

No. 9 of 2012

Tuesday, 5 June 2012

On the

Health (Commonwealth State Funding
Arrangements) Bill 2012

Local Government (Brimbank City
Council) Amendment Bill 2012

Residential Tenancies Amendment Bill
2012

Working with Children Amendment
Bill 2012

The Committee



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Member for Eastern Victoria



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Member for Pascoe Vale



Mr Colin Brooks MLA
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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 (currently one penalty unit equals \$122.14).

'*Statement of Compatibility*' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.

'*VCAT*' refers to the Victorian Civil and Administrative Tribunal;

[] denotes clause numbers in a Bill.

Alert Digest No. 9 of 2012

Health (Commonwealth State Funding Arrangements) Bill 2012

Introduced	22 May 2012
Second Reading Speech	23 May 2012
House	Legislative Assembly
Member introducing Bill	Hon. Denis Napthine MLA
Portfolio responsibility	Minister for Health

Purpose

The Bill implements the funding arrangements set out in the National Health Reform Agreement between the Commonwealth and the States and Territories that was agreed to by the Council of Australian Governments on 2 August 2011. The Bill establishes the office of the Administrator of the National Health Funding Pool, a State Pool Account and a State Managed Fund.

Extract from the explanatory memorandum:

The Health (Commonwealth State Funding Arrangements) Bill 2012 provides for the implementation of the funding, payment, accountability and transparency arrangements under the National Health Reform Agreement. The Bill includes provisions which have been agreed with the Commonwealth and all other States and Territories, as well as Victorian specific provisions. The common provisions will appear in complementary legislation in all jurisdictions.

Committee comment

Inappropriately delegates legislative power – Applied Acts of the Commonwealth may be modified by Commonwealth regulations – Parliamentary Committees Act 2003, section 17(vi)

The Bill provides that certain Victorian Acts do not apply to the powers or functions exercised or performed by the Administrator established under this legislative scheme. [30 and 31] Instead the Bill provides that certain Commonwealth Acts apply (the applied Acts). [32(2)] The applied Acts may be subject to modifications made by regulations made under the *National Health Reform Act 2011 (Cth)* with the agreement of all the members of the Standing Council of Health.

The Committee notes this extract from the Second Reading Speech:

Similarly, to ensure the Administrator, as an officer of nine jurisdictions, is not subject to nine different administrative law schemes, the Bill also disapplies the *Freedom of Information Act 1982*, the *Health Records Act 2001*, the *Information Privacy Act 2000*, the *Interpretation of Legislation Act 1984*, the *Ombudsman Act 1973* and the *Subordinate Legislation Act 1994* to the office of the Administrator and adopts the relevant Commonwealth laws, as modified by the Commonwealth regulations. These regulations may only be made with the agreement of all relevant State ministers.

The Committee notes that a provision in a Bill that permits subordinate legislation to amend an Act may constitute an inappropriate delegation of legislative power. Such provisions are commonly referred to as a Henry VIII clause.

The Committee has previously accepted that in limited circumstances such provisions may be justifiable for example, where the power to modify primary legislation is for a limited time to facilitate transitional arrangements, or in necessitous circumstances to accommodate rapidly evolving technologies or developments where frequent amendments to primary legislation may be considered to be impracticable.

Where a Bill includes a power to modify primary legislation by means of subordinate legislation it is the practice of the Committee to seek an explanation justifying their inclusion for the advice of the Parliament.

The Committee will seek further information from the Minister.

The Committee makes no further comment.

Local Government (Brimbank City Council) Amendment Bill 2012

Introduced	22 May 2012
Second Reading Speech	23 May 2012
House	Legislative Assembly
Member introducing Bill	Hon. Janette Powell MLA
Portfolio responsibility	Minister for Local Government

Background

The Bill amends the *Local Government Act 1989* (the 'Act') to extend the period of administration of the Brimbank City Council and provide that a general election for that municipality is to be held on the fourth Saturday in March 2015.

Note: The Act currently provides that an election be held on the fourth Saturday in October 2012, along with elections for other municipal Councils.

