

No. 5 of 2013

Tuesday, 16 April 2013

On the

Adoption Amendment Bill 2013

Corrections Further Amendment
Bill 2013

Energy Legislation Amendment (Feed-
In Tariffs and Other Matters) Bill 2013

Gambling Legislation Amendment
Bill 2013

Integrity Legislation Amendment
Bill 2013

Parliamentary Committees
Amendment Bill 2013

Rail Safety National Law Application
Bill 2013

Transport Legislation Amendment
(Rail Safety Local Operations and
Other Matters) Bill 2013

The Committee



Chairperson
Hon. Richard Dalla-Riva MLC
Member for Eastern Metropolitan



Deputy Chairperson
Hon. Christine Campbell MLA
Member for Pascoe Vale



Mr Colin Brooks MLA
Member for Bundoora



Mr Michael Gidley MLA
Member for Mount Waverley



Mr Don Nardella MLA
Member for Melton



Dr Bill Sykes MLA
Member for Benalla



Mr Graham Watt MLA
Member for Burwood

Parliament House, Spring Street
Melbourne Victoria 3002

Telephone: (03) 8682 2895
Facsimilie: (03) 8682 2858
Email: andrew.homer@parliament.vic.gov.au

Committee Staff

Ms Helen Mason, Senior Legal Adviser
and Legal Adviser - Regulations
Mr Simon Dinsbergs, Business Support Officer
Ms Sonya Caruana, Office Manager

Terms of Reference - Scrutiny of Bills

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

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

Table of Contents

	Page Nos.
Alert Digest No. 5 of 2013	
Corrections Further Amendment Bill 2013	1
Energy Legislation Amendment (Feed-In Tariffs and Other Matters) Bill 2013	4
Gambling Legislation Amendment Bill 2013	6
Integrity Legislation Amendment Bill 2013	8
Parliamentary Committees Amendment Bill 2013	11
Ministerial Correspondence	
Adoption Amendment Bill 2013	13
Rail Safety National Law Application Bill 2013 and Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	18
Appendices	
1 – Index of Acts and Bills in 2013	25
2 – Committee Comments classified by Terms of Reference	27
3 – Ministerial Correspondence 2013	29

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 \$140.84).

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

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

[] denotes clause numbers in a Bill.

Alert Digest No. 5 of 2013

Corrections Further Amendment Bill 2013

Introduced	19 March 2013
Second Reading Speech	20 March 2013
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister for Corrections

Purpose

The Bill amends the *Corrections Act 1986* (the Act). In particular, it:-

- Validates decisions purportedly taken by the Director-General of Corrections or the Secretary to the Department of Justice under section 17 before 12 January 1995;
- Validates the inclusion of a margin in the retail price of cigarettes and tobacco sold in prisons between 24 March 1993 and 8 April 2004.
- Validates the making of decisions by the Director-General or the Secretary between 1 March 1988 (when section 17 commenced) and 12 January 1995 (when amendments to section 17 commenced) that could have been made under section 17 after the commencement of the amendments on that date.

Amendments

Section 17(a)(i) – Rights or freedoms – retrospectivity

- Clause [2] is the commencement provision. The Bill is taken to have come into operation on 20 March 2013. This is the date of the Second Reading of the Bill in the Legislative Assembly. The Explanatory memorandum note:- *‘This will ensure that, from the date the Government’s intention to legislate certain decisions or actions taken under the Corrections Act 1986 is announced, those affected decisions will be taken to be valid.’* The Committee notes the retrospective effect of clause [2] and refers to the Second Reading Speech extract below.
- It also inserts new section 112C which validates decisions purportedly taken by the Director-General or the Secretary to the Department of Justice under section 17 before 12 January 1995 [3]. There is a common law assumption that legislation is not assumed to have retrospective operation.¹ The Second Reading Speech extract:- *‘This legislation addresses a Supreme Court decision that calls into question the validity of certain decisions or actions taken in relation to prison or prisoners, based on insufficient records. In order to understand the reason for the Bill, it is necessary to provide some background. Prison authorities sell a range of products to prisoners, including cigarettes and tobacco.*

Before 1993, cigarettes and tobacco were sold to prisoners at wholesale prices. In 1993, in support of a smoke free environment policy across correctional facilities, it was decided by Corrections Executive that the price at which cigarettes and tobacco would be sold in prisons would be increased to 90% of the recommended retail price. The margin would be allocated to a fund to be used to promote smoking cessation and associated health related purposes.

In 2004 the policy was updated and it was determined that the price of cigarettes and tobacco in prisons would be increased to 90% of the recommended retail price. The purpose

¹ Maxwell v Murphy (1957) 96 CLR 261, Fisher v Hebburn (1960) 105 CLR 188

to which the margin was put was unaltered. In 2011 proceedings were commenced in the Supreme Court, testing the validity of both the 1993 decision and the 2004 decision. The decisions relating to cigarette and tobacco pricing were found to be decisions with respect to the welfare of prisoners and the management of prisons, and were supported by sections 20 and 21 of the Corrections Act 1986. The 2004 pricing decision having been made by the Acting Commissioner of Corrections pursuant to a delegation of the Secretary's powers under section 17 of the Corrections Act was found to be valid. However, the 1993 pricing decision was found to be invalid. This was for two reasons.

First, the records from the period show that the 1993 decision was made by the Corrections Executive but no conclusive evidence of the actual decision maker was able to be identified. Secondly, (and even if the evidence that suggested the decision had been made by the General-Manager, Prison Operations or the Director of Corrections Services had been accepted), government archives did not contain a record of the delegation of the relevant powers to either of these positions under section 17 of the Corrections Act. We certainly have no dispute with the Court's findings – which of course included that the decisions in relation to cigarette and tobacco pricing in prisons were decisions with respect to the welfare of prisoners and the management of prisons, and were supported by the provisions of the Corrections Act.

Unfortunately, though the records of a relatively unexceptional administrative decisions dating back over 20 years were not able to produce the information required by the court to find the 1993 pricing decision to have been validly made. The finding that the sale of cigarettes and tobacco at a price higher than the wholesale purchase price between 1993 and 2004 was invalid has opened the way for prisoners or former prisoners to claim compensation for the additional monies they paid for cigarettes during this period. Although the amounts of money involved in any compensation claims would not be large and legal defences to any claim are available, the administrative and legal costs involved in resolving claims would be significant. The Bill, therefore has the effect of validating the sale of cigarettes and tobacco products in accordance with the 1993 pricing policy decision.

The second element to this Bill addresses a potential broader problem. The Court that the provisions of section 17 of the Corrections Act as they stood in 1993 only permitted the Secretary to the Department (at that time exercising the powers of the Director-General) to exercise the powers of a prison Governor in relation to the welfare of prisoners and the management of prisons, whilst actually at a prison and only where prison security or good order was threatened. Section 17 was amended as of 12 January 1995 so that the Secretary to the Department is able to exercise all of the functions of a Governor of a prison – including the powers and duties in relation to welfare of prisoners and the management of prisons.

This observation suggests that the validity of any decision made by the then Director-General or delegate (or Secretary exercising such powers) in relation to prisons between 1 March 1988 (when section 17 commenced) and 12 January 1995 could potentially be challenged by a prisoner. It is not possible to identify what decisions may have been made in relation to the welfare of prisoners or the management of prisons that could be impacted. However, they will include decisions relating to the separation of transfer of prisoners. To avoid future litigation on this issue, the Bill has the effect of validating the making of decisions by the Director-General or the Secretary between 1 March 1988 (when section 17 commenced) that could have been made under section 17 after the commencement of the amendments on that date.'

The Committee notes the retrospective operation of clauses 2 and 3 may engage its terms of reference under section 17(a)(i) of the *Parliamentary Committees Act 2003*, the Explanatory memorandum and the Second Reading Speech. The Committee draws the provisions to the attention of the Parliament.

