

No. 15 of 2008

Tuesday, 2 December 2008

On the

Assisted Reproductive Treatment
Bill 2008

Coroners Bill 2008

Gambling Legislation Amendment
(Responsible Gambling and Other
Measures) Bill 2008

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

Major Crime Legislation Amendment
Bill 2008

Primary Industries Legislation Amendment
Bill 2008

Professional Boxing and Combat Sports
Amendment Bill 2007

Relationships Amendment (Caring
Relationships) Bill 2008

Sheriff 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 –

Major Crime Legislation Amendment Bill 2008
Relationships Amendment (Caring Relationships) Bill 2008

The Committee notes the following correspondence –

Assisted Reproductive Treatment Bill 2008
Coroners Bill 2008
Gambling Legislation Amendment (Responsible Gambling and Other Measures) Bill 2008
Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008
Primary Industries Legislation Amendment Bill 2008
Professional Boxing and Combat Sports Amendment Bill 2007
Sheriff 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. 15 of 2008

Major Crime Legislation Amendment Bill 2008

Introduced	11 November 2008
Second Reading Speech	12 November 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Major Crime (Investigative Powers) Act 2004* (the 'Act') to –

1. Extend the definition of 'organised crime offence' to ensure that serious and organised crime involving the abuse of children and paedophilia networks are captured as relevant offences for the purpose of the coercive questioning powers under the Act. (*Refer to the Charter Report below*).

Note: 'organised crime' as amended (underlined) by the Bill is to be defined as an indictable offence against a law of Victoria punishable by level 5 imprisonment (10 years or more) that (a) involves 2 or more offenders; and (b) involves substantial planning and organisation; and (c) forms part of systemic and continuing criminal activity; and (d) has a purpose of obtaining profit, gain, power or influence or of sexual gratification where the victim is a child.

2. Establish new procedures for the court to follow in hearing an application for the revocation of a coercive powers order. The procedures are based upon those found in the *Police Integrity Act 2008* for the determination of objections by protected persons, such as the Director, Police Integrity, to a subpoena issued during the course of criminal proceedings for the production of documents or other things that have come into the possession of protected persons in the performance of functions under that Act.

Where a person makes an application to the Court the amendments prescribe procedures within which the Court may determine the matter, by way of confidential affidavit, in a closed court, or at a hearing in the absence of one or more of the parties. The Court may also appoint a special counsel to represent the interests of an absent party. (*Refer to the Charter Report below*).

3. Require the Court or the Chief Examiner to give a notice causing the confidentiality notice (confidentiality of a witness summons and orders) to cease effect where the basis upon which the original confidentiality notice was given no longer applies and provide for confidentiality notices to cease effect after five years but to also allow the Chief Examiner and the Chief Commissioner to apply to the Supreme Court for an extension of the five-year period if an extension is necessary to protect a continuing investigation, any proceedings that have commenced but are not yet finalised, the safety or reputation of a person or the fair trial of a person.
4. Clarifies that the Chief Commissioner, the Chief Examiner and a witness whose interests are affected by a direction of the Chief Examiner restricting publication or communication of evidence or other information the opportunity to make submissions to a court when the court is considering whether or not to release the restricted evidence or other information to a defendant in criminal proceedings or to that person's legal representative.

5. Clarify that, for the purposes of the Act, 'police station' means any police premises where a counter inquiry service for the public is provided.

Note: *Section 30(2) provides that for the purposes of the Chief Examiner coercive powers prescribed under the Act an examination in relation to an organised crime offence must not be conducted at a police gaol.*

6. Give the Supreme and County courts jurisdiction to determine any dispute regarding legal professional privilege that arises during an examination hearing. In accordance with the recommendation of the Special Investigations Monitor (the 'SIM') the Magistrates' Court will no longer determine these matters.
7. Provide a new definition of 'member of police personnel' to include public servants employed by the Chief Commissioner and contractors engaged by the Chief Commissioner, to clarify that such persons may provide assistance to the Chief Examiner's office and are also subject to the confidentiality provisions under the Act.

Note: *In respect to the amendments made by this Bill to the Act section 62 of the Act required the SIM to report to the Parliament within three years after of the commencement of the Act on the need for the Act and the adequacy of the performance of the Chief Examiner, Examiners and members of the police force of functions and powers under the Act.*

Surveillance Devices Act 1999

8. The Bill amends the Act to clarify that civilians can provide assistance or technical expertise to the law enforcement officer who is primarily responsible for a surveillance devices warrant.

Casino Control Act 1991 and the Racing Act 1958

9. The Bill amends both these Acts to establish a process that the court can apply where a person challenges an order made by the Chief Commissioner excluding that person from attending or remaining at the casino or a racecourse. The process is similar to the legislative scheme applying in respect to the amendments made to the Major Crimes Act (see paragraph 2 above).

Content and Committee comment

[Clauses]

Commencement more than 12 months after introduction

[2]. Part 2 of the Bill, regarding amendments to the *Major Crime (Investigative Powers) Act 2004*, will commence on proclamation but not later than by 1 February 2010.

Note: *From the explanatory memorandum – The default commencement date of 1 February 2010 is provided to ensure that there is a sufficient amount of time available for the implementation of the new provisions of the Major Crime (Investigative Powers) Act 2004. The period will be less than 12 months from the date that the Bill receives Royal Assent.*

Extension of definition of 'organised crime'

[3]. Inserts two new definitions into the Act and amends the existing definition of organised crime offence.

The definition of organised crime offence in the Act is amended to make it clear that an indictable offence that is punishable by level 5 (10 years maximum) imprisonment or more

and that has a purpose of obtaining sexual gratification where the victim is a child is an organised crime offence. (Refer to the Charter Report below).

