

No. 18 of 2012

**Tuesday, 11 December
2012**

On the

Criminal Organisations Control
Bill 2012

Fire Services Levy Monitor Bill 2012

Health Services Amendment (Health
Purchasing) Bill 2012

Integrity and Accountability Legislation
Amendment Bill 2012

Protected Disclosure Bill 2012

Tobacco Amendment (Smoking in
Outdoor Areas) Bill 2012

Water Legislation 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
Member for Bundoora



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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;

Table of Contents

	Page Nos.
Alert Digest No. 18 of 2012	
Health Services Amendment (Health Purchasing Victoria) Bill 2012	1
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	2
Water Legislation Amendment Bill 2012	4
Ministerial Correspondence	
Criminal Organisations Control Bill 2012	7
Fire Services Levy Monitor Bill 2012	15
Integrity and Accountability Legislation Amendment Bill 2012	17
Protected Disclosure Bill 2012	20
Appendices	
1 – Index of Acts and Bills in 2012	21
2 – Committee Comments classified by Terms of Reference	23
3 – Ministerial Correspondence 2012	25

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

'AAT' refers to the Administrative Appeals Tribunal;

'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 \$140.84).

'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. 18 of 2012

Health Services Amendment (Health Purchasing Victoria) Bill 2012

Introduced	27 November 2012
Second Reading Speech	29 November 2012
House	Legislative Assembly
Member introducing Bill	Hon. Dr Denis Napthine MLA
Portfolio responsibility	Minister for Major Projects

Purpose

The Bill amends the *Health Services Act 1988*.

- The Bill expands the range of health or related services in relation to which Health Purchasing Victoria performs functions and exercises powers to include registered community health centres [3] and women's health services [4]. The Second Reading Speech extract:- *'The amendment will enable registered Community Health Centres and 11 specified Women's Health Services to procure from Health Purchasing Victoria contracts on an opt-in basis. The ability to access HPV contracts under this amendment to the Act will also provide registered Community Health Centres and Women's Health Services the opportunity to access Health Purchasing Victoria-facilitated services and receive advice, staff training and consultancy services.'*

The Committee makes no further comment.

Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012

Introduced	28 November 2012
Second Reading Speech	28 November 2012
House	Legislative Council
Member introducing Bill	Ms Colleen Hartland MLC
Private members Bill	

Purpose

The Bill amends the *Tobacco Act 1987* (the Act) to prohibit smoking certain outdoor areas.

- Smoking is prohibited in outdoor dining and drinking areas except in designated outdoor smoking areas. The relevant penalty for an individual who smokes breach of the offence is 5 penalty units. The penalty to venue occupiers for not complying with their obligations is 10 penalty units for a natural person and 50 penalty units for a body corporate. Smoking management plans must be prepared [5]; Smoking is prohibited on the beaches of Port Phillip and Western Port Bay, around and within 10 metres of children's playground equipment at and within 4 metres of public transport stops [8].

Section 17(a)(i) – Rights or freedoms

The Committee notes that new section 5RD does not apply to a person at a residential premises. The Committee also notes that new section 5RE does not contain the same exception for a person at a residential premises. The Committee refers the matter to the Parliament for debate.

Smoking is also prohibited at sporting grounds and facilities during events, training and practices [8]. The Second Reading Speech extract:- *'This Bill also makes it an offence to smoke at sporting venues within one hour of and during organised sporting events. This includes organised games and training or practice sessions. This applies to both major sporting events and community sporting events at ovals, parks and grounds. The smoke free area extends to any area or facility used by competitors, officials or spectators during an organised sporting event.'*

Charter report

Presumption of innocence – Defences to offences relating to designated outdoor smoking areas and smoking near public transport stops – Legal onus of proof on the accused

Summary: The effect of clauses 6 and 8 is to require people who claim a statutory defence to offences relating to designated outdoor smoking areas and smoking near public transport stops to prove that defence in court on the balance of probabilities. The Committee will write to the Member seeking further information as to the compatibility of new sub-sections 5EB(3) and 5RE(2) with the Charter right of defendants to be presumed innocent until proved guilty according to law.

The Committee notes that:

- clause 6, inserting a new section 5EB, creates a number of offences in relation to occupiers of premises containing designated outdoor smoking areas, including for failing to ensure that children and food do not enter those areas. New sub-section 5EB(3) provides for defences 'if the accused proves that the accused' either didn't and couldn't reasonably have known that the child or food had entered the area or had requested that the child or person possessing food leave it.

- clause 8, inserting a new section 5RE, creates an offence of smoking at or within 4 metres of various public transport stops. New sub-section 5RE(2) provides for a defence ‘if the accused proves that he or she’ was only passing and did not remain at the stop.

The Statement of Compatibility remarks that the Bill ‘does not raise any human rights issues.’ **However, the Committee observes that the effect of clauses 6 and 8 is to require people who claim a statutory defence to offences relating to designated outdoor smoking areas and smoking near public transport stops to prove that defence in court on the balance of probabilities.**

In its *Practice Note No. 3*, the Committee states that for any provision of a Bill that ‘place[s] a legal onus of proof on an accused with respect to any issue in a criminal proceeding’, the Statement of Compatibility ‘should state whether and how that provision satisfies the Charter’s test for reasonable limits on rights’ and ‘may address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision’s purpose’.¹

The Committee will write to the Member seeking further information as to the compatibility of new sub-sections 5EB(3) and 5RE(2) with the Charter right of defendants to be presumed innocent until proved guilty according to law.² Pending the Member’s response, the Committee draws attention to clauses 6 and 8.

The Committee makes no further comment.

¹ Compare *Smoke-Free Public Places Act 2003* (ACT), ss. 9H(2) & 9H(3), placing evidential onuses on the an accused charged with failing to ensure that a child or food does not enter a designated outdoor smoking area to present or point to evidence that suggests a reasonable possibility of a honest and reasonable mistake of fact or reasonable lack of knowledge about the food – see *Criminal Code 2002* (ACT), ss. 23(1)(b), 58(2) & 58(3); but see *Smoke-Free Environment Act 2000* (NSW), s. 6A(5) (to be inserted by the *Tobacco Legislation Amendment Act 2012* (NSW), schedule 1, clause 8), placing a legal onus on an accused charged with smoking at a public transport stop to ‘establish’ that he or she was passing through and did not remain.

² Charter s. 25(1).

Water Legislation Amendment Bill 2012

Introduced	27 November 2012
Second Reading Speech	29 November 2012
House	Legislative Assembly
Member introducing Bill	Hon Peter Walsh MLA
Portfolio responsibility	Minister for Water

Purpose

The Bill amends the *Water Act 1989* (the Act). It clarifies the powers of water authorities:-

- To install meters on land;
- In relation to licences to take and use water and licences to construct works;
- In relation to the transfer of water shares by mortgagees;
- In relation to the information that must be recorded in the water register;
- In relation to the appointment of persons who may bring proceedings for offences against the Act.

