

No. 14 of 2007

Tuesday, 30 October 2007

On the

Agent-General and Commissioners for
Victoria Bill 2007

Animals Legislation Amendment
(Animal Care) Bill 2007

Crimes Amendment (Rape)
Bill 2007

Electricity Safety Amendment
Bill 2007

Energy Legislation Further Amendment
Bill 2007

Equal Opportunity Amendment (Family
Responsibilities) Bill 2007

Justice Legislation Amendment
Bill 2007

Melbourne and Olympic Parks
Amendment Bill 2007

Port Services Amendment Bill 2007

Victorian Workers' Wages Protection
Bill 2007

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Glossary



- ‘**Article**’ refers to an Article of the International Covenant on Civil and Political Rights;
- ‘**Assembly**’ refers to the Legislative Assembly of the Victorian Parliament;
- ‘**Charter**’ refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;
- ‘**child**’ means a person under 18 years of age;
- ‘**Committee**’ refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;
- ‘**Council**’ refers to the Legislative Council of the Victorian Parliament;
- ‘**court**’ refers to the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court as the circumstances require;
- ‘**Covenant**’ refers to the International Covenant on Civil and Political Rights;
- ‘**human rights**’ refers to the rights set out in Part 2 of the Charter;
- ‘**penalty units**’ refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (*currently one penalty unit equals \$110.20*).
- ‘**Statement of Compatibility**’ refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.
- ‘**VCAT**’ refers to the Victorian Civil and Administrative Tribunal;

Useful provisions

Section 7 of the *Charter* provides –

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

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

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

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



Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities*;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –
 - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
 - (ii) within 10 sitting days after the Act receives Royal Assent —
whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;*
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

The Committee has considered the following Bills–

Agent-General and Commissioners for Victoria Bill 2007
Animals Legislation Amendment (Animal Care) Bill 2007
Electricity Safety Amendment Bill 2007
Equal Opportunity Amendment (Family Responsibilities) Bill 2007
Melbourne and Olympic Parks Amendment Bill 2007
Port Services Amendment Bill 2007
Victorian Workers' Wages Protection Bill 2007

The Committee notes the following correspondence –

Crimes Amendment (Rape) Bill 2007
Energy Legislation Further Amendment Bill 2007
Justice Legislation Amendment Bill 2007



Role of the Committee

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

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

Alert Digest No. 14 of 2007

Agent-General and Commissioners for Victoria Bill 2007

Introduced	9 October 2007
Second Reading Speech	11 October 2007
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Portfolio responsibility	Premier

Purpose

The Bill creates a new statutory regime for Victoria's overseas representatives. The Agent-General in London, Victoria's traditional representative to the United Kingdom, will be joined by a new class of statutory officeholders, to be known as Commissioners for Victoria.

Commissioners will undertake similar roles to the Agent-General, who will also hold office as a Commissioner. The creation of Commissioners for Victoria will form a brand for Victorian trade and investment promotion professionals, increasing the profile of the State overseas.

Content and Committee comment

[Clauses]

[2]. The Bill will commence operation on the day after Royal Assent.

[4]. Empowers the Governor in Council to appoint the Agent-General and Commissioners for Victoria.

[5 to 9]. Provides the terms and conditions upon which the Agent-General and Commissioners may be appointed, and the circumstances in which they cease to hold office, resign from office, be suspended from office, when an Acting Commissioner may be appointed and sets out the functions and duties of the Agent-General and the other Commissioners for Victoria.

[17]. Repeals the *Agent-General's Act 1994*.

The Committee makes no further comment.

Animals Legislation Amendment (Animal Care) Bill 2007

Introduced	10 October 2007
Second Reading Speech	11 October 2007
House	Legislative Assembly
Member introducing Bill	Hon. Joe Helper MLA
Portfolio responsibility	Minister for Agriculture

Purpose

The Bill amends the —

Domestic (Feral and Nuisance) Animals Act 1994 to —

- rename the Act; and
- regulate the permanent identification of horses and other animals; and
- provide for further enforcement powers particularly in relation to restricted breed ; and
- provide for further offences that may be subject to infringement notices; and
- create additional offences and increase certain penalties.

Impounding of Livestock Act 1994 to —

- provide for the impounding of abandoned livestock; and
- provide for infringement notices to be served for certain offences; and
- provide for further enforcement powers; and
- create additional offences; and
- provide for further regulation making powers

Prevention of Cruelty to Animals Act 1986 to —

- provide for further enforcement powers; and
- provide further for the regulation of rodeos and rodeo schools; and
- increase the penalties for offences; and
- provide further for the prohibition of certain procedures; and
- create offences for the breeding and displaying of animals with heritable defects.

Content and Committee comment

[Clauses]

[2]. The commencement provisions provide that some sections will come into operation on Royal Assent whilst the remaining provisions commence on proclamation but not later than by 1 December 2009.

Note: In respect to the delayed commencement provision the explanatory memorandum provides –
The period allowed is necessary to allow time to make regulations to support amendments made by the Bill.

Domestic (Feral and Nuisance) Animals Act 1994

[3]. Amends the title to the Act to the *Domestic Animals Act 1994*.

[28]. Amends section 74A to expand the power of an authorised officer appointed under section 72A to obtain information and ask questions of persons suspected of committing certain offences.

[29]. Substitutes Division 2 of Part 7 of the Act with a new Part 7A consolidating the powers of authorised officers to seize and dispose of dogs and cats. It re-enacts the provisions in Division 2 of Part 7 and adds a number of new provisions.

New section 80 provides authorised officers with a power to seize a dog which the officer reasonably believes is a restricted breed dog.

New section 84C allows an authorised officer to seize an abandoned dog or cat from any premises including a person's residence.

New section 84E sets out requirements for the application and granting of search warrants to authorised officers.

New section 84O sets out the circumstances in which a dog or cat seized under certain circumstances may be sold or destroyed. This power is currently provided for in section 80(1) of the Act.

New section 84R provides that in situations where the Council suspects that an owner of a dog has committed an offence but does not have sufficient information about the owner to prosecute the owner, the Council may require, in the notice of seizure, the owner to provide their current address.

New section 84W provides the Magistrates' Court with the power to order an owner to carry out works to ensure a dog or cat is not able to escape the owner's premises on being found guilty of certain offences.

Impounding of Livestock Act 1994

[49]. Inserts new section 5A into the Act to set out the powers of an authorised officer of a council to enter any land or non-residential building and impound abandoned livestock.

[62]. Inserts new Division 2 into Part 2 and inserts new section 16B to set out the powers of an authorised officer of a council to serve a notice requiring the owner of livestock to take measures set out in the notice to ensure the livestock are adequately confined.

[64]. Inserts new section 17A into the Act to require a council to hold abandoned livestock that has been impounded for at least 14 days.

[75]. Inserts new Division 2 of new Part 5A and new sections 33B, 33C and 33D and deals with the service of infringement notices in respect of certain offences against the Act and prescribed offences against the regulations.

Prevention of Cruelty to Animals Act 1986 (the POCTA)

[89]. Inserts new section 15B into the Act.

Operator onus offence

Presumption of innocence – New section 15B makes it an 'operator onus offence' to carry an unsecured dog on a tray or trailer (section 15A – dogs on moving vehicles) for the purposes of Part 6AA of the *Road Safety Act 1986*. The operator onus provisions provide a mechanism to determine who may be held responsible for the offence where the identity of the offender is not established at the time the offence is detected (*refer to Charter Report below*).

[95]. Substitutes new Part 2A (enforcement provisions) of the Act.

New section 23 sets out the emergency powers and situations in which a POCTA inspector may enter premises that is not a person's dwelling and carry out certain activities including inspecting, examining and caring for animals on the premises.

New section 24 gives power to an inspector to enter premises that is not a person's dwelling and seize or destroy abandoned animals.

New section 24G sets out requirements for the application and granting of search warrants to an inspector to enter premises and search for, seize, retain, examine, feed and water, free, take samples from and take photographs of animals. Section 21A of the Act currently sets out these requirements.

New section 24K sets out requirements for the application and granting of search warrants to enter premises, including residential premises, and search for, seize, secure, examine and take photographs of things named or described in the warrant.

New section 24L sets out additional powers of entry for a specialist inspector with the prior written authority of the Minister.

New section 24T sets out the steps that must be taken by an owner or person in charge to recover their seized animal where the welfare of the animal is not at risk. If the owner cannot be ascertained the animal may be disposed of in 14 days.

New section 24X allows a person who seized an animal to apply, in specified circumstances, to the Magistrates' Court for an order for the owner or person in charge of the animal to pay a bond or security for the costs to care for and maintain the animal or an order to dispose of the animal.

New section 24ZD provides a court with the power to order the forfeiture an animal seized in relation to an offence against the POCTA Act or regulations under that Act for which a person has been found guilty. Section 21M of the POCTA Act currently provides for forfeiture of seized animals.

New section 24ZQ sets out the powers of an inspector to require a person to provide information when exercising a power of entry under new Part 2A.

New section 24ZR makes it an offence to obstruct or intimidate an inspector, refuse admission to an inspector exercising a power of entry or a person assisting the inspector or to contravene any direction or requirement of an inspector.

Protection against self-incrimination preserved other than the requirement to provide documents required to be produced by the Act even where they may tend to incriminate

New section 24ZV sets out the circumstances in which the privilege against self-incrimination applies. The privilege does not apply to the production of documents required to be kept under the legislation.

[107]. Inserts new section 41AC which extends the time in which a charge may be filed for certain offences (cruelty, aggravated cruelty and scientific procedures) under the Act to 3 years after the date on which the alleged offence was committed.

