No. 1 of 2011

Tuesday, 1 March 2011

On the

Building Amendment Bill 2011
Bushfires Royal Commission Implementation Monitor Bill 2011
Civil Procedure Bill 2010
Civil Procedure and Legal Profession Amendment Bill 2011
Education and Training Reform Amendment (School Safety) Bill 2010
Police Regulation Amendment (Protective Services Officers) Bill 2010
Sentencing Amendment Act 2010
Sentencing Further Amendment Bill 2010
Shrine of Remembrance Bill 2011
Shop Trading Reform Amendment (Easter Sunday) Bill 2011
Statute Law Revision Bill 2011
Victoria Law Foundation Amendment Bill 2011

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Glossary and Symbols

'*Article*' refers to an Article of the International Covenant on Civil and Political Rights;

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

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

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

'*Committee*' refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;

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

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

'*Covenant*' refers to the International Covenant on Civil and Political Rights;

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

'***penalty units'*** refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette *(*currently one penalty unit equals $116.82).

'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.

Useful provisions

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.

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.

The Committee has considered the following Bills –

Building Amendment Bill 2011
Bushfires Royal Commission Implementation Monitor Bill 2011
Civil Procedure and Legal Profession Amendment Bill 2011
Education and Training Reform Amendment (School Safety) Bill 2010
Police Regulation Amendment (Protective Services Officers) Bill 2010
Sentencing Amendment Act 2010
Sentencing Further Amendment Bill 2010
Shrine of Remembrance Bill 2011
Shop Trading Reform Amendment (Easter Sunday) Bill 2011
Statute Law Revision Bill 2011
Victoria Law Foundation Amendment Bill 2011

The Committee notes the following correspondence –

Civil Procedure Bill 2010

Role of the Committee

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

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

Alert Digest No. 1 of 2011

Building Amendment Bill 2011

Introduced	8 February 2011
Second Reading Speech	10 February 2011
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Minister for Planning

Background

The Bill inserts a new section 160B in the *Building Act 1993* (the 'Act') to enable persons to apply to the Building Appeals Board (the 'Board') for a disapplication, modification or variation of an access provision of the building regulations (these are the requirements in the Access Code that are to be inserted in the Building Code of Australia Volume One) *on the ground that compliance would impose unjustifiable hardship on the applicant*. The amendment is a response to recent Federal discrimination law standards dealing with access to buildings and associated services and facilities for persons with disabilities. **[5]**

Under the *Disability Discrimination Act 1992 (Cth)* (the 'DDA') it is unlawful for a person to contravene the national Disability (Access to Premises-Building) Standards 2010 (the Access Standards). One of the objectives of these regulations is to give certainty that if access to buildings is provided in accordance with the Access Standards the provision of access will not be unlawful under the DDA. In deciding whether a person has complied with the Access Standards the Federal Court may look at whether compliance would impose unjustifiable hardship on a person. The Court must take into all the relevant circumstances set out in Part 4.1 of the Access Standards.

The Access Standards also provide that decisions made by State boards or panels established to make recommendations on building access matters are to be taken into account by the Federal Court when determining if a person has acted lawfully, because compliance would impose unjustifiable hardship. In determining an application under section 160B of the Act the Board must take into account similar circumstances to those considered by the Federal Court in Part 4.1 of the Access Standards.

> **Note:** *Members will find more detailed explanatory material concerning the purpose of these amendments in the General section of the Explanatory Memorandum provided with this Bill.*

The Bill will also enable Volume One and Two of the National Construction Code Series (Building Code of Australia) to be adopted by and form part of the Building Regulations 2006 and Volume Three of the National Construction Code Series (Plumbing Code of Australia) to be adopted by and form part of the Plumbing Regulations 2008. **[3 and 6]**

Charter report

Recognition and equality before the law – Equal and effective protection against discrimination – Impairment discrimination – Access provisions of building standards – Definition of unjustifiable hardship

Summary: The Bill uses a different definition of unjustifiable hardship from that used in the national premises standards. The Committee will write to the Minister seeking further information.

The Committee notes that clause 5, inserting a new section 160B, provides for the Building Appeals Board to determine that, because compliance would impose unjustifiable hardship, an access provision of building regulations does not apply to a building. The Committee considers that clause 5 engages the Charter right of disabled people to equal and effective protection against discrimination on the basis of impairment.[1]

The Statement of Compatibility *remarks:*

> *I consider new section 160B inserted by clause 5 of the bill is necessary for consistency with the national premises standards and the Disability Discrimination Act 1992 (cth).*

However, the Committee observes that the Bill uses a different definition of unjustifiable hardship from that used in the national premises standards:

- Section 4.1(5) of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) provides:

  > *For these Standards,* ***unjustifiable hardship*** *is to be interpreted and applied having due regard to the scope and objects of the Act (in particular the object of removing discrimination as far as possible) and the rights and interests of all relevant parties.*

  ('Act', in the Standards, means the *Disability Discrimination Act 1992* (Cth).[2])

- New section 160B(7) provides:

  > *For the purposes of this section,* ***unjustifiable hardship*** *is to be interpreted and applied having due regard to the rights and interests of all relevant parties.*

The Committee is concerned that the definition in new section 160B(7) may provide less protection to disabled people than the definition in the national premises standards.

