

HUMAN RIGHTS DIALOGUE

Bill	<p style="text-align: center;">Human Rights Dialogue</p> <p>SOC: Statement of Compatibility SARC: Report by the Scrutiny of Acts and Regulations Committee MR: Ministerial response to SARC (where required) LA: Legislative Assembly (date of vote) LC: Legislative Council (date of vote) PD: Parliamentary Debate (nature of debate regarding human rights)</p>
<p>1. Appropriation (2009/2010) Bill 2009 Provides authority for payments from the Consolidated Fund for the ordinary annual services of government for the 2009/2010 financial year.</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 6 – 02/06/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 11/06/09 LC: 25/06/09 PD:</p>
<p>2. Appropriation (Parliament 2009/10) Bill 2009 Provides authority for payments from the Consolidated Fund to the Parliament in respect of the 2009-2010 financial year.</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 6 – 02/06/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 02/06/09 LC: 02/06/09 PD:</p>
<p>3. Associations Incorporation Amendment Bill 2008 * Enhances the rights of members of incorporated associations and improves internal governance arrangements.</p>	<p>SOC: The registrar's power of inquiry regarding natural persons engaged but did not limit the right to privacy. SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 11/3/09 LC: 1/4/09 PD:</p>
<p>4. Bushfires Royal Commission (Report) Bill 2009 Commits the government to publishing the</p>	<p>SOC: The bill reasonably limited the right to privacy. The commission may include material of a private nature or critical of individuals in its reports. The bill granted absolute privilege to the publication of reports, so those affected would not be able to sue for defamation. The purposes of the commission are to consider the causes, management and responses to the</p>

<p>reports of the 2009 Bushfires Royal Commission, and provide a process for publishing and attaching privilege to reports when Parliament is not sitting.</p>	<p>2009 bushfires, and to provide recommendations to improve all aspects of preparation and planning for any future bushfire threats. The publication of reports is necessary to ensure that its findings are considered by the community and adequately responded to by government and other affected organisations. The government could publish the reports without the bill, and if published during sitting days, privilege would be attached to them. SARC: (Alert Digest 4 – 31/03/2009) SARC made no further comment pertaining to human rights. MR: N/A LC: 01/4/09 LA: 02/06/09 PD: It was noted that the Report of the Royal Commission may affect people’s privacy and reputation if it includes material of a private nature, critical of individuals. Members, however, commended the Bill for meeting the requirements of the Charter and facilitating public scrutiny of important issues affecting the community.</p>
<p>5. Bus Safety Bill 2008 * Aims to enhance the safe operation of bus services in Victoria. Enables a finding of not guilty by reason of mental impairment to be brought within the accreditation scheme to deem it as a finding of guilt.</p>	<p>SOC: The bill triggered a range of human rights. Among other things, clauses required the Director, Public Transport Safety (‘Director’) to refuse an application for or cancel accreditation to operate a bus where an applicant is found guilty of criminal offences including murder, sexual offences and indictable fraud and dishonesty offences or where the applicant is subject to reporting obligations under the <i>Working with Children Act 2005</i>. Findings of guilt for certain offences including summary offences involving fraud or dishonesty could disqualify applicants from accreditation where they cannot show cause why it is appropriate. The Director has discretion to refuse accreditation where the applicant has been found guilty of less serious offences. An applicant refused accreditation may be disqualified from reapplying for up to five years. This raised the issue of double jeopardy in relation to whether an applicant or operator is to be punished twice for the same offence. The right not to be tried or punished more than once does not preclude the imposition of civil sanctions designed to protect the public, which are not designed to punish. The bill engaged but did not limit the right to equality. Rejection or suspension of accreditation would not occur due to the person’s mental impairment but in the interests of public care and safety.</p> <p>SARC: (Alert Digest 1 – 03/02/2009) - clauses empower the Director to reject any application or suspend or cancel any registration in a variety of circumstances relating to public safety. Clauses providing that people found not guilty of an offence on the basis of ‘mental impairment’ are to be treated as if they have been found guilty of the offence engage the right to equal protection of the law without discrimination on the basis of ‘impairment’. The bill therefore imposes barriers on people who involuntarily commit crimes due to mental impairment. Whereas the bill does not impose barriers on people who have acted involuntarily for reasons including intoxication, temporary psychosis, or disorders including sleepwalking or automatism, which may also create safety concerns. - SARC will write to the Minister seeking further information as to whether or not the Director’s general powers are a less restrictive means reasonably available to achieve the purpose of protecting bus passengers. MR: 5/5/2009: - The bill places public safety considerations at the centre of regulation of the bus industry, reflecting regulatory best practice.</p>

	<ul style="list-style-type: none"> - The deeming provision in the Act reflects the long-standing position at law that persons found not guilty due to mental impairment must be treated in a manner that gives primary consideration to public safety. A finding of mental impairment is a reliable indicator of a safety risk, as is culpable guilt. - A less restrictive means of achieving the purpose of protecting public safety is not available as removing the deeming provisions would be inconsistent with the common law and <i>Crimes (Mental Impairment & Unfitness to be Tried) Act 1997</i>. - To amount to direct discrimination, there must be less favourable treatment of a person with a disability who is in "the same or similar circumstances" as a person without a disability. Under the approach taken in <i>Purvis v NSW (2003) 217 CLR 92</i>, a person is not being treated less favourably because of their impairment. Instead, they are treated differently because they have committed the physical element of the offence. Due to the mental impairment, the offending conduct is prone to recur. - Some medical conditions, such as intoxication or sleepwalking, may not constitute 'mental impairment' and are therefore not deemed to be findings of guilt. However, such cases may still justify refusal of accreditation if the Director is satisfied that the person is not competent to safely operate a bus service. Potential unfairness to those seeking accreditation is avoided as all decisions can be reviewed by VCAT. <p>LA: 12/03/09 LC: 31/03/09 PD:</p>
<p>6. Casino Legislation Amendment Bill 2009 Amends the <i>Casino Management Agreement Act 1993</i> and the <i>Casino Control Act 1991</i> to amend the rate of taxation applying to gaming machine revenue.</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 7 – 23/06/2009) SARC made no further comment pertaining to human rights. MR: LA: 13/08/09 LC: 13/08/09 PD:</p>
<p>7. Cemeteries and Crematoria Amendment Bill 2009 Amends the <i>Cemeteries and Crematoria Act 2003</i> to provide for further management of cemetery trusts</p>	<p>SOC: The bill reasonably limited the right to take part in public life and engaged but did not limit the right to privacy. The bill required certain cemetery trusts to establish a community advisory committee to liaise with communities receiving cemetery or crematoria services. Appointments to the committee needed to give preference to those who are not a funeral director or stonemason. Giving preference in such a way may limit the participation in the conduct of public affairs of the members of those groups which are not given preferred status. Participating in public life is considered to include participation in public debate and in the development of policies affecting the community. The purpose of the limitation is to ensure that committees reflect as fully as possible the community in which the cemetery trust operates and is not dominated by those who derive their income from work that involves frequent association with cemetery trusts, or whose income might be affected by decisions made by those trusts. The bill provided for amalgamation of existing metropolitan cemetery trusts, to take over responsibility for public cemeteries. This has privacy implications as all client, employee and contract records will be transferred to the newly created trust</p>

	<p>resulting from amalgamation. The new trusts will be subject to laws regarding privacy and use of personal information. Amalgamation is designed to better manage the provision of cemetery services. The Secretary to the Department of Human Services is empowered to conduct performance audits of cemetery trusts. An auditor appointed to undertake an audit will have the right to enter trust premises and inspect trust records, copy any relevant records and interview trust employees and members. Auditors would not be permitted to enter a trust member's home. The bill will impose confidentiality requirements on auditors, so that they may only use information gathered in the course of an audit for the purposes of the audit and may not disclose confidential information regarding the trust, other than to report to the secretary.</p> <p>SARC: (Alert Digest 9 – 11/08/2009) SARC made no further comment pertaining to human rights.</p> <p>MR:</p> <p>LA:</p> <p>LC:</p> <p>PD:</p>
<p>8. Children Legislation Amendment Bill 2009 Amends the <i>Children Youth and Families Act 2005</i> and the <i>Child Wellbeing and Safety Act 2005</i> to enable the Child Safety Commissioner to conduct a broader range of inquiries.</p>	<p>SOC: The bill engaged but did not limit the right to privacy. Amendments expanded the number of people who may receive and disclose personal information associated with tasks surrounding child protection. Clauses extended the definition of child protection client who may be the subject of a review by the Child Safety Commissioner. Disclosure of health or personal information regarding a child is limited to the Commissioner's functions. The provisions aimed to uphold the right of children to such protection as is in their best interests.</p> <p>SARC: (Alert Digest 5 - 05/05/2009) SARC made no further comment pertaining to human rights.</p> <p>MR:</p> <p>LA: 30/07/09</p> <p>LC: 13/08/09</p> <p>PD:</p>
<p>9. Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2009 Gives effect to the cooperative commonwealth, state and territory scheme for the classification of publications, films and computer games set out in the <i>Commonwealth Classification (Publications, Films and Computer Games) Act 1995</i>. The bill regulates certain categories of publications, films and computer games.</p>	<p>SOC: The bill reasonably limited freedom of expression and equality rights by restricting access and use of certain media and prohibiting unauthorised advertising. Films of different classifications may not be advertised together and certain classifications may be restricted from being screened in public. Offence provisions in relation to advertisements for films or computer games were designed to give effect to classification categories, restricting access based on age. The amendments aimed to protect the best interests of minors, by shielding them from material that is likely to harm or disturb them and to prevent any person from exposure to unsolicited material that they may find offensive.</p> <p>The bill enhanced the right to be presumed innocent. Offence provisions have previously imposed a legal onus on a defendant to prove elements of a defence in relation to prosecution for the offence of advertising a film or game classified as MA15+ and above where the advertising occurs in a public place or can be seen from a public place. Defences were only available where a defendant could prove the advertisement was screened during a program for the exhibition of a film of an equal or higher classification or the place was a restricted publications area. The defences were not available regarding higher classifications. The bill narrowed the scope of offences and removed the reverse onus defence to ensure consistency with the right to be presumed innocent.</p>

	<p>SARC: (Alert Digest 6 – 02/06/2009) SARC made no further comment pertaining to human rights. MR: LA: 11/06/09 LC: 23/06/09 PD:</p>
<p>10. Courts Legislation Amendment (Judicial Resolution Conference) Bill 2009 Facilitates confidential Alternative Dispute Resolution processes conducted by judicial officers and applies judicial immunity to judges and magistrates carrying out judicial resolution conferences - in any proceeding, of anything said or done arising from the conference. The explanatory memorandum indicates that the provisions aim to prevent judicial officers being compellable to give evidence intended to assist in the interpretation of the terms of a written agreement arising from a conference.</p>	<p>SOC: The right to a fair hearing was not engaged by the bill. In the case of <i>Kracke v Mental Health Review Board</i> [2009] VCAT 646, Justice Bell found that the right to a fair hearing is engaged where the civil proceedings are ‘determinative of private rights and interests’. The ADR processes set out in the bill are non-determinative. The practice of ADR is designed to negotiate a settlement of a dispute. At the conclusion of ADR, parties who have not reached a settlement may return to the courts’ determination process culminating in a public hearing. SARC: (Alert Digest 9 – 11/08/2009) SARC noted that the bar on compellability of judicial officers would be absolute. There was no mechanism for limiting the potentially capricious effect of the clauses – for example, a general bar on compellability being subject to a court granting leave. SARC suggested that the provisions would bar a judge alleged to have taken a bribe from being compelled to testify at civil proceedings aimed at overturning an allegedly corrupt settlement and at criminal proceedings against an allegedly corrupt party. SARC indicated that it would write to the Attorney-General seeking further information regarding the broad scope of the bar, whether the clauses limited the right to a fair hearing of litigants in civil or criminal proceedings and whether enabling a court to grant leave would be a less restrictive alternative reasonably available to achieve the same purpose. MR: (Alert Digest 11 – 14/09/2009) The provisions confirmed that the existing non-compellability rule in the <i>Evidence Act</i> 2008 applied to judicial resolution conferences in the same way as every other proceeding over which a Judge presided. The clauses were limited by the <i>Evidence Act</i> 2008, which gave a Court in a subsequent proceeding the power to order a Judge to give evidence in exceptional circumstances. The Courts had indicated that, in order to embark on the judicial resolution conference process successfully and with complete confidence, it must be put beyond doubt that judicial immunity extended to the conduct of ADR processes. LA: 13/08/09 LC: 13/08/09 PD: Members in both houses of Parliament noted SARC’s concerns about the potential for the bill to limit the right to a fair hearing. One member stated that she had written to the Minister noting the issues raised by SARC. The member commented that, in general, the answers to the questions alleviated the concerns raised by SARC. For example, in relation to the issue of why the bar on judicial compellability was absolute, without a mechanism for limiting any capricious effect, the department responded that the bar on judicial compellability was subject to and limited by section 16(2) of the <i>Evidence Act</i>.</p>
<p>11. Courts Legislation Amendment (Sunset Provisions) Bill 2009 Repeals the sunset provisions in the <i>Family</i></p>	<p>SOC: The amendments require male offenders to attend compulsory counselling, engaging but not limiting the right to protection from torture and cruel, inhuman or degrading treatment (being subjected to medical treatment without full, free and informed consent) and the right to privacy. ‘Medical treatment’ encompasses all forms of medical treatment and</p>

<p><i>Violence Protection Act 2008</i> to make the Family Violence Court Intervention Project (FVCIP) ongoing. This permits the Magistrates Court to order a defendant to attend counselling designed to change violent behaviour. Those failing to attend will be guilty of an offence and liable to a fine.</p>	<p>intervention, including compulsory counselling, examinations and testing. The provision is designed to ensure that attendees receive treatment intended to address their violent behaviour. The scheme only requires attendance at counselling for a limited period. This indirectly promoted the right to life and the right of families and children to protection.</p> <p>SARC: (Alert Digest 8 – 28/07/2009) SARC noted that the SOC incorrectly described the compulsory counselling provision as only requiring male offenders to attend, whereas it was applicable to all ‘adult’ respondents (of any gender) to applications for family violence intervention orders for whom final orders have had been made. A final order can be made to such an order whether or not a person has been found to have committed a criminal offence. SARC indicated that it would write to the Minister suggesting that the wording of the section refer to an ‘adult’ rather than a ‘male’.</p> <p>MR: (Alert Digest 10 – 01/09/2009) While the Act is applicable to both men and women, currently only men’s counselling programs are funded by the Department of Justice. This is because evidence suggests that men are predominantly the perpetrators of family violence. Accordingly, the pilot program for compulsory men’s counselling was established to address men’s violent behaviour. The Act’s reference to gender neutral adult offenders leaves open the possibility that counselling program could be expanded in the future to address women’s violent behaviour if it is considered necessary.</p> <p>SARC Response: The Attorney-General advised that ‘currently only men’s counselling programs are funded by the Department of Justice.’ The limitation of approvals to counselling for male offenders may engage the right to equal protection of the law. Females represent a significant fraction of respondents.</p> <p>LA: 30/07/09 LC: 11/08/09</p> <p>PD: A member made note of the mistake made in the SOC and SARC’s comments. Concern was expressed about the extended sunset clause proposed. It was also noted that evidence about the efficacy of men’s behaviour change programs, whether mandated or voluntary, is highly contested and that SARC had stated that it is difficult to assess the effectiveness of the men’s behavioural change program in preventing recidivist offending.</p>
<p>12. Crimes Amendment (Identity Crime) Bill 2009 Creates new identity crime offences and allows victims of identity crime to obtain court certificates to assist them in remedying the effects of the crime.</p>	<p>SOC: The bill engaged and lawfully restricted the right to freedom of expression. Clauses creating identity crime offences targeted the creation, capture, use or transfer of information that can be used by a person to pass themselves off as someone else. Freedom of expression may be subject to lawful restrictions, to protect the privacy and property rights of victims of identity crime and potential threats to national security. The provisions did not capture legitimate possession or use of equipment, for example, artists using equipment to produce artwork. The bill promoted the right to a fair hearing by enabling a court to record sentence discounts for pleas of guilty, enhancing transparency in sentencing. The bill engaged but did not limit the right of a person charged with a criminal offence to be promptly informed of the nature and reason for the charge.</p> <p>SARC: (Alert Digest 4 – 31/03/2009) SARC indicated that it would write to the Minister expressing concern regarding the compatibility of provisions including:</p> <ul style="list-style-type: none"> - A clause engaging defendants’ right to be informed promptly of the nature of a criminal charge – a jury may find a person charged with an offence of making, using or supplying identification information guilty of possession. - A clause enabling victims of identity crime (where a defendant is found guilty) to obtain an identity crime certificate to