[108]. Amends the regulation making powers in section 42(1) of the Act to enable regulations to be made to support the amendments in the Bill in relation to traps and rodeo licences, rodeo permits and rodeo school permits.

[113]. Provides for the automatic repeal of this amending Act on 1 December 2010.

Charter Report

Keywords – Reasonable limits on rights – Keeping and welfare of animals – Forced work – Privacy – Property – Presumption of innocence – Adequacy of statement of compatibility

Charter s.7(2) provides that human rights may be ‘subject to such reasonable limits as can be demonstrably justified in a free and democratic society’. Charter s.28(3)(a) provides that a statement of compatibility must state how a Bill is compatible with human rights.

The Committee notes that the Bill extends and amends various provisions relating to the keeping and welfare of animals. The provisions are generally typical of legislative schemes to regulate private behaviour that may harm others (including, in this instance, humans and animals.)

The Statement of Compatibility identifies a number of provisions in the Bill that are said to engage the following Charter rights:

- **Forced work** (Charter s.11): Provisions requiring people to comply with orders or directions to ensure that animals cannot escape their property (clause 29 inserting new section 84W into the *Domestic Animals Act 1994*; clause 62 inserting new sections 16B & 25B into the *Impounding of Livestock Act 1994*.)
- **Privacy** (Charter s.13(a)): Provisions empowering certain officers to –
 - o enter premises with an owner or occupier’s permission or a court warrant (clause 29 inserting new sections 84C & 84E into the *Domestic Animals Act 1994*; clause 95 inserting new sections 24G & 24K into the *Prevention of Cruelty to Animals Act 1986*);
 - o enter non-residential premises without a warrant in certain emergencies (clause 95 inserting new sections 23, 24 & 24ZR(2) into the *Prevention of Cruelty to Animals Act 1986*);
 - o require people suspected of offences to supply their name and address upon request (clause 28(2) amending s74A of the *Domestic Animals Act 1994*, clause 29 inserting a new section 84R into the *Domestic Animals Act 1994*; clause 95 inserting new section 24ZT into the *Prevention of Cruelty to Animals Act 1986*).
- **Property** (Charter s.20): Provisions empowering –
 - o officers to sell or destroy pets and livestock in various defined circumstances (clause 29, inserting new sections 84O, 84P, 84S & 84T into the *Domestic Animals Act 1994*; clauses 65, 66 & 67 amending, respectively ss.18, 21 & 22 of the *Impounding of Livestock Act 1994*);
 - o officers to dispose of animals that are unclaimed, at risk, diseased or distressed (clause 95, inserting new sections 23(4)(b), 24(1)(b)(i), 24F(b), 24T, 24W, 24X & 24Z into the *Prevention of Cruelty to Animals Act 1986*);
 - o courts to order the forfeiture of a seized animal or thing where a person has been found guilty of an animal cruelty offence (clause 95 inserting new sections 24ZD & 24ZN into the *Prevention of Cruelty to Animals Act 1986*.)
- **Presumption of innocence** (Charter s.25(1)): A provision that deems the owner of a vehicle to be its driver for the purpose of the offence of driving with an unsecured dog, unless the owner can prove that he or she provided adequate information concerning the identity of the driver or the sale or theft of the vehicle.

In each instance the Statement of Compatibility contends that the respective rights, to the extent that they are infringed at all, are reasonably limited by the Bill according to the test set out in Charter s.7(2). Having considered the above provisions, the Committee is satisfied that the measures so engaged do not warrant any special mention or adverse comment in respect to possible incompatibility with human rights.

However, the Committee is concerned that the Statement of Compatibility, which is very lengthy and deals with a large and complex amendment bill, does not identify by clause or section number any of the many provisions that it discusses. The Committee refers to its Practice Note No. 2, which states that ‘the Committee considers that the provision to Parliament of reasonable explanatory material is critical to the Parliament’s exercise of legislative power in an informed manner.’ While appreciating the Statement’s comprehensiveness, the Committee considers that the absence of express references to clause or section numbers in relation to such a complex bill may render the statement incapable of informed consideration by members of Parliament.

The Committee resolves to raise this concern with the Minister.

Keywords – Privacy – Powers of entry and questioning without emergencies or court warrants – Entry and observation of non-residential premises housing animals for purpose of animal cruelty laws– Requirement for occupiers of premises searched under animal cruelty laws to provide information to the extent reasonably necessary to determine whether an offence has been committed – Whether unlawful

Charter s.13(a) gives people the right not to have their ‘privacy... unlawfully or arbitrarily interfered with’. An interference with privacy is unlawful unless it is authorised by a law that is certain, appropriately circumscribed and accessible.

The Committee notes that clause 95 provides for two intrusive enforcement powers that require neither an emergency nor a court warrant. New section 24L of the *Prevention of Cruelty to Animals Act 1986* provides that a ‘specialist inspector’ may enter non-residential premises housing animals and observe structures and practices ‘for the purposes of’ Parts 2 and 2A of the Act (dealing, respectively, with the protection of animals and enforcement) and regulations under the Act. The Statement of Compatibility remarks:

This power is a re-enactment of an existing power under the Act. The power can only be exercised with the written authority of the minister, and not in relation to a person’s dwelling, therefore minimising the interference with privacy.

New section 24ZQ(1)(a) provides that occupiers (or their employees or agents) of premises lawfully searched under the Act must ‘give information... orally or in writing’ as required by the inspector ‘[t]o the extent that is reasonably necessary to determine whether an offence’ against the Act ‘has been or is about to be committed.’ The Statement of Compatibility remarks:

These powers are largely a re-enactment of existing powers. The power to request information may only be exercised to the extent that is reasonably necessary to determine whether an offence against the act or regulations has been or is about to be committed.

The Committee observes that all provisions of bills introduced into Parliament after 1st January 2007, including re-enactments of existing laws, are subject to scrutiny for compatibility with human rights under the Charter. The Committee also observes that Charter s13(a)’s right not to be subject to arbitrary or unlawful interferences applies to even minimal interferences with privacy, including entry into non-residential premises. The Committee further observes that the broad questioning power in the new section 24ZQ(1)(a) does not appear to be contained in the existing Act.

While the Committee considers that any interferences with privacy authorised by new sections 24L & 24ZQ(1)(a) are not arbitrary (in light of their express connections to the purpose of preventing cruelty to animals), the Committee is concerned that both powers may be too broad (in both drafting and effect) to be considered lawful interferences with the Charter’s right to privacy, in the absence of context-specific constraints such as a belief that an emergency exists or a court warrant. In the case of the new section 24ZQ(1)(a), the Committee is also concerned that individuals questioned may be unaware that they do not have to comply with a request for information that ‘would tend to incriminate the person’ (as provided by new section 24ZV(1)).

The Committee will seek further advice from the Minister concerning the following matters:

- 1. Why does the new section 24L permit entry into private premises in the absence of an emergency or a court warrant?*
- 2. Why does the new section 24L refer generally to ‘the purposes’ of Parts 2 and 2A and the regulations of the Act, rather than setting out specific situations when specialist inspectors can enter non-residential premises housing animals?*
- 3. Why does new section s24ZQ(1)(a) permit inspectors to require people to provide information in the absence of an emergency or a specific court warrant to that effect?*
- 4. Why does the new section s24ZQ(1)(a) refer to questioning ‘to the extent that is necessary to determine whether an offence... has been or is about to be committed’ rather than setting out specific questions that an inspector may require a person to answer?*
- 5. Will people questioned under new section 24ZQ(1)(a) be told of their right not to provide self-incriminatory information?*

Pending the Minister’s response, the Committee draws attention to these provisions.

The Committee makes no further comment.

Electricity Safety Amendment Bill 2007

Introduced	9 October 2007
Second Reading Speech	11 October 2007
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Minister for Energy and Resources

Purpose

The Bill amends the *Electricity Safety Act 1998* (the ‘Act’) to —

- revise the arrangements relating to electricity safety management schemes that must be provided by major electricity companies (regulated distribution and transmission companies).
- enable enforcement officers appointed by Energy Safe Victoria to serve notices on registered electrical contractors and licensed electrical installation workers compelling them to rectify non-compliant electrical work.
- provide for the representation of both tram and train operators on the Victorian Electrolysis Committee.

Content and Committee comment

[Clauses]

[2]. Other than for Part 2 (clauses 4 to 11) the provisions in the Bill come into operation the day after Royal Assent. Part 2, subject to earlier proclamation comes into operation on 1 January 2010. Part 2 deals with electricity safety management schemes.

Note: From the explanatory memorandum - *Part 2 will be proclaimed once relevant regulations are made.*

[14]. Inserts a new section 45AB into the Act to provide that an enforcement officer may give a written rectification notice requiring the person responsible for carrying out non-compliant electrical installation work to rectify that work.

New section 45AB(4) provides that a person must comply with the requirements of a rectification notice and must not seek or receive any money in respect of costs arising from complying with the notice.

[15]. Amends section 69 of Act to provide that a person may apply to the VCAT for review of the decision of an enforcement officer to give a rectification notice in relation to electrical work and the requirements in a rectification notice. The clause also repeals section 69(7) of the *Electricity Safety Act 1998* relating to applications for review of a decision on an accepted electricity safety manager. This repeal is consequential to the repeal of section 149A of the *Electricity Safety Act 1998* (see clause 9 of the Bill).

[17]. Provides for the automatic repeal of this amending Act on 1 January 2011.

Charter Report

Keywords – Freedom from forced work – Requirement to rectify unsafe work – Normal civic obligations

Charter s.11(2) provides that people ‘must not be made to perform forced or compulsory labour.’ Charter s.11(3)(c) provides that this does not include ‘work or service that forms part of normal civic obligations.’

