No. 16 of 2007

Tuesday, 4 December 2007

On the

Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2007

Criminal Procedure Legislation Amendment Bill 2007

Equal Opportunity Amendment (Family Responsibilities) Bill 2007

Freedom of Information Amendment Bill 2007

Port Services Amendment Bill 2007

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Glossary

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

Useful provisions

Section 7 of the ***Charter*** provides –

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

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the imitation; and

(d) the relationship between the limitation and its purpose; and

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

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

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

Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –

  (i) trespasses unduly upon rights or freedoms;

  (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;

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

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

  (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;

  (vi) inappropriately delegates legislative power;

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

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

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –

  (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;

  (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;

  (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –

  (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or

  (ii) within 10 sitting days after the Act receives Royal Assent —

  whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;

(d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;

(e) the functions conferred on the Committee by the *Environment Protection Act 1970*;

(f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;

(fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;*

(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

The Committee has considered the following Bills –

Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2007
Criminal Procedure Legislation Amendment Bill 2007
Freedom of Information Amendment Bill 2007

The Committee notes the following correspondence –

Equal Opportunity Amendment (Family Responsibilities) Bill 2007
Port Services Amendment Bill 2007

Scrutiny of Acts and Regulations Committee

Role of the Committee

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

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

Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2007

Introduced	20 November 2007
Second Reading Speech	22 November 2007
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (the 'Act') to implement amendments consequential on the *Classification (Publications, Films and Computer Games) Amendment Act 2007 (Cth).*

Content and Committee comment

[Clauses]

[2]. Clauses 1 and 2(1) will come into operation on the day after Royal Assent. The remaining provisions will come into operation on a day or days to be proclaimed but not later than by 15 March 2008.

[13]. Provides for the automatic repeal of this amending Act on 15 March 2009.

Charter Report

Keywords: Freedom of expression – Enforcement of national classification scheme – Requirement for sellers, exhibitors, demonstrators and advertisers of classified items to impart classification information as determined by a Commonwealth Minister – Whether reasonable limit on right not to impart information

Charter s.15(2) provides people with a right to 'freedom of expression', including the right to 'impart information and ideas of all kinds' in any 'medium' they choose. Similar rights have been held by overseas courts to include a right not to impart information.

The Committee notes that the Bill changes how the national classification scheme is enforced in Victoria. The Committee observes that the scheme, which restricts or prevents the distribution or display of certain publications, films and computer games, engages the Charter's right to freedom of expression.

The Statement of Compatibility argues that the Bill does not limit freedom of expression as it consists of:

- substantive amendments that reduce 'classification obligations imposed on industry and distributors' (clauses 5, 6 & 7, inserting a new s.5A and amending ss.6 and 16 of the Act to exempt compilations and modifications from classification requirements); and

- technical amendments 'which do not impose further restrictions in relation to an individual's ability to access information' (clauses 4(2), 9, 11 & 12, amending ss.3, 62B, 78 & 82 of the Act to assign separate functions to the Director and Convenor of the Classification Board.)

The Committee agrees that these aspects of the Bill do not limit the Charter's right to freedom of expression.

However, the Committee observes that the Bill makes two substantive amendments that may alter Victorians' Charter rights not to impart information

- clause 4(1), amending s.3 of the Act, read in conjunction with the existing ss. 7, 17 and 35 of the Act and s.8A of the Commonwealth Act, requires exhibitors and sellers of classified films and sellers and demonstrators of classified computer games to display notices about classification to members of the public in a form approved by the relevant Commonwealth Minister (presently the Attorney-General.) This differs from the current requirement for approval by the Director of the Classification Board.
- clause 8, amending s.52 of the Act, read in conjunction with s.8 of the Commonwealth Act, bars advertisements for classified publications unless they contain classification markings determined by the relevant Commonwealth Minister. This differs from the current provision for determinations by the Director of the Classification Board.

