

10.55 Having regard to the other registration functions of the Victorian Registration and Qualifications Authority, it seems logical and preferable that this function be transferred to it, so it continues to be the one-stop shop for education providers. The new provisions give a statutory base to this function and enable student exchange organisations to be registered with the authority and enable it to issue guidelines and set conditions and forms for registration.

The third matter requires the Victorian Institute of Teaching to ensure that every registered teacher has a criminal check every five years and for the institute to undertake the checks and invoice teachers. The proposal will mirror the requirements of the Working with Children Act, which requires a criminal check every five years. A recent audit of institute's records revealed that criminal checks have not occurred at the same time as initial registration and that some checks have occurred prior to or after initial registration.

The next matter involves the Victorian Institute of Teaching being able to obtain relevant details of teachers from schools to enable it to cross-check its details of registered teachers. The amendment will enable the institute to seek the relevant details from the employer of teachers, for example, the secretary or school council in the case of teachers in government schools, or the employer of teachers in non-government schools. It is proposed that the institute will obtain the information through an annual online census, although it will also be able to require the relevant details in specific cases.

The last matter involves amending section 4.3.9 to permit children to be registered for homeschooling up to 18 years of age. The reason for this amendment is because section 4.3.9 of the Education and Training Reform Act 2006 enables the Victorian Registration and Qualification Authority to register students for homeschooling. The word 'student' is not defined in the act, but the section is part of the scheme which gives parents of compulsory school-aged children the option of registering their child for homeschooling. The purpose of the amendment is to ensure that the authority may continue to register students for homeschooling past their 16th birthday and enable parents to continue to receive government support available to registered homeschoolers. The amendment will also reflect arrangements previously operating in the department.

In conclusion, in one sense this bill provides the finishing touches to the current act. On the other hand, it builds upon the current act by making some significant changes to provide the right framework

upon which we can continue to lead in the field of education and training.  
I commend the bill to the house.

**Debate adjourned on motion of Mr DIXON (Nepain).**

**Debate adjourned until Thursday, 4 October.**

### TRANSPORT LEGISLATION AMENDMENT BILL

#### Statement of compatibility

**Ms KOSKY (Minister for Public Transport) tabbed following statement in accordance with Charter of Human Rights and Responsibilities Act:**

In accordance with section 28 of the Charter of Human Rights and Responsibilities, I make this statement of compatibility with respect to the Transport Legislation Amendment Bill 2007.

In my opinion the Transport Legislation Amendment Bill 2007, as introduced to the Legislative Assembly, is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

#### Overview of the bill

The bill is another step in the reform and modernisation of Victoria's transport legislation. It provides the legislative underpinnings for a number of important government transport initiatives, including the new ticketing solution and the introduction of new Smartbus services among other key matters such as a major new reform initiative aimed at improving safety at level crossings.

The main purposes of the bill are to:

- (a) to amend the Transport Act 1983 —
  - (i) to facilitate the use of smartcards for public transport; and
  - (ii) to otherwise improve the operation and enforcement of that act; and
- (b) to amend the Public Transport Competition Act 1995 —
  - (i) in relation to bus contracts; and
  - (ii) to otherwise improve the operation of that act; and
- (c) to amend the Rail Safety Act 2006 to improve the operation of that act; and
- (d) to make miscellaneous amendments to —
  - (i) the Marine Act 1988;
  - (ii) the Rail Corporations Act 1996;
  - (iii) the Road Safety Act 1986;

- (iv) the Terrorism (Community Protection) Act 2003;
- (v) the Transport Legislation (Further Amendment) Act 2006;
- (vi) the Transport (Taxi-cab Accreditation and Other Amendments) Act 2006.

#### Human rights issues

**Human rights protected by the charter that are relevant to the bill**

The human rights that the bill will have an impact upon or engage are as follows.

#### Section 8 — recognition and equality before the law

Clause 23 engages the right to recognition and equality before the law provided by sections 8(2) and 8(3) of the charter.

