No. 4 of 2012

Tuesday, 13 March 2012

On the

Associations Incorporation Reform Bill 2011

Australian Consumer Law and Fair Trading Bill 2011

Control of Weapons and Firearms Acts Amendment Bill 2011

Disability Amendment Bill 2012

Drugs, Poisons and Controlled Substances Amendment (Supply by Midwives) Bill 2012

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Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

Section 35 (b)(iv) of the *Interpretation of Legislation Act 1984* provides –

> In the interpretation of a provision of an Act or subordinate instrument consideration may be given to any matter or document that is relevant including, but not limited to, reports of Parliamentary Committees.

When may human rights be limited

Section 7 of the *Charter* provides –

> Human rights – what they are and when they may be limited –
>
> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

Glossary and Symbols

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

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

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

'DPP' refers to the Director of Public Prosecutions for the State of Victoria;

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

'IBAC' refers to the Independent Broad-based Anti-corruption Commission

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (currently one penalty unit equals $122.14).

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

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

[ ] denotes clause numbers in a Bill.

Alert Digest No. 4 of 2012

Disability Amendment Bill 2012

Introduced	28 February 2012
Second Reading Speech	29 February 2012
House	Legislative Assembly
Member introducing Bill	Hon. Mary Wooldridge MLA
Portfolio responsibility	Minister for Community Services

Purpose

The Bill amends the *Disability Act 2006* (the Act) to—

1. clarify the definition of residential service, substitute and insert new definitions. **[4 and 5]**
2. change the eligibility requirements for membership of the Disability Services Board. **[7]**
3. remove the requirement that community visitors be appointed for a particular region. **[9 to 12]**
4. clarify the requirements for Councils in relation to Disability Action Plans. **[13]**
5. remove the requirement of a disability service provider to give a residential statement when accommodation is provided to a person with a disability on a short term basis for the purpose of providing respite to a carer of the person with a disability. **[15]**
6. provide additional procedural matters in relation to possession orders and warrants of possession. **[30 to 34]**
7. provide an additional category of persons who may give consent for a disability service provider to manage the money of a resident. **[35]**
8. provide for complaints made in relation to contracted service providers and funded service providers, including by giving the Disability Services Commissioner jurisdiction over those complaints. **[36 to 41]**
9. provide additional procedural matters in relation to complaints. **[6, 42 to 51]**
10. make separate provision in relation to restrictive interventions used on a person for whom a treatment plan is in force or is required to be prepared. **[82]**
11. change the circumstances in which the presence of an independent person is required to be involved in a review of a behaviour support plan. **[61]**
12. provide for the approval of treatment plans by the Senior Practitioner. **[70 to 78]**
13. provide for VCAT to make a determination in relation to the expiry of a supervised treatment order. **[79]**
14. provide for the review of an assessment order made by a Senior Practitioner by the VCAT. **[80 and 81]**
15. make other minor and technical and consequential amendments to other Acts. **[84, 86 to 88]**

The Bill also amends the *Human Services (Complex Needs) Act 2009* to confer powers and functions under that Act on the Secretary to the Department of Human Services. The Bill further makes consequential amendments to other Acts. **[85]**

Charter report

Liberty – Fair hearing – Restrictive interventions other than restraint and seclusion

Summary: The Committee will write to the Minister seeking further information as to the compatibility of clauses 54 (which limits the existing regime for restrictive interventions to persons with a disability who are not on a treatment plan), 61 (which modifies the requirement for an independent person to explain all changes to behavioural support plans to the person with a disability) and 82 (which creates a new regime for restrictive interventions for persons with a disability who are on a treatment plan) with the Charter rights of persons with a disability who are or may be subject to restrictive interventions other than restraint or seclusion.

The Committee notes that clauses 82, inserting a new section 201A, and 54, substituting a new section 133(1), provide for separate regulation of 'restrictive interventions' respectively on persons for whom a treatment plan is in force and all other persons with a disability (who may be the subject of a behaviour support plan.) Existing s. 3 provides:

> restrictive intervention means any intervention that is used to restrict the rights or freedom of movement of a person with a disability including-
>
> (a) chemical restraint;
>
> (b) mechanical restraint;
>
> (c) seclusion;

Rather than engaging any specific right set out in Part 2 of the Charter, the Committee observes that, by definition, all restrictive interventions engage one or more Charter rights of persons with a disability who are subject to those interventions.

The Committee notes that the amending Bill retains the approach of the existing Act, where two sorts of restrictive interventions – restraints[1] and seclusion[2] – are subject to a variety of express statutory protections, while the regulation of other types of interventions (e.g. 1: 1 supervision of the person with a disability[3]) is primarily left to the discretion of the Senior Practitioner.[4] However, as a result of the Bill, restrictive interventions other than restraint and seclusion are regulated differently under the two regimes in some respects.[5]

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1 Restraint is defined in existing s. 3 as 'chemical restraint or mechanical restraint', respectively defined as 'the use, for the primary purpose of the behavioural control of a person with a disability, of a chemical substance to control or subdue the person but does not include the use of a drug prescribed by a registered medical practitioner for the treatment, or to enable the treatment, of a mental illness or a physical illness or physical condition' and 'the use, for the primary purpose of the behavioural control of a person with a disability, of devices to prevent, restrict or subdue a person's movement but does not include the use of devices- (a) for therapeutic purposes; or (b) to enable the safe transportation of the person'.

2 Seclusion is defined in existing s. 3 as 'seclusion means the sole confinement of a person with a disability at any hour of the day or night- (a) in any room in the premises where disability services are being provided of which the doors and windows cannot be opened by the person from the inside; or (b) in any room in the premises where disability services are being provided of which the doors and windows are locked from the outside; or (c) to a part of any premises in which disability services are being provided'

3 E.g. *LM (Guardianship)* [2008] VCAT 2084, [15].

4 See existing s. 150 (as modified by clauses 54 and 68) and new section 201H (as inserted by clause 82), providing for the Senior Practitioner to require reports on the use of such interventions, (for non-treatment plans, to require the development of a behaviour support plan), develop guidelines and standards, audit and evaluate them, make directions prohibiting or regulating particular interventions and research and advising on them.

5 The existing criminal prohibition on the unapproved use of restrictive interventions on a person with a disability (carrying a fine of 240 penalty units) no longer applies to persons on a treatment plan (clause 55, substituting existing s. 134). The equivalent new prohibition for persons on a treatment plan does not provide for any criminal penalty (new section 201B). Instead, a criminal penalty is only provided for irregular detention, restraint and seclusion of such persons (new sections 150A and 201G). On the other hand, all restrictive interventions must be included in a treatment plan (new section 201G); by contrast, only restraints and seclusion must be included in a behaviour support

The Committee also notes that, in a substantive change to the existing Act, clause 61, amending existing s. 143, provides that an independent person is not required (outside of the annual review process) to explain changed behaviour support plans to persons with a disability that involve a more restrictive use or form of restrictive interventions other than restraint or seclusions. For example, even if the Senior Practitioner requires that 1:1 supervision of a person must be included in a behaviour support plan, a proposal (outside of the annual review process) to introduce such supervision into a behavioural support plan or to extend existing 1:1 supervision in the community to include 1:1 supervision in the person's residence can occur without an independent person first explaining that proposal to the person with a disability.