Parts 2 and 3 – Amendments to the *Water Act 1989* and the *Water Industry Act 1994*

- It is an offence for a person to transfer ownership of a water share that is subject to a recorded mortgage without first obtaining the Minister's consent. The penalty set out in the Act is 60 penalty units **[7-8]**. The Second Reading Speech extract:- *'Under a general transfer of a water share, the sale of a water share by a mortgagee does not need Ministerial approval and therefore escapes the trading rules, including the rule that imposes a 4% annual limit on trade out of an irrigation district. A mortgagee of water share can therefore sell mortgaged water shares when other shareholders might not receive approval because the 4% limit has been reached. This is not equitable and imposes an unfair advantage on mortgagees over rural land owners. This Bill will amend the Water Act to provide that a mortgagee exercising a power of sale under a recorded mortgage will require the Minister's approval for the transfer of that water share, consistent with transfers by other water share holders.'*
- It provides that where a registration licence authorises a person to take and use water from multiple springs, soaks or dams, the licence may be amended. New registration licences may be issued so that each licence will authorise a person to take and use water from no more than one spring, soak or dam **[11]**.
- The Minister must consider certain matters when determining applications for the transfer of licences under section 51 (licence to take and use water) and section 67 (licence to construct works) to successors in title. Under the amendments **[19, 21]** the Minister is not required to take into account environmental and third party impacts. The Second Reading Speech extract:- *'When it is necessary to transfer a licence to take and use water or a works licence as a result of a sale of the land to which the licence relates, taking into account such considerations is an unnecessary duplication of effort because the environmental and other third party impacts will be the same as they were when the licence was first issued. The Bill will provide that the relevant criteria for a transfer of these two types of licence will not need to be considered when the only change to the licence is to name of holder of the licence where the land for which it was originally issued does not change. This will remove unnecessary red tape for the holders of such licences and the Government.'*

- It extends the Minister's responsibilities for establishing and maintaining the system for the water register established under Part 5A. It specifies the information which the Minister must record in the water register in relation to licences to construct works (section 67). It also extends the Authorities' responsibilities for establishing and maintaining records and information in the water register [22-26]. Clause [27] amends section 84Z to specify that records and information collected under Part 5A are to be publicly available. This includes names and addresses of holders of licences to take and use water issued under sections 51, (licence to take and use water) 51AA, (amendment of original registration licences) or 51AB (issue of new registration licences); the names and addresses of holders of works licences outside of declared water systems under section 84V (see new section 84V as amended by clause 24).
- An Authority may provide or install and maintain a separate meter for each occupancy where there are multiple occupancies. Meters may measure the amount of water to be delivered for each service [29]. It replaces the existing requirement for applicants to pay a fee set by a by-law with a requirement to pay a fee set by a determination of the Authority as they relate to installation of separate meters [31]. Fees may be imposed on an owners corporation by an Authority or directly on the owners of each lot and apportioned based on the number of lots or the individual liability. The owners corporation may specify which method to use to suit its members [33]. It changes the existing reverse legal onus to a reverse evidentiary onus in relation to presumptions of fact about analytical evidence in criminal proceedings [36].³
- Section 4F of the *Water Industry Act* 1994 sets out the power of the Essential Services Commission (the Commission) to make or amend Codes with respect to the regulated water industry. This includes the power to make Codes which deal with the recovery by water corporations of amounts owing to them. The amendments ensure the Commission's power to make Codes is better aligned with the powers of water corporations under the Act. A Code may now specify where a water corporation's power to charge interest may not be used rather than where it may be used [39].

The Committee makes no further comment.

³ See Alert Digest No. 5 of 2012 tabled on 27 March 2012; SARC report on clause 61 of the *Water Amendment (Governance and Other Reforms) Bill* 2012 and the Minister's response, pages 16-17.

Ministerial Correspondence

Criminal Organisations Control Bill 2012

The Bill was introduced into the Legislative Assembly on 13 November 2012 by the Hon. Robert Clark MP. The Committee considered the Bill on 26 November 2012 and made the following comments in Alert Digest No. 17 of 2012 tabled in the Parliament on 27 November 2012.

Committee Comment

Charter report

Personal association discrimination – Freedom of association – Rights of communities and families – Declarations about organisations whose activities pose a serious threat to public safety and order

Summary: Clause 19 provides that the Supreme Court may make a declaration about an organisation based on findings about its connection to serious criminal activity and the threat its activities pose to public safety and order. The Committee notes that a court may be permitted to make declarations about groups of people who associate together due to personal or communal attributes that are protected by the Charter and on the basis of the activities of a small number of members or former members. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 19 provides that the Supreme Court may declare that ‘an organisation the subject of [an] application’ by the Chief Commissioner ‘is a declared organisation’ based on findings about its connection to serious criminal activityⁱ and the threat its activities pose to public safety and order. While such a declaration has no immediate legal consequences in Victoria,ⁱⁱ it means that the Chief Commissioner may ask the Supreme Court to make a control order about any of the organisation’s members, former members and prospective members.ⁱⁱⁱ

The Committee observes that clause 7 defines an organisation to mean a ‘body or association’, whether incorporated or not, and specifies that ‘an organisation can include individuals who are related to one another’. **The Committee notes that this definition may permit declarations to be made under clause 19 about groups of people who associate together due to personal or communal attributes that are protected by the Charter.^{iv}**

ⁱ Clauses 3 and 4 define ‘serious criminal activity’ to mean conduct that would constitute an offence that is either punishable by at least 10 years imprisonment or is listed in Schedule 2 and involves 2 or more offenders, substantial planning and organisation, systemic criminal activity and a purpose of profit, gain, power, influence or child sexual gratification.

ⁱⁱ The declaration, if registered in some other Australian jurisdictions, may automatically make some activities relating to that organisation criminal in that jurisdiction: see *Criminal Organisation Act 2009* (Qld), ss. 97 & 100; *Serious and Organised Crime (Control) Act 2008* (SA), ss. 34A, 34B, 35 & 39C(2). See also Crimes (Criminal Organisations Control) Amendment Bill 2012 (NSW), Schedule 1, cl. 17 (new section 27H); Criminal Organisations Control Bill 2011 (WA), cls. 106, 107 & 125(1).

ⁱⁱⁱ Clause 43, discussed further below.

^{iv} Charter ss. 8(3) (‘equal protection of the law without discrimination’, including on the basis of ‘personal association’ with a person who is identified by reference to the attributes listed in s. 6 of the *Equal Opportunity Act 2010*), 14(1)(b) (‘freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching... as part of a community’), 17(1) (‘Families are the fundamental group unit of society and are entitled to be protected by society and the State’) & 19 (‘All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and

However, the Committee observes that the Charter's associational rights with respect to political and industrial activities^v are protected by clause 11, which provides that Parliament does not intend to diminish Victorians' freedoms 'to participate in lawful protest, advocacy, dissent or industrial action'.

The Statement of Compatibility remarks:

The Bill sets out clear criteria for the making of declarations (clause 19) which require serious criminal activity and a serious threat to public safety and order.

A declaration can only be made against an organisation or individual if the court is satisfied:

(beyond reasonable doubt) that the organisation, or the individual and other members using the organisation, have engaged in, organised, facilitated or supported serious criminal activity or are currently doing so; and

(on the balance of probabilities) that the activities of the organisation or of the individual and other members acting together pose a serious threat to public safety and order.

The Committee considers that the Charter's 'right to freedom of association with others'^{vi} does not include the right to associate for the purpose of criminal activities. The Committee observes that the Bill's criteria for 'serious criminal activity'^{vii} and clause 19's requirement that the Supreme Court must be satisfied beyond reasonable doubt that an organisation or its members have engaged in serious criminal activities are more stringent than all similar Australian statutes.^{viii}

However, the Committee notes that, under clause 19(2)(a)(ii), a declaration about an organisation may be made where a court finds beyond reasonable doubt that:

any 2 or more members, former members or prospective members of the organisation have used or are using—

(A) the organisation; or

(B) their relationship with that organisation or with the organisation's members, former members or prospective members—

for a criminal purpose.^{ix}

and on the balance of probabilities that 'the activities of the organisation pose a serious threat to public safety and order'.^x **The Committee observes that clause 19(2)(a)(ii) may**

practise his or her religion and to use his or her language'. Sub-section (2) also sets out specific cultural rights for Aboriginal persons 'with other members of their community'.)

^v Charter ss. 8 (in combination with ss. 6(f) & (k) of the *Equal Opportunity Act 2010*) & 16(2) 'right to form and join trade unions.'

^{vi} Charter s. 16(2).