The Committee will write to the Minister seeking further information as to the significance of the difference between new section 160B(7) and s. 4.1(5) of the Disability (Access to Premises – Buildings) Standards 2010 (Cth). Pending the Minister's response, the Committee draws attention to new section 160B(7).

The Committee makes no further comment.

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1 Charter s. 8(3) c.f. Charter s. 3 ('discrimination') and s. 6(b), *Equal Opportunity Act 1995* (Vic).

2 *Disability (Access to Premises – Buildings) Standards 2010* (Cth), s. 1.4(1). The objects of the *Disability Discrimination Act 1992* (Cth) are to eliminate, as far as possible, discrimination of persons on the ground of disability in the areas of... access to premises; to ensure, as far as practicable, that disabled persons have the same rights to equality before the law as the rest of the community; and to promote recognition and acceptance within the community of the principle that persons with disability have the same fundamental rights as the rest of the community: s. 3.

Bushfires Royal Commission Implementation Monitor Bill 2011

Introduced	8 February 2011
Second Reading Speech	10 February 2011
House	Legislative Assembly
Member introducing Bill	Hon. Peter Ryan MLA
Portfolio responsibility	Minister for Bushfire Response

Background

The Bill –

- establishes the position of the Bushfires Royal Commission Implementation Monitor (the 'Monitor').
- provides for the functions, powers and duties of the Monitor.
- provides for the preparation of an Implementation Plan in response to the Bushfires Royal Commission.

Content

The Bill defines 'agency' as a State government Department, government agency (other than a Council) or State employee that is specified in the Implementation plan to carry out an implementation action **[3],** and in addition allows the Governor in Council to specify a body or entity (with their consent) to be an agency for the purposes of the Act. **[14]**

The Bill provides a power to require information to be given to the Monitor by an agency **[16]**; in respect to a government or other entity with responsibility in carry out an implementation action, powers of entry, to inspect a place, document, thing or activity in that place. **[14 and 17]** Establish a duty on a State employee or officer to co-operate with the Monitor. **[19]**

The Bill removes any obligation on a State agency or employee to maintain secrecy imposed by any Act or law in respect to disclosures that must be made to the Monitor under this legislation.

Part 3 of the Bill provides that the Minister must prepare, table in Parliament and publish on an appropriate Internet site an Implementation Plan. **[22 and 23]**

The Act is repealed on 30 September 2012. **[25]**

The Committee makes no further comment.

Civil Procedure and Legal Profession Amendment Bill 2011

Introduced	8 February 2011
Second Reading Speech	10 February 2011
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Background

The Bill amends the *Civil Procedure Act 2010* (the 'Act') to repeal Chapter 3 and other consequential provisions that relate to the mandatory civil proceedings pre-litigation requirements that were due to commence on 1 July 2011.

> **Note:** *The discretionary power for courts to have regard to any mandatory or voluntary pre-litigation processes will continue to exist under the amended section 9 of the Act.*

The Bill also amends the *Legal Profession Act 2004* to allow for the grant or renewal of practising certificates without the need of a supporting statutory declaration. Instead, the Bill makes provision for practitioners to complete a form approved by the Legal Services Board which will allow a declaration to be completed online.

The Committee makes no further comment.

Education and Training Reform Amendment (School Safety) Bill 2010

Introduced	21 December 2010
Second Reading Speech	21 December 2010
House	Legislative Assembly
Member introducing Bill	Hon. Martin Dixon MLA
Portfolio responsibility	Minister for Education

Purpose

The Bill amends the *Education and Training Reform Act 2006* (the 'Act') to provide for certain powers for Government school principals and others in relation to weapons and other harmful items in the possession of students. The Bill makes consequential amendments to the *Control of Weapons 1990* and the *Firearms Act 1996.*

Content

The Bill amends the Act to authorise principals of a Government schools (a principal) to make a declaration banning harmful items (see note below) that must not be brought onto school premises, or allowing such items only at times and for purposes specified in the declaration. A declaration may only be made concerning items that the principal reasonably believes are likely to be used in a threatening, violent or harmful manner (new 5.8A.1 and 5.8A.2).