The Statement of Compatibility remarks:

> Section 143(1)(c) of the Act currently requires an independent person to explain any change to a behaviour support plan, regardless of whether the change involves the use of restraint or seclusion. This has proved to be unduly onerous and unnecessary to protect rights, as behaviour support plans may be reviewed up to four times a year, including to reduce the use of restraint or seclusion.
>
> The Bill amends the Act to require than an independent person only has to be available to explain to a person with a disability the review of the person's behaviour or support plan annually or whenever there is a proposed increase in restraint or seclusion. The amendment retains the important role of the independent person in explaining amendments to behaviour support plans that restrict a person's liberty (and in relation to which they may wish to seek a review). Consequently, the amendment does not limit the right to a fair hearing, nor the right to liberty and security of the person.

The Committee will write to the Minister seeking further information as to the compatibility of clauses 54 (which limits the existing regime for restrictive interventions to persons with a disability who are not on a treatment plan), 61 (which modifies the requirement for an independent person to explain all changes to behavioural support plans to the person with a disability) and 82 (which creates a new regime for restrictive interventions for persons with a disability who are on a treatment plan) with the Charter rights of persons who are or may be subject to restrictive interventions other than restraint or seclusion.

The Committee makes no further comment.

plan, unless the Senior Practitioner requires otherwise (existing s. 140; amended by clause 58(1), and existing s. 150(2)(b).) For example, the Act requires that a proposal for 1:1 supervision of a person with a disability be included in a treatment plan (if one applies) but not a behaviour support plan.

Drugs, Poisons and Controlled Substances Amendment (Supply by Midwives) Bill 2012

Introduced	28 February 2012
Second Reading Speech	29 February 2012
House	Legislative Assembly
Member introducing Bill	Hon. Denis Napthine MLA
Portfolio responsibility	Minister for Health

Purpose

The Bill amends the *Drugs, Poisons and Controlled Substances Act 1981* (the 'Act') to allow suitably qualified and endorsed midwives to possess and sell, use or supply certain drugs required for midwifery practice.

The Bill clarifies that the authorization does not authorize the registered midwife to sell any scheduled substances by retail in an open shop. A separate licence under the Act would be required to do so. **[5]**

The Bill empowers the Minister for Health to approve a list of scheduled poisons for the purposes of the authorization of a registered midwife. **[7]**

The Bill amends section 129 and 132 of the Act to enable regulations to be made to give effect to the purposes of the Bill. **[8 and 9]**

Extract from the Second Reading Speech:

> In summary, the amendments will enable clients of an eligible midwife to receive comprehensive services and not need to also see a medical practitioner or nurse practitioner to have medicines prescribed for their routine maternity care where this referral is unnecessary.
>
> These amendments are made in the context of a strong regulatory framework that will ensure that only midwives endorsed as having the competence to do so will be authorised to prescribe. The Commonwealth law for the purposes of Medicare and PBS access also builds in the important requirement of maintaining an ongoing collaborative relationship with a medical practitioner.
>
> This Bill is widely supported by key stakeholders and will align Victorian midwives' practice with their professional colleagues in other States.
>
> This Bill will enable Victoria to fully participate in National Maternity Services Plan 2010, especially with respect to its intention to provide more maternity services for rural and remote communities. Furthermore, birthing women will be able to receive a PBS rebate for medicines prescribed as a part of private midwifery practice.

The Committee makes no further comment.

Justice Legislation Amendment Bill 2012

Introduced	28 February 2012
Second Reading Speech	1 March 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the:

- *Magistrates' Act 1989* to clarify the procedural framework for the Assessment and Referral Court (ARC)[6] list of the Magistrates' Court. **[7 to 9]**
- *County Court Act 1958* to empower the Governor in Council to make regulations with respect to fees for civil matters in the County Court and fees payable regarding bailiffs or the execution of a warrant or other process. The amendment replaces the current outdated procedure for setting fees in the County Court. **[4 and 5]**
- *Children, Youth and Families Act 2005* to streamline appointment processes related to dispute resolution convenors in that court. The Act allows the family Division of the Children's Court to refer a matter to dispute resolution conference. The Bill will remove the requirement that dispute resolution conference convenors be appointed by Governor in Council, and instead provide a process for convenors to be appointed by the President of the Children's Court. **[3]**
- *Victorian Law Reform Commission Act 2000* to allow a part-time chairperson to be appointed to the Victorian Law Reform Commission. **[10 and 11]**
- *Liquor Control Reform Act 1998* to make statute law revisions to correct a reference to the Director of Liquor Licensing in the *Victorian Commission for Gambling and Liquor Regulation Act 2011*.

Content

Retrospective commencement – Amendments to the Liquor Control Reform Act 1998

The Bill amends sections 78(2)(a) and 148ZT(1)(f) of the *Liquor Control Reform Act 1998*, and clauses 17(2), 17(2)(a) and 17(3) in Schedule 3 to that Act to enable statute law revision amendments to be made. The revision is taken to have come into operation on 6 February 2012, which is the day the *Victorian Commission for Gambling and Liquor Regulation Act 2011* came into operation establishing a new integrated regulator for both liquor and gambling in Victoria. The amendments give the new Commission all the regulatory powers of the former Director of Liquor Licensing. **[6]**

Extract from the Second Reading Speech:

> The Victorian Commission for Gambling and Liquor Regulation Act 2011 (VCGLR Act) commenced on 6 February 2012. The VCGLR Act established a new integrated regulator for both liquor and gambling in Victoria. In doing so, the Liquor Control Reform Act 1998 was amended to give the new Commission all the regulatory powers of the former Director of

[6] The assessment and referral court list was established in 2010. It is a criminal procedure framework in the Magistrates Court of Victoria (MCV) available for offenders who have cognitive impairments, including mental illness, an intellectual disability, an acquired brain injury, autism spectrum disorder or a neurological impairment such as dementia.

Liquor Licensing. This Bill allows a statute law revision to that Act to clarify a reference to the Director of Liquor Licensing.

The Committee accepts that the retrospective amendments do not directly trespass unduly on rights or freedoms. The amendments seek to remedy legislative oversights in giving effect to a new regulatory regime for liquor and gambling in Victoria and retrospectivity is therefore appropriate given the circumstances.

The Committee makes no further comment.

