

No. 10 of 2008

Tuesday, 19 August 2008

On the

Corrections Amendment Bill 2008

County Court Amendment
(Koori Court) Bill 2008

Labour and Industry (Repeal)
Bill 2008

Local Government Amendment
(Disclosure) Bill 2008

Road Safety Amendment (Fatigue
Management) Bill 2008

Whistleblowers Protection
Amendment Bill 2008

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Glossary



- ‘**Article**’ refers to an Article of the International Covenant on Civil and Political Rights;
- ‘**Assembly**’ refers to the Legislative Assembly of the Victorian Parliament;
- ‘**Charter**’ refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;
- ‘**child**’ means a person under 18 years of age;
- ‘**Committee**’ refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;
- ‘**Council**’ refers to the Legislative Council of the Victorian Parliament;
- ‘**court**’ refers to the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court as the circumstances require;
- ‘**Covenant**’ refers to the International Covenant on Civil and Political Rights;
- ‘**human rights**’ refers to the rights set out in Part 2 of the Charter;
- ‘**penalty units**’ refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (*currently one penalty unit equals \$113.42*).
- ‘**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;

Useful provisions

Section 7 of the **Charter** provides –

Human rights – what they are and when they may be limited –

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

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

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



Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –
 - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
 - (ii) within 10 sitting days after the Act receives Royal Assent —
whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

The Committee has considered the following Bills –

Corrections Amendment Bill 2008
County Court Amendment (Koori Court) Bill 2008
Labour and Industry (Repeal) Bill 2008
Local Government Amendment (Disclosure) Bill 2008
Road Safety Amendment (Fatigue Management) Bill 2008
Whistleblowers Protection Amendment Bill 2008



Role of the Committee

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

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

Alert Digest No. 10 of 2008

Corrections Amendment Bill 2008

Introduced	30 July 2008
Second Reading Speech	31 July 2008
House	Legislative Assembly
Member introducing Bill	Hon. Bob Cameron MLA
Portfolio responsibility	Minister for Corrections

Purpose

The Bill amends the *Corrections Act 1986* (the 'Act') to –

- quarantine, for a specified period, certain types of damages and awards payments to prisoners received as a result of a successful claim against the State or a private prison operator relating to a prisoners custodial sentence (other than whilst on remand),
- provide for the public notification of successful claims by prisoners to enable victims of crime and others to consider civil action to recover funds,
- provide for the registration of victims to allow the disclosure of relevant information,
- provide for the payment out of the fund to victims and creditors.

The Committee notes these extracts from the Second Reading Speech –

Under the Bill, damages awarded to offenders will immediately be paid to the Secretary of the Department of Justice to be quarantined in a trust fund. A public notification process will then commence. Victims will have 12 months in which to consider and commence legal proceedings against the offender. They can do this with the knowledge that the quarantined funds may be available to satisfy a successful claim.

...

It is not appropriate under the Bill to quarantine all types of payments. Accordingly, the Bill will not affect damages payable in relation to medical costs and the cost of future care.

In addition, the scheme does not capture the payment of legal costs awarded against the State of Victoria or a private prison operator.

...

The scheme sets a threshold quarantine amount of payments of or in excess of \$10,000 as it is inefficient to include small amounts of money in the fund. This, in effect, will be a threshold amount determining when the scheme operates.

Submissions received

The Committee received submissions from –

- Human Rights Law Resource Centre Ltd
- Office of the Victorian Privacy Commissioner

Note: *The above submissions are available on the Committee Website.*

Content and Committee comment

[2]. The provisions in the Bill will come into operation on the day after Royal Assent.

[3]. Inserts a new Part 9C into the Act (new sections 104O to 104ZN).

For the purposes of the new Part a *civil wrong* means an act or omission of the State that gives rise to a claim by a prisoner against the State; and that occurred while the claimant was a prisoner detained in custody in a prison; and that arose out of and in connection with his or her detention in custody in a prison.

New section 104Q defines a *criminal act*.

New section 104S provides that any agreement between the State and a prisoner for a payment of damages must be approved by a court.

Parliamentary Committees Act 2003, s. 17(a)(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 (the ‘IPA’) – Registration at VCAT of conciliation agreements concerning complaints of breach of privacy

The Committee notes the submission made by the Office of the Victorian Privacy Commissioner concerning the possible effect of the operation of new section 104S in respect to the conciliation provisions in section 35 of the IPA.

In respect to a breach of privacy complaint section 35 of the IPA allows parties to register a certified record of conciliation (an agreement) with the VCAT. The tenure of the submission is that new section 104S (as currently drafted) excludes the conciliation mechanism provided in section 35 of the IPA and therefore may have an adverse impact on personal privacy.