The Committee notes that clause 14, inserting a new section 45AB in the Act requires a person who installed work in breach of the Act or regulations made under the Act to comply with a written notice requiring rectification (without further payment), or be liable to conviction for an offence punishable by a fine. The Statement of Compatibility states that this provision:

will ensure that defective work that is unsafe is made safe as soon as possible and regardless of whether the consumer chooses to enforce his or her contractual rights. Electricity is inherently dangerous and unsafe electrical work creates significant risks to life and property: for example, from house fires caused by faulty wiring.

The Committee considers that rectifying a person's own unsafe work in these circumstances 'forms part of normal civic obligations' and therefore clause 14 does not infringe the Charter's freedom from forced work.

The Committee makes no further comment.

Equal Opportunity Amendment (Family Responsibilities) Bill 2007

Introduced	9 October 2007
Second Reading Speech	11 October 2007
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Equal Opportunity Act 1995* (the ‘Act’) to expand for the purposes of the Act the range of what may constitute discrimination against parents or carers in employment and employment-related areas.

The Bill requires an employer, a principal or a firm, in relation to work arrangements, not to unreasonably refuse to accommodate the parental or carer responsibilities of a person offered employment, an employee, a contract worker, a person invited to become a partner in a firm, or a partner in a firm. It will be discrimination under the Act for an employer, principal or firm to contravene this requirement.

Content and Committee comment

[Clauses]

[2]. The Bill will commence on a day to be proclaimed but not later than by 1 September 2008.

[6]. Amends section 7(1) of the Act which deals with the meaning of discrimination. The amended section 7(1) (*underlined*) of the Act will provide – *7(1) Discrimination means direct or indirect discrimination on the basis of an attribute or a contravention of section 13A, 14A, 15A, 31A, 51 or 52.*

Note: New section 13A, 14A, 15A and 31A are inserted by clauses 7 to 10 below. Existing sections 51 and 52 of the Act respectively provide for discrimination in providing accommodation by refusing to allow alterations and refusing to allow guide dogs.



Explanatory memorandum

The Committee notes that the explanatory memorandum provides no advice for the reason for including sections 51 and 52 in the amendments made to section 7(1). The Committee draws attention to its Practice Note No. 1 in respect to the standard and content expected by the Committee of an explanatory memorandum.

The Committee will seek further advice from the Attorney-General.

[7]. Inserts a new section 13A to provide that an employer must not, in relation to the work arrangements of a person offered employment, *unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.* In this case, work arrangements means arrangements that would apply to the person as an employee, or arrangements applying to the workplace.

[8]. Inserts a new section 14A to provide that an employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the

employee has as a parent or carer. In this case, work arrangements means arrangements applying to the employee or to the workplace.

[9]. Inserts a new section 15A to provide that a principal must not, in relation to the work arrangements of a contract worker, unreasonably refuse to accommodate the responsibilities that the contract worker has as a parent or carer. In this case, work arrangements means arrangements that apply to the contract worker or to the principal's workplace.

[10]. Inserts a new section 31A to provide that a firm comprising 5 or more partners must not, in relation to the work arrangements of a person invited to become a partner in the firm or a person who is a partner in the firm, *unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.*

[11]. Provides for the automatic repeal of this amending Bill on 1 September 2009.

The Committee makes no further comment.

Melbourne and Olympic Parks Amendment Bill 2007

Introduced	9 October 2007
Second Reading Speech	11 October 2007
House	Legislative Assembly
Member introducing Bill	Hon. James Merlino MLA
Portfolio responsibility	Minister for Sports, Recreation and Youth Affairs

Purpose

The Bill amends the *Melbourne and Olympic Parks Act 1985* (the 'Act') to consolidate land management arrangements in the Melbourne and Olympic Parks precinct and in respect to the permanent reservation of Gosch's Paddock as a public park and its management by the Trust as a committee of management.

Content and Committee comment

[Clauses]

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

[12]. Provides for a new Part 5A (new sections 30A to 30F) to be inserted into the Act. New section 30B provides for the closure of sections of surplus declared road shown hatched on the plan in Part 7 of the Schedule.

[13]. Inserts new sections 31C and 31D to provide for the incorporation of additional lands into Olympic Park land and the process by which each identified parcel of land is to have all current legal encumbrances and management structures removed and a new reservation made.

The provisions of the Bill in relation to this land do not affect any easement created under section 339B of the Land Act 1958, before the creation of the Order.

New section 31D provides for the closure of a declared road and the reservation of unreserved former Army Barracks land for the purposes of sport, recreation and entertainment.

[14]. Inserts a new Part 6A (new sections 32A and 32B into the Act which provides for the permanent reservation of Gosch's Paddock as a public park.

New section 32A provides for the closure of a declared road on the land shown hatched in Part 13 of the Schedule, to a depth of 10 metres from the surface of the land.

New section 32B provides for the permanent reservation of land in Gosch's Paddock for the purposes of a public park.

Any easement created under section 339B of the *Land Act 1958* will remain unaffected by an Order under this section.

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

Charter Report

Keywords – Freedom of movement – Property – Management and consolidation of small parcels of land – Discharge of certain property interests

Charter s.12 provides that people have ‘the right to move freely within Victoria.’ Charter s.20 provides that people must not be deprived of property ‘other than in accordance with law.’ A deprivation of property will not breach Charter s.20 if it is for a non-arbitrary purpose and is proportionate to that purpose. Charter s.6(1) provides that only human beings have rights under the Charter.

The Committee notes that the Statement of Compatibility concludes that the following provisions limit Charter s.12:

- clause 8(6) (amending s.7 of the *Melbourne and Olympic Parks Act 1985*) permits the Melbourne and Olympic Parks Trust to licence Gosch’s Paddock for uses that are ‘not substantially detrimental to’ its reservation as a public park; and
- clauses 12 and 13 (inserting, respectively, Part 5A and new sections 31C & 31C) provide for defined land parcels to be reserved for the purposes of, respectively, ‘the national tennis centre’ and ‘sport, recreation and entertainment’, and for consequential changes in land ownership, management and registration.

The Committee observes that these changes involve very small areas of Victoria; do not appear to impose any significant constraints on Victorians’ ability to move between parts of Victoria that fall outside those areas; do not target any particular individual or group; and are consistent with normal management of public property. The Committee therefore considers that these changes do not engage the Charter’s freedom of movement.

The Committee also notes that clauses 12, 13 and 14 (inserting new sections 30A(3)(c), 30B(3)(c), 30D(3)(d), 31C(3)(b), 31D(3)(c), 32A(3)(c) & 32B(3)(c)) provide for the discharge of certain property interests in defined portions of land and do not provide for compensation. The Statement of Compatibility remarks that any deprivation of a natural person’s property caused by these provisions (which it incorrectly refers to as ‘clauses 11, 12 and 13’):

would not be arbitrary because it is part of a highly structured and circumscribed process relating to a limited number of small parcels of land.

The Committee refers to Parliament for its consideration the question of whether any deprivation of a natural person’s property under clauses 12, 13 and 14 is ‘in accordance with law’.

The Committee makes no further comment.

Port Services Amendment Bill 2007

Introduced	9 October 2007
Second Reading Speech	11 October 2007
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

Purpose

The Bill amends the *Port Services Act 1995* to make provision for further powers as to dredging, make further provision for port fees, make provision for powers to restrict access to certain port lands and waters, and make provision for other matters.

Content and Committee comment

[Clauses]

[2]. The provisions in the Bill come onto operation on proclamation but not later than by 1 July 2008.

[7]. Amends section 31(1) by replacing the word "spouse" with "partner" to broaden the operation of the provision (which is a prohibition on the making of loans to directors of port corporations) to include "domestic partner". This is to better accord with the Charter in respect to the right to recognition and equality before the Law.

The Committee notes this extract from the Second Reading Speech –

Charter of Human Rights

In accordance with the review of legislation being undertaken by government departments to ensure that it accords with the Charter of Human Rights and Responsibilities Act 2006, an amendment is being made to section 31(1) of the Port Services Act so that there is consistent treatment of domestic partners with spouses. This addresses an apparent oversight in not making these amendments in 2001 when discrimination based on marital status was removed in various pieces of legislation.

Strict liability offences – reverse onus to establish ‘reasonable excuse’ –freedom of expression – implied right of free political communication

[14]. Inserts a new Part 5A into the Act (new sections 83 to 88H) in respect to powers to restrict access to port areas.

New section 88B makes it an offence for an unauthorized person to enter or remain in a restricted access area or to cause a vessel to enter or remain there in contravention of a declaration. The offence has a penalty of 10 penalty units. It is a defence to show reasonable excuse for entering into or remaining in the area.

New section 88C creates two offences relating to interference with activities. First, it is an offence to interfere with or hinder or cause another person to interfere with or hinder the carrying out of works in a restricted access area. Secondly, it is an offence to interfere with or hinder or cause another person to interfere with or hinder the entry of an authorised person into a designated access area. In relation to each of the offences, it is a defence to show reasonable excuse for interfering or hindering.



Strict liability Offences – Implied right to free political communication

The Committee notes the strict liability offences in new sections 88B and 88C.

The Committee accepts that there may be circumstances where the proof of an evidentiary fact may be easily established by an accused person and where the prosecution may find it impossible to negative the existence of every conceivable defence.

The Committee notes the amendments sought may have implications in respect to the implied right of free political communication under the Federal Constitution and discusses this matter in the Charter Report below.

New section 88D creates two offences relating to the provision of information requested by a member of the police force.

New section 88E gives the Port of Melbourne Corporation and the Victorian Regional Channels Authority the ability to warn a person to leave any part of a restricted access area and deems the recommending authority to be the occupier of land for the purposes of section 9(1) of the *Summary Offences Act 1966*.