Legal Profession and Public Notaries Amendment Bill 2012

Introduced	28 February 2012
Second Reading Speech	29 February 2012
House	Legislative Assembly
Member introducing Bill	Hon. Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Legal Profession Act 2004* to:

1. permit corporate legal practitioners to engage in legal practice on a pro bono basis. **[3 to 5]**
2. change the annual reporting requirements of the Legal Services Board. **[12]**
3. provide an additional basis on which the Legal Services Commissioner may dismiss a disciplinary complaint. **[8]**
4. empower the Legal Services Commissioner to suspend, or decide to take no further action in relation to, an investigation under Division 3 of Part 4.4 in certain circumstances. **[9 and 10]**
5. change the factors that the Legal Practitioners' Liability Committee must take into account in determining premiums and excesses in relation to contracts of professional indemnity insurance. **[6 and 7]**
6. empower the Legal Services Board to make payments out of the Public Purpose Fund for the purpose of judicial education. **[13]**
7. permit the Legal Services Board to delegate certain functions in relation to setting professional indemnity insurance requirements. Delegations are permitted 6.2.19 of the Act to a Member of the Board, the Commissioner, a staff member or a prescribed person under the regulations. **[11]**
8. make a number of minor statute law revision amendments. **[15]**

The Bill also amends the *Public Notaries Act 2001* to insert a new statutory ground of eligibility for appointment as a public notary into section 4 of the Act, providing that in order to be eligible for appointment as a public notary a person must satisfy the Board of Examiners that they are a fit and proper person for appointment and amends section 5 of the Act to indicate the types of matters the Board of Examiners must have regard to when assessing the fitness and propriety of an applicant for appointment. **[16 to 18]**

The Committee makes no further comment.

Statute Law Repeals Bill 2012

Introduced	28 February 2012
Second Reading Speech	29 February 2012
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Premier

The Committee notes that this Bill has been referred to the Committee for inquiry and report by the Legislative Assembly on 29 February 2012 and the Committee intends to table a report as quickly as possible.

Purpose

The Bill repeals nineteen spent or redundant Acts in three categories –

1. Principal Acts listed in items 1.1 to 1.5 of the explanatory memorandum. These are principal Acts that have been identified as spent or redundant.
2. Amending Acts listed in items 2.1 to 2.12 of the explanatory memorandum. These Acts contain transitional, savings, validation provisions or substantive or unproclaimed provisions. The explanatory memorandum provides that the substantive provisions are no longer required because they have taken effect and are spent or they are redundant. The unproclaimed provisions are no longer required. Any residual operation or continuing effect of the transitional and savings provisions and the effect of any validation provisions will be preserved by section 14 of the *Interpretation of Legislation Act 1984.*
3. Amending Acts listed in items 3.1 and 3.2 of the explanatory memorandum. These Acts are now wholly in operation and have amended the Acts they were enacted to amend and contain no transitional or substantive provisions.

Committee comments

1. ***Preservation of rights and obligations*** – In respect to the repeal of Acts that may have included provisions creating rights or imposing obligations the Committee notes the operation of section 14(2)(e) of the *Interpretation of Legislation Act 1984*. The section relevantly provides that –

   > Where an Act or a provision of an Act is repealed or amended or expires, lapses or otherwise ceases to have effect the repeal, expiry, lapsing or ceasing to have effect of that Act or provision shall not unless the contrary intention expressly appears affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision.

2. ***No compensation provision*** – The *Aboriginal Land (Manatunga Land) Act 1992 (No. 29 of 1992)* which is to be repealed (see item 1.3 of the explanatory memorandum) includes a provision (section 7) providing that the Crown has no obligation to pay compensation in respect of matters arising under the Act. The Crown's rights in respect to compensation rights are preserved by the operation of section 14 of the *Interpretation of Legislation Act 1984* and section 8 which alters or varies section 85 of the *Constitution Act 1975*[7] because of section 7 is no longer required.

[7] Section 85 of the Constitution Act 1975 provides that the Supreme Court is created the superior court of Victoria with unlimited jurisdiction and further provides that where a provision of an Act seeks to repeal, alter or vary the courts unlimited jurisdiction, the provision(s) will not be effective unless certain procedures are followed. Briefly, these procedures require the relevant provisions that intend to limit the court's jurisdiction to be specifically identified by the Bill (the declaratory provision) and also requires the member of Parliament introducing the Bill to make a statement of the reasons for seeking to limit the court's jurisdiction. Section 18(2A) of the *Constitution Act 1975*

3. ***Committee report to the Parliament*** – On 29 February 2012 the Legislative Assembly referred this Bill to the Committee for further consideration, inquiry and report.

The Committee expects to table its report in March 2012.

The Committee makes no further comment.

further provides that a limitation amendment fails if it does not receive an absolute majority of the members in both Houses.

Statute Law Revision Bill 2012

Introduced	1 March 2012
Second Reading Speech	1 March 2012
House	Legislative Council
Member introducing Bill	Hon. David Davis MLC
Portfolio responsibility	Premier

The Committee notes that this Bill has been referred to the Committee for inquiry and report by the Legislative Council on 1 March 2012 and the Committee intends to table a report as quickly as possible.

Purpose

The Bill proposes to make statute law revision amendments to 57 Acts to:

- correct minor errors or omissions such as cross-references, spelling, drafting or grammatical errors
- update nomenclature such as the names of government departments agencies or successor Acts
- repeal spent subsections, sections, divisions or parts of Acts
- remedy incorrect legislative instructions or failed amendments.

Items 5, 6, 15, 17.1, 27, 28, 43, 45.1, 47.1, 47.3, 47.4, 47.5 and 55 listed in the Schedule are sought to apply retrospectively. These items are reported below and in the Committee's separate report on this Bill to be tabled at a later date.

Content

Retrospective amendments

Item 5 – *Children, Youth and Families Amendment (Security of Youth Justice Facilities) Act 2011*

This item amends section 1 to replace the reference to the "Bill" with a reference to the "Act". The amendment is sought to be made retrospective to 2 November 2011, which is the day on which the *Children, Youth and Families Amendment (Security of Youth Justice Facilities) Act 2011* received the Royal Assent, to ensure that section 1 was enacted as intended.

Item 6 – *Children's Services Amendment Act 2011*

This item amends item 2.2 of the Schedule to correct a reference to section 182(1)(f) of the *Children, Youth and Families Act 2005*. It was incorrectly referred to as section 182(f). This amendment is sought to be made retrospective to 31 December 2011, the day before item 2.2 came into operation, to remove any doubt that the amendment took effect as intended.

Item 15 – *Emergency Management Legislation Amendment Act 2011*

This item amends section 32(3) to correct a reference to section 19(1) of the *Terrorism (Community Protection) Act 2003*. It was incorrectly referred to as section 19(1)(b). This amendment is sought to be made retrospective to 2 November 2011, the day before section 32(3) came into operation, to remove any doubt that the amendment took effect as intended.

Item 17.1 – *Evidence (Miscellaneous Provisions) Act 1958*

Item 17.1 substitutes section 19B(2) as was intended by section 8(2) of the *Crimes Legislation Amendment Act 2010* which has now been repealed. Section 8(2) referred to the *Evidence*

(Miscellaneous Provisions) Act 1958 by an incorrect title (the '*Evidence Act (Miscellaneous Provisions) 1958'*). This amendment is sought to be made retrospective to 17 March 2010, the day that section 8(2) of the Crimes Legislation Amendment Act 2010 came into operation, to remove any doubt that the amendment took effect as intended.

Item 27 – *Liquor Control Reform Further Amendment Act 2011*

This item amends section 14(1) to correct an incorrect reference to section 22(ca) of *the Liquor Control Reform Act 1998*. The reference should have been to section 22(1)(ca). This amendment is sought to be made retrospective to 19 February 2012, the day before section 14(1) came into operation, to remove any doubt that the amendment took effect as intended.

