

No. 14 of 2008

Tuesday, 11 November 2008

On the

Assisted Reproductive Treatment Bill
2008

Prohibition of Human Cloning for
Reproduction Bill 2008

Research Involving Human Embryos
Bill 2008

Building Amendment Bill 2008

Crimes Legislation Amendment (Food
and Drink Spiking) Bill 2008

Health Services Legislation
Amendment

Bill 2008

Local Government Amendment
(Councillor Conduct and Other Matters)
Bill 2008

Multicultural Victoria Amendment Bill
2008

Police Regulation Amendment Bill
2008

Professional Standards and Legal
Profession Acts Amendment Bill 2008

Prostitution Control and Other Matters
Amendment Bill 2008

Public Administration Amendment Bill
2008

State Taxation Acts Further
Amendment

Bill 2008

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Glossary



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

Useful provisions

Section 7 of the **Charter** provides –

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

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

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

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



Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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

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

The Committee has considered the following Bills –

Assisted Reproductive Treatment Bill 2008
Prohibition of Human Cloning for Reproduction Bill 2008
Research Involving Human Embryos Bill 2008
Crimes Legislation Amendment (Food and Drink Spiking) Bill 2008
Health Services Legislation Amendment Bill 2008
Multicultural Victoria Amendment Bill 2008
Police Regulation Amendment Bill 2008
Professional Standards and Legal Profession Acts Amendment Bill 2008
Public Administration Amendment Bill 2008
State Taxation Acts Further Amendment Bill 2008

The Committee notes the following correspondence –

Building Amendment Bill 2008
Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008
Prostitution Control and Other Matters Amendment Bill 2008



Role of the Committee

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

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

Alert Digest No. 14 of 2008

Assisted Reproductive Treatment Bill 2008 Prohibition of Human Cloning for Reproduction Bill 2008 Research Involving Human Embryos Bill 2008

Introduced	9 September 2008
Second Reading Speech	10 September 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibilities	Attorney-General and Minister for Health

Purpose

The *Assisted Reproductive Treatment Bill 2008* repeals the *Infertility Treatment Act 1995* and replaces it with three new principal Acts.

The *Assisted Reproductive Treatment Bill 2008* –

- removes the current statutory requirement that women be married or be in a de facto relationship with a male to have access to *Assisted Reproductive Treatment* (ART) treatment in Victoria;
 - strengthens the protections for children born through ART by implementing enhanced screening for treatment, expanding donor-conceived children's access to information about their genetic history and clarifying parentage laws;
 - provides that complex treatment decisions are made by an independent expert Patient Review Panel, with provision for review of decisions by the Victorian Civil and Administrative Tribunal;
 - expands the opportunity for altruistic surrogacy and posthumous use of gametes in treatment procedures, in the context of rigorously assessed applications;
 - updates Victoria's laws on ART and surrogacy to clarify and remove existing anomalies and inconsistencies to recognise the realities of Victorian families and reflect new technologies;
 - provides that prescribed ART records are held by the Registry of Births, Deaths and Marriages; and
 - reduces the regulatory burden on ART providers by introducing a deemed registration system.
- amends the *Status of Children Act 1974* and the *Births, Deaths and Marriages Registration Act 1996*.

The *Prohibition of Human Cloning for Reproduction Bill 2008* re-enacts Part 4A of the *Infertility Treatment Act 1995* as a separate new principal Act to continue the prohibition on human cloning for reproduction and other unacceptable practices associated with reproductive technology.

The *Research Involving Human Embryos Bill 2008* re-enacts Part 2A of the *Infertility Treatment Act 1995* as a separate new principal Act to regulate research involving the use of human embryos.

Public submissions sought

The Committee reported on the Bill in Alert Digest No. 12 of 2008 which was tabled in the Parliament on 7 October 2008. In that report the Committee indicated that it would call for public written submissions and comments in respect to these Bills.

The Committee received written submissions from –

- Ad Hoc Interfaith Committee
- Australian Christian Lobby
- Australian Family Association
- Catholic Women’s League of Victoria & Wagga Wagga Inc.
- Christine Whipp
- Donor Conception Support Group Aust. Inc.
- Family Voice Australia (FAVA)
- Institute for Judaism & Civilization Inc.
- John Schmid
- Lauren Burns
- Lawrie McNamara
- Liberty Victoria
- Meredith Lenne
- Myfanwy Walker and Joanna Rose
- Narelle Grace
- Office of the Victorian Privacy Commissioner
- Pauline Peile
- Rainbow Families Council
- Romana Rossi
- Sandra Johnson

Committee comment

Undue trespass to rights and freedoms – Parliamentary Committees Act 2003, section 17(a)(i) – Access to Assisted to Reproductive Treatment or surrogacy

The Committee having reviewed the submissions is of the opinion that they do not raise any issue that could be characterised as an undue trespass to rights and freedoms within the meaning of the Act.

Charter Report

Rights of families and children – Charter differs from international human rights law relating to families and children – Charter omits rights relevant to assisted reproductive technology – No issues of Charter incompatibility

The majority of public submissions on the Assisted Reproductive Treatment Bill 2008 (and related bills) focus on the following issues relating to children and families:

- Discrimination against donor-conceived children based on the timing of their donation and vis a vis adoptees.
- Protection and promotion of the natural family unit.
- A right of children under intentional law to know about their identity and their biological parents
- A right of children under international law to have their identity registered
- A conflict between the interests of children and those of prospective ART users.

The Committee is of the opinion that, regardless of how the various differing views on the law and the evidence addressed in each submission is resolved, none of them raise any issues of Charter incompatibility.

The Committee notes that each of the relevant Charter rights has significant limitations on their operation, as follows:

- **Charter s. 8 equality rights:** The Charter's rights against discrimination are limited to the discrimination attributes in s. 6 of the *Equal Opportunity Act 1995*. These attributes do not include the timing of conception or the manner in which their family was founded. Therefore, Charter s. 8 does not provide any rights for people conceived from a donation made prior to any particular date to be treated equally with people conceived from a donation made after that date, nor does it provide for donor-conceived people to be treated the same as adopted people.
- **Charter s. 17(1) rights of families:** The Charter omits the International Covenant on Civil and Political Rights (ICCPR) reference to a 'natural' family unit, and instead refers to 'families' in plural and omits the right of men and women to marry and found a family. The explanatory memorandum of the Charter states:

This sub-clause recognises a right to protection. It is not Parliament's intention to create a right to found a family in the Charter. Parliament intends that the term "families" be given meaning that recognises the diversity of families that live in Victoria, all of whom are worthy of protection.

Therefore, Charter s. 17(1) does not provide traditional families with any rights that are distinct from those of non-traditional families, including same-sex couples and single people.

