

No. 8 of 2014

Tuesday, 24 June 2014
on the following Bills

Freedom of Information and Victorian
Inspectorate Acts Amendment Bill 2014

Melbourne Market Authority
Amendment Bill 2014

Privacy and Data Protection Bill 2014

Public Records Amendment Bill 2014

Road Safety Road Rules 2009
(Overtaking Bicycles) Bill 2014

The Committee



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Member for Pascoe Vale



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Terms of Reference - Scrutiny of Bills

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

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

Table of Contents

	Page Nos.
Alert Digest No. 8 of 2014	
Freedom of Information and Victorian Inspectorate Acts Amendment Bill 2014	1
Melbourne Market Authority Amendment Bill 2014	2
Privacy and Data Protection Bill 2014	5
Public Records Amendment Bill 2014	7
Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2014	8
Appendices	
1 – Index of Bills in 2014	9
2 – Committee Comments classified by Terms of Reference	11
3 – Ministerial Correspondence 2014	13

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 (as from 1 July 2013 one penalty unit equals \$144.36)

'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. 8 of 2014

Freedom of Information and Victorian Inspectorate Acts Amendment Bill 2014

Introduced	10 June 2014
Second Reading Speech	11 June 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the:

Freedom of Information Act 1982 (FOI Act) to:

- provide for the appointment by the Governor in Council of Assistant Freedom of Information Commissioners under the FOI Act and make provision for their powers and functions. The Bill further make provisions for Acting Assistant Commissioners. The Bill provides that the FOI Commissioner ('the Commissioner') may refer any review or complaint to an Assistant FOI Commissioner who will have all the powers of the Commissioner in dealing with the review or complaint. **[6, 7, 12]**
- provide greater guidance in relation to time limits and notification requirements by, and to, the Commissioner **[10, 14, 17, 18]**
- facilitate the effective and informal resolution of reviews and complaints **[15, 16, 19, 21, 23]**
- ensure that many of the functions of the Commissioner may be undertaken by, or delegated to Assistant Commissioners and members of staff. **[9, 13, 20, 22]**

Victorian Inspectorate Act 2011 to:

- provide a definition for 'detained person' **[25]**
- improve processes associated with obtaining evidence by means of summons from persons detained in custody and clarify that a detained person may make a complaint to the Victorian Inspector **[28, 29]**
- set specific penalties for a body corporate that is found guilty of an offence under the Act **[30]**
- establish that any officers of a body corporate knowingly concerned in the commission of certain offences by the body corporate are also guilty of those offences. **[30]**

Charter report

The Freedom of Information and Victorian Inspectorate Acts Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Melbourne Market Authority Amendment Bill 2014

Introduced	10 June 2014
Second Reading Speech	11 June 2014
House	Legislative Council
Member introducing Bill	Hon Gordon Rich-Phillips MLC
Portfolio responsibility	Minister for Major Projects

Purpose

The Bill amends the *Melbourne Market Authority Act 1977* to provide for the use of land under that Act and to make arrangements for the relocation of the Melbourne wholesale fruit, vegetable or flower market at West Melbourne to the new purpose built facility in Cooper Street, Epping . The Bill also makes a number of minor amendments to that Act in the nature of statute law revision.

Extracts from the second reading speech:

The introduction of the Bill to the Parliament marks an historic occasion as it heralds the closing of the 33-hectare site on Footscray Road, West Melbourne, as a wholesale fruit, vegetable and flower market and facilitates the move of the market to a brand-new, purpose-built facility in Cooper Street, Epping. The Footscray Road site has been the home of the Melbourne wholesale fruit, vegetable and flower market for 46 years.

... The Bill will support the finalisation of the Melbourne Market relocation project by ensuring that the West Melbourne market is able to be closed in an orderly way and legacy issues will not be carried over to the new market at Epping. The Bill will also enable the West Melbourne site to be used for other purposes and clarify the ability of the Melbourne Market Authority to manage the market land at Epping.