Item 28 – *Magistrates Court Amendment (Assessment and Referral Court List) Act 2010*

This item amends section 4(2)(a). Section 4(2) amends the definition of proper venue in section 3(1) of the *Magistrates' Court Act 1989*, however section 4(2)(a) contains an incorrect reference to "paragraph (c)" rather than "paragraphs (c)". This amendment is sought to be made retrospective to 20 April 2010, the day before section 4(2) came into operation, to remove any doubt that the amendment took effect as intended.

Item 43 – Resources Legislation Amendment Act 2011

This item amends section 6. Section 6 amends section 77S of the *Mineral Resources (Sustainable Development) Act 1990* by replacing various instances of the phrase "an exploration and mining licence". However, section 77S does not contain this phrase; it contains the phrase "an exploration or mining licence" instead. This amendment is sought to be made retrospective to 19 October 2011, the day after the *Resources Legislation Amendment Act 2011* received the Royal Assent. This is to ensure that section 6 takes effect as intended.

Item 45.1 – *Road Safety Amendment (Hoon Driving and Other Matters) Act 2011*

Item 45.1 amends section 20 which inserted section 103ZD in the *Road Safety Act 1986* on 30 June 2011. Section 20 was expressed to insert section 103ZD after section 103ZC. However section 103ZC did not exist on 30 June 2011 as it was not inserted in the *Road Safety Act 1986* until 1 July 2011 by section 39 of the *Road Safety Amendment (Hoon Driving) Act 2010*. This item amends section 20 so that is expressed to insert section 103ZD after section 103ZB. This amendment is sought to be made retrospective to 29 June 2011, the day before the day on which section 20 came into operation, to remove any doubt that the amendment took effect as intended.

Item 47.1, 47.3, 47.4 and 47.5 – *Sentencing Amendment (Community Correction Reform) Act 2011*

Item 47.1 amends section 68, which inserts new section 115B in the *Sentencing Act 1991*. This amendment corrects an incorrect reference to the new section being inserted after section 115A of the *Sentencing Act 1991*, which at the time of insertion did not exist. The reference is amended to refer to section 115 instead of 115A and is sought to be made retrospective to 15 January 2012, the day before the day on which section 68 came into operation, to remove any doubt that the amendment took effect as intended.

Item 47.3 amends item 4.5 in the Schedule to correct an incorrect reference to a provision number. Item 4.5 amends a note at the foot of section 268(1)(b) of the *Criminal Procedure Act 2009*. However, the amendment incorrectly refers to the note being at the foot of section 268(1). This amendment is sought to be made retrospective to 15 January 2012, the day before the day on which item 4.5 came into operation, to remove any doubt that the amendment took effect as intended.

Item 47.4 amends item 6.2 in the Schedule to correct an incorrect instruction so that it refers to "in" the definition of prohibited person in section 3(1) of the *Firearms Act 1996* rather than "for" that definition. This amendment is sought to be made retrospective to 15 January 2012, the day before

the day on which item 6.2 came into operation, to remove any doubt that the amendment took effect as intended.

Item 47.5 amends item 11.2 in the Schedule to correct an incorrect instruction so that it refers to "in" the definition of custodial sentence in section 3 of the *Serious Sex Offenders (Detention and Supervision) Act 2009* rather than "for" that definition. This amendment is sought to be made retrospective to 15 January 2012, the day before the day on which item 11.2 came into operation, to remove any doubt that the amendment took effect as intended.

Item 55 – *Transport Legislation Amendment (Public Transport Development Authority) Act 2011*

This item amends section 4 which inserted a new Part 10 in the *Transport Integration Act 2010*. Section 4 was expressed to insert Part 10 after Part 9. However, Part 9 had not been inserted in the *Transport Integration Act 2010* by the date that section 4 came into operation. This item amends section 4 to insert Part 10 after Part 8. (Part 9 has now been inserted after Part 8 and the positioning of all Parts is correct.) This amendment is sought to be made retrospective to 14 December 2011, the day before the day on which section 4 came into operation, to remove any doubt that the amendment took effect as intended.

Committee comments

Rights and freedoms – Retrospective amendments

The Committee is satisfied that the retrospective amendments in the items listed above appear to be necessary and appropriate statute law revision amendments and that they do not unduly trespass on rights and freedoms.

The Committee expects to table its report concerning these retrospective provisions and other statute law revision amendments made by the Bill in March 2012.

The Committee makes no further comment.

Water Amendment (Governance and Other Reforms) Bill 2012

Introduced	28 February 2012
Second Reading Speech	29 February 2012
House	Legislative Assembly
Member introducing Bill	Hon. Peter Walsh MLA
Portfolio responsibility	Minister for Water

Purpose

The purpose of the Bill is to convert the three Melbourne water retailers from Corporations Act companies regulated under the *Water Industry Act 1994* into statutory corporations regulated under the *Water Act 1989* (the 'Act').

Extracts from the Second Reading Speech:

> Unlike Victoria's rural and regional water corporations, which are statutory corporations, the three Melbourne water retailer – City West Water Ltd, South East Water Ltd and Yarra Valley Water Ltd – were originally established as three special-purpose Corporations Act companies. This Bill will convert them into statutory corporations and migrate them from the *Water Industry Act 1994* to the *Water Act 1989* under which all the other water corporations are established. … This Bill will therefore simplify the current arrangements in Victoria by unifying the incorporation, governance and regulatory arrangements that apply to the State's 19 water corporations under the Water Act.
>
> The Bill establishes three new statutory corporations, with names similar to their current names, and provides for a whole-of-business transfer from each retailer to the relevant new water corporation.
>
> … The government recognises that water is the most crucial of the essential services for meeting human needs. The Bill therefore removes the power of a water corporation to cut off a person's supply of drinking water because that person has not paid their bill. … The Water Act will keep two debt management powers, being the ability to charge interest on unpaid moneys and providing that debts owed to a water corporation form a charge on the land to which they relate. **[42]**
>
> … However, the Bill will also ensure that a water corporation's use of these two remaining powers can be regulated by the Essential Services Commission through a customer service code for water services, in consultation with the community, to make sure use of these powers is appropriate and sensitive to the needs of those in our community facing financial hardship.

Content

Rights and freedoms – Entry to residential premises – Entry by warrant, with or without notice or by consent of occupier

The Bill makes provision for entry to land used primarily for residential purposes to inspect for legal compliance or to carry out other functions in a variety of circumstances. Entry may take place on giving 7 days notice to the occupier; with the consent of the occupier; in an emergency situation or, on obtaining a warrant under the Act. **[20 and 55]**

The Committee notes the detailed discussion of these relevant amendments in the Statement of Compatibility

Fair hearing – Rule against hearsay

The Bill inserts a new section 303A in the Act concerning issues of evidence and proof in relation to proceedings under the Act relating to the discharge of anything into the works of an Authority or a sewerage system. The evidentiary provision raises question of the admissibility of hearsay evidence[8]. **[61]** *The Committee raises this issue in the Charter report below.*

Presumption of innocence – reverse evidentiary onus

The Bill provides a reverse evidentiary onus in new section 303A(6) which provides that anything found in a sewer on a property, or which exclusively services a property, or in any works connected to that sewer, is presumed, in the absence of evidence to the contrary, to have been discharged by the occupier of that property. **[61]** *The Committee notes the explanation for this provision in the Statement of Compatibility.*

Charter report

Statements of compatibility

The Committee commends the Statement of Compatibility for the Bill for its clarity and utility.