	<p>assist in remedying the effects of the crime. Although the issuing of a certificate is contingent on a finding of guilt, it requires the court to make additional findings about the offence committed, including that the victim's identification information was used in connection with the commission of the offence. The process allows a court to include any other matters it considers relevant. This may have legal implications for the defendant in subsequent proceedings, for example, civil litigation. No provision is made regarding defendants' procedural rights in relation to the issuing of certificates. SARC expressed concern that a defendant may be named in a certificate. Where a certificate includes matters beyond a finding of guilt, it may amount to an unlawful attack on reputation and could even constitute a penalty. SARC highlighted the absence of a mechanism to appeal the making of a certificate. This may limit the defendant's right to a fair hearing. There is also no provision governing certificates where a defendant successfully appeals against the offence in respect of which a certificate was issued.</p> <p>MR: 04/05/2009. The minister considered that the bill's limitations on human rights were reasonable and reiterated that an identity crime certificate did not amount to a penalty:</p> <ul style="list-style-type: none"> - The Bill does not provide for the accused to appeal against the issuing of an identity crime certificate, as it is not a conviction or a sentence. - The accused is not formally a party to the proceeding as the findings required for the court to issue a certificate do not involve additional allegations against the accused. However, the accused will generally be present and often represented. - Unless the court orders otherwise, court proceedings are always open to the public and court records, which include the accused's name, are a matter of public record. The ability to include the accused's name on an identity crime certificate does not constitute an unlawful attack on the accused's reputation. - An identity crime certificate does not directly affect the accused's rights. It will be issued to a victim of the offence, following a finding of guilt in criminal proceedings. The certificate will set out that the victim had their identification information used, without their consent, in the commission of the identity crime offence. Its primary purpose is to help the victim to overcome any problems caused by the crime. - Upon successful appeal against conviction for an identity crime offence to which the certificate relates, the basis for the certificate will no longer exist. In such cases, the court can set aside certificates. <p>LA: 06/05/09 LC: 04/06/09 PD: It was noted that SARC had written to the Minister about various provisions of the bill and had not received a response prior to Parliamentary consideration of the Bill. This overrode the Charter's mandatory process, as serious concerns raised by SARC were effectively ignored.</p>
<p>13. Criminal Procedure Bill 2008 * Overhauls existing criminal procedure laws, to ensure that criminal procedure is modern, accessible, coherent and easy to follow.</p>	<p>SOC: The bill engaged many human rights including:</p> <ul style="list-style-type: none"> - Provisions reasonably limiting the right to equality in that they provide protections to complainants who are children or who are cognitively impaired not given to complainants without those attributes. A child or cognitively impaired complainant cannot be cross-examined at a committal hearing. The purpose of these provisions is to protect such witnesses from unnecessary trauma and delay. - An accused who wishes to rely on a defence in relation to an offence heard summarily, must point to or present evidence of relevant facts (an evidential burden), triggering the right to the presumption of innocence. The prosecution bears a

legal burden of disproving the issue beyond reasonable doubt. An evidential burden will not ordinarily limit the right to be presumed innocent. It only applies to an exception, exemption, proviso, excuse or qualification, therefore focusing on true defences rather than core elements of an offence, which remain the sole responsibility of the prosecution to prove.

- Clauses regulating the power of a court in indictable proceedings and on appeal to convict an accused of an offence other than the offence charged if it is an alternative or lesser offence. In summary proceedings, this power would only extend to an attempt to commit the offence. These provisions reasonably limited an accused person's **right to be informed of a charge**. An accused person risks conviction for an offence which is not contained in a charge-sheet or indictment. The power to convict of alternative offences, however, is important for the efficient and fair operation of the criminal justice system. Where an alternative offence is appropriate, it avoids a charge having to be re-laid and the criminal process started afresh. Certain safeguards apply.
- Diversion, case conferences and sentence indication provisions engaged but did not limit the **right not to be compelled to testify against oneself or to confess guilt**. The Magistrates Court may adjourn a proceeding to allow an accused to undertake a diversion program. This applies to less serious driving offences involving alcohol or drugs where the accused acknowledges responsibility for the offence. This acknowledgement is inadmissible as evidence in a proceeding for the offence. There is no compulsion to plead guilty. If the accused completes a program and is discharged, they cannot be charged with the offence again. A successful diversion process benefits an accused and the community. The content of case conferences to be held in both summary and committal proceedings are inadmissible in any hearing of the charge. A sentencing indication may only be given where the accused has sought an indication and the accused is free to choose whether to do so.
- the bill engaged but did not limit an **accused child's right to be treated in a way that is appropriate for his or her age**: the bill permitted a joint committal when a child and an adult are charged in relation to the same offence. Joint committals avoid duplication of proceedings, save witnesses from having to give evidence twice and help to reduce delay. It would only occur when relevant charges could not be determined in the Children's Court, including murder and other serious criminal offences. The child accused would have to be over 15 years of age. Both courts would have to agree that joint committal is appropriate, having regard to the age and ability of the child, the effect on victims and the estimated duration of the proceedings.

SARC: (Alert Digest 1 – 03/02/2009) SARC commended the statement as clear, helpful and detailed analysis of a large and complex bill, engaging numerous rights.

SARC accepted the desirability of:

- including reverse evidentiary onus provisions in minor regulatory offences.
- re-sentencing as a consequence of a successful Crown appeal against sentence.

SARC referred to parliament various provisions including the following:

- reiterating its position in relation to the *Criminal Procedure Legislation Amendment Bill 2007* on the issue of sentencing indications, posing the question whether the procedure may induce a person to plead guilty.
- The question of whether special provisions for child and cognitively impaired complaints are proportionate to protect vulnerable witnesses with reduced capacity whilst preserving procedural fairness for an accused.

	<ul style="list-style-type: none"> - Several provisions of the Bill engaged various rights in criminal proceedings, by permitting potential breaches of those rights, for example, giving the Magistrates Court a power to convict someone charged with a summary offence of ‘attempting to’ commit an offence, whether or not the offender was promptly informed this may occur. - While SARC accepted that existing court practices protect defendants’ rights, it was concerned that possible future changes to practices may limit human rights. Section 38(1), which obliges public authorities to act compatibly with rights, does not apply to courts in these circumstances, because their non-administrative functions are exempted from the definition of public authority by s. 4(1)(j) of the Charter. - SARC will write to the Minister regarding whether there is a justification for a clause barring a court from hearing a criminal proceeding in the absence of a competent interpreter, but providing no protection for people who know but cannot speak English, who require assistance to communicate, or those charged with offences that are not punishable by imprisonment. <p>MR: 23/02/2009:</p> <ul style="list-style-type: none"> - The clause concerning access to interpreters, when read in full, refers to a knowledge of the English language sufficient to enable the person to “understand or participate in the proceeding”. When considering whether the accused can “participate” in the proceeding, the court would necessarily consider whether the accused can speak English. The clause complements section 25(2)(i) of the Charter, rather than limiting it. <p>LA: 5/02/2009 LC: 26/02/2009 PD: Members noted:</p> <ul style="list-style-type: none"> - SARC concerns in relation to a clause barring a court from hearing a criminal proceeding in the absence of a competent interpreter, but providing no protection for people who know but cannot speak English, who require assistance to communicate, or those charged with offences that are not punishable by imprisonment, or in civil proceedings. - a clause giving the Magistrates Court a power to convict someone charged with a summary offence of ‘attempting to’ commit an offence, whether or not the offender was promptly informed of this possibility. - Section 25(2)(j)’s minimum guarantee of the free assistance of an interpreter if a person cannot understand or speak English and assistants and specialised communications tools and technology if communication or speech difficulties require such assistance.
<p>14. Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009 Facilitates the introduction and implementation of the <i>Criminal Procedure Act 2009</i>. That Act overhauls existing laws that deal with criminal procedure (including committals, trial procedure and appeals) by rationalising and clarifying provisions, modernising language and process, and improving procedures in the criminal justice</p>	<p>SOC: The bill made a variety of changes to criminal processes. This included the bill substituting a new appeals framework into the <i>Children, Youth and Families Act 2005</i>, enhancing the right to have a conviction and sentence for a criminal offence reviewed by making appeals procedure clearer and more accessible for children and parents. A court must not hear and determine an appeal or explain the nature of an order made without an interpreter present if a child, their parent or any other party has difficulty communicating in English.</p> <p>The bill also promoted the right to review by providing for an extension of time for filing or serving appeals via a clause giving a court a discretion to extend the time period. The bill expedited the process for obtaining an authoritative judgement from the Court of Appeal in cases involving the review of questions concerning the operation of the Charter. The current process precluded the County Court from referring a Charter question directly to the Court of Appeal. The question would first proceed to a single judge of the Supreme Court, involving considerable delay in getting an issue ultimately resolved by</p>

<p>system.</p>	<p>the Court of Appeal. The bill amended a section to enable issues to be referred directly to the Court of Appeal. The bill engaged but did not limit rights in relation to children charged with criminal offences. The bill would allow joint committal proceedings in limited circumstances where a child and an adult were charged in relation to the same offence. Joint committals avoid duplication of proceedings, save witnesses from having to give evidence twice and help to reduce delay. A joint committal raises the accused child's right to be treated in a way that is appropriate for their age. A joint committal would only be available where the relevant charges for serious offences including murder or manslaughter could not ultimately be determined in the Children's Court. The child accused must be over 15 years of age and the court satisfied that the charges against each accused would ordinarily be tried together in the County Court or the Supreme Court. Both courts would need to agree that such proceedings were appropriate in the particular case, having regard to the age and ability of the child, the effect on victims and the estimated duration of the proceedings. Joint committals would be ordered only when adequate protections for the child existed in the particular case.</p> <p>The bill neither engaged nor limited the right against retrospective criminal laws. The common law and statutory prohibition on retrospectivity in the criminal legal context has traditionally been understood as preventing only the retrospective imposition of criminal liability, not the application of new procedural rules that are different from those in force at the time of commission of an offence. The transitional provisions concerned criminal procedure and did not involve substantive rights. Provisions removing double jeopardy as a consideration in Crown appeals would apply only to appeals where the sentence was imposed on or after the commencement of the Act. In this way, the bill would not operate retrospectively to affect any perceived procedural advantage that the accused otherwise would have had.</p> <p>The bill engaged competing Charter rights. Various measures would protect vulnerable witnesses whilst ensuring the accused could challenge the evidence against them. The scheme restricted certain rights in criminal proceedings: including of an accused person to admit evidence or cross-examine with respect to the complainant's chastity and sexual history. This would aim to preserve the privacy and reputation of the complainant in sexual offence proceedings. The protection would be well-balanced against the right of the accused to examine witnesses and present relevant evidence to the court. The court could grant leave to an accused to introduce evidence or cross-examine a witness if it was satisfied that the evidence had substantial relevance to a fact in issue and was in the interests of justice.</p> <p>Certain arrangements could protect vulnerable witnesses and complainants giving evidence. Although the right to a fair hearing incorporates the concept that an accused should be able to face their accuser, this is not always appropriate in sexual offence or family violence proceedings. An accused could still challenge the evidence or cross examine witnesses. This would promote the right to privacy and reputation of victims and the obligation to provide special protection to families and children. Special procedures for children in trial proceedings also enhance this right by requiring a special hearing to be held within three months of the accused being committed for trial.</p> <p>The bill reasonably limited the right of an accused to be tried and to defend themselves in person or through legal assistance. The right to defend oneself personally is not absolute, rather the reference to legal assistance suggests that the accused may choose one or the other. A category of witness would be 'protected' from personal cross-examination by the accused. Where an accused was not legally represented, the court could order Victoria Legal Aid to provide legal</p>
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	<p>representation for the purpose of cross-examination of the protected witness. A protected witness is a complainant, a family member of the complainant or the accused or any other witness the court declared to be protected. There were important public policy reasons for protecting witnesses and complainants when giving evidence in sexual offence and family violence cases. The nature of these cases are such that the complainant and other witnesses often have a personal relationship with the accused. This could act as a deterrent for complainants to report offences and for witnesses to give evidence. The restriction would not limit the accused from conducting their defence personally for any other aspect of the trial. Legal representation would only be required for cross-examination of a small category of protected witnesses. The court would grant an adjournment in order for the accused to obtain legal representation. The limitation is proportionate to protecting witnesses and addressing the under-reporting and prosecution of sexual and family violence offences while still maintaining the right to a fair hearing for the accused.</p> <p>SARC: MR: LA: LC: PD:</p>
<p>15. Crown Land Acts Amendment (Lease and Licence Terms) Bill 2009 Seeks to facilitate investment in developments of public benefit on Crown land by increasing the maximum lease term in the <i>Crown Land (Reserves) Act 1978</i> and the <i>Forests Act 1958</i> from 21 years up to 65 years. Current maximum lease terms sometimes do not allow for recovery of capital investment in major land developments or improvements. This aims to facilitate use and development of Crown land for commercial, tourism and other purposes.</p>	<p>SOC: The bill reasonably limited freedom of movement and cultural rights. The bill engaged but did not limit property rights. Increasing maximum lease terms could mean restrictions on public access lasting longer, as leases grant exclusive occupation and use of the property. This may limit cultural rights by affecting the ability of Aboriginal persons to conduct cultural ceremonies or activities within affected areas. The majority of leases will last less than 21 years. Longer terms will only be granted where the minister is satisfied that the proposed development, improvements or works are of a substantial nature, deliver public value and justify the longer term. In granting a lease, the minister acts as a public authority, is subject to section 38 of the charter and required to give proper consideration to charter rights, including cultural rights.</p> <p>The bill may be perceived to engage property rights of traditional owners of land where such owners have a recognised native title claim. Where recognised native title rights exist, however, a lease can only be granted after an indigenous land use agreement is negotiated, with the capacity to address such property rights.</p> <p>SARC: (Alert Digest 6 – 02/06/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 23/06/09 LC: 30/07/09 PD:</p>
<p>16. Deakin University Bill 2009 Victoria has eight public universities currently covered by 20 pieces of legislation. The government seeks to modernise this legislation</p>	<p>SOC: The bill engaged but did not limit property rights. The bill grants the minister power to compulsorily acquire any land for the purpose of, or in connection with the university. Acquisition of land would be in accordance with law, as this power is set out in the <i>Land Acquisition and Compensation Act 1986</i>. The Act sets out clear and accessible procedures for acquiring land and determining the amount of compensation payable.</p>

<p>through a new principal act for each university. The university bills aim to ensure consistency with national protocols for university governance.</p>	<p>SARC: MR: LA: LC: PD:</p>
<p>17. Duties Amendment Bill 2008 * Amends the <i>Duties Act</i> 2000 to ensure that duty is payable where effective control or ownership of real property is obtained.</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 1 – 03/02/2009) Retrospective application of the bill's taxation provisions may be justified by government to avoid the possibility of persons and corporations achieving windfall profits prior to enactment. SARC made no further comment pertaining to human rights. MR: N/A LA: 26/02/2009 LC: 25/06/09 PD:</p>
<p>18. Education and Training Reform Amendment (School Age) Bill Amend the <i>Education and Training Reform Act</i> 2006 to increase the minimum school leaving age from 16 years to 17 years. Clarify exceptions to the mandatory requirements for school attendance.</p>	<p>SOC: Compulsory schooling compels attendance, limiting the right to freedom of belief or thought in choosing not to attend school. Compulsory schooling may also limit an individual's freedom of expression, by compelling that individual to receive information of a certain kind. Other jurisdictions have, however, overwhelmingly upheld the right to education, which includes the right to compulsory education. Article 26(1) of the <i>Universal Declaration of Human Rights</i> provides that everyone has the right to education, and that elementary education shall be compulsory. The principle of compulsory education is affirmed by several human rights treaties, including Article 13 of the <i>International Covenant on Economic, Social and Cultural Rights</i> and Articles 28 and 29 of the <i>Convention on the Rights of the Child</i>.</p> <p>In interpreting this right, the Committee on the Rights of the Child has considered it essential that no child leaves school without being equipped to face the challenges they can expect to be confronted in life. All states are obliged to make primary education compulsory. No upper age limit has been fixed to mark the end of compulsory education. Thus, it is open to each state to decide when formal education no longer becomes compulsory after primary school. The European Court of Human Rights has found that states enjoy a 'margin of appreciation in setting up and interpreting the rules of their education system'.</p> <p>While there is no right to education contained in the Charter, given the international approach, it is unlikely that compulsory education would be interpreted as unreasonably limiting a person's human rights. Furthermore, compulsory education enhances a number of fundamental rights, such as the recognition and protection of children as vulnerable members of society, through guaranteeing a capacity to attend school. Compulsory education also enhances the right to equality before the law under s 8 by guaranteeing equal education. A range of exemptions prevent the requirement that compulsory school age children attend school from being applied in a blanket fashion and allow flexibility for the needs of children in specific circumstances to be taken into account.</p>

SARC: (Alert Digest 11 – 14/09/2009)
 SARC indicated that it would write to the Minister expressing its concern about the adequacy of the SOC. SARC considered that the Bill could engage a range of Charter rights:

Equality: Clauses treating 16 year-olds differently from people aged 17 or over.