Content

Common law right abrogated - No compensation payable by the Crown

Clause 19 of the Bill inserts new section 36A and 36B and provides (*see Charter report below*):

36A Common law right abrogated

On and from the nominated day—

- (a) any common law right as to the provision of the Melbourne wholesale fruit, vegetable or flower market is abrogated; and
- (b) any incidents of a market at common law that would otherwise attach to the provision of the Melbourne wholesale fruit, vegetable or flower market, whether on the West Melbourne market land, the Epping market land or other land, are abrogated.

36B No compensation payable by the Crown

- (1) No amount is payable by the Crown (as compensation, damages or otherwise) to any person for any loss or damage arising out of or in connection with the enactment of the Melbourne Market Authority Amendment Act 2014.
- (2) Without limiting subsection (1), the Crown is not liable to any person for any claim arising out of or in connection with —
 - (a) the relocation of the Melbourne wholesale fruit, vegetable or flower market from the West Melbourne market land; or
 - (b) the removal of the condition on the title to the West Melbourne market land; or

- (c) the abrogation of any common law right as to the provision of a market; or
- (d) any action referred to in section 38D(1).*

* *The section deals with leases, licences, equitable interests and rights of occupancy.*

The impact of clause 19 on current proceedings (if any) is addressed in the Charter report. The Committee will write to the Minister as outlined below.

Charter report

Property – Crown not liable for claims relating to West Melbourne Market relocation, changes to title, removal of common law rights or ending of interests – No compensation payable by the Crown

Summary: The Committee notes that clause 19 provides that the Crown is not liable for claims arising in connection with the relocation of the Melbourne wholesale fruit, vegetable or flower market. The Committee observes that the Bill does not address the rights of parties to existing litigation affected by the Bill..

The Committee notes that clause 19, inserting a new section 36B, provides that the Crown is not liable to any person for any claim arising in connection with:

- the relocation of the Melbourne wholesale fruit, vegetable or flower market (see clause 22, inserting a new Part IVA);
- the removal of the condition on the title to the West Melbourne Market land (see clause 26, substituting existing s. 26);
- the abrogation of any common law rights as to provision of a market (see clause 19, inserting a new section 36A); and
- any action referred to in section 38D(1)(see clause 22, inserting a new section 38D(1), ending leases, licences, interests or rights associated with the West Melbourne Market other than interests declared to be preserved by the Governor-in-Council under new section 38E).

The Statement of Compatibility remarks:

‘Property’ under section 20 of the Charter Act includes the property rights and interests of a person and may include a lease or licence granted to a person where there is a reasonable expectation of the lasting nature of the lease or licence. To the extent that clauses 19 and 22 may deprive certain persons of some form of proprietary right or interest in the West Melbourne market, any such deprivation will occur in accordance with the processes outlined clearly in the bill and consequently will be lawful. Additionally, new section 38E allows for legitimate interests to be preserved.

The Committee observes that the Bill does not address the rights of parties to existing litigation (if any) affected by the Bill.¹ The Committee notes that, while new section 38D(3) provides that the nomination of a day for the relocation of the Melbourne wholesale fruit, vegetable or flower market ‘does not affect the status or continuity of any preserved interests’, the scope of ‘preserved interests’ (aside from a lease between Victorian Rail Track and the Melbourne Market Authority), including its application to rights that are the subject of current litigation, depends on a declaration by the Governor in Council under new section 38E.

¹ Compare, e.g. *Justice Legislation Amendment Act 2013*, s. 10 (inserting Schedule 4, clause 5 into the *Sentencing Act 1991*).

The Committee notes that the Charter's rights (including the rights to property and to a fair hearing²) are limited to human beings.³ **The Committee will write to the Minister as outlined below.**

Correspondence

The Committee will write to the Minister for Major Projects seeking further information as to the Bill's effect on the rights of natural persons⁴ and body corporates⁵ who are parties to current legal proceedings (if any) relating to the West Melbourne market or its relocation. Pending the Minister's response, the Committee draws attention to clause 19.

The Committee makes no further comment

² Charter ss. 20 & 24(1).

³ Charter s. 6(1).