The Committee considers that these changes may engage the Charter rights of exhibitors, sellers, demonstrators and advertisers of classified publications, films and computer games not to impart information (specifically notices and classification markings as determined by a Commonwealth Minister.)

The Committee also notes that Charter s.15(3) provides that freedom of expression, including the right not to impart information, may be reasonably limited for various purposes, including protecting others' rights and promoting public order and public morality. While the Committee feels that obligations to provide classification information to members of the public who may be exposed to classified material may serve these purposes, the Committee considers that whether or not clauses 4(1) & 8 may be considered reasonable limits may depend on what sellers, exhibitors, demonstrators and advertisers may be required to say. The Committee observes that the Commonwealth provisions do not place any restrictions on what the Minister may require in terms of the content or form of notices and classification markings. The Committee also observes that the relevant Minister's decisions will not be subject to review by the Victorian government or to the requirements of the Charter.

The Committee further notes that clauses 4(1) and 8 are consequential on changes to the Commonwealth legislation that transfer responsibility for determining classification markings from the Director to the relevant Minister. The Explanatory Memorandum to the Commonwealth's amendment bill argues that this transfer, which (with respect to classification markings) replaces determinations by notice in the Government Gazette with determinations by legislative instrument, 'ensures transparency of the law and its central location in the Federal Register of Legislative Instruments.' The Commonwealth amendments also provide that the Minister must consult with relevant state and territory ministers before making a determination about classification markings.

The Committee refers to Parliament for its consideration the question of whether or not clauses 4(1) & 8 are reasonable limits on the Charter rights of, sellers, exhibitors, demonstrators and advertisers of classified films, publications and computer games not to impart information (specifically notices and classification markings as determined by a Commonwealth Minister.)

The Committee makes no further comment.

Criminal Procedure Legislation Amendment Bill 2007

Introduced	20 November 2007
Second Reading Speech	22 November 2007
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends a number of related Acts. The purposes of the amendments are to —

- enable courts to give sentencing indications and to identify sentence discounts;
- abolish reserved pleas;
- amend the obligation to strike out a charge for a summary offence when the charge-sheet and summons have not been filed within time;
- amend the penalty for the common law offence of exposure;
- amend the summary offence of wilful damage;
- make other minor amendments.

Content and Committee comment

[Clauses]

[2]. Part 1 and clause 21(2) come into operation on the day after the day on Royal Assent.

Clause 21(1) is deemed to have come into operation on 23 April 2007.

> Note: In respect to the retrospective commencement of clause 21(1) the explanatory memorandum provides that – *This is the commencement date of section 606 and Schedule 4 (Transitional and saving provisions) of the Children, Youth and Families Act 2005. Clause 23 of Schedule 4 to that Act provides that a youth training centre existing immediately before the repeal of the Children and Young Persons Act 1989 is deemed to be established as a youth justice centre under the new Act. Clause 24 of Schedule 4 to the Children, Youth and Families Act 2005 provides that a reference in any other Act, or in any instrument made under any Act or in any other document of any kind, to a youth training centre must be read as a reference to a youth justice centre.*

The remaining provisions of the Bill come into operation on proclamation but not later than by 1 July 2008.

Discounted sentences for a plea of guilty [3 and4]

[3]. Inserts new section 6AAA in Part 2 of the *Sentencing Act 1991* imposing an obligation on a court to identify the amount of a sentence discount given for a guilty plea in respect of custodial sentencing orders, fines over 10 penalty units and aggregate fines over 20 penalty units.

The court will need to state the sentence and the non-parole period, if any, that it would have imposed for each individual offence or for the total effective sentence.

Other than specified sentences the court may identify the amount of any sentence discount given for any other sentencing order under the *Sentencing Act 1991*, for example a community based order, a fine of 10 penalty units or less or an aggregate fine of 20 penalty units or less. (*Refer to Charter Report at* [A]).