Charter report

Periodic municipal elections – Council elections delayed for two-and-a-half years – Whether reasonable limit

Summary: Clause 3 delays the general election for Brimbank City Council for two-and-a-half years. The Committee refers to Parliament for its consideration whether or not clause 3 is a reasonable and demonstrably justified limit on the Charter right of eligible people in Brimbank City Council to vote and be elected at periodic municipal elections.

The Committee notes that clause 3, amending existing s. 10(1), moves the next general election for Brimbank City Council from October 2012 to March 2015, a delay of two and a half years. The Committee observes that clause 3 may limit Charter s. 18(2)(a), which provides a right 'to vote and be elected at periodic... municipal elections'.

The Statement of Compatibility remarks:

Three years ago, the Brimbank City Council was dismissed by the Local Government (Brimbank City Council) Act 2009. This followed findings of profound failures of governance by the Ombudsman, and a recommendation to remove the council by an inspector of municipal administration appointed to monitor and evaluate the council's capacity...

A panel of three administrators was appointed to constitute the council until the next scheduled elections in 2012. Among the administrators' core responsibilities are the development of strategies to improve council's decision-making and governance processes to ensure consistency, fairness, transparency and accountability....

While much progress has been made towards the development and implementation of these strategies, it is apparent that a number of key projects central to the realisation of improved governance will reach a critical stage during 2012 and some will not be fully realised for at least two years.

The Committee observes that, while the previous legislation only affected the composition of Brimbank City Council between periodic municipal elections, the effect of clause 3 is to prevent the people of Brimbank City Council from voting or being elected to the Council at a periodic municipal election.

The Committee refers to Parliament for its consideration whether or not clause 3 is a reasonable and demonstrably justified limit on the Charter right of eligible people in Brimbank City Council to vote and be elected at periodic municipal elections.

The Committee makes no further comment.

Residential Tenancies Amendment Bill 2012

Introduced	22 May 2012
Second Reading Speech	23 May 2012
House	Legislative Assembly
Member introducing Bill	Hon. Michael O'Brien MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill amends the *Residential Tenancies Act 1997* (the 'Act') to clarify the circumstances in which a notice to vacate or notice of intention to vacate can be served under that Act for a third breach of the same duty provision.

Extract from the explanatory memorandum:

Part 2 of the Bill amends successive breach provisions in the Act to clarify that where two breach of duty notices are served, in accordance with the relevant provisions of the Act, for the same breach, a notice to vacate may be served on the third occurrence of the same breach. In this circumstance, a third breach of duty notice is not necessary before a notice to vacate or notice of intention to vacate can be served.

The Committee notes the Statement of Compatibility:

Section 13 – Privacy and reputation

The right of a tenant or resident not to have the tenant or resident's home unlawfully or arbitrarily interfered with may be engaged when a notice to vacate is issued. The amendments proposed by this Bill clarify that a person may only serve a notice to vacate for a breach of a duty provision, if the tenant or resident has previously been served with two successive breach of duty notices for a breach of the same duty. Therefore, any interference with the tenant or resident's home or family will be lawful.

If a notice to vacate is issued and the tenant or resident remains in the rented premises, the person seeking eviction may only regain possession of the rented premises if the Victorian Civil and Administrative Tribunal ('VCAT') grants a possession order.

VCAT may only grant a possession order if VCAT is satisfied of a number of factors, including that the person was entitled to give the notice to vacate. Therefore, while the right is engaged, any interference with the family or home will not be arbitrary or unlawful and will be subject to review. Accordingly this right is not limited.

The Bill amends various provisions in Part 10 of the Act to clarify that references to "a bond" or "the bond" include not only full bond amounts but also parts of the full bond amount.

The Bill also provides:

- a mechanism for the substitution of a bond amount paid by a tenant with a bond amount paid by the Director of Housing on the tenant's behalf;
- the refund by the Residential Tenancies Bond Authority ("the Authority") of a bond amount where a substitute bond has been received by the Authority; and
- a mechanism for the reimbursement of a bond paid to the Authority by the Director of Housing on behalf of a tenant where a subsequent bond is received by the Authority for the same premises from a different tenant.

The Bill includes an amendment making it an offence for a landlord to request or obtain the signature of a tenant on an application form for payment out of a bond, where the amount of the bond to be refunded and any necessary apportionment of that amount between the landlord and tenant has not been specified on the form.