^{vii} Clause 4(1), requiring the involvement of 2 or more offenders, substantial planning and organisation, systemic criminal activity and a purpose of profit, gain, power, influence or child sexual gratification.

^{viii} *Crimes (Criminal Organisations Control) Act 2012* (NSW), ss. 3, 32(1); *Serious Crime Control Act 2009* (NT), ss. 6, 83(1); *Criminal Organisation Act 2009* (Qld), ss. 7, 110.; *Serious and Organised Crime Control Act 2008* (SA), ss. 3, 5(1), all requiring proof on the balance of probabilities and none requiring proof of joint, organised or systemic conduct for declarations (although *Criminal Organisation Act 2009* (Qld), s. 18(1)(c) requires proof of joint conduct before a court can make a control order.) See also *Crimes (Criminal Organisations Control) Amendment Bill 2012* (NSW), Schedule 1, cl. 2; *Criminal Organisations Control Bill 2011* (WA), csl. 3(1) 163(2)(a).

^{ix} Clause 19(2)(a)(ii). Clause 19(5) provides that using an organisation or a relationship with an organisation for a criminal purpose includes associating for that purpose on the organisation's land or common meeting places or at organisation meetings or while wearing the organisation's patches or insignia or identifying themselves as the organisation's members, as well as using their membership to obtain information, contacts or access to other people for that purpose. Clause 3 defines 'criminal purpose' to mean 'the purpose of engaging in, organising, facilitating or supporting serious criminal activity'.

permit a declaration to be made about an entire organisation on the basis of activities by a small number of members or former members of the organisation. The Committee notes that most similar Australian statutes bar a declaration about an organisation being made on the basis of activities of only some of the organisation's members unless 'those members constitute a significant group within the organisation' in terms of numbers or influence.^{xi} None permit a declaration solely on the basis of the activities of former members.^{xii}

The Second Reading speech remarks:

Organisations involved in serious criminal activity, including bikie gangs, often regard themselves as beyond the reach of the law, and commonly use violence and intimidation to achieve their criminal aims.

These criminal organisations are resistant to traditional policing methods. Such groups typically intermingle their illegal activities with lawful business or social activity. This makes such groups harder to detect and prosecute using the criminal law...

In some cases organisations are primarily established and exist for the purpose of criminal activity. In other cases legitimate organisations with lawful purposes may have members and associates that seek to infiltrate and use the organisation for serious criminal purposes.

The Committee will write to the Attorney-General seeking further information as to:

- **whether or not declarations may be made under clause 19 about groups of people who associate together due to personal or communal attributes that are protected by the Charter; and**
- **whether or not requiring a court to make findings about the activities of a significant group within an organisation (in terms of numbers or influence) before it makes a declaration about the whole organisation is a less restrictive means reasonably available to achieve the purpose of preventing and disrupting the activities of organisations involved in serious criminal activity.**

Pending the Attorney-General's response, the Committee draws attention to clause 19.

Reasonable limits – Control orders for current, former or prospective members of a declared organisation to contribute to preventing or disrupting serious criminal activity

Summary: Clause 43(2) permits the Supreme Court to make a control order for current, former or prospective members of a declared organisation if the order is likely to contribute to the purpose of preventing or disrupting serious criminal activity by that member. The Committee notes that significant restrictions on a member's Charter rights may be imposed on the basis of the possibility of future serious criminal activity, whether or not the activity or

^x Clause 19(2)(b). The equivalent requirement in all similar Australian statutes requires a finding about the risk represented by 'the organisation itself, rather than the 'threat posed by' its 'activities': see *Crimes (Criminal Organisations Control) Act 2012* (NSW), s. 9(1)(b); *Serious Crime Control Act 2009* (NT), s. 12(1)(b); *Criminal Organisation Act 2009* (Qld), s. 10(1)(c); *Serious and Organised Crime Control Act 2008* (SA), s. 11(1)(b). See also *Criminal Organisations Control Bill 2011* (WA), cl. 13(1)(c) and note *Crimes (Criminal Organisations Control) Amendment Bill 2012* (NSW), Schedule 1, cl. 7, which replaces that jurisdiction's requirement with a new requirement that 'the continued existence of the organisation represents a risk to public safety and order'.

^{xi} *Crimes (Criminal Organisations Control) Act 2012* (NSW), s. 9(4)(a); *Serious Crime Control Act 2009* (NT), s. 12(2)(a); *Criminal Organisation Act 2009* (Qld), s. 10(5). See also *Criminal Organisations Control Bill 2011* (WA), cl. 13(3)(a) and *Crimes (Criminal Organisation Control) Bill 2012* (NSW), Schedule 1, cl. 10. The exception is the *Serious and Organised Crime Control Act 2008* (SA), s. 11(5)(a).

^{xii} *Crimes (Criminal Organisations Control) Act 2012* (NSW), s. 9(1)(a); *Serious Crime Control Act 2009* (NT), s. 12(1)(a); *Criminal Organisation Act 2009* (Qld), s. 10(1)(b); *Serious and Organised Crime Control Act 2008* (SA), s. 11(1)(a). See also *Criminal Organisations Control Bill 2011* (WA), cl. 13(1)(b).

restrictions relate to the declared organisation or the member's associations have a criminal purpose. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 43(2) permits the Supreme Court to 'make a control order that applies to' current, former or prospective members of a declared organisation if 'the making of the control order is likely to contribute to the purpose of preventing or disrupting' serious criminal activity by (or facilitated by) that member. While a control order has no automatic legal consequences in Victoria,^{xiii} clause 47(1) provides that the Supreme Court, in making the order, 'may impose the conditions the Court considers appropriate'. Clause 68 provides that a breach of any condition in a control order is an offence punishable by up to five years imprisonment.

The Statement of Compatibility remarks:

If a control order is made, the court is empowered to impose a range of conditions that may have an impact upon a range of rights of individuals, including freedom of expression, freedom of association, privacy, freedom of movement and property rights. The types of conditions are set out in clauses 45 and 47.

...

It is not possible to exhaustively set out the limits upon rights that may be imposed, as this will depend upon the particular circumstances. Nevertheless, I consider that the powers given to the court to impose conditions that are likely to result in restrictions upon rights are compatible with those rights either because they do not limit the rights as described in the charter or because any such limits are reasonable and justified under section 7(2).

...

The bill... sets out clear criteria for the making of control orders (clause 43). These criteria reflect the important purposes of such orders, namely to prevent and disrupt the activities of organisations involved in criminal activity. These purposes will also guide the court in determining what conditions should be imposed.

The court will also need to have regard to clause 11 which makes it clear that it is not intended that the powers in the bill be exercised in a way that diminishes the freedom of persons to participate in lawful protest, advocacy, dissent or industrial action. In addition, the bill contains a range of procedural safeguards before such conditions are able to be imposed.

The Committee notes that two key procedural safeguards in the Bill are that the Supreme Court (rather than, as in some similar Australian statutes, judges acting in their personal capacity^{xiv}) makes both declarations and control orders and that (unlike in all similar Australian statutes) claims of prior or current serious criminal activity must be proved beyond reasonable doubt. The Committee observes that Victorian judges have held in other contexts that, where a court has found that the person has committed a serious offence and is more likely than not to do so again, legislation permitting the imposition of significant restrictions on the rights of a person to prevent future crimes is compatible with the Charter.^{xv}

^{xiii} The order, if registered in some other Australian jurisdictions, may automatically make some activities relating to that organisation criminal in that jurisdiction: see *Criminal Organisation Act 2009* (Qld), ss. 97 & 100; *Serious and Organised Crime (Control) Act 2008* (SA), ss. 34B, 35 & 39N(2). See also Crimes (Criminal Organisations Control) Amendment Bill 2012 (NSW), Schedule 1, cl. 17 (new section 27U); Criminal Organisations Control Bill 2011 (WA), cls. 99, 102 & 142(1).