A principal, assistant principal or any authorised teacher of a Government school may search for and seize harmful items as defined by the Bill (including declared items) that are on school grounds, or in the possession of students at school or when engaged in teacher supervised student activities. A person must not conduct a search unless they have a reasonable suspicion that the search will uncover harmful items. A search and seizure powers must be exercised in accordance with any Regulations (new 5.8A.3 and 5.8A.4). *(see Charter report below)*

> **Note:** Extract from the Explanatory Memorandum – *Harmful items are defined as those items covered by the Control of Weapons Act 1990 and the Firearms Act 1996, those items declared by the principal to be banned, or those items which the principal reasonably suspects are being used, or are likely to be used in a threatening, violent or harmful manner.*

Extract from the Statement of Compatibility –

> *While I acknowledge that the right to privacy is engaged by these provisions, I note that students may have a diminished expectation of privacy in a school environment. A student should be aware that they must comply with school regulations, and that it is not appropriate to bring certain items, such as weapons, on to school grounds or on school activities.*
>
> *… Further, there are important limitations on the search powers authorised in the bill. First, the search power does not extend to the student's person. Searches only apply to premises, vehicles, lockers, and storage items carried by the student or brought by the student onto the premises. In addition, the principal, assistant principal or authorised teacher must reasonably suspect that the search will uncover harmful items. The bill therefore does not authorise arbitrary, unreasonable, or overly intrusive searches.*
>
> *For these reasons, I consider that the search powers do not constitute an arbitrary or unlawful interference with privacy, and therefore the bill does not limit the right to privacy in section 13 of the charter.*

The Bill amends the *Control of Weapons 1990* and the *Firearms Act 1996* to make an exemption for persons having temporary possession of weapons or firearms that come into their possession as a

result of the exercise of the new search and seizure powers proposed to be inserted in to the Act by the provisions in this Bill. **[5 to 7]**

Committee comment

Search and seizure – Standard of satisfaction for exercise of power – Reasonable suspicion

The Committee notes that the search powers proposed by the Bill may be exercised on the grounds of 'reasonable suspicion' rather than the higher standard of reasonable belief. The question whether the lesser standard of satisfaction for the exercise of the power is a matter for Parliament to determine.

The Committee draws attention to the provision.

Charter report

Privacy – Property – Power to search students' bags – Power to ask students to disclose concealed items – Requirement to surrender items to police upon request – Limits of powers set by regulations

Summary: Clause 3 gives government school officials new powers with respect to harmful items. The Committee is concerned that some exercises of the new powers may limit Charter rights with respect to privacy and property, if regulations limiting those powers are not enacted before the Bill commences. The Committee will write to the Minister seeking further information. .

The Committee notes that clause 3, inserting a new Part 5.8A into the *Education and Training Reform Act 2006*, gives principals, assistant principals and authorised teachers of government schools new powers with respect to harmful items, including:

- a power to search 'any bag or other article that is being used by a student for storage' for harmful items if the official 'reasonably suspects that the search will uncover harmful items': new sections 5.8A.3(1)(d) & 5.8A.3(2).
- a power to 'ask a student to turn out the student's pockets' and 'to disclose whether or not the student is concealing a harmful item: new section 5.8A.3(3)(c)-(d).
- a requirement to surrender non-weapon items to a police officer 'if so requested by the member of the police force': new section 5.8A.5(2)(b).

The Committee observes that new section 5.8A.3(2) is consistent with rulings in North America permitting searches of students by school officials on the basis of reasonable suspicion.[3] The Supreme Court of Canada has held:[4]

> *This modified standard for reasonable searches should apply to searches of students on school property conducted by teachers or school officials within the scope of their responsibility and authority to maintain order, discipline and safety within the school. This standard will not apply to any actions taken which are beyond the scope of the authority of teachers or principals.*
>
> *Further a different situation arises if the school authorities are acting as agents of the police…. There would obviously be a potential for abuse, were that not the case.*

However, the Committee notes most limitations on the exercise of the search, seizure and retention powers granted by the Bill will be dealt with by regulations.[5] The Second Reading Speech remarks:

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3 *New Jersey v T.L.O*, 469 US 325 (1985); *R v M.(M.R.)* [1998] 3 SCR 39.

4 *R v M.(M.R.)* [1998] 3 SCR 393, [55]-[56] c.f. *New Jersey v T.L.O*, 469 US 325 (1985) (footnote 7.)

5 New sections 5.8A.3(4), 5.8A.4(4) and 5.8A.5(2) provide that any powers must be exercised 'in accordance with any Regulations'.

Regulations will be developed to help guide principals in the exercise of this power and the related seizure powers under this bill. These regulations will establish a framework for the development of appropriate protocols between Victoria Police and the Department of Education and Early Childhood Development, on behalf of principals, regarding the manner in which certain powers should be exercised in different circumstances, and how seized items should be handled and how school principals will liaise with Victoria Police in the execution of these new powers.