The Bill also simplifies the process by which the Director of Housing can be reimbursed an amount of bond paid on behalf of a tenant.

The Bill makes a number of consequential and technical amendments, including to the *Consumer Affairs Legislation Amendment (Reform) Act 2010*.

The Committee makes no further comment.

Working with Children Amendment Bill 2012

Introduced	22 May 2012
Second Reading Speech	24 May 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Working with Children Act 2005* (the 'Act') to:

- strengthen the tests that must be satisfied before an assessment notice may be given
- make murder a category 1 offence (currently a category 2 offence) [3 and 4]
- increase the range of offences to be considered when assessing a person's eligibility for an assessment notice [5]
- ensure that, in relation to a re-assessment of a person's eligibility, the categorisation of the matter is not determined by the offence considered in the earlier determination of eligibility
- increase the range of circumstances in which the Secretary may suspend an assessment notice or revoke a suspended assessment notice
- clarify provisions relating to applications to VCAT by persons subject to supervision or detention orders under the *Serious Sex Offenders (Detention and Supervision) Act 2009* [12]
- prevent a person working with children while his or her application for an assessment notice is being determined if the application is a category 1 or 2 application [10]

The Bill also amends the *Victorian Civil and Administrative Tribunal Act 1998* to strengthen the tests that must be satisfied before an assessment notice may be given under the Act. [17 and 18]

The Bill makes consequential amendments to the *Transport (Compliance and Miscellaneous) Act 1983* to maintain consistency between the working with children check scheme and the accredited driver scheme under that Act. [13, 19 and 20]

Content and Committee comment

The Bill provides for the suspension of a person's assessment notice by the Secretary if the person is charged with or has been convicted of or found guilty of a category 1 or category 2 offence.

In respect to the reinstatement of the assessment notice where the charged is withdrawn, dismissed by the court or the person is acquitted of the offence the Committee notes the following extracts from the explanatory memorandum and the relevant clause of the Bill.

Explanatory memorandum:

If after the suspension of the assessment notice, the charge against the person is withdrawn or the charge is dismissed by a court or the person is acquitted of the offence by a court, then the Secretary **must reinstate** that person's assessment notice.

Clause 10(2):

21B(2) If the person is being re-assessed because the Secretary was notified that the person has been charged with a relevant offence, the Secretary **may reinstate** that person's assessment notice if, after the suspension of the notice—

- (a) the charge against the person is withdrawn; or
- (b) the charge is dismissed by a court; or
- (c) the person is acquitted of the offence by a court.

The Committee notes the discrepancy between the explanatory memorandum and clause 10(2) of the Bill and provides the following Charter report on this matter.

Charter report

Presumption of innocence – Suspension of an assessment notice when holder charged with certain offences – Position when charge is withdrawn or dismissed or defendant acquitted

Summary: Clause 10 provides that, when a person with an assessment notice is charged with a category 1 or 2 offence, the Secretary must suspend that assessment notice pending its re-assessment. The Committee will write to the Attorney-General seeking further information as to whether the Secretary has a discretion to not reinstate an assessment notice despite the withdrawal, dismissal or acquittal of the charge on which the notice's suspension was based.

The Committee notes that clause 10, inserting a new section 21B, provides that, when a person with an assessment notice is charged with a category 1 or 2 offence, the Secretary must suspend that assessment notice 'pending the carrying out and completion of a re assessment under section 21'.¹

The Statement of Compatibility remarks:

I consider that these provisions are compatible with the human rights in the charter act. I acknowledge that suspension occurs automatically; that this may involve a significant restriction upon a person's ability to engage in their employment; and that the notification to the person's employer and agency with whom they are registered may affect the person's reputation...

The purpose and effect of the WWC provisions is not to impose additional penalties on offenders for a criminal offence but to protect children. While the presumption of innocence in section 25(1) will need to be respected by the secretary and VCAT in carrying out their re-assessments where a person is charged with an offence, the provisions are compatible with that right....

Category 1 and 2 offences are serious matters. Category 1 offences include serious sex offences committed by an adult against a child victim. Category 2 offences include serious violent and drug-related offences. The fact that a person has been convicted of or charged with such an offence raises very real concerns for the safety of children. I consider it is appropriate that the person is suspended from engaging in child-related work until the secretary or VCAT is satisfied that the person does not pose an unjustifiable risk to the safety of children.