The Committee resolved to forward the Commissioner’s submission to the Minister for further advice from the Minister.

New section 104V requires an award of damages to a prisoner in respect of a civil wrong to be paid immediately to the Secretary after the damages are awarded and excludes from the amount to be paid any amount attributable to existing and future medical costs and legal costs. The amount paid to the Secretary must be held in trust for the prisoner by the Secretary during the quarantine period and until the final payment is made out of the prisoner compensation quarantine fund in accordance with the Part and excludes an amount of damages that would be required to be paid to the Secretary if it does not exceed \$10,000.

New section 104X provides that a victim in relation to a criminal act by a prisoner may apply to the Secretary to be notified of an award of damages to the prisoner.

New section 104Y provides that the Secretary must publish a notice advising of an award of damages to a prisoner as soon as practicable after the amount of damages is paid to the Secretary under section 104V. The notice must be published in the Government Gazette and in newspapers circulating generally within Victoria and in Australia. The notice may also be placed on the Internet.

New section 104Z authorises the Secretary to forward a copy of the notice under section 104Y in respect of an award of damages to a prisoner to any victim who has applied to the Secretary under section 104X to be notified of an award of damages in respect of the prisoner.

[8]. Provides for the automatic repeal of this amending Bill on the first anniversary of the day on which it receives the Royal Assent.

Charter Report

Privacy – Name of prisoner and fact of award of damages must be published in newspapers – Whether arbitrary – Whether reasonable limit

Charter s. 13(a) provides that everyone has the right not to have their 'privacy... unlawfully or arbitrarily interfered with'. Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.

The Committee notes that clause 3, inserting a new section 104Y into the *Corrections Act 1986*, provides that the Secretary to the Department of Justice 'must' publish a notice stating that damages have been awarded to a named prisoner in a claim against the State in the Government Gazette and daily newspapers circulating in Victoria and Australia. The Committee observes that the information contained in the notice – that the prisoner has been a victim of a civil wrong committed by the state and is the recipient of an award of more than \$10,000 – is potentially sensitive information, particularly given the vulnerabilities of many prisoners. The Committee also observes that this requirement is a mandatory one regardless of the circumstances and, in particular, overrides any confidentiality clause contained in an agreement between the state and the prisoner (see new section 104ZB.) The Committee therefore considers that new section 104Y may engage prisoners' Charter right against arbitrary interferences in their privacy.

The Statement of Compatibility remarks:

[T]he interferences are not arbitrary, as any interference will occur only in precise and circumscribed circumstances, and the bill provides safeguards regarding the use of the information, apart from where the information is in the public domain.

The Committee observes that the offence in new section 104ZFD for the disclosure of information except for the purposes of legal proceedings against the prisoner, while expressed to apply to information 'disclosed under section 104Y', cannot apply to any disclosures under that section as they will be automatically in the public domain. The Committee also observes that new section 104Y requires disclosure in all cases, regardless of whether or not there were any victims of the defendant's criminal act, whether any of those victims have unfulfilled claims against the defendant and whether or not the publication may harm or compromise the safety of the prisoner or anyone else. The Committee is concerned that the Secretary's obligation to publish information may override any contrary court orders, such as suppression orders made under ss. 18 & 19 of the *Supreme Court Act 1986*, or contrary laws, such as s. 534 of the *Children, Youth & Families Act 2005*.

The Committee considers that the compatibility of new section 104Y with Charter s. 13(a) may depend on the satisfaction of the test for reasonable limits on rights in Charter s. 7(2). Whilst the Committee considers that notifying potential claimants of the existence of quarantined funds is an important goal, the Committee is concerned that the automatic mandatory publication of notices in newspapers may not be the least intrusive way of achieving this goal. The Committee observes that the similar *Prisoners' and Victims' Claims Act 2005* (NZ) only requires newspaper publication where the known victims cannot be directly contacted and makes all notice requirements subject to contrary court orders or laws. The Committee also observes that the similar *Civil Liability Act 2002* (NSW) only mandates that victims be directly contacted and only provides for additional discretionary publication in the government gazette.

The Committee will write to the Minister seeking further information as to whether or not section 104Y will override contrary court orders or laws.