^{xiv} *Crimes (Criminal Organisations Control) Act 2012* (NSW), s. 5; *Serious and Organised Crime Control Act 2008* (SA), s. 8. See also Criminal Organisations Control Bill 2011 (WA), cl. 26.

^{xv} E.g. *R J E v Secretary to the Department of Justice* [2008] VSCA 265, [54], [119].

The Committee notes that, like most similar Australian statutes,^{xvi} clause 43(2) permits the Supreme Court to impose a control order on current, prospective and former members of a declared organisation without any finding of previous or current criminal activity by that member. However, unlike all similar Australian statutes,^{xvii} it also requires the Supreme Court to find, on the basis of acceptable, cogent and sufficient evidence, that the order is 'likely to contribute to the purpose of preventing or disrupting' serious criminal activity by that member. The Committee observes that **clause 43(2) may nevertheless permit the imposition of significant restrictions on the Charter rights of any current, prospective or former member of a declared organisation on the basis of the possibility that the member will engage in or facilitate serious criminal activity in the future.**

The Committee also notes that there is no requirement in clause 43(2) or 47(1) require that the control order's purpose or content relate to the member's association with the declared organisation. The Committee observes that, while all similar Australian statutes operate in this way for current members of a declared organisation,^{xviii} some bar the imposition of control orders on former members unless they have an ongoing involvement with the organisation.^{xix}

The Committee further notes that clause 68(5) provides that a person can be convicted for associating with others in breach of a control order without any proof that the association was for a criminal or other unreasonable purpose. The Committee observes that most similar Australian statutes expressly exempt certain reasonable personal associations from restriction by control orders.^{xx}

The Committee will write to the Attorney-General seeking further information as to whether or not providing express exemptions from control orders for former members with no significant current involvement with a declared organisation and certain reasonable personal associations are less restrictive means reasonably available to achieve the purpose of preventing or disrupting the activities of organisations involved in serious criminal activity. Pending the Attorney-General's response, the Committee draws attention to clauses 43(2), 47(1) and 68(5).

Minister's Response

Thank you for your letter dated 27 November 2012 seeking my response in relation to the issues raised in Alert Digest No. 17 of 2012 in relation to the Criminal Organisations Control Bill 2012 (the Bill).

^{xvi} *Crimes (Criminal Organisations Control) Act 2012* (NSW), s. 19(1); *Serious Crime Control Act 2009* (NT), s. 23(1); *Serious and Organised Crime Control Act 2008* (SA), s. 22(2)(a). See also *Criminal Organisations Control Bill 2011* (WA), cl. 57(2)(a). The exception is the *Criminal Organisation Act 2009* (Qld), s. 18(1)(b).

^{xvii} *Crimes (Criminal Organisations Control) Act 2012* (NSW), s. 19(1)(b) (although it requires that 'sufficient grounds exist for making the order'); *Serious Crime Control Act 2009* (NT), s. 25(2)(a); *Criminal Organisation Act 2009* (Qld), s. 18(1), *Serious and Organised Crime Control Act 2008* (SA), s. 22(2) (although it requires that 'the making of the order is appropriate in the circumstances'.) See also *Criminal Organisations Control Bill 2011* (WA), cl. 57(2)(a) (although it requires that 'it is appropriate in the circumstances to make the order'.)

^{xviii} *Crimes (Criminal Organisations Control) Act 2012* (NSW), ss. 19(1) & 27; *Serious Crime Control Act 2009* (NT), s. 27(2)(a)(iv), (b), (3); *Criminal Organisation Act 2009* (Qld), ss. 18(1) & 19(1), (2)(c), (g) & (h); *Serious and Organised Crime Control Act 2008* (SA), ss. 22(2)(a) & 22(5). See also *Criminal Organisations Control Bill 2011* (WA), cls. 57(2)(a), 79 & 80.

^{xix} *Crimes (Criminal Organisations Control) Act 2012* (NSW), s. 19(1)(a)(ii) & (8); *Serious and Organised Crime Control Act 2008* (SA), s. 22(2)(b). See also *Criminal Organisations Control Bill 2011* (WA), cl. 57(2)(b). The exceptions are the *Serious Crime Control Act 2009* (NT), s. 23(1)(b) and the *Criminal Organisation Act 2009* (Qld), s. 18(1)(a).

^{xx} *Crimes (Criminal Organisations Control) Act 2012* (NSW), ss. 19(7)(a) & 25(5); *Serious Crime Control Act 2009* (NT), s. 36(3); *Serious and Organised Crime Control Act 2008* (SA), s. 35(6). See also *Criminal Organisations Control Bill 2011* (WA), cl. 101. The exception is the *Criminal Organisation Act 2009* (Qld), s. 19(5)(b), but note s. 19(7).

Grounds for making declarations

The Committee states that the Bill may permit a court to make declarations about groups of people who associate due to personal or communal attributes protected by the *Charter of Human Rights and Responsibilities Act 2006* (the Charter Act), and based on the activities of a small number of members. The Committee specifically refers to the following provisions of the Charter Act:

- section 8(3) which includes a right to equality before the law and protection against discrimination
- section 14(1)(b) regarding the freedom to demonstrate a person's religion or belief
- section 17(1) regarding protection of families
- section 19 regarding certain cultural, religious, racial and linguistic rights.

The Committee notes that most similar Australian laws only enable a declaration to be made about an organisation based on the activities of a significant group of members within the organisation.

The Committee states that most similar Australian laws only enable a declaration to be made about an organisations based on the activities of a significant group of members within the organisation.

The committee seeks further information as to whether:

- declarations may be made about groups of people who associate due to personal or communal attributes protected by the Charter Act, and
- basing the power to make declarations on the activities of a significant group within an organisation is a less restrictive means reasonably available to achieve the purpose of preventing and disrupting the activities of organisations involved in serious criminal activity.

Association due to attributes protected by the Charter Act

A declaration under clause 19 could be made in respect of an organisation whose members associate together for reasons that include shared personal or communal attributes (such as a particular cultural, religious, racial or linguistic background as referred to in section 19 of the Charter Act). However, any such declaration would not be based on the presence of such an attribute, but on the findings of the court that the organisation (or its members) have engaged or are engaging in serious criminal activity and that the activities of the organisation pose a serious threat to public safety and order. If a court finds that an organisation meets these tests, including that the activities of the organisation pose a serious threat to public safety and order, the fact that the members of the organisation associate due to particular personal or communal attributes should be no barrier to the court protecting the public through the making of a declaration.

Furthermore, on its own, a declaration does not affect any limits upon rights. Any limitation of a right, be it a right referred to in the Charter Act, or any other right, can only occur if a court makes a control order and imposes conditions that restrict that right. Such a control order can only be made if the court is satisfied that the making of the control order is likely to contribute to the purpose of preventing or disrupting serious criminal activity by the organisation or its members. Having regard to the criteria for making a control order and imposing conditions, I consider that the provisions of the Bill are compatible with the rights in sections 8, 14, 17 and 19 of the Charter Act.

In my view, it is highly unlikely that the making of a control order could amount to discrimination under section 8 of the Charter Act on the basis of a protected attribute. The tests for making declarations and control orders are based upon criminal activity and a

serious threat to public safety and order, not any of the attributes to which section 8 relates. While a control order could include conditions that affect a person's ability to associate with family members or with persons sharing a similar cultural, religious, racial or linguistic background, such conditions would not be imposed because of that background or attribute but because the court considers they are appropriate in order to prevent or disrupt serious criminal activity by the organisation or member. Even if such court-imposed conditions disadvantaged persons with the attribute, the conditions would not be unreasonable and hence would not amount to indirect discrimination.