[4]. Inserts new section 362A in the *Children, Youth and Families Act 2005* imposing an obligation on the Children's Court to identify the amount of a sentence discount given for any sentence that includes detention such as a youth justice centre order.

The court will need to state the sentence that it would have imposed but for the guilty plea for each individual offence or, where the offender is sentenced to detention for more than one offence, the total or aggregate period of detention. (*Refer to Charter Report at* [A]).

Sentencing indication [5 and 7].

[5]. Inserts new section 50A in the *Magistrates' Court Act 1989* enabling the Court to give an indication of the type of sentence that will be imposed if the defendant pleads guilty at that time.

If the Court gives a sentence indication and the defendant pleads guilty to the charge at the first available opportunity after the indication, the Court is bound by the indication to the extent that a more severe type of sentence than that indicated must not be imposed. The Court may impose a less severe sentence than that indicated.

If the defendant does not plead guilty in response to the indication but instead chooses to proceed with a contested hearing, the contested hearing will be conducted before a different magistrate except where both parties consent to continue the hearing before the same magistrate.

A sentence indication may be provided at any time that the Court considers appropriate. These provisions also apply to indictable offences being heard and determined summarily.

The Court has unfettered discretion to refuse to provide a sentence indication.

Accordingly, if the material available to the Court is insufficient to provide an indication by which the Court is prepared to be bound, the Court may decline to provide a sentence indication.

A decision to give or not to give a sentence indication is final and conclusive and cannot be appealed. However, this does not limit the number of sentence indications that the Court may give.

The prosecution and defendant retain their rights to appeal against sentence.

An application for an indication, the sentence indication hearing and any sentence indication given may not be used as evidence against the defendant in any proceeding. (*Refer to Charter Report at* [A and B] *and to clause 6 below in respect to a section 85 of the Constitution Act 1975 statement and Committee report*).

[7]. Inserts new section 23A in *Crimes (Criminal Trials) Act 1999* to allow the County Court and the Supreme Court to provide a sentence indication as to whether the accused would or would not be likely to receive an immediately servable term of imprisonment, if the accused pleads guilty to the offence charged, or another specified offence.

This indication is narrower than that which the Magistrates' Court may give. The Magistrates' Court may give an indication as to the type of sentence.

A sentence indication may only be provided once (unless the Director of Public Prosecutions agrees otherwise), and may only be provided on application by the accused (or the legal representative of the accused) and with the consent of the Director of Public Prosecutions. There is no limit on how many times an accused may apply for a sentence indication.

The court has unfettered discretion to refuse to provide a sentence indication.

If the court gives a sentence indication that a sentence of imprisonment commencing immediately is unlikely and the accused pleads guilty at the first available opportunity thereafter, the indication

is binding on the court and the court must not impose a sentence of imprisonment that commences immediately. When an accused does plead guilty following a sentence indication, the court may depart from its indicated sentence to impose a lesser sentence than that which was indicated. That is, where a court gives a sentence indication that imprisonment is likely and the accused then pleads guilty, the court, after hearing the plea in full, does not have to impose imprisonment.

If the accused does not plead guilty at the first available opportunity after the sentence indication is given, a trial must be conducted before a different judge, unless the parties agree otherwise. An application for an indication, the sentence indication hearing and any sentence indication given may not be used as evidence against the accused in any proceeding.

A decision to give or not to give a sentence indication is final and conclusive. This means that a sentence indication or a refusal to give a sentence indication is not appellable or reviewable. This does not affect any right to appeal against sentence. The prosecution and accused retain their rights to appeal the sentence ultimately imposed.

There are no restrictions on the types of offences for which sentence indication can be made available.

This does not affect any right to appeal against sentence. The prosecution and accused retain their rights to appeal the sentence ultimately imposed. (*Refer to Charter Report at* [A and B] *and to clause 8 below in respect to a section 85 of the Constitution Act 1975 statement and Committee report*).