Forced work: In the case of 16 year-olds who cannot feasibly participate in either education or training, employment was the only option permitted. This could limit the Charter rights of those 16 year-olds against ‘forced or compulsory labour’.

Freedom of movement: School attendance officers were empowered to stop and question persons appearing to be of ‘compulsory school age’ in a public place during school hours, to persons who appeared to be 16, even though some 16 year-olds may be legitimately not attending school. Such a power could arbitrary limit 16 year-olds’ right to movement, privacy and expression.

Privacy: requirement for approval by Ministerial order of the alternative of ‘participating in education or training, or employment or both’ amounted to a broad power to control large parts of the lives of those 16 year-olds who do not attend school or receive home instruction. This may limit the right of such 16 year-olds against breaches of privacy.

Family rights: In addition to more formal excuses for non-attendance, a section provided an excuse for parents where a child’s absence from instruction was because of the child’s disobedience and not due to any fault of the parent. By contrast, similar legislation on youth participation in England imposed obligations directly on children aged 16 and over, rather than parents. While actual prosecutions of parents may be rare, potential fines for parents may limit the rights of families against arbitrary intrusions and to protection by the State.

Conscience: Some mature 16 year-olds may have compelling personal reasons to not participate in education, training or employment. Personal reasons are only partially accommodated; an exception for ‘attending or observing a religious event or obligation as a result of a genuinely held belief of the child’. This does not cover non-religious matter, such as political, social or family events or obligations. This may limit 16 year-olds’ rights to freedom of (nonreligious) conscience.

Children: While attending school will be in the best interests of most 16 year-olds, it will not be contrary to the best interests of some. The distinct interests of 16 year-olds for whom continued schooling is not an appropriate or feasible option would need to be catered for.

Presumption of innocence: An existing section placed a reverse onus on the defence of reasonable excuse for a child’s non-attendance. The extension of the section to parents of 16 year-olds may limit the right to be presumed innocent. Some of the reasonable excuses contained in the section may not be within the personal knowledge of the parents of 16 year-olds.

Apart from freedom of conscience and expression, the SOC did not address the above rights. The SOC also did not explore whether the limitations on conscience or expression were reasonable under Section 7(2). SARC recalled its *Alert Digest 4 of 2007*, noting that: *where there is a reasonable prospect that a provision in a Bill may test or infringe Charter compatibility that issue should be drawn to the attention of the Parliament and a reasoned, even if brief, analysis of why the provision is nevertheless considered compatible with the Charter should be outlined.* Section 28’s requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both

	<p>informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.</p> <p>SARC did not question the policy of compulsory education promoted by the Bill and considered that the Bill positively engaged the Charter rights of children and the right to education at international law. SARC observed, however, that the general scheme of compulsory education in Victoria pre-dated the Charter and therefore had not been subject to parliamentary scrutiny for compatibility with human rights.</p> <p>MR: LA: LC: PD:</p>
<p>19. Electricity Industry Amendment (Premium Solar Feed-in Tariff) Bill 2009 Promotes the installation and use of small solar energy generation facilities by encouraging Victorians to install solar facilities. Facilitates a feed-in credit system for the supply of energy by households to the grid against charges payable.</p>	<p>SOC: The bill was unlikely to engage human rights as it affects licensees that are corporations rather than individuals. If individuals were affected, the bill would engage but not limit property rights under licences, as licensees are not deprived of the use or enjoyment of licenses and terms and conditions of licenses regarding feed-in credits are not arbitrary.</p> <p>SARC: (Alert Digest 4 – 31/03/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: N/A LA: 02/04/09 LC: 25/06/09 PD:</p>
<p>20. Energy and Resources Legislation Amendment Bill 2009 Amends the <i>Petroleum Act</i> 1988 to create a special drilling authorisation, improve public safety and protect the environment by reducing risks associated with mine collapses.</p>	<p>SOC: The special drilling authorisation engaged but did not limit property rights, as a holder of an authorisation would be required to obtain the consent of landowners or occupiers before operations could commence on private land. Aboriginal cultural rights were engaged but not limited, as petroleum operations could not contravene the <i>Aboriginal Heritage Act</i> 2006. Freedom of movement was reasonably limited by the bill. Drilling authorisations could impede movement in relation to people seeking access to the authorisation area, particularly during the construction phase. This would ensure public safety and protection of drilling infrastructure. After construction, the extraction facility would take up a small area of land and operations would be carried out in a manner that would not interfere with the activities of other land users to a greater extent than necessary.</p> <p>SARC: (Alert Digest 10 – 01/09/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: LA: LC: PD:</p>
<p>21. Energy Legislation Amendment (Australian Energy Market Operator) Bill 2009 Supports the functions of a national Australian</p>	<p>SOC: The bill engaged but did not limit property rights, freedom of expression and privacy. Obligations on electricity transmission operators to ensure access to land is required for planning, construction and operation of the system and would occur in accordance with a lease or license. Only corporations are likely to be affected. A new information gathering framework may be used to require natural persons to provide information to the operator under the threat of a civil liability</p>

<p>Energy Market Operator ('AEMO') and makes consequential amendments to various Acts, to enable electricity transmission planning and gas market operation to occur through AEMO.</p>	<p>for non compliance. Such information gathering is reasonably necessary to uphold public order, as electricity and gas are essential services. To the extent that personal information is disclosed and protected, this would occur in the exercise of the operators' statutory functions, in prescribed circumstances.</p> <p>SARC: (Alert Digest 6 – 02/06/2009) SARC commented that the bill was a response to planned modifications to a national scheme for electricity and gas markets. The SOC had not identified whether the Victorian bill's passage would alter the human rights impact of the proposed changes to the scheme. SARC also noted that VenCorp, the Victorian operator, was established by a Victorian statute and likely to be a public authority, however, AEMO was not established by a Victorian statute, arguably does not exercise its functions on behalf of Victoria and may not be a public authority. SARC indicated that it will write to the minister raising the question of whether AEMO is a public authority noting that the bill may have the effect of transferring public functions that engage human rights from a body subject to the Charter to one that is not.</p> <p>MR: (Alert Digest 8 – 28/07/2009) The Minister commented that any proposed amendments to the national laws would require unanimous agreement by all jurisdictions via a Ministerial Council on Energy. A Victorian bill could also modify or dis-apply the application of national laws engaging the Charter. None of the clauses of the bill touched upon aspects of proposed amendments to national laws that could engage the Charter and therefore did not alter the human rights impact of the planned changes. The Minister confirmed that AEMO will be a public authority for the purposes of the Charter, as its functions and powers are of a public nature.</p> <p>LC: 02/06/09 LA: 09/06/09 PD: It was noted that SARC had raised a number of issues of concern about how the legislation interacted with the Charter, in particular, observing that the bill could have the effect of transferring public functions exercisable in Victoria, including powers that engage human rights, from a body subject to the Charter to one that is not. There was argument, however, that AEMO would be bound by the Charter to the extent it interacted with individuals because it could be considered as falling within the definition of a public authority. In practice, it would be unlikely that AEMO would have many dealings with individuals, as the bulk of its transactions would affect corporations.</p>
<p>22. Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 A Private Member's Bill, it establishes a beverage container deposit and recovery scheme to be administered by the Environment Protection Authority</p>	<p>SOC: The bill reasonably limited the right to privacy and freedom of expression by providing for a depot to request a person presenting a beverage container to claim a refund amount to complete a declaration stating that they have no reason to believe that the beverage container was purchased outside Victoria. This limitation on rights aimed to prevent fraudulent claims. The bill engaged but did not limit property rights, as a purchaser of a beverage container may have a deposit refunded by returning the container. The levy was justified as integral to the purpose of the bill, facilitating environmentally sustainable uses of resources and best practices in waste management.</p> <p>SARC: (Alert Digest 6 – 02/06/2009) SARC stated that it would write to the Member seeking further information about the compatibility of a new offence provision with the right to freedom of movement. The provision prohibits the import of a beverage container without paying an environmental levy or obtaining an exemption. The provisions apply broadly to all containers rather than simply containers for sale. The ubiquity of beverage containers and their utility to travellers mean that even a modest levy may limit</p>

	<p>the right. Whilst the purpose of environmental protection may justify restrictions on what people bring into Victoria, the environmental benefit of imposing on a levy on containers that are not sold in Victoria is not apparent, as a new section bars any refunds. The South Australian deposit scheme avoids limiting people's right to enter that state, by imposing a levy on suppliers or sellers of containers, instead of importers or producers.</p> <p>MR: (Alert Digest 7 – 23/06/2009) The response indicated that the levy should apply only to drink containers sold in Victoria.</p> <p>LC: 24/06/09</p> <p>LA:</p> <p>PD:</p>
<p>23. Equal Opportunity Amendment (Governance) Bill 2008 * Amends the <i>Equal Opportunity Act</i> 1995 to create a new governance structure for the Victorian Equal Opportunity and Human Rights Commission.</p>	<p>SOC: The bill promoted the right to privacy and lawfully restricted the right to freedom of expression by preventing the recording, disclosure or communication of personal information by the commissioner, board members and staff of the Commission unless necessary for the purpose of, or in connection with the performance of a function or duty or the exercise of a power under the <i>Equal Opportunity Act</i> 1995.</p> <p>SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: N/A</p> <p>LA: 5/2/2009</p> <p>LC: 31/3/09</p> <p>PD: Some members considered that the Bill would enable the Commission to more effectively fulfil its responsibilities under EOA, RRTA and Charter. In particular, the Bill facilitated a renewed role for the Commission to move from tackling individual complaint resolution to addressing systemic, structural discrimination. One member sought assurances that the Commission's own-motion investigation function would be broadened to enable the Commission to investigate systemic discrimination, no matter how the Commissioner was made aware of it, whether or not a complaint had been made.</p>
<p>24. Fair Trading and Other Acts Amendment Bill 2008 * Improves the operation of markets by ensuring that Victorian consumers are protected via amendments to the <i>Fair Trading Act</i> 1999.</p>	<p>SOC: The right to privacy and freedom of expression, property rights and right not to be subject to retrospective criminal laws were engaged but not limited by the bill.</p> <p>SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights</p> <p>LA: 02/04/09</p> <p>LC: 02/06/09</p> <p>PD:</p>
<p>25. Fair Work (Commonwealth Powers) Act 2009 The bill aims to refer matters relating to industrial relations to the commonwealth Parliament and to repeal the <i>Commonwealth Powers (Industrial Relations) Act</i> 1996. It facilitates Victoria's participation in a national workplace relations</p>	<p>SOC: An inter-governmental agreement providing for Victoria to scrutinise future amendments to the commonwealth Fair Work laws will enable Victoria to assess the continued Charter compatibility of fair work laws. The FWA scheme generally promotes freedom of association by prohibiting a person taking adverse action against another person (including discrimination or refusal to employ) on the basis of membership of an industrial association or participation in industrial activity. This promotes freedom of association as well as the right to effective protection against discrimination. Law enforcement officers are excluded from the application of the FWA, potentially limiting their freedom of association. Most claims of adverse action made by them would likely relate to promotion, transfer, discipline or terminations, excluded</p>

system based on the *Fair Work Act 2009* (Cth) ('FWA'). The bill permits the commonwealth Parliament to extend the application of the FWA to apply to Victorian employers and employees, principally unincorporated businesses and state public sector agencies.

The FWA establishes a new framework for workplace relations. Among other things, it sets out terms and conditions of employment including a new safety net – national employment standards to be reflected in employment contracts, broader access to unfair dismissal complaints, greater capacity for unions to access workplaces and the creation of a body, Fair Work Australia, with the power to vary awards and make minimum wages orders.

matters. The non-discrimination provisions under the EOA and Charter, however, apply to law enforcement officers.

Employees with responsibility for the care of a child under school age or care of a disabled child younger than 18 years, have the right to request flexible working arrangements. The provision distinguishes between different kinds of carers, in that the entitlement is not available to employees with other dependants, such as a dependent spouse or parent and uses the age of an employee's young and dependent children as a criterion for determining an entitlement to request. This is, however, a remedial measure designed to assist parents of young and dependent children by offering them expanded flexible working opportunities. Other parents and carers are protected by existing provisions in the *EO Act*.

Employers and employees can make a collective enterprise agreement about certain 'permitted matters' pertaining to the relationship between an employer and its employees. Single-enterprise agreements and multi-enterprise agreements may be made. Multi-enterprise agreements are subject to special certification arrangements and industrial action in furtherance of their negotiation prohibited. Pattern bargaining, an industry-wide negotiating strategy, is prohibited and a court injunction can restrain any industrial action in support of it. Multiple requirements must be satisfied if industrial action is to be 'protected' under the act. The restrictions aim to prevent industrial unrest and enhance productivity, ensuring that parties focus on agreement making before engaging in industrial action. The ability of persons to collectively bargain at the multi-enterprise level or industry level is therefore limited, engaging **the right to freedom of association**. The right to freedom of association includes the right to form and join a trade union. This right requires the government to permit or make possible trade-union action aimed at protecting the interests of trade union members. International jurisprudence has found that the right does not extend to a right to strike or a particular model but to a general process of collective bargaining.

The provisions grant inspectors certain powers including to enter into premises or inspect and make copies of documents in order to determine whether the act is being complied with. The compliance powers engage but do not limit the **right to privacy** as they are reasonably circumscribed to be exercised for a declared compliance purpose, where the inspector reasonably believes that a person has contravened the act.

Information obtained by the inspector is inadmissible against a person in criminal proceedings. This use immunity **upholds** a person's **right to a fair hearing**. The **protection against self-incrimination** is not limited as this right relates to incriminating statements rather than real evidence, such as the compulsory production of records and documents.

Offence provisions prohibit conduct that insults or disturbs a Fair Work Australia member in the performance of their functions, or exercise of their powers. This engages but lawfully restricts **freedom of expression** as it is reasonably necessary for the protection of public order and proper administration of fair work proceedings.

SARC: (Alert Digest 7 – 23/06/2009) SARC commended the SOC for providing an especially clear and helpful analysis of the complex human rights issues raised by the commonwealth FWA. The SARC report set out the following concerns:

- SARC did not report on the Act's compatibility with human rights while it was still a Bill. In Alert Digest No. 1 of 2009, SARC expressed concern that this procedure may not satisfy the mandatory requirement for human rights scrutiny of new bills imposed by s.30 of the Charter. The Attorney-General had not yet responded to SARC's earlier queries about the requirements and effects of Charter s. 30.

Uncertainties arise regarding the continuing operation of the Charter's provisions for:

- scrutiny of new laws made pursuant to Victoria's referral, given that future amendments will be enacted by the Commonwealth (rather than the Victorian) parliament.
- interpretation of legislation supported by Victoria's referral, as the FWA is a Commonwealth (rather than Victorian) statute and is subject to the Commonwealth's interpretation law. SARC
- court declarations of inconsistent interpretation about statutory provisions made pursuant to Victoria's referral, as those laws are Commonwealth (rather than Victorian) statutory provisions and courts examining them may be exercising federal (rather than state) judicial power.
- obligations of public authorities administering laws made pursuant to Victoria's referral, as those entities are established by Commonwealth (rather than Victorian) enactments.

When Victoria refers legislative power, valid Commonwealth statutes may invalidate State statutes, including the Charter. This means that the Victorian Act might authorise the removal or reduction of the Charter's protections for the human rights of Victorian employers and employees who are brought within the Commonwealth law, including both protections from the federal scheme itself (to the extent that it or any future amendments limit Charter rights) and Charter protections that are additional to that scheme (e.g. from Victorian laws that limit employment rights protected by the Charter or against Victorian public authorities whose acts or decisions limit such rights.)

SARC was especially concerned that neither the Victorian Act nor the Commonwealth Act expressly provide that the Charter continues to apply. While both Acts expressly preserve the *EOA*, neither expressly preserves the additional protections against discrimination contained in s.8 of the Charter. It is possible that once Part 3-1 of the FWA applies to most workplaces, it will 'cover the field' on the 'right to form and join trade unions', potentially rendering the right to freedom of association, or Charter provisions protecting that right, partially invalid.