Pending the Minister's response, the Committee refers to Parliament for its consideration the following questions:

1. *Whether or not new section 104Y, by making it mandatory for the Secretary to publish the fact that a named prisoner has been successful in a significant compensation claim against the state, regardless of the circumstances of the prisoner's crime and the likelihood of any claims by victims, limits the prisoner's Charter right not to have his or her privacy arbitrarily interfered with.*
2. *If so, whether or not new section 104Y is a reasonable limit on the right to privacy according to the test set out in Charter s. 7(2) and, in particular, whether giving the Secretary a discretion to advertise in newspapers would be a less intrusive way of achieving the purpose of the section.*

The Committee makes no further comment.

County Court Amendment (Koori Court) Bill 2008

Introduced	30 July 2008
Second Reading Speech	31 July 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney General

Purpose

The Bill amends the *County Court Act 1958* (the 'Act') to –

- establish a Koori Court Division of the County Court; and
- provide for the jurisdiction and procedure of that Division—

with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the County Court through the role to be played in that process by the Aboriginal elder or respected person and others.

Content and Committee comment

[2]. Provides that with certain exceptions the provisions in the Bill come into operation on proclamation but not later than by 1 February 2009. The commencement of provisions in section 10 (consequential amendments) is linked to the commencement of other legislation that have not yet commenced operation.

[6]. Inserts new sections 4A to 4G into the Act to establish a new Koori Court Division of the County Court, which has such of the powers of the County Court as are necessary to enable it to exercise its jurisdiction including jurisdiction to hear certain appeals against decisions of the Magistrates' Court.

New section 4A establishes the Koori Court Division of the County Court.

New sections 4B to 4D deal with the jurisdiction of the new Division including an appeal jurisdiction of decisions of the Magistrates' Court.

New section 4E provide the new Division applies where the defendant is Aboriginal, pleads guilty to the relevant offence and consents to the proceedings being dealt with by the Koori Division. The Koori Division of the Court must consider it appropriate to deal with the proceedings in that Division and the proceedings must not relate to a sexual offence or an offence under section 22 of the *Crimes (Family Violence) Act 1987*.

New section 4G deals with the sentencing procedure in the Koori Court Division.

[7]. Inserts new Division 4A providing for the appointment of Aboriginal elders or respected persons.

[8]. Makes provision for rules of practice to be made in relation to any matter relating to the practice and procedure of the Koori Court Division of the court and for the transfer of proceedings to and from the Koori Court Division of the court.

[11]. Repeals the amending Act on 1 February 2010.

Charter Report

Errors in second reading speech

The Committee notes that Second Reading Speech remarks:

The Koori Court division will have the same jurisdiction as the criminal jurisdiction of the County Court to hear all offences, with the exception of sexual offences.

The Committee observes that clause 6, inserting a new s. 4E(b)(ii) into the *County Court Act 1958*, also excludes offences of breaching a family violence intervention order and other offences arising out of such breaches from the Koori Court division's jurisdiction.

The Committee also notes that the Second Reading Speech remarks:

The Koori Court division will hear a proceeding where the defendant meets the definition of an Aborigine, as set out in the bill, and pleads guilty or is found guilty, of an offence.

The Committee observes that clause 6, inserting a new s. 4E(c), requires that 'the defendant pleads guilty to the offence' and therefore does not extend the jurisdiction of the Koori Court division to offenders who are 'found guilty'.

The Committee will write to the Minister concerning these errors in the Second Reading Speech.

Equal protection against discrimination – Compelled guilty plea – Sentencing process to assist a group disadvantaged by discrimination – Exclusion of sexual and family violence offenders – Requirement of guilty plea – Whether reasonable limit

Charter s. 8(3) provides that everyone is entitled to 'equal and effective protection against discrimination'. Charter s. 8(4) provides that measures to assist 'groups of persons disadvantaged because of discrimination' are not discrimination for the purposes of the Charter. Charter s. 25(2)(k) provides that all criminal defendants are entitled 'to not be compelled to confess guilt'. Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.

The Committee notes that clause 6, inserting a new s. 4E(a) into the *County Court Act 1958*, restricts access to the Koori Court division of the County Court to criminal defendants who are Aboriginal.

The Statement of Compatibility remarks:

The purpose of establishing the Koori Court is to assist indigenous persons, who are disadvantaged and overrepresented in the criminal justice system... Therefore, this proposed amendment falls within section 8(4) of the charter and is accordingly compatible with the Charter.

Whilst the Committee considers that new s. 4E(a) falls within the exception contained in Charter s. 8(4), the Committee observes that because the Koori Court division of the County Court is measure to redress discrimination against Aboriginal persons, Charter s. 8(3) requires that all Aboriginal persons must be given 'equal and effective protection' from this discrimination.