New section 88F empowers a member of the police force to take charge of a vessel and move or direct that another person moves the vessel to an appropriate place, when a person in charge of a vessel commits an offence under Part 5A within sight of the member of the police force.

[19]. Provides for the automatic repeal of this amending Act on 1 July 2009.

Charter Report

Keywords – Freedom of expression – Peaceful assembly – Restrictions on protesters’ access to areas and vessels in port waters and land – Restrictions necessary to permit port bodies to carry out statutory powers, functions and objectives – Reasonable limitations – Adequacy of statement of compatibility

Charter s.15(2) gives every person ‘the right to freedom of expression’ including the ‘the freedom to seek, receive and impart information and ideas of all kinds’ in any ‘medium chosen by him or her.’ Charter s.16(1) gives every person ‘the right of peaceful assembly.’ Charter s28(3)(a) provides that a statement of compatibility must state how a Bill is compatible with human rights.

The Committee notes that clause 14, inserting a new division 2 of Part 5A into the *Port Services Act 1995*, provides for the making of declarations that any part of certain port waters and land or an area surrounding any vessel in certain port waters is ‘an area to which access is restricted’.

The Committee notes that events or vessels in port waters or land may attract political protestors, for example the entry of a war ship to port waters (as mentioned in the second reading speech) or dredging work. The Committee also notes that new section 85, which provides that a declaration of a restricted access area may be specific to particular vessels, persons, purposes, times or activities, may permit a declaration that is specific to particular protestors, protest activities or protests in general. The Committee further notes that the High Court of Australia in *Levy v Victoria* (1997) 189 CLR 579 held that a law banning protestors from an area where a politically controversial activity will occur, and therefore preventing them from collecting information about that activity or drawing public attention (via television coverage of proximate protests) to it, engaged (but, in that instance, did not infringe) the Commonwealth *Constitution’s* freedom of political communication. The Committee therefore considers that clause 14 engages Charter ss 15(2) and 16(1).

The Committee observes that, under Charter s.15(2), freedom of expression ‘may be subject to lawful restrictions reasonable necessary... for the protection of... public order’ and that, under Charter s.7(2), all Charter rights may be subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society.’ The Committee notes that, under new section 84(3)(a), declarations of restricted access (including the specifications under new section 85) must not be made unless the Minister ‘is satisfied that the declaration is necessary to enable’ the Port of Melbourne Corporation or the Victorian Regional Channels Authority ‘to carry out its powers or functions and to give effect to its objectives under the Act.’ The Committee also notes that, from 1st January 2008, Charter s.38(1) will (subject to Charter s.38(2)) require the Minister to consider the Charter rights of Victorians (including the rights of protesters) when making or continuing a declaration. The Committee therefore considers that clause 14 is a reasonable limit on the Charter’s freedom of expression and right to peaceful assembly.

However, the Committee is concerned that the Statement of Compatibility does not discuss the compatibility of the new Part 5A with the Charter’s rights to freedom of expression (aside from a minor enforcement provision) and peaceful assembly. The Committee reiterates its view stated in Alert Digest No. 9 of 2007 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.

The Committee resolves to write to the Minister expressing its concern about this statement of compatibility.

Keywords – Reasonable limits on rights – Enforcement of restricted access areas – Movement – Privacy – Expression – Property – Self-incrimination

Charter s.7(2) provides that human rights may be ‘subject to such reasonable limits as can be demonstrably justified in a free and democratic society.’

The Committee notes that clause 14, inserting a new division 3 of Part 5A into the *Port Services Act 1995*, provides for the enforcement of restricted access areas created under the new division 2. These provisions are generally typical of enforcement measures in statutes.

The Statement of Compatibility identifies a number of provisions in the new division 3 that are said to engage the following Charter rights:

- **Movement** (Charter s.12): a provision creating an offence of entering or remaining in a restricted access area without authorisation or a reasonable excuse (new section 88B);
- **Privacy** (Charter s.13(a)), **expression** (Charter s15(2)) and **self-incrimination** (Charter s25(2)(k)): a provision requiring anyone in a restricted access area to provide his or her name, address, authority for being in the area, evidence of that authority and (where applicable) a certificate of authorisation at the request of the police (new section 88D);
- **Property** (Charter s.25(1)): a provision permitting police to take charge of a vessel owned by a person who committed an offence and to move the vessel ‘to an appropriate place’ (new section 88F).

In each instance the Statement of Compatibility contends that the respective rights are not infringed, are balanced by children’s right to protection or are reasonable limits. Having considered the above Charter rights and provisions, the Committee is satisfied that the measures so engaged do not warrant any special mention or adverse comment in respect to possible incompatibility with human rights.

The Committee makes no further comment.

Victorian Workers' Wages Protection Bill 2007

Introduced	9 October 2007
Second Reading Speech	11 October 2007
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Minister for Industrial Relations

Purpose

The purpose of the Bill is to —

- ensure that employers pay wages in money and to set out the method of that payment.
- regulate the ability of an employer to make deductions from an employee's wages.
- provide for enforcement mechanisms and remedies if an employer, fails to pay an employee's wages in money; or unlawfully deducts an amount from an employee's wages; or terminates, or threatens to terminate, an employee's employment or prejudicially alters an employee's position because the employee is entitled to, or seeks to, exercise a right under this Act.
- amend the *Public Sector (Union Fees) Act 1992* and the *Outworkers (Improved Protection) Act 2003*.

Content and Committee comment

[Clauses]

[2]. The provisions in the Bill comes into operation on proclamation but not later than by 1 December 2008.

[6]. Sets out the requirements for the payment of employees' wages and [7] sets out the circumstances in which deductions can lawfully be made from wages.

[8]. Sets out the requirements of a written authorisation to make deductions.

[9]. Sets out circumstances in which a deduction is taken not to be authorised when it was obtained as a result of duress or coercion on the part of the employer; where the authorisation was not otherwise freely given by the employee; where the employee is a child and the authorisation has not been consented to a parent or guardian; or where the deduction is unreasonable in all the circumstances.

[10]. Provides that an employer must not deduct any amount from a relevant employee's wages (even with the employee's consent) certain fees or costs or the provision of certain goods and services.

[11]. Provides that any term of a contract or agreement (other than an industrial instrument) is void to the extent that it is contrary to or inconsistent with anything in the Bill or regulations made under the Bill or purports to exclude the Bill or its regulations. An inconsistent provision in an agreement will prevail over the legislation for 6 months after the commencement of the Act (*also refer to transitional provision in clause 25*).

[12]. A court may order an employer to pay a civil penalty and or, pay an employee payment or reimbursement.

[20]. An employer must not terminate or threaten to terminate or alter the position of an employee to the employee's prejudice because the employee is entitled to or seeks to exercise any entitlement or other right under the Bill.

Reverse onus – evidentiary burden – presumption of innocence

[23]. Provides that where application is made in respect of a contravention of clause 6 and the affected employee is dead, there is a reversal of the evidentiary onus in any proceedings such that an employer bears the onus of presenting evidence that the payment in kind was duly authorised and did not form part of the employee's wages.

Where application is made in respect of a contravention of clause 7 or 10 and the affected employee is dead, there is a reversal of the evidentiary onus in any proceedings such that an employer bears the onus of presenting evidence that the deduction from wages was lawful.



Reverse onus – evidentiary fact to be established by party not ordinarily obliged to establish a fact in proceedings

The Committee notes that the section provides for a reverse onus of proof in certain situations. The Committee notes that a similar provision is already included in the Outworkers (Improved Protection) Act 2003. (Refer to Charter report below).

The Committee notes that there may be special circumstance where the proof of certain evidentiary facts may be more conveniently established by a party to proceedings who is not ordinarily obliged to bear the evidentiary burden of establishing a fact(s). In such circumstances it may be permissible to allow a reverse onus provision to prevail.

The question whether a reverse onus provision is appropriate in the circumstances is a matter for the Parliament to consider.

[25]. Is a transitional provision that will permit non-compliant agreements to run for 6 months after the commencement of the legislation. Further this Act has no affect on any proceedings commenced or concluded before the commencement of this Act.

[26]. Amends the *Public Sector (Union Fees) Act 1992* to require that public sector union fee deductions must also comply with this Act.

[27]. Amends the *Outworkers (Improved Protection) Act 2003* to provide that an outworker is an employee for the purposes of this Act.

Charter Report

Keywords – Reasonable limits – Protection of children – Wage protection – Age discrimination – Privacy – Presumption of innocence

Charter s.7(2) provides that human rights may be ‘subject to such reasonable limits as can be demonstrably justified in a free and democratic society.’ Charter s.17(2) provides that every child has the right ‘to such protections as is in his or her best interests.’

The Committee notes that the Bill provides for protections of the wages of workers. The provisions are typical of protective measures in employment laws.

The Statement of Compatibility identifies a number of provisions in the Bill that are said to engage the following Charter rights:

- **Age discrimination** (Charter s.8(3)) and **privacy** (Charter s.13(a)): a provision requiring written parental consent for wage deductions in the case of minor employees (clause 9).
- **Presumption of innocence** (Charter s.25(1)): provisions requiring employers charged with offences concerning wages of employees who have since died to provide evidence capable of supporting an inference that the wages were paid in money and that any deductions were lawful (clause 23).

In each instance the Statement of Compatibility contends that the respective rights are not infringed, are balanced by children's right to protection or are reasonable limitations. Having considered the above Charter rights and provisions, the Committee is satisfied that the measures so engaged do not warrant any special mention or adverse comment in respect to possible incompatibility with human rights.

The Committee makes no further comment.