Activities of a significant group

A declaration against an organisation may be based upon the activities of only two or a small proportion of members. However, having regard to the test for making declarations and control orders, and the fact that declarations and control orders are made by the court on findings made on cogent evidence, and having regard to the purposes of the Bill, I consider that the provisions are compatible with the human rights in the Charter Act.

While the test for making a declaration against an organisation in clause 19(2) on the basis of the serious criminal activity of its members (rather than of the organisation) does not require that the members involved in serious criminal activity are a significant group within the organisation, the court must consider the way the organisation is being used and the threat the organisation poses. A declaration can only be made against the organisation in such circumstances if:

- the members have used, or are using, the organisation or their relationship with it or its members for a criminal purpose; and
- the activities *of the organisation* pose a serious threat to public safety and order.

There is no need for a super-added requirement that a "significant group" within the organisation is engaged in serious criminal activity. If a court considers that the serious criminal activity is isolated to a few members, with the result that the organisation does not pose a serious threat to public safety and order, the court will not make the declaration against the organisation. To cover such circumstances, the Bill allows the Chief Commissioner to apply for a declaration against relevant individuals instead of the organisation.

As stated above, no rights are limited by making a declaration. Rather, a declaration operates as a pre-condition to obtain a control order against the organisation or a member. A control order can only be made against an organisation if it is likely to contribute to the purpose of preventing or disrupting serious criminal activity by the organisation or its members. A control order can only be made against an individual if it is likely to contribute to preventing or disrupting serious criminal activity by that person, or which he or she may facilitate. The court can impose such conditions as it considers appropriate, which will be informed by the purposes of the Bill.

These purposes are not limited to preventing organisations themselves from engaging in serious criminal activity, but extend to such activities of their individual members (clause 1(a)). Limiting the power to make a declaration against an organisation based on the activities of a significant group of members would not be as effective to fully achieve these purposes.

Controls on former members

The Committee states that the Bill enables significant restrictions to be placed on the Charter Act rights of any current, prospective or former member of a declared organisation. It also states that clauses 43(2) and 47(1) do not require the content of a control order to relate to a member's association with a declared organisation.

The Committee seeks further information as to whether a less restrictive means of preventing or disrupting the activities of organisations involved in serious criminal activity would be to provide for exemptions for former members with no current involvement with a declared organisation.

The Bill is aimed at preventing and disrupting the serious criminal activities of individuals linked to organisations, not just the serious criminal activities of the organisation. Current and former members of organisations may be jointly engaged in serious criminal activity and it would create a significant gap in the scheme of the legislation to exclude former members. Where restrictions on former members of an organisation limit rights under the Charter Act, I consider they will be reasonable and justified by the need to achieve this specific purpose of the Bill. In particular, it is important to prevent persons seeking to avoid the application of the legislation simply by claiming that they had at some prior time ceased to be a member of the organisation.

Exemption from controls for reasonable associations

The Committee notes that clause 68(5) makes it an offence to associate in breach of a control order, without the need to prove that the association was for a criminal or other unreasonable purpose. The Committee requests further information as to whether exemptions from control orders for reasonable personal associations would be a less restrictive means to prevent and disrupt organisations involved in serious criminal activity.

I do not consider that such exemptions are a less restrictive means to achieve the Bill's objectives. Where interstate schemes provide for mandatory controls on association, the exemptions in those schemes are necessary to ameliorate or avoid unintended effects of those mandatory controls. In contrast, the Bill confers on the court a flexible discretion whether to impose a control order, and if so, the terms of the conditions that apply. This will allow the court to take into account personal associations, such as family relationships, when framing appropriate conditions for a control order.

I hope this information assists in the Committee's consideration of the Bill.

ROBERT CLARK MP

Attorney-General

10 December 2012

The Committee thanks the Attorney-General for this response.

Fire Services Levy Monitor Bill 2012

The Bill was introduced into the Legislative Assembly on 13 November 2012 by the Hon. Michael O'Brien MP. The Committee considered the Bill on 26 November 2012 and made the following comments in Alert Digest No. 17 of 2012 tabled in the Parliament on 27 November 2012.

Committee Comment

Charter report

Expression – False representations or misleading or deceptive conduct about the likely effect of the abolition of the fire services levy

Summary: Clause 31 prohibits conduct that falsely represents or is likely to mislead or deceive any person about the effect or likely effect of the abolition of the fire services levy. The Committee will write to the Minister seeking further information as to whether or not clause 31's application to unintentionally false, misleading or deceptive statements in non-commercial contexts is reasonably necessary according to the test for limits on freedom of expression set out in the Charter.

The Committee notes that clause 31 prohibits conduct that 'falsely represents (whether expressly or impliedly)' or 'is likely to mislead or deceive any person about' the 'effect, or likely effect' of the abolition of the fire services levy by the *Fire Services Property Levy Act 2012*. If someone breaches clause 31, the Fire Services Levy Monitor may ask the Supreme Court to impose a penalty of up to \$500,000, issue injunctions to restrain the person's statements or require him or her to do an act or thing; or make corrective or punitive advertising orders.^{xxi}

The Committee considers that clause 31 may engage the Charter's right to freedom of expression.^{xxii} The Committee notes that Charter s. 15(3) states:

Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-

- (a) to respect the rights and reputation of other persons; or
- (b) for the protection of national security, public order, public health or public morality.

The Statement of Compatibility remarks:

Clauses 18, 19, 30, 31, 67, 69 and 79 all impose prohibitions on engaging in conduct, making a representation, or providing information that is false or misleading, in certain specified circumstances. These clauses may engage the right to freedom of expression by curtailing a person's right to express or impart information in a false or misleading manner. However, it is unlikely that the right to freedom of expression extends to a right to false or misleading expression. Even if the right does extend to such forms of expression, I consider that... [t]hese prohibitions on false and misleading conduct, information and representations are reasonably necessary to protect public order and the rights of others.

The Committee notes that clauses 18, 19, 30, 67, 69 and 79 concern false statements to or about the Monitor and mostly require proof of knowledge that the statement was false.^{xxiii}

^{xxi} Clauses 32, 95, 96, 101 and 102.

^{xxii} Charter s. 15(2).

^{xxiii} The exception is clause 79, concerning false or misleading information in compliance with a notice from the Monitor requiring a person who has made a claim about the likely effect of the fire services levy reform in trade or commerce to substantiate that claim.

By contrast, clause 31 concerns false, misleading or deceptive statements to anyone about the abolition of the fire services levy and does not require proof that the speaker knew of the falsehood or intended to mislead or deceive.^{xxiv}

The Second Reading Speech remarks:

Penalties for contravention of these prohibitions are substantial and are consistent with the penalties introduced by the commonwealth into the Trade Practices Act in 1999-2000 in respect of similar prohibitions around the introduction of the goods and services tax.

The Committee notes that the equivalent federal provision relating to the goods and services tax was limited to conduct that is 'in trade or commerce, for the purpose of price exploitation, in connection with the supply or possible supply of goods or services' or the promotion of that supply.^{xxv} By contrast, clause 31 is potentially applicable to false, misleading or deceptive statements in non-commercial contexts.

The Committee will write to the Minister seeking further information as to whether or not clause 31's application to unintentionally false, misleading or deceptive statements in non-commercial contexts is reasonably necessary according to the test for limits on freedom of expression set out in Charter s. 15(3). Pending the Minister's response, the Committee draws attention to clause 31.

Minister's Response

Thank you for your letter dated 27 November 2012 concerning the Fire Services Levy Monitor Bill 2012 (FSLM Bill).

The prohibition in clause 31 of the FSLM Bill is intended to apply to situations where a person seeks to justify an increase in the price of goods or services on the alleged impact of the fire services levy reform. It was not intended that clause 31 apply to statements made (for example) in political, media or other public discourse around the reforms.