SARC indicated that it would write to the Attorney-General seeking advice about the following matters, specifically whether:

- s.30 had been complied with and if not, the consequences of non-compliance.
- amendments to the FWA made under the referred power would be scrutinised for Charter compatibility.
- the FWA, to the extent it is supported by the referral of power will be interpreted pursuant to s.32 of the Charter.
- a court could make declarations of inconsistent interpretation if the FWA or future amendments could not be interpreted consistently with human rights
- Fair Work Australia would be subject to the Charter provisions pertaining to public authorities when administering

	<p>laws made pursuant to the Victorian referral of power.</p> <ul style="list-style-type: none"> - any provision of the Charter will be rendered invalid to any extent by the enactment of the FWA. <p>MR: LA: 03/06/09 LC: 09/06/09 PD:</p>
<p>26. Food Amendment (Regulation Reform) Bill 2009</p> <p>Strengthens regulation of the sale of food to ensure that it is safe for human consumption and establish a registration system for certain premises.</p>	<p>SOC: To the extent that the bill would affect natural persons, it engaged but did not limit the right to privacy and property rights. Most of the information required as a consequence of state-wide registration will relate to food handling. However, a limited amount of personal information relating to individuals will also be required, for example, the name of a proprietor. Councils would be permitted to share identifying information in order to monitor compliance with the Act. Councils would also be required to maintain a publicly accessible register containing the names of proprietors, whether businesses were permitted to operate lawfully and whether proprietors had relevant convictions. The information would be required to enforce the law pertaining to food businesses. Registration could be suspended or refused, preventing a business operating lawfully. It is unclear if this would amount to a deprivation of property, but it would be lifted once the public health issue was resolved. The register would not limit the right not to be tried or punished more than once for an offence, as public access to information about such convictions would not, of itself, amount to a punishment.</p> <p>SARC: (Alert Digest 7 – 23/06/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: LA: 25/06/09 LC: 28/07/09 PD:</p>
<p>27. Gambling Regulation Amendment Bill 2009</p> <p>Amends new provisions to be inserted in the <i>Gambling Regulation Act 2003</i> by increasing prescribed percentages payable to the State from profits made by venue operators transferring gaming machine entitlements.</p>	<p>SOC: The bill did not engage human rights.</p> <p>SARC: (Alert Digest 7 – 23/06/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: LA: 25/06/09 LC: 28/07/09 PD:</p>
<p>28. Gambling Regulation Further Amendment Bill 2009</p> <p>Amends the <i>Gambling Regulation Act 2003</i> to improve its operation.</p>	<p>SOC: The bill engaged but did not limit the right to privacy. Various categories of license holders would be required, upon the Minister's written direction, to provide information or documents but only information relating to the kind of activities authorised by a license.</p> <p>SARC: (Alert Digest 10 – 01/09/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: LA: LC:</p>

<p>29. Gambling Regulation Amendment (Licensing) Bill 2009 Amends the <i>Gambling Regulation Act 2003</i>, restructuring the gaming industry by providing for a new licence regime for monitoring gambling and imposing restrictions in relation to licensees.</p>	<p>PD: SOC: The right to privacy, property rights and freedom of expression were engaged but not limited by the bill. SARC: (Alert Digest 2 – 26/02/2009) SARC made no further comment pertaining to human rights MR: N/A LA: 12/03/09 LC: 04/06/09 PD:</p>
<p>30. Human Services (Complex Needs) Bill 2009 Facilitates the continuation of the Department of Human Services' multiple and complex needs initiative (MACNI) after the sunset of the <i>Human Services (Complex Needs) Act 2003</i>. Provides for assessment and care planning for persons with specified needs</p>	<p>SOC: The bill engaged and reasonably limited the right to recognition and equality before the law. Only persons over the age of 16 years, with prescribed disabilities or with a drug or alcohol addiction, exhibiting violent or dangerous behaviour / reasonably likely to cause harm to oneself or someone else are eligible to receive coordinated housing, health, welfare, disability, drug or alcohol treatment services designed for adults. The limitation is designed to facilitate coordinated service delivery to those who need it most due to multiple and complex needs. The needs of children are more appropriately met by child-focused services. The bill engaged but did not limit the right to privacy. SARC: (Alert Digest 4 – 31/03/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 02/04/09 LC: 07/05/09 PD: Members generally supported passage of the Bill. A member commended the SOC as having properly addressed all issues pertaining to equality and privacy. Another member considered that persons in receipt of health services should not be referred to as 'clients' but 'citizens' seeking synthesis of all available services to assist them to address their needs.</p>
<p>31. Human Tissue Amendment Bill 2009 Amends the <i>Human Tissue Act 1982</i> to enable mature minors, aged 16 years and over to consent to the donation of their blood for therapeutic medical or scientific purposes including transfusion.</p>	<p>SOC: The bill engaged but did not limit the right to privacy and the right of children to such protection as is in their best interests. The provisions only relate to the voluntary donation of blood, rather than donation of tissue or organs. Each mature minor would be dealt with as an individual by Australian Red Cross Blood Service staff assessing their health, capacity and willingness to consent. Only those determined to have given informed consent would be permitted to donate. SARC: (Alert Digest 8 – 28/07/2009) SARC observed that the bill preserved the existing law barring children under 16 from donating blood without parental consent. An inflexible age limitation on blood donations may be inappropriate, given the varying physical and emotional maturity of similarly aged teenagers and the alternative controls on the issues of informed consent and health. This issue was not addressed by the SOC. SARC noted a recent decision of the Supreme Court of Canada (concerning transfusions rather than donations) holding that a statute governing consent to medical treatment must give 'adolescents under 16 the right to demonstrate mature medical decisional capacity' if it is to be compatible with that nation's rights to bodily integrity and equality. SARC noted that the bill did not alter the operation of an existing clause, which permits non-consensual blood transfusions to be performed on 16- and 17-year-olds in some circumstances. In addition, 16- and 17-year-olds are currently unable to utilise the 'refusal of treatment certificate' process set out in the <i>Medical Treatment Act 1988</i>. SARC indicated that it would write to the Minister seeking further information as to whether</p>

	<p>the provision was compatible with the right against age discrimination. MR: (Alert Digest 10 – 01/09/2009) The purpose of the limitation is to ensure that, while the pool of potential blood donors is expanded to include mid-teens, the health and safety of younger teens and children is not compromised. It is a public necessity for the State to make a determination as to an appropriate age limit for the donation of blood by young persons for the purpose of regulating the blood donation system and protecting the health of children. There are protective health reasons for setting such an age limit; a child under the age of 16 years may not as yet have reached a weight that would enable them to donate safely, nor the maturity and cognitive ability to understand their own health needs, and the potential ramifications of their decision. These are essentially protective measures, and such restrictions are consistent with the right in section 17(2) of the Charter which entitles children to appropriate protection. The choice of 16 years as the 'cut off' was based upon the agreement of all Australian health ministers to achieve national consistency.</p> <p>The refusal of treatment provisions of the <i>Medical Treatment Act</i> deal specifically with life and death situations and, as such, different public policy priorities come to the fore. The circumstances in which a medical procedure such as a blood transfusion is contemplated is far removed from those in which blood donation is contemplated. Parliament has determined that the need to save a young person's life with this treatment outweighs the usual primacy of individual consent. The provisions reflect the view that the serious nature of a decision to refuse what may amount to life-saving or extending treatment is too significant a decision to be left to those who may have the capacity to understand what they are doing. LA: 30/07/09 LC: 13/08/09 PD: A member noted the concerns SARC expressed about the bill, but indicated their own reservations about the Charter enabling young people wishing donating blood without parental consent to do so at a younger age. Another Member commented that, despite SARC's comments about the inflexible age limit applying to those donating blood without parental consent, such a restriction was appropriate.</p>
<p>32. Justice Legislation Amendment Bill 2009 An omnibus bill, it amends various Acts to, among other things, repeal sunset provisions pertaining to the Koori Court (Criminal Division) of the Children's Court and creates new offences for publishing or disseminating certain types of gambling advertising.</p>	<p>SOC: The bill engaged but did not limit equality rights, the right to privacy and property rights. The bill reasonably restricted freedom of expression. The bill promoted cultural rights. Among other things, the bill aimed to ensure the continued operation of the Koori Court (Criminal Division) of the Children's Court. This potentially discriminated against non-Aboriginal children but was a special measure designed to improve outcomes for indigenous children within the criminal justice system and facilitate procedures to reinforce the cultural rights of indigenous people. The bill facilitated freedom of expression by removing current advertising restrictions on wagering service providers but limited expression by prohibiting publication of certain types of gambling advertising, for example, advertising that may interfere with public health objectives or lead to irresponsible gambling. SARC: (Alert Digest 5 – 05/05/2009) SARC observed a new addition to a clause making it a criminal offence for a wagering service provider to disseminate 'offensive' gambling advertising. SARC commented that while some offensive gambling advertising may be contrary to public morality, criminalising all such advertising may go further than 'reasonably necessary' to protect public morality. SARC indicated that it would write to the minister seeking further information regarding why the</p>

	<p>provision was justified and how wagering service providers would be able to judge in advance whether a particular instance of gambling advertising is offensive.</p> <p>MR: (29/05/2009)</p> <ul style="list-style-type: none"> - Interstate wagering service providers will be allowed to advertise their business services in Victoria. The National wagering market is a highly competitive environment and it is envisaged that some wagering service providers will undertake aggressive advertising campaigns in an attempt to establish a business profile in Victoria. The Government has no other means apart from criminalisation available to influence the behaviour of interstate wagering service providers. - The need to protect public morality under these circumstances outweighs the potential restriction upon the right to freedom of expression. Wagering service providers are motivated solely by commercial interests rather than participating in political expression. - The vast majority of wagering service providers seeking to advertise are corporations and accordingly do not enjoy any human rights protection under the Charter. <p>LA: 07/05/09 LC: 11/06/09 PD: Members noted with approval the removal of the sunset provisions, observing that the Koori Court enhanced cultural rights and had reduced recidivism. It was suggested that some of the positive aspects could be broadly incorporated into our legal system.</p>
<p>33. Justice Legislation Further Amendment Bill 2009 An omnibus bill, the bill amends a variety of acts.</p>	<p>SOC: The bill required receivers of prescribed chemicals and equipment which have the capacity to be used to manufacture illicit drugs to provide names and addresses to suppliers and authorise access by law enforcement agencies. This engaged but did not limit the right to privacy, as use and disclosure would be subject to relevant privacy laws. It would also occur as part of the detection and prosecution of drug offences. The bill enabled a broader range of health professionals to conduct drug alcohol or drugs blood tests on OPI personnel, where the Director, Police Integrity reasonably believed the officer's ability to perform their duties was affected by alcohol or drugs. This engaged but did not limit the right to privacy, as testing would be strictly circumscribed. The scheme also reasonably limited the right against medical treatment without consent.</p> <p>The bill reasonably limited the right to privacy by requiring registered convicted sex offenders to provide internet/other electronic service user names, passport details and to report any changes. These limitations were proportionate, having regard to the expanded contact opportunities afforded by the internet and the pressing societal concerns of child and community safety.</p> <p>The bill engaged but did not limit the right not to be deprived of liberty by shortening the time limit within which a convicted sex offender must report changes relating to whether they generally reside with or have unsupervised contact with a child. A court may still consider whether an offender has a reasonable excuse.</p> <p>The bill gave the court discretion on sentencing a juvenile offender to impose reporting obligations for those convicted of a broader range of sex offences. This engaged but did not limit the right of a child convicted of an offence to be treated in a way appropriate for their age and the right of children to such protection as in their best interests. Reporting obligations would be imposed on a young offender only at the discretion of a court giving consideration to these rights.</p>

	<p>A provision clarified that a reduced reporting period for registered juvenile sex offenders would only apply where the person was a child at the time of any registrable offence. Where a person is convicted as an adult for registrable sex offences and was also convicted while still a minor, the juvenile offences could be considered as though they were adult convictions for the purpose of calculating how long a sex offender must be required to comply with reporting obligations. Children under 18 years old would still be treated as juvenile offenders subject to a reduced reporting period.</p> <p>The bill enhanced property rights by providing for the return or lawful disposal of weapons surrendered to Victoria Police in searches of premises pursuant to Family Violence or Stalking Intervention Orders.</p> <p>The bill engaged but did not limit the right to a fair hearing by allowing immediate use of a document seized from a public authority for an investigation. The provision did not remove the right of a person to make an application for the return of seized documents or a court to exclude improperly obtained evidence. The bill did not limit the right against self incrimination by removing the capacity to claim privilege against self incrimination in relation to material seized under a search warrant. Citing the approach taken by the European Court of Human Rights, the SOC indicated that the right against self incrimination did not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers like search warrants which have an existence independent of the will of a suspect.</p> <p>SARC: (Alert Digest 10 – 01/09/2009) SARC observed that the requirement of convicted sex offenders to provide expanded information about internet/other electronic service user names regarding all uses of internet and electronic communication irrespective of potential connection to children or other criminal behaviour, represented a significant increase in surveillance of such offenders. Requiring registrable offenders to notify the police of user names that are not used for interpersonal communication may be an arbitrary interference with their privacy and could potentially cover a wide range of information, from trivial to sensitive.</p> <p>The SOC had not addressed the compatibility of the changes to the registration scheme in its extended form with human rights. SARC reiterated its comment concerning the <i>Major Crime Legislation Amendment Bill 2008</i>, (Alert Digest 15 of 2008): When anything more than a technical extension is made to an existing scheme engaging human rights, section 28 of the Charter requires the SOC to include an explanation of the compatibility of the scheme in its extended form with human rights. A qualitative change in a broad-based scheme automatically applicable to significant categories to significant categories of offenders, is an important example. If changes are not addressed in a SOC, there is a risk that human rights may be limited through incremental expansions of existing legislation. SARC indicated that it would write to the Minister seeking further information regarding the compatibility of the scheme with the Charter.</p> <p>MR: LA: LC: PD:</p>
<p>34. Land Legislation Amendment Bill 2009 Modernises and improves the operation of</p>	<p>SOC: The bill engaged but did not limit equality before the law or privacy. The amendments modernised the language regarding the lodgement of caveats to protect the interests of persons suffering certain disabilities or to prevent</p>

various Acts	<p>inappropriate dealings resulting from error or fraud. The measures will strengthen the existing powers to assist those disadvantaged and who may otherwise not receive equal recognition and equality before the law, including minors and people with a disability.</p> <p>The bill will bring clarity to the types of encumbrances that may be extinguished over property, providing greater certainty of what property rights remain following acquisition of title by possession. The changes do not limit property rights.</p> <p>SARC: (Alert Digest 11 – 14/09/2009) SARC made no further comment pertaining to human rights.</p> <p>MR:</p> <p>LA:</p> <p>LC:</p> <p>PD:</p>
<p>35. Land (Revocation of Reservations and Other Matters) Bill 2009 Revokes permanent reservation and restricted Crown grant over land in St.Kilda</p>	<p>SOC: The bill reasonably limited freedom of movement by temporarily restricting public access to certain areas, to enable works to improve road and public transport services.</p> <p>SARC:</p> <p>MR:</p> <p>LA:</p> <p>LC:</p> <p>PD:</p>
<p>36. La Trobe University Bill 2009 Please refer to <i>Deakin University Bill 2009</i></p>	<p>SOC: Refer to <i>Deakin University Bill 2009</i>, above</p> <p>SARC:</p> <p>MR:</p> <p>LA:</p> <p>LC:</p> <p>PD:</p>
<p>37. Legislation Reform (Repeals No. 4) Bill 2009 Repeals a number of redundant Acts of Parliament</p>	<p>SOC: The bill did not engage human rights.</p> <p>SARC: (Alert Digest 4 – 31/03/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: N/A</p> <p>LA: 25/06/09</p> <p>LC: 30/07/09</p> <p>PD:</p>
<p>38. Liquor Control Reform Amendment (Enforcement) Bill 2008 * Amends the <i>Liquor Control Reform Act 1998</i> to strengthen enforcement powers, clarify the power to impose conditions in relation to security cameras, require associates of licensees to be</p>	<p>SOC: The right to privacy was engaged but not limited and freedom of movement and the right to be presumed innocent reasonably limited by the bill. The bill created reverse onus offences including failing without a reasonable excuse to produce for inspection documents or equipment when requested by an authorised officer. It would be onerous for the Crown to investigate and prove beyond reasonable doubt that a person did not have a reasonable excuse. An authorised officer may require the holder of a licence or BYO permit or their associate in writing to attend before them to answer questions. This temporary restriction on movement is reasonable, as the questioning must be related to an activity</p>