Charter report

The Corrections Further Amendment Bill 2013 is compatible with the rights set out in the *Charter of Human Rights and Responsibilities*.

The Committee makes no further comment

Energy Legislation Amendment (Feed-In Tariffs and Other Matters) Bill 2013

Introduced	19 March 2013
Second Reading Speech	20 March 2013
House	Legislative Assembly
Member introducing Bill	Hon. Nicholas Kotsiras MLA
Portfolio responsibility	Minister for Energy and Resources

Purpose

The Bill amends a number of pieces of Energy legislation. In particular:-

- Amends the *Electricity Industry Act 2000* in relation to general renewable energy feed-in terms and conditions;
- Widen the scope of an existing offence relating to the installation of electrical equipment under the *Electricity Safety Act 1988*;
- Create a new offence relating to the carrying out of electrical equipment work;
- Amend the *Energy Safe Victoria Act 2005* to allow Energy Safe Victoria to provide information it holds to the Australian Energy Regulator (AER);
- Amends the *Gas Safety Act 1997* to create a new offence prohibiting building work at a premises that a person knows or should reasonably be expected to know will make a gas installation or building at the premises unsafe;
- Amends the *Victorian Energy Efficiency Target Act 2007* so that retailers that supply a small number of large customers are no longer exempt from energy efficiency targets.

Amendment of *Electricity Industry Act 2000*

- It makes amendments to require general renewable energy feed-in terms and conditions to include minimum terms and conditions as specified under new section 40FBA. It provides the minimum terms and conditions for including the credit in a customer's electricity bill and applying any credit against the amount owed by the customer to the retailer. The feed-in credit rates are to be determined annually by the Essential Services Commission [4-11]. The Second Reading Speech extract:- *'The Victorian Competition and Efficiency Commission's recommendations included establishing a new efficient and fair feed-in tariff that would be available to all small scale low emissions or renewable energy distributed generation facilities. The inquiry found that continuing to provide above market premium feed-in tariffs for these facilities could lead to unnecessary increases in electricity prices for all Victorian consumers. The Bill implements the Government response by providing for a new efficient and fair feed-in tariff rate. This efficient and fair rate will be set by the Essential Services Commission, based on the wholesale price of electricity and the distribution and transmission costs avoided through the supply of electricity from distributed generators.'*

The Bill also allows for a wider range of small generation facilities to be eligible for the feed-in tariff scheme by removing existing restrictions on facility eligibility. This will allow new technologies to be assessed for inclusion in the scheme on a case by case basis. An electricity customer with a small solar energy facility who receive a premium feed-in tariff and who chooses to increase the generating capacity of that facility after 31 December 2012 will no longer be eligible for that premium rate. While these customers may still be eligible for the new efficient and fair rate, if they were to continue to receive a premium rate, the costs for

these schemes, ultimately borne by all Victorian electricity customers could significantly increase.'

Other amendments – *Electricity Safety Act 1988, Energy Safe Victoria Act 2005, Gas Safety Act 1997, Victorian Energy Efficiency Target Act 2007*

- It is an offence to install unsafe electrical equipment or install electrical equipment which will make a building or structure unsafe. The penalty is 40 penalty units **[12]**. The same offence and penalty is inserted with respect to unsafe gas installation **[15]**. It authorises Energy Safe Victoria to provide information to the Australian Energy Regulator (AER) that is reasonably required for the performance of AERs duties **[13]**. Energy Safe Victoria is to monitor compliance with the *Gas Safety Act 1997* **[14]**.
- Energy retailers participating in the Victorian Energy Efficiency Target Scheme (VEET Scheme) will include retailers who meet an energy use threshold as an alternative to the existing 5000 customer threshold **[16]**. It allows the greenhouse gas emissions savings achieved by undertaking prescribed activities to be assessed over multiple periods of time **[18]**. It allows regulations to be made under the *Victorian Energy Efficiency Target Act 2007* which adopt, apply or incorporate documents as they are published or amended from time to time **[21]**.

Charter report

The Energy Legislation Amendment (Feed-In Tariffs and Other Matters) Bill 2013 is compatible with the rights set out in the *Charter of Human Rights and Responsibilities*.

The Committee makes no further comment

Gambling Legislation Amendment Bill 2013

Introduced	19 March 2013
Second Reading Speech	20 March 2013
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister for Gaming Regulation

Purpose

The Bill makes a number of amendments to the *Gambling Regulation Act 2003* (the Act). The Second Reading Speech extract:- *'From August 2012, the Victorian gaming industry transitioned from the duopoly gaming operator system to a new structure where venue operators have direct control over their gaming operations. The Government has worked closely with the industry to facilitate a ... transition to the new gambling industry structure and the ... establishment of the combined gambling and liquor regulator.'*

The main purpose of the Bill is to resolve operational issues that have arisen with the commencement of the new licences and industry structure. The amendments include:-

- To allow the keno licensee to develop linked jackpot arrangements for keno games with keno operators in other jurisdictions;
- To extend by four years the current arrangement of \$45 million of gaming machine taxation being reserved from payment to the Community Support Fund to fund Victoria's drug and alcohol strategy.

Amendments

- It provides that a person listed on the Roll of Manufacturers, Supplier and Testers does not commit an offence by selling gaming machines in accordance with a published price list **[5]**. The Second Reading Speech extract:- *'Persons listed on the Roll undertake a range of functions including the sale of gaming machines to venue operators. It is a common commercial practice permitted by the Act to provide a bulk purchase rate to customers.'* It extends by four years existing arrangements of the reservation of \$45 million of taxation funds for payment to the Community Support Fund **[8]**. It gives the Treasurer the power to grant an exemption from tax on fixed-odds approved betting competitions run by the wagering and betting licensee as currently exists for totalisators. The Second Reading Speech extract:- *'The purpose of the exemption is to ensure that the wagering and betting licensee can provide fixed odds betting book management services for operators in other states without incurring a tax liability in both Victoria and the other jurisdiction.'*
- It inserts a new section 6A.1.3 into the Act that provides the Minister with the power to approve a keno linked jackpot arrangement between the keno licensee and a keno operator in another jurisdiction **[14-16]**. The Second Reading Speech extract:- *'While linked jackpots are not currently permitted across jurisdictions for keno games, they are allowed for public lotteries. Linking jackpots across jurisdictions allows keno operators to offer a linked prize pool, increasing the growth of jackpot prize pools ... In approving linked jackpot arrangements, the State will ensure that keno tax revenue and agent commission rates are not negatively affected and that existing responsible gambling measures that apply to keno are not undermined.'*
- It provides that the Commission may serve documents on a gaming industry employee by sending the documents by post to the person at their usual or last known place of residence or business **[20]**.

Charter report

The Gambling Legislation Amendment Bill 2013 is compatible with the rights set out in the *Charter of Human Rights and Responsibilities*.

The Committee makes no further comment

Integrity Legislation Amendment Bill 2013

Introduced	19 March 2013
Second Reading Speech	20 March 2013
House	Legislative Assembly
Member introducing Bill	Hon. Andrew McIntosh MLA
Portfolio responsibility	Minister for responsible for Independent Broad-based Anti-corruption Commission

Purpose

The Bill amends the *Independent Broad-based Anti-corruption Commission Act 2011* and the *Victorian Inspectorate Act 2011* to:-

- Provide for pension entitlements for the IBAC Commissioner;
- Provide for pension entitlements for the Inspector.