⁴ With respect to the Committee's terms of references with respect to rights or freedoms (*Parliamentary Committees Act 2003*, s. 17(a)(i)) and Charter rights (Charter s. 30).

⁵ With respect to the Committee's term of reference with respect to rights or freedoms (*Parliamentary Committees Act 2003*, s. 17(a)(i)).

Privacy and Data Protection Bill 2014

Introduced	11 June 2014
Second Reading Speech	12 June 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill is for and Act to:

- provide for responsible collection and handling of personal information in the Victorian public sector
- provide remedies for interferences with the information privacy of an individual
- establish a protective data security regime for the Victorian public sector
- establish a regime for monitoring and assuring public sector data security
- establish the Commissioner for Privacy and Data Protection ('the Commissioner')
- repeal the *Information Privacy Act 2000* and the *Commissioner for Law Enforcement Data Security Act 2005* and make consequential amendments to other Acts.

Extracts from the second reading speech:

... The Bill also merges the existing roles of Privacy Commissioner and the Commissioner for Law Enforcement Data Security to create a single Privacy and Data Protection Commissioner with responsibility for the oversight of the privacy regime in Victoria.

The Bill otherwise re-enacts, or re-enacts with clearer wording, many key provisions of the Information Privacy Act, notably the information privacy principles. The 'organisations' to which that Act applied remain subject to the privacy provisions of this bill.

Content

Public interest determinations

The Bill allows the Commissioner on application by an organisation, to make a Public Interest Determination (PIDs), and in urgent circumstances, to make Temporary Public Interest Determination (TPIDs) for up to 12 months duration. A PID or TPID may authorise an organisation to engage in practices that contravene or may contravene an IPP other than IPP 4 (Data Security) or 6 (Access and Correction) where there is a public interest in allowing that contravention. **[29]**

Where an application is made a person whose interests would be affected is given an opportunity to be heard before the PID is made. The Commissioner may only make a PID or TPID if satisfied that the public interest in the organisation engaging in the act or practice substantially outweighs the public interest in complying with the relevant IPP or approved code of practice.

If a PID or TPID is made it must be published on the Commissioner's website.

A PID or TPID may be disallowed by Parliament. **[42]**

Information usage arrangements (IUAs)

Subject to the Commissioner's satisfaction that relevant public interest tests have been met and with the approval of the relevant Minister, an IUA may authorise a departure from the IPPs (except IPPs 4

and 6) or an approved code of practice and may determine that an information handling practice is permitted for the purpose of an information handling provision.

An IUA must be submitted for approval by the Commissioner and the relevant Minister. Before allowing an IUA the Commissioner must consider and certify that the acts and practices described in the IUA satisfy a net public interest test before any authorisation to depart from an IPP or approved code of practice or any permission for the purposes of an information handling provision is given.

The IUA must be published on the Commissioner's website. The Commissioner may issue compliance notices in respect of IUAs if the terms of an IUA are not complied with by the organisations involved. The responsible Minister must revoke an IUA if the public interest tests are no longer met, or may revoke it if the reasons for application no longer apply. **[43 to 54]**

Certifications by the Commissioner

The Commissioner may also certify that a specified act or practice of an organisation is consistent with an IPP or an information handling provision or an approved code of practice.

The certification process is not an authority to departure from an IPP or information handling provision or an approved code of practice, but a means of providing legal certainty that an act or practice is consistent with them.

The certificate provides an immunity to persons who act in good faith in reliance on a current certificate.

Certificates must be published on the Commissioner's website. **[55]**

Any person whose interests are affected by a certificate may seek review of the decision to issue the certificate in VCAT and VCAT or a court may set aside a certificate. **[56]**

Charter report

The Privacy and Data Protection Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Public Records Amendment Bill 2014

Introduced	10 June 2014
Second Reading Speech	11 June 2014
House	Legislative Council
Member introducing Bill	Hon David Davis MLC
Portfolio responsibility	Premier

Purpose

The Bill amends the *Public Records Act 1973* ('the Act') to:

- a) provide for a legislated process for the annual public release of Cabinet records 30 years after the year in which they were created rather than 30 years after the defeat of the government that created them. The Secretary of the Department of Premier and Cabinet will be responsible for closing Cabinet records. The new legislative regime will apply to Cabinet records of this, and future governments **[4, 7 to 10]**
- b) confer a new advisory function on the Public Records Advisory Council in relation to public records management advice to the Minister **[5]**
- c) require public records to be transferred to the Public Record Office Victoria sooner when they are no longer in use by a public office **[6]**
- d) confer a power on the keeper of public records to fix the fees charged for copying and other services provided by PROV **[12]**
- e) increase the penalty for unlawfully destroying, damaging, removing or selling a public record to better reflect the seriousness of this offence **[11]**
- f) update the language used in the Act to ensure that it is gender-neutral. **[14]**

Content

Delayed commencement – One year rule

The Bill provides that the amendments come into operation on proclamation but not later than by 1 January 2016, it comes into operation on that day.

In respect to the delayed commencement the explanatory memorandum provides:

The default commencement date will be more than 12 months after the introduction of the Bill. This later date has been chosen to ensure there is sufficient time to prepare and implement the new fee arrangements (inserted by clause 12 of the Bill) before the Bill commences. This will ensure a smooth transition and avoid disruption to the services provided by the Public Record Office.

Charter report

The Public Records Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2014

Introduced	11 June 2014
Second Reading Speech	11 June 2014
House	Legislative Council
Member introducing Bill	Mr Greg Barber MLC
Private Member's Bill	

Purpose

The Bill seeks to amend the *Road Safety Road Rules 2009 (the 'Road Rules')* in order to require motor vehicle drivers and motor bike riders to maintain at least a prescribed distance when overtaking bicycles on a road.

Content

The Bill inserts a new rule 144(2), which prescribes that when a driver or motor bike rider is overtaking a person who is riding a bicycle, a 'sufficient distance' for the purposes of existing rule 144 is a lateral distance of at least 1m, in the case of roads with a speed limit of 60 km per hour or less; or at least 1.5m, in the case of roads with a speed limit of greater than 60 km per hour measured from the furthest right hand side of the bicycle to the left hand side of any part of the vehicle or motor bike. A bicycle rider overtaking another bicycle must leave a safe distance in the circumstances. [4]

The Bill amends:

- rule 146 with the effect that drivers overtaking bicycles may move out of their marked lane in the same way they would if they were avoiding an obstruction on the road.
- rule 147 with the effect that drivers overtaking bicycles may move from one marked lane to another marked lane by crossing a continuous line separating the lanes in the same way they would if they were avoiding an obstruction on the road.
- rule 150(1A) with the effect that drivers overtaking bicycles may drive on or over a continuous white edge line on a road in the same way they would if they were avoiding an obstruction on the road. [5]

The Bill declares that amendments to the Road Safety Road Rules by this Bill have the same effect as if they were made under section 95D of the *Road Safety Act 1986*.

The explanatory memorandum states '*that this has the effect of providing that they may be altered or repealed in the same way as other rules*'.

Charter report

The Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Committee Room

23 June 2014

Appendix 1

Index of Bills in 2014

Alert Digest Nos.