<p>declared.</p>	<p>regulated by the act. SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 26/02/2009 LC: 10/03/2009 PD:</p>
<p>39. Liquor Control Reform Amendment (Licensing) Bill 2009 Implement Victoria's Alcohol Action Plan 2008-2013 to review licence categories and introduce a risk-based fee structure designed to ensure that late-night licensees associated with the most harm pay a commensurate fee. The bill aims to enhance responsible consumption of alcohol and harm minimisation.</p>	<p>SOC: The bill engaged but did not limit the right to privacy. An authorised person including a member of the police force can request a licence or permit holder to provide information about the conduct of the licensed premises to assist in determining fees or identifying and measuring the factors contributing to the risk of alcohol-related harm. A body corporate would not of itself, have human rights. The information to be provided would relate to purposes in respect of which a person would not have a reasonable expectation of privacy. The requirement would amount to a reasonable regulatory limitation on the right to privacy of persons holding a liquor license or permit. SARC: (Alert Digest 10 – 01/09/2009) SARC made no further comment pertaining to human rights. MR: LA: LC: PD:</p>
<p>40. Local Government Amendment (Conflicting Duties) Bill 2009 Amends the <i>Local Government Act</i> 1989 in response to a recommendation of the Victorian Ombudsman in his report following investigation into alleged improper conduct of councillors at Brimbank City Council</p>	<p>SOC: The bill would disqualify persons employed as electorate officers, ministerial advisers and parliamentary advisers, or employed by federal or state members of Parliament, from becoming or continuing to be a councillor or nominating as a candidate. It would also disqualify members of Parliament and councillors from another council in Victoria or other state or territory, from becoming or continuing to be a councillor. The bill engaged and reasonably limited the right to take part in public life. The right protects rights in relation to political participation in Victoria. The conduct of public affairs is a broad concept, which embraces the exercise of governmental power by state and municipal government. Councillors have a clear and primary duty to their constituency and their council, rather than to another political or jurisdictional sphere. It is desirable that a person does not occupy office with a council and another publicly elected body simultaneously. The bill would also impose eligibility requirements apply to persons who stand for council election. Significant potential exists for conflicts between a person's obligations to the member they work for and their ability to freely represent themselves and their policies to the local community as a candidate for the office of councillor. People working for members of Parliament can have access to public resources and information not available to other candidates that may be used to benefit an election campaign. Public resources and information should not be able to be used in a way that undermines key democratic principles or creates a perception that municipal elections are not conducted in a fair manner. SARC: (Alert Digest 9 – 11/08/2009) SARC indicated that it would write to the Minister in regard to the following issues: - Limiting a disqualification on employees of politicians from becoming or remaining a Councillor rather than applying the disqualification to all public servants may limit the capacity of political employees from participating directly in public affairs without discrimination on the basis of political activity. SARC noted that the UN Human Rights Committee has held in</p>

	<p>relation to the right to participate in public affairs in the ICCPR: if there are reasonable grounds for regarding certain elective officers as incompatible with tenure of specific positions, (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights [to vote and to be elected].</p> <ul style="list-style-type: none"> - in relation to disqualification, the SOC had simply stated that in relation to s.7 factors, there were no less restrictive factors reasonably available to achieve its intended purposes. Although one of the purposes of the limitation was to implement a recommendation from the Ombudsman, even measures to implement compelling government interests must satisfy the Charter's requirement for a SOC to explore how a bill is compatible with human rights. - Forcing elected Councillors out of office on the basis of a disqualification that did not exist when elections were held may partially annul the results of the 2008 local government elections. This may be incompatible with the right of electors to a guarantee of the free expression of their will. SARC referred to a European Court of Human Rights decision, which held that once the wishes of the people have been freely and democratically expressed, no subsequent amendment may call that choice into question, except in the presence of compelling grounds for democratic order. - The seven day grace period could amount to an unreasonable interference with the private lives of Councillors employed as political advisers, particularly in the case of employees who are legally required to give more lengthy notice before they resign from their employment. A decision to retain or abandon a job or career is a significant personal decision that requires time for consideration, consultation with affected people and alternative sources of income. SARC questioned whether less restrictive measures were reasonably available. <p>MR: (Alert Digest 11 – 14/09/2009) The disqualification of persons holding specified positions to become or continue to be a Councillor was not arbitrary and did not discriminate on the basis of political belief or activity. The disqualification aimed to address targeted, known instances of conflicting duties undermining local government. It was therefore not appropriate to extend disqualification to rule out all public servants. It was questionable whether the right to privacy extended to the seven-day grace period. Given the compelling public purpose of the bill and the well publicised Victorian Ombudsman report, the notice provision could not be regarded as arbitrary. It balanced the need to give Councillors a period to formally decide whether to give up conflicting employment with the need to ensure that damaging conflicts of interest are removed as soon as possible.</p> <p>LA: 13/08/09</p> <p>LC:</p> <p>PD: Members reiterated concerns raised by SARC's set out above, including noting indicating that they had been calling for an extension of time to allow councillors to make informed decisions about their employment. It was noted that SARC had written to the minister, but Parliament was required to debate the bill before a ministerial response was provided.</p>
<p>41. Local Government Amendment (Offences and Other Matters) Bill 2009 Amends the <i>Local Government Act</i> 1989 to ensure penalty levels are consistent with the <i>Sentencing Act</i> 1991 as well as reflect current community expectations</p>	<p>SOC: The bill reasonably limited the right to take part in public life by a provision deeming a person incapable of becoming or continuing to be a councillor for a period of seven years after conviction for certain offences. This recognises that there are standards that are required of people who hold public office and that the community has an expectation to be represented by people who act lawfully and with integrity. The bill engaged but did not limit property rights – in cases where a person is found guilty of acting as a councillor while incapable, a court may order them to return any allowances, reimbursements, equipment or materials received as a result of acting as a councillor. Since the person had no right to the</p>

	<p>property, there would be no deprivation of property. SARC: (Alert Digest 10 – 01/09/2009) SARC indicated that it would write the Minister, observing that the Bill provides for increased penalties for a variety of offences under the <i>Local Government Act 1989</i>. However, the SOC does not address any of the increased penalties. SARC recalled its Alert Digest No 8 of 2009, where it stated, in relation to the <i>Tobacco Amendment (Protection of Children) Bill 2009</i>: While the Committee feels that a SOC need not address minor changes in offence penalties, it considers that SOC's should address the impact of a provision doubling a fine for an offence on any rights engaged by that offence. In particular, it should address whether or not the new penalty is proportionate. Introduction of a potential prison sentence for a reverse onus offence of distributing 'any matter or thing that is likely to mislead or deceive a voter in relation to the casting of the vote' may significantly chill political expression in relation to local government elections and may limit the right to the presumption of innocence. MR: LA: LC: PD:</p>
<p>42. Macedonian Orthodox Church (Victoria) Property Trust Bill 2009 Enables the Macedonian Orthodox Church Diocese of Australia and New Zealand in Victoria to establish a statutory trust to govern acquisition and disposal of property.</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 6 – 02/06/2009) SARC made no further comment pertaining to human rights. MR: LA: LC: PD:</p>
<p>43. Major Sporting Events Bill 2009 Aims to provide a safe environment for spectators and participants at major sporting events, manage unauthorised broadcasting and protect against misuse of event logos, images and references.</p>	<p>SOC: The right to freedom of movement was reasonably limited: Various provisions limited movement, for example, clauses prohibiting unauthorised entry into competition areas, setting out penalties in case of breach and sections facilitating temporary road closures. Freedom of expression was reasonably limited: use of protected event logos and unauthorised broadcasting restricted, protecting the right of event organisers to profit from their labours and intellectual property. Possession and use of certain unauthorised items including large banners and fireworks was prohibited to ensure the safety of spectators and participants. Certain offence provisions regulated anti-social behaviour. The bill engaged but did not limit the right to privacy, property rights and the right to liberty and security of person. SARC: (Alert Digest 3 – 10/03/2009) SARC considered the majority of the bill's limitations on public speech were proportionate measures to protect public enjoyment of sporting events but indicated that it would write to the minister concerning: - the necessity of a clause making it a criminal offence to possess all large banners in all parts of sporting areas and whether this limited the right to freedom of expression and participation in public life. Large banners are a potentially important form of public expression and can be used without significant disruption in some parts of sporting venues (e.g. in open areas or plazas surrounding stadiums.) Given that other clauses of the bill already prohibit behaviour interfering with spectators or workers, additionally criminalising the possession of all large banners in this way may be an unreasonable</p>

	<p>limit on the rights to freedom of expression and public life. SARC queried whether steps would be taken to ensure that spectators (including overseas spectators) are made aware of the requirements surrounding prohibited items.</p> <ul style="list-style-type: none"> - whether a clause enabling an authorised officer to exclude a person from an event venue or area for 24 hours if they reasonably believe that the person is engaging in behaviour including disrupting or interrupting a sporting event is a less restrictive limitation available to achieve the purpose of facilitating the public enjoyment of sporting events. Potential protesters may be unable to predict in advance what behaviours will lead to exclusion and be expelled for behaviour without realising that it was unsafe, disturbing or interfering, or may avoid acceptable expression to remove the risk of summary exclusion. A less restrictive alternative measure may be a power to expel only becoming available once the person has been warned that his or her behaviour is unacceptable and nevertheless persists. <p>SARC also referred these issues for parliamentary consideration.</p> <p>MR: 5/5/2009:</p> <ul style="list-style-type: none"> - The provision is designed to provide authorised officers and police with the flexibility to regulate crowd behaviour in changing and volatile situations. In practice it is likely to be limited to types of behaviour that are extreme and officers may exercise discretion to give a person a warning. - Requiring an authorised officer to issue a warning to a person about particular behaviour before directing them to leave if they persist would undermine the objective of the clause. In some circumstances, it would not be appropriate to issue warnings, for example if a fight broke out in a crowded area. <p>LA: 02/04/09 LC: 11/06/09 PD: A member unsuccessfully proposed an amendment to the clause providing that authorised officers should warn or attempt to warn a person that their behaviour is disruptive and may result in their being directed to leave, based on SARC's comments above.</p>
<p>44. Major Transport Projects Facilitation Bill 2009 Facilitates the development and construction of major transport infrastructure projects.</p>	<p>SOC: The bill engaged but did not limit property rights: the bill would grant a project authority the power to compulsorily acquire an interest in land for any purpose connected with an approved project, including acquiring a native title right or temporarily occupying land. Such land acquisition would give rise to a right to compensation on just terms. Holders of native title rights would be compensated on just terms. Therefore, any deprivation of property would be in accordance with law. As the bill would adopt the decision-making rights and processes that apply to the valid acquisition of native title rights under the <i>Native Title Act</i>, to the extent that acquisition of land with which Aboriginal persons may have distinctive spiritual, material and economic relationship, there is no infringement to the right to culture.</p> <p>The bill would provide for a project authority to enter into possession of project land, engaging but not limiting the right to privacy. A number of procedural safeguards are provided in the bill. Decisions to enter into possession are subject to judicial review. Certain land acquisitions for project developments would not be subject to appeal or review, engaging but not limiting the right to a fair hearing. The right would not apply to such decisions as an affected person would not be 'a party to a civil proceeding.' The SOC made reference to a UK decision distinguishing such planning decisions from judicial or quasi judicial acts. The SOC referred to the <i>Kracke</i> decision, noting that Bell J had held that an assessment of whether the right to a fair hearing applied to administrative proceedings needed to be made on a case-by-case basis. The right was</p>

	<p>intended to apply to persons and bodies conducting proceedings with parties, requiring a certain procedure and need to identify parties. To the extent that the right may be limited, it is reasonable. The bill would also allow judicial review in relation to decisions made by the planning minister.</p> <p>SARC: (Alert Digest 10 – 01/09/2009) SARC indicated that it would write to the Minister seeking further information regarding why the criminalisation of insults in impact assessment meetings was reasonably necessary to protect public order. SARC noted that such a ban could criminalise vigorous public participation and chill freedom of expression.</p> <p>MR: (Alert Digest 11 – 14/09/2009) The offence was reasonably necessary to achieve public order at meetings – essential for the production of proper and accurate impact assessments in an environment free from intimidation or coercion.</p> <p>LA: LC: PD:</p>
<p>45. Melbourne Cricket Ground Bill 2008 * Provides for a further function of the Melbourne Cricket Ground Trust, modifies the provisions relating floodlights at the ground and introduces an offence for unauthorised commercial exploitation of its name.</p>	<p>SOC: Property rights were raised but not limited and freedom of movement and expression reasonably limited by the capacity to make regulations regarding entry into and movement within the ground and impose admission fees or other charges. These measures would promote public safety and facilitate proper site management.</p> <p>SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: N/A LA: 12/3/2009 LC: 02/04/09 PD: Members expressed support for the Bill, noting that it was compatible with the Charter and that the SOC had properly addressed a range of human rights.</p>
<p>46. Melbourne University Amendment Bill Facilitates an amalgamation between the faculty of the Victorian College of the Arts and the faculty of music at the University of Melbourne.</p>	<p>SOC: The bill did not engage human rights.</p> <p>SARC: (Alert Digest 3 – 10/03/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: N/A LA: 12/03/2009 LC: 31/03/2009 PD:</p>
<p>47. Monash University Bill 2009 Please refer to <i>Deakin University Bill 2009</i></p>	<p>SOC: Refer to <i>Deakin University Bill 2009</i>, above</p> <p>SARC: MR: LA: LC: PD:</p>
<p>48. National Parks Amendment (Point Nepean) Bill 2009 Provides for the addition of land to Point Nepean</p>	<p>SOC: The capacity to grant a lease conveys a right to occupy an area or premises to the exclusion of others. This reasonably limited the right to freedom of movement and cultural rights. In the granting of a lease, the Minister would be bound to act as a public authority, subject to section 38 of the Charter and give proper consideration to human rights. When</p>

<p>National Park, extended leasing and licensing powers, to enable the minister to lease land and buildings within the area for longer periods</p>	<p>deciding whether the particular circumstances warrant granting a lease, the minister would also need to give proper consideration to the cultural rights of Aboriginal people. SARC: (Alert Digest 7 – 23/06/2009) SARC made no further comment pertaining to human rights. MR: LA: 25/06/09 LC: 11/08/09 PD:</p>
<p>49. Occupational Health and Safety Amendment (Employee Protection) Bill 2008 * The bill increases individuals' protection from discrimination for raising a health and safety issue by providing for a civil remedy under the <i>OHS Act</i> for individual employees who have suffered discrimination, in addition to pre-existing offence provisions.</p>	<p>SOC: The bill promoted protection against discrimination of employees who raise health and safety issues. The bill engaged but did not limit the right to be presumed innocent. The bill provided for a reverse onus on a defendant to prove that a civil claim was not a substantial reason for engaging in further prohibited conduct. The reverse onus of proof would be appropriate, as the employer would be in a clear position to explain their motivation for undertaking the conduct. SARC: (Alert Digest 1 – 03/02/2009) Although the Statement addressed certain clauses imposing a reverse onus on civil defendants (who do not have a right to be presumed innocent), it did not address whether and how the provisions applying to criminal defendants were compatible with the Charter. SARC indicated that it would write to the Minister seeking further information about whether the reverse onus in the context of the criminal offence is compatible with the Charter. MR: (Alert Digest 7 – 23/06/2009) The Minister responded that the provisions are necessary to ensure that a prosecuting authority retains a reasonable prospect of proving offences in anti-discrimination cases. The Minister also noted that the amendments would not impact on any Charter rights that are not already engaged by the <i>OHS Act</i>, nor change the intent of the Act, to protect employees proactively raising OHS issues from discrimination. SARC Response: (Alert Digest 7 – 23/06/2009) SARC commented that the SOC should address any clause that increases the impact of existing provisions on any Charter right, even when the same rights are engaged and the same purpose is furthered.) A criminal defendant would be required to prove on the balance of probabilities that the dominant purpose for their conduct was not due to prohibited purposes including an employee raising a concern with an authorised representative. SARC also considered that it is essential that any reverse onus be demonstrably justified according to the test set out in s.7(2) of the Charter, especially where an offence carries a prison sentence. In particular, a reverse onus provision may be incompatible with the right to the presumption of innocence, if the alternative of placing an evidential burden on a defendant was reasonably available to achieve the purpose of ensuring a reasonable prospect of successful convictions. SARC referred these issues for parliamentary consideration. MR: (Alert Digest 9 – 11/08/2009) The Minister considered that the imposition of a reverse onus of proof would be reasonable and justified, as such offences turn on an employer's motivation for taking certain actions for reasons known only to them. It would therefore be appropriate to expect an employer to explain their actions, rather than having their reasoning proved by someone else. The reverse onus provision would only apply once all the facts constituting the offence, other than the defendant's motivation, had been proved. Defendants would have the capacity to exonerate themselves. The penalty had also been reduced by eliminating a prison sentence. The amendments sought to strengthen the anti-discrimination provisions of the</p>