Amendments

Section 17(a)(i) – rights or freedoms – retrospectivity

- The salary on which a pension for both the IBAC Commissioner and the Inspector is calculated is the annual salary for the time being applicable to the office of a Judge of the Supreme Court [3, 4]. The commencement provision provides that the relevant sections are taken to have come into operation on 1 January 2013 so that the conferral of pension entitlements become effective from that date. There is a common law assumption that legislation is not assumed to have retrospective operation.² The Explanatory memorandum note:- ‘Section 24A(12) provides that section 24A is taken to have effect on and from 1 January so as to align the conferral of the pension entitlement on the Commissioner with the date upon which the first Commissioner was appointed ... Section 21A(12) provides that section 21A is taken to have effect on and from 1 January 2013 so as to align the conferral of the pension entitlement on the Inspector with the date upon which the first Inspector was appointed.’

The Committee notes the retrospective operation of the provisions may engage its terms of reference under section 17(a)(i) of the *Parliamentary Committees Act 2003* and the Explanatory memorandum. The Committee draws the provisions to the attention of the Parliament.

Charter report

Discrimination – Marital status – Surviving partner entitled to pension until he or she becomes the domestic partner or spouse of another person

Summary: The Committee refers to Parliament for its consideration the question of whether or not clauses 3 and 4, by providing that surviving partners of deceased Commissioners and Inspectors must remain single to receive a pension, reasonably limit the Charter’s right against discrimination on the basis of marital status.

The Committee notes that clauses 3, inserting a new section 24A(3)(b) into the *Independent Broad-based Anti-corruption Commission Act 2011*, and 4, inserting a new section 21(3)(b) into the *Victorian Inspectorate Act 2011*, provide that upon the death of a current or former Commissioner or

² Maxwell v Murphy (1957) 96 CLR 261, Fisher v Hebburn (1960) 105 CLR 188

Inspector, his or her partner is entitled to a pension until ‘the partner becomes the domestic partner or spouse of another person’.³

The Committee observes that the effect of clauses 3 and 4 is that surviving partners of deceased Commissioners and Inspectors must remain single to receive a pension. The Committee considers that clauses 3 and 4 may engage the Charter’s right against discrimination on the basis of marital status (which includes a person’s status of being single, married, a domestic partner or widowed).⁴

The Statement of Compatibility remarks:

The amendments conferring pension entitlements on the IBAC Commissioner and the Inspector incorporate the same post-retirement restrictions as apply to Supreme Court judges under section 83(4) of the Constitution Act 1975. These restrictions also apply to the other officers in receipt of constitutionally protected pensions, such as judges of the County Court, the Chief Magistrate, the solicitor-general, the Director of Public Prosecutions, the chief Crown prosecutor and senior Crown prosecutors.

However, while the Statement addresses the discretionary suspension of a former Commissioner’s or Inspector’s pension if he or she engages in paid public work or legal practice,⁵ it does not discuss the mandatory termination of a surviving partner’s pension if he or she marries or forms a domestic relationship.

The Committee notes that a rule that surviving partners become ineligible for a pension if they remarry once applied to most Victorian public sector pensions.⁶ The rule was largely removed in 1993,⁷ but was left in place for surviving partners of constitutionally protected persons.⁸ A Statement of Compatibility for a 2008 Bill, extending the rule to surviving partners who enter into a domestic relationship, remarked:⁹

Unlike other superannuation funds, the constitutionally protected pension scheme is non-contributory and unfunded – sourced directly from Consolidated Fund. It is not provided as part of a total remuneration package, but rather is created by statute and paid to those who qualify under the statutory criteria. Together with security of tenure, payment of adequate and protected remuneration, the pension promotes judicial independence.

The entitlement to a reversionary pension is based on the policy that entitlement is referable to the surviving partner’s relationship with the deceased constitutionally protected officer, and therefore when the surviving partner remarries the entitlement ceases. The purpose of the limitation is to

³ See also new sections 24A(1)(a) of the *Independent Broad-based Anti-corruption Commission Act 2011* and 21A(1)(a) of the *Victorian Inspectorate Act 2011*, read with s. 83(2) of the *Constitution Act 1975*. If the surviving partner has children under 25, then they may become eligible for a child’s pension after the surviving partner becomes ineligible: see new sections 24A(4) of the *Independent Broad-based Anti-corruption Commission Act 2011* and 21A(4) of the *Victorian Inspectorate Act 2011*,

⁴ Charter s. 8(3) provides that ‘[e]very person... is entitled to equal protection of the law without discrimination’. Charter s. 3 provides that ‘discrimination... means discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in section 6 of that Act’. Section 6(h) of the *Equal Opportunity Act 2010* sets out the attribute of ‘marital status’. Section 4 of that Act provides that ‘marital status’ means ‘a person’s status of being- (a) single; or (b) married; or (c) a domestic partner; or (d) married but living separately and apart from his or her spouse; or (e) divorced; or (f) widowed.’ The *Oxford English Dictionary* defines a ‘widow’ as ‘[a] woman who has lost her husband by death and has not married again.’

⁵ See new sections 24A(1)(a) of the *Independent Broad-based Anti-corruption Commission Act 2011* and 21A(1)(a) of the *Victorian Inspectorate Act 2011*, read with s. 83(4)(ii) of the *Constitution Act 1975*. The Statement addresses the compatibility of these sections with Charter s. 18(1)’s right to participate in the conduct of public affairs.

⁶ *State Superannuation Act 1988*, ss. 36(2)(a), 37(2)(a) & 37(5)(a); *Parliamentary Salaries and Superannuation Act 1968*, ss. 18(1), (2).

⁷ *Public Sector Superannuation (Administration) Act 1993*, ss. 75(1), (2) & (4) & 104(2)(a).

⁸ *Constitution Act 1975*, ss. 7A(3), 83(2); *County Court Act 1958*, ss. 14(3), 17B(2); *Supreme Court Act 1986*, s. 104A(2).

⁹ Statement of Compatibility to the Constitution Amendment (Judicial Pensions) Bill 2007 on its introduction to the Legislative Council, ‘address[ing] a number of human rights issues raised by the Scrutiny of Acts and Regulations Committee’s Alert Digest No. 1 of 2008.’

maintain the policy basis and ensure that the policy which applies to surviving partners who remarry applies equally to those who choose to enter a domestic relationship.

...

The right not to be discriminated against on the basis of marital status will be limited to the extent that a partner of a constitutionally protected officer will not be eligible or will be disentitled to receive a pension under the scheme, if they choose to marry or become the domestic partner of another person.

...

There is no less restrictive means to achieve the purpose of the limitation, having regard to the historical origins and policy basis of the reversionary pension and the distinct nature of the constitutionally protected pensions scheme.

The Committee observes that most unfunded, non-contributory pension schemes for judges in Australia once similarly barred surviving partners from receiving a pension if they remarried.¹⁰ However, in recent decades, all jurisdictions except Victoria removed such rules.¹¹ Surviving partners of non-Victorian judges are now entitled by statute to a lifetime pension, whether or not they choose to remain single.¹² In South Australia and Western Australia, this entitlement extends to surviving partners of those jurisdictions' corruption commissioners.¹³

The Committee refers to Parliament for its consideration the question of whether or not clauses 3 and 4, by providing that surviving partners of deceased Commissioners and Inspectors must remain single to receive a pension, reasonably limit the Charter's right against discrimination on the basis of marital status.

The Committee makes no further comment

¹⁰ *Judges' Pensions 1968* (Cth), ss. 7(2), 8(2) (before 1992) (applicable in the ACT: *Supreme Court Act 1933*, s37U(4)); *Judges' Pensions Act 1953* (NSW), s. 6(1) (before 1994); *Supreme Court (Judges Pensions) Act 1980* (NT), ss. 5(2), 6(2) (before 2006 – from 2003, the rule was extended to surviving partners who entered domestic relationships); *Judges (Pensions and Long Leave) Act 1957* (Qld), ss. 7, 8(2) (before 2002); *Judges' Salaries and Pensions Act 1950* (WA), Second Schedule (before 2003).