Fair hearing – Presumption of innocence – Equipment presumed to be accurate and precise – Analytical evidence admissible use of hearsay – Samples presumed to be unaffected by storage

Summary: Clause 61 provides for rules relating to evidence and proof in proceedings (including criminal proceedings) relating to the discharge of anything into the Authority's works or sewerage system. The Committee refers to Parliament for its consideration the question of whether or not the admission of certain analysis based on hearsay is compatible with the Charter's fair hearing rights and will write to the Minister seeking further information as to the compatibility of presumptions of fidelity and robustness for certain analytical evidence with the Charter's right to be presumed innocent.

The Committee notes that clause 61, inserting a new section 303A, copies existing rules relating to evidence and proof in proceedings under the *Water Industry Act 1994* or regulations relating to the discharge of anything into the Authority's works or sewerage system,[9] so that they also apply to similar proceedings under the *Water Act 1989* or its regulations. Those rules include the following:

- Equipment and installations used by water officers and analysis in connection with any evidence 'must be presumed, until the contrary is proved, to be accurate and precise': new sub-section (1)
- The results of analysis based on analytical techniques that infringe the hearsay rule 'by their nature' are 'admissible in evidence' despite that rule: new sub-section (2)
- Attributes of samples taken under the Act or regulations 'must be presumed, unless the contrary is proved, not to be materially affected by its method of storage or preservation': new sub-section (3).

[8] At common law, the rule against hearsay rendered inadmissible any evidence of a statement made to a witness by a person not called as a witness (and therefore not subject to cross-examination), with the object of asserting the truth of the contents of the statement.

[9] *Water Industry Act 1994*, s. 177C, inserted by the *Water Acts (Further Amendment) Act 1997*.

The Committee observes that these provisions may apply in criminal proceedings under the *Water Act 1989*.[10]

New-subsection (2) may engage the Charter's fair hearing rights.[11] For example, the automatic admission of all analytical evidence, even though it depends on techniques that depend on observations (such as reports of smells or spot-testing) by people who do not testify, may be either arbitrary or unfair, at least when it is used to support the prosecution case in a criminal trial. The Statement of Compatibility remarks:

> While this engages section 24 of the charter act, it is fair and reasonable and does not limit the right to a fair hearing because:
>
> - the purpose of this provision is to ensure that parties to proceedings are able to utilise all available evidentiary technology; and
> - it is reasonable to expect that any such analysis would be carried out by appropriately qualified people to legally recognised standards

The Committee observes that the *Evidence Act 2008* makes hearsay admissible in a number of circumstances, including when the adducing party establishes that it 'was made in circumstances that make it highly probable that [it] was reliable', but also requires that hearsay admitted on this ground be first-hand and that reasonable notice be given to the other party.[12] The Committee notes that clause 61 does not disturb trial protections for criminal defendants other than the rule against hearsay evidence.

As well, new-sub-sections (1) and (3) may engage the Charter's right to be presumed innocent until proved guilty of a criminal offence.[13] For example, if Authority testing equipment indicates that a particular unauthorised substance (connected to the defendant) is in a sewer, then the defendant will be convicted unless he or she proves (on the balance of probabilities) that the equipment is fallible. By contrast, equivalent presumptions in the *Evidence Act 2008* and the *Environment Protection Act 1970* are displaced where 'evidence sufficient to raise doubt… is adduced' or 'evidence to the contrary is presented'.[14]

The Committee refers to Parliament for its consideration the question of whether or not clause 61, inserting a new sub-section 303A(3) that permits the admission of certain analytical results based on hearsay (including as prosecution evidence in criminal trials), is a reasonable and demonstrably justified means of achieving the purpose of allowing parties in certain Water Act proceedings to utilise all available evidentiary technology.

The Committee will write to the Minister seeking further information as to the compatibility of new sub-sections 303A(1) & (3), which create presumptions of fact as to fidelity and robustness of certain analytical evidence that criminal defendants must disprove on the balance of probabilities, with the Charter's right to be presumed innocent. Pending the Minister's response, the Committee draws attention to clause 61.

The Committee makes no further comment.

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10 E.g. ss. 75 (barring, e.g., interferences with any works on a waterway, punishable by imprisonment for three months) & 178 (barring a discharge of anything other than sewerage or agreed trade waste into an Authority sewerage system, with a penalty of 200 penalty units and 80 units per day.)

11 Charter s. 24(1). See also Charter s. 25(2)(g), which provides a right to examine opposing witnesses 'unless otherwise provided for by law'.

12 *Evidence Act 2008*, s. 65(2)(c). See also ss. 62 and 67.

13 Charter s. 25(1).

14 *Evidence Act 2008*, s. 146; *Environment Protection Act 1970*, s. 59AB(1), (3).

Associations Incorporation Reform Bill 2011

The Bill was introduced into the Legislative Assembly on 6 December 2011 by the Hon. Michael O'Brien MLA. The Committee considered the Bill on 6 February 2012 and made the following comments in Alert Digest No. 1 of 2012 tabled in the Parliament on 7 February 2012.

Committee comment

Compelled self-incrimination – Lay people required to assist in investigations relating to incorporated associations

Summary: Clauses 153 and 158 respectively provide for two schemes that permit a court to require any person to assist in various investigations relating to incorporated associations. Each scheme partially removes the common law privilege against compelled self-incrimination. The Committee will write to the Minister seeking further information as to the compatibility of clause 178(2) (which requires people, including non-office-holders, to identify and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme. Pending the Minister's response, the Committee draws attention to clauses 153 and 158.

The Committee notes that the Bill provides for two schemes that permit a court to require any person to assist in various investigations relating to incorporated associations:

- Clause 153 applies a modified version of the federal corporations law's regime for investigating corporate affairs to some aspects of the affairs of Victorian incorporated associations. Under this scheme, the Supreme Court may summon people to an examination by the Court, the Registrar of Incorporated Associations or liquidators or administrators of the incorporated association about various 'examinable affairs'. It is an offence for a summonsed person to refuse to attend an examination or answer questions or to fail to provide documents requested or relevant to the examination.
- Clause 158 empowers the Magistrates' Court to order any person to answer questions, supply information or produce documents required or specified by an investigator relating to a possible contravention of the Bill or its regulations. Clause 176 makes it an offence to fail to comply with such a request. Clause 178(2) requires a person who produces a document upon request that he or she knows is 'false or misleading in a material particular' to 'indicat[e] the respect in which it is false or misleading and, if practicable, provid[e] correct information'.

Each scheme partially abrogates the common law privilege against compelled self-incrimination, albeit in different ways.