- **Charter s. 17(2) rights of children:** The Charter omits the ICCPR's right of children to registration and identity. The Charter also doesn't follow the *United Nations Convention on the Rights of the Child* in requiring that all decisions be made in the child's best interests. Rather, it provides only a narrower right for children to such protection as is in their best interests and is needed by them 'by reason of being a child'. In essence, the Charter requires the State to take action where children are vulnerable due to their age to remedy that vulnerability. Therefore, Charter s. 17(2) does not require that children's (and potential children's) interests be paramount over those of parents (and potential parents) and does not contain a right of children to know their identity.

Charter s. 32(2) permits relevant international human rights law to be considered in interpreting Charter rights. However, each of the above differences from international law is the result of an express decision by the drafters, either to conform with existing Victorian law or not to pre-empt the VLRC's ART and adoption inquiries.¹ In addition, the rights promoted by the Charter do not include the detailed rights in the *UN Convention on the Rights of the Child*; that matter will be addressed in the 2011 review of the Charter.²

The Committee is of the opinion that the international law cited in the submissions is not relevant to the Charter. The submissions on these issues therefore do not raise any issues of Charter incompatibility.

Privacy – Criminal records check — Whether irrelevant records will be disclosed – No issue of Charter compatibility

One submission³ raises an issue about the criminal records check process. The Committee's report referred to Parliament a question about whether this process (which natural parents do not have to undergo) limits the Charter's equality rights. The submission raises a separate issue about whether a check of all crimes is necessary, given that only certain offences will raise a presumption against the parents.

While a full check in these circumstances is arguably contrary to the Charter right against arbitrary or unlawful interferences in privacy, the Committee observes that compliance with the Bill only requires Victoria Police to pass on relevant charges to ART service providers. This interpretation is supported by the Charter's own requirements that statutory provisions be interpreted compatibly with the Charter and that public authorities act compatibly with the Charter.⁴ Therefore there are no Charter compatibility issues raised by this submission.

Rights of embryos – Discrimination – Freedom of expression – Referred to parliament

Several submissions engage with the Committee's original report into the bill. The rights compatibility issues discussed are ones that the Committee referred to Parliament for its consideration (or, in the case of surrogacy, wrote to the Minister about.) The Committee is of the opinion that the submissions therefore do not raise any new compatibility issues.

The Committee makes no further comment.

¹ Consultation Committee Report, [2.4.6]

² Charter s. 44(2)(ii)

³ Office of the Privacy Commissioner.

⁴ Charter ss. 32(1) & 38(1).

Crimes Legislation Amendment (Food and Drink Spiking) Bill 2008

Introduced	7 October 2008
Second Reading Speech	28 October 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill creates two new offences which relate to food or drinking spiking behaviour.

The Bill amends the –

- *Crimes Act 1958* to create a new offence of administering a drug, matter or thing with the intention of rendering a person incapable of resisting an indecent act (defined by new section 53(3)). The existing provision only applies to situations where a person has been rendered incapable of resisting sexual penetration.
- *Summary Offences Act 1966* to create a new offence of food or drink spiking. The offence occurs where a person gives another person, or causes another person to be given or to consume, food or drink that is spiked; and knows that the victim is not aware, or is reckless as to whether the victim is aware, that the food or drink is spiked; and intends the victim to be harmed by the consumption of the food or drink.

The offence is also made out if the victim has been given more of an intoxicating substance than they could reasonably expect their food or drink to contain. This means that it captures the spiking of an alcoholic drink with additional alcohol where the elements of the offence are also satisfied.

The offence is a preparatory offence. It is not necessary for food or drink to be consumed, nor is it necessary that a person's senses or understanding actually be impaired.

The Committee makes no further comment.

Health Services Legislation Amendment Bill 2008

Introduced	28 October 2008
Second Reading Speech	29 October 2008
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose

The Bill amends the –

- *Health Services Act 1988* to provide a new regulatory framework for community health centres. The Second Reading Speech provides -

.. the Bill provides for a voluntary registration scheme for organisations that provide government-funded community health services - community health centres that register will be eligible to receive community health and dental funding and be subject to a new monitoring and governance framework. Registration will be a one-off process, although the Secretary may revoke a community health centre's registration under certain circumstances. The Department of Human Services will manage the registration system, including assessing applications for registration against registration criteria provided for in the Bill.

A key aspect of the new governance framework is a requirement that agencies registering must be companies limited by guarantee. Companies limited by guarantee are subject to more rigorous reporting arrangements than incorporated associations. The vast majority of community health centres are currently incorporated associations ...

The new regulatory framework sets performance standards for community health centres. These are determined by the Minister for Health and provided for in the Bill. The Bill provides that if a registered community health centre does not comply with a direction by the Secretary, funding to the agency may be stopped or its registration revoked.

- *Health Services (Conciliation and Review) Act 1987* to provide that members of the Health Services Review Council are appointed for a term of up to three years, and can serve a maximum of 9 consecutive years on the Council.

Content and Committee comment

[Clauses]

[8]. Substitutes the existing Division 6 of Part 3 of the *Health Services Act 1988* with a new regulatory framework for community health centres.

New section 50 deals with the Secretary's power to refuse an application for registration and new section 56 sets out the procedure to be followed if the Secretary intends to revoke the registration of a registered community health centre.

New section 57C allows for application to the VCAT for review of a decision by the Secretary to refuse or revoke registration, or a decision by the Minister to recommend the appointment of an administrator.

The Committee makes no further comment.

Multicultural Victoria Amendment Bill 2008

Introduced	15 October 2008
Second Reading Speech	28 October 2008
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Portfolio responsibility	Minister for Multicultural Affairs

Purpose

The purpose of the Bill is to formalise the structural and administrative changes to the Victorian Multicultural Commission following its merger with the Victorian Office of Multicultural Affairs.

The Bill amends the *Multicultural Victoria Act 2004* to —

- amend the principles and functions of the Victorian Multicultural Commission;
- provide for the appointment of a Director and other staff of the Victorian Multicultural Commission and amends the provision relating to the appointment of the Deputy Chairperson;
- amend the reporting requirements of Government Departments in the area of multicultural affairs.

The Committee makes no further comment.

Police Regulation Amendment Bill 2008

Introduced	9 October 2008
Second Reading Speech	9 October 2008
House	Legislative Assembly
Member introducing Bill	Hon. Hon. Bob Cameron MLA
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

This Bill amends the *Police Regulation Act 1958* (the 'Act') to —

- reform the police discipline arrangements in the Act to remove a formal charge and inquiry process and substitute a model that is focussed on a remedial approach whilst retaining the ability to dismiss members who are unsuitable to remain in the police force for reasons of misconduct or underperformance;
- clarify the supervisory capacity of the Chief Commissioner of Police with respect to members of the police force and to improve the management of the performance and conduct of police members;
- improve procedures for the State to assume liability in civil actions against police members arising from the performance of their functions.