Note: *Such an offence must satisfy other existing criteria in the definition, which are, the offence must involve 2 or more offenders, involve substantial planning and organisation and must form part of systemic and continuing criminal activity. The purpose of obtaining sexual gratification where the victim is a child is in addition to the other available purposes in the definition—of obtaining profit, gain, power or influence.*

Revocation procedure for coercive powers and exclusion orders

[4, 14 and 15]. Make provision for a process and procedure for the revocation of coercive powers under the *Major Crime (Investigative Powers) Act 2004* and in relation to applications for a review of exclusion orders under the *Casino Control Act 1991* and the *Racing Act 1958*. (Refer to the Charter Report below).

Charter report

Keywords – Adequacy of statement of compatibility – Extension of scope of coercive powers scheme – Organised crime offence involving sexual gratification where the victim is a child.

Summary: *The Statement of Compatibility does not address clause 3(2), which extends an existing scheme that engages Charter rights. The Committee will write to the Minister about the statement of compatibility. It draws attention to clause 3(2).*

The Committee notes that clause 3(2), amending s. 3 of the Major Crime (Investigative Powers) Act 2004, extends the definition of ‘organised crime offence’ to include offences that have the purpose ‘of sexual gratification where the victim is a child’. The Second Reading Speech remarks:

This bill inserts an additional element into the final limb of the definition to ensure that serious and organised crime involving the abuse of children and paedophilia networks is captured for the purpose of the coercive questioning powers. This will be achieved by expanding the purposes for the offending to include sexual gratification where the victim is a child. The amendment is necessary as organised crime groups involved in child abuse and pornography are not necessarily motivated by profit, gain, power or influence.

The Committee is concerned that the Statement of Compatibility does not address the compatibility or otherwise of clause 3(2)’s extension of the coercive powers scheme with human rights. In its Alert Digest No 9 of 2004, the Committee identified numerous concerns about the (then) Bill creating the scheme under its ‘trespasses unduly on rights and freedoms’ term of reference. Some of these concerns, notably those relating to privacy and self-incrimination, obviously also engage rights under the Charter, e.g. Charter ss. 13(a), 24 and 25(2)(k). Indeed, the compatibility of aspects of the existing scheme with the Charter is currently being litigated in the Supreme Court.¹

The Committee considers that when anything more than a technical extension is made to an existing scheme that engages human rights, Charter s. 28 requires that the Statement of Compatibility include an explanation of the compatibility or otherwise of the scheme (in its extended form) with human rights. The Committee feels that clause 3(2)’s extension of a significant, unusual and coercive scheme, enacted before the commencement of the Charter, to a new category of criminal offence is an especially important instance of this principle.

¹ See *Special Investigations Monitor Annual Report 2007-2008*, [5.4.4.2], noting that ‘His Honour Justice Bongiorno raised the possible conflict between s. 25(2)(k) of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) and s. 39 of the MCIP Act’ and that ‘Important issues are involved which are yet to be determined by the Supreme Court.’

The Committee will therefore write to the Minister expressing its concern about the statement of compatibility. Pending the Minister's response, the Committee draws attention to clause 3(2).

Keywords – Fair hearing – Proceedings for revoking or reviewing certain orders – Proceedings may be determined on the basis of information that is not revealed to the applicant – Whether reasonable limit

Summary: Clauses 4, 14 and 15 allow a court to determine some proceedings on the basis of evidence that is kept secret from one party and his or her lawyers. In some instances, this may result in the matter being determined without a fair hearing. The Statement of Compatibility does not address why less intrusive schemes aren't available. The Committee refers the question of possible Charter incompatibility to Parliament.

The Committee notes that clauses 4², 14³ and 15⁴, providing for the revocation or review of certain orders in the Supreme Court, contain procedures that apply when the Chief Commissioner 'objects to the disclosure or production of protected information at the hearing of the application'. Of the four options available to the Supreme Court in such a circumstance, three of them involve the Supreme Court potentially determining the proceedings on the basis of information that is not revealed to the applicant or his or her legal representative, either because 'a confidential affidavit... is not disclosed to one or more of the parties or any representative of those parties' or because the application is determined 'at a hearing held without notice to, and without the presence of, one or more of the parties, or any representative of those parties'.

Clauses 4, 14 and 15 go considerably further than the provisions of the *Police Integrity Act 2008* on which they are based. Under the *Police Integrity Act 2008*, information that a court determines cannot be disclosed to a litigant is excluded from the proceedings altogether. By contrast, **under clauses 4, 14 and 15, such evidence is considered by the court in the revocation or review proceedings, and may even be determinative of those proceedings, even though the applicant doesn't know what the evidence is and has had no opportunity to respond to it.**

The Committee therefore considers that clauses 4, 14 and 15 may limit such applicants' Charter right to have civil proceedings determined after a fair hearing.⁵ To the extent that they hinder the effective review of orders made against applicants, they may also engage Charter rights affected by those orders, such as the many rights limited by coercive powers orders made under the *Major Crimes (Investigative Powers) Act 2004*. The Committee observes that clause 4 was not recommended by the Special Investigations Monitor in his report on the coercive powers regime.⁶

The Committee considers that the compatibility of clauses 4, 14 and 15 with the Charter may depend on whether or not they satisfy the test for limiting rights set out in Charter s, 7(2).⁷

² Substituting s12 and inserting new sections 12A-12C into the *Major Crime (Investigative Powers) Act 2004*, applicable to procedures for the revocation of coercive powers orders.

³ Inserting new sections 74A-74B into the *Casino Control Act 1991*, governing the review of exclusion orders.

⁴ Inserting new sections 35E-35F into the *Racing Act 1958*, governing reviews of exclusion orders.