The Committee is concerned that some exercises of the new powers may limit Charter rights with respect to privacy and property, if regulations limiting those powers are not enacted before the Bill commences.[6]

In particular:

- new section 5.8A.3(1)(d) appears to permit searches of students' property conducted at the request of the police, without complying with restrictions on the police's own search powers.[7]
- new section 5.8A.3(3)(c)-(d) appears to permit requests to students to turn out their pockets or disclose concealed items without informing them that they do not have to obey such requests.[8]
- new section 5.8A.5(2)(b) appears to permit police to seize non-weapon items without complying with restrictions on the police's general seizure powers.[9]

The Committee will write to the Minister seeking further information as to whether or not regulations under new sections 5.8A.3(4), 5.8A.4(4) and 5.8A.5(2) will be enacted before the commencement of new Part 5.8A. Pending the Minister's response, the Committee draws Parliament's attention to new sections 5.8A.3(1)(d), 5.8A.3(3)(c) and 5.8A.5(2)(b).

The Committee makes no further comment.

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6 Charter s. 13(a) provides that 'A person has the right… not to have his or her privacy… unlawfully or arbitrarily interfered with'. Charter s. 20 provides that 'A person must not be deprived of his or her property other than in accordance with law.'

7 For example, the police's powers to search for weapons are conditioned on informing the person being searched of their grounds for suspicion: s. 10(1)(b), *Control of Weapons Act 1990*; s. 149(1)(b), *Firearms Act 1996*.

8 New section 5.8A.3(1) does not authorise any searches of students' clothing or bodies. The personal search powers in s. 10, *Control of Weapons Act 1990* and s. 149, *Firearms Act 1996* are only available to 'a member of the police force'. Personal searches for other items generally require a warrant or an arrest.

9 In general, seizure requires a reasonable belief that the item to be seized is the object, instrument or evidence of an offence: *Crimes Act 1958*, s. 465(1).

Police Regulation Amendment (Protective Services Officers) Bill 2010

Introduced	21 December 2010
Second Reading Speech	21 December 2010
House	Legislative Assembly
Member introducing Bill	Hon. Peter Ryan MLA
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

The Bill amends sections 118B(1) and 118B(1A) of the *Police Regulation Act 1958* respectively to –

- broaden the purposes for which Protective Service Officers can be appointed to include the protection of 'the general public in certain places'.
- remove the existing cap on the number of Protective Service Officers that can be appointed.

The Committee makes no further comment.

Sentencing Amendment Act 2010

Introduced	5 October 2010
Second Reading Speech	6 October 2010
Royal Assent	19 October 2010
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

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

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

17(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –

(i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or

(ii) (ii) within 10 sitting days after the Act receives Royal Assent —
whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;

Background

The Bill amends the *Sentencing Act 1991* (the 'Act') to repeal suspended sentences for serious offences. The Bill provides for new sentencing options known as intensive correction management orders (ICMO). There will be two variants of these orders, the ICMO (general), and an ICMO (drug and alcohol). The Act makes further amendments to a range of sentencing options.

The Bill also amends the *Road Safety Act 1986* to remove the mandatory term of imprisonment for a subsequent offence of driving whilst disqualified or suspended.

Extract from the Second Reading Speech –

Suspended sentences

… No offender convicted of a serious offence, including armed robbery, sexual penetration of a child under 16 or intentionally causing serious injury, will be able to receive a suspended sentence. For these offences, a sentence of jail will mean a sentence of jail.

The new intensive correction management order

This Bill will abolish the old intensive correction order.

… It will be replaced with the new intensive correction management order (ICMO).

The ICMO will not be a sentence of imprisonment, but it is targeted at those who are at risk of going to jail. If the court considers that an offender may commit further offences and, if this order were not available the court would consider sending that offender to prison, then the court can instead order an ICMO. There will be two variants of this order, the general ICMO, and an ICMO, drug and alcohol.

… The combined custody and treatment order (CCTO) is abolished by this Bill. Like the ICO, this order has been criticised for its inflexibility and has rarely been imposed by the courts.

Breaches of an ICMO

If these orders are breached, the offender will return to the court. It will be presumed by the court that the appropriate response will be to re-sentence the offender for the original crime. An offender who breaches these orders then will be at real risk of being sentenced to a term of imprisonment.

…

Intensive correction management orders in addition to jail

In serious cases it may be appropriate for a court to jail an offender for a short period and subject them to further supervision and treatment on their release from imprisonment. Currently, under the Sentencing Act, a community-based order (CBO) may be imposed in addition to a period of imprisonment of up to three months. An important feature of this Bill is that a court will have the same discretion for an ICMO. Such an option did not exist for courts under the intensive correction order.

Community-based orders

The sentence of a community-based order will remain.

However, to make it clear that it is a lower order sentence and not appropriate for those who commit more serious offences, the amount of hours of community work that can be ordered to be served under a CBO will be capped at 300 hours.