***Note:** This Bill was originally part of the Police, Major Crime and Whistleblowers Legislation Amendment Bill 2008 and was split on 9 October 2008 in the Legislative Assembly. The Committee considered the original Bill in Alert Digest No. 12 of 2008.*

Call for submissions

On 28 October 2008 the Committee, by facsimile transmission, invited key peak bodies and persons to make written submissions to the Committee by 7 November 2008. The inquiry concerned amendments made by the Bill to the Act.

Clause 18 of the Bill amends section 68D of the Act effectively removing the ability of the Police Appeals Board (the 'Board') to order the Chief Commissioner to reinstate an applicant officer where the Board, on appeal, has concluded that the dismissal was not *sound, defensible or well-founded*. The Bill provides that the only remedy available to the Board in such circumstances is to order the Chief Commissioner to pay the applicant an amount of compensation not exceeding the amount of remuneration of the applicant during the period of 12 months immediately before being dismissed.

The Committee invited submissions in accordance with its terms of reference, namely, whether the removal of the Board's ability to order reinstatement is either an undue trespass to rights or freedom within the meaning of section 17(a)(i) of the *Parliamentary Committees Act 2003*; or is incompatible with the human rights set out in Part 2 of the *Charter of Human Rights and Responsibilities*.

Submissions received

The Committee received written submissions from —

- Chief Commissioner of Police
- The Police Association (Victoria)
- Minister for Police and Emergency Services

The Committee has determined to publish the submissions on its Website.

Remedy on appeal for dismissal – Removal of right of reinstatement – Police Appeals Board – Whether an undue trespasses to rights or freedoms – Whether incompatible with Charter

The Committee has considered the written submissions made to it and is of the opinion that these provisions do not raise any issue concerning common law rights within the meaning of section 17(a)(i) of the Parliamentary Committee Act 2003 (undue trespass to rights or freedoms).

The Committee further considers that the provisions do not raise a question of Charter incompatibility within the meaning of the rights set out in Chapter 2 of the Charter for Human Rights and Responsibilities (see Charter Report below).

The Committee refers to the Parliament the question whether on appeal to the Board reinstatement of an officer should be an essential or appropriate remedy in all the particular circumstances.

Charter Report

Chief Commissioner's want of confidence dismissal powers – Remedy of compensation on appeal – No right to reinstatement – No issues of Charter compatibility

The Police Association's submission raises numerous issues about the fairness of proposed provisions for the dismissal of police officers and the limited remedies in the event that the Police Appeals Board makes findings adverse to the Commissioner. Whether or not these claims are correct, *they raise no issues with respect to the Charter.*

The Committee notes that the Charter does not contain any relevant rights to employment or to a remedy in the event of an unfair dismissal. In particular, the Charter's discrimination rights are limited to defined attributes and those attributes do not include employment as a police officer. There is no Charter right for police officers (or anyone else) to be treated fairly in relation to their dismissal. However the Committee observes that the Chief Commissioner is a public authority under the Charter and therefore is obliged to act compatibly with other rights that might arise in public employment, such as the right against race discrimination.

The Committee has concluded that the *submissions do not raise any issues of Charter incompatibility.*

The Committee makes no further comment.

Professional Standards and Legal Profession Acts Amendment Bill 2008

Introduced	28 October 2008
Second Reading Speech	29 October 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the -

- *Professional Standards Act 2003* to facilitate a national framework for the mutual recognition of professional standards schemes (PS schemes) approved under nationally consistent professional standards legislation of each State and Territory so as to allow members of occupational associations who are covered by a PS scheme in another State or Territory, to practise under that scheme if that scheme is authorised for operation in Victoria.

Note: Victoria enacted the Professional Standards Act 2003 as part of the national tort law reforms with the specific objectives of improving professional service standards and limiting the occupational liability of professionals in certain circumstances. This was aimed at helping stabilise professional indemnity insurance premiums for service providers. In return for conferring a benefit of capped liability for members of participating professional associations, the legislation also protects consumer interests through requirements for members to hold satisfactory levels of insurance, implement risk management strategies and to establish complaints and disciplinary procedures.

- *Legal Profession Act 2004* to clarify that, at the time of notifying a practitioner of a complaint, the Legal Services Commissioner is not required to give a practitioner an opportunity to make a submission as to whether to treat a complaint as a disciplinary complaint, civil complaint or both; and to clarify that the Commissioner is not required to give a complainant or practitioner an opportunity to make a submission before exercising his/her powers to summarily dismiss a complaint.

*Note: The Committee notes that the amendments will only apply to complaints lodged after the commencement of the amendments and does not affect the decision made by the Supreme Court in the case of *Byrne v. Marles & Anor.**

The Committee makes no further comment.

Public Administration Amendment Bill 2008

Introduced	28 October 2008
Second Reading Speech	29 October 2008
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Portfolio responsibility	Premier

Purpose

The Bill amends the

- *Public Administration Act 2004* in relation to employer powers including; emergency redeployment powers; employee mobility; employee misconduct; employee probationary periods; and the powers of the Public Sector Standards Commissioner.
- *Ombudsman Act 1973* to clarify that the Ombudsman has jurisdiction under the Act to investigate administrative actions of the Office of Police Integrity (the OPI) and the Director, Police Integrity and of members of the police force in the course of a secondment to that Office. The Special Investigations Monitor has jurisdiction to investigate complaints about the OPI's use of coercive powers.
- *Project Development and Construction Management Act 1994* to create the Secretary to the Department of Innovation, Industry and Regional Development as a body corporate; to abolish the body corporate named Secretary to the Department of Transport; to provide for the transfer of certain matters from the Secretary to the Department of Transport body corporate to the Secretary to the Department of Innovation, Industry and Regional Development body corporate;

Content and Committee comment

[Clauses]

Public Administration Act 2004

[14]. *Employer powers in emergency circumstances* – Inserts a new Part 7A to provide special powers to public sector employers for use in emergency situations. The new provisions permit the Premier to declare that an emergency situation exists for a specified period, which can be revoked or extended. The employer may change the duties of employees, require employees to perform work for another public sector body, perform their duties at a different location, and to not attend for duty.

The employer powers do not authorise the imposition of conditions of employment that are less favourable than applied previous to the making of the declaration. When declaring the emergency situation, the Premier will be required to consult specified persons, and such a declaration will not be able to be extended beyond six months without the agreement of Parliament.

The Committee makes no further comment.

State Taxation Acts Further Amendment Bill 2008

Introduced	28 October 2008
Second Reading Speech	29 October 2008
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Minister for Finance

Purpose

The Bill amends the –

Duties Act 2000 to —

- *clarify duty on sub-sales of land;*
- *clarify the duty exemption for transfers to and from trustees and nominees;*
- *lower the age for eligibility for the equity release program exemption;*
- *provide for the registration of approved agents for the purposes of Part 4 of Chapter 10 of that Act and Part 6 of the Livestock Disease Control Act 1994.*

First Home Owner Grant Act 2000 to —

- *provide for the administration of the First Home Owners Boost;*
- *enable the Commissioner to vary or reverse a decision in relation to an application in certain circumstances despite 5 years having passed since the decision was made;*
- *clarify that applicants may object to the imposition of penalties imposed under that Act;*
- *strengthen the protection of confidential information under that Act.*

Livestock Disease Control Act 1994 to —

- *substitute references to the Stamps Act 1958 with references to the Duties Act 2000;*
- *repeal the requirement to affix duty stamps;*
- *clarify requirements in relation to statements and invoices;*
- *enable infringement notices to be issued in relation to certain offences.*

Taxation Administration Act 1997 to permit the disclosure of information to the Business Licensing Authority, the Roads Corporations and the Secretary to the Department of Primary Industries.