⁵ Charter s. 24(1)

⁶ *Report by the Special Investigations Monitor Pursuant to s. 62 of the Major Crime (Investigative Powers) Act 2004*, [25.4]

⁷ Charter s. 7(2) states: '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 limitation; and (d) the relationship between

The Statement of Compatibility remarks:

[T]he court would only determine the application without notice to and without the presence of certain parties if it was in the public interest to do so.... [T]he interests of parties seeking the revocation of orders will be protected by the appointment of a special counsel to represent the interests of a party to the proceeding at the hearing, where the court decides to proceed by way of a hearing held without notice to and without the present of a party, which provides an additional safeguard.

The Committee is concerned that, in some cases, the information at issue may be both too sensitive to reveal to the applicant and too crucial to consider fairly without the applicant's personal input. The special counsel procedure cannot always resolve this problem, because counsel is barred from taking instructions from the applicant once the information is disclosed. In such circumstances, **the provisions may require the court to resolve the matter without a fair hearing.** Last year, the House of Lords held that a similar regime would be incompatible with the right to a fair hearing, unless the court had additional powers, on fairness grounds alone, to either disclose the information to the applicant or to resolve the matter in the applicant's favour.⁸

The Statement of Compatibility also remarks:

There are no less restrictive means to reasonably achieve the purpose of protecting confidential intelligence information.

The Committee notes the following regimes from other jurisdictions:

- The *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth), which governs all federal matters (including the making of control orders in relation to suspected terrorist acts) provides for *ex parte* procedures for the redaction or summarising of protected documents. However, substantive proceedings are determined solely on the basis of information that is released to all the parties.⁹
- Canada's Security Intelligence Review Committee, which first developed the special counsel procedure in the context of deportation proceedings, requires the special counsel to negotiate a statement of the 'gist' of the evidence contained in the confidential document, which is immediately handed to the excluded party and his or her lawyer to facilitate vigorous advocacy about the protected evidence.¹⁰
- The *Prevention of Terrorism Act 2005* (UK) requires the court to consider requiring the state to provide a summary of the protected information to the subject of the order and, in the event the summary isn't provided, to withdraw the protected information from its consideration.¹¹ As interpreted by the House of Lords, the legislation also empowers the courts to either disclose any information or to quash the control order if doing so is necessary to protect that party's right to a fair hearing.¹²

The Committee observes **that the statement of compatibility does not address why these alternatives are not reasonable available in relation to proceedings for revoking or reviewing coercion or exclusion orders.**

the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.'

⁸ *Secretary of State for the Home Department (Respondent) v. MB* [2007] UKHL 46, [72]

⁹ s38L.

¹⁰ *Charkaoui v. Canada* [2007] 1 S.C.R. 350, [73]

¹¹ Schedule, clauses 4(3) & 4(4).

¹² *Secretary of State for the Home Department (Respondent) v. MB* [2007] UKHL 46, [72]

The Committee will write to the Attorney-General seeking further information as to whether the Commonwealth, Canadian or United Kingdom schemes would reasonably achieve the purpose of protecting confidential intelligence information.

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

- 1. Whether or not clauses 4, 14 and 15, by permitting a court to determine certain proceedings on the basis of evidence that is kept secret from one party and his or her lawyers, may limit that party's Charter rights to a fair hearing and to other rights at stake in the proceeding.***
- 2. If so, whether or not clauses 4, 14 and 15 are reasonable limits on the applicant's Charter rights under the test in Charter s. 7(2) and, in particular, whether or not there are less restrictive means reasonably available to achieve the purpose of protecting confidential intelligence information.***

The Committee makes no further comment.

Relationships Amendment (Caring Relationships) Bill 2008

Introduced	11 November 2008
Second Reading Speech	12 November 2008
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Relationships Act 2008* (the 'Act') to provide for the registration of caring relationships on the Relationships Register (the Register) established under the Act and provides for the adjustment of property interests between partners who are in, or have been in, a registered caring relationship and further provides for rights to maintenance of partners who are in, or have been in, a registered caring relationship (see definition at clause 3 below).

Background

1. The Act establishes a Register for the registration of domestic relationships in Victoria and provides a single location for statutory requirements governing property matters in the event of a breakdown of a domestic relationship whether registered or not.
2. The purpose of the Register is to allow people to register one relationship, their primary relationship, which will be recognised as such for the purposes of Victorian law. Registration of a caring relationship will provide conclusive proof of the relationship where caring relationships are recognised under Victorian law.
3. Caring partners may be related by family, must be over 18 years of age, must both be domiciled or ordinarily resident in Victoria, and must not be married, already in a registered relationship or in another relationship that could be registered in Victoria.
4. The partners in the caring relationship may provide each other with personal or financial support of a domestic nature but not on a commercial for fee or profit basis.
5. Unlike registered domestic relationships caring partners applying for registration must seek prior independent legal advice concerning the legal consequences of registration.
6. As with domestic relationships the Bill allows partners in registered caring relationships that have broken down to apply to a court for the adjustment of interests in the property of the relationship and for maintenance, and permits partners in a caring relationship to enter into relationship agreements.
7. For the purposes of the property and maintenance jurisdiction under the Act only partners who have registered their caring relationship will be captured by the Act.
8. The rights and obligation covered by caring relationship registration under the Act will not give entitlements to reversionary pensions under superannuation and judicial pension schemes.
9. The Bill also makes consequential amendments to a number of Acts to clarify that those Acts, while applying to partners in domestic relationships, do not apply to partners in caring relationships.