The Committee also notes that clause 6, inserting new ss. 4E(b) and 4E(c), excludes sexual offenders, certain family violence offenders and people who plead not guilty from the jurisdiction of the Koori Court division. The Committee considers that clause 6 may engage the Charter right of such offenders to 'equal' protection against discrimination. The Committee observes that the Statement of Compatibility does not address the compatibility of new ss. 4E(b) and 4E(c) with Charter s. 8(3).

The Committee also considers that new s. 4E(c), by barring defendants who plead not guilty from accessing the Koori Court division, may engage Aboriginal County Court defendants' Charter right to not be compelled to confess guilt.

The Statement of Compatibility remarks:

A guilty plea is a fundamental aspect of the County Koori Court model, based on the Magistrates Koori Court model already in operation. For the Aboriginal elder or respected person to have a significant participatory role in the plea discussion in the Koori Court division, the defendant must be willing to acknowledge their guilty plea and address the ways of resolving their offending behaviour.

It should be noted that nothing in the bill limits the right of an indigenous defendant to be presumed innocent in the County Court, nor to plead not guilty and have their proceeding heard at first instance or on appeal in the County Court, sitting other than as the Koori Court division. Therefore, the right to be presumed innocent is not limited.

While the Committee accepts that new s. 4E(c) is compatible with the Charter right to be presumed innocent, the Committee is concerned that requiring Aboriginal County Court defendants to choose between contesting their charge and utilising a sentencing system designed to assist them against discrimination may place pressure on them to plead guilty, potentially limiting their Charter right to not be compelled to plead guilty.

The Committee considers that the compatibility of new ss. 4E(b) and 4E(c) with the Charter may depend on their satisfaction of the test for limiting Charter rights in Charter s. 7(2) Whilst the Committee accepts that it is appropriate to limit the availability of the Koori Court process to offenders who can be suitably dealt with under that process, the Committee is concerned that an automatic exclusion of entire categories of offenders may not be a 'reasonable limit' that is 'demonstrably justified'. For example, some pleas of 'not guilty' may co-exist with remorse and acknowledgement of responsibility, such as where the offender only contests an element of aggravation (e.g. whether his or her admitted conduct caused 'serious injury', rather than mere 'injury'.) For a holding by a Canadian Court that an indigenous sentencing procedure can, in rare cases, be successfully applied to an offender who pled not guilty to a sexual offence against his spouse, see *R v Taylor* (1997) 122 CCC (3d) 376.

The Committee notes that new s. 4E(e) provides that the Koori Court division can only hear matters where it 'considers that it is appropriate in all the circumstances that the proceeding be dealt with.' The Committee observes that this section may allow the Koori Court division to appropriately limit its jurisdiction to suitable candidates without the need for blanket rules excluding entire categories of offenders.

The Committee refers to Parliament for its consideration the following questions:

- 1. Whether or not clause 6, inserting new ss. 4E(b) and 4E(c) that exclude sexual offenders, family violence offenders and offenders who plead not guilty from the Koori Court division's jurisdiction, limits the Charter right of Aboriginal offenders to equal protection against discrimination?***
- 2. Whether or not clause 6, inserting a new s. 4E(c) that excludes offenders who plead not guilty from the Koori Court division's jurisdiction, limits the Charter right of Aboriginal defendants not to be compelled to confess guilt?***

3. *If so, whether or not clause 6's automatic exclusion of such offenders from the Koori Court division's jurisdiction is a demonstrably justified and reasonable limit of their Charter rights according to the test set out in Charter s. 7(2)?*

The Committee makes no further comment.

Labour and Industry (Repeal) Bill 2008

Introduced	30 July 2008
Second Reading Speech	31 July 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Minister for Industrial Relations

Purpose

The Bill repeals the *Labour and Industry Act 1958* and amends the *ANZAC Day Act 1958* to re-enact certain provisions currently in the *Labour and Industry Act 1958* concerning the closure of factories and warehouses on ANZAC Day.

The Bill also makes consequential amendments to the *Education and Training Reform Act 2006* and the *Pipelines Act 2005*.

Content and Committee comment

[Clauses]

[2]. The provisions in the Bill come into operation on Royal Assent.

[3]. Repeals the *Labour and Industry Act 1958*.

Note: *The explanatory memorandum details the reasons for the repeal of that Act.*

[5]. Inserts a new Part 3 (new sections 5B to 5D – ‘Closure of Factories and Warehouses on ANZAC Day’) into the *ANZAC Day Act 1958*.

New section 5C provides that factories and warehouses must be closed on ANZAC Day (with certain exceptions and exemptions). The section provides for offences by a body corporate and of persons concerned with the management of a body corporate. Section 5C(5) provides for defences. (*Refer to Charter Report below*).