	<p><i>OHS Act</i> and encourage workers to be proactive in relation to any OHS concerns they might have. Being unable to raise issues regarding workplace health and safety due to a fear of discrimination could place at risk the wellbeing of those at work.</p> <p>LA: 02/06/09 LC: 23/06/09 PD:</p>
<p>50. Parliamentary Salaries and Superannuation Amendment Bill 2009 Limits the increase in the salary payable members of the Victorian Parliament to 2.5 per cent</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 5 - 05/05/2009) SARC made no further comment pertaining to human rights. MR: LA: 02/06/09 LC: 06/05/09 PD:</p>
<p>51. Personal Property Securities (Commonwealth Powers) Bill 2009 The bill refers legislative power to the Commonwealth Parliament for the purpose of enabling the Commonwealth to enact a nationally consistent personal property securities (PPS) registration scheme. The bill would enable the Commonwealth to make express amendments with respect to the referred PPS matters. It sets out rules for determining priority among competing security interests in personal property.</p>	<p>SOC: The bill would create the PPS register. Whenever a register is created, privacy issues are raised. Personal information could be accessed with relative ease through the register. The register would contain limited personal information about the person granting a security interest in personal property, thereby engaging the right to privacy. The system would protect both borrowers and lenders by providing a means of registering security interests. Potential purchasers or lenders could search the register to ensure they are not taken by surprise by the existence of other interests. An improper search or misuse of personal information would constitute an interference with privacy and individuals would be able to make a complaint to the Office of the Federal Privacy Commissioner under the <i>Privacy Act 1988</i> (cth). SARC: (Alert Digest 10 – 01/09/2009) SARC indicated that it would write to the Minister seeking further information regarding whether the regulations for the proposed <i>Personal Property Securities Act</i> (Cth) made pursuant to the referred power will be scrutinised for compatibility with human rights and able to be the subject of declarations of inconsistent interpretation. SARC was concerned that the making and content of any regulations, as well as the conduct of the Registrar of Personal Property Securities may not be subject to the Charter's operative provisions. MR: LA: LC: PD:</p>
<p>52. Planning Legislation Amendment Bill 2009 Amends the <i>Planning and Environment Act 1987</i> to introduce a system of development assessment committees to function as a delegate to make decisions on certain</p>	<p>SOC: The bill engaged but did not limit the right to privacy and reasonably limited freedom of expression and the right to take part in public life. Among other things, the bill prohibited members of development assessment committees from disclosing certain confidential information gained during the course of employment, to enable members to effectively assess applications and ensure integrity in the application process. Provisions prohibit members with a conflict of interest from deciding applications and enable suspension of membership in cases of misconduct or abuse of membership. These are necessary to ensure impartial consideration of projects in the public interest, untainted by any private interest a member</p>

<p>applications specified by the Minister for Planning.</p>	<p>may have. SARC: (Alert Digest 5 - 05/05/2009) SARC made no further comment pertaining to human rights. MR: LA: 07/05/09 LC: 11/06/09 PD:</p>
<p>53. Planning Legislation Amendment Bill 2009 (No. 2) Amends the <i>Planning and Environment Act 1987</i> and introduce a system of development assessment committees to make decisions on classes of applications specified by the Minister for Planning.</p>	<p>SOC: The bill engaged but did not limit privacy. A provision required DAC members to disclose interests on a register. The Minister also had to publish the details of members on the internet, to be easily accessible for members of the public. The requirements of the register and its contents were clearly and precisely defined. The information was necessary to ensure transparency around the private interests of DAC members, which had the potential to influence their public duties and decisions.</p> <p>The bill reasonably limited freedom of expression and the right to participate in the conduct of public affairs. A section prohibited DAC members from disclosing confidential information (making a record, divulging or communicating information conveyed during employment or making use of the information for any purpose unrelated to discharge of official duties). This aimed to provide DAC members with access to confidential information important to their duties in making application decisions and to ensure the integrity of the application process.</p> <p>Provisions required DAC members not to participate in decision making in certain circumstances and empowered the Minister to suspend a member if the Minister reasonably believed that the member misused their position, had a conflict of interest or acted corruptly. Members could not participate in decision making in circumstances when they could have a conflict. This was vital to ensure that appropriate standards required of people who hold public office were upheld.</p> <p>SARC: MR: LA: LC: PD:</p>
<p>54. Primary Industries Legislation Further Amendment Act 2009 Clarifies when various amendments in the <i>Primary Industries Legislation Amendment Bill 2008</i> will take effect.</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 8 – 28/07/2009) SARC made no further comment pertaining to human rights. MR: LA: 23/06/09 LC: 25/06/09 PD:</p>
<p>55. Racing Legislation Amendment (Racing Integrity Assurance) Bill 2009</p>	<p>SOC: The bill engaged but did not limit the right to privacy and the right to a fair hearing. The RIC would have the power to disclose integrity related information (including personal information) to a number of bodies and persons, Victoria Police</p>

<p>Amends the <i>Racing Act</i> 1958 to establish the position of Racing Integrity Commissioner (RIC) to oversee integrity procedures and act in a quasi ombudsman role for the Victorian racing industry. The bill establishes new racing appeals and disciplinary boards for Greyhound Racing Victoria (GRV) and Harness Racing Victoria (HRV)</p>	<p>and other law enforcement bodies. Such disclosure would be subject to the safeguards contained in the <i>Information Privacy Act</i> 2000. The RIC would be able to disclose only integrity related information, for example, the relevant rules of racing, the nature of the alleged breach of these rules, the potential commission of criminal offences, to enable a full and proper investigation. A new Racing Appeals and Disciplinary Board, to hear and determine appeals and disciplinary matters, would ensure independent, impartial, fair and public hearings. The Board would be bound by the rules of natural justice and required to provide written reasons for decisions upon a party’s request. The Chairperson and Deputy would have strict qualification requirements. Where a person is fined an amount under \$250, they would not have an automatic right of appeal, as such appeals could present an unreasonable burden on appeals and disciplinary bodies. Participants in the racing industry engage voluntarily in strictly regulated activities and thus agree to be subject to the imposition of penalties. The SOC also referred to jurisprudence relating to the European Convention on Human Rights and the case of <i>Kracke v Mental Health Review Board</i> [2009] VCAT 646 in addressing whether this limited the right to a fair hearing. In <i>Kracke</i>, Justice Bell held that although the right to a fair hearing includes civil proceedings which covers some administrative as well as judicial proceedings, not all administrative decision making processes are afforded the full protection of the right to a fair trial. This question must be addressed on a case-by-case basis.</p> <p>SARC: (Alert Digest 9 – 11/08/2009) SARC made no further comment pertaining to human rights.</p> <p>MR:</p> <p>LA: 13/08/09</p> <p>LC:</p> <p>PD:</p>
<p>56. Residential Tenancies Amendment (Housing Standards) Bill 2009 A Private Member’s Bill, it amends the <i>Residential Tenancies Act</i> 1997 in relation to the imposition of minimum housing standards. The bill empowers the minister to set permanent or temporary quality standards minimum standards for rooming houses and other dwellings occupied under residential tenancy agreements.</p>	<p>The bill engaged but did not limit various human rights including: privacy, protection of families and children and property rights. The bill in no way affected the legal requirements with which landlords must comply in order to lawfully enter onto the premises. The bill enhanced protection of families and children by providing vulnerable families and children with recourse to ensure their physical safety, health and comfort through the range of measures that can be enacted by the minister. While the bill would force landowners to repair, modify and upgrade their properties to meet standards to be established, no deprivation of property would occur. If money is to be considered property, there may be a compulsory extraction of property, but such deprivation is in accordance with the law in much the same way as paying for a roadworthy certificate to attain registration. Complying with the standards would be an incidental statutory requirement of a landowner entering into a commercial relationship with a tenant.</p> <p>The bill aimed to uphold human dignity and health and combat increasing costs of living disproportionately affecting the poor.</p> <p>The bill did not prescribe minimum standards, as this role is appropriately vested in the minister with resources at their disposal to investigate what standards should be implemented and how they can most effectively be targeted. The bill aimed to ensure that the places low income tenants inhabit have guaranteed minimum standards such as heating, insulation, lighting, adequate plumbing for sanitisation, security requirements and other measures.</p>

	<p>This bill aimed to provide the impetus for the state government to conduct further research so as to determine the standard of housing stock and an appropriate minimum standard to improve housing. The bill provided for dispute procedures in cases when a landlord does not voluntarily take steps to bring the premises up to the declared standard. The amendments offered the remedy of requiring a landlord to improve the quality of the premises, while the tenant would be entitled to keep the tenancy agreement, to avoid homelessness.</p> <p>The human right to adequate housing is included in Article 11 of the <i>International Covenant on Economic, Social and Cultural Rights</i>, to which Australia is a signatory, but there is no corresponding right under the Charter.</p> <p>SARC: (Alert Digest 8 – 28/07/2009) SARC made no further comment pertaining to human rights. MR: LA: LC: PD:</p>
<p>57. Resources Industry Legislation Amendment Bill 2008 * Modernises and regulates Victoria's extractive industries.</p>	<p>SOC: Certain provisions engaged but did not limit the right to privacy and property rights. SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 3/02/09 LC: 26/02/09 PD:</p>
<p>58. Road Legislation Amendment Bill 2009 Amends various Acts to improve road safety.</p>	<p>SOC: The bill engaged but did not limit the right to freedom of movement, privacy and property rights. The bill reasonably limited equality rights, freedom of expression and the right to the presumption of innocence. A provision enabling the minister to set guidelines regarding tests to be used to determine fitness to drive could result in people with certain disabilities being treated less favourably and restrict privacy, however, driving is an inherently dangerous activity and fitness requirements are necessary to uphold public safety. Certain amendments may impede movement including lowering the blood alcohol concentration threshold triggering immediate license suspension, however this only affects travel via motor vehicle. Amendments prohibiting certain offensive behaviour towards operators of road safety cameras enable their role to be carried out safely. A clause imposing a legal burden on a defendant to prove on the balance of probabilities that they had a reasonable excuse for bypassing an interlock fitted into a vehicle for someone required to use it is a reasonable measure designed to uphold road safety. Similarly, creating offences imposing a legal burden on employers, contractors or operators to prove that they took all reasonable steps to ensure business practices will not cause drivers subject to their control to speed aims to address the pressing and substantial societal concern of speeding heavy vehicles causing serious accidents. SARC: (Alert Digest 5 - 05/05/2009) SARC noted that an amendment clause expanded the circumstances authorising</p>

	<p>police to use a tyre deflation device and that an existing section indicated that provisions of other Acts operating to restrict the use of such devices did not apply to police members doing so when exercising their duties. SARC indicated that it would write to the minister expressing its concern that this provision may mean the placement of tyre deflation devices on roads is not subject to the Charter's obligation for police officers to act in a way that is compatible with the right to life. Although the devices mitigate dangers posed by illegal driving and police pursuits, they can cause road accidents and fatalities. SARC also noted an error in the Statement, indicating that a new section made it an offence to among other things "insult" an operator of road safety cameras. This could raise significant issues with respect to freedom of expression. The clause that was introduced into parliament, however, only made it an offence to "obstruct, hinder, threaten, abuse or intimidate" operators.</p> <p>MR: LA: 07/05/09 LC: 04/06/09 PD:</p>
<p>59. Salaries Legislation Amendment (Salary Sacrifice) Act 2008 * Amends various Acts in relation to salary sacrifice.</p>	<p>SOC: The bill did not raise any human rights issues. SARC: (Alert Digest 1 – 03/02/2009) Various sections authorise certain judicial officers and tribunal members to enter into salary sacrificing arrangements. SARC was concerned that if the consent of a member of the executive is necessary before officers and members can obtain the financial benefits of salary sacrificing, they may be required or able to negotiate with the executive about remuneration, potentially limiting the right of litigants to a hearing before an 'independent' court or tribunal. SARC will write to the Attorney General about not having the opportunity to report on the compatibility of the Act while it was still a bill. s.30 of the Charter provides that SARC 'must consider any bill' and 'must report... as to whether the bill is incompatible with human rights.' MR: 5/5/2009: A judge's salary is fixed under the <i>Judicial Salaries Act 2004</i>. Pursuant to section 82(6B) of the Act, this salary cannot be reduced. A subsection provides that a judge may agree to receive "the whole or part of the total amount of future salary as non-salary benefits". The subsection does not affect the total amount of salary; the provision simply determines how much of that salary is to be 'sacrificed'. There is therefore no scope for negotiation on the part of either the judge or the Crown as to the quantum of the salary. LA: 02/12/2008 LC: 02/12/2008 PD:</p>
<p>60. Sentencing Amendment Bill 2009 Amends the <i>Sentencing Act 1991</i>, which provides for matters that must be considered by courts in sentencing. The amendment requires</p>	<p>SOC: The bill engaged but did not limit the right against retrospective criminal laws. The bill included a transitional provision to enable the amendment to the <i>Sentencing Act</i> to apply to sentencing of a person on or after its commencement, regardless of when the offence was committed. - The current sentencing practice being reinforced by the amendment already applied to the sentencing of offenders</p>

<p>judicial consideration of whether the offence was motivated by hatred for or prejudice against a group of people with common characteristics with which the victim was associated, or the offender believed the victim was associated.</p>	<p>motivated by hatred or prejudice: offences which are motivated by hatred for or prejudice against particular groups are inconsistent with the prevailing values of tolerance and respect for diversity held by the community.</p> <ul style="list-style-type: none"> - The amendment did not fetter judicial discretion but reinforced the longstanding position that it has always been relevant for a court to have regard to the motivation of an offender. <ul style="list-style-type: none"> ▪ The bill engaged but did not limit the right to hold an opinion without interference. Although indirectly limiting the right to freedom of expression, in relation to offences where a person expresses hatred or motivation against a group of people with common characteristics, it was a lawful restriction reasonably necessary to respect the rights and reputation of other persons; and to protect public order and morality. ▪ The amendment promoted a number of rights in relation to persons who may be the victim of crimes motivated by hatred or prejudice against groups of people, including the right to enjoy human rights without discrimination, right to freedom of thought, conscience, religion and belief, freedom of expression and right to enjoy culture or religion. Crimes motivated by hate or prejudice against members of particular groups impact disproportionately on vulnerable members of the Victorian community. <p>SARC: (Alert Digest 12 –13/10/2009): SARC referred to Parliament for its consideration the question of whether or not, by retrospectively applying a new statutory sentencing factor to proceedings that are already in progress and appeals from completed proceedings, the section limited offenders’ right to a fair hearing. SARC noted the insertion of a new statutory aggravating factor for crimes motivated by hate or prejudice to the main statutory guideline on sentencing. While SARC considered this was compatible with human rights, it was concerned about a clause providing that the section applied ‘to a sentence imposed on or after the commencement of that Act, irrespective of when the offence was committed.’ The effect of this was to make the aggravating factor apply retrospectively: to offences, prosecutions, trials, sentencing hearings and appealed sentences that pre-dated the Act’s commencement. This could engage offenders’ right to a fair sentencing hearing.</p> <p>SARC observed that previous transitional provisions in this context had only been used for amendments that introduced beneficial sentencing options, made procedural changes or redressed earlier anomalies. Previous amendments adding new sentencing factors were not accompanied by a transitional provision or the provision was limited to ‘a proceeding for an offence commenced on or after’ the clause’s commencement. This approach would prevent an offender who pleaded guilty or participated in a sentencing hearing under one statutory provision being sentenced under a different statutory provision.</p> <p>MR: LA: LC: PD:</p>
<p>61. Serious Sex Offenders Monitoring Amendment Act 2009 Amends the <i>Serious Sex Offenders Monitoring Act 2005</i> ('the Monitoring Act') to further regulate</p>	<p>SOC: The Act clarified Parliament's intention in relation to the meaning of the word 'likely' in the test for making and reviewing ESOs and overrode the decision of RJE v. Secretary to the Department of Justice [2008] VSCA 265 ('RJE').</p> <ul style="list-style-type: none"> - In RJE, the Court of Appeal held that the word 'likely' in section 11 required that an offender be 'more likely than not' to commit a further relevant offence if unsupervised - or 'more than 50 per cent likely'.