Content and Committee comment

[Clauses]

[2]. Division 1 of Part 3 (clauses 14 to 16 amending the *First Home Owner Grant Act 2000*) are deemed to have commenced on 14 October 2008 the date of the announcement of the First Home Owners Boost policy.

Retrospective application of laws

The Committee notes the retrospective application of these amendments. The Committee accepts that there are occasions where deemed retrospective commencement is acceptable including, as in this instance, provisions that provide a financial benefit to persons.

Section 11(3) of Division 3 of Part 2, and Division 3 of Part 4 come into operation on a day or days to be proclaimed.

Note: In respect to commencement by proclamation – From the explanatory memorandum – *This is because they relate to swine duty sections in the Livestock Disease Control Act 1994 which have not yet been proclaimed and have no default commencement date. When the Stamps Act 1958 was repealed by the Duties Act 2000, provisions for the imposition of swine duty were retained on the assumption that, when the relevant provisions in the Livestock Disease Control Act 1994 were proclaimed, collection of swine duty could immediately continue again.*

The Committee makes no further comment.

Ministerial Correspondence

Building Amendment Bill 2008

The Bill was introduced into the Legislative Assembly on 25 June 2008 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 28 July 2008 and made the following comments in Alert Digest No. 9 of 2008 tabled in the Parliament on 29 July 2008.

Committee's Comments

The Committee notes the delayed commencement and observes that no reasons are given in any of the explanatory material for the reasons for such a delay.

The Committee will seek further advice from the Minister for the need to delay commencement by more than one year.

The Committee once again draws attention to Practice Note No. 1 of 2005 concerning indefinite or delayed commencement of Acts.

Minister's response

Thank you for your letter seeking my advice in respect of matters raised by the Scrutiny of Acts and Regulations Committee of Parliament and included in the Committee's Alert Digest No. 9 of 2008.

*I understand the Committee's concern to ensure that forced commencement provisions comply with Practice Note No 1 of 2005, to ensure that they do not constitute an inappropriate delegation of legislative power within the meaning of section 17(a)(vi) of the **Parliamentary Committees Act 2003**.*

The forced commencement period provided in the Building Amendment Bill 2008 was calculated on the basis of likely passage and Royal Assent to provide for a forced commencement period of within 12 months.

The Bill was passed by the Legislative Assembly on 31 July 2008 and by the Legislative Council on 21 August 2008, and received Royal Assent on 26 August 2008.

This full 12 month period will provide sufficient time for regulations to be made to support the implementation of the provisions.

I trust this addresses the concerns of the Committee and thank you for drawing the matter to my attention.

JUSTIN MADDEN MLC
Minister for Planning

20 October 2008

The Committee thanks the Minister for this response.

Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008

The Bill was introduced into the Legislative Assembly on 9 September 2008 by the Hon. Richard Wynne MLA. The Committee considered the Bill on 6 October 2008 and made the following comments in Alert Digest No. 12 of 2008 tabled in the Parliament on 7 October 2008.

Committee's Comments

Charter Report

Presumption of innocence – Charged councillors can be required to take a leave of absence until the proceedings are determined – Requirement to have regard to the nature and circumstances of the charge

The Committee notes that clause 11(3), amending existing s. 29 of the Local Government Act 1989, provides for VCAT to order a Councillor who is charged with certain offences to take a leave of absence until the proceedings in respect of the charge are finally determined. New section 29(5) requires VCAT to 'have regard to the nature and circumstances of the charge.' The Committee considers that clause 11(3) may engage the Charter right of charged councillors to be presumed innocent until proven guilty.

The Statement of Compatibility remarks:

VCAT provides Victorians with access to a civil justice system, whose role and jurisdiction is separate to that of the criminal jurisdictions of courts and other tribunals. VCAT's power to make orders and impose civil liability under clause.. 11... is intended to address local governance issues and ensure that elected councillors undertake their public duty in accordance with community expectations. It does not in any way interfere with or prejudice an individual's right to be presumed innocent... by the Victorian criminal justice system.

The Committee reiterates its view that the Charter right to be presumed innocent may apply outside the context of criminal proceedings, especially in proceedings (such as the 'leave of absence' determination) that are both triggered by and require the consideration of a criminal charge.

The Committee is concerned that new section 29(5) requires VCAT to 'have regard to the nature and circumstances of the charge'. This may be read as permitting VCAT to decide on the basis of the fact of the charge, rather than on any evidence that relevantly shows that the councillor may have committed a relevant offence. The Committee considers that a Councillor's right to be presumed innocent may be infringed if VCAT's decision is made on the basis of the charge, rather than any evidence properly before it that shows that the Councillor may have committed a relevant offence.

The Committee will write to the Minister seeking further information about whether or not VCAT could make its decision to order a Councillor to go on leave only on the basis of the charge against the Councillor, rather than to any evidence properly before the tribunal that shows that the Councillor may have committed a relevant offence. Pending the Minister's response, the Committee draws attention to clause 11(3) and its compatibility with Charter s. 25(1).

Minister's response

I refer to the Parliament of Victoria, Scrutiny of Acts and Regulations Committee's ('the Committee') letter of 7 October 2008 and its comments in Alert Digest No. 12 of 2008 regarding clause 11(3) of the Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008 ('the Bill').

I confirm that the intention of clause 11(3) of the Bill is that where a councillor is charged with a certain offence referred to under the Local Government Act 1989, the Victorian Civil and Administrative Tribunal ('VCAT') may order a councillor to take leave of absence from the office of councillor with full remuneration until the proceedings in respect of the charge are determined, on the basis of the charge alone. VCAT must have regard to the nature and circumstances of the charge but is not required to have regard to any evidence before the Tribunal that shows the councillor may have committed the offence.

As stated in the Statement of Compatibility, clause 11(3) does not in any way interfere with or prejudice an individual's right to be presumed innocent under the Charter. The Charter right to be presumed innocent protects a person in the context of a criminal trial and does not apply outside the context of criminal proceedings (Sabet v Medical Practitioners Board of Victoria [2008] VSC 347 [146]). VCAT's power to make orders and impose civil liability under clause 11(3) will not involve criminal proceedings and is independent of the criminal process, and, therefore, does not engage the right. I note that even if the concept of criminal proceedings were given a broad construction, so as to include procedural matters prior to or after a criminal trial, such as a pre-trial detention hearing, which are all stages of the criminal process, that would not be broad enough to include disciplinary proceedings, such as a VCAT 'leave of absence' determination, in which no finding of guilt is to be made (Sabet [176]).