… Capping the CBO at 300 hours will reflect the current practice of the courts and ensure a clear distinction between the more onerous ICMO and the community-based order.

Deferral of sentence

… Deferral is a useful tool for judicial officers. It allows offenders the chance to demonstrate that they are a good candidate for a sentence that provides the opportunity for rehabilitation. It also creates a good incentive for offenders to address the factors that lead to their offending before they are sentenced, in the expectation that the court will impose a sentence that recognises their genuine efforts. For these reasons, in this Bill we accept the recommendations of the SAC to broaden the ability to defer a sentence. The ability to defer a sentence will be extended to all of the Magistrates Court and to the County Court and will apply to all offenders regardless of their age. A sentence will be able to be deferred for up to 12 months. The Bill also provides the courts with the power to review an offender's progress during this period of deferral.

Drive while disqualified

… This Bill will abolish the mandatory jail sentence for this offence. The courts may still sentence a person to jail. The offence still carries a maximum penalty of two years imprisonment. However, if jail is not appropriate, rather than being restricted to imposing a suspended sentence, the courts may use any other sentencing tool, including the new ICMO. This will allow courts to create a sentence that both punishes the offender and requires the offender to comply with conditions to address the behaviour that led to the offending.

Content

Suspended sentences

Section 12 of the Act substitutes a new section 27(2B) in the Act concerning suspended sentences for serious offences. The existing provision allows a court a discretion to impose a suspend sentence for a serious offence because of the existence of *'exceptional circumstances and in the interests of justice'*. The substituted subsection removes that discretion. The note to section 12 provides that a suspended sentence may still be available for a serious offence committed before the commencement of the amendment made by the Act. **[12]**

Intensive correction management orders – Medical treatment – Informed consent

The Bill introduces a new sentencing regime, an Intensive Correction Management Order (ICMO). There are two divisions within the ICMO regime, a general ICMO and drug and alcohol ICMO (ICMODA). A ICMODA involves intensive supervision and treatment of the offender in the community (new section 35C). An ICMO of either kind may only be made if the offender agrees in writing to comply with the order (new section 35D).

The Committee notes this extract from the Statement of Compatibility –

> *Further, the offender must give written consent or give an undertaking to comply with the conditions attached to his or her ICMO, including treatment programs. The offender can refuse to undergo a treatment program, but as a result may forego the benefit of the ICMO and may be required by the court, on re-sentencing, to serve the remaining portion of his or her sentence in prison. Refusal to participate in a treatment program does not, however, comprise an offence, punishable by a further sanction.*
>
> *The requirement that an offender subject to a ICMODA undertake treatment programs is narrowly tailored to addressing the purposes of his or her rehabilitation and the prevention of crime. The amendment alleviates the harshness of a prison sentence by enabling an offender to serve his or her sentence in the community while also supporting such offenders in their rehabilitation. In these circumstances, offenders who participate in treatment programs choose to do so as a condition of obtaining the benefit of the ICMODA and avoiding the more restrictive requirements of imprisonment.*

Charter report

Reduced penalties – Intensive correction management orders – Transitional arrangements

Summary: Sections 4, 5 and 13 provide a new sentencing option – an intensive correction management order – for people who would otherwise be imprisoned. The Committee will write to the Attorney-General seeking further information as to whether or not intensive corrections management orders will be available at the sentencing of offenders whose offences were committed before the Act's commencement.

The Committee notes that s. 5(c), amending s. 7 of the *Sentencing Act 1991*, enables sentencing judges to make an intensive correction management order. Such orders can only be made only if:

- the court would otherwise consider sentencing the offender to a term of imprisonment: s. 13, inserting a new section 35B(2)
- a community-based order would not suffice: s. 4(3), amending existing s. 5(5)
- the offender agrees in writing to comply with the order: s. 13, inserting a new section 35D

Existing s. 5(4) bars sentencing judges from imprisoning an offender if an intensive correction management order would suffice. **In short, ss. 4, 5 and 13 provide a new sentencing option for people who would otherwise be imprisoned.**

Charter s. 27(3) provides that:

> *If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.*

The Supreme Court of Canada has held that a similar provision in that nation's rights Charter means that new, less onerous, alternative punishments must be made available to offenders who have not yet been sentenced for offences committed before the new options were introduced.[10] The Committee therefore considers that Charter s. 27(3) may require that ss. 4, 5 and 13 apply to all offenders awaiting sentence, regardless of when the offence was committed.

The Committee observes that s. 27, inserting a new s. 143(4) into the *Sentencing Act 1991*, provides only for the retrospective application of s. 13 to continuing offences that straddle the commencement date. Also, it does not provide for the retrospective application of ss. 4 and 5. The

[10] *R v Johnson* [2003] 2 SCR 357, [41]-[46].