¹¹ *Law and Justice Legislation Amendment Act (No. 2) 1992* (Cth), ss. 4, 5; *Judges' Pensions (Amendment) Act 1994* (NSW), Schedule 1(1)(a); *Judges and Administrators Pensions Legislation Amendment Act 2006* (NT), ss. 3, 4; *Superannuation Legislation Amendment Act 2002* (Qld), ss. 6, 7; *Acts Amendment (Equality of Status) Act 2003* (WA), s. 99.

¹² *Judges' Pensions 1968* (Cth), ss. 7, 8 (applicable in the ACT: *Supreme Court Act 1933*, s37U(4)); *Judges' Pensions Act 1953* (NSW), s. 6(1); *Supreme Court (Judges Pensions) Act 1980* (NT), ss. 5, 6; *Judges (Pensions and Long Leave) Act 1957* (Qld), ss. 7, 8; *Judges' Pensions Act 1971* (SA), s. 8; *Judges' Contributory Pensions Act 1968* (Tas), s. 6.; *Judges' Salaries and Pensions Act 1950* (WA), Second Schedule, Part 1, Clause 3(3)

¹³ *Independent Commissioner Against Corruption Act 2012* (SA), s. 10(1) (if provided for in the instrument of appointment); *Corruption and Crime Commission Act 2003* (WA), Schedule 2, cl. 3(b). The remuneration of the remaining Australian equivalents to Victoria's Commissioner and the Inspector is not fixed by statute (unless the appointee is a sitting judge): *Law Enforcement Integrity Commissioner Act 2006* (Cth), s. 178; *Independent Commission Against Corruption Act 1988* (NSW), Schedule 1, cl. 5(1); *Corruption and Crime Commission Act 2003* (WA), Schedule 3, cl. 3(1); *Crime and Misconduct Act 2001* (Qld), ss. 232 & 310; *Integrity Commission Act 2009* (Tas), Schedule 1, cl. 5(1).

Parliamentary Committees Amendment Bill 2013

Introduced	19 March 2013
Second Reading Speech	20 March 2013
House	Legislative Assembly
Member introducing Bill	Hon. Louise Asher MLA
Portfolio responsibility	Premier

Purpose

The Bill amends the *Parliamentary Committees Act 2003* (the Act) to merge four existing Joint House Committees into two new Joint House Committees.

- It merges the Law Reform Committee and the Drugs and Crime Prevention Committee to form the Law Reform, Drugs and Crime Prevention Committee **[3(c), 4, 6]**.
- It merges the Economic Development and Infrastructure Committee and the Outer Suburban/Interface Services and Development Committee to form the Economic Development, Infrastructure and Outer Suburban/Interface Services Committee **[3(b), 5]**.

The Second Reading Speech extract:-

‘The new Committees will have the same functions as the existing committees, thereby preserving the coverage of the existing committee system. If this Bill is passed by the Parliament, the number of Joint House Committees will be 12, the same number as existed in 2005. The Bill will commence on 1 August 2013. This will enable the existing committees to complete their current inquiries.’

Charter report

The Parliamentary Committees Amendment Bill 2013 is compatible with the rights set out in the *Charter of Human Rights and Responsibilities*.

The Committee makes no further comment

Ministerial Correspondence

Adoption Amendment Bill 2013

The Bill was introduced into the Legislative Assembly on 5 March 2013 by the Hon. Mary Wooldridge MLA. The Committee considered the Bill on 18 March 2013 and made the following comments in Alert Digest No. 4 of 2013 tabled in the Parliament on 19 March 2013.

Committee Comment

Charter report

Equal protection of the law – Parental status – Statements by adopted person about contact with natural parents

Summary: Clauses 5, 6 and 8 only provide for statements of the wishes of the adopted person about contact by the natural parent. The Committee will write to the Minister seeking further information as to the compatibility of clauses 5, 6 and 8 with the Charter's right to equal protection of the law without discrimination on the ground of parental status.

The Committee notes that clause 5, inserting a new Division 1A, provides for an adult adopted person to provide the Secretary of the Department of Human Services with a written statement stating the person's wishes about being contacted by a natural parent of the adopted person. Clause 6, substituting existing s. 96(2), provides that the relevant authority cannot give information that discloses an adopted person's identity or whereabouts to a natural parent unless the authority has disclosed the adopted person's wishes about contact with the natural parent. Clause 8, inserting a new section 127A, provides that it is an offence for a 'person who is a natural parent of an adopted person' who knows that he or she has been specified in a current contact statement as a person by whom an adopted person does not wish to be contacted to contact the adopted person.

The Committee observes that clauses 5, 6 and 8 only provide for statements by adopted persons about contact with natural parents. By contrast, similar provisions in other Australian adoption laws also provide for statements by natural parents about contact with adopted persons.ⁱ

The Committee notes that the equality rights in the Charter are generally limited to rights against discrimination on the basis of an attribute protected by the *Equal Opportunity Act 2010*.ⁱⁱ The Committee observes that the protected attribute of 'parental status',ⁱⁱⁱ which is defined to mean 'the status of being a parent or not being a parent',^{iv} is usually associated with distinctions between people with responsibilities for children and people without such responsibilities, e.g. in employment decisions.^v The Committee is not aware of any legal authorities that have discussed the potential application of the attribute of parental status outside of the employment context.

ⁱ *Adoption Act 1993* (ACT), s. 70(1)(f); *Adoption Act 2000* (NSW), s. 154(b); *Adoption of Children Act 1994* (NT), s. 65(2) (statements about disclosure of identifying information, rather than contact); *Adoption Act 2009* (Qld), s. 269(1); *Adoption Act 1988* (SA), s. 27B(2) (statements about disclosure of identifying information, rather than contact); *Adoption Act 1988* (Tas), s. 82(2); *Adoption Act 1994* (WA), s. 101 (c.f. the previous s. 96(1)).

ⁱⁱ Charter s. 8(3) provides: 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.' 'Discrimination' is defined in Charter s. 3 to mean 'discrimination on the basis of an attribute set out in s.6' of the *Equal Opportunity Act 2010*.

ⁱⁱⁱ *Equal Opportunity Act 2010*, s. 6(j).

^{iv} *Equal Opportunity Act 2010*, s. 4.

^v See, e.g., *Equal Opportunity Act 2010*, ss. 17, 19, 22 & 32, providing for additional duties of employers, principals and firms to accommodate an employee's, contract worker's or partner's or prospective employee's or partner's responsibilities as a parent or carer.

The Committee will write to the Minister seeking further information as to the compatibility of clauses 5, 6 and 8 with the Charter's right to equal protection of the law without discrimination on the ground of parental status. Pending the Minister's response, the Committee draws attention to clauses 5, 6 and 8.

Privacy – Natural parent may receive information identifying an adult adopted person without the adopted person's consent

Summary: The Committee considers that clause 6, by permitting the Secretary and adoption agencies to disclose the identity and whereabouts of an adult adopted person to a natural parent without the adopted person's consent, may engage the Charter right of adult adopted people not to have their privacy arbitrarily interfered with. The Committee will write to the Minister seeking further information as to whether or not there are any less restrictive alternatives reasonably available to achieve clause 6's purpose of giving natural parents a right to identifying information about an adult adopted person while allowing the adult adopted person to regulate contact.

The Committee notes that clause 6 repeals existing section 96(2), which prohibits the Secretary and adoption agencies from releasing information that may identify or allow the ascertainment of the whereabouts of a living adult adopted person to that person's natural parent without the written consent of the adult adopted person.^{vi} In its place, new section 96(2) permits the release of that information after Secretary or agency has disclosed any statement made by the adopted person about his or her wishes concerning contact to the natural parent.