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

RICHARD WYNNE MP
Minister for Local Government

29 October 2008

The Committee thanks the Minister for this response.

Further Comments

Presumption of innocence – Whether limited to criminal proceedings – Where meaning of a Charter right is not settled – Need for statement of compatibility to address compatibility issues arising from differing interpretations of a Charter right

11. Disqualifications

(3) After section 29(3) of the Principal Act insert—

"(4) If a Councillor is charged with an offence referred to in subsection (2), the Secretary may apply to VCAT for an order requiring the Councillor to take leave of absence from the office of Councillor until the proceedings in respect of the charge are finally determined.

The Committee notes the Minister's remark that clause 11(3) will permit VCAT to order a councillor charged with a criminal offence to take a leave of absence 'on the basis of the charge alone'. The Committee repeats its view that, while the Charter permits interim executive action on the basis of evidence relating to a charge, taking such action merely on the basis of a charge alone may limit a councillor's Charter right to be presumed innocent until proved guilty.

The Minister cites a recent Supreme Court decision concerning a disciplinary board's decision to suspend a doctor facing criminal charges for the proposition that the right to be presumed innocent 'does not apply outside the context of criminal proceedings'.⁵ However, while the judge in that decision discussed whether or not the presumption of innocence applies outside of criminal proceedings, she expressly declined to reach any

⁵ Citing *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 347, [146].

conclusion on that issue.⁶ Instead, her only finding was that the particular act of the disciplinary board did not limit the presumption of innocence.⁷ Her reasoning on that latter point expressly focused on how the board's reasoning was based on the evidence before it, rather than the mere fact of the laying of a criminal charge.⁸

The Committee considers that, where a relevant threshold legal question about the applicability of the Charter has been raised but not settled before the courts, it is important that Parliament be fully informed about the compatibility issues that could arise if the issue is resolved differently to the view taken by the government.

The Committee will write to the Minister seeking further information as to the following questions:

- ***If a court holds that Charter s. 25(1) is applicable in disciplinary proceedings, would clause 11(3) limit the Charter's right to be presumed innocent?***
- ***If so, would clause 11(3) be a reasonable limit on the right of councillors to be presumed innocent of criminal charges under proved guilty according to the test set out in Charter s. 7(2)?***

Pending the Minister's response, the Committee draws attention to clause 11(3).

⁶ Ibid [177]-[178]

⁷ Ibid [185]

⁸ Ibid [183] cf [100]

Prostitution Control and Other Matters Amendment Bill 2008

The Bill was introduced into the Legislative Assembly on 7 October 2008 by the Hon. Tony Robinson MLA. The Committee considered the Bill on 27 October and made the following comments in Alert Digest No. 13 of 2008 tabled in the Parliament on 28 October 2008.

Committee's Comments

Delayed commencement – Inappropriate delegation of legislative power

The Committee refers to its Practice Note No. 1 concerning delayed commencement provisions exceeding one year from introduction in the Parliament. In such circumstances the Committee will seek to ensure that Parliament has sufficient information to determine whether a delay in commencement is justified. The Committee will seek further information from the Minister.

Minister's response

Thank you for your facsimile communication dated 28 October 2008, in which you request advice in relation to delayed commencement of certain provisions of the Prostitution Control and Other Matters Amendment Bill 2008.

I note that the Scrutiny of Acts and Regulations Committee's (SARC's) Practice Note 1 provides that "where the commencement is more than 12 months from Royal Assent the Committee expects that Parliament will be informed as to the reasons why it is desirable or necessary to employ such commencement provisions".

The Bill sets the default commencement date for sections 6, 7(1), 7(2) and 8 at 1 January 2010, if not proclaimed before then.

In nominating a default date for the commencement of provisions of a Bill it is necessary to take account of what further steps must be undertaken following the passage of the Bill before the relevant provisions can come into operation. This includes the preparation of any necessary regulations, the preparation and conduct of an education campaign, and any further necessary research that may accompany these. The need to ensure that sufficient time is available for the completion of these activities must be balanced with the need to ensure that legislative power is not inappropriately delegated.

This is further complicated by the uncertainty of the progress of a Bill through the Parliament, which is affected by the direction of debate and other Parliamentary business, making the final date of the Royal Assent uncertain.

The relevant sections of the Bill introduce an offence for licensees who fail to exercise effective control over their businesses. There are a number of requirements on licensees to meet the effective control standard. Licensees will need time to prepare to comply with the provisions before they come into operation, and the Business Licensing Authority (BLA) and Consumer Affairs Victoria (CAV) will need time to develop guidelines for compliance, and consult with industry on these. In addition, the Bill makes provision for consideration of matters prescribed in regulations, which (if found to be necessary) will be made prior to commencement of the relevant sections.

The likely date of Royal Assent of the Bill under consideration is either December 2008, or if the Bill is not passed until early 2009, February or March 2009. A default commencement date of 1 January 2010 for sections 6, 7(1), 7(2) and 8 thus appears to adhere to the spirit of the Practice Note as well as can be reasonably achieved.

Thank you for raising this matter with me.

Yours sincerely

TONY ROBINSON MP
Minister for Consumer Affairs

7 November 2008

The Committee thanks the Minister for this response.

Committee Room
10 November 2008

Extracts from the Proceedings

The Minutes of the Committee show that the following Divisions took place during consideration of **Alert Digest No. 14 of 2008** on Monday 10 November 2008.

Assisted Reproductive Treatment Bill 2008
Prohibition of Human Cloning for Reproduction Bill 2008
Research Involving Human Embryos Bill 2008

Motion—That the Committee proceed to hold public hearings in respect to the *Assisted Reproductive Treatment Bill 2008*.

Moved Mrs Inga Peulich MLC
Seconded Mr Ryan Smith MLA

The Committee divided.

Ayes, 2	Noes, 6
Mrs Inga Peulich MLC	Mr Carlo Carli MLA
Mr Ryan Smith MLA	Mr Colin Brooks MLA
	Mr Khalil Eideh MLC
	Mr Ken Jasper MLA
	Mr Telmo Languiller MLA
	Ms Jaala Pulford MLC

And so it passed in the negative.

Motion— That the Committee adopt the report on the *Assisted Reproductive Treatment Bill 2008*, the *Prohibition of Human Cloning for Reproduction Bill 2008* and the *Research Involving Human Embryos Bill 2008* and the report stand part of Alert Digest No.14 of 2008.

Moved Ms Jaala Pulford MLC
Seconded Mr Colin Brooks MLA

The Committee divided.

Ayes, 6	Noes, 2
Ms Jaala Pulford MLC	Mrs Inga Peulich MLC
Mr Carlo Carli MLA	Mr Ryan Smith MLA
Mr Colin Brooks MLA	
Mr Khalil Eideh MLC	
Mr Ken Jasper MLA	
Mr Telmo Languiller MLA	

And so it passed in the positive.