Under the Supreme Court scheme, a person can be required to answer questions even if the answers are self-incriminatory. While the person's answers cannot be used against him or her in most subsequent proceedings, there is no bar on the use of information derived from those answers. For example, if an employee of an incorporated association is asked to identify suppliers to the association during a period of potential bankruptcy, then the employee's answers cannot be adduced in a later prosecution of the employee; however, testimony from the suppliers the employee identified can be used against him or her in a

subsequent prosecution (e.g. for being knowingly concerned in fraud against the association's creditors.) The Statement of Compatibility remarks:

> The availability of derivate use immunity in relation to the Corporations Act provisions would not allow the legislative scheme to achieve its purpose because it would make investigations and prosecutions more complex and less effective. Having considered the right against self-incrimination in other common law jurisdictions and under human rights instruments, as well as commonwealth government reports on use immunity provisions in corporations law, I am of the view that direct use immunity for oral testimony is sufficient protection for individuals who have voluntarily taken on positions of responsibility and privilege in a regulated industry.

Under the Magistrates' Court scheme, possible self-incrimination is a reasonable excuse for failing to comply with most obligations, but is not a reasonable excuse for failing to produce a document. For example, where an association is being investigated for securing a pecuniary profit for its members, those members can refuse to answer questions about what money they have received from the association but cannot refuse a request for records of their communications with the association. Those records, information obtained from them, the fact that the member knew they existed and any identifications of falsehoods made by the member can be used against the member in a subsequent prosecution (e.g. for being concerned in the association's offence or for tax evasion.) The Statement of Compatibility remarks:

> Any writing present in a document will have pre-existed the order to hand over the document, meaning that any self-incriminating evidence derived from the writing is not compelled. Furthermore, the handing over of pre-existing documents to investigators on request or as compelled by a court in most circumstances is analogous to the seizing of documents or evidence through the execution of a lawful warrant….
>
> [I]t is necessary for regulators to have access to relevant documents to ensure the effective administration of the regulatory scheme. Persons who will be subject to this power will be aware of their obligations to keep and provide such documents which relate to compliance (or non-compliance) with the regulatory scheme and cannot reasonably expect to be immunised from their production.

The Committee observes that, in common with many other compulsory questioning regimes, both schemes extend beyond office holders of the incorporated association. The Supreme Court scheme can apply to anyone who 'may be able to give information about examinable affairs of the corporation.' The Magistrates' Court scheme can apply to 'any person', whether or not they are the person suspected of contravening the Bill or regulations. In relation to the Supreme Court scheme, the Statement of Compatibility remarks:

> While the Supreme Court also has a discretionary power under s596B(1)(b)(ii) of the Corporations Act to summon a broader class of people for examination, including any person able to give information about the examinable affairs of the incorporated association, I am of the view that the abrogation will still only occur in narrow and appropriate circumstances. In regards to the examination of persons who are not office-holders of an incorporated association… it is highly unlikely that this class of persons would be at risk of incriminating themselves with the information they provide to a court and eligible applicant through the operation of these provisions, given that such persons would not be subject to the duties and associated penalties of this bill.

The Committee notes that non-office-holders may still be prosecuted as accessories to office-holders' offences, or for general crimes such as embezzlement or fraud. The Committee also notes that the Statement of Compatibility does not address clause 178(2), which obliges people required to produce documents under the Magistrates' Court scheme to identify and correct any documents that they know to be false or misleading in a material particular. The

Committee observes that, while such offences are a common feature of Victorian regulatory schemes, clause 178(2) may be applied to people who did not voluntarily participate in the regulatory field, e.g. non-office-holders who have access to documents that are relevant to an investigation.

The Committee will write to the Minister seeking further information as to the compatibility of clause 178(2) (which requires people, potentially including non-office-holders, to identify and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme. Pending the Minister's response, the Committee draws attention to clauses 153 and 158.

Minister's Response

Thank you for your letter dated 7 February 2012 regarding the Committee's consideration of the *Associations Incorporation Reform Bill 2011* (the Bill).

The Committee has sought further information regarding the compatibility of clause 171(2) with the right to protection from self-incrimination, embodied in sections 24 and 25(2)(k) of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter Act'), particularly of persons who do not voluntarily participate in the Bill's regulatory scheme.

Clause 178(2)

Clause 178(2) requires a person who produces a document upon the request of the Director of Consumer Affairs Victoria or an authorised inspector that he or she knows is 'false or misleading in a material particular' to 'indicat[e] the respect in which it is false or misleading and, if practicable, provid[e] correct information'.

The Committee observes that, while such offences are a common feature of Victorian regulatory schemes, clause 178(2) may be applied to people who did not voluntarily participate in the regulatory field, such as non-office holders who have access to documents that are relevant to an investigation.

Clause 178(2) involves three elements:

1. the provision of a document containing false and misleading information pursuant to the compulsion to provide documents under Part 12;
2. the obligation to indicate the respect in which the information contained in the document is false or misleading; and
3. the obligation to provide correct information if practicable.

The operation of clause 178(2) does not place any additional limit on the protection against self-incrimination which was not already identified in the Statement of Compatibility. A person must comply with the first element, regardless of whether providing such documents would incriminate that person. This limit was discussed in the Statement of Compatibility in regards to the operation of clause 177(2) and was analogised to the seizing of existing documents or real evidence through the execution of a lawful warrant. The compulsion to produce pre-existing documents that speak for themselves is in strong contrast to testimonial oral or written evidence that is brought into existence as a direct response to incriminating questions or interrogation by investigators.

The offence in clause 178 is limited to the giving of information pursuant to the inspection powers in Part 12. The vast majority of inspections will occur in regards to persons who are office holders of incorporated associations. On occasion, these powers might be applied to persons outside of this scheme. However, where this is the case the production powers are subject to judicial supervision under clause 158 where a contravention is believed to have occurred. It is essential for the enforcement of regulatory laws in any context that

investigators are able to gather evidence that gives rise to proof of a contravention of the regulatory scheme. That a person has access to relevant documents which are incriminatory but is not an office-holder does not alter the reasonableness or necessity of enabling regulators to have access to relevant documents. To excuse the production of such documents where they are in the possession of a person who has not voluntarily taken on the duties required by the regulatory field would circumvent the record keeping obligations of the Bill and significantly impede the regulator's ability to investigate and enforce compliance with the scheme.

In regards to elements 2 and 3 of clause 178(2), compelling someone to identify and correct misleading information might lead to direct or derivative evidence that incriminates the person with respect to a criminal offence, either under this Bill or under other criminal laws.

However, the abrogation of the privilege in clause 177(2) is limited to the production of documents, and does not extend to the requirement to indicate the respect in which a produced document is false or misleading or to provide correct information. Accordingly, clause 178(2) does not limit the Charter Act right to protection from self-incrimination beyond the production of existing documents, which was identified and discussed in the Statement of Compatibility pursuant to the criteria set out in section 7(2) of the Charter Act

Thank you for giving me the opportunity to respond to the Committee's concerns. I trust that this information is of assistance to the Committee.

HON. MICHAEL O'BRIEN MP
Minister for Consumer Affairs

24 February 2012

The Committee thanks the Minister for this response.

