Safety Act 2006* and the *Bus Safety Act 2009* to limit the regulatory burden on transport operators by —
  - providing that the requirement to prepare and maintain a safety management system applies only to accredited rail operators.
  - permitting the operators of community and private bus services to use drivers who hold a probationary driver licence.
  - providing greater flexibility in the scheduling of compulsory bus safety inspections.
  - giving the Director, Transport Safety greater discretion in determining whether or not a person is suitable to be accredited as a bus operator.

**The Committee makes no further comment.**



# Ministerial Correspondence

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## Justice Legislation Amendment (Infringement Offences) Act 2011

The Bill was introduced into the Legislative Assembly on 3 May 2011 by the Hon. Robert Clark MLA. The Committee considered the Bill on 27 June 2011 and made the following comments in Alert Digest No. 7 of 2011 tabled in the Parliament on 28 June 2011.

### Committees Comment

#### 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.
- '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.

***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.***

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:

*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. 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. 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. 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'.*

*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 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. 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. Enforcement orders can only be revoked at the request of the recipient if there are 'sufficient grounds' for revocation. Revocation is unavailable once certain enforcement actions have been imposed.*

*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:*

*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.***

## Minister's Response

*Thank you for your letter dated 28 June 2011 concerning the Justice Legislation Amendment (Infringement Offences) Act 2011 (the Amendment Act).*

*The Committee has raised the issue of tabling supplementary Statements of Compatibility for house amendments, and two issues related to the Charter of Human Rights and Responsibilities Act 2006 (the Charter Act). The Charter Act issues relate to the application of sanctions for breaches of enforcement orders for certain offences, and possible indirect extensions to the limitation period for those offences.*

*Responses to each of these concerns are set out below.*

### **1. Statement of Compatibility process**

*The Committee has noted the following statement by its predecessor:*

*While Charter section 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.*

Response

*I understand that there are procedural difficulties with the proposal for supplementary Statements of Compatibility. However, I will endeavour to ensure that supplementary information is provided to the Parliament for future house amendments to Bills within my portfolio where amendments are proposed that are unrelated to the original purpose of the Bill.*

**2. The application of sanctions for breaches of enforcement orders**

*The issue raised by the Committee is that the relevant provisions of the Amendment Act '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 infringement offences'. The Committee writes that the right to avoid the enforcement regime by electing to have a matter heard in court, is not available once an enforcement order has been made: section 16(1). It notes that enforcement orders can only be revoked at the request of the recipient if there are sufficient grounds for revocation (section 66(2)) and revocation is unavailable once certain enforcement actions have been imposed (section 65(2)).*

Response

*I consider that section 27 of the Charter Act is not engaged by this aspect of the amendments because it does not alter the relevant offences or their applicable penalties. I note that the section provides:*

**27. Retrospective Criminal Laws**

- (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.*
- (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.*
- (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.*

*Since the relevant offences have long been criminal offences and the relevant amendments did not change this, sub-section 27(1) is not engaged. The question to consider is whether sub-section 27(2) is engaged, that is, whether by allowing non-payment of enforcement orders to be sanctioned under the Infringements Act 2006 imposes a greater 'penalty' than that attaching to the offence when it was committed.*

*The amendments do not affect the prescribed maximum penalty able to be imposed by a court in hearing and determining these offences, nor do they affect the prescribed infringement penalty amount for these offences. For instance, the maximum penalty for an offence under section 6(4) of the Summary Offences Act 1966 remains five penalty units.*

*It has always been possible for a person alleged to have committed an infringement offence to be charged with the relevant offence and for that charge to be heard and determined in the Magistrates' Court, which may impose the maximum penalty. That remains the case regardless of whether the offence is prescribed as a lodgeable infringement offence with effect that the enforcement processes under the Infringements Act 2006 might apply to it.*

*Accordingly, I consider that the effect of the amendments relation to exposing infringement notice recipients to sanctions for breaches of enforcement orders does not engage section 27 of the Charter Act.*

**3. Possible extensions to the limitation period for certain offences**

*The Committee has expressed concern that the relevant provisions of the Amendment Act (s 2(3), 2(4), 7 and 8) may engage the rights with respect to retrospective criminal laws set out in section 27 of the Charter Act on the basis that they may retrospectively permit prosecutions despite the expiry of the one-year limitation period for prosecutions of summary offences.<sup>1</sup>*

*The Committee has noted that the provisions of the Infringements Act 2006 (the Act) effectively extend this 12-month period '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'. Section 71(2) of the Act is cited as authority for that statement and reference is also made to s 55 of the Act as allowing lodgement despite expiry of the limitation period in some circumstances (for example, where a person has defaulted on a payment plan).

Response

I consider that section 27 of the Charter Act is not engaged by this aspect of the amendments because it does not alter the relevant offences or their applicable penalties.

The Committee has cited various authorities in support of the assertion that section 27 is engaged by this aspect of the amendments. However, there are grounds to distinguish each of those authorities in their application to the Charter Act in this context. For example, there is no equivalent in section 27 to the category of retrospective law that formed the basis of the majority's decision by the United States Supreme Court in *Stogner v California*.<sup>1</sup>

In the European Court of Human Rights case of *Coëme v Belgium*,<sup>2</sup> the Court did not decide the issue of the application of Article 7 of the Convention for the Protection of Fundamental Rights and Freedoms in circumstances where the limitation period has lapsed and the law revives it.

Further authorities in this area support two important propositions. One is that there is a distinction to be drawn between a penalty and the manner of its enforcement as described above.<sup>3</sup> The other is that courts should consider whether an offence was defined by law with sufficient accessibility and foreseeable so that a person could have known on the date the offence was committed what acts and omissions would make him or her criminally liable for such a crime and regulate his or her conduct accordingly.<sup>4</sup>

In conclusion, I consider that section 27 of the Charter Act is not engaged by the Amendment Act.

I trust this information addresses your concerns

**ROBERT CLARK MP**

Attorney-General'

12 August 2011

**Committee Room**  
**15 August 2011**

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<sup>1</sup> The one-year period is set by s 7(1) of the *Criminal Procedure Act 2009* (Vic), unless an Act provides otherwise for a particular offence.

<sup>2</sup> [2000] ECHR 250.

<sup>3</sup> *Morgan v Superintendent, Rimutka Prison*, unreported 7 March 2005.

<sup>4</sup> *Kononov v Latvia* ECHR no 36376/04, 24 July 2008; *Her Majesty's Advocate v Mark Harris* [2010] HCJAC 102, judgment delivered 8 October 2010.

# Appendix 1

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# Appendix 2

## Committee Comments classified by Terms of Reference

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

### Alert Digest Nos.

#### Section 17(a)

**(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

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**Table of correspondence between the Committee and Ministers during 2011**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
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
Justice Legislation Amendment (Infringement Offences) Act 2011	Attorney-General	28.06.11 12.08.11	7 of 2011 8 of 2011

**Table of Ministers responses still pending**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
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