Note: By clause 8 of the Bill a registrable caring relationship means a relationship, (other than a registered relationship), between two adults who are not a couple or married to each other and who may be related. It is a relationship where one or each of the partners provides personal or financial commitment and support of a domestic nature for the material benefit of the other. Partners in a registrable caring relationship do not necessarily have to be living together. However, a registrable caring relationship does not include a relationship in which a person simply provides domestic support and personal care to the other person for fee or reward, such as on a commercial or for profit basis. The amended Act will therefore contain two separate definitions that of a registrable domestic relationship and for 'registrable caring relationship'.

Charter report

Marital status discrimination – Married or partnered people caring for a third party cannot register that caring relationship – Whether less favourable treatment – Whether reasonable

Summary: Under clause 9(2), only single people may register a caring relationship. The clause may treat married and partnered people less favourably than single people. This possible limitation of the Charter's equality rights does not appear to have been demonstrably justified. The Committee will write to the Attorney-General about the statement of compatibility. The question of possible Charter incompatibility is referred to Parliament.

The Committee notes that clause 9(2), amending s. 6, provides that caring relationships can only be registered if they satisfy the existing registration requirements, including that each person is:

- 'not married or in a registered relationship'; and
- 'not in another relationship that could be registered', e.g. in a domestic relationship with someone else (other than someone who is married, in a registered relationship or domiciled outside of Victoria)

In short, **only single people can register a caring relationship**. The Committee therefore considers that clause 9(2) engages the Charter's equality rights, by denying legal benefits on the basis of 'marital status'.¹³

The Statement of Compatibility remarks:

Preventing married people and people in domestic relationships from registering a caring relationship... does not amount to less favourable treatment when compared to a person who is not married or in a domestic relationship being able to register a caring relationship. Marriage itself confers benefits, as does recognition as a domestic partner and, in most cases, spouses and domestic partners are treated equally across the statute book. The bill otherwise allows for the recognition of registered caring relationships in Victorian legislation where there has previously been on recognition.

Whilst the Committee recognises that the bill is beneficial, it is nevertheless concerned that **clause 9(2) may treat married or partnered people less favourably than single people**. For example, a middle-aged person may provide significant care for a disabled friend. If both are single, they will be able to register that relationship, allowing easy proof of that relationship and access to the property adjustment regime in Part 3 of the *Relationships Act 2008*. However, if the one happens to be married (e.g. to a long-term spouse with dementia who is living in a nursing home) or has an intimate relationship with a neighbour, then they will both be denied these legal benefits in respect of their caring relationship.

¹³ Charter s. 8 and *Equal Opportunity Act 1995*, s. 6(e). 'Marital status' is defined as marital status means a person's status of being - (a) single; (b) married; (c) a domestic partner; (d) married but living separately and apart from his or her spouse; (e) divorced; (f) widowed'.

The Committee therefore considers that clause 9(2) may limit the Charter's right to 'equal enjoyment of human rights' and to 'equal protection of the law without discrimination' on the basis of marital status.¹⁴

The Statement of Compatibility also remarks:

The requirements are reasonable given the purpose of the registration scheme is to allow people to register their primary relationship, which will be recognised as such for the purposes of Victorian laws. The registration scheme provides certainty about who the law applies to and it would become unworkable if someone could register numerous relationships.

The Committee observes that the purpose of allowing only allowing the registration of a 'primary' relationship appears merely to re-state the scheme's exclusion of married and partnered people. The statement that a broader scheme would be unworkable is not explained. The Committee therefore considers that **the statement of compatibility does not appear to provide a demonstrable justification for any limitation on the Charter's equality rights**, according to the test in Charter s. 7(2).¹⁵

In its *Practice Note No. 2*, the Committee wrote that it 'will write to Ministers where, in the Committee's opinion, a Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right.' ***The Committee will write to the Attorney-General expressing its concern about the Statement of Compatibility.***

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

- 1. Whether or not clause 9(2), by preventing the registration of caring relationships when either caring partner is married or in a domestic relationship, limits the right of both partners to equal protection of the law without discrimination on the basis of marital status.***
- 2. If so, whether or not clause 9(2) is a demonstrably justified limit on the Charter's equality rights according to the test set out in Charter s. 7(2).***

The Committee makes no further comment.

¹⁴ Charter ss. 8(2) & 8(3). In relation to Charter s. 8(2), the Statement of Compatibility remarks that the property management scheme in Part 3 of the Act afford the property right in Charter s. 20 to members of registered caring relationships.

¹⁵ Charter s. 7(2) states: '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 limitation; 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.'

Ministerial Correspondence

Assisted Reproductive Treatment Bill 2008

The Bill was introduced into the Legislative Assembly on 9 September 2008 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 6 October 2008.

Committee's Comments

The Committee considered this Bill at its meeting on 6 October 2008 and within its terms of reference reported on the delayed commencement provisions provided in clause 2.

The Committee adopted the one year rule in Practice Note No. 1 of 2006. The Practice Note seeks to ensure that where a delay in commencement of greater than one year from introduction is proposed that Parliament is fully aware of why such a provision is necessary. By comparison the Senate Scrutiny of Bills Committee comments adversely on delays greater than 6 months.

Minister's Response

Thank you for your letter of 7 October 2008 in relation to the delayed commencement provisions of the Assisted Reproductive Treatment Bill 2008 (ART Bill).

Clause 2 of the ART Bill provides that the majority of the Bill will come into operation by proclamation, with a forced commencement date of 1 January 2010.

However, the intention is to proclaim the ART Act by 1 July 2009, pending satisfactory resolution of any implementation requirements. If it is possible to achieve this, this Bill will commence within the one year period specified in Practice Note 1 produced by SARC.

I note that the Minister for Health has written to you in relation to the commencement provisions of the Prohibition of Human Cloning for Reproduction Bill 2008 and the Research Involving Human Embryos Bill 2008.

I trust that this letter addresses the Committee's concerns.