Australian Consumer Law and Fair Trading Bill 2011

The Bill was introduced into the Legislative Assembly on 6 December 2011 by the Hon. Michael O'Brien MLA. The Committee considered the Bill on 6 February 2012 and made the following comments in Alert Digest No. 1 of 2012 tabled in the Parliament on 7 February 2012.

Committee comment

Compelled self-incrimination – Lay consumers required to assist in investigations relating to consumer transactions

Summary: Clauses 125-126 and 145 respectively provide for two schemes that permit a court to require any person to assist in various investigations relating to consumer transactions. Each scheme partially removes the common law privilege against compelled self-incrimination. The Committee will write to the Minister seeking further information as to the compatibility of clause 171(2) (which requires people, potentially including consumers, to identify and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme. Pending the Minister's response, the Committee draws attention to clauses 125, 126 and 145.

The Committee notes that the Bill provides for two schemes that permit a court to require any person to assist in various investigations relating to consumer transactions:

- Clauses 125-126 empower the Director of Consumer Affairs Victoria to require any person who the Director believes has information that would assist in monitoring compliance with, or relates to a contravention of, the Bill or regulations (including the Australian Consumer Law), as well as a number of other Victorian consumer statutes, to provide information, produce documents or (for possible contraventions) give sworn evidence. Refusal to comply or knowingly providing false information is an offence.
- Clause 145 empowers the Magistrates' Court to order any person to answer questions, supply information or produce documents required or specified by an investigator appointed by the Director relating to a possible contravention of the Bill or its regulations (including the Australian Consumer Law), as well as numerous other Victorian consumer statutes. Clause 169 makes it an offence to fail to comply with such a request. Clause 171(2) requires a person who produces a document upon request that he or she knows is 'false or misleading in a material particular' to 'indicat[e] the respect in which it is false or misleading and, if practicable, provid[e] correct information'.

Each scheme partially abrogates the common law privilege against compelled self-incrimination, albeit in different ways.

Under the Director's powers, a person can be required to provide information, answer questions or produce documents even if the information, answers or documents are self-incriminatory. While the person's actual answers and information (and, for compliance requests, produced documents) cannot be used against him or her in most subsequent proceedings, there is no bar on the later use of information derived from that evidence. For example, if a customer who supplied a testimonial in relation to goods or services was asked by the Director to provide information and documents about payments received for making it, that information (and, for compliance requests, the documents) couldn't be adduced in a later prosecution of the customer; however, the Director could then subpoena a bank for records that match the payments described by the customer and use them to prosecute him or her (e.g. for making a false representation concerning a testimonial.) The Statement of Compatibility remarks:

> [I]t is likely that only a small percentage of persons in this class would be affected by the lack of derivative use immunity; being such persons who engage in regulated activities under the bill, and who would consequently be aware of their obligations to comply with the regulatory scheme. Additionally, the penalty for failing to comply with a notice issued by the director is relatively low under both provisions.
>
> Granting immunities in a regulated commercial context to individuals most likely to be questioned and exposed to criminal and civil penalties leads to protracted investigations, and those responsible for wrong doing and misconduct may escape liability. The limitation on derivative use immunity addresses this issue by allowing the director to effectively monitor compliance with the regulatory scheme without jeopardising the success of any proceedings which may be brought after all relevant information concerning a person's activities have come to light.

Under the Magistrates' Court's powers, possible self-incrimination is a reasonable excuse for failing to comply with most obligations, but is not a reasonable excuse for failing to produce a document. For example, where a potential pyramid scheme is being investigated, purchasers of the goods dealt with by the scheme can refuse to answer questions about their role in selling the goods but cannot refuse a request for records of their communications with the suppliers or potential other purchasers. Those records, information obtained from them, the fact that the purchaser knew they existed and any identifications of falsehoods made by the purchaser can be used against the participant in a subsequent prosecution (e.g. for participating in a pyramid scheme.) The Statement of Compatibility remarks:

> The delivery of existing documents to investigators on request in most circumstances is analogous to the seizing of documents or evidence through execution of a lawful warrant, which is not considered as engaging the right to protection against self-incrimination…
>
> The limitation is directly related to its purpose. The documents required to be produced are those that are connected with an alleged contravention of the bill. The duty to provide these documents assist [sic] is consistent with the reasonable expectations of those who operate a business within a regulated scheme. Moreover, it is necessary for regulators to have access to documents to ensure the effective administration of the scheme.

The Committee observes that, in common with many other compulsory questioning regimes, both schemes extend beyond people who operate a business. The Director's powers can apply to anyone who 'the Director believes is capable of providing information' about compliance or a contravention. The Magistrates' Court's powers can apply to 'any person', whether or not they are the person suspected of contravening the Bill. The Committee also observes that neither scheme is limited to formal business records and therefore may encompass private documents, e.g. emails, or information, e.g. sources of income. The Committee additionally observes that each scheme extends to a variety of other Victorian regulatory schemes, including the *Residential Tenancies Act 1997*. For example, consumers or tenants could be compelled to answer questions or provide private papers, even if the information supplied might lead the authorities to evidence of their own offences, or face a maximum penalty of over $6000.

The Committee notes that the Statement of Compatibility does not address clause 171(2), which obliges people required to produce documents under the Magistrates' Court scheme to identify and correct any documents that they know to be false or misleading in a material particular. The Committee observes that, while such offences are a common feature of Victorian regulatory schemes, clause 171(2) may be applied to people who did not voluntarily participate in the regulatory field, e.g. lay consumers with access to relevant documents.

The Committee will write to the Minister seeking further information as to the compatibility of clause 171(2) (which requires people to identify, potentially including consumers, and correct any documents they are compelled to produce that they know to be false or misleading) with the Charter rights with respect to self-incrimination of people who did not voluntarily participate in the Bill's regulatory scheme. Pending the Minister's response, the Committee draws attention to clauses 125, 126 and 145.

Minister's Response

Thank you for your letter dated 7 February 2012 regarding the Committee's consideration of the *Australian Consumer Law and Fair Trading Bill 2011* (the Bill).

The Committee has sought further information regarding the compatibility of clause 171(2) with the right to protection from self-incrimination, embodied in sections 24 and 25(2)(k) of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter Act'), particularly of persons who do not voluntarily participate in the Bill's regulatory scheme.

Clause 171(2)

Clause 171(2) requires a person who produces a document upon the request of the Director of Consumer Affairs Victoria or an authorised inspector, that he or she knows is 'false or misleading in a material particular' to 'indicat[e] the respect in which it is false or misleading and, if practicable, provid[e] correct information'.

The Committee observes that, while such offences are a common feature of Victorian regulatory schemes, clause 171(2) may be applied to people who did not voluntarily participate in the regulatory field, such as lay consumers with access to relevant documents.

Clause 171(2) involves three elements:

1. the provision of a document containing false and misleading information pursuant to the compulsion to provide documents under Part 6.4;
2. the obligation to indicate the respect in which the information contained in the document is false or misleading; and
3. the obligation to provide correct information if practicable.