Note: *New Part 3 deals with the closure of factories and warehouses on ANZAC Day. The Part largely replicates, with some amendments, section 139 of the Labour and Industry Act 1958.*

[10]. Provides for the repeal of this amending Bill on the first anniversary of the day on which it receives the Royal Assent.

Charter Report

Errors in statement of compatibility

The Committee notes that the Statement of Compatibility wrongly refers to new sub-section 5C(4) as clause 5C(5) and new sub-section 5C(5) as clause 5C(6).

Presumption of innocence – Offence of opening factories or warehouses or failing to provide holiday to employees on ANZAC Day – Managers guilty of offence committed by body corporate – Defence if manager proves due diligence – No defence if manager knew that the body corporate committed an offence – Whether reasonable limit

Charter s. 25(1) provides that criminal defendants have the right ‘to be presumed innocent until proved guilty according to law.’ Charter s. 7(2) provides that human rights may be

‘subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society’.

The Committee notes that clause 5, inserting a new s. 5C(4) into the *ANZAC Day Act 1958*, provides that, where a body corporate occupier of a factory or warehouse commits the offence of failing to close a factory or warehouse on ANZAC Day or failing to give each employee a holiday for the whole of ANZAC Day, anyone concerned in the management of the body corporate is also guilty of that offence and is liable for its penalty. The Committee observes that the effect of s. 5C(4) is that, if an employee of a body corporate, acting in the course of his or her employment, opened a factory or warehouse or failed to give an employee a full holiday on ANZAC Day, then the chair and every board member, director, secretary and officer of the corporation may be convicted of a criminal offence and fined up to 100 penalty units (currently \$11,012.)

The Committee also notes that new s. 5C(5) provides a defence for managers who can prove that they didn’t consent to the opening or employment and exercised due diligence to prevent it. The Committee observes that, to use this defence, managers will have to prove their due diligence and lack of consent on the balance of probabilities. The Committee therefore considers that s. 5C(5) engages the Charter right of criminal defendants to be presumed innocent until proven guilty.

The Statement of Compatibility remarks:

The right to be presumed innocent is an important right that has long been recognised well before the enactment of the charter. However, the courts have held that it may be subject to limits particularly where, as here:

the offence is of a regulatory nature; and,

a defence is enacted for the benefit of an accused to escape liability...

...The purpose of the imposition of a burden of proof on an accused person concerned with the management of the body corporate, is to provide such a person with an opportunity to escape liability in circumstances where the offence was committed without his or her knowledge or consent and where the defendant took appropriate measures to ensure compliance with clause 5C(1) without undermining the ability to enforce the provision.

The Committee observes that s. 5C(4) may render people liable for conduct that they have no connection to and that s. 5C(5) may therefore be correctly classified as a denial of an essential element of an offence: see *State v Coetzee* [1997] ZACC 2 (a decision of the Constitutional Court of South Africa on a similar provision.) The Committee also observes that although the offence in s. 5C(1) does not attract imprisonment, the fine is a significant one. The Committee is therefore concerned that, despite the regulatory nature of the offence, the reverse onus in s. 5C(5) may not be a reasonable limit on the Charter’s right to be presumed innocent according to the test in Charter s. 7(2).

The Committee is also concerned that the defence of due diligence is not available to managers if they knew that the offence was being or would be committed (as s. 5C(5) requires that defence prove both that the offence occurred without their ‘consent or knowledge’ and that they ‘exercised due diligence’.) The Committee observes that a person concerned with the management of a corporation who acts diligently to prevent a factory opening on ANZAC Day but who discovers on ANZAC Day that the factory is nevertheless open will have no defence to a prosecution for the offence. The Committee also observes that the defence of due diligence is usually conceived as an alternative, rather than an addition, to the defence of absence of knowledge: see *R v Sault Ste. Marie* [1978] 2 SCR 1299, 1326. The Committee further observes that a number of similar managerial liability provisions in other statutes provide for a broader defence for managers, either by omitting

the requirement to prove that the offence occurred without the manager's knowledgeⁱ ; substituting narrower requirements like 'without knowing permission', 'without connivance' or 'unintentionally'ⁱⁱ; or by making the defence of due diligence an alternative to the defence of lack of knowledge or consent.ⁱⁱⁱ

The Committee will write to the Minister seeking further advice on the following matters:

- 1. Whether it is appropriate to reverse the burden of proof on the sole defence available to a criminal offence where a person's liability for that offence can be established solely by their occupation and the offence carries a significant financial penalty?**
- 2. Whether the defence in new sub-section 5C(5) would be available to a manager who learns on ANZAC Day that a factory is open and immediately take all reasonable steps to close it, given para (a)'s requirement that a person wishing to use the due diligence offence must prove that the offence occurred 'without that person's... knowledge'?**

Pending the Minister's response, the Committee draws attention to new sub-section 5C(5).