The Committee observes that a Canadian court has held that a similar scheme is incompatible with a right under Canada's Charter against the non-consensual disclosure of personal and confidential information where a person has a reasonable expectation of privacy.^{vii} However, two United States courts have rejected challenges under that nation's constitutional right to privacy to similar laws permitting the disclosure of the natural parent's identity to adult adopted children.^{viii} **The Committee considers that clause 6, by permitting the Secretary and adoption agencies to disclose the identity and whereabouts of an adult adopted person to a natural parent without the adopted person's consent, may engage the Charter right of adult adopted people not to have their privacy arbitrarily interfered with.**^{ix}

The Statement of Compatibility remarks:

The bill engages the right to privacy, by giving natural parents a right to be provided with identifying information about their adult adopted son or daughter, without the written agreement, or evidence of death, of the adopted person. This could impact on an adult adopted person's right not to have their privacy, family or home unlawfully or arbitrarily interfered with.

The bill also engages the right to freedom of expression, by allowing an adult adopted person to regulate contact by lodging a contact statement specifying the type of contact, if any, they wish to have with a natural parent. Those wishes about contact must be disclosed to a natural parent before providing them with identifying information, and it is an offence to breach a current contact statement where no contact is specified...

These rights have been balanced so that a natural parent has a right to identifying information about an adult adopted child, but the adopted person can regulate contact. Thus privacy is not unlawfully or arbitrarily interfered with by the bill...

^{vi} The prohibition extends to information that would contradict conditions the adult adopted person would place on the disclosure. However, existing s. 99 provides that the County Court of Victoria may order the release of the information to the natural parent if it finds that disclosure is in the natural parent's best interests and that special circumstances exist that make it desirable to release the information, having first heard from the adult adopted person in a closed hearing.

^{vii} *Cheskes v Ontario* (Attorney General), 2007 CanLII 38387. The Ontario legislature responded by re-enacting the law with a provision permitting the adult adopted person to veto the disclosure of identifying information: see *Vital Statistics Act 1990* (Ontario), s. 48.1(9).

^{viii} *Doe v Sundquist*, 2 SW 3d 919 (1999); *Does v Oregon*, 993 P 2d 822 (1999).

^{ix} Charter s. 13(a).

The Committee notes that similar disclosure schemes for past adoptions exist in most Australian jurisdictions.^x However, some of those jurisdictions require or permit the non-disclosure of information to prevent harm;^{xi} or provide for the disclosure to be delayed and/or advance notice of the disclosure to be given in some circumstances.^{xii} The Committee also notes that, under new section 127A, it is not an offence to contact a person contrary to that person's contact statement if the contact statement was lodged after contact was first made^{xiii} or if the contact statement permits contact, but only in a specified way.^{xiv}

The Committee will write to the Minister seeking further information as to whether or not there are any less restrictive alternatives reasonably available to achieve clause 6's purpose of giving natural parents a right to identifying information about an adult adopted person while allowing the adult adopted person to regulate contact. Pending the Minister's response, the Committee draws attention to clause 6.

Minister's Response

I refer to the letter of 19th March from the Scrutiny of Acts and Regulations Committee (the Committee) requesting advice in relation to the amendments proposed to the *Adoption Act 1984* (the Act) by the Adoption Amendment Bill 2013 (the Bill).

I have been asked to respond to the Committee's Charter report, in Alert Digest No. 4 of 2013, tabled in Parliament on 19 March 2013, and the concerns raised about particular provisions in the Bill relating to the introduction of 'contact statements' by adopted persons, and the release of information identifying an adopted person without that person's consent, to natural parents.

In this response to the Committee, I will explain how these provisions are compatible with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter Act).

Clause 5, 6 and 8 - Right to Equality

Clauses 5, 6 and 8 of the Bill set out a new regime for adopted persons to provide the Secretary of the Department of Human Services with a 'contact statement' stating whether (and how) they wish to be contacted by a natural parent. If the adopted person has specified a natural parent in a current contact statement, their wishes about contact must be disclosed to that natural parent before any identifying information is provided, and it is an offence for a natural parent to contact an adopted person if that would be contrary to a current contact statement expressing a wish for no contact with that parent. The Committee has queried whether these provisions limit the right to equality of natural parents under section 8 of the Charter Act, in that the regime does not apply in reverse (i.e. it does not provide for a natural parent to lodge a binding contact statement).

In particular, the Committee has queried whether these provisions amount to discrimination on the ground of parental status. Section 3 of the Charter Act defines discrimination to mean discrimination

^x *Adoption Act 1993* (ACT), Division 5.3; *Adoption Act 2000* (NSW), Part 2, Division 2 & Part 4; *Adoption Act 2009* (Qld), s. 265 & Part 11, Division 4; *Adoption Act 1988* (Tas), s. 84; *Adoption Act 1994* (WA), s. 82(2) & Part 4, Division 4. In the Northern Territory and South Australia, the adopted person may veto the disclosure of identifying information to the natural parent: *Adoption of Children Act 1994* (NT), s. 65(2); *Adoption Act 1988* (SA), s. 27B(1).

^{xi} *Adoption Act 1993* (ACT), s. 68(7) ('if the director-general believes, on reasonable grounds, that the person has been subjected to sexual or physical abuse from that birth parent'); *Adoption Act 2000* (NSW), s. 136A(3) ('exceptional circumstances exist that make it necessary to do so to prevent serious harm to a party concerned'); *Adoption of Children Act 1994* (NT), s. 62(3) ('there are reasonable grounds for believing that the personal safety of another person may be endangered'); *Adoption Act 2009* (Qld), s. 275 ('an unacceptable risk of harm'); *Adoption Act 1994* (WA), s. 83(2) ('likely to place the [adopted person] or the person to whom the [adopted person] is married, or in a de facto relationship with, or the [adopted person]'s children at serious risk'). See also broader discretions to refuse to supply information in South Australia, Tasmania and Western Australia: *Adoption Act 1988* (SA), s. 27(5); *Adoption Act 1988* (Tas), ss. 78(b) & s. 86A(1)(b); *Adoption Act 1994* (WA), s. 82 ('a good reason for not doing so').

^{xii} See *Adoption Act 2000* (NSW), Part 3 & ss. 162(1), 163; *Adoption Act 2009* (Qld), s. 271(4)(a).

^{xiii} New section 127A(2) contains an exception for where 'the contact is a continuation of, or of a similar kind to, contact that the person had with the adopted person before the person knew of the current contact statement'.

^{xiv} New section 90A(3)(b) provides that a contact statement may state that 'the adopted person wishes any contact with a specified person occur only in a specified way'. However, new section 127A(1) limits the offence relating to contact statements to 'a person specified in a current contact statement as a person by whom an adopted person does not wish to be contacted'.

within the meaning of and on the basis of attributes set out in section 6 of the *Equal Opportunity Act 2010* (EO Act). Direct discrimination under the EO Act means unfavourable treatment because of an attribute. "Parental status" is an attribute and means the status of being a parent (or not).

I am advised that not extending the contact statement regime to natural parents does not amount to discrimination on the basis of parental status, and therefore does not limit the right to equality under the Charter Act. The provisions do not treat natural parents unfavourably because they are parents. Rather, the provisions strike an appropriate balance between the rights of natural parents and adopted persons within that unique relationship. Within that dynamic, it is appropriate to prioritise an adopted person's desire for contact with their natural parents as such contact may be relevant to their core identity. The law currently provides that after receiving their original birth certificate, adoption and court records, adopted persons are free to make contact with their natural parents. It would not be appropriate to extend the new contact statement regime to now prevent adopted persons from contacting their natural parents. I note, however, that natural parents can still enter "Non Contact" registrations on the Adoption Information Register, in order to record their wish not be contacted. Although this does not prevent contact, their wish will be communicated and discussed with the adopted person seeking to make contact.