For the reasons given the Statement of Compatibility, the Committee considers that barring a defendant from working with children while both charges against the person for serious offences and

¹ Section 21 is an existing provision that requires a re-assessment of a notice in these circumstances.

a mandatory re-assessment of the person's assessment notice are pending is compatible with the Charter right of defendants to be presumed innocent until proved guilty according to law.²

However, the Committee observes that an assessment notice may remain suspended under new section 21B after the charge has been dropped or the defendant has been acquitted. New subsection 21B(2) provides:

If a person is being re-assessed because the Secretary was notified that the person has been charged with a relevant offence, the Secretary may reinstate that person's assessment notice if, after the suspension of the notice—

- (a) the charge against the person is withdrawn; or
- (b) the charge is dismissed by a court; or
- (c) the person is acquitted of the offence by a court.

The Committee notes that, while the Explanatory Memorandum to clause 10 states that if the circumstances in s. 21B(2)(a)-(c) apply, 'then the Secretary must reinstate that person's assessment notice', the actual wording of clause 10 appears to give the Secretary a discretion to not reinstate an assessment notice despite the withdrawal, dismissal or acquittal of the charge on which the suspension was based.³

The Committee will write to the Attorney General seeking further information as to whether the Secretary has a discretion under new section 21B(2) to not reinstate an assessment notice despite the withdrawal, dismissal or acquittal of the charge on which the notice's suspension was based. Pending the Attorney General's response, the Committee draws attention to clause 10.

The Committee makes no further comment.

Committee Room
4 June 2012

² Charter s. 25(1).

³ From 2007-2010, the Secretary was permitted to refuse or revoke an assessment notice on the basis of charges that had been finally dealt with through withdrawal or dismissal (but not acquittal.) However, that permission was removed from the Act in 2010, with the then Attorney-General remarking that this Committee's predecessor had identified the Secretary's use of withdrawn or dismissed charges to make a negative assessment as raising a potential incompatibility with the Charter's right to be presumed innocent See *Alert Digest No 9 of 2010* (reporting on the Working With Children Amendment Bill 2010), p. 11.

Appendix 1

Index of Acts and Bills in 2012

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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)

(vi) inappropriately delegates legislative power

Health (Commonwealth State Funding Arrangements) Bill 2012 9

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

Associations Incorporation Reform Bill 2011 1
Australian Consumer Law and Fair Trading Bill 2011 1
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Section 17(b)

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

Australian Consumer Law and Fair Trading Bill 2011 1

Appendix 3

Ministerial Correspondence 2012

Table of correspondence between the Committee and Ministers during 2012

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Associations Incorporation Reform Bill 2011	Minister for Consumer Affairs	07-02-12 24-02-12	1 of 2012 4 of 2012
Australian Consumer Law and Fair Trading Bill 2011	Minister for Consumer Affairs	07-02-12 24-02-12	1 of 2012 4 of 2012
Control of Weapons and Firearms Acts Amendment Bill 2011	Minister for Police and Emergency Services	07-02-12 29-02-12	1 of 2012 4 of 2012
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	28-02-12 14-03-12	12 of 2011 5 of 2012
Disability Amendment Bill 2012	Minister for Community Services	13-03-12 26-03-12	4 of 2012 5 of 2012
Water Amendment (Governance and Other Reforms) Bill 2012	Minister for Water	13-03-12 27-03-12	4 of 2012 5 of 2012
Victorian Inspectorate Amendment Bill 2012	Minister responsible for the establishment of an anti-corruption commission	27-03-12 16-04-12	5 of 2012 6 of 2012
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	Minister responsible for the establishment of an anti-corruption commission	01-05-12 21-05-12	7 of 2012 8 of 2012
National Energy Retail Law (Victoria) Bill 2012	Minister for Energy and Resources	17-04-12 01-05-12	6 of 2012 8 of 2012

Table of Ministers responses still pending

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Health (Commonwealth State Funding Arrangements) Bill 2012	Minister for Health	05-06-12	9 of 2012
Working with Children Amendment Bill 2012	Attorney-General	05-06-12	9 of 2012