The Committee makes no further comment.

ⁱ E.g. *Consumer Affairs and Fair Trading Act 1990* (NT), s. 330; *Door-to-door Trading Act 1991* (ACT), s. 18; *Nuclear Waste Storage Facility (Prohibition) Act 2000* (SA), s. 10; *Plant Quarantine Act 1997* (Tas), s. 84; *Radiation Protection and Control Act 1982* (SA), s. 47.

ⁱⁱ E.g. *Animal Health Act 1995* (Tas), s. 95; *Debits Tax Act 1990* (NT), s. 18; *Electricity Reform Act 2000* (NT), ss. 104-105; *Mining Management Act 1972* (NT), s. 72(2); *Petroleum Act 1984* (NT), s. 108; *Shop Trading Hours Act 1984* (Tas), ss. 5 & 5AA; *Therapeutic Goods and Cosmetics Act 1996* (NT), s. 50; *Transport Act 1983* (Vic), s. 226; *Travel Agents Act 1985* (WA).

ⁱⁱⁱ E.g. *Environment Protection Act 1997* (ACT), s. 147; *Fisheries Act 1988* (NT), s. 45; *Poisons Act 1971* (Tas), s. 86; *Rail Safety Act 2007* (SA), s. 172(4); *Unordered Goods and Services Act 1973* (Tas), s. 13; *Water Resources Act 1998* (ACT), s. 74; *Workers Rehabilitation and Compensation Act 1988* (Tas), s. 160. See also clause 26 of the *Unclaimed Money Bill 2008* (Vic) and the defence provided in numerous New Zealand statutes, e.g. *Copyright Act 1984* (NZ), s. 133.

Local Government Amendment (Disclosure) Bill 2008

Introduced	25 June 2008
Second Reading Speech	30 July 2008
House	Legislative Council
Member introducing Bill	Mr Greg Barber MLC
Private Member's Bill	

Purpose

The Bill amends the *Local Government Act 1989* (the 'Act') to strengthen the disclosure of gifts provisions and to require a candidate for a Council election to disclose in his or her nomination form whether they have been a member of a registered political party.

Content and Committee comment

[Clauses]

[2]. The provisions in the Bill come into operation on the day after Royal Assent.

[3]. Amends section 62 of the Act to set out the time in which election campaign gift disclosures must be made.

[4]. Amends section 62A(3) of the Act to ensure that the Chief Executive Officer publishes a copy of an election campaign donation return on an Internet website maintained by the Council.

[5]. Amends section 78(2) of the Act to strengthen conflict of interest provisions.

[6]. Amends section 81 of the Act to revoke the requirement to make a written application to the Chief Executive Officer in order to view the register of the interests of Councillors and makes provision to make available the register of interests of Councillors on an Internet website maintained by the Council.

[7]. Amends clause 5(1) of Schedule 2 of the Act to require that a candidate in a local government election declare his or her membership of a political party, registered under the *Electoral Act 2002*, during the period since the relevant Council's last election.

[8]. Provides for the automatic repeal of this amending Act on the first anniversary of its commencement.

The Committee makes no further comment.

Road Safety Amendment (Fatigue Management) Bill 2008

Introduced	30 July 2008
Second Reading Speech	31 July 2008
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

Purpose

The Bill amends the *Road Legislation Further Amendment Act 2007* (the 'Act')* to —

- implement nationally agreed amendments to provisions providing for fatigue management for drivers of certain heavy vehicles, based on national model amending legislation which has been developed by the National Transport Commission for implementation throughout Australia;
- make minor and technical amendments to the provisions providing for fatigue management for drivers of certain heavy vehicles.

Note: *The Act amends the Road Safety Act 1986 but is not yet in operation.*

Content and Committee comment

[2]. The provisions in the Bill come into operation on the day after Royal Assent.

[4]. Amends a number of definitions including the definition of 'unloader' to make it consistent with the definition in the *National Transport Commission (Model Legislation—Heavy Vehicle Driver Fatigue) Regulations 2007*.

The Committee notes the comments in the Statement of Compatibility to the effect that the amended definition of 'unloader' will widen the class of persons caught by the section applying certain reverse onus offences. Under the provisions of the Act a number of parties in the chain of responsibility may be deemed to have committed an offence unless they can prove the existence of the 'reasonable steps' defence provided in section 191ZZP of the Act. (Refer to report below).