Alert Digest No. 14 of 2008

Motion—That the Committee adopt the Alert Digest No. 14 of 2008 as amended.

Moved Ms Jaala Pulford MLC
Seconded Mr Khalil Eideh MLC

The Committee divided.

Ayes, 6	Noes, 2
Ms Jaala Pulford MLC	Mrs Inga Peulich MLC
Mr Carlo Carli MLA	Mr Ryan Smith MLA
Mr Colin Brooks MLA	
Mr Khalil Eideh MLC	
Mr Ken Jasper MLA	
Mr Telmo Languiller MLA	

And so it passed in the positive.

Appendix 1

Index of Bills in 2008

Alert Digest Nos.

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Animals Legislation Amendment (Animal Care) Bill 2007	3, 4
Appropriation (2008/2009) Bill 2008	6
Appropriation (Parliament 2008/2009) Bill 2008	6
Assisted Reproductive Treatment Bill 2008	12, 14
Building Amendment Bill 2008	9, 14
Cancer Amendment (HPV) Bill 2008	5
Children's Legislation Amendment Bill 2008	5, 7
Compensation and Superannuation Legislation Amendment Bill 2008	
Constitution Amendment (Judicial Pensions) Bill 2007	1, 6
Consumer Credit (Victoria) and Other Acts Amendment Bill 2007	1
Co-operatives and Private Security Acts Amendment Bill 2008	4
Corrections Amendment Bill 2008	10, 12
County Court Amendment (Koori Court) Bill 2008	10, 12
Courts Legislation Amendment (Associate Judges) Bill 2008	3, 6
Courts Legislation Amendment (Costs Court and Other Matters) Bill 2008	11
Courts Legislation Amendment (Juries and Other Matters) Bill 2008	7
Crimes Amendment (Child Homicide) Bill 2007	1, 4
Crimes (Controlled Operations) Amendment Bill 2008	7
Crimes Legislation Amendment (Food and Drink Spiking) Bill 2008	14
Criminal Procedure Legislation Amendment Bill 2007	1, 2, 6
Crown Land (Reserves) Amendment (Carlton Gardens) Bill 2008	2
Dangerous Goods Amendment (Transport) Bill 2008	12, 13
Drugs, Poisons and Controlled Substances Amendment Bill 2008	3, 4
Drugs, Poisons and Controlled Substances (Volatile Substances) (Repeal) Bill 2008	6
Education and Training Reform Amendment Bill 2008	4, 5
Energy and Resources Legislation Amendment Bill 2008	5
Energy Legislation Amendment (Retail Competition and Other Matters) Bill 2008	12
Environment Protection Amendment (Landfill Levies) Bill 2008	4
Essential Services Commission Amendment Bill 2008	4, 5
Evidence Bill 2008	9, 11
Family Violence Protection Bill 2008	9, 11
Gambling Regulation Amendment (Licensing) Bill 2008	5, 8
Greenhouse Gas Geological Sequestration Bill 2008	12
Health Professions Registration Amendment Bill 2008	12
Health Services Legislation Amendment Bill 2008	14
Heritage Amendment Bill 2008	9
Infringements and Other Acts Amendment Bill 2007	1
Justice Legislation Amendment Bill 2008	5, 6
Justice Legislation Amendment (Sex Offences Procedure) Bill 2008	4, 5
Labour and Industry (Repeal) Bill 2008	10, 13
Land (Revocation of Reservations) Bill 2008	4
Land (Revocation of Reservations) (Convention Centre Land) Bill 2008	8
Legislation Reform (Repeals No. 2) Bill 2007	1
Legislation Reform (Repeals No. 3) Bill 2008	5
Liquor Control Reform Amendment Bill 2007	1
Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008	12, 14

Local Government Amendment (Disclosure) Bill 2008	10
Local Government Amendment (Elections) Bill 2008	8
Medical Research Institutes Repeal Bill 2008	11
Medical Treatment (Physician Assisted Dying) Bill 2008	8
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Multicultural Victoria Amendment Bill 2008	14
National Gas (Victoria) Bill 2008	6, 9
National Parks and Crown Land (Reserves) Acts Amendment Bill 2008	8
Police Integrity Bill 2008	4, 5
Police, Major Crime and Whistleblowers Legislation Amendment Bill 2008	12, 13
Police Regulation Amendment Bill 2008	13, 14
Port Services Amendment (Disposal of Material) Bill 2008	8
Port Services Amendment (Public Disclosure) Bill 2008	2
Professional Boxing and Combat Sports Amendment Bill 2007	1
Professional Standards and Legal Profession Acts Amendment Bill 2008	14
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Public Holidays Amendment Bill 2008	9
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Road Safety Amendment (Fatigue Management) Bill 2008	10
Stalking Intervention Orders Bill 2008	12
State Taxation Acts Amendment Bill 2008	6
State Taxation Acts Further Amendment Bill 2008	14
Summary Offences Amendment (Tattooing and Body Piercing) Bill 2008	8
Superannuation Legislation Amendment Bill 2008	8
The Uniting Church in Australia Amendment Bill 2008	5
Tobacco (Control of Tobacco Effects on Minors) Bill 2007	8
Unclaimed Money Bill 2008	7
Victoria Law Foundation Bill 2008	9
Victorian Energy Efficiency Target Bill 2007	1
Victorian Water Substitution Target Bill 2007	5
Whistleblowers Protection Amendment Bill 2008	10
Wildlife Amendment (Marine Mammals) Bill 2008	7
Working with Children Amendment Bill 2007	3, 4

Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Abortion Law Reform Bill 2008	11
Constitution Amendment (Judicial Pensions) Bill 2007	1
Family Violence Protection Bill 2008	9

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

Relationships Bill 2007	1
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(iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000

Corrections Amendment Bill 2008	
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(vi) inappropriately delegates legislative power

Essential Service Commission Amendmnet Bill 2008	4
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(vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

National Gas (Victoria) Bill 2008	6
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(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities.