ROB HULLS MP
Attorney-General

21 November 2008

The Committee thanks the Attorney-General for this response

The Committee notes that it has not yet received a response in relation to its other query relating to the compatibility of clause 45 of the Bill (on the publication of personal views about surrogacy) with the Charter's right to freedom of expression.

Coroners 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 2008 and made the following comments in Alert Digest No. 13 of 2008 tabled in the Parliament on 28 October 2008.

Committee's Comments

Charter Report

Partial exemption from Charter – Obligation to act compatibly with and give proper consideration to human rights – Extent of exemption – Whether exceptional circumstances

The Committee notes that clause 129 and item 5 of Schedule 2, amending s. 3 of the Charter includes the Coroners Court within the Charter's definition of 'court'. This has the effect of exempting the Coroners Court from the Charter's definition of 'public authority' when it is not acting in an administrative capacity, and thus from the Charter requirement that it act compatibly with and give proper consideration to human rights.

The Statement of Compatibility remarks:

When acting in an administrative capacity, the Coroners Court will be a public authority and will be bound by section 38 of the Charter. Further, statutory provisions and discretions in the bill will need to be interpreted, where possible, compatibly with the human rights set out in the Charter.

The Committee observes that coroners are presently bound by Charter s. 38 in all of their capacities and that interpretation of statutory discretions under Charter s. 32 will not necessarily produce the same requirement.

The Committee considers that the Charter's general protections should not be removed except in exceptional circumstances. The exemption of other courts and tribunals from Charter s. 38 in their non-administrative capacities has the purpose of avoiding constitutional problems arising from Australia's unified common law and preventing the Charter from affecting private disputes. However, these purposes do not appear to be served by exempting the Coroners Court, which neither develops the common law nor adjudicates private disputes. The Committee is also concerned that the meaning of 'administrative capacity' may be unclear in the context of an inquisitorial court.

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

- 1. What capacities of the Coroners Court are non-administrative?***
- 2. What exceptional circumstances exist for exempting the Coroners Court in those capacities from the Charter's obligation to act compatibly with and give proper consideration to human rights?***

Pending the Minister's response, the Committee draws attention to clause 129 and item 5 of Schedule 2.

Rights of criminal defendants – Trial and punishment for contempt – Adoption of any procedure that the coroner sees fit

The Committee notes that clause 103 provides that the Coroners Court may find a person guilty of contempt and may commit an offender to prison or impose a fine. Clause 103(4) provides that, once a coroner has informed a defendant of a charge, the coroner 'may adopt any procedure that the coroner thinks fit'.

The Committee is concerned that the procedures adopted by the coroner for trying and sentencing contempt under clause 103(4) may fall short of Charter rights of criminal defendants. The Supreme Court recently held that an identical provision permits VCAT to commit people charged with contempt to prison in their absence. By contrast, the Magistrates' Court is not permitted to impose any custodial sentence in the absence of the defendant.

The Committee will write to the Minister seeking further information as to whether the Coroners Court can adopt procedures under clause 103(4) that fall short of the Charter rights of criminal defendants. Pending the Minister's response, the Committee draws attention to clause 103(4).

Minister's response

Thank you for your letter dated 28 October 2008 regarding the Coroners Bill 2008.

Your letter referred to a Charter Report in Alert Digest number 13 of 2008 and sought my response regarding the following issues:

- 1. What capacities of the Coroners Court are non-administrative?*
- 2. What exceptional circumstances exist for exempting the Coroners Court in those capacities from the Charter's obligation to act compatibly with and give proper consideration to human rights?*
- 3. Whether the Coroners Court can adopt procedures under clause 103(4) that fall short of the human rights for criminal defendants that are in the Charter of Human Rights and Responsibilities.*

Non-administrative capacities of the Coroners Court

Although most of the functions of the Coroners Court would be administrative, some of the Court's powers would be judicial, such as:

- A decision regarding the release of a body (see clauses 47 & 48); and*
- A decision regarding contempt of court (see clause 103).*

Defining the Coroners Court as a "Court" for the purposes of the Charter

As noted above, when exercising the majority of its powers, the Coroners Court will be acting in an administrative capacity and will therefore be bound as a public authority by the obligation in section 38 of the Charter.

In the circumstances where the Coroners Court is acting in a non-administrative capacity, it will be bound by section 32 of the Charter to interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. For example, as discussed below, when exercising the power in clause 103(4) of the Bill, the Court will be bound by the interpretive obligation in section 32 of the Charter.

Accordingly, the amendment to the Charter to include the Coroners Court in the definition of 'court' is entirely consistent with the provisions of the Charter. Therefore, the question of what exceptional circumstances exist to justify the amendment does not arise. Section 31 of the Charter provides that, in exceptional circumstances, the Parliament may make an 'override declaration' to expressly declare that a provision of an Act which is incompatible with the Charter has effect despite the Charter. The amendment to the definition of 'court' in the Charter is not incompatible with the human rights in the Charter or any other provision of the Charter. It is therefore unnecessary to consider whether there are exceptional circumstances for the purposes of an 'override declaration'.

Clause 103(4) of the Bill

The third question relates to the procedures that may be adopted by the Coroners Court under clause 103(4) of the Bill. Clause 103(4) provides:

“On the person being brought before the Coroners Court, the coroner must cause the person to be informed of the contempt with which he or she is charged and may adopt any procedure that the coroner thinks fit.”

This provision is subject to other provisions in the Bill, including the requirement that a coroner is bound by the rules of evidence and must be satisfied of a person’s guilt on proof beyond reasonable doubt.