The operation of clause 171(2) does not place any additional limit on the protection against self-incrimination which was not already identified in the Statement of Compatibility. A person must comply with the first element, regardless of whether providing such documents would incriminate that person. This limit was discussed in the Statement of Compatibility in regards to the operation of clause 170(2) and was analogised to the seizing of existing documents or real evidence through the execution of a lawful warrant. The compulsion to produce pre-existing documents that speak for themselves is in strong contrast to testimonial oral or written evidence that is brought into existence as a direct response to incriminating questions or interrogation by investigators.

The offence in clause 171 is limited to the giving of information pursuant to the inspection powers in Part 6.4. The vast majority of inspections will occur in regards to persons who participate in the operation of a business. On occasion, these powers might be applied to persons outside of this scheme. However, where this is the case the production powers are subject to judicial supervision under clause 145 where a contravention is believed to have occurred. It is essential for the enforcement of regulatory laws in any context that investigators are able to gather evidence that gives rise to proof of a contravention of the regulatory scheme. That a person has access to relevant documents which are incriminatory but is a consumer or a layperson does not alter the reasonableness or necessity of enabling regulators to have access to relevant documents. To excuse the production of such documents where they are in the possession of a layperson would circumvent the record

keeping obligations of the Bill and significantly impede the regulator's ability to investigate and enforce compliance with the scheme.

In regards to elements 2 and 3 of clause 171(2), compelling someone to identify and correct misleading information might lead to direct or derivative evidence that incriminates the person with respect to a criminal offence, either under this Bill or under other criminal laws.

However, the abrogation of the privilege in clause 170(2) is limited to the production of documents, and does not extend to the requirement to indicate the respect in which a produced document is false or misleading or to provide correct information. Accordingly, clause 171(2) does not limit the Charter Act right to protection from self-incrimination beyond the production of existing documents, which was identified and discussed in the Statement of Compatibility pursuant to the criteria set out in section 7(2) of the Charter Act

Thank you for giving me the opportunity to respond to the Committee's concerns. I trust that this information is of assistance to the Committee.

HON. MICHAEL O'BRIEN MP
Minister for Consumer Affairs

24 February 2012

The Committee thanks the Minister for this response.

Control of Weapons and Firearms Acts Amendment Bill 2011

The Bill was introduced into the Legislative Assembly on 6 December 2011 by the Hon. Peter Ryan MLA. The Committee considered the Bill on 6 February 2012 and made the following comments in Alert Digest No. 1 of 2012 tabled in the Parliament on 7 February 2012.

Committee comment

Privacy – Protection of children – Liberty – Controlled weapons search regime – Designations based on previously violent or disordered events – Removal of seven-day period for notice

Summary: Clause 5's sole impact is to reduce the mandatory period between notification of a planned designation in the government gazette and when the designation may validly operate. The Committee will write to the Minister seeking further information as to the required period of time between notification of a designation in a daily newspaper and when the designation may validly operate.

The Committee notes that clause 5, amending existing s. 10D of the *Control of Weapons Act 1990*, provides that a declaration of a 'planned' designated search area may only take effect 'after the date of publication of the notice in the Government Gazette'. Existing s. 10D provides that a declaration may only take effect 'not less than 7 days after the date of the publication of the notice in the Government Gazette'. Previous statements of compatibility relating to the controlled weapons search regime found that the regime was only 'partially compatible' with the Charter's rights to privacy, the protection of children and (in relation to one Bill) liberty.

The Statement of Compatibility for the present Bill remarks:

> Clause 5 of the bill makes a minor amendment to the controlled weapons search regime and in my opinion has no impact on rights protected under the charter act.
>
> The clause removes the requirement for a seven-day notice period between publication of a notice in the Government Gazette declaring an area to be a designated area and the commencement of random weapon searches under the planned designation provisions. However, the requirement to advertise planned designations in both the gazette and a daily newspaper is retained.

The Committee notes that clause 5's sole impact is to reduce the mandatory period between notification of a planned designation of an area in the government gazette and when the designation may validly operate. While such a reduction has no practical impact on the controlled weapons search regime in its application to recently violent or disordered 'areas' (as such areas can already be subject to 'unplanned' – i.e. without notice – designations) the Committee observes that clause 5 may have a potential practical impact on the controlled weapons search regime in its application to previously violent or disordered 'events' (such as sporting, cultural or political events that move from place to place or extend for more than a year), to the extent that prospective attendees at such an event may be unaware that it is in an area that has been recently designated. However, the Committee notes that all planned designations must still be notified in a daily newspaper and that any notice must specify the period of operation of the designation.

The Committee will write to the Minister seeking further information as to the required period of time between notification of a designation in a daily newspaper and when the designation may validly operate. Pending the Minister's response, the Committee draws attention to clause 5.

Minister's Response

Thank you for your letter of 7 February 2012 on behalf of the Scrutiny of Acts and Regulations Committee of the Parliament (the Committee) requesting my advice in relation to amendments to the *Control of Weapons Act 1990* (the Act) as contained in the Control of Weapons and Firearms Acts Amendment Bill 2011 (the Bill).

As noted in the second reading speech, the Bill fulfils the Government's election commitment to reduce knife crimes. In fulfilment of this commitment, clause 5 of the Bill amends the Act to remove the requirement to publish notice of a declaration of a planned designation of a search area in the Government Gazette at least seven days prior to the declaration coming into effect.

I now turn to the request for further information directed to me in the Committee's Charter Report, as contained within Alert Digest No. 1 of 2012 and as tabled in Parliament on 7 February 2012.

Clause 5 of the Bill ensures that publication of the notice in the Government Gazette and a newspaper will still be required, but publication in the Government Gazette will be able to occur at any time prior to the declaration taking effect rather than seven days prior. It should be noted that the seven-day requirement has only ever applied to the Government Gazette publication requirement, and does not apply to publication in a newspaper. The timing of publication in a newspaper has always been at the discretion of Victoria Police. Victoria Police will be able to select the timing most appropriate to the circumstances in relation to publication of notices for planned area designations. There is no required period of time between notification of a designation in the Government Gazette and newspaper and when the designation may validly operate. Victoria Police will have discretion choosing when to publish the notice (whether seven days prior or otherwise), to suit the circumstances of the particular event or high profile activity.

The notice requirement has been retained because it is often in the interests of police and the community that published notice be provided in addition to the search notice that police will continue to be required to provide to each individual to be searched. Forewarning that random searches will be conducted at a particular event can often be effective in deterring unlawful weapons carriage and use from occurring.

Thank you for bringing this matter to my attention and for giving me the opportunity to respond to the Committee's query.

Peter Ryan MLA
Minister for Police and Emergency Services

29 February 2012

The Committee thanks the Minister for this response.

Committee Room
9 March 2012

Appendix 1
Index of Acts and Bills in 2012

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)

(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

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
Disability Amendment Bill 2012	4
Water Amendment (Governance and Other Reforms) Bill 2012	4

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*

Table of Ministers responses still pending

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Water Legislation Amendment (Water Infrastructure Charges) Bill 2011	Minister for Water	25-10-11	12 of 2011
Disability Amendment Bill 2012	Minister for Community Services	13-03-12	4 of 2012
Water Amendment (Governance and Other Reforms) Bill 2012	Minister for Water	13-03-12	4 of 2012