The clause will amend section 220D of the Transport Act to confirm the power of the director or public transport to determine and publish a condition that provides that overseas students or specified classes of overseas students are not eligible for student concession entitlement to use a public transport service. Overseas students are defined as excluding Australian citizens, permanent residents, persons with refugee status, overseas exchange students and persons in receipt of an Australian development scholarship from the commonwealth government.

In *Sinhey University Prograduate Representative Association (SUPro) v. Minister for Transport Services* (2006) NSW ADT 83, the New South Wales Administrative Decisions Tribunal held that the concession scheme was the provision of a service and that exclusion of full fee-paying overseas students from the New South Wales concession scheme was discriminatory. Similar proceedings have been brought in Victoria, but have yet to be determined.

Following the New South Wales decision, the eligibility for student concession entitlement has been reviewed. The government has decided not to extend the student concession entitlement to overseas students who are on temporary student visas. The concession entitlement will continue to apply to full-time students who are Australian citizens, permanent residents, persons with refugee status, overseas exchange students and students in receipt of an Australian development scholarship from the commonwealth government.

In discrimination, context is everything. This is particularly so in the area of taxpayer-funded benefits. Unless a government is able to afford a universal benefit or decides to provide no benefit at all, the redistribution of wealth through the provision of targeted welfare benefits often involves distinctions on the basis of attributes specified in the Equal Opportunity Act, such as age, impairment, marital status, parental status and carer status. These distinctions are considered normal and necessary in the welfare context, whereas in other contexts they might be highly discriminatory.

The same can be said for targeting benefits, including public transport concession entitlements, on the basis of citizenship, residency and visa status. Citizenship and residency are commonly used as criteria for eligibility to taxpayer-funded benefits, such as welfare and health care. The reason is

simple. Provision of a particular taxpayer-funded benefit cannot be considered in isolation. It must be considered in the context of the taxation and welfare schemes as a whole. It is fair and reasonable to exclude visitors and temporary residents from receiving taxpayer funded benefits (welfare schemes, health care et cetera), because their residency status is such that they do not participate in or contribute to the taxation scheme in the same way as long-term or permanent residents or Australian citizens.

Provision of subsidised public transport for students represents an investment for Victoria and Australia. The scheme is primarily aimed at persons who are likely in the future to contribute to the generation of a 'knowledge economy' and the creation of a skilled workforce in Australia. These students will also continue as taxpayers once they enter the workforce. Some will have already made such a contribution. Accordingly, the scheme covers students whose residency or visa status indicates a long-term connection with Australia. The scheme is not limited to Australian citizens. Persons of foreign nationalities will be entitled to a student concession entitlement if their status is such that they are likely to have an ongoing connection with the taxation system, that is if they are permanent residents or have been granted refugee status.

To amount to discrimination under the Equal Opportunity Act, a person must be treated less favourably by reason of nationality than a person of a different nationality in the same or similar circumstances. The interlocking nature of the tax and welfare systems in redistributing wealth has led the House of Lords to conclude that no discrimination arises in respect of differential treatment of recipients of retirement pensions based upon residence in the UK.<sup>1</sup> Their lordships considered that the fact that the plaintiff was living outside the UK and therefore was not currently contributing to the UK tax regime meant that her circumstances were materially and relevantly different and different treatment was justified.

For the same reasons as the House of Lords found the UK pension scheme did not amount to discrimination, the exclusion of those overseas students who are in Australia on temporary study visas is not discriminatory. These students do not have the same ongoing connection with the Australian tax system as students who are Australian citizens. They are not in 'same or similar circumstances'.

Even if the scheme could be regarded as discriminatory for the purposes of the Equal Opportunity Act, the discrimination is justified for the purpose of section 7(2) of the charter. The following addresses the factors set out in section 7(2).

#### The nature of the right

The right to be free from discrimination is an important right, but as already set out above, it can be limited and context is important.