Ministerial Correspondence

Crimes Amendment (Rape) Bill 2007

The Bill was introduced into the Legislative Assembly on 21 August 2007 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 17 September 2007 and made the following comments in Alert Digest No. 12 of 2007 tabled in the Parliament on 18 September 2007.

Committee's Comment

Keywords – Protection of families – Incest – Defence of compulsion – Widening of defence – Whether a law fails to protect families in some circumstances – Prospective law – Defence of compulsion limited by other party's incorrect belief

Charter s17(1) provides that families 'are entitled to be protected by society and the State.' The Committee observes that Charter s17(1) obliges the State to protect families and that a Bill may be incompatible with this obligation if it fails to protect families in some circumstances.

The Committee notes that s44(6) of the Crimes Act 1958 provides that people who are compelled to engage in an act of sexual penetration with a family member are not guilty of incest. The Committee considers that this defence protects families, by reducing stigma and the threat of punishment for non-consenting participants in incest. However, the Committee observes that this protection is limited by s44(6A)(b), which provides that the defence of compulsion is only available when the person who compelled the victim to engage in incest was aware that the victim might not be consenting to it.

The Committee notes that clause 8 amends s44(6A)(b) to make the defence available when the person who compelled the victim to engage in incest gave no thought as to whether or not the victim was consenting. While the Committee considers that this change extends the protection offered by the law to non-consenting participants in incest, the Committee is concerned that clause 8 is restricted (by clause 9, inserting a new s609 into the Crimes Act 1958) to incest alleged to occur after the commencement of clause 8. The Committee is further concerned that the defence of compulsion will remain (under the amended s44(6A)(b)) unavailable to non-consenting participants in incest where the other person mistakenly believed that the victim was consenting.

The Committee will seek further advice from the Minister concerning the following matters:

- 1. Should clause 8, which widens a defence to the crime of incest, be applied retrospectively, rather than (as clause 9 presently provides) only prospectively?*
- 2. Should s44(6A)(b) of the Crimes Act 1958, which has the effect of making some non-consenting participants in incest guilty of that offence, be removed, rather than (as clause 8 presently provides) retained with amendments?*

Pending the Minister's response, the Committee draws attention to this provision.

Minister's Response

Thank you for your letter dated 19 September 2007 regarding your Committee's consideration of the Crimes Amendment (Rape) Bill 2007. You sought further advice on whether clause 8 should be applied retrospectively or whether section 44(6A)(b) of the Crimes Act 1958 should be removed rather than retained with amendments as proposed in the Bill.

As the Committee noted in its report (Alert Digest No. 12 of 12007), section 44(6A)(b) formed part of amendments made to the Crimes Act 1958 by the Crimes (Sexual Offences) Act 2006. This Act

made amendments to a range of sexual offences and for consistency, similar definitions were utilised when referring to matters relating to consent.

I agree with the Committee that the amendment to section 4 has the effect of making the compulsion exception unavailable to non-consenting participants in incest where that person cannot prove that the person who compelled them to participate in the act was aware of the actual or possible absence of consent. This was not an intended consequence of the 2006 amendments and, consequently, the Crimes Amendment (Rape) Bill 2007 will be amended to removed section 44(6A)(b).

This amendment will commence operation from the day after it receives the Royal Assent, ie: at the earliest opportunity without giving the amendment retrospective operation in relation to trials that have already commenced. The amendment would apply to a person charged with incest whose trial has not yet commenced at the day after the amendment receives Royal Assent.

Parliamentary Counsel has advised that it would be undesirable to backdate this amendment to have effect from 1 December 2006 because this would have the potential to inappropriately interfere with the independence of the courts should a trial already have commenced.

I am advised that, owing to the way in which the prosecutorial discretion is exercised, it is unlikely that any person has actually been charged in circumstances where retrospective operation of this provision would render assistance. However, if a person has been charged, it is even more unlikely that the trial of a person in these circumstances would have commenced.

I thank the Committee for bringing this issue to my attention.

*ROB HULLS MP
Attorney-General*

8 October 2007

The Committee thanks the Attorney-General for this response.

Energy Legislation Further Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 18 September 2007 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 8 October 2007 and made the following comments in Alert Digest No. 13 of 2007 tabled in the Parliament on 9 October 2007.

Committee's Comment

Retrospective application – validation

[35]. Inserts new section 20A which retrospectively validates a relevant Order in Council published on 25 August 1994 made under section 11 of the Gas and Fuel Corporation (Heatane Gas) Act 1993. Section 12 of the Act deals with the creation of statutory easements and covenants that may involve property rights. The Committee refers to the Charter report below.

Charter report

Keywords – Right to property – Force and effect may be given to Order of Governor in Council – Order's operation triggers statutory variation of property rights – No compensation payable – Whether in accordance with law

Charter s.20 provides that people must not be deprived of property 'other than in accordance with law.' Charter 6(1) provides that only human beings have rights under the Charter.

The Committee notes that clause 35 (inserting a new section 20A into the Gas and Fuel Corporation (Heatane Gas) Act 1993) may give force and effect to an Order of the Governor in Council (providing for the transfer of the Heatane pipeline) purportedly made in 1994 under s.11 of that Act. The Committee observes that s.12 of that Act (read together with s.3, defining 'appointed day') provides for the extinguishment, variation and creation of certain easements and restrictive covenants when an order made under s.11 comes 'into operation' and that ss.13-16 and 18-19 make further provision for the legal effect of these changes. The Committee is concerned that, although the parties to the transfer of the pipeline (the Gas and Fuel Corporation of Victorian and Elgas Reticulation Pty Ltd) are corporations, non-corporate individuals may be amongst the third parties whose property may be affected by ss.12-16 and 18-19 of the Act.

The Committee also notes that s.20 of the existing Act provides that no compensation is payable by certain parties 'in respect of the extinguishment, creation or variation by this Act of an interest, right, privilege or obligation over land.' The Committee considers that the absence of compensation may be relevant to whether or not a deprivation of property occasioned by clause 35 is disproportionate to its purpose and, therefore, 'other than in accordance with law' under the Charter's right to property.

The Committee will seek further advice from the Minister concerning the following matters:

- 1. Will clause 35, read in conjunction with the existing provisions of the Gas and Fuel Corporation (Heatane Gas) Act 1993, impose easements or restrictive covenants on (or otherwise deprive) the property of any non-corporate individual?*
- 2. What is the purpose of any such deprivation?*
- 3. What is the purpose of preventing the payment of compensation to such a person?*

Pending the Minister's response, the Committee draws attention to this provision.

Minister's Response

I refer to your letter dated 9 October 2007.

Answers to Questions Raised by the Committee

1. *Will clause 35, read in conjunction with existing provisions of the Gas and Fuel Corporation (Heatane Gas) Act 1993, impose easements or restrictive covenants on (or otherwise deprive) the property of any non-corporate individual?*

Clause 35 of the Bill will not impose easements or restrictive covenants on (or otherwise deprive) the property of any non-corporate individual. It will merely transfer pre-existing rights of the Gas and Fuel Corporation of Victoria (GFCV) to Elgas Reticulation Pty Ltd.

2. *What is the purpose of any such deprivation?*

Please refer to answer to Question 1.

3. *What is the purpose of preventing the payment of compensation to such a person?*

Please refer to answer to Question 1.

Background

Sale in 1993 by GFCV to Elgas Reticulation Pty Ltd facilitated by enabling legislation

- *In 1993 the GFCV sold its heatane gas pipeline to Elgas Reticulation Pty Ltd.*
- *The Gas and Fuel Corporation (Heatane Gas) Act 1993 (Act) was enacted to enable the sale.*
- *The Act provided that transfer of the pipeline to Elgas Reticulation Pty Ltd was to take effect on publication in the Victorian Government Gazette of an Order in Council.*

Intended transfer in 1994 of pipeline pursuant to legislation

- *An Order under the Act was published in 1994 (Order). The Order was intended to transfer ownership of the pipeline to Elgas Reticulation Pty Ltd.*
- *The Order did not however, serve its intended purpose of transferring legal ownership of the pipeline from GFCV to Elgas Reticulation Pty Ltd because the Order referred to Elgas Limited as transferee of the pipeline instead of Elgas Reticulation Pty Ltd.*

Intended transfer in 1994 of easement pursuant to legislation

- *The Act also provided for creation by Order in Council of a statutory easement in favour of GFCV over property situated along the pipeline route, and for the owner of the pipeline to be entitled to the statutory easement.*
- *The statutory easement was a replacement for an existing common law easement in favour of GFCV in relation to the same property.*
- *The validity of the creation of the statutory easement is not in question.*
- *The statutory easement was not however transferred from GFCV to Elgas Reticulation Pty Ltd as ownership of the pipeline was not transferred from GFCV to Elgas Reticulation Pty Ltd.*

Effect of the 2007 Bill

- *Clause 35 of the Bill provides that the 1994 Order has effect as if it always referred to Elgas Reticulation Pty Ltd.*
- *This will enable transfer of the legal ownership of the pipeline, together with the statutory easement, to Elgas Reticulation Pty Ltd as at the date of the Order in 1994.*

JOHN LENDERS MP
Treasurer

23 October 2007

The Committee thanks the Treasurer for this response.

Justice Legislation Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 21 August 2007 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 17 September 2007 and made the following comments in Alert Digest No. 12 of 2007 tabled in the Parliament on 18 September 2007.

Committee's Comment

The Committee reports to Parliament pursuant to a term of reference provided in section 17(a)(i) of the Parliamentary Committees Act 2003, – ‘trespasses unduly on rights or freedoms’ – Retrospective validation – Existing causes of action

The Committee notes that clause 20 amplifies and clarifies the regulation making power currently found in section 112(1)(k). It is not clear to the Committee that any existing regulation made under that power, absent the validation clause, would be held invalid were it to be challenged in proceedings.