Section 85 Report to the Parliament pursuant to section 17(b) of the Parliamentary Committees Act 2003 concerning a repeal alteration or variation of section 85 of the Constitution Act 1975 (limitation of the jurisdiction of the Supreme Court)

[6]. Inserts new section 139A(4) in the *Magistrates' Court Act 1989* to declare that it is the intention of new section 50A(5) as inserted by [5] to alter or vary section 85 of the *Constitution Act 1975*.

> Note: From the explanatory memorandum – *New section 50A(5) provides that a decision to give or not to give a sentence indication is final and conclusive. This alters or varies the jurisdiction of the Supreme Court to review these decisions. This does not affect any right to appeal against sentence. The prosecution and defendant retain their rights to appeal the sentence ultimately imposed.*

[8]. Inserts new section 32A in the *Crimes (Criminal Trials) Act 1999* to declare that it is the intention of new section 23A(9) as inserted by [7] to alter or vary section 85 of the *Constitution Act 1975*.

> Note: From the explanatory memorandum – *New section 23A(9) provides that a decision to give or not to give a sentence indication is final and conclusive. This alters or varies the jurisdiction of the Supreme Court to review these decisions.*

In respect to clause 5 and 7 the Committee notes the section 85 statement from the Second Reading Speech –

> *Section 50A(5) of the Magistrates' Court Act 1989 and section 23A of the Crimes (Criminal Trials) Act 1999 will provide the Magistrates, Children's, County and Supreme courts with the capacity to provide a sentencing indication to a defendant who is considering pleading guilty. In accordance with a recommendation from the Sentencing Advisory Council, these sections provide that a decision to give or not to give a sentence indication is final and conclusive.*
>
> *A sentence indication should only be given where it is likely to be of benefit in concluding proceedings. The reason for restricting review and appeal rights against a decision to give or not to give a sentence indication is to ensure that this decision is final and the substantive proceedings,*

whether a trial or a plea hearing, can proceed without delay. If review and appeal rights were not restricted, they could defeat the purpose for the introduction of this reform. Importantly, when a sentence is imposed, each party has rights of appeal against the sentence imposed.

The government wants to ensure that appropriate measures are in place to protect the community and enable just punishment for those who commit offences. The scheme has been carefully designed to ensure that it does not improperly induce guilty pleas, engender disproportionate and unduly lenient sentencing, or limit sentencing discretion.

These reforms help to provide a better justice system. Guilty pleas bring earlier closure to victims and their families and assist the victim to begin the process of recovery. A guilty plea also signifies a defendant's willingness to accept responsibility for his or her conduct, and frees up the resources of the justice system for other matters. To ensure that these reforms work effectively, the Sentencing Advisory Council will monitor the effectiveness of these reforms.

These reforms will also complement the government's reforms to committal proceedings contained in the Courts Legislation Jurisdiction (Amendment) Act 2006 and the 2007 budget initiatives to reduce delay, particularly through the establishment of an early resolution unit at the Office of Public Prosecutions.

The Committee reports to Parliament pursuant to a term of reference provided in section 17(b) of the Parliamentary Committees Act 2003, – 'limitation of the jurisdiction of the Supreme Court'.

The Committee having reviewed the section 85 statement made in the Second Reading Speech, the declaratory and enabling clauses and the explanatory memorandum. The Committee is of the view that the proposed provisions altering or varying section 85 of the Constitution Act 1975 are appropriate and desirable in all the circumstances.

[9 to 11] Allow the relevant courts to make rules of court with respect to sentence indications.

Wilful exposure

[12]. Inserts a new offence in the Table in section 320 of the *Crimes Act 1958*. Section 320 provides maximum penalties for the common law offences specified in the Table. The amendment provides a maximum penalty of level 6 imprisonment (5 years maximum) for the common law offence of wilful exposure. (*Refer to Charter Report at* [C]).