Committee is concerned that this limited transitional provision for intensive correction management orders may implicitly override the general rule that reduced penalties apply retrospectively.[11]

The Committee will write to the Attorney-General seeking further information as to whether or not intensive corrections management orders will be available at the sentencing of offenders whose offences were committed before the Act's commencement. Pending the Attorney-General's response, the Committee draws attention to ss. 4, 5, 13 and 27, and the requirements of Charter s. 27(3).

The Committee makes no further comment.

[11] *Sentencing Act 1991* (Vic), s. 114(2).

Sentencing Further Amendment Bill 2010

Introduced	21 December 2010
Second Reading Speech	21 December 2010
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Background

The Bill amends the *Sentencing Act 1991* to abolish the availability of the suspended sentence option for certain offences namely –

- recklessly causing serious injury,
- commercial drug trafficking,
- aggravated burglary, and
- arson.

The Bill will also amend the Act to expand the membership of the Sentencing Advisory Council to include a person who is a member of a victim of crime support or advocacy group and an operational member of the police force below commissioned officer rank who is actively engaged in criminal law enforcement.

Submission received

The Committee received a submission from the Victorian Inter-Church Criminal Justice Taskforce.

The Committee makes no further comment.

Shop Trading Reform Amendment (Easter Sunday) Bill 2011

Introduced	8 February 2011
Second Reading Speech	10 February 2011
House	Legislative Assembly
Member introducing Bill	Hon. Louise Asher MLA
Portfolio responsibility	Minister for Innovation, Services and Small Business

Background

The Bill amends the *Shop Trading Reform Act 1996* to remove shop trading restrictions on Easter Sunday.

> **Note:** *The Minister's Second Reading Speech provides that the legislation is intended to take effect before this coming Easter Sunday 24 April 2011.*

The Committee makes no further comment.

Shrine of Remembrance Bill 2011

Introduced	8 February 2011
Second Reading Speech	10 February 2011
House	Legislative Assembly
Member introducing Bill	Hon. Hugh Delahunty MLA
Portfolio responsibility	Minister for Veterans' Affairs

Background

The Bill amends the *Shrine of Remembrance Act 1978* and the *Melbourne Market and Park Lands Act 1933* to amend the composition, duties and powers of the trustees of the Shrine of Remembrance and to further provide for management powers in respect of the Shrine of Remembrance.

The Committee makes no further comment.

Statute Law Revision Bill 2011*

Introduced	9 February 2011
Second Reading Speech	10 February 2011
House	Legislative Council
Member introducing Bill	Hon. David Davis MLC
Portfolio responsibility	Minister for Health

***The Committee notes that this Bill has been referred to the Committee for inquiry and report by the Legislative Council on 10 February 2011 and the Committee intends to table a report as quickly as possible.*

Background

The Bill revises the statute law of Victoria.

Schedule 1 of the Bill lists items 1 to 112. These items make minor amendments to a large number of Acts to correct typographical, spelling, grammatical, cross-references, superfluous words, missing words and other like minor errors or omissions in Acts.

Schedule 2 of the Bill specifies 27 spent or redundant principal or amending Acts that have been identified by the Office of Chief Parliamentary Counsel that now may be repealed.

Content

Retrospective amendments

Items 10.3, 17.2, 25, 43.1, 60.1, 60.2, 75.3, 86.2, 86.3, 99 and 100 make amendments that have retrospective operation.

Item 10.3 – Children's Services Act 1996

The amendment made by item 10.3 is retrospective to 25 May 2009. The amendment corrects an erroneous instruction made in section 22(4) of the *Children's Legislation Amendment Act 2008* to 'insert section 36(3)' rather than as was intended to 'substitute section 36(3)'.

Item 17.2 – Consumer Affairs Legislation Amendment (Reform) Act 2010 (the amending Act)

The amendment made by item 17.2 is retrospective to 28 September 2010. Section 57 of the Act made substantive amendments to section 9AA of the *Sale of Land Act 1962* and section 60(2) of the Act contained a transitional provision (a new section 51 of the *Sale of Land Act 1962*) in respect to that substantive amendment. The cross-reference in new section 51 of the *Sale of Land Act 1962* should have been to section 57 (the substantive amendment made by the Act) rather than to section 65 of the Act. The erroneous reference to section 65 of the Act referred to another amendment made by the Act to the *Retirement Villages Act 1986*.

Item 25 – Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009

The amendment made by item 25.1 is retrospective to 31 December 2009 and amending item 40.39 of the Schedule to correct a reference to section 46ZFB(2A) of the *Crimes Act 1958* whereas the correct reference should have been to section 464ZFB(2A).

The amendment made by item 25.2 is retrospective to 31 December 2009 amending item 106.23 of the Schedule to correct a reference to section 84ZB(b)(i) of the *Road Safety Act 1986* whereas the correct reference should have been to 84ZB(1)(b)(i).