The Alert refers to the Supreme Court case of Devine v Victorian Civil and Administrative Tribunal (2008) VSC 410. In that case, the plaintiffs contended that the VCAT decision “breached the plaintiffs’ right to a fair hearing under the Charter”. The Court found that the “Charter has no direct application in [the] case. The VCAT proceeding was commenced and concluded prior to the operative commencement date of Division 3 of Part 3 of the Charter.” That case did not address the implications of the Charter.

The words “any procedure that the coroner thinks fit” in clause 103(4) would be read in accordance with general legal principles of interpretation and would not be interpreted literally. For instance, the words would not empower the Court to adopt a procedure that was contrary to the requirements of procedural fairness. Since the Charter is in force, the words would also be interpreted in accordance with section 32(1) of the Charter, which provides:

“So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

Section 32(1) of the Charter applies to clause 103(4) of the Bill and the clause would be interpreted in a way that is compatible with human rights.

If the Committee requires clarification of any of the matters raised in the paper, please do not hesitate to contact my office or Stephen Lodge of the Courts and Tribunals Unit, Department of Justice (9603 9456).

ROB HULLS MP
Attorney-General

17 November 2008

The Committee thanks the Attorney-General for this response

Gambling Legislation Amendment (Responsible Gambling and Other Measures) 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 2008 and made the following comments in Alert Digest No. 13 of 2008 tabled in the Parliament on 28 October 2008.

Committee's Comments

[2]

Delayed commencement – Inappropriate delegation of legislative power

In respect to Parts 2 and 4 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 letter dated 28 October 2008 regarding the commencement date for some of the provisions in the Gambling Legislation Amendment (Responsible Gambling and Other Measures) Bill 2008 (Bill) that is currently before the Parliament.

As you will be aware, clause 2(3) of the Bill provides that Part 3 of the Bill comes into operation on the first anniversary of the day on which the Bill received Royal Assent. This delayed commencement date is provided to allow new regulations to be made in relation to the conduct of bingo, which will be required under the new provisions. The deferred commencement will also allow information to be provided to community and charitable organisations that conduct bingo about the new regulatory requirements.

Clause 2(4) of the Bill provides that if a provision of Part 2 or 4 does not come into operation before 1 January 2010, it comes into operation on that day.

This default commencement date is specified to provide some flexibility as to the commencement of the Parts 2 and 4 of the Bill, given that these provisions impose new obligations on certain gambling industry licensees and create new offences relating to minors. The delay in the commencement of these provisions will give industry time to adjust to its new legal obligations. I believe this to be reasonable in the circumstances.

In relation to your specific concern regarding the delayed commencement exceeding one year from introduction in the Parliament, the date of the 1 January 2010 was selected as it allows the new obligations to apply from the commencement of the new calendar year at the latest, which is a date that is easily understood and clear for industry.

Although this means the provisions may not commence until more than one year after introduction, the provisions are likely to be proclaimed to commence at an earlier date and, even if this were not the case, the provisions would commence at most within three months of one year after introduction. I also believe this to be reasonable in the circumstances.

I hope this provides you with the information you require.

HON TONY ROBINSON MP

Minister for Gaming

14 November 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 commented on the Bill in Alert Digest No. 12 of 2008 tabled in the Parliament on 7 October 2008. On 10 November the Committee considered the Minister's response and made the following subsequent comments in Alert Digest No. 14 of 2008.

Committee's Comments

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'. 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 conclusion on that issue. Instead, her only finding was that the particular act of the disciplinary board did not limit the presumption of innocence. 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.

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).

Minister's response

I refer to the Parliament of Victoria, Scrutiny of Acts and Regulations Committee's letter of 11 November 2008 and its comments in Alert Digest No. 14 of 2008 regarding section 11(3) of the Local Government Amendment (Councillor Conduct and Other Matters) Act 2008 ('the Act').

As previously advised, I am of the view that section 11(3) does not in any way interfere with the right to be presumed innocent.

VCAT provides for a civil justice system, and any order made under section 11(3) is made for the purpose of imposing a civil liability against a councillor charged with a criminal offence. VCAT does not make findings of guilt in respect of the charges, and therefore does not prejudice the role of the criminal justice system nor limit the councillor's right to be presumed innocent. It is the role of the criminal courts and not VCAT to consider the facts and evidence before it, and make a determination in respect of the charges. It is clear that the right does not apply in these circumstances. As such, it is therefore unnecessary to speculate about hypothetical future court decisions.

As previously noted, requiring a councillor to take a leave of absence until proceedings in respect of charges are determined, ensures that elected councillors undertake their public duty in accordance with the interests and expectations of the community. A councillor who is required to take leave of absence is entitled to receive their full allowance during the leave period, and the required leave of absence ceases if the charges are withdrawn or the councillor is not convicted of the offence.

RICHARD WYNNE MP
Minister for Local Government

27 November 2008

The Committee thanks the Minister for this response

Primary Industries Legislation Amendment Bill 2008

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

Committee's Comments

Charter report

Presumption of innocence – Arbitrary detention – Offence of possessing or selling a fish taken or dealt with illegally – Penalty of six months imprisonment – Defendant must prove lack of knowledge of the illegality and the reasonableness of that lack of knowledge – Whether reasonable limit – Adequacy of section heading

The Committee notes that clause 68 extends the offence of possessing or selling an illegally taken fish in s. 116 of the Fisheries Act 1995 to include the possession or sale or a fish 'otherwise dealt with' in contravention of any Australian law. This extension will make it is a criminal offence to possess or sell a fish that has ever been fished, farmed, stocked, possessed, transported, processed, sold or disposed of in breach of any Australian law. Once such possession has been established, the defendant can only avoid a conviction (and a possible sentence of six months imprisonment) if he or she can prove, on the balance of probabilities, that he or she neither knew nor ought to have known of the illegality. The Committee considers that clause 68 engages the Charter rights of criminal defendants to be presumed innocent and to be free from arbitrary detention.