In the circumstances the Committee notes the retrospective validation seeks to avoid doubt as to the legal validity of existing regulations.

The Committee will however seek further advice from the Minister whether he is aware of any existing proceeding challenging the existing regulations.

Pending further advice the Committee draws attention to the provisions

Keywords – Right to security – Offence to carry or possess a dangerous article in a public place without a lawful excuse – Removal of self-defence as a lawful excuse – Perceived immediate threats – Isolated or unsafe public places

The Committee notes that the Statement of Compatibility does not address the compatibility of clause 7 (amending s7 of the Control of Weapons Act 1990) with human rights. Charter s21(1) provides that everyone has a right to ‘security’. The Committee considers that this right extends, not only to security from state conduct, but also to security from the conduct of others.

The Committee notes that s7(3) & (4) of the Control of Weapons Act 1990 presently provide that self-defence is a lawful excuse to a charge of carrying or possessing a dangerous article. The Committee observes that the High Court has ruled that an identical provision in New South Wales does not authorise carrying or possessing an article merely ‘for the purpose of “self-defence”’; rather, ‘[t]here must be a perceived threat, and its immediacy is also a relevant factor.’ (Taikato v R (1996) 186 CLR 454, 467) The Committee considers that the right to security under s21(1) includes a right to take any steps reasonably necessary to defend oneself from such a perceived threat.

The Committee notes that clause 7, which removes self-defence as a lawful excuse to this offence, makes it unlawful for anyone who perceives an immediate threat in a public place to pick up or modify an article to defend himself or herself. The Committee observes that the only lawful options that will be available to such a person will be to call for help, run away or defend themselves with their hands or any items that they are carrying for another purpose. These options may not be sufficient to overcome an immediate threat to personal security in some instances, particularly for people who live or work in isolated or unsafe places. The Committee is concerned that a law making it an offence for such a person to pick up, e.g. a brick, to fend off a potential attack, may deny that person an effective means of temporarily securing themselves against possible harm while they seek help or safety. The Committee therefore considers that the removal of self-defence as a lawful excuse for carrying or possessing a dangerous article may infringe the right to security from perceived immediate threats.

The Committee notes the following comment from the second reading speech:

To further safeguard public safety, this bill now removes self-defence as a lawful excuse for carrying dangerous articles. A ‘dangerous article’ is any item (for example a broken bottle or a pair of scissors) that is adapted or carried for use as a weapon. It is not appropriate in our

society that such articles should be carried solely for self-defence when their use could result in serious injury or death.

The Committee observes that, as the Statement of Compatibility does not address the compatibility of clause 7 with human rights, it does not address whether clause 7 strikes a reasonable balance between different aspects of the right to security under Charter s21(1). The Committee will seek further advice from the Minister concerning the following matters:

- 1. What impact will removal of self-defence as a lawful excuse for possessing or carrying a dangerous article have on the security of people who perceive immediate threat of harm in an isolated or unsafe public place?*
- 2. What is the extent of the risk to public safety posed by permitting people to temporarily carry an article as a weapon in a public place to defend themselves from a perceived immediate threat of harm?*
- 3. Are there less restrictive means to overcome this risk than the removal of self-defence as a lawful excuse for possessing or carrying a dangerous article?*

Pending the Minister's response, the Committee refers to Parliament the question of whether or not clause 7 strikes a reasonable balance between people's Charter right to be secure from being harmed by articles modified or carried as a weapon and people's Charter right to secure themselves by carrying such articles when they perceive an imminent threat of harm.

Keywords – Right to correspondence – Freedom of expression – Prisoners – Censorship of letters that may be regarded by a victim as distressing or traumatic – Letters sent to prisoners – Whether proportional – Whether predictable

Charter s13(a) gives people the right not to have their 'correspondence... unlawfully or arbitrarily interfered with'. Charter s15(2) gives people the 'right to freedom of expression', including the 'freedom to seek and impart information and ideas of all kinds'. The Committee observes that the rights in the Charter extend to all human beings, including prisoners. The Committee notes that the European Court of Human Rights has held that right of prisoners to correspondence differs from the rights of non-prisoners only to the extent that is necessitated by 'the ordinary and reasonable requirements of imprisonment' (Golder v United Kingdom [1975] ECHR 1, [45].)

The Committee considers that clause 17, amending s47D(1) of the Corrections Act 1986 to extend an existing scheme for censoring letters sent to and from prisoners, may interfere with prisoners' and their correspondents' rights to correspondence and freedom of expression. However, the Committee notes that the rights to correspondence and freedom of expression are not absolute. In particular, all people's right to freedom of expression 'may be subject to lawful restrictions reasonably necessary... to respect the rights... of other persons'. The Committee observes that clause 17 has such a purpose: the protection of the rights of victims of crime. The Committee considers that clause 17 will be compatible with human rights if it is a proportionate and predictable means of protecting victims of crime.

The Committee notes that clause 17 gives prison governors and their delegates the power to censor any letter whose contents 'may be regarded as distressing or traumatic to a victim.' The Committee observes such letters may be censored or intercepted, regardless of any other characteristics of the letter, or of the prisoner or the other party to the correspondence or of any victim. The Committee notes that decisions under the European Convention on Human Rights and Fundamental Freedoms have emphasised that prison censorship schemes must be narrowly tailored to their intended purposes, as letters provide prisoners with an important link to the outside world. This is especially the case for letters between family members and letters airing a perceived injustice.

The Committee notes that censorship of prisoners' letters is discretionary and that (from next year) prison governors may be obliged by Charter s38(1) (subject to the limitation in Charter s38(2)) to consider prisoners' rights to correspondence and free expression when deciding whether or not to censor any particular letter. The Committee is nevertheless concerned that the test of whether a prison governor reasonably believes that a letter's contents may be regarded by a victim as distressing or traumatic may cover too broad a range of letters to be considered proportionate to the purpose of protecting victims. The Committee is also concerned that, without statutory or

publicised administrative guidelines about how the discretion will be exercised, prisoners and their correspondents may be unable to predict how the scheme will operate in practice.

The Committee further notes that clause 17 applies, not only to letters sent by prisoners, but also to letters sent to prisoners. The Committee notes the following comment in the Statement of Compatibility about such letters:

It is also in accordance with the interests of justice that correspondence to prisoners be stopped or censored if it would be regarded by a victim as traumatic or distressing... [A]s envisaged by s5(1) of the Sentencing Act 1991, three important objectives associated with custodial sentences are that prisoners are rehabilitated; the potential for recidivism is reduced; and the community is protected. It is therefore not 'unjust' to stop or censor correspondence that may jeopardise these outcomes by adding to a victim's distress or trauma; or glorifying, encouraging or excusing criminal behaviour.

The Committee observes that the contents of letters sent into a prison cannot add to a victim's distress or trauma unless the victim is informed of those contents. The Committee further observes that the existing s47D(1) of the Corrections Act 1986 already permits prison governors to censor all letters into and out of prisons that they reasonably believe is a threat to prison security; may be of a threatening or harassing nature; may be used to further an unlawful activity or purpose; or contains indecent, abusive, threatening or offensive matter.

The Committee will seek further advice from the Minister concerning the following matters:

1. What information will prisoners and their correspondents be given concerning the way that prison governors and their delegates will exercise their discretion to censor letters whose contents may be regarded by victims as distressing or traumatic?
2. Given the existing powers of censorship under s47D(1), what is the purpose of giving prison governors a further ground to censor letters sent to prisoners?

Pending the Minister's response, the Committee refers to Parliament the question of whether clause 17 is a proportionate and predictable limit on the rights to correspondence and freedom of expression of prisoners and their correspondents.

Keywords – Right not to be arbitrarily deprived of life – Prison escapees – Validation of regulations purportedly authorising the discharge of firearms by prison officers – Discharge of firearms as a last resort to prevent escape – Non-violent escapees – Proportionality – Reasonable limits

Charter s9 provides that everyone has 'the right not to be arbitrarily deprived of life.' The Committee observes that the rights in the Charter extend to all human beings, including prison escapees and those who aid them.

The Committee notes that clause 20 (inserting a new section 112B into the Corrections Act 1986) may operate to give force and effect to regulations in the Corrections Regulations 1998 that may presently be of no force and effect. This may include reg 10, which purports to permit prison officers to 'discharge a firearm at' an escaping prisoner or a person reasonably believed to be aiding him or her in certain circumstances.

The Committee notes that discharging a firearm at a person is likely to deprive him or her of life. The Committee observes that reg 10 permits a prison officer to discharge a firearm to prevent an escape regardless of the offence that the prisoner is in custody for, his or her security classification or the likelihood that the prisoner will commit violent offences if he or she escapes. So, clause 20 may authorise a prison officer to shoot a low security prisoner who is imprisoned for a non-violent offence and attempts to escape.

The Committee notes that reg 10 imposes other constraints on the discharge of firearms, including avoiding dangers to others, giving oral warnings if practicable and only shooting as a last resort. The Committee also notes that reg 10 does not oblige prison officers to discharge firearms against escaping non-violent offenders and observes that prison officers would surely choose to refrain from doing so. The Committee further notes the comments in the Statement of Compatibility that officers are 'trained to appropriately assess security risks and apply the use of force at a level that is

proportionate to their relevant risk' and the government's intention stated in the Second Reading Speech to make new regulations limiting the circumstances when firearms may be issued. However, the Committee considers that the compatibility or otherwise of clause 20 with the right not to be arbitrarily deprived of life depends on what reg 10 currently authorises, rather than possible future contingences, such as discretions exercised during an escape and the proposed revision of the regulations.