Item 43.1 – Gambling Regulation Further Amendment Act 2009

The amendment made by item 43.1 is retrospective to 20 October 2009 amending section 19(2) to make it clear that the amendment is inserting a new paragraph (ca) after section 3.4.4(1)(c) of the *Gambling Regulation Act 2003*. The original amendment incorrectly contained the instruction 'in section' rather than 'after section'.

Item 60.1 and 60.2 – Mineral Resources (Sustainable Development) Act 1990

The amendments made by items 60.1 and 60.2 are retrospective to 1 January 2010. The amendment to sub-sections 80(4) and (5) substitute the references to 'licensee' with references to 'authority holder'. Most of the references to 'licensees' in the 1990 Act were substituted by section 24(4) and (5) of the *Resources Industry Legislation Amendment Act 2009* but these two were missed.

Item 75.3 and 75.4 - Public Health and Wellbeing Act 2008

The amendment made by item 75.3 is retrospective to 31 December 2009. The amendment to section 256 corrects a reference in words being substituted in section 40(2) of the *Food Act 1984.* The original amendment referred to 'Part XII or XIX' rather than to "Part XII or Part XIX'.

The amendment made by item 75.4 is retrospective to 2 September 2008 amending section 269 to correct an incorrect reference to the *Ambulance Services Act 1986*. The incorrect reference was to 'Ambulances' rather than 'Ambulance'.

Item 86.2 and 86.3 – Severe Substance Dependence Treatment Act 2010

The amendment made by item 86.2 is retrospective to 10 August 2010. The amendment corrects a reference in section 49(1) to section 3(1) of the *Veterinary Practice Act 1997.* The correct reference should have been simply to section 3 as the section does not contain subsections.

The amendment made by item 86.3 is retrospective to 10 August 2010. The amendment omits a superfluous word in section 49(2). The incorrect reference was to an 'alcoholic or a drug-dependent person' whereas the correct reference should have been to 'an alcoholic or drug-dependent person'.

Item 99 – Transport Legislation Amendment Act 2007

The amendment made by item 99 is retrospective to 11 December 2007. The amendment to section 67 corrects the reference to the *Rail Safety Act 2006* (the 'Act') which failed to include the year of the Act.

Item 100 – Transport Legislation Amendment (Compliance, Enforcement and Regulation) Act 2010

The amendment made by item 100 is retrospective to 21 May 2010. The amendment corrects a spelling error in section 77(b) in the amendment to the definition of *prescribed device* in section 208 of the *Transport Act 1983* (which was later renamed the *Transport (Compliance and Miscellaneous) Act 1983*). The erroneous spelling was 'presribed' rather than 'prescribed'.

The Committee makes no further comment.

Victoria Law Foundation Amendment Bill 2011

Introduced	8 February 2011
Second Reading Speech	10 February 2011
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Background

The Bill amends the *Victoria Law Foundation Act 2009* (the 'Foundation') to amend the governance arrangements by reducing the number of Ministerial nominees to the Foundation from a maximum of four to two. The Bill also provides that the Chairperson of the Foundation is the Chief Justice of the Supreme Court (or nominee) and the Chairperson is not subject to Ministerial appointment or removal.

> **Note**: *The Foundation is a statutory body established in 1967 to contribute to the Victorian community and legal sector by improving access to justice through the provision of information, education and grants.*

The Committee makes no further comment.

Civil Procedure Bill 2010

The Bill was introduced into the Legislative Assembly on 22 June 2010 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 26 July 2010 and made the following comments in Alert Digest No. 10 of 2010 tabled in the Parliament on 27 July 2010.

Committee's Comments

Charter report

Operation of the Charter – Exclusion of Charter proceedings from pre-litigation requirements

Summary: Clause 32(1)(b) exempts Charter proceedings from the Bill's provisions for pre-litigation requirements. The Committee is concerned that the clause may deny Charter claimants the benefits of those requirements. It will write to the Attorney-General seeking further information.

The Committee notes that clause 32(1)(b) exempts 'a civil proceeding under section 33 or 39 of the Charter' from the Bill's provisions for pre-litigation requirements *in Parts 3.1 (requiring civil litigants to take reasonable steps to resolve disputes by agreement, clarify and narrow the issues in dispute and not unreasonably refuse negotiations or appropriate dispute resolution) and Part 3.2 (allowing a court to take compliance with these requirements into account in costs and other orders.) The Committee observes that, in contrast to the other categories of proceedings exempted by clause 32(1), clause 32(1)(b) potentially applies in any civil proceeding. The exemption will apply whether the Charter is raised by the plaintiff or defendant (including a public defendant) and whether it is a central or minor element of the litigation.*

The Second Reading Speech remarks:

> *[T]he prelitigation requirements only reflect current good practice. It is recognised that there will be some disputes where it would be unreasonable to require the parties to go through a prelitigation process… To provide some guidance around what matters do not need to follow this process, there are some limited statutory exceptions, including appeals, proceedings under the Charter of Human Rights and Responsibilities, and proceedings in which civil penalties are sought….*

While the Committee appreciates that the purpose of clause 32(1)(b) is to remove potential barriers to bringing Charter claims, it is concerned that the clause may also deny Charter claimants the benefits of Parts 3.1 and 3.2. *It may deter litigants who seek an early resolution of a dispute from relying on the Charter and also permit respondents to Charter claims to needlessly force rights claims into costly court litigation.*

The Committee is also concerned that the meaning of 'a civil proceeding under section 33… of the Charter' is unclear and may be very broad, because Charter s. 33, which governs referrals of Charter questions from lower courts to the Supreme Court, also refers to 'a proceeding before a court or tribunal [where] a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter'. The Court of Appeal has recently held that the Charter now affects every interpretation of every Victorian statutory provision.

The Committee will write to the Attorney-General seeking further information as to the meaning of clause 32(1)(b)'s reference to 'a civil proceeding under section 33 of the Charter'. Pending the Attorney-General's response, the Committee draws attention to clause 32(1)(b).

Minister's Response

I refer to your letter dated 28 July 2010, which requested advice in relation to the Civil Procedure Bill 2010, now the Civil Procedure Act 2010 (the Act).

Generally, the Act's provisions will apply to litigation that raises human rights issues under the Charter of Human Rights and Responsibilities. The only restrictions are in respect of the prelitigation requirements contained in Chapter 3 of the Act, where compliance is not required for proceedings under sections 33 and 39 of the Charter.

I note the Committee's concerns that:

- *section 32(1)(b) of the Act may deny Charter claimants the benefits of the pre-litigation requirements; and*
- *the meaning of the phrase "a civil proceeding under section 33 ... of the Charter" is unclear and may apply to a broad range of civil proceedings.*

I am advised that Charter issues are usually raised in the context of the interpretive obligation in section 32 of the Charter rather than in proceedings based on section 33 or section 39. The section 32 obligation to interpret legislation consistently with human rights may be explored in a wide range of cases where a statutory provision needs to be construed. Such cases are not subject to the exception to the pre-litigation requirements in section 32(1)(b) of the Act. By contrast, cases that have relied on section 33 or section 39 as a means of raising Charter issues are not common.

Section 33 provides for a referral of a question of law in relation to a Charter issue once a proceeding has been commenced. It is in the nature of an interlocutory step or interlocutory appeal to a higher court. Because it applies after the substantive proceeding has commenced, it makes sense to clarify that the pre-litigation requirements would not apply to such a step.

The Committee appears to be concerned that because of the broad range of matters that may be referred to a higher court under section 33, i.e. "matters where a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter", this somehow extends the exemption from the pre-litigation requirements to all proceedings where such a question of law or statutory interpretation is raised. The general words should be read in the context of the procedure provided for by section 33, which is for referral of such an issue to the Supreme Court once a proceeding has commenced. It is intended that only the referral proceedings should be exempt from the pre-litigation requirements, not the substantive proceedings.

Section 39 provides for a remedy against a public authority on a Charter-related ground if the person could already seek relief against the public authority on the ground that the act or decision was otherwise unlawful. Because damages are excluded by section 39(3), it was anticipated that a claimant under section 39 would be more likely to be seeking relief by way of some type of administrative law remedy. As such remedies are subject to short limitation periods, and in view of the likely public interest in having the matter determined judicially, the Government decided that the pre-litigation requirements would not apply to those proceedings.

Finally, I note that section 32(1)(b) of the Act does not preclude Charter claimants and respondents from negotiating prior to issuing proceedings under section 33 or section 39, it only removes the mandatory nature of such steps.

I hope that this is of assistance to the Committee.

ROB HULLS MP
Attorney-General

29 October 2010

The Committee thanks the former Attorney-General for this response.

Committee Room
28 February 2011

Appendix 1
Index of Bills in 2011

Alert Digest Nos.

Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

(ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers

(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions

(iv) unduly requires or authorise acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;

(v) unduly requires or authorise acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;

(vi) inappropriately delegates legislative power.

(vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

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

Building Amendment Bill 2011 1
Education and Training Reform Amendment (School Safety) Bill 2010 1
Sentencing Amendment Act 2010 1

Section 17(b)

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

Appendix 3

Ministerial Correspondence 2011

Table of correspondence between the Committee and Ministers during 2011

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Building Amendment Bill 2011	Minister for Planning	01.03.11	1 of 2011
Education and Training Reform Amendment (School Safety) Bill 2010	Minister for Education	01.03.11	1 of 2011
Sentencing Amendment Act 2010	Attorney-General	01.03.11	1 of 2011