Bills

Appropriation (2014-2015) Bill 2014	6
Appropriation (Parliament 2014-2015) Bill 2014	6
Assisted Reproductive Treatment Further Amendment Bill 2013	1
Building Legislation Amendment Bill 2014	6, 7
Building a Better Victoria (State Tax and Other Legislation Amendment) Bill 2014	6
Children, Youth and Families Amendment Bill 2014	6
Children, Youth and Families Amendment (Security Measures) Bill 2013	1
Consumer Affairs Legislation Amendment Bill 2014	5
Corrections Amendment (Further Parole Reform) Bill 2014	4
Corrections Amendment (Parole) Bill 2014	3
Corrections Amendment (Smoke-Free Prisons) Bill 2014	5
Corrections Amendment (Smoke-Free Prisons) Bill 2014 (Assembly initiated)	6
Corrections Legislation Amendment Bill 2013	1
Crimes Amendment (Grooming) Bill 2013	1
Crimes Amendment (Protection of Children) Bill 2014	5
Crime Statistics Bill 2014	5
Drugs, Poisons and Controlled Substances (Poppy Cultivation and Processing) Bill 2013	1
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	2, 3
Energy Legislation Amendment (Customer Metering Protections and Other Matters) Bill 2014	5
Environment Protection and Sustainability Victoria Amendment Bill 2014	2
Fences Amendment Bill 2013	1
Fences Amendment Bill 2014	3
Film Approval Bill 2014	5
Fines Reform Bill 2014	6
Freedom of Information and Victorian Inspectorate Acts Amendment Bill 2014	8
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	5, 6
Gambling and Liquor Legislation Amendment (Reduction of Red Tape) Bill 2014	3
Game Management Authority Bill 2013	1
Health Services Amendment Bill 2014	2
Honorary Justices Bill 2014	3
Jury Directions Amendment Bill 2013	1
Jury Directions Amendment Bill 2014 (Council initiated)	5
Justice Legislation Amendment Bill 2014	5
Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Bill 2014	2
Legal Profession Uniform Law Application Bill 2013	1, 2
Local Government Amendment (Governance and Conduct) Bill 2014	5
Local Government (Brimbank City Council) Amendment Bill 2014	6
Melbourne Market Authority Amendment Bill 2014	8
Mental Health Bill 2014	3, 4
Native Vegetation Credit Market Bill 2014	7
Parliamentary Budget Officer Bill 2013	1

Scrutiny of Acts and Regulations Committee

Private Health Care Facilities Bill 2014	7
Privacy and Data Protection Bill 2014	8
Public Records Amendment Bill 2014	8
Road Safety Amendment Bill 2014	7
Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2014	8
Sale of Land Amendment Bill 2014	2
Sentencing Amendment (Baseline Sentences) Bill 2014	5
Small Business Commissioner Amendment Bill 2013	1
State Taxation Legislation Amendment Bill 2014	2
Summary Offences and Sentencing Amendment Bill 2013	1
Transport Legislation Amendment (Further Taxi Reform and Other Matters) Bill 2014	4
Transport (Safety Schemes Compliance and Enforcement) Bill 2014	3
Treasury Legislation and Other Acts Amendment Bill 2014	6
Vexatious Proceedings Bill 2014	3, 4
Vexatious Proceedings Bill 2014 (Council initiated)	5
Victorian Civil and Administrative Tribunal Amendment Bill 2014	2
Victoria Police Amendment (Consequential and Other Matters) Bill 2014	4
Water Amendment (Flood Mitigation) Bill 2014	6
Water Amendment (Water Trading) Bill 2014	2
Witness Protection Amendment Bill 2014	4
Regulations	
Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	2
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	2

Appendix 2

Committee Comments classified by Terms of Reference

This Appendix lists Bills and Regulations 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

Building Legislation Amendment Bill 2014	6
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	2
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	5
Legal Profession Uniform Law Application Bill 2013	1
Melbourne Market Authority Amendment Bill 2014	8
Mental Health Bill 2014	3
Vexatious Proceedings Bill 2014	3

Appendix 3

Ministerial Correspondence 2014

Table of correspondence between the Committee and Ministers and members during 2013-14

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Legal Profession Uniform Law Application Bill 2013	Attorney-General	04-02-14 14-02-14	1 of 2014 2 of 2014
Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	Education	18-02-14 26-02-14	2 of 2014 3 of 2014
Mental Health Bill 2014	Mental Health	06-03-14 24-03-14	3 of 2014 4 of 2014
Vexatious Proceedings Bill 2014	Attorney-General	06-03-14 22-03-14	3 of 2014 4 of 2014
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	Liquor and Gaming	06-05-14 23-05-14	5 of 2014 6 of 2014
Building Legislation Amendment Bill 2014	Planning	27-05-14 06-06-14	6 of 2014 7 of 2014
Melbourne Market Authority Amendment Bill 2014	Major Projects	24-06-14	8 of 2014