#### The importance of the purpose of the limitation

The government considers it is critical to encourage and support education. Investment in education is an investment in Victoria's future economy. The purpose of the provision is

<sup>1</sup> *R v Secretary of State for Work and Pensions, Ex parte Carson and Reynolds* (2005) 2 WLR 1369.

to enable public monies to be targeted in the most effective way.

**Nature and extent of the limitation**

This is not a case where persons are being excluded from access to public transport by reason of their nationality. Overseas students are the recipients of a heavily subsidised public transport system in the same way as all other public transport users. The limitation relates to their access to additional subsidies.

The student concession scheme does not distinguish between all foreign nationals and Australian citizens. Nor does it treat students of one foreign nationality less favourably than another. A large number of non-Australian citizens will be eligible for a student concession entitlement by reason of their permanent residency or refugee status. The scheme also provides for student concession entitlement for overseas exchange students and persons in receipt of an Australian development scholarship from the Commonwealth government. This recognises the reciprocal nature of student exchange programs and Australia's contribution to aid programs.

**The relationship between the limitation and its purpose**

The limitation is directly connected to the purpose of the provision. It excludes from the definition of overseas students those persons whose citizenship, residency or visa status is such that there is likely to be an ongoing connection with Australia.

**Any less restrictive means reasonably available**

The government recognises that some overseas students studying in Australia will go on to apply for work visas or permanent residency and will ultimately contribute to Australia's economy in the longer term. However, there is no simple way of accurately identifying those persons in advance.

The costs of extending the existing concession entitlement scheme to all overseas students is significant and would necessarily mean less money being available elsewhere. Reduced subsidies or a means-tested scheme for all students would not achieve the purposes of the existing scheme to the same extent. Further, establishing a means-tested scheme for students would be costly and therefore reduce the monies available for subsidies. It is difficult to link the student concession scheme to receipt of commonwealth welfare benefits because of the complexities surrounding eligibility of students for such benefits.

All public transport users, including overseas students, are subsidised by approximately 60 per cent in the use of their public transport. The government considers that a targeted scheme in respect of additional subsidies is the best use of public monies.

**Other relevant factors**

Also relevant to the issue of whether any limitation is reasonable and justifiable is that full fee-paying overseas students come to Australia and are granted study visas on the basis that they are able to meet their expenses, and will not need to rely upon taxpayer-funded benefits. Overseas students must provide evidence of their capacity to meet living expenses and education costs for the duration of their studies.

In addition, many new overseas students are required by the Department of Immigration and Multicultural Affairs to sign a legal document (called an 'assurance of support').

**Section 21 — right to a fair hearing**

Clause 23 makes clear that the publication of conditions excluding overseas students from the student concession scheme is authorised by the act and does not constitute discrimination under the Equal Opportunity Act. The provision applies retrospectively to the existing conditions, but expressly preserves the current complaint in the Victorian Human Rights and Equal Opportunity Commission.

Section 24(1) provides that a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The right to a fair hearing is said to be a procedural right that affects the way a hearing is conducted, rather than affecting the substantive rights between the parties. Even if the section affects substantive rights, it applies only to a party to a civil proceeding. It does not apply to persons who have not yet issued a proceeding. As the current complaint is expressly preserved, the provision is compatible with section 24 of the charter.

**Section 13 — privacy and reputation**

Section 13(a) of the charter provides:

- A person has the right —
- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with ...

In international human rights law, 'home' includes a place where a person resides or carries out his or her usual occupation.<sup>2</sup>

Clause 12 inserts a new regulation-making power into the Transport Act to enable regulations to be made to collect information from equipment that is used in taxis.

Although the home has been interpreted to include the workplace, it is questionable whether collection of information from equipment used in taxis is covered by the right.

In any event, the requirement will be made lawful through the clause, and it is not arbitrary. The information is needed to provide for access to information to assist in the administration of the taxicab accreditation scheme. It is also needed to facilitate longer term planning and regulation of the taxi industry and to assist with broad overall public transport planning.

Accordingly, the provision does not limit the right to privacy in section 13 of the charter.