Note: The explanatory memorandum provides - *The existing common law penalty for this offence is at large, that is, there is no specified maximum penalty. The common law offence of wilful exposure is an indictable offence and must be heard and determined by a judge and jury. Fixing a maximum penalty provides guidance to the courts about the seriousness of this offence. It also operates as a trigger which will enable this offence to be heard and determined summarily where appropriate. When heard summarily the maximum penalty that may be imposed is 2 years.*

Discretion to strike out charge filed out of time

[13]. Amends section 30(3) of the *Magistrates' Court Act 1989* to give the Court discretion to strike out a charge (rather than mandating that it be struck out) where the prosecution cannot prove that it filed the charge and summons in the Court within 7 days after signing the charge-sheet. (*Refer to Charter Report at* [D]).

Abolition of reserved pleas

[15]. Inserts new clause 24(1)(aa) in Schedule 5 to the *Magistrates' Court Act 1989* to provide that at the conclusion of committal proceedings, if the Magistrates' Court has decided to commit the defendant for trial, the Court must ask the defendant whether the defendant pleads guilty or not guilty to the charge. The Court must also inform the defendant that the sentencing court may take

into account a plea of guilty and the stage in the proceeding at which the plea or an intention to plead guilty is indicated.

As a result, a defendant will be required to plead guilty or not guilty at the conclusion of the committal proceeding. This removes the capacity of a defendant to reserve his or her plea (*Refer to Charter Report at* [A and E]).

Note: *A person is required to plead on arraignment (the commencement of the trial).*

[16]. Amends section 9(1)(c) of the *Summary Offences Act 1966* to allow a person to be charged with the summary offence of wilful damage where the amount of damage caused to property is less than $5000. Currently a charge for the offence of wilful damage is restricted to damage of less than $500. (*Refer to Charter Report at* [F]).

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

Charter Report

[A]

Keywords: Rights in criminal proceedings – Sentencing discount for guilty plea – Sentence indication procedure – Whether compulsion to plead guilty

Charter s.25(2)(k) provides that people charged with a criminal offence must not 'be compelled to confess guilt.' A confession of guilt includes a plea of guilty.

The Committee notes that the Bill permits or requires sentencing courts to inform defendants, in three ways, about the impact of a guilty plea on their sentence:

- clauses 5 and 7, inserting a new s.50A into the *Magistrates' Court Act 1989* and a new s.23A into the *Crimes (Criminal Trials) Act 1999*, permit criminal courts, where a criminal defendant applies and the prosecution consents, to indicate the type of sentence the defendant would be likely to receive if he or she pleads guilty at that time.
- clause 15, amending cl.24 of Schedule 5 to the *Magistrates' Court Act 1989*, requires a Magistrate, after requesting a plea from a defendant following a committal, to inform him or her that a sentencing court may take account of a guilty plea and the stage at which it is made.
- clauses 3 and 4, inserting new s.6AAA into the *Sentencing Act 1991* and new s.362A into the *Children, Youth and Families Act 2005*, require or permit criminal courts and the Children's Court, when sentencing defendants who have pled guilty, to state the sentence the defendant would have received if he or she had not pled guilty.

The Committee also notes that existing s.5(2)(e) of the *Sentencing Act 1991* provides that courts (other than the Children's Court) sentencing defendants must 'have regard to whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so.' The Committee observes that neither this provision nor Victoria's courts have, to date, placed any quantitative limit on the extent of the discount that may be available for a guilty plea. The Committee also observes that a substantial sentence discount for pleading guilty, if communicated to defendants, may place pressure on them to plead guilty. The Committee therefore considers that clauses 3, 4, 5, 7 and 15 engage defendants' Charter rights not to be compelled to confess guilt.