The Committee observes that, whilst the international law of human rights permits the use of force on escaping prisoners, that permission is strictly limited to force that is proportional to the threat that the prisoner poses to others. In particular, firearms may only be used on persons who present a grave threat to life and the intentional use of firearms is only permitted when strictly unavoidable in order to protect life. The Committee therefore considers that clause 20, in its potential application to reg 10, may be incompatible with the rights of prisoners and others not to be arbitrarily deprived of life. The Committee's concern relates only to reg 10 in so far as it authorises the discharge of a firearm where an escort officer does not believe on reasonable grounds that the prisoner poses a significant threat of death or injury to others.

Charter s7(2) provides that human rights may be 'subject to such reasonable limits as can be demonstrably justified in a free and democratic society.' The Committee notes the following comment in the Statement of Compatibility about reg 10's application to escaping prisoners who do not present a danger to the community:

The issuance and hence, potential use of firearms also serves the important purpose of deterring prisoners who might otherwise contemplate escaping custody. Given the rarity of the actual use of firearms, the greatest utility of firearms in the corrections context is this deterrent effect, rather than their actual use. By corollary, without the authority to use firearms it is likely that there would be an increase in the number of prisoners who attempt to escape from custody and of the willingness of other people to assist them in doing so. This would then pose an increased risk to the safety of officers, prisoners and the community; and compromise the good order and security of prisons.

The Committee will seek further advice from the Minister concerning the following matters:

- 1. Will the proposed new regulations authorise the discharge of firearms by a prison officer in circumstances where he or she does not believe on reasonable grounds that a prisoner poses a significant threat of death or injury to others?*
- 2. Taking account of the time required to draft the proposed new regulations and train prison officers to operate within them, when are the new regulations expected to come into operation?*

Pending the Minister's response, the Committee refers to Parliament the question of whether or not reg 10, in so far as it authorises prison officers to discharge firearms as a last resort to prevent a non-violent offender from escaping, strikes an appropriate balance between the rights of Victorians to security and the rights of escapees and those aiding them not to be arbitrarily deprived of life.

Minister's Response

Thank you for your letter of 19 September 2007 in which you seek advice in relation to amendments to the Control of Weapons Act 1990 and the Corrections Act 1986 contained in the Justice Legislation Amendment Bill 2007.

I will deal with the amendments to the Control of Weapons Act 1990 and then the Corrections Act 1986.

Amendments to the Control of Weapons Act 1990

The Justice Legislation Amendment Bill 2007 amends the Control of Weapons Act 1990 to increase most penalties under that Act; treat the carrying of weapons in, or in the immediate vicinity of, licensed premises as an aggravating circumstance with higher penalties; ensure that dangerous articles cannot be carried solely for the purpose of self-defence in case of attack; and clarify the obligations of corporations, partnerships and their officers and employees authorised to handle prohibited weapons or body armour.

I note that the Committee has sought advice in relation to the removal of the defence of possession of dangerous articles for the purpose of self-defence.

At the outset, I should clarify that the Bill does not remove self-defence as a defence to the offence of carrying or possessing a dangerous article. Rather, the Bill only removes the ability to arm oneself with a dangerous article in case of an attack, where there is no actual or threatened attack.

In this regard, a distinction needs to be drawn between the defence of self-defence and the defence of possession for the purpose of self-defence contained in s7(3) of the Control of Weapons Act 1990.

The defence of self-defence entitles a person to use reasonable force to defend him/herself from unlawful violence, provided the person honestly believes that what he or she does is necessary to defend him/herself and provided a reasonable person in that situation would not have regarded the acts as out of proportion to the danger being faced.

Unlike the defence of self-defence, the defence of possession for the purpose of self-defence under the Control of Weapons Act 1990 does not require an actual or threatened attack. Rather, it enables a person to carry a weapon in case of attack.

The defence of 'lawful excuse' encompasses a range of defences, including self-defence. This is confirmed by:

- *the law in relation to the defence of 'lawful excuse' in respect of the offence of assault in s31 of the Crimes Act 1958 (see para s 31.50 in Bourke's Criminal Law); and*
- *the judgement of the High Court in Taihzo v R. In that case, the High Court of Australia confirmed that the defence of 'lawful purpose' included self-defence in respect of an actual or threatened attack, but did not include arming oneself on the off chance of being attacked. The Court was considering a provision that did not expressly affirm a defence of self-defence (the NSW provision as it stood in 1992 when the offence was committed was not identical to the Control of Weapons Act 1990 provisions). The only defences available were 'lawful purpose' and 'reasonable excuse'. The Court made clear that the defence of self-defence was incorporated within the defence of lawful purpose.*

I note the Committee's observation in its Charter Report that the Statement of Compatibility for the Bill does not address whether clause 7 of the Bill strikes a reasonable balance between different aspects of the right to security under Charter s21(1).

On this point, I consider that the Bill protects the right under Charter s21(1) rather than limits it, as the Bill reduces the risk of harm posed by dangerous articles being present in public places, but does not remove the defence of self-defence.

I now turn to the Committee's questions.

What impact will removal of self-defence as a lawful excuse of possessing or carrying a dangerous article have on the security of people who perceive immediate threat of harm in an isolated or unsafe public place?

The repeal of s7(3) of the Control of Weapons Act 1990 will have no impact in this situation. As indicated above, the defence of self-defence remains a 'lawful excuse' and therefore a defence to a charge of possessing or carrying a dangerous article in a public place. For example, the following persons would have a good defence to such a charge:

- *a woman who is confronted by an attacker who uses scissors she has in her purse, or picks up and breaks a bottle or some other item and uses it as a weapon to defend herself; or*
- *a builder who has a screwdriver in his or her toolkit and uses the screwdriver as a weapon to defend him/herself against attack.*

What is the extent of the risk to public safety posed by permitting people to temporarily carry an article as a weapon in a public place to defend themselves from a perceived immediate threat of harm?

*There will always be a risk to public safety in permitting people to carry an article as a weapon in a public place. As the High Court in *Taikato v R* correctly identified, even if a person does not intend to use a dangerous article, its mere presence in a public place enables it to be used to cause harm.*

The Bill seeks to reduce this risk by removing the ability to arm oneself with a dangerous article for the sole purpose of defending a possible attack. However, the Bill does not limit the ability of people to convert items already in their possession, or to pick up items, in order to use them to defend themselves against an actual or threatened attack.

Are there less restrictive means to overcome this risk than the removal of self-defence as a lawful excuse for possessing or carrying a dangerous article?

By removing the ability of persons to carry or possess dangerous articles where there is no immediate threat, the Bill protects the right to life, liberty and security, rather than limits it. To the extent that it may be necessary to use a weapon to defend oneself from an actual or threatened attack, that ability to do so is preserved within the defence of lawful excuse, which incorporates self-defence.

Amendments to the Corrections Act 1986

The Justice Legislation Amendment Bill 2007 amends the Corrections Act 1986 to enable prison Governors to stop or censor any letter to be sent by a prisoner to, or sent to a prisoner by, any person if reasonably believed that the letter contains material that may be regarded by a victim as distressing or traumatic. The Bill also creates a new offence where a prisoner sends a letter to a victim, or a family member of a victim, if the prisoner knows or ought reasonably to have known that the letter contains material that may be distressing or traumatic to the victim or any other victim who might reasonably receive it.

What information will prisoners and their correspondents be given concerning the way that prison Governors and their delegates will exercise their discretion to censor letters whose contents may be regarded by victims as distressing or traumatic?

Currently, prisoners and their correspondents are not given any information concerning the exercise of a governor's discretion to stop or censor letters by or to prisoners under section 47D of the Corrections Act 1986. This is because the exercise of any discretion is considered to be unfettered. Corrections Victoria operational procedures about prisoner communications provide some advice about the circumstances in which letters may be stopped or censored under section 47D of the Corrections Act 1986 and notification of prisoners when their correspondence is stopped or censored.

However, Corrections Victoria will consider a review of operational procedures about prisoner communications. This may include guidance on how this discretion must be examined in the light of the obligations on public authorities in section 38 of the Charter. This provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. In discharging the obligation in section 38, Governors would need to consider whether it would be a reasonable limitation on prisoners' rights to privacy and freedom of expression to stop or censor their correspondence.

Given the existing powers of censorship under s47D(I), what is the purpose of giving prison Governors a further ground to censor letters sent to prisoners?

Clause 17 of the Justice Legislation Amendment Bill extends prison Governors' powers under section 47D of the Corrections Act 1986 to intercept or censor letters sent by a prisoner to, or sent to a prisoner by, any person that a Governor reasonably believes may cause distress or trauma to a victim or their family (ie by glorifying, encouraging or excusing criminal behaviour). The purpose of this amendment is to assist in achieving three important objectives associated with custodial

sentences: that prisoners are rehabilitated, the potential for recidivism is reduced and the community is protected.

Is the retrospective validation of a decision made by the prison Governor to stop the letter that Julian Knight wrote, which was the subject of the decision of the Supreme Court in Knight v. Anderson, warranted in the circumstances?

I note that the Committee referred this question to Parliament. I also offer the following response. Clause 17 of the Bill will apply retrospectively to 1 July 2005. The retrospective application of this amendment is intended to validate the prison governor's decision to stop a letter that Julian Knight wrote to a victim, and to overcome the effect of the recent judgement of the Supreme Court case of Knight v. Anderson (2007) VSC 278. Its retrospective application is considered necessary to protect victims and their families from the severe and on-going distress and trauma that is likely to be inflicted by the receipt of a letter from the perpetrator in this case. However, this amendment will not affect the rights of an applicant bringing judicial review proceedings, in respect of a letter stopped or censored by a prison governor, to a fair and public hearing before a competent and independent court.