The Statement of Compatibility remarks:

The burden of proof is imposed in respect of an affirmative defence only, and does not apply to essential elements of the offences. Further, before the defence could apply, the prosecution would have to establish that the accused has failed to comply with section 116. The facts which an accused would need to prove in order to avail himself or herself of the defence are peculiarly in the knowledge of the accused and would be difficult for the prosecution to prove.

The Committee observes that a person can 'fail to comply' with s. 116 merely by possessing a fish, even if the person knows nothing about how that fish was previously dealt with. So, the offence is considerably broader than the usual regulatory offences that typically attract reverse onus defences. In particular, it is not limited to people involved in the fishing industry but rather extends to ordinary end sellers and consumers (such as workers and shoppers at a supermarket). Such people may find establishing an affirmative defence (containing both objective and subjective elements and concerning a breach of any law in Australia in relation to anything ever done with the fish) to the civil standard confusing, distressing, difficult and expensive.

The Statement of Compatibility remarks:

Although an evidential onus would be less restrictive upon the right to be presumed innocent, it would not be as effective in achieving the purpose of ensuring the effectiveness of the regulatory scheme created by the Fisheries Act. Enabling an accused merely to point to or adduce sufficient evidence to raise the defence would undermine the effectiveness of the offences.

The Committee is concerned that people may be convicted of the offence and sentenced to prison despite evidence raising a reasonable doubt about whether or not they have any knowledge about the illegality affecting their fish. Such outcomes may not advance (or significantly advance) the effective regulation of fisheries or fish. The Committee also notes that the headings of the existing offence – 'Sale of fish taken in contravention of this Act or corresponding law' – and clause 68 do not adequately describe the scope of the offence, which extends to the possession of such fish. Overseas courts have held that adequate notification of laws is an essential precondition for any law that limits a human right. The

Committee considers that it should be made clear that mere possession of a fish, with no intention to sell, may expose the possessor to liability and imprisonment in the absence of an affirmative defence.

The Committee therefore considers that clause 68 may be incompatible with the Charter.

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

- 1. Whether or not clause 68, by requiring people who possess fish that anyone has dealt with illegally to prove that they didn't know of that illegality and that it was reasonable for them not to know (or face a conviction and possible imprisonment) limits their Charter rights to be presumed innocent and to not be arbitrarily detained?**
- 2. If so, whether or not clause 68 is a reasonable and demonstrably justified limit on their Charter rights according to the test in Charter s. 7(2)?**

The Committee will write to the Minister concerning the headings to clause 68 and s. 116 of the Fisheries Act 1995.

Minister's Response

I am writing to you in relation to concerns raised by the S.A.R.C in Alert Digest No 13 on the Primary Industries Legislation Amendment Bill 2008.

The questions posed by the Committee were in relation to clause 68 of the Bill. Clause 68 amends the current provision in section 116 of the Fisheries Act 1995 that makes it an offence to possess or sell fish that have been taken in contravention of the Fisheries Act 1995. Clause 68 extends the ambit of the provision to also apply where fish were 'otherwise dealt with' in contravention of the Act. This amendment will ensure that there is no loophole where, for example, fish were taken lawfully but then sold unlawfully. Section 116 currently provides that it is a defence in any proceedings for a person charged under this section to prove that it was reasonable for them not to know of the illegality. Thus there is an existing reverse onus of proof that limits the right to be presumed innocent.

The right to be presumed innocent is an important right. However, the courts have recognised, especially in a regulatory regime that it can be subject to limits. In this instance the legal burden imposed is necessary to ensure the effectiveness of the regulatory regime that protects important environmental resources.

The burden of proof is imposed in respect of an affirmative defence only and does not apply to essential elements of the offence. Further the illegality must first be proven.

Also, the facts which the accused would need to prove in order to avail himself or herself of the defence are peculiarly in the knowledge of the accused and would be difficult for the prosecution to prove.

The reasoning and justification for the limitation imposed by clause 68 is set out in the Statement of Compatibility that was tabled with the Bill and I refer the members again to the Statement.

I also point out that the Fisheries Act 1995, including s116 with its reverse onus of proof, was reviewed against the Charter of Human Rights in 2007 and found to be reasonable and justifiable.

I am confident that the above addresses the committee's questions in relation to the Bill. I thank the committee for its work and bringing these questions to my attention.

Joe Helper MP
Minister for Agriculture

(received 11 November 2008)

The Committee thanks the Minister for this response

Committee's further comments

The Committee notes that the response does not address the issue that the Committee wrote to the Minister about, which concerned the headings to clause 68 and existing s116 of the Fisheries Act 1995. In its Alert Digest no 13 of 2008, the Committee remarked:

that the headings of the existing offence – ‘Sale of fish taken in contravention of this Act or corresponding law’ – and clause 68 do not adequately describe the scope of the offence, which extends to the possession of such fish. Overseas courts have held that adequate notification of laws is an essential precondition for any law that limits a human right. The Committee considers that it should be made clear that mere possession of a fish, with no intention to sell, may expose the possessor to liability and imprisonment in the absence of an affirmative defence.

The Committee also expresses its surprise at the Minister's remark that existing s116 was found to be reasonable and justifiable when it was reviewed for Charter compatibility in 2007. The Committee reiterates its concern that exposing ordinary end sellers and consumers to a potential prison sentence merely for possessing a fish that someone else has handled illegally, unless they establish a complex defence in court, may go beyond what is necessary to achieve the purpose of protecting environmental resources. The Committee therefore considers that clause 68 may be incompatible with the Charter's right for criminal defendants to be presumed innocent until proven guilty.