Clause 6 - Right to Privacy

Clause 6 of the Bill gives natural parents a right to be provided with identifying information about adopted persons, without the consent of the adopted person. This was previously prohibited. As acknowledged in the Statement of Compatibility accompanying the Bill, this provision does impact on the right to privacy of adopted persons. However, as it is not an unlawful or arbitrary interference with privacy it is compatible with the Charter Act. The Bill strikes an appropriate balance between the desire of a natural parent to obtain identifying information about their biological son or daughter, and the privacy of adopted persons, by providing adopted persons with the opportunity to lodge binding contact statements stating whether (and how) they wish to be contacted by a natural parent.

The Committee has queried whether there are any less restrictive alternatives reasonably available to achieve the purpose of clause 6. In raising this query, the Committee referred to a Canadian decision in which a court held a similar adoption scheme to be incompatible with the right to privacy as protected by the *Canadian Charter of Rights and Freedoms*. The court did so on the basis that there were other options that represented a lesser interference with the right to privacy; specifically, the scheme could give parties a right to veto the release of identifying information. However, the social and legal context in which the provisions in the Bill are being introduced in Victoria is different, as are the rights and considerations that must be balanced when determining human rights compatibility.

First, the right to privacy under the Charter Act is different to that under the Canadian Charter (which is located within the right to life, liberty and security of the person, rather than a freestanding right to privacy). Significantly, the right to privacy under the Charter Act extends to the right not to have one's family unlawfully or arbitrarily interfered with. Past adoption practices in Victoria, particularly between 1950 and 1975, resulted in a number of children being relinquished for adoption in circumstances where natural mothers did not provide full, free and informed consent. Provisions enabling natural parents to access identifying information about adopted persons therefore promote the right to privacy and family of these natural mothers. In the Victorian context, the question is one of balancing competing rights. (In the Canadian context, the interest of natural parents could only be characterised as a desire rather than a right).

Second, under the Charter Act, whether there are any less restrictive means reasonably available to achieve the purpose of an interference with a right is only one of several factors to be considered in determining whether a limitation on a right can be justified. The question is whether the chosen measure falls within a range of reasonable alternatives - it is not a test of 'minimal impairment' as in Canada.

I acknowledge that there are a number of different ways in which adoption schemes can be tailored to balance competing rights and interests. In my view, the provisions contained in the Bill, including those relating to the disclosure of identifying information, fall within the range of reasonable alternatives.

Thank you for the opportunity to respond to the Committee's concerns. I trust that this information is of assistance to the Committee. Should the Committee require any additional information or clarification of the effect of the amendments, please do not hesitate to contact my office.

Hon Mary Wooldridge MP
Minister for Community Services

4 April 2013

The Committee thanks the Minister for this response.

Rail Safety National Law Application Bill 2013 and Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013

The Bills were introduced into the Legislative Assembly on 6 March 2013 by the Hon. Terry Mulder MLA. The Committee considered the Bills on 18 March 2013 and made the following comments in Alert Digest No. 4 of 2013 tabled in the Parliament on 19 March 2013.

Committee Comment

RAIL SAFETY NATIONAL LAW APPLICATION BILL 2013

Charter report

Presumption of innocence – Victimisation offence – Employers must prove that victimisation was not the dominant reason for their conduct

Summary: Section 225(4) of the Rail Safety National Law may require an employer charged with a victimisation offence to prove that victimisation was not the dominant reason why the employer acted against or failed to hire an employee. The Committee will write to the Minister seeking further information as to the compatibility of section 225(4) with employers' Charter right to be presumed innocent of victimisation offences until proved guilty according to law.

The Committee notes that section 225 of the Rail Safety National Law makes it an offence for an employer to dismiss an employee or act to an employee's detriment, to threaten to do so, or to fail to offer employment to or to treat a prospective employee unfavourably, because the employee assisted or complained to a public agency about a breach of an Australian rail safety law, if that was the dominant reason for the employer's action. Section 225(4) provides that, in proceedings for such an offence:

if all the facts constituting the offence other than the reason for the defendant's conduct are proved, the defence bears the onus of proving that the reason alleged in the charge was not the dominant reason why the defendant engaged in the conduct.

The Committee observes that section 225(4) may require an employer charged with a victimisation offence to prove that victimisation was not the dominant reason why the employer acted against or failed to hire an employee. The Committee considers that section 225(4) may engage the Charter right of employers to be presumed innocent of a victimisation offence until proved guilty according to law.^{xv}

The Statement of Compatibility does not address section 225(4). The Committee notes that reverse onuses on the issue of the dominant purpose for acting against or failing to hire an employee are common in victimisation offences in Australian safety laws.^{xvi} The Committee also notes that the reverse onus in section 225(4) does not apply until the prosecution has first proved beyond reasonable doubt that the employer acted against or failed to hire an employee. However, the Committee observes that a number of recent Australian work safety laws impose additional proof or evidence requirements on the prosecution before an employer is required to discharge such a reverse legal onus.^{xvii}

^{xv} Charter s. 25(1). This right is limited to human (rather than corporate) employers: Charter s. 6(1).

^{xvi} E.g. *Occupational Health and Safety Act 2004* (Vic), s. 77; *Road Safety Act 1986* (Vic), s. 196(4); *Coal Mine Health and Safety Act 2002* (NSW), s. 61(2); *Mine Health and Safety Act 2004* (NSW), s. 52(2); *Road Transport (General) Act 2005* (NSW), s. 116(5); *Heavy Vehicle National Law Act 2012* (Qld), Schedule, s. 639(3); *Road Traffic Act 1961* (SA), s. 174G(5); *Dangerous Goods (Road and Rail Transport) Act 2010* (Tas), s. 130(5); *Heavy Vehicle Road Transport Act 2009* (Tas), s. 155(5); *Rail Safety Act 2010* (WA), s. 191.

^{xvii} I.e. requirements that the prosecution first prove beyond reasonable doubt that the employee's circumstances were susceptible to victimisation (i.e. that the employee assisted or complained to a public authority about a safety issue) (see *Work Health and Safety Act 2011* (Cth), s. 110(1)(b); *Work Health and Safety Act 2011* (ACT), s. 110(1)(b); *Work Health and Safety Act 2011* (NSW), s. 110(1)(b); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT), s. 110(1)(b); *Work Health and Safety Act 2011* (Qld), s. 110(1)(b); *Work Health and Safety Act 2012* (SA), s. 110(1)(b);

The Committee will write to the Minister seeking further information as to the compatibility of section 225(4) of the Rail Safety National Law with employers' Charter right to be presumed innocent of victimisation offences until proved guilty according to law. Pending the Minister's response, the Committee draws attention to section 225(4) of that Law.

Self-incrimination – National Rail Safety Regulator may require a person to provide self-incriminatory information

Summary: Section 20(7) of the Rail Safety National Law may abrogate the common law privilege against self-incrimination for people who are required to answer questions put by the Rail Safety National Regulator. The Committee will write to the Minister seeking further information as to the compatibility of section 20(7) with the Charter's rights against self-incrimination.

The Committee notes that section 155 of the Rail Safety National Law provides that a person is not excused from answering questions on the ground that the answers may tend to incriminate the person. While section 155(2) provides that the person's answers cannot be used against him or her in most subsequent proceedings, the Rail Safety National Law omits the common law protection against prosecution using information derived from those answers. The Committee considers that section 155 may engage the Charter's rights against self-incrimination.^{xviii}

The Committee observes that clause 46 modifies the Rail Safety National Law as it applies in Victoria to provide for protection against prosecution using information derived from answers that a person is required or directed to give by a rail safety officer under Part 4 of that Law.^{xix} However, it does not provide such protection for answers that the National Rail Safety Regulator requires under section 20 of that Law.^{xx}

The Statement of Compatibility remarks:

The abrogation of the privilege against self-incrimination in section 155 of the national law and the associated immunity provided in section 155(2) apply only to directions under part 4 of the national law...