To put beyond doubt that the prohibition in clause 31 is not intended to affect freedom of expression and will only apply to conduct in trade or commerce, the Government moved a house amendment in the Legislative Assembly to insert the qualifying words "in trade or commerce" into clause 31.

As amended, the chapeau to clause 31 of the FSLM Bill now provides:

"A person must not engage in any conduct in trade or commerce which- "

I am confident that this amendment will ensure that clause 31 will not operate to unreasonably limit the right to freedom of expression under the Charter Act.

I trust this information is of assistance to you.

HON. MICHAEL O'BRIEN MP
Minister for Consumer Affairs

3 December 2012

The Committee thanks the Minister for this response.

^{xxiv} Clause 38 (1). However, reasonable mistake and due diligence are defences in penalty proceedings and the court may consider the defendant's intentions or knowledge when determining the amount of the penalty: clauses 32(3)(b) and 33(1).

^{xxv} *Trade Practices Act 1974* (Cth), s. 75AYA (inserted by the *A New Tax System (Trade Practices Amendment) Act 2000* (Cth), Schedule 1, clauses 2 and 9.) Compare clause 76(1) (empowering the Monitor to require a person to substantiate claims about the effect or likely effect of the fire services levy reform), which is limited to 'a claim or representation in trade or commerce'.

Integrity and Accountability Legislation Amendment Bill 2012

The Bill was introduced into the Legislative Assembly on 13 November 2012 by the Hon. Andrew McIntosh MP. The Committee considered the Bill on 26 November 2012 and made the following comments in Alert Digest No. 17 of 2012 tabled in the Parliament on 27 November 2012.

Committee Comment

Charter report

Compelled self-incrimination – Admission of compelled statements in prosecutions relating to agencies overseen by the Victorian Inspectorate

Summary: Clauses 51, 215 and 278 allow the Victorian Inspectorate to compel anyone to truthfully state whether or not he or she is guilty of an offence under a statute governing a body it oversees and then supply that answer to a prosecutor for use as evidence against that person at a later trial for that offence. The Committee will write to the Minister seeking further information as to whether or not provisions in other Australian integrity legislation governing the use of compelled self-incriminatory answers are a less restrictive means reasonably available to achieve the purpose of facilitating the Victorian Inspectorate's oversight functions

The Committee notes that clauses 51, 215 and 278 amend existing s. 33T of the *Victorian Inspectorate Act 2011*, which bars the admission in most legal proceedings of incriminatory answers given at witness summons. The three clauses provide for exceptions to this ban for proceedings for any offence under, respectively, the *Major Crime (Investigative Powers) Act 2004*, the *Audit Act 1994* and the *Ombudsman Act 1973*, which govern bodies the Victorian Inspectorate oversees. **The effect of clauses 51, 215 and 278 is to allow the Victorian Inspectorate to compel anyone to truthfully state whether or not he or she is guilty of such an offence and then supply that answer to a prosecutor for use as evidence against that person at a later trial for that offence.** The Committee considers that clauses 51, 215 and 278 may engage the Charter's right against compelled self-incrimination.^{xxvi}

The Statement of Compatibility remarks:

The objective of providing the Victorian Inspectorate with this power is to facilitate its oversight of the Chief Examiner, Examiners, the Auditor-General and the Ombudsman, all of which have significant powers. The Victorian Inspectorate will have an important role in ensuring the integrity and probity of the Auditor-General's and the Ombudsman's operations. It is therefore appropriate that the Victorian Inspectorate have the necessary powers to fulfil this function.

Provisions such as these are standard in legislation relating to investigatory bodies in Australia and are important to ensure that the Victorian Inspectorate has the tools it needs to undertake full and proper investigations.

The Committee notes that similar provisions in other Australian integrity legislation may only permit the admission of compelled self-incriminatory answers in later prosecutions for perjury, contempt or obstruction of the integrity body or (in some instances) other offences against integrity body's own statute.^{xxvii} In some jurisdictions where a single body performs

^{xxvi} Charter ss. 24(1) & 25(2)(k).

^{xxvii} *Law Enforcement Integrity Commissioner Act 2006* (Cth), s. 96(4)(c)-(f); *Crime Commission Act 2012* (NSW), s. 64(2); *Independent Commission Against Corruption Act 1988* (NSW), s. 37(4)(a), (b); *Police Integrity Commission Act 1996* (NSW), s. 28(2) & *Royal Commissions Act 1923* (NSW), s. 17(3)(a), (b); *Crime & Misconduct Act 2001* (Qld), ss. 197(3)(b)(i), (ii), 318(9)(a); *Corruption and Crime Commission Act 2003* (WA), ss. 145(1)(i), (ii), 197(3) & *Royal Commission Act 1968* (WA), s. 20. See also *Independent Commission Against Corruption Bill 2012* (SA), schedule 2, cl 8(5)(d).

both integrity function and Chief Examiner functions, this may permit the use of compelled self-incriminatory answers in prosecutions for offences relating to powers equivalent to those of the Chief Examiner.^{xxviii} For offences under separate legislation of agencies subject to oversight, other Australian integrity bodies generally may compel self-incriminatory answers and adduce evidence obtained as a result of those answers in later prosecutions, but cannot offer the answers themselves in evidence in prosecutions against the people who gave them.^{xxix}

The Committee will write to the Minister seeking further information as to whether or not the provisions in other Australian integrity legislation governing the use of compelled self-incriminatory answers are a less restrictive means reasonably available to achieve clauses 51, 215 and 278's purpose of facilitating the Victorian Inspectorate's oversight function. Pending the Minister's response, the Committee draws attention to clauses 51, 215 and 278.

Minister's Response

Thank you for your letter dated 27 November 2012 requesting my advice in relation to the Integrity and Accountability Legislation Amendment Bill 2012 ("the Bill").

As noted in the second reading speech, the Bill completes the legislative framework for the Government's integrity reforms, and provides for the transition to the new integrity system. Among other matters, the Bill provides the Victorian Inspectorate ("VI"), as established by the *Victorian Inspectorate Act 2011* ("VI Act"), with oversight functions, duties and powers in relation to the Auditor-General, the Ombudsman and the offices of Chief Examiner and Examiner.

I now turn to the request for advice directed to me in the Committee's Report, as contained within Alert Digest No. 17 of 2012 and as tabled in Parliament on 30 April 2012.

Clauses 51, 215 and 278

Clauses 51, 215 and 278 of the Bill amend existing section 33T of the VI Act, which bars the admission in legal proceedings of incriminatory answers given in accordance with a witness summons – with certain exceptions.

It is common for Australian integrity bodies to be empowered to compel answers by overriding the privilege against self-incrimination. Section 33T of the VI Act already allows the VI to do this – in relation to its existing oversight functions for the Independent Broad-based Anti-corruption Commission (the IBAC).

While inspectorates exist for anti-corruption bodies in other states, this Bill makes the VI unique as an inspectorate with oversight responsibilities across the state's key integrity agencies.

The *Victorian Inspectorate Amendment Act 2012* amended the VI Act to provide that, where self-incriminating evidence is compelled by the VI, that evidence may be used in proceedings for an offence against the *Independent Broad-based Anti-corruption Commission Act 2011*. The Bill therefore acknowledges the VI's new oversight functions by extending the proceedings in which self-incriminating evidence may be admissible to include offences

^{xxviii} See the provisions of the *Crime and Misconduct Act 2001* (Qld) and the *Corruption and Crime Commission Act 2003* (WA).