Abortion Law Reform Bill 2008	11
Children's Legislation Amendment Bill 2008	5
Constitution Amendment (Judicial Pensions) Bill 2007	1
Corrections Amendment Bill 2008	10
Crimes Amendment (Child Homicide) Bill 2007	1
Drugs, Poisons and Controlled Substances Amendment Bill 2008	3
Education and Training Reform Amendment Bill 2008	4
Family Violence Protection Bill 2008	9
Gambling Regulation Amendment (Licensing) Bill 2008	5
Justice Legislation Amendment Bill 2008	5
Justice Legislation Amendment (Sex Offenders Procedure) Bill 2008	4
Labour and Industry (Repeal) Bill 2008	10
Local Government Amendment (Councillor Conduct and Other matters) Bill 2008	12
Police Integrity Bill 2008	4

Scrutiny of Acts and Regulations Committee

Police, Major Crimes and Whistleblowers Legislation Amendment Bill 2008	12
Primary Industries Legislation Amendment Bill 2008	13
Relationships Bill 2007	1
Superannuation Legislation Amendment Bill 2008	8

Section 17(b)

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

Major Crime (Investigative Powers) and Other Acts Amendment Bill 2008	13
Police Integrity Bill 2008	4
Police, Major Crimes and Whistleblowers Legislation Amendment Bill 2008	12
Stalking Intervention Orders Bill 2008	12

Appendix 3

Ministerial Correspondence

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

Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Working with Children Amendment Bill 2007	Attorney-General	19.09.07	19.03.08	12 of 2007	4 of 2008
Emergency Services Legislation Amendment Bill 2007	Police and Emergency Services	09.10.07	29.01.08	13 of 2007	1 of 2008
Animals Legislation Amendment (Animal Care) Bill 2007	Agriculture	31.10.07	12.12.07	14 of 2007	4 of 2008
Liquor Control Reform Amendment Bill 2007	Consumer Affairs	21.11.07	04.12.07	15 of 2007	1 of 2008
Police Regulation Amendment Bill 2007	Police and Emergency Services	21.11.07	06.12.07	15 of 2007	1 of 2008
Victorian Energy Efficiency Target Bill 2007	Energy and Resources	21.11.07	04.12.07	15 of 2007	1 of 2008
Criminal Procedure Legislation Amendment Bill 2007	Attorney-General	04.12.07	30.01.08	16 of 2007	1 of 2008
Crimes Amendment (Child Homicide) Bill 2007	Attorney-General	05.02.08	25.02.08	1 of 2008	4 of 2008
Constitution Amendment (Judicial Pensions) Bill 2007	Attorney-General	05.02.08	21.05.08	1 of 2008	6 of 2008
Professional Boxing and Combat Sports Amendment Bill 2007	Sport, Recreation and Youth Affairs	05.02.08		1 of 2008	
Relationships Bill 2007	Attorney-General	05.02.08	03.03.08	1 of 2008	3 of 2008
Criminal Procedure Legislation Amendment Bill 2007	Attorney-General	28.02.08	07.05.08	2 of 2008	6 of 2008
Port Services Amendment (Public Disclosure) Bill 2008	Hon. David Davis MLC	28.02.08		2 of 2008	

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Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Courts Legislation Amendment (Associate Judges) Bill 2008	Attorney-General	11.03.08	13.05.08	3 of 2008	6 of 2008
Drugs, Poisons and Controlled Substances Amendment Bill 2008	Health	12.03.08	03.04.08	3 of 2008	4 of 2008
Education and Training Reform Amendment Bill 2008	Education	08.04.08	16.04.08	4 of 2008	5 of 2008
Essential Services Commission (Amendment) Bill 2007	Finance	08.04.08	17.04.08	4 of 2008	5 of 2008
Justice Legislation Amendment (Sex Offenders Procedure) Bill 2008	Attorney-General	08.04.08	21.04.08	4 of 2008	5 of 2008
Police Integrity Bill 2008	Police & Emergency Services	08.04.08	18.04.08	4 of 2008	5 of 2008
Children's Legislation Amendment Bill 2008	Children & Early Childhood Development	07.05.08	28.05.08	5 of 2008	7 of 2008
Gambling Regulation Amendment (Licensing) Bill 2008	Gambling	07.05.08	11.06.08	5 of 2008	8 of 2008
Justice Legislation Amendment Bill 2008	Corrections	07.05.08	23.05.08	5 of 2008	6 of 2008
National Gas (Victoria) Bill 2008	Energy & Resources	30.05.08	24.06.08	6 of 2008	9 of 2008
Public Health and Wellbeing Bill 2008	Health	24.06.08	17.07.08	6 of 2008	9 of 2008
Building Amendment Bill 2008	Planning	30.07.08	20.10.08	9 of 2008	14 of 2008
Evidence Bill 2008	Attorney-General	30.07.08	13.08.08	9 of 2008	11 of 2008
Family Violence Protection Bill 2008	Attorney-General	30.07.08	21.08.08	9 of 2008	11 of 2008
Corrections Amendment Bill 2008	Corrections	19.08.08	08.09.08	10 of 2008	12 of 2008
County Court Amendment (Koori Court) Bill 2008	Attorney-General	19.08.08	08.09.08	10 of 2008	12 of 2008
Labour and Industry (Repeal) Bill 2008	Industrial Relations	19.08.08	06.10.08	10 of 2008	13 of 2008
Abortion Law Reform Bill 2008	Women's Affairs	09.09.08	07.10.08	11 of 2008	13 of 2008
Dangerous Goods Amendment (Transport) Bill 2008	Finance	07.10.08	15.10.08	12 of 2008	13 of 2008
Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008	Local Government	07.10.08	29.10.08	12 of 2008	14 of 2008
Police, Major Crime and Whistleblowers Legislation Amendment Bill 2008	Police and Emergency Services	07.10.08	14.10.08	12 of 2008	13 of 2008

Prohibition of Human Cloning for Reproduction Bill 2008	Health	07.10.08	20.10.08	12 of 2008	13 of 2008
Research Involving Human Embryos Bill 2008	Health	07.10.08	20.10.08	12 of 2008	13 of 2008
Coroners Bill 2008	Attorney-General	28.10.08		14 of 2008	
Gambling Legislation Amendment (Responsible Gambling and Other Measures) Bill 2008	Gaming	28.10.08		14 of 2008	
Primary Industries Legislation Amendment Bill 2008	Agriculture	28.10.08		14 of 2008	
Prostitution Control and Other Matters Amendment Bill 2008	Consumer Affairs	28.10.08	07.11.08	13 of 2008	14 of 2008
Sheriff Bill 2008	Attorney-General	28.10.08		14 of 2008	

Scrutiny of Acts and Regulations Alert Digest 14 of 2008

Minority Report on Artificial Reproductive Treatment Bill 2008

Inga Peulich MLC South Eastern Metropolitan Region

I am submitting this minority report tabled as part of the Alert Digest. My minority report is in relation to the Scrutiny of Acts and Regulation Committee's decision to not hold public hearings for the inquiry the committee agreed to conduct into Assisted Reproductive Treatment Bill 2008, Prohibition of Human Cloning for Reproduction Bill 2008 and Research Involving Human Embryos Bill 2008.

This was indeed disappointing given that The Scrutiny of Acts and Regulation Committee took a decision to call for submissions by the placing of an advertisement in a daily newspaper. The decision to call for submissions was one taken very reluctantly by the Government -dominated committee and at the insistence of majority of non- government members, public hearings were agreed to, setting aside two days for public hearings with the organisational details left until the closure of submissions.