Is clause 17 a proportionate and predictable limit on the rights to correspondence and freedom of expression of prisoners and their correspondents?

I note that the Committee referred this question to Parliament. I also offer the following response. This amendment allows Governors' to the exercise their discretion to stop or censor letters either by or to prisoners on a case-by-case basis, based on his or her reasonable belief that such correspondence may be regarded by a victim as traumatic or distressing and having regard to section 38 of the Charter. These processes will ensure that any interference with prisoner correspondence will be proportionate to the risk that a victim would be distressed or traumatised by such correspondence and reasonably predictable whilst allowing for a degree of discretion to be applied in each particular case.

Does clause 18 meet the test in Charter s.7(2), including whether or not there is a 'less restrictive means reasonably available to achieve the purpose' of preventing offenders from causing distress or trauma to victims by circumventing the censorship regime?

I note that the Committee referred this question to Parliament. I also offer the following response. Clause 18 does not limit the right to privacy in section 13(a) of the Charter as the interference with correspondence is not 'arbitrary' or 'unlawful'. This amendment also falls within the exception envisaged by section 15(3) of the Charter, and thus does not limit the right to freedom of expression. The measures proposed are considered to be appropriate and necessary to ensure that victims are prevented from further distress and trauma received from unwarranted correspondence from the victim's perpetrator or another prisoner. There is no practicable less restrictive means of achieving this objective.

Is the Minister aware of any existing proceeding challenging the existing regulations?

The Justice Legislation Amendment Bill 2007 also amends the Corrections Act 1986 to confirm existing powers set out in the Corrections Regulations 1998 in relation to the issue to, and use of, firearms by prison officers. There is no existing proceeding challenging the current regulations. However, the validity of the powers of prison officers to use firearms was raised in the Supreme Court case of DPP v. Federico [2006] VSC 24. This case involved the murder trial of a prison officer resulting from an incident in which the officer shot and lethally wounded a remand prisoner whilst he was trying to escape from St Vincent's Hospital. In this case, Justice Cummins suggested that regulation 10 of the Corrections Regulations 1998 could be invalid as it may extend beyond the regulation making power in the Corrections Act 1986 or beyond common law powers to use force without clear statutory authority.

Will the proposed new regulations authorise the discharge of firearms by a prison officer in circumstances where he or she does not believe on reasonable grounds that a prisoner poses a significant threat of death or injury to others?

I also intend my officers to review the Corrections Regulations 1998 with a view to making new regulations that set out the circumstances in which firearms are issued to prison officers pursuant to

the existing operational framework. These new regulations will reflect current practice, whereby firearms are issued for the escort of high and maximum security prisoners, and otherwise only in emergency situations, or where safety and security considerations require it. This would ensure that the circumstances in which firearms are issued are proportionate to the safety risk presented. This also ensures that the power to use firearms is compatible with section 9 of the Charter (right to life).

Taking into account of the time required to draft the proposed new regulations and train prison officers to operate within them, when are the new regulations expected to come into operation?

Clauses 19 and 20 of the Justice Legislation Amendment Bill 2007 have a default commencement date of 1 May 2008. It is anticipated that amendments to the Corrections Regulations 1998 will commence operation in conjunction with the legislative amendments either on or before 1 May 2008.

Whether or not reg 10, in so far as it authorises prison officers to discharge firearms as a last resort to prevent a non-violent offender from escaping, strikes an appropriate balance between the rights of Victorians to security and the rights of escapees and those aiding them not to be arbitrarily deprived of life.

Clause 20 of the Bill aims to ensure the security and safety of others in the community and within the corrections environment and meets community expectation that prison authorities and correctional officers fulfil their role in contributing to public order and public safety. This is balanced against safeguards on the exercise of the use of lethal force in the Corrections Regulations 1998 and operational procedures.

The Corrections Regulations 1998 ensure that the circumstance in which a prison officer may discharge a firearm is proportionate to the safety and security risks presented to prison officers, prisoners and the community. Regulation 8 of the Corrections Regulations 1998 sets out the restricted circumstances in which a Governor may issue a firearm to a prison officer. Regulation 10 of the Corrections Regulations 1998 ensures proportionality by requiring that a prison officer must believe that use of a firearm is the only practicable way to prevent the escape of a prisoner or a person causing death or serious injury. A prison officer must also give an oral warning before discharging a firearm at a person and satisfy himself or herself that shooting at the person does not create an unnecessary risk to any other person.

Existing operational procedures also ensure that the use of lethal force is proportionate to the relevant safety risk and an absolute last resort. For instance, officers may only use such force as is reasonable and necessary to resolve the situation and must identify possible courses of action that involve the use of all other tactical options before having to resort to the use of lethal force to manage those risks. The use of firearms is an option available only to trained staff in very specific circumstances when there are no other options that would achieve the purpose of preventing escape or defending themselves or others.

Amendments to Firearms Act 1996

Finally, I note that in its Alert Digest No. 12 of 2007, the Committee has drawn attention to a provision in another Bill currently before the Parliament which falls within my responsibility, the Firearms Amendment Bill 2007.

The Committee has noted that the search and seizure powers in the Bill extend the existing police powers in the Firearms Act 1996 for search without warrant where police suspect on reasonable grounds that a person is committing or is about to commit an offence against the Act. This power will now extend to include silencers and prescribed items.

The Committee observes in the Alert Digest that it has previously reported to the Parliament that the threshold for the exercise of the power based on 'reasonable suspicion' is a lower threshold test than that based on 'reasonable belief'.

I would take this opportunity to draw to the Committee's attention to R v Clayton 2007 SCC 32, in which the Supreme Court of Canada makes clear that 'individualised suspicion' is sufficient to justify detention and search without warrant. Indeed, police would be in breach of their duties if they failed to act in such circumstances.

I thank you for the opportunity to respond to the Committee's questions.

*Bob Cameron MP
Minister for Police & Emergency Services
Minister for Corrections*

10 October 2007

The Committee thanks the Minister for this response.

**Committee Room
29 October 2007**

Appendix 1

Index of Bills in 2007

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Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights and freedoms.

Justice Legislation Amendment Bill 2007	12
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Senate Elections Amendment Bill 2006	1
Working with Children Amendment Bill 2007	12

(ii) Makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers.

Emergency Services Legislation Amendment Bill 2007	13
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(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;

Justice and Road Legislation Amendment (Law Enforcement) Bill 2007	10
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(vi) inappropriately delegates legislative power.

Accident Towing Services Bill 2007	5
Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007	4
Road Legislation Amendment Bill 2007	4
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(vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

Transport Accident and Accident Compensation Acts Amendment Bill 2007	13
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(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities.

Energy Legislation Further Amendment Bill 2007	13
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Scrutiny of Acts and Regulations Committee

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Appendix 3

Ministerial Correspondence

Table of correspondence between the Committee and Ministers during 2006-07

Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Justice Legislation (Further Miscellaneous Amendments) Bill	Attorney-General	31.5.06	13.10.06	5 of 2006	1 of 2007
Water (Governance) Bill	Water	22.8.06	1.11.06	9 of 2006	1 of 2007
Funerals Bill	Attorney-General	22.8.06		9 of 2006	
Public Sector Acts (Further Workplace Protection and Other Matters) Bill	Industrial Relations	13.9.06		10 of 2006	
Road Legislation (Projects and Road Safety) Bill	Transport	13.9.06	18.10.06	10 of 2006	1 of 2007
Serious Sex Offenders Monitoring (Amendment) Bill	Corrections	16.10.06		12 of 2006	
Public Prosecutions Amendment Bill 2006	Attorney-General	13.2.07	26.2.07	1 of 2007	3 of 2007
Senate Elections Amendment Bill 2006	Attorney-General	13.2.07		1 of 2007	
Water Amendment (Critical Water Infrastructure Projects) Bill 2006	Water	13.2.07	20.3.07	1 of 2007	4 of 2007
Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007	Gaming	17.4.07	27.4.07	4 of 2007	5 of 2007
Roads Legislation Amendment Bill 2007	Roads and Ports	17.4.07	19.8.07	4 of 2007	11 of 2007
Infertility Treatment Amendment Bill 2007	Health	28.3.07	3.7.07	4 of 2007	9 of 2007
Accident Towing Services Bill 2007	Roads and Ports	1.5.07	18.5.07	5 of 2007	6 of 2007
Fair Trading and Consumer Acts Amendment Bill 2007	Consumer Affairs	1.5.07	3.5.07	5 of 2007	6 of 2007

Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Superannuation Legislation Amendment (Contribution and Other Matters) Bill 2007	Finance	5.6.07	3.7.07	7 of 2007	9 of 2007
Royal Children's Hospital (Land) Bill	Planning	7.8.07	20.9.07	10 of 2007	13 of 2007
Justice and Road Legislation Amendment (Law Enforcement) Bill 2007	Police and Emergency Services	7.8.07	20.8.07	10 of 2007	12 of 2007
Justice Legislation Amendment Bill 2007	Attorney-General	19.9.07	10.10.07	12 of 2007	14 of 2007
Working with Children Amendment Bill 2007	Attorney-General	19.9.07		12 of 2007	
Crimes Amendment (Rape) Bill 2007	Attorney-General	19.9.07	8.10.07	12 of 2007	14 of 2007
Emergency Services Legislation Amendment Bill 2007	Police and Emergency Services	9.10.07		13 of 2007	
Energy Legislation Further Amendment Bill 2007	Treasurer	9.10.07	23.10.07	13 of 2007	14 of 2007
Transport Accident and Accident Compensation Acts Amendment Bill 2007	Finance	9.10.07		13 of 2007	
Transport Legislation Amendment Bill 2007	Transport	9.10.07		13 of 2007	