^{xxix} *Law Enforcement Integrity Commissioner Act 2006* (Cth), s. 96(4)(a), (b); *Crime Commission Act 2012* (NSW), s. 64(2); *Independent Commission Against Corruption Act 1988* (NSW), s. 37(3); *Police Integrity Commission Act 1996* (NSW), s. 28 & *Royal Commissions Act 1923* (NSW), s. 17(2); *Crime & Misconduct Act 2001* (Qld), ss. 197(2), 318(9); *Corruption and Crime Commission Act 2003* (WA), ss. 145(1)(a), 197(3) & *Royal Commission Act 1968* (WA), s. 20. Compare *Integrity Act 2009* (Tas), s. 92. See also *Independent Commission Against Corruption Bill 2012* (SA), schedule 2, cl 8(5)(a).

against the *Major Crime (Investigative Powers) Act 2004*, the *Audit Act 1994* and the *Ombudsman Act 1973*.

The VI's ability to abrogate the privilege against self-incrimination, and for such compelled evidence to be admissible in certain legal proceedings, should be considered in the context of the VI's role – that is, to provide independent oversight of the integrity bodies and officers within its jurisdiction. The VI's power to require a person to answer questions is limited to matters it is authorised to investigate in the performance of this role.

The Government's reform of Victoria's integrity regime has stressed the fundamental importance of effective oversight of Victoria's key integrity bodies. These bodies play a vital role in ensuring confidence in public sector propriety, and exercise significant powers in carrying out this role. It is therefore important that these bodies are themselves subject to effective accountability measures, and that the VI has the necessary powers to fulfil its functions.

Further, offending by any person against the crimes referred to in the amended section 33T would undermine the efficacy of Victoria's integrity system. Section 33T therefore promotes compliance with the statutory regimes of the IBAC, Auditor-General, Ombudsman and the offices of Chief Examiner and Examiner, in addition to facilitating robust oversight of these bodies and officers.

As indicated in the Statement of Compatibility, it will remain open to a court, under the rules of evidence and procedure, and taking into account the *Charter of Human Rights and Responsibilities Act 2006*, to consider whether and in what circumstances information disclosed is admitted as evidence in any eventual proceeding.

I am of the view that the clauses 51, 215 and 278 are appropriate and important provisions to enable the VI to achieve its purpose and that there are no less restrictive means reasonably available to achieve the purpose of these clauses.

Thank you for providing me with the opportunity to comment on clauses 51, 215 and 278 of the Integrity and Accountability Legislation Amendment Bill.

Andrew McIntosh MP

Received 10 December 2012

The Committee thanks the Minister for this response.

Protected Disclosure Bill 2012

The Bill was introduced into the Legislative Assembly on 13 November 2012 by the Hon. Andrew McIntosh MP. The Committee considered the Bill on 26 November 2012 and made the following comments in Alert Digest No. 17 of 2012 tabled in the Parliament on 27 November 2012.

Committee Comment

Section 17(a)(vi) legislative power

- The commencement provision states ‘The Act comes into operation on a day or days to be proclaimed’ [2]. There is no default commencement date or explanation in the Explanatory Memorandum or Second Reading Speech. It contains the various definitions for the purposes of the Act [2-8].

The Committee will write to the Minister for further information and explanation as to why there is no default commencement provision. The Committee draws the provision to the attention of the Parliament.

Minister’s Response

Thank you for your letter dated 27 November 2012 regarding the Protected Disclosure Bill 2012 (“Bill”). I refer to the Scrutiny of Acts and Regulations Committee’s request for advice directed to me in the Report contained within Alert Digest No. 17 of 2012.

As I noted in its second reading speech, the Bill is a vital component of the legislative framework for the Government’s integrity reforms. As with other pieces of legislation establishing Victoria’s new integrity system, there is no default commencement date for the Bill. This approach was taken because:

- flexibility of commencement is required to ensure that the various legislative components of the new integrity scheme can commence together; and
- the precise date of commencement depends on a number of factors, including the anticipated declaration by the Commonwealth Attorney-General of the Independent Broad-based Anti-corruption Commission as a telecommunication interception (TI) “agency”, thereby allowing it to use TI powers upon commencement of the legislation.

I am therefore of the view that it is appropriate that the Bill commence on a day to be proclaimed. Thank you for providing me with the opportunity to comment on these matters.

Andrew McIntosh MP

Received 10 December 2012

The Committee thanks the Minister for this response.

**Committee Room
10 December 2012**

Appendix 1

Index of Acts and Bills in 2012

	Alert Digest Nos.
Accident Compensation Amendment (Repayments and Dividends) Bill 2012	5
Alcoa (Portland Aluminium Smelter) (Amendment) Act Amendment Bill 2012	17
Appropriation (2012/2013) Bill 2012	8
Appropriation (Parliament 2012/2013) Bill 2012	8
Associations Incorporation Reform Bill 2011	1, 4
Australian Consumer Law and Fair Trading Bill 2011	1, 4
Building Amendment Bill 2012	2
Carers Recognition Bill 2012	2
City of Melbourne Amendment (Enrolment) Act 2012	10
City of Melbourne Amendment (Environmental Upgrade Agreement) Bill 2012	2
Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2012	15
Civil Procedure Amendment Bill 2012	11
Climate Change and Environment Protection Amendment Bill 2012	15
Community Based Sentences (Transfer) Bill 2012	10
Commission for Children and Young People Bill 2012	17
Control of Weapons and Firearms Acts Amendment Bill 2011	1, 4
Courts and Sentencing Legislation Amendment Bill 2012	7
Criminal Organisations Control Bill 2012	17, 18
Criminal Procedure Amendment Bill 2012	11, 12
Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Bill 2012	11
Disability Amendment Bill 2012	4, 5
Drugs, Poisons and Controlled Substances Amendment Bill 2012	13, 16
Drugs, Poisons and Controlled Substances Amendment (Supply by Midwives) Bill 2012	4
Duties Amendment (Landholder) Bill 2012	8
Education Legislation Amendment (Governance) Bill 2012	16
Education Legislation Amendment (VET Sector, Universities and Other Matters) Bill 2012	8
Electronic Conveyancing (Adoption of National Law) Bill 2012	17
Emergency Services Legislation Amendment Bill 2011	1
Energy Legislation Amendment Bill 2012	12
Evidence Amendment (Journalist Privilege) Bill 2012	10
Evidence (Miscellaneous Provisions) Amendment (Affidavits) Bill 2012	3
Fire Services Levy Monitor Bill 2012	17, 18
Fire Services Property Levy Bill 2012	13
Forests Amendment Bill 2012	7
Free Presbyterian Church Property Amendment Bill 2012	12
Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011	1
Gambling Legislation Amendment (Transition) Bill 2012	7
Health (Commonwealth State Funding Arrangements) Bill 2012	9, 11
Health Professions Registration (Repeal) Bill 2012	6
Health Services Amendment (Health Purchasing) Bill 2012	18
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	7, 8
Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011	1
Integrity and Accountability Legislation Amendment Bill 2012	17, 18