[15]. Amends section 191V of the Act which sets out requirements where a work diary is filled up, destroyed, lost or stolen or, in the case of an electronic work diary, is malfunctioning. The amendments restructure section 191V and make some minor enhancements and clarifications to the existing provision.

Subclause (4) inserts proposed new subsections 191V(7) and (8) to clarify that a person charged with an offence under section 191V does not have the benefit of the mistake of fact defence (that is that they were acting under an honest and reasonable mistake of fact). However subsection (8) provides that a person charged under subsection (5) or (6) has the benefit of the 'reasonable steps' defence. (Refer to report below).

[28]. Inserts new section 191ZXA in the Act to impose an obligation on a driver using an electronic work diary to operate and maintain it in accordance with the manufacturer's specifications and in compliance with any written conditions imposed by VicRoads. The record keeper is required to ensure that the driver complies with that obligation. There is a defence to failing to operate or maintain a diary in accordance with the manufacturer's specifications if the particular specification was not integral to the effective operation of the diary or the failure to operate or maintain the diary in accordance with the specification was industry practice.

The amendment involves a reverse onus of proof of evidentiary facts relied upon by way of defence to the offence proposed by the amendment. (*Refer to report below*).

Parliamentary Committees Act 2003, s. 17(a)(i) – Trespasses unduly on rights or freedoms – Legal burden – Reverse onus to establish ‘reasonable steps’ defence – Presumption of innocence.

The Committee notes the provisions in clauses 4 and 15 make amendments that engage the presumption of innocence in the sense that they require an accused person to bear the legal burden, on the balance of probabilities, to establish a defence, that is, that they took ‘reasonable steps to prevent the relevant contravention (see section 191ZZP). Further, the provisions specifically exclude the ‘reasonable excuse’ defence, that is, that they were acting under an honest and reasonable mistake of fact. In respect to clause 28 the new offence imposes a reverse onus to establish evidentiary facts by way or reasonable excuse to the offence proposed.

The Committee commented on these reverse onus offences concerning this Act in Alert Digest No. 15 of 2007. The relevant extract from that report provides –

The Committee considers that imposing the onus on the defendant in certain circumstances may be justified to provide a reasonable balance between the effective enforcement of a regulatory scheme, being the combating of driver fatigue, and the rights of defendants, being the ordinary requirement in criminal / penalty offences that the prosecution prove its case.

The Committee further observes that reverse onus provisions may be more readily justifiable in the context of regulatory offences which are punishable by fines rather than imprisonment and where the reverse legal burden of establishing a reasonable steps defence lies more conveniently with the accused than with the prosecuting authority.

[47]. Provides for the repeal of this amending Bill on the first anniversary of the day on which it commences.

The Committee makes no further comment.

Whistleblowers Protection Amendment Bill 2008

Introduced	30 July 2008
Second Reading Speech	31 July 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

This Bill amends the *Whistleblowers Protection Act 2001* (the 'Act') to allow the Ombudsman to table a report in Parliament under section 103 (other reports by the ombudsman) of the Act that contains particulars likely to lead to the identification of a person against whom a protected disclosure is made.

Content and Committee comment

[Clauses]

[2]. Provides that the Act is to commence operation on the day after Royal Assent.

[4]. Inserts new section 22A into the Act to provide that, subject to certain criteria, the Ombudsman may, in a report to Parliament under section 103 of the Act, disclose particulars likely to lead to the identification of a person against whom a protected disclosure is made, if the Ombudsman determines that it is in the public interest to do so. Where a disclosure is made under the new section the Ombudsman must set out in the report why it is in the public interest to make the disclosure.

Notes: Relevant sections of the Act provide –

s. 22(3). – Offence to reveal confidential information – *The Ombudsman or a public body must not in a report referred to in Part 9 disclose particulars likely to lead to the identification of a person against whom a protected disclosure is made.*

s. 103. – Other reports by Ombudsman – *The Ombudsman may at any time cause a report on any matter arising in relation to a disclosed matter to be laid before each House of Parliament.*

[5]. Amends section 61(1) to provide that any person subject to an adverse comment in a report made under section 103 of the Act must be given an opportunity to be heard in the matter and have his or her defence fairly set out in the report.

[6]. The amendments apply to a report tabled by the Ombudsman under section 103 regardless of when a disclosure under the Act is or was made or an investigation under the Act is or was commenced but do not apply if the Ombudsman has already made a report under section 63 of the Act or has laid a report before Parliament under section 103 of the Act prior to the commencement of the amendments.