<p>sex offenders.</p> <p><u>Background</u> - The Monitoring Act has regulated convicted sex offenders since 2005. Where an offender serves a custodial sentence for a serious sexual offence against a child or adult, the Monitoring Act has enabled a court to impose an extended supervision order 'ESO' for up to fifteen years after the custodial sentence expires. The Monitoring Act authorised a range of limitations on rights, in relation to automatic conditions that attach to an ESO. These conditions reasonably limited an offender's rights to privacy, liberty and freedom of movement. The making of an ESO engaged but did not limit the right not to be tried or punished more than once.</p>	<ul style="list-style-type: none"> - It was not Parliament's intention that extended supervision of known serious sex offenders would only be possible in such cases, particularly given the limitations associated with clinical predictions of future and which cannot be reduced to a precise mathematical equation. - Justice Nettle considered the test of 'likely' in the absence of any consideration of the type of re-offending that might occur. Section 7(2) of the Charter requires a balance between the rights of offenders as well as the rights of the community, particularly potential victims including children. Whether it is reasonable and justifiable to impose restrictions upon the rights of offenders depends not only on the likelihood of re-offending but also on the nature and gravity of the potential re-offending. The test should reflect this, and enable ESOs to be made even where it cannot be proved that an individual is more likely than not to re-offend. - The Minister endorsed the decision of TSL, where the Court of Appeal held that the word 'likely' did not require the Secretary to prove that it is more likely than not that a person will commit a relevant offence; and that there is no reason to think that [the degree of likelihood] must be more than 50 per cent. - Taking into account the gravity of the offending that the scheme contemplates and seeks to guard against, and the nature of such offending in terms of its pervasive impacts on victims and the community generally, it is appropriate that the threshold for 'likelihood' accommodate a much lower level of risk. - The Act amended the monitoring act to enable a court to impose an ESO where there is a risk of relevant offending that is 'both real, ongoing and which cannot sensibly be ignored having regard to the nature and gravity of the offending'. This may mean that, in some cases even a small likelihood of re-offending could be sufficient to warrant the imposition of an extended supervision order, having regard to the gravity and nature of that possible offending and its impacts on the community and possible future victims. - It is intended that this will validate existing extended supervision orders, notwithstanding what was said in RJE. <p>SARC: (Alert Digest 2 – 26/02/2009)</p> <p>SARC will write to the Minister in regard to the following concerns:</p> <ul style="list-style-type: none"> - SARC reiterated its observation in Alert Digest 5 of 2008 that ESOs involve a number of significant limits on Charter rights, beyond those imposed by the criminal justice system. While ESOs may be justifiable in the case of very serious offences such as the rape of a child, the threshold requirement that a risk 'cannot sensibly be ignored' may be too low for such significant human rights limitations in a 'society based on human dignity, equality and freedom'. - the lower threshold test of risk may be overly susceptible to varying application amongst individual judges, based on their own views of what may be 'sensible'. The new test imposes a qualitative component of probability, replacing a wholly quantitative assessment. The Court of Appeal has also indicated that there may be a need to defer to expert assessments of likelihood. The review process may be too slow and onerous to prevent development of discrepancies in the imposition of orders. - the Statement did not address factors set out in Section 7(2) of the Charter, in particular, not assessing 'reasonably available' alternatives, such as an 'unacceptable risk' test recommended by the Victorian Sentencing Advisory Council. - An ESO may amount to a penalty. Changes to the rules regarding the retrospective review or revocation of existing orders, presently in place, may infringe the right not to be deprived of liberty except on grounds, and in accordance with
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procedures established by law.
 SARC will write to the Attorney-General expressing its concern about the Charter’s human rights dialogue in relation to this Act:

- The Court of Appeal did not consider the Charter when interpreting the previous versions of sections relating to making and review of ESOs. Parliament therefore lacked an authoritative judicial ruling on the Charter compatibility of the sections in the context of amendments lowering the threshold test for imposition of ESOs.
- the Statement did not follow the normal format of addressing the factors contained in Section 7(2)’s test for limiting human rights, an explanation of ‘how’ it was compatible with human rights, as required by Section 28 of the Charter.
- The bill was enacted prior to a SARC Charter Report. SARC reiterated its concern stated in Alert Digest 1 of 2009 regarding non compliance with section 30 of the Charter.

MR: 5/5/2009:

- A previous SOC in relation to the *Justice Legislation Amendment Bill 2008* and the SOC for the Amending Act comprehensively deal with the rights of offenders engaged or limited by the imposition of an ESO. This discussion adequately addresses the key issues raised by s. 7(2) of the Charter.
- The Charter does not require SOC’s to address every conceivable way of amending legislation
- In the case of serious sex offenders, the rights of individual offenders need to be balanced against the rights and interests of community members, including the rights of children to such protection as is in their best interests. The amended test gives effect to this balancing exercise by directing courts to have regard not only to the likelihood of a further offence being committed, but the nature and gravity of the possible offending, and the nature of the harm that is sought to be protected against. The test provides a stronger relationship between the limitation of individual offenders’ rights and the protection of the community.
- A qualitative approach also ensures a fairer result for offenders. If, for example, having taken all of the evidence into account, a court finds that the nature and gravity of an offender’s possible offending are not sufficiently serious to warrant the imposition of an ESO, the test will not be met. This is more likely to occur where a type of offending does not involve significant risk of harm to members of the community.
- In cases in which an offender poses a moderate risk of committing further offences, but the offending can involve serious harm to potential victims, it is reasonable to impose limitations on an offender’s individual rights through imposing automatic conditions and any other directions necessary to protect the community or rehabilitate and treat the offender, determined by the Adult Parole Board.
- The amendments determine the manner in which existing rights or duties may be enforced, rather than alter existing rights and liabilities. They do not fall within the application of the presumption against retrospectivity.

LA: 4/02/2009
LC: 5/02/2009
PD: Members generally supported the bill, but noted that Parliament should give proper consideration to matters raised by bills involving the deprivation of liberty, a serious issue, no matter who is being deprived of their liberty. As a matter of principle and as a general rule, such legislation should only be enacted after the Parliament and the community have had

<p>62. State Taxation Acts Amendment Bill 2009 Amends various Acts to, among other things, clarify the scope of the exemption from duty in relation to deceased estates, amend the first home owner grant and first home bonus to include a cap of \$600,000 on the value of homes which qualify. The bonus will be extended to contracts signed on or before 30 June 2010.</p>	<p>the opportunity to reflect on its implications. SOC: The bill does not raise any human rights issues. SARC: (Alert Digest 6 – 02/06/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 04/06/09 LC: 23/06/09 PD:</p>
<p>63. Statute Law Amendment (Charter of Human Rights and Responsibilities) Bill 2009 Amends various Acts to ensure their compatibility with the Charter</p>	<p>SOC: The bill promoted the right to equality, and the right to freedom of expression. The bill also amended a number of Acts to ensure consistency with the right to be presumed innocent in circumstances where an existing reverse legal onus might not constitute a reasonable limitation on rights, for example, the <i>Victorian Urban Development Authority Act 2003</i>. A section of the Act made it an offence for a person connected with VicUrban to communicate information, except in carrying out official duties or obligations. The provision restricted the right of freedom of expression. The restriction aimed to protect confidential project information but appeared to apply to all information, including information in the public domain. The provision would prevent an employee from talking to friends or family regarding publicly known facts about projects, if they became aware of the information because of a connection with VicUrban. The amendment sought to ensure that the restriction on communicating information only applied to confidential information. SARC: (Alert Digest 4 – 31/03/2009) SARC commented that whether to place an evidential burden on a defendant is one to be considered on a case-by-case basis, involving a balance to be struck between the effective prosecution of regulatory offences and the rights of a defendant in criminal proceedings. A reverse onus provision may be justified where the offence is regulatory in nature, the penalty is a relatively low-level fine, not involving imprisonment and where the evidence to be adduced is more easily within the defendant’s knowledge and it would be unreasonably difficult for the prosecution to prove. SARC indicated that it would write to the Minister seeking information about the following: - Certain clauses retain existing reverse onus provisions regarding criminal proceedings that have already commenced. The Statement did not address why it was necessary to retain exemptions in relation to the final, verdict stage of proceedings. - The Statement did not address a clause amending an offence under the <i>Transport Act 1983</i>. The existing clause enabled a transport safety officer to direct a person to provide certain assistance. It was an offence not to comply. The provision imposed a reverse legal onus on the defendant to establish that the direction was unreasonable or outside the scope of the defendant’s business or other activity. SARC considered that the existing reverse onus was capable of being reinterpreted under s.32 of the Charter in a way that did not limit the right to be presumed innocent. The amendment, however, was not capable of such re-interpretation as it indicated that it was a defence if a person charged ‘proved’ rather than ‘established’ on the balance of probabilities that a direction was outside the scope of their business. The amendment may also not be</p>

capable of being read to only apply in a prospective manner and potentially exposed defendants to wider criminal liability than applicable at the time of the offence.

MR: (Alert Digest 7 – 23/06/2009) The Attorney-General's response indicated exemptions relating to ongoing proceedings are designed to avoid confusion and clarify the timing in relation to the development of the new provisions. It is standard practice for ongoing proceedings to be exempted from changes to procedural rules during a transition period. The amendment to the offence under the *Transport Act* imposing a reverse onus was reasonable, as an accused can easily be able to point to evidence that the direction was outside the scope of their business. It would be more difficult for the prosecution to prove such matters. By replacing the word 'establish' with 'prove', the bill clarified that that an accused would have to discharge a legal onus. The ordinary meaning of the two words is the same.

SARC Response: (Alert Digest 7 – 23/06/2009) SARC referred certain questions for parliamentary consideration:

- If an existing reverse onus is incompatible with the Charter, then a continuation of an ongoing prosecution that would not succeed without that reverse onus may be incompatible with the right to presumption of innocence. SARC questioned whether allowing people charged with offences prior to the commencement of the bill to be subjected to reverse onus provisions that the bill repeals, is compatible with the right against retrospective criminalisation.
- whether preserving the reverse legal onus in respect to the above offence rather than an evidential burden was compatible with the right to the presumption of innocence.
- Even if the words 'establish' and 'prove' have the same meaning, requiring a defendant to 'prove on the balance of probabilities' may have the effect of preventing Victorian courts from following UK decisions which interpret the word 'prove' to only impose an evidential burden. SARC questioned whether this was compatible with the right to the presumption of innocence.

LA: 24/06/09

LC: 28/07/09

PD: The Hansard record has captured significant and ongoing debate regarding the bill in both the legislative Council and Assembly. Members expressed concern about the following issues:

- the capacity of the reverse onus provisions in the Statute Law Amendment Bill and others within the statute book to infringe the presumption of innocence. One member noted that SARC had observed that the question of whether it is justifiable to place a reverse burden on a defendant is one that should be considered on a case-by-case basis, regardless of whether it is evidential or legal. The member emphasised that it was important to ensure that provisions imposing legal or evidential burdens of proof were proportionate. Accordingly, the right to the presumption of innocence should be subject only to the reasonable and demonstrable limits referred to in s.7(2) of the Charter.
- the limited scope of the review of the statute book. One member cited a range of examples of legislation containing reverse legal onus offences, emphasising, "there are legion examples throughout the statute book of instances where there are continuing reverse onus obligations. There is no assessment of or explanation by the government as to why those reverse onus provisions remain whereas the modest handful in this bill are to be deleted."
- the capacity of the wording contained in an amended reverse onus to make the burden of proof more difficult for a defendant to discharge. The member unsuccessfully sought to have amendments made to the bill to ensure that people

	<p>charged with offences prior to the commencement of the bill were not subjected to repealed reverse onus provisions and to amend the clause requiring a criminal defendant to prove a defence to the offence under the <i>Transport Act</i> on the balance of probabilities.</p> <p>Members debated the ongoing relevance of the Charter, one member reflecting on how the Charter has enhanced the dialogue and debate about what human rights are and how they should be protected.</p> <p>A Minister confirmed that the seven acts identified in the bill were not the only acts being reviewed by the government, and that the bill did not amount to a completion of the review. There are a number of ongoing reviews of legislation and there may be others. In response to the proposed amendments to require retrospective application of the bill to criminal proceedings on foot, the Minister indicated that the law needed to take effect in a way which ensures that there is maximum certainty and that the rules of engagement do not change halfway through a case. People ought to be charged and prosecuted under the law as it applies at the time that the alleged offence occurred.</p>
<p>64. Statute Law Amendment (Evidence Consequential Provisions) Bill 2009 Facilitates introduction and implementation of the <i>Evidence Act</i> 2008. Repeal many sections of Acts including the <i>Evidence Act</i> 1958.</p>	<p>SOC: The bill engaged diverse rights. The bill promoted the right to recognition and equality before the law – in relation to the competence and compellability of witnesses in proceedings under the <i>Family Violence Protection Act</i> 2008. A new amendment focused on the capacity of an individual to understand and answer questions, rather than on the existence of a disability. Freedom of thought, conscience, religion and belief was promoted by an amendment allowing a person not to be required to use a religious text when taking an oath and the protection of privilege for religious confessions. A provision promoted the protection of families by protecting spouses and others testifying in criminal proceedings. It supported the notion that it could cause harm to a family if someone was a compellable witnesses where a defendant was a family member. This went further than existing provisions in that the new section recognised and provided equal protection for those in same-sex relationships.</p> <p>The bill engaged but did not limit the right to a fair trial by broadening the circumstances in which hearsay evidence may be admitted where the maker of the previous representation is not available to be cross-examined. Safeguards would ensure that parties received a fair trial, including notice requirements where such evidence is proposed to be introduced and courts limiting the use of such evidence where it may be unfairly prejudicial to a defendant.</p> <p>SARC: MR: LA: LC: PD:</p>
<p>65. Superannuation Legislation Amendment Bill 2009 Among other things, this bill aims to allow the reinstatement of reversionary spouse pensions</p>	<p>SOC: The bill promoted equality rights. The cancellation of reversionary spouse pensions on remarriage was based on the outdated notion of financial dependency of spouses. The amendments will redress discrimination on the basis of marital status that occurred when reversionary spouse pensions were cancelled upon remarriage. The <i>Superannuation Legislation Amendment Act</i> 2008 amended the definition of 'eligible spouse' in the Victorian superannuation legislation to reflect the</p>

<p>previously cancelled upon remarriage of recipients and amend Acts governing Victorian public sector superannuation schemes to enable trustees to give effect to superannuation orders or agreements made in respect to de facto relationships</p>	<p>Commonwealth's definition in the <i>Family Law Act 1975</i> (Cth). At the time, the Commonwealth's definition was not compliant with the Charter, as it was restricted to married or heterosexual de facto partners. The Commonwealth has recently amended the <i>Family Law Act 1975</i> by expanding the definition of 'spouse' to include parties in a de facto relationship (including same-sex relationships). This enables trustees of Victorian public sector superannuation schemes to be able to give effect to family law superannuation orders or agreements made in respect of members in same sex de facto relationships.</p> <p>SARC: (Alert Digest 6 – 02/06/2009) SARC observed that the bill re-instated pensions previously cancelled on the ground of re-marriage. However, any entitlement is limited to the period after an eligible person applies for reinstatement. The Committee considered that this limitation may engage the right of eligible people to 'equal and effective protection against discrimination' on the ground of marital status. No redress is provided for pensions denied previously, including the period after the discriminatory nature of the denial was recognised (e.g. by Parliament's repeal of the earlier disentitlement. SARC noted that it would write to the Minister seeking further information as to measures that will be taken to inform eligible people of their entitlements and assist them to apply for them.</p> <p>MR: (Alert Digest 8 – 28/07/2009) The Minister responded that reinstatement of a surviving spouse's pension can impact upon the pensions paid to other dependents of the deceased member. Accordingly, it would not be appropriate to reinstate a pension prior to the date of application. The Minister acknowledged that, in order to take advantage of the changes in entitlement, affected people needed to be made aware. ESSSuper would be required to provide all eligible former pensioners with written information about the changes and how to make an application and that the ESSSuper website would post information announcing the changes. The reinstatement of reversionary spouse pensions does not impose any limits on equality rights but redresses historical discrimination on the basis of marital status that occurred when such pensions were cancelled upon remarriage.</p> <p>SARC Response: (Alert Digest 8 – 28/07/2009) SARC considered that there are several different equality rights in Section 8 of the Charter. While most of the rights in s.8 are engaged by bills that are discriminatory, an additional one – s.8(3): the right to 'equal and effective protection against discrimination' is engaged by bills that address discrimination. Where a bill provides only limited redress and/or excludes some affected people from that redress, the SOC must explain how any limitations or exclusions are reasonable according to the test contained in s.7(2). This applies whether or not the bill is beneficial in purpose, any historical discrimination can be justified, or the limitations or exclusions are based on attributes of discrimination set out in the <i>Equal Opportunity Act</i>. SARC indicated that it would write to the Minister seeking further information regarding whether making the reinstated pension available from a fixed date instead of the date of application would be a less restrictive alternative reasonably available to achieve the purpose of redressing historical discrimination.</p> <p>LA: 09/06/09 LC: 23/06/09 PD:</p>
<p>66. Tobacco Amendment (Protection of Children) Bill 2009</p>	<p>SOC: The bill engaged but did not limit the right to privacy and reputation, by creating an offence of smoking in a motor vehicle when a child is present. The provisions clearly set out the circumstances in which the offence applies. There is also</p>

Amends the *Tobacco Act 1987*, to create new offences. These prohibit the display of tobacco advertising, including tobacco product in retail outlets, with an exemption for certain 'specialist tobacconists' and smoking in a motor vehicle where another person under the age of 18 years is present. The bill provides new powers for the Minister for Health to ban the sale of tobacco products and packaging that appeal to young people, non-tobacco products that resemble tobacco products, and other products which might encourage young people to smoke.

no risk-free level of second-hand smoke in confined areas such as cars and even brief periods of such exposure can be harmful to children because they are especially vulnerable to its effects. Tobacco advertising restrictions amount to lawful limitations on **freedom of expression** – reasonably necessary for the protection of public health. Current partial restrictions have not altered the fact that tobacco products remain more visible and available than any other consumer product in Australia, including milk or bread, increasing the likelihood that young people will start or continue to smoke.