Scrutiny of Acts and Regulations Committee

Justice Legislation Amendment Bill 2012	4
Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012	17
Justice Legislation Amendment (Miscellaneous) Bill 2012	15
Land (Revocation of Reservations) Bill 2012	6
Legal Profession and Public Notaries Amendment Bill 2012	4
Liquor Control Reform Amendment Bill 2012	17
Local Government (Brimbank City Council) Amendment Bill 2012	9
Local Government Legislation Amendment (Miscellaneous) Bill 2012	11, 14
Marriage Equality Bill 2012	10, 11
Mineral Resources (Sustainable Development) Amendment Bill 2012	15
Monetary Units Amendment Bill 2012	8
National Energy Retail Law (Victoria) Bill 2012	6, 8
Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Bill 2012	15, 16
Parliamentary Salaries and Superannuation Amendment (Salary Restraint) Bill 2012	8
Planning and Environment Amendment (General) Bill 2012	13
Planning and Environment Amendment (VicSmart Planning Assessment) Bill 2012	11
Police and Emergency Management Legislation Amendment Bill 2012	8
Police Regulation Amendment Bill 2012	16
Port Bellarine Tourist Resort (Repeal) Bill 2012	5
Port Management Amendment (Port of Melbourne Corporation Licence Fee) Bill 2011	1
Port Management Further Amendment Bill 2012	7
Primary Industries and Food Legislation Amendment Bill 2012	12, 14
Primary Industries Legislation Amendment Bill 2012	7
Protected Disclosure Bill 2012	17, 18
Racing Legislation Amendment Bill 2012	11
Residential Tenancies Amendment Bill 2012	9
Residential Tenancies and Other Consumer Acts Amendment Bill 2012	12
Resources Legislation Amendment (General) Bill 2012	13
Retail Leases Amendment Bill 2012	14
Retirement Villages Amendment (Information Disclosure) Bill 2012	16
Road Management Amendment (Peninsula Link) Bill 2012	15, 16
Road Safety Amendment Bill 2012	8
Road Safety Amendment (Car Doors) Bill 2102	2
Road Safety Amendment (Drinking While Driving) Act 2011	1
Road Safety Amendment (Operator Onus) Bill 2012	16
Road Safety and Sentencing Acts Amendment Act 2012	12, 14
Royal Women's Hospital Land Bill 2012	6
State Taxation Acts Amendment Bill 2012	8
State Taxation and Other Acts Amendment Bill 2012	16
Serious Sex Offenders (Detention and Supervision) Amendment Bill 2012	14
Statute Law Repeals Bill 2012	4
Tobacco Amendment (Shopper Loyalty Schemes) Bill 2012	15
Tobacco Amendment (Smoking at Patrolled Beaches) Bill 2012	15
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	18
Traditional Owner Settlement Amendment Bill 2012	14
Transport (Compliance and Miscellaneous) Amendment (Fares) Bill 2012	6
Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012	14, 15
Victorian Inspectorate Amendment Bill 2012	5, 6
Water Legislation Amendment Bill 2012	18
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	5
Water Amendment (Governance and Other Reforms) Bill 2012	4, 5
Working with Children Amendment Bill 2012	9, 10

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) Rights or freedoms

Road Safety and Sentencing Acts Amendment Act 2012 12

(vi) inappropriately delegates legislative power

Health (Commonwealth State Funding Arrangements) Bill 2012 9
Protected Disclosure Bill 2012 17

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

Associations Incorporation Reform Bill 2011	1
Australian Consumer Law and Fair Trading Bill 2011	1
Control of Weapons and Firearms Acts Amendment Bill 2011	1
Criminal Organisations Control Bill 2012	17
Criminal Procedure Amendment Bill 2012	11
Drugs, Poisons and Controlled Substances Amendment Bill 2012	13
Fire Services Levy Monitor Bill 2012	17
Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012	7
Integrity and Accountability Legislation Amendment Bill 2012	17
Local Government Legislation Amendment (Miscellaneous) Bill 2012	11
Marriage Equality Bill 2012	10
National Energy Retail Law (Victoria) Bill 2012	6
Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Bill 2012	15
Primary Industry and Food Legislation Amendment Bill	12
Road Management Amendment (Peninsula Link) Bill 2012	15
Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012	14
Victorian Inspectorate Amendment Bill 2012	5
Water Amendment (Governance and Other Reforms) Bill 2012	4
Working with Children Amendment Bill 2012	9

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
Working with Children Amendment Bill 2012	Attorney-General	05-06-12 16-06-12	9 of 2012 10 of 2012
Health (Commonwealth State Funding Arrangements) Bill 2012	Minister for Health	05-06-12 19-06-12	9 of 2012 11 of 2012
Marriage Equality Bill 2012	Ms Sue Pennicuik MLC	19-06-12 10-08-12	10 of 2012 11 of 2012
Criminal Procedure Amendment Bill 2012	Attorney-General	14.08.12 23.08.12	11 of 2012 12 of 2012
Primary Industries and Food Legislation Amendment Bill 2012	Minister for Agriculture and Food Security	28.08.12 13.09.12	12 of 2012 14 of 2012
Road Safety and Sentencing Acts Amendment Act 2012	Attorney-General	28.08.12 20.09.12	12 of 2012 14 of 2012
Local Government Legislation Amendment (Miscellaneous) Bill 2012	Minister for Local Government	14.08.12 04.10.12	11 of 2012 14 of 2012

Scrutiny of Acts and Regulations Committee

Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012	Minister for Ports	09.10.12 18.10.12	14 of 2012 15 of 2012
Drugs, Poisons and Controlled Substances Amendment Bill 2012	Minister for Police and Emergency Services	11.09.12 25.10.12	13 of 2012 16 of 2012
Road Management Amendment (Peninsula Link) Bill 2012	Minister for Roads	23.10.12 31.10.12	15 of 2012 16 of 2012
Offshore Petroleum and Greenhouse Gas Storage Amendment (NOPSEMA) Bill 2012	Minister for Energy and Resources	23.10.12 08.11.12	15 of 2012 16 of 2012
Criminal Organisations Control Bill 2012	Attorney-General	27.11.12 10.12.12	17 of 2012 18 of 2012
Fire Services Levy Monitor Bill 2012	Minister for Consumer Affairs	27.11.12 03.12.12	17 of 2012 18 of 2012
Integrity and Accountability Legislation Amendment Bill 2012	Minister for responsible for the establishment of an anti-	27.11.12 10.12.12	17 of 2012 18 of 2012
Protected Disclosure Bill 2012	Minister for responsible for the establishment of an anti-	27.11.12 10.12.12	17 of 2012 18 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

Practice Note No. 4

The Committee's Practice Notes provide information to Victorian Government legislation officers. In relation to Bills or provisions of Bills which engage its terms of reference, the Committee prefers that information is set out in explanatory material¹ provided at the time a Bill is introduced in Parliament.

This Practice Note addresses provisions which create exceptions to criminal offences where such exceptions may place a legal onus on an accused without express words to that effect.²

Keywords – Presumption of innocence – Exceptions to criminal offences – Whether legal onus on the accused

Victorian legislation often sets out exceptions to criminal offences, using language such as 'It is a defence to a prosecution for an offence if...' or 'A person is not liable to be prosecuted for an offence if...' or 'A person is not guilty of an offence if...' or a particular offence provision 'does not apply if...'

The Committee notes that any provision that places a legal onus of proof on a person accused of a criminal offence may engage the Charter right of an accused person to be presumed innocent until proved guilty according to law.³ The Committee may write to Ministers where the explanatory material for a Bill that introduces or significantly alters such an exception does not state whether or not the exception places a legal onus on the accused.

For exceptions to summary offences, the explanatory material may address the effect of s.72 of the *Criminal Procedure Act 2009*.⁴

For exceptions that impose a legal onus on the accused without express words to that effect, the statement of compatibility may address whether or not the inclusion of express words would be a less restrictive alternative reasonably available to achieve the exception's purpose.⁵

¹ Explanatory material includes – (1) a Statement of Compatibility made under section 28 of the *Charter of Human Rights and Responsibilities Act 2006*, (2) an explanatory memorandum (clause notes), and (3) Ministerial correspondence.

² See *Alert Digest No. 14 of 2012*, p. 16 (Ministerial correspondence on the Primary Industries and Food Legislation Amendment Bill 2012, clause 33), referring to advice from the Office of the Chief Parliamentary Counsel and the Victorian Government Solicitors Office.

³ Charter s. 25(1).

⁴ Section 72 of the *Criminal Procedure Act 2009* provides that such exceptions place an 'evidential' onus on an accused to present or point to evidence that suggests that the exception would be established.

⁵ Further expectations for statements of compatibility for provisions that place a legal onus on the accused are set out in *Practice Note No. 3*.