This means that the common law right not to incriminate oneself and charter rights (including derivative use immunity...) apply to requirements made by the national regulator under section 20 of the national law. For that reason, the extended immunity and exceptions provided for under clause 46 do not need to extend to section 20 powers.

However, the Committee notes that section 20(7) of the Rail Safety National Law provides that '[s]ection 155 (with any necessary changes) applies to a requirement' by the National Rail Safety Regulator to answer questions under section 20. **Accordingly, the Committee observes that section 20(7) may abrogate the common law privilege against self-incrimination for people who are required to answer questions put by the Rail Safety National Regulator.**

The Committee will write to the Minister seeking further information as to the compatibility of section 20(7) of the Rail Safety National Law with the Charter's rights against self-incrimination. Pending the Minister's response, the Committee draws attention to sections 20(7) of that Law.

Work Health and Safety Act 2012 (Tas), s. 110(1)(b)); and that the prosecution must adduce evidence that victimisation was a reason for the employer's conduct (*Work Health and Safety Act 2011* (Cth), s. 110(1)(c); *Work Health and Safety Act 2011* (ACT), s. 110(1)(c); *Work Health and Safety Act 2011* (NSW), s. 110(1)(c); *Work Health and Safety Act 2012* (Tas), s. 110(1)(c)). In *Chasser v Patrick Stevedoring Pty Ltd* [2011] VMC 62, [10]-[12], a magistrate has held that the first of these requirements is implicit in s. 77 of the *Occupation Health and Safety Act 2004* (Vic), which is in similar terms to section 225(4) of the Rail Safety National Law.

^{xviii} See *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [143], which held that Charter ss. 24(1) and 25(2)(k) provide protection against self-incrimination that is as extensive as the common law.

^{xix} The immunity in clause 46 does not extend to proceedings for giving false information, or to information required to be kept under the Rail Safety National Law.

^{xx} Section 20 provides that a person who the Regulator has reasonable grounds to believe is capable of giving information in relation to a possible contravention of the national Law or to assist in monitoring or enforcing compliance with the Law may be required by written notice to give information, produce documents or answer questions as required by the Regulator. Failure to comply without reasonable excuse is an offence punishable by a \$10,000 fine.

TRANSPORT LEGISLATION AMENDMENT (RAIL SAFETY LOCAL OPERATIONS AND OTHER MATTERS)
BILL 2013

Charter report

Fair hearing – Rail safety offences relating to alcohol – Breath analysis certificate is conclusive proof of concentration of alcohol

Summary The effect of new section 86K(6) is that when a rail safety worker is prosecuted for an alcohol offence, a court may be required to treat the main allegations against the worker as conclusively proved by a certificate written by someone who the worker cannot cross-examine. The Committee will write to the Minister seeking further information as to whether or not omitting new section 86K(6) is a less restrictive means reasonably available to achieve the purpose of facilitating the effective prosecution of rail safety offences relating to the use of alcohol.

The Committee notes that clause 89, inserting a new section 86K into the *Rail Safety Act 2006*,^{xxi} provides that a certificate containing prescribed information produced by a breath analysing instrument that measured the concentration of alcohol in a person's breath and purporting to be signed by the instrument's operator 'is conclusive proof of... the facts and matters contained in' the certificate and certain other matters establishing the accuracy and legality of the instrument.^{xxii} New section 86K applies in prosecutions for rail safety offences related to alcohol where such facts are often determinative of guilt.^{xxiii}

The Committee observes that an accused rail safety worker can prevent the certificate from being conclusive proof of those facts if he or she gives timely notice^{xxiv} that he or she either requires the certificate's maker to be called as a witness or intends to adduce evidence rebutting a fact in the certificate. However, new section 86K(6) restores the conclusive nature of the certificate if a court is satisfied that a person who the accused requires to be called as a witness dead, too sick to testify, impracticable to call due to a change of occupation or state, or cannot be found.

Accordingly, the effect of new section 86K(6) may be to require a court to treat the main allegations against a rail safety worker charged with an offence relating to alcohol as conclusively proved by a certificate written by someone who the worker cannot cross-examine.^{xxv} The Committee considers that new section 86K(6) may engage the Charter right of a rail safety worker charged with an offence relating to alcohol to have that charge determined after a fair hearing.^{xxvi}

The Statement of Compatibility remarks

New section 86K relates to the giving of evidence about breath tests. A certificate is conclusive proof of the matters stated unless the accused gives notice that he or she requires the maker of the certificate to be called. However, in certain circumstances (such as where the person is dead) the provisions have effect as if such a notice by the accused had not been given.

...

^{xxi} Section 86K will apply to both local and national rail operations in Victoria (see clause 43(2) of the Rail Safety National Law Application Bill 2003).

^{xxii} These include the nature of the instrument, the authority of the operator, compliance with all relevant regulations, the instrument's accuracy and the certificate's identity with one given to the accused after the breath was analysed.

^{xxiii} See new sections 76(1)(c) (and 128(1)(c) of the Rail Safety National Law) (carrying out or attempting to carry out rail safety work while so much under the influence of alcohol as to be incapable of effectively discharging the function or duty of a rail safety worker, 77(1)(a) (carrying out rail safety work with breath that contains more than the prescribed concentration of alcohol) and 77(1)(f) (having more than the prescribed concentration of alcohol with 3 hours of carrying out rail safety work where the concentration is not due solely to consumption after having carried out that work), each punishable by a fine of up to \$10,000.

^{xxiv} The notice must be given 28 days before the hearing of the offence, or any shorter period ordered by the court or agreed by the informant.

^{xxv} See *DPP v Murphy* [2000] VSC 458, concerning an equivalent provision in s. 55(2C) of the *Road Safety Act 1986*, holding that a court cannot exclude such a certificate from the trial merely because the maker of the certificate is unavailable for cross-examination by the accused.

^{xxvi} Charter s. 24(1). See also Charter ss. 25(1) (the presumption of innocence) and 25(2)(g) (the right to examine opposing witnesses.)

These limitations in the bill are clearly related to their purpose which is to facilitate the effective prosecution of rail safety offences relating to the use of alcohol. I do not consider that less restrictive means are reasonably available to achieve the purpose of the limitation.

The Committee notes that neither of the two other Australian rail safety laws that provide for breath analysis results to be proved by certificate unless the accused makes a timely request that the maker of the certificate be called to testify creates an exception if the maker is unavailable to testify.^{xxvii} The Committee observes that, under new section 86K(7), the certificate remains admissible even if the accused gives effective notice, but ceases to be conclusive proof of the facts it states.

The Committee will write to the Minister seeking further information as to whether or not omitting new section 86K(6) (and therefore making breath analysis certificates admissible but not conclusive evidence of the facts they contain if the accused makes a timely request for the maker to testify and the maker is unavailable to do so) is a less restrictive means reasonably available to achieve the purpose of facilitating the effective prosecution of rail safety offences relating to the use of alcohol. Pending the Minister's response, the Committee draws attention to clause 89.

Minister's Response

I am pleased to respond to the matters raised by Mr Edward O'Donohue MLC in his letters of 19 March 2013 (in his then capacity as Chairperson of the Scrutiny of Acts and Regulations Committee) regarding the Rail Safety National Law Application Bill and the Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013.

RAIL SAFETY NATIONAL LAW APPLICATION BILL 2013

Section 225 of the national law

The Bill applies the national law as the law of Victoria subject to certain necessary variations. The national law is annexed to the Bill.

Section 225 of the national law contains provisions protecting employees and prospective employees from victimisation. The provisions apply in circumstances where the employee or potential employee has complained or provided information to or assisted a public authority in relation to a breach or alleged breach of an Australian rail safety law.