The bill engaged but did not limit the **right to be presumed innocent**, as the offence provisions place an evidential burden to point to evidence to raise a defence rather than a legal burden. The bill **promoted the right of children to such protection as is in their best interests**, by limiting the exposure of children to tobacco smoking, advertising and sales. Smoking remains the leading avoidable cause of many diseases, costing approximately 4000 lives and \$5 billion every year in Victoria. Tobacco control legislation positively engages the right of everyone to enjoy the highest attainable standard of health, recognised by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12 requires States parties to take steps to achieve the full realisation of this right, including measures necessary for the healthy development of children. Health is a fundamental human right, essential for the enjoyment of many other rights including the right to life.

SARC: (Alert Digest 8 – 28/07/2009) SARC noted, as it had in its Alert Digest No 8 of 2008, that there was considerable debate about whether criminalising smoking by children will promote or hamper the effort to prevent them from become addicted to tobacco. A section in the bill made it an offence for anyone to smoke in a motor vehicle if someone else in the vehicle was aged under 18. The section encompassed two different scenarios: parents and other responsible adults exposing young children in their care to second-hand smoke and cars occupied by groups of teenagers close to 18 years of age, including some smokers. If 16 and 17-year-olds were passengers in a car, and the 16-year-old smoked, she would be guilty of an offence (even if the 17-year-old smoked too.) While criminalising the first scenario positively engaged the right of children to such protection as is in his or her their best interests, the second scenario could partially criminalise teen smoking. None of the other Australian offences that criminalised smoking in cars where minors are present were fully enforceable when a 17 year-old smoked next to another 17-year old. Alternative measures included providing that minors could not commit the offence, restricting its enforcement against minors, limiting the offence to where the passenger was under 16 or providing a defence when the smoker and passenger were similar ages.

SARC indicated that it would write to the Minister seeking further information as to whether:

- the section could negatively engage older teenagers' rights to association and protection
- less restrictive alternatives were reasonably available to achieve the purpose of protecting vulnerable children from second-hand smoking.

A new section provided that, for the purposes of a prosecution, evidence that someone appeared to be under 18 was proof of that fact in the absence of evidence to the contrary. Anyone smoking in a car occupied by someone who merely looked under 18 would have to present evidence that the person was 18 or over in order to avoid being convicted of an offence. The new section relieved the prosecution of the burden of proving an essential element of the offence in a very common innocent circumstance: where a person smoked alongside an adult passenger who looked younger than 18. The evidential

burden in the section related to a matter that may not be within the personal knowledge of the defendant. SARC indicated that it would write to the Minister regarding whether:

- the new section amounted to a reasonable limit on the right of such smokers to be presumed innocent until proven guilty
- the provision could result in an innocent person being convicted of an offence
- the defence of mistake of fact was available to a person charged

The SOC did not address a number of clauses that doubled the penalties for various criminal offences engaging rights, for example, the offence of selling tobacco to a minor (which incorporated a reverse onus provision engaging the presumption of innocence). While SARC considered that SOCs need not address minor changes in offence penalties (such as 20% increases in fines), they should address the impact of a provision doubling a fine for an offence on any rights engaged by that offence. SARC indicated that it would write to the Minister regarding whether the new penalties were proportionate to achieving the purpose of the provisions limiting rights.

MR: (Alert Digest 10 – 01/09/2009) The right to freedom of association is intended to protect people's right to belong to associations and organizations with common purposes such as trade unions and political parties. It does not apply to situations involving teenagers or indeed other people who merely choose to spend their leisure time together. In addition, the Bill does not prevent teenagers from travelling in cars together; rather it prohibits them from smoking while doing so if someone under the age of 18 years old is present. It requires them to refrain from smoking or to leave the vehicle before smoking.

The policy behind the Bill is to discourage young people, including older teenagers, from smoking. It is with the protection of children in mind that the Bill has been drafted.

It is debatable that the right to be presumed innocent is engaged as the burden is an evidential not a legal one. It is envisaged that in many cases the accused will be able to discharge this burden by stating in the interview that the alleged "victim" of passive smoking is 18 years or older. As the police officer will not be in a position to know the age of the victim, the police officer will accept the evidence of the accused and would only prosecute if the victim looks significantly younger than 18.

Penalties for not complying with the legislation should be commensurate with the harm that unrestricted tobacco use is known to cause. The existing penalties were at the lowest level of the scale of penalties. The increase is to the next permissible penalty and is proportionate to any restriction on the right to freedom of expression.

SARC Further Comments: (Alert Digest 10 – 01/09/2009) SARC indicated that it would refer to parliament the following questions:

- whether barring 17 year-olds from smoking together in cars reasonably limits their right to associate with one another.
- SARC observed that that the Charter's explanatory memorandum or other supporting documents did not express an intention to limit freedom of association to the context of trade unions and political parties. While Canadian and European courts have construed similar rights in this narrow way, New Zealand courts have held that the right to associate extends to 'the right of an individual to associate with any other individual simpliciter'. Given that the matter is yet to be addressed by a Victorian court and that equivalent protection arises in any event under Charter ss. 8(2), 12, 13(a) and 15(2), SARC

	<p>considered that SOCs should address any provision of a bill that limits the ability of individuals to associate with each other.</p> <ul style="list-style-type: none"> - whether requiring defendants to present evidence of a passenger's age in order to avoid conviction for smoking in a car where an occupant appears to be under 18, limits the Charter's right to be presumed innocent until proven guilty. SARC observed that there were alternative ways to deal with this issue include relying on the admissibility of the police officer's opinion as to the passenger's age⁴ or empowering police officers to order passengers who appear to be under 18 to disclose their age. <p>LC: 25/06/09 LA:</p> <p>PD: Members noted that the debate around tobacco deals with the limiting of people's rights, but it was not a limitation of a person's rights for them to be freed from second-hand smoke in a car. A child may be incapable of making a choice about whether or not they are in a car in those circumstances. Members noted SARC's concern about operation of the provision that could criminalize teenage smoking in a car in the presence of another minor. A member commented that, where prosecutions are undertaken the presumption of innocence should exist as far as young people are concerned. The reverse onus and doubling of penalties were issues that needed to be addressed by the Minister. Another member considered however, that the effect and the intention of the bill outweighed the concerns raised about the offence provisions. It was reasonable to limit people's rights in this way to protect the health of children.</p>
<p>67. Transport Legislation Amendment (Driver and Industry Standards) Act 2008 * Amends the <i>Transport (Taxicab Accreditation) Act 2006</i> to extend a deeming provision regarding who can and cannot be taxi drivers to people who have been found not guilty because of mental impairment. Enables a finding under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> of not guilty by reason of mental impairment to be brought within the taxi industry accreditation scheme to deem it as a finding of guilt.</p>	<p>SOC: The Bill engaged but did not limit equality rights:</p> <ul style="list-style-type: none"> - Differentiation on the basis that a person has committed the physical element of an offence did not amount to direct discrimination, as the person is not being treated less favourably due to their impairment, but because they have committed the physical element (or actus reus) of the offence: <i>Purvis v. New South Wales (Department of Education and Training)</i> (2003) 217 CLR 92. - Under the Purvis approach, equality rights would not be engaged, because there is no discrimination on the basis of a person's impairment, or any other attribute in section 6 of the <i>EO Act</i>. The comparator is one who, like the person, committed the physical element of the offence. - The purpose of the accreditation scheme introduced by the bill aimed to ensure the highest level of public safety through providing provisions in taxi industry accreditation and driver accreditation for commercial passenger vehicles and private bus services. - Only those found guilty of the serious offences set out in the <i>Transport (Taxicab Accreditation) Act 2006</i> are to be excluded from accreditation or suspended on a mandatory basis. Other offences trigger discretion, which must be exercised compatibly with the Charter. - The bill was compatible with right to be presumed innocent as the provisions did not amount to a determination of a criminal charge, nor would they result in prejudice to separate criminal proceedings. The determination of criminal proceedings relating to persons affected by these provisions have been already made and the proceedings closed. Neither criminal charges, nor criminal proceedings would be pending. <p>SARC: (Alert Digest 1 – 03/02/2009)</p>

SARC indicated that it would write to the Attorney-General seeking the same information in relation to compliance with s. 30 of the Charter as those raised in relation to the *Salaries Legislation (Salary Sacrifice) Act 2008*.

SARC will write to the Minister seeking further information regarding:

- whether or not the powers to refuse or cancel registration are a less restrictive means reasonably available to achieve the purpose of protecting taxi passengers from people who are found not guilty of crimes on the basis of mental impairment.
- A clause extends barriers to accreditation for people convicted of certain 'tier 2' offences and those charged (but not convicted) of more serious 'tier 1' offences. The statement did not address whether the provision precluding people who are currently criminal defendants from gaining accreditation is compatible with the Charter. SARC is concerned that the section amounts to a public pronouncement by the legislature that people are presumed to be a threat to public safety or amenity merely because they have been charged.

MR: 5/5/2009:

The ministerial response articulated similar points made in relation to the Bus Safety Bill (above): the scheme reflected regulatory best practice. A mental impairment finding was a reliable indicator of ongoing safety risk. The Director had the capacity to refuse accreditation in other instances where satisfied there was a safety risk. The avenue of VCAT review remained available for all administrative decisions made about registration. A less restrictive means was not available as it would be inconsistent with the common law and the CMIUT Act. The deeming provisions applied the *Purvis* approach.

The response also emphasised the following:

- The rights of an individual applicant cannot be the prime consideration in deciding who is a suitable person to be accredited to drive a taxi. *Paramount consideration* must be given to the rights of those needing to use taxi services, particularly disadvantaged or vulnerable people.
- Candidates are seeking to work in positions of considerable trust and will regularly have close contact with the public.
- The Government wants to make it clear to the community and the courts that a person who kills while insane is, in almost all conceivable circumstances, not a suitable person to drive a taxi. Extending mandatory refusal to such cases sends a clear signal to the regulator, the community and the courts.
- Limitations on human rights has been justified on the ground of public safety by the courts. The availability of a verdict for individuals of "not guilty on the grounds of mental illness" [sic] and legislation providing for detention until it is safe to release also demonstrates the importance of the policy that society desires to be protected from further misconduct by those who have committed offences whilst mentally ill.
- When VCAT is reviewing a mandatory refusal or cancellation of driver accreditation (ie where a category 1 offence such as murder is involved), it is now required to give paramount consideration to public safety. VCAT cannot accredit such applicants unless satisfied of certain matters including that the making of the order would not pose an "unjustifiable risk" to the safety of persons using services and it is in the public interest to make the order.
- The right to the presumption of innocence is not addressed in the SOC because the right only applies in relation to criminal matters, rather than administrative decisions under the accreditation scheme. The right only applies to criminal proceedings (see *Sebat v Medical Practitioners Board of Victoria* [2008] VSC 346)
- The effect of a serious criminal charge impeding accreditation is temporary pending the outcome of the charge. The

	<p>accreditation process is premised on the view that the charge is so serious in its nature that the possibility of the applicant being found guilty is significant enough to affect the process. This does amount to a public pronouncement by the legislature that people are presumed to be a threat to public safety or amenity due to merely being charged with a category 1 offence. The presumption is rebuttable by the applicant during the accreditation process and by VCAT on review.</p> <p>LA: 3/12/2008 LC: 4/12/2008</p> <p>PD: Members expressed concern about the speed with which the bill was debated and passed, shortcutting parliamentary processes designed to protect the community from ill-considered laws. It was noted that the bill raised important questions under the Charter - questions that required considered thought, research and consultation with experts – and had not been the subject of SARC scrutiny. SARC should have considered the bill prior to its passage, as it was in that sort of considered environment that the impact of the bill upon the important human rights could be properly interrogated. Issues regarding how such disqualification from accreditation may be applied to other sensitive occupations in the future and whether wider categories of people who have fallen foul of the law during their lives would be captured, were also ventilated.</p>
<p>68. Transport Legislation General Amendments Bill 2008 * Amends the <i>Rail Corporations Act</i> 1996 to ensure that the state is able to enforce financial penalties against parties with whom it contracts, where they cause disruptions to public transport services.</p>	<p>SOC: Contracts would most likely be between the state and corporations. The Charter provides that only persons, and not corporations, have human rights. The bill did not engage human rights.</p> <p>SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: N/A LA: 02/04/09 LC: 04/06/09 PD:</p>
<p>69. Transport Legislation Miscellaneous Amendments Bill 2008 * Amends a range of transport-related legislation in support of key government transport policies.</p>	<p>SOC: The bill engaged but did not limit the right to privacy, property rights and rights in criminal proceedings. The bill reasonably limited freedom of movement by enabling a Chief Investigator to notify in writing that they require a person to attend before them to answer questions for the purposes of an investigation into a public transport or marine safety matter, as such questioning had to be related to an activity regulated by the Act.</p> <p>SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights.</p> <p>MR: N/A LA: 12/03/09 LC: 07/05/09 PD:</p>
<p>70. University of Melbourne Bill 2009 Please refer to <i>Deakin University Bill</i> 2009</p>	<p>SOC: Refer to <i>Deakin University Bill</i> 2009, above</p> <p>SARC: MR: LA: LC: PD:</p>

<p>71. Valuation of Land Amendment Bill 2009 Amends the <i>Valuation of Land Act 1960</i></p>	<p>SOC: The bill engaged but did not limit privacy. Individual council ownership of general valuation data makes modelling at a state-wide level difficult as analysts are currently required to obtain data from each of the 79 councils. Amending the Act to make the Valuer-General Victoria the custodian of state-wide general valuation data will provide a single source for accessing state-wide data, for both public policy and community purposes. Data disseminated to the wider community from the Valuer-General will be de-identified, thereby satisfying concerns regarding privacy. The bill engaged but did not limit the right to a fair hearing. The Valuer-General will oversee the contracting out of municipal valuations for those municipal districts falling under their responsibility. It will also administer objections and appeals in relation to valuations for which it is responsible. The Valuer-general will ensure objectors' right to a fair hearing will be upheld as the industry expert on valuation standards and practices. The proposed changes act to strengthen rate and tax payers' right to a fair hearing when objecting to a valuation. SARC: (Alert Digest 11 – 14/09/2009) SARC made no further comment pertaining to human rights. MR: LA: LC: PD:</p>
<p>72. Victorian Renewable Energy Amendment Bill 2009 Amends the <i>Victorian Renewable Energy Act 2006</i> to support the transition of the Victorian renewable energy target scheme to the expanded commonwealth renewable energy target scheme.</p>	<p>SOC: The bill engaged but did not limit property rights. Cut-off dates in relation to the creation of tradeable certificates for renewable energy generation operate to limit a statutory entitlement to create a property right that exists only by virtue of the Act and does nothing to deprive or interfere with a person's right to transfer or dispose of property after a certificate is validly created. SARC: (Alert Digest 11 – 14/09/2009) SARC made no further comment pertaining to human rights. MR: LA: LC: PD:</p>
<p>73. Water Amendment (Non Water User Limit) Bill 2009 Removes the non-water user limit from the <i>Water Act 1989</i>, giving irrigators and other water share owners greater freedom to deal with their water shares and more flexibility to respond to ongoing drought.</p>	<p>SOC: The bill promoted property rights. Although the term property is not defined in the Charter, it extends to statutory rights where they have the characteristics of traditional property rights. To the extent that a water share is property, the bill would engage the right. As the bill removed restrictions on the transfer of ownership of water shares, the right would be positively promoted. SARC: (Alert Digest 9 – 11/08/2009) SARC made no further comment pertaining to human rights. MR: LA: 13/08/09 LC: PD:</p>

<p>74. Workplace Rights Advocate (Repeal) Bill 2008 * Repeals the <i>Workplace Rights Advocate Act</i> 2005.</p>	<p>SOC: The bill did not engage human rights. SARC: (Alert Digest 1 – 03/02/2009) SARC made no further comment pertaining to human rights. MR: N/A LA: 12/03/09 LC: 07/05/09 PD:</p>
<p>75.</p>	<p>SOC: SARC: MR: LA: LC: PD:</p>

KEY

- * Bills/Acts where SARC's comments were not available at time of 2008 reporting
- Bills generating a difference of views between the SOC and SARC Charter Report
- Ministerial Responses
- Bills generating parliamentary debate captured in Hansard