[7]. Provides for the repeal of this amending Act on the first anniversary of its commencement.

The Committee makes no further comment.

**Committee Room
18 August 2008**

Appendix 1

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County Court Amendment (Koori Court) Bill 2008	10
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Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Constitution Amendment (Judicial Pensions) Bill 2007 1

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

Relationships Bill 2007 1

(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

Corrections Amendment Bill 2008

(vi) inappropriately delegates legislative power

Essential Service Commission Amendmnet Bill 2008 4

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

National Gas (Victoria) Bill 2008 6

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

Children's Legislation Amendment Bill 2008 5

Constitution Amendment (Judicial Pensions) Bill 2007 1

Corrections Amendment Bill 2008 10

Crimes Amendment (Child Homicide) Bill 2007 1

Drugs, Poisons and Controlled Substances Amendment Bill 2008 3

Education and Training Reform Amendment Bill 2008 4

Gambling Regulation Amendment (Licensing) Bill 2008 5

Justice Legislation Amendment Bill 2008 5

Justice Legislation Amendment (Sex Offenders Procedure) Bill 2008 4

Labour and Industry (Repeal) Bill 2008 10

Police Integrity Bill 2008 4

Relationships Bill 2007 1

Section 17(b)

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

Police Integrity Bill 2008

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Appendix 3

Ministerial Correspondence

Table of correspondence between the Committee and Ministers during 2007-08

Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Working with Children Amendment Bill 2007	Attorney-General	19.09.07	19.03.08	12 of 2007	4 of 2008
Emergency Services Legislation Amendment Bill 2007	Police and Emergency Services	09.10.07	-	13 of 2007	1 of 2008
Animals Legislation Amendment (Animal Care) Bill 2007	Agriculture	31.10.07	12.12.07	14 of 2007	4 of 2008
Liquor Control Reform Amendment Bill 2007	Consumer Affairs	21.11.07	04.12.07	15 of 2007	1 of 2008
Police Regulation Amendment Bill 2007	Police and Emergency Services	21.11.07	06.12.07	15 of 2007	1 of 2008
Victorian Energy Efficiency Target Bill 2007	Energy and Resources	21.11.07	04.12.07	15 of 2007	1 of 2008
Criminal Procedure Legislation Amendment Bill 2007	Attorney-General	04.12.07	30.01.08	16 of 2007	1 of 2008
Crimes Amendment (Child Homicide) Bill 2007	Attorney-General	05.02.08	25.02.08	1 of 2008	4 of 2008
Constitution Amendment (Judicial Pensions) Bill 2007	Attorney-General	05.02.08	21.05.08	1 of 2008	6 of 2008
Professional Boxing and Combat Sports Amendment Bill 2007	Sport, Recreation and Youth Affairs	05.02.08		1 of 2008	
Relationships Bill 2007	Attorney-General	05.02.08	03.03.08	1 of 2008	3 of 2008
Criminal Procedure Legislation Amendment Bill 2007	Attorney-General	28.02.08	07.05.08	2 of 2008	6 of 2008
Port Services Amendment (Public Disclosure) Bill 2008	Hon. David Davis MLC	28.02.08		2 of 2008	

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Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Courts Legislation Amendment (Associate Judges) Bill 2008	Attorney-General	11.03.08	13.05.08	3 of 2008	6 of 2008
Drugs, Poisons and Controlled Substances Amendment Bill 2008	Health	12.03.08	03.04.08	3 of 2008	4 of 2008
Education and Training Reform Amendment Bill 2008	Education	08.04.08	16.04.08	4 of 2008	5 of 2008
Essential Services Commission (Amendment) Bill 2007	Finance	08.04.08	17.04.08	4 of 2008	5 of 2008
Justice Legislation Amendment (Sex Offenders Procedure) Bill 2008	Attorney-General	08.04.08	21.04.08	4 of 2008	5 of 2008
Police Integrity Bill 2008	Police & Emergency Services	08.04.08	18.04.08	4 of 2008	5 of 2008
Children's Legislation Amendment Bill 2008	Children & Early Childhood Development	07.05.08	28.05.08	5 of 2008	7 of 2008
Gambling Regulation Amendment (Licensing) Bill 2008	Gambling	07.05.08	11.06.08	5 of 2008	8 of 2008
Justice Legislation Amendment Bill 2008	Corrections	07.05.08	23.05.08	5 of 2008	6 of 2008
National Gas (Victoria) Bill 2008	Energy & Resources	27.05.08		6 of 2008	