Section 225(2) contains offence provisions relating to dismissal or victimisation on the basis of conduct specified in paragraphs (a) to (d) of that section.

Section 225(3) provides that an employer or prospective employer may be guilty of an offence only if the dominant reason for the employer's conduct is a reason referred to in paragraphs (a) to (d) of subsection (2).

Section 225(4) contains a provision which reverses the legal onus of proof once all facts constituting the offence (except for the reason for the defendant's conduct) are proved

beyond reasonable doubt by the prosecution. In those circumstances, the employer bears the onus of proving that the reason alleged in the charge was not the dominant reason why the employer engaged in the conduct complained of. The evidence is to be assessed on the balance of probabilities.

The legal onus of proof is reversed because the employer (defendant) bears the onus of proving that the section 225(2)(a) to (d) reasons were not the dominant reasons for the dismissal, failure to employ or alleged victimisation. This imposes a limitation on a defendant's rights in criminal proceedings and the right to a fair hearing.

^{xxvii} *Rail Safety National Law (South Australia) Act 2012 (SA)*, s. 20(21)(b); *Rail Safety (National Uniform Legislation) Act 2012 (NT)*, 31(2)(b). Under the NSW and Tasmanian rail safety laws, notice does not affect the evidential value of breath analysis certificates, but those certificates are only 'prima facie evidence' (i.e. not proof) of the facts they state: see *Rail Safety (Adoption of National Law) Regulation 2012 (NSW)*, s. 28(2); *Rail Safety National Law (Tasmania) Act 2012 (Tas)*, s. 10(2) (read with the *Road Safety (Alcohol and Drugs) Act 1970 (Tas)*, s. 25(2)). Queensland's and Western Australia's current rail safety laws (*Transport (Rail Safety) Act 2010 (Qld)*, *Rail Safety Act 2010 (WA)*) do not provide for breath analysis certificates.

The limitation serves the purpose of rendering prosecution an effective mechanism to prevent victimisation and protect employees who cooperate with or provide information to public authorities. This protection helps secure the safe operation of railways in Victoria and elsewhere.

It should not be difficult for an employer to adduce evidence of the reasons for the employer's conduct. If the provision was not in place, it would be very difficult for the prosecution to prove the dominant reason for the employer's conduct.

Although the Committee has drawn attention to different formulations in various Australian work health and safety laws, as the Committee notes, the formulation in the national law is similar to section 77 of the *Occupational Health and Safety Act 2004* (Vic) and is considered appropriate and compatible with the Charter Act rights for the reasons stated above.

Abrogation of privilege against self-incrimination

The Committee notes that section 155 of the national law (abrogation of privilege against self-incrimination) applies with any necessary changes to section 20 of the national law (questions by the regulator).

Section 155 of the national law provides that a person is not excused from answering a question or provide information or a document on the ground that to do so would incriminate the person. For that reason, the provision engages the right not to be compelled to incriminate oneself. That right is protected by the right not to have to testify against oneself – rights in criminal proceedings – and also the right to a fair hearing.

Section 155 contains a direct use immunity (as explained in the statement of compatibility for the Bill).

In Victoria, where the privilege against self-incrimination is abrogated, a person's rights under a direct use immunity have been held to extend to derivative use of the evidence obtained pursuant to compelled testimony unless the evidence is discoverable through alternative means (*Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (*Major Crime*)).

The provision may be expected to be interpreted accordingly.

TRANSPORT LEGISLATION AMENDMENT (RAIL SAFETY LOCAL OPERATIONS AND OTHER MATTERS) BILL 2013

The Committee has sought further information about new section 86K(6) in clause 89 of the Bill which relates to breath analysis certificates and alcohol.

The Committee draws attention to the conclusive nature of the certificate if a court is satisfied that a person who the accused requires to be called as a witness is dead, too sick to testify, that it is impracticable to call the witness due to a change of occupation or State, or if the witness cannot be found.

The Committee asks whether omitting new section 86K(6) would be a less onerous means reasonably available to achieve the intended purpose.

The Committee notes that other jurisdictions' rail safety laws do not contain similar wording.

The approach taken in respect of drug and alcohol evidentiary and testing provisions is for each jurisdiction to follow its road safety provisions. This is to ensure, so far as possible, consistent drug and alcohol testing and evidentiary provisions in each participating jurisdiction.

In respect of new section 86K(6), the comparable provision is section 58(2C) of the Victorian *Road Safety Act 1986*.

The provision relates to the ability to call a person to give evidence. It does not affect the accused adducing evidence, including expert evidence, in respect of matters with which the accused has taken issue. In addition, the court must be satisfied in respect of the reason the witness is not called.

For those reasons, I consider that the provision is justified and there are no less restrictive means to achieve the policy intent.

If you require further information, please contact Ian Shepherd, Deputy Executive Director of the Department of Transport on telephone (03) 9655 1701.

Hon Terry Mulder MP
Minister for Public Transport

1 April 2013

The Committee thanks the Minister for this response.

Committee Room
15 April 2013

Appendix 1

Index of Acts and Bills in 2013

	Alert Digest Nos.
Accident Compensation Legislation (Fair Protection for Firefighters) Bill 2011	2
Adoption Amendment Bill 2013	4, 5
Alpine Resorts And National Parks Acts Amendment Bill 2013	3
Assisted Reproductive Treatment Amendment Bill 2012	1
Company Titles (Home Units) Bill 2013	3
Co-Operatives National Law Application Bill 2013	2, 3
Corrections Amendment Bill 2012	1
Corrections Further Amendment Bill 2013	5
Courts Legislation Amendment (Reserve Judicial Officers) Bill 2012	1
Crimes Amendment (Gross Violence Offences) Bill 2012	1
Crimes Amendment (Integrity in Sports) Bill 2013	4
Education and Training Reform Amendment (Teacher Registration and Other Matters) Bill 2013	2
Energy Legislation Amendment (Feed-In Tariffs and Other Matters) Bill 2013	5
Energy Legislation Amendment (Flexible Pricing and Other Matters) Bill 2012	1
Gambling Legislation Amendment Bill 2013	5
Integrity Legislation Amendment Bill 2013	5
Jury Directions Bill 2012	1
Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013	2, 4
Major Sporting Events Amendment Bill 2013	3
Parliamentary Committees Amendment Bill 2013	5
Planning and Environment (Growth Areas Authority and Miscellaneous) Bill 2013	4
Rail Safety National Law Application Bill 2013	4, 5
Statute Law Amendment (Directors' Liability) Bill 2012	1, 2
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	2
Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	4, 5

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*

Adoption Amendment Bill 2013	4
Co-operatives National Law Application Bill 2013	2
Rail Safety National Law Application Bill 2013	4
Statute Law Amendment (Directors' Liability) Bill 2012	1
Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	4

Section 17(b)

Appendix 3

Ministerial Correspondence 2013

Table of correspondence between the Committee and Ministers and members during 2012-13

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Tobacco Amendment (Smoking in Outdoor Areas) Bill 2012	Ms Colleen Hartland MLC	11-12-12 06-02-13	18 of 2012 2 of 2013
Statute Law Amendment (Directors' Liability) Bill	Attorney-General	05-02-13 18-02-13	1 of 2013 2 of 2013
Co-operatives National Law Application Bill 2013	Consumer Affairs	19-02-13 28-02-13	2 of 2013 3 of 2013
Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013	Corrections	04-03-13	4 of 2013
Adoption Amendment Bill 2013	Community Services	19-03-13 04-04-13	4 of 2013 5 of 2013
Rail Safety National Law Application Bill 2013	Public Transport	19-03-13 01-04-13	4 of 2013 5 of 2013
Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013	Public Transport	19-03-13 01-04-13	4 of 2013 5 of 2013