SARC received 21 submissions, some quite detailed, within a short space of time indicating a strong level of interest especially among organisations who will now not be able to give verbal evidence. Those who made written submissions include:

Ad Hoc Faith Committee, Australian Christian Lobby, Australian Family Association, Donor Conception Support Groups Aust. Inc, Family Voice Australia, Institute of Judaism & Civilisation Inc and Liberty Victoria.

Notwithstanding the controversy and deep sentiment expressed on both sides of the debate surrounding the Assisted Reproductive Treatment legislation in particular, and the numerous failed attempts to move amendments in the Assembly by MPs on both sides of the house during the debate in the Legislative Assembly, as well as specific concerns raised by numerous individuals and organisations about the rights of children and duties of society in raising children being impacted upon by provisions of the Assisted Reproductive Treatment Bill 2008, SARC then voted against the holding of public hearings on the grounds that the submissions raised:

"...no substantive issue in respect to common law rights and freedoms or issues of Charter incompatibility." (SARC Minutes 10 November, 2008)

The following is an extract from the draft minutes of the meeting including the motion and the committee vote on the motion.

"That the Committee proceed to hold public hearings for the Assisted Reproduction Treatment Bill 2008." Moved by Mrs Inga Peulich MLC; Seconded Mr Ryan Smith MLA

The motion was put and defeated with the voting as follows:

Ayes, 2	Noes, 6
Mrs Inga Peulich MLC	Mr Carlo Carli MLA
Mr Ryan Smith MLA	Mr Colin Brooks MLA

Mr Khalil Eideh MLC

Mr Ken Jasper MLA

Mr Telmo Languiller MLA

Ms Jaala Pulford MLC

The narrow interpretation of the role of SARC is one that clearly suits the Victorian Government and Government MPs who, earlier this year, had gone to significant lengths to gag the committee and prevent it exercising its proper role of scrutiny (see the Minority report on the Office of Police Integrity Bill 2008 tabled June 2008).

This interpretation, enforced by a Government majority on the committee, means that when required, the government can be protected from politically inconvenient or damaging scrutiny or criticisms especially on contentious legislation. This occurred in the deliberation of the Police Integrity legislation, the recent abortion legislation (for which the Minister did not prepare a compatibility statement adopting the absurd interpretation of the Charter of Human Rights and Responsibilities Act 2006 that it was not necessary to do so because the abortion legislation was a bill and not an ACT) , and now the ART Bill.

Notwithstanding the convenience for staff and government alike, it is also regrettable that most public hearings are now conveniently ensconced in 55 St Andrews Place, well away from the glare of public attention or usual parliament house activity.

The problems of fulfilling the scrutiny role have, from time to time, been compounded by the inaccurate advice provided to the committee, with the cumulative effect of all of these measures being to water down, and in some cases, shut down scrutiny for the government. This is despite an annual budget of nearly \$ 500,000 being set aside for the functioning of this committee.

Apart from the frustration arising from the management of the committee and its processes, there are significant grounds of concern in relation to the functioning of SARC and the limits imposed on its role, which I believe are neither intended nor justified.

-
- The most frequent justification given by the Chairman, Mr Carlo Carli MLA, Government MPs and Executive Officer of the committee for limiting scrutiny of legislation through SARC is that the SARC's terms of reference prevent broader scrutiny, arguing that if legislation does not engage the Government's Human Rights Charter of Responsibility, the committee was prevented from exercising a broader scrutiny role.

-
- **2. This is clearly not the case given the broad nature of the actual terms of reference which includes SARC's functions which are set out in section 17 of the Parliamentary Committees Act 2003 which provides as follows:**

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** –

- (1) trespasses unduly upon rights or freedoms; (i)

- Specifically in relation to this inquiry, I am also aware that significant discourse existed in relation to the exclusion of the International Covenant on Civil and Political Rights (to which Australia is a signatory) from the Government's Charter of Human Rights and Responsibilities Act 2006.
-

It is my view that the consideration by SARC of the Assisted Reproductive Treatment Bill 2008 would have been more comprehensive and thorough if public hearings were held and the intersect of the ART Bill with the ICCPR to which Australia is a signatory were considered along with other rights and issues .

- *Public hearings would have also given an opportunity for witnesses to focus the committee's attention on the "The Best Interests of the Child" principle as set out in the United Nations Convention on the Rights of the Child (CRC), adopted in 1989 and ratified by Australia in December 1990 which, in my view should have been considered in the scrutiny of this legislation.*

The principle of the best interests of the child is one of the fundamental principles of the CRC underpinning the interpretation of all children's rights and freedoms. This is the central concern of article 3.1 which states:

" In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child

Article 3.1 clearly covers decision-making by all three arms of government: legislative, administrative and judicial and therefore is clearly within SARC's terms of reference.

Furthermore, the CRC establishes minimum standards. Where Australian domestic law sets a higher standard it must not be diluted (article 41). If, for example, the best interests of the child are the paramount consideration when the CRC only requires primary consideration, the higher standard must be retained.

The High Court has imposed an obligation to consider human rights in cases of discretionary administrative decision-making. In *Ah Hin Teoh* the majority held that, although the CRC has not been implemented in Australian law, its ratification by Australia had given rise to a legitimate expectation that decision-makers would take its provisions into account. Where legislation permits a discretion, that discretion should be exercised in conformity with Australia's international treaty obligations.

It is also now accepted 'that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law' and that 'an international convention may play a part in the development by the courts of the common law' (Mason CJ and Deane J in *Ah Hin Teoh*).

- The narrow view of SARC's role advocated by the Government -dominated is also contrary to the view of Mr Julian Burnside, Liberty Victoria, who on a previous occasion, gave evidence to SARC and argued that SARC deliberations should not shy away from policy deliberations.
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- A view consistent with Mr Burnside's position on the role of SARC was also presented at a highly respected bi-annual Scrutiny of Acts and Regulation Conference, held in New Zealand last year. This conference was attended by Victorian SARC Committee Members as well as the Executive Officer.
-

Conclusion

Notwithstanding that the Charter of Human Rights and Responsibilities Act 2006 is relatively new legislation and a new ingredient added to the deliberations of SARC and the Parliament of Victoria, the scrutiny exercised now seems to be a pale imitation of previous Scrutiny Committees of the Victorian Parliament which have, in the past, been respected for their vigour.

I see the decision not to proceed with the public hearings as a political act intended to close down this area of inquiry and deliberation and to deny significant groups with the opportunity to give evidence which could better inform parliamentary debate and development of legislation.

This, I assume, is not in the political interest of the government which has been prepared to sacrifice the integrity of its own Charter of Human Rights and Responsibilities Act 2006 when it suits the government's legislative or political agenda.

Selective application of the Charter of Human Rights and Responsibilities Act 2006 - the Government's and Government Committee members preparedness to cling to the charter to drive legislative reform but disregard when it does not suit does place into question the value of the charter, the expensive resourcing of the charter implementation across all portfolios and the work of the SARC committee under the Brumby Labor Government.

Inga Peulich MLC

Member, Scrutiny of Acts and Regulations

11 November, 2009