The Committee will write to the Minister again concerning the headings to clause 68 and s. 116 of the Fisheries Act 1995, and also expressing its concern about these provisions' Charter compatibility. Pending the Minister's response, the Committee draws attention to clause 68.

Professional Boxing and Combat Sports Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 4 December 2007 by the Hon. James Merlino MLA. The Committee considered the Bill on 4 February 2008 and made the following comments in Alert Digest No. 1 of 2008 tabled in the Parliament on 5 February 2008.

Committee's Comments

Charter Report

Keywords: Reasonable limits on rights – Regulation of a sport – Discrimination on the basis of impairment or physical features – Medical treatment without consent – Privacy – 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'.

The Committee notes that the Bill's subject-matter relates to the regulation of a sport. The Committee observes that such legislation inevitably engages a variety of human rights, but that reasonable provisions will typically satisfy Charter s. 7(2), as well as internal limits on particular rights.

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

- *Discrimination on the basis of impairment or physical features (Charter s. 8(3)): provisions requiring the deregistration of registered professional contestants where a doctor reports that the contestant is unfit to engage in professional contests generally or the Professional Boxing and Combat Sports Board considers that it is against his or her interests to engage in professional contests (clause 13, substituting s. 10B into the Professional Boxing and Combat Sports Act 1985)*
- *Medical treatment without consent (Charter s. 10(c)): provisions giving the Professional Boxing and Combat Sports Board a discretion to deregister registered professional contestants who fail to present for a medical examination at various times (clause 13, substituting s. 10B of the Professional Boxing and Combat Sports Act 1985)*
- *Privacy (Charter s. 13(a)): provisions requiring medical practitioners to notify the Professional Boxing and Combat Sports Board about any professional contestant's unfitness to compete (clause 15, substituting s. 12 of the Professional Boxing and Combat Sports Act 1985).*

The Statement of Compatibility contends that the Charter's right against discrimination is either not limited or reasonably limited by the Bill, and that the Charter's rights against medical treatment without consent and to privacy are not limited by the Bill. 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. In particular, the Committee considers that clause 15, by replacing an existing criminal offence for failing to submit to a medical examination in the current s. 12(1) of the Professional Boxing and Combat Sports Act 1985 with a discretion to deregister a professional contestant in such circumstances, promotes the Charter's right to freedom from non-consensual medical treatment.

The Committee observes that the Statement of Compatibility does not identify by clause or section number any of the provisions it discusses. The Committee reiterates its view, stated in Alert Digest No. 14 of 2007, that –

'the absence of express references to clause or section numbers in relation to a complex Bill may render the statement of compatibility incapable of informed consideration by members of Parliament.'

The Committee draws attention to its Practice Note No. 2 concerning the content of Statements of Compatibility and the Committee's practice in reporting on them where the Committee considers that they are inadequate or inaccurate.

The Committee will raise these concerns with the Minister.

Minister's Response

I refer to your letter of 5 February 2008 regarding the Scrutiny of Acts and Regulations Committee's comments in respect of the Statement of Compatibility for the Professional Boxing and Combat Sports Amendment Bill 2007.

I apologise for the delay in responding. I have been advised, however, that the Committee's comments were noted by relevant departmental officers immediately following the receipt of your letter and have been taken into account in the preparation of Statements of Compatibility sine that time.

JAMES MERLINO MP

Minister for Sport, Recreation and Youth Affairs

30 October 2008

The Committee thanks the Minister for this response

Sheriff Bill 2008

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

Committee's Comments

[2]

Delayed commencement – Inappropriate delegation of legislative power

The Committee refers to its Practice Note No. 1 concerning delayed commencement provisions exceeding one year from their 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 Attorney-General.

Minister's Response

Thank you for your letter dated 28 October 2008 regarding your Committee's consideration of the Sheriff Bill 2008 (the Bill). You sought further advice on the need to delay commencement of the legislation for more than one year.

The Bill introduces a number of new and extended powers for the sheriff, as well as placing some existing powers in legislation for the first time. This will require additional training for sheriff's officers, and substantial changes to policy and procedures manuals. New legislatively mandated documents will also need to be created to support the practices of the sheriff. Further, computer systems may need to be updated to reflect the changes made by the Bill.

Accordingly, the commencement date has been chosen to allow adequate time for passage of the Bill through Parliament and for these updates to be completed. Depending upon passage through Parliament, it is hoped that most aspects of the Bill will commence prior to 1 January 2010.

I trust this information is of assistance.

ROB HULLS MP
Attorney-General

26 November 2008

The Committee thanks the Attorney-General for this response.

Committee Room
1 December 2008

Appendix 1

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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.

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

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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

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(vi) inappropriately delegates legislative power

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

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

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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
Major Crime Legislation Amendment Bill 2008	15

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Police Integrity Bill 2008	4
Police, Major Crimes and Whistleblowers Legislation Amendment Bill 2008	12
Primary Industries Legislation Amendment Bill 2008	13
Relationships Bill 2007	1
Relationships Amendment (Caring Relationships) Bill 2008	15
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	30.10.08	1 of 2008	15 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
Assisted Reproductive Treatment Bill 2008	Attorney-General	07.10.08	-	-	15 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

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.
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	17.11.08	13 of 2008	15 of 2008
Gambling Legislation Amendment (Responsible Gambling and Other Measures) Bill 2008	Gaming	28.10.08	14.11.08	13 of 2008	15 of 2008
Primary Industries Legislation Amendment Bill 2008	Agriculture	28.10.08	11.11.08	13 of 2008	15 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	26.11.08	13 of 2008	15 of 2008
Local Government Amendment (Councillor Conduct and Other Matters) Bill 2008	Local Government	11.11.08	27.11.08	14 of 2008	15 of 2008