**Section 15 — freedom of expression**

Clause 16 raises but does not limit the right to freedom of expression provided by section 15(2) of the charter.

The provision seeks to restrict commercial expression by amending the offence on towing for the hire of a motor vehicle.

The right may be subject to lawful restrictions reasonably necessary to respect the rights of other people and for the protection of public order.

In this instance, the right needs to be balanced against the property rights of legitimate commercial vehicle passenger operators who are operating in accordance with their licence which has been granted under the Transport Act. The right also needs to be balanced against the potential disruption to public order if the legitimate licensing regime was undermined and towing became more prevalent.

Therefore, it is considered that the provision provides for a lawful restriction that is reasonably necessary.

**Section 20 — property rights**

Division 5 of part 3 raises the right not to be deprived of property other than in accordance with the law, as provided by section 20 of the charter. It does not, however, limit the right for the reasons explained below.

The division will amend the Public Transport Competition Act which provides legislative support for a contractual mechanism that provides for the transfer of property used in provision of regular passenger services under certain circumstances, for example the insolvency of an operator.

The purpose of the mechanism is to enable service continuity in the event that an operator is unable to provide the bus service. The type of property affected includes buses and bus depots. The consideration payable for the relevant property is determined under the contract and will already be agreed by the parties to the contract. In addition, the transfer will be subject to any circumstances, so as not to prejudice existing third party rights.

In any event, it is unlikely that a person will be affected by the provision as the property in question will be owned by companies, which do not enjoy human rights under the charter. In the event that the property is owned by a person, it will not be allocated except in accordance with the law. The allocation will not be arbitrary. In fact, the terms under which the property can be allocated will be specifically agreed by the parties in the new performance based bus contracts. The division will simply provide legislative support for those contractual terms.

Therefore, it is considered that the division does not limit the property right provided by section 20 of the charter.

Clause 27 raises the right not to be deprived of property other than in accordance with the law, as provided by section 20 of the charter. It does not, however, limit the right for the reasons explained below.

The clause will amend section 2282X of the Transport Act to enable forfeiture of a seized thing under certain circumstances without a court order. The current provision requires an order by the Magistrates Court.

The deprivation of the property rights is in accordance with law and will not be arbitrary. Officers receive appropriate training on the use of coercive powers and other relevant matters. The circumstances under which the property can be

deprived are very limited and align with those in section 109 of the Occupational Health and Safety Act 2004, namely where the transport safety officer —

- cannot find the owner of the seized thing despite making reasonable enquiries;
- cannot return the thing to the owner despite making reasonable efforts, or
- considers it necessary to retain the thing to prevent the commission of an offence against the relevant act or the regulations.

Therefore, it is considered that the clause does not limit the property right provided by section 20 of the charter.

**Conclusion**

I consider that the bill is compatible with the Charter of Human Rights and Responsibilities because:

- To the extent that some provisions raise human rights issues they do not limit those rights.
- To the extent that some provisions may limit human rights those limitations are reasonable and justified in the circumstances.

LYNNE KOSKY, MP  
Minister for Public Transport

*Second reading*

**Ms KOSKY (Minister for Public Transport) — 1**  
move:

That this bill be now read a second time.

This bill supports a number of important public transport reform initiatives, including the new ticketing solution and new SmartBus services among other key matters such as a major new reform initiative aimed at improving safety at level crossings.

The bill represents a further step in the work of improving Victoria's transport policy and legislation settings. We are doing this to give the state a best practice framework that supports the modernisation and improvement of our transport sector. While the results of this reform activity can be seen most clearly in recent major proposals, such as the Rail Safety Act 2006 and the Accident Towing Services Act 2007, at the same time the government is improving the central Transport Act 1983. Examples of this important work include recent major reforms in taxi regulation and public transport enforcement.

We are in the midst of the most far-reaching transport policy and legislation reform review program for the last 25 years. This work continues at pace. It will ultimately result in new over-arching settings which will better support the essential project and service delivery

<sup>2</sup> General Comment 16, United Nations Human Rights Committee.