The Statement of Compatibility remarks:

> *The scheme provided by the bill does not induce or compel accused persons to plead guilty. While sentence discounts may be seen as permitting a risk of an inducement, discounts have been available in statutes since 1991. The sentence discounts reforms are focussed on making the current operation of the law more explicit and transparent.*

The Statement of Compatibility also remarks that clause 14, which requires sentencers in the Children's Court to inform defendants who plead guilty of the amount of the sentencing discount:

> *will not infringe the right of children to be treated according to their age. It is a part of the Children's Court procedures, which have been put in place to protect the rights of children.*

The Committee observes that past law or practice, especially pre-Charter law or practice, as well as procedures that are intended to be protective, may nevertheless be incompatible with Charter rights and, in particular, the guarantee that defendants must not be compelled to confess guilt. The Committee also observes that a more transparent scheme may augment any pressure that is inherent in the existing sentence discount.

The Committee further notes that clauses 5 and 7, inserting a new s.50A(2) into the *Magistrates' Court Act 1989* and a new s.23A(6) into the *Crimes (Criminal Trials) Act 1999*, provide that, if a defendant pleads guilty at the first available opportunity after receiving a sentence indication, the sentence must not exceed the type of sentence indicated. The Committee observes that this procedure may place such defendants under heightened pressure to plead guilty, especially if the sentence indicated is a generous one.

The Committee considers that the compatibility of clauses 3, 4, 5, 7 and 15 with defendants' Charter rights not to be compelled to plead guilty depends on the extent of the discount offered for guilty pleas, including the discounts offered as part of the sentence indication scheme. The Committee observes that courts, when sentencing defendants or indicating sentences, are not required to act compatibly with defendants' Charter rights under Charter s.38(1).

The Committee refers to Parliament for its consideration the question of whether or not the procedures provided for by clauses 3, 4, 5, 7 and 15 may be incompatible with defendants' Charter rights not to be compelled to plead guilty.

[B]

Keywords: Fair and public hearing – Victims' rights – Trial without unreasonable delay – Right to appeal – Sentence indication hearings

Charter s.21(1) provides that people have 'the right to liberty and security'. Charter s.24(1) provides that criminal defendants are entitled to have the charge decided after a 'fair and public hearing'. The right to a fair hearing includes all aspects of the post-charge procedure, including sentencing and appeals. Charter s.25(2)(c) provides that people charged with a criminal offence have the right 'to be tried without unreasonable delay'. Charter s. 25(4) provides that people convicted of a criminal offence have 'the right to have the conviction… reviewed by a higher court in accordance with law.'

The Committee notes that clauses 5 and 7, inserting a new s.50A into the *Magistrates' Court Act 1989* and a new s.23A into the *Crimes (Criminal Trials) Act 1999*, implement a sentence indication procedure in the Magistrates', County and Supreme Courts. The Statement of Compatibility argues that these clauses promote the Charter right to a fair and public hearing:

> *Sentence indications are aimed at helping an accused to make their plea decision at an earlier stage, by having more knowledge and certainty about what sentence he or she is likely to receive. Further, the bill provides that if the accused does not wish to plead guilty after receiving an indication, the case must be listed before a different magistrate or judge.*

> *Section 24(3) of the charter provides a right to the public pronouncement of judgements and decisions by a court or tribunal. Amendments in the bill that oblige the court to identify the amount of a sentence discount, for certain types of sentence orders, may enhance this right by making sentencing decisions more transparent.*

While the Committee considers that clauses 5 and 7 may promote defendants' Charter rights to a fair and public hearing by making the sentencing process more transparent and accessible, the Committee also feels that aspects of the new provisions may limit the rights of defendants and others in some respects:

- **Victims' rights:** The Committee notes that new ss. 50A(2) of the *Magistrates' Court Act 1989* and 23A(6) of the *Crimes (Criminal Trials) Act 1999* provide that sentence indications are binding if a guilty plea is entered at the first available opportunity. The Committee observes that sentence indication hearings may occur at an early stage and that victims therefore may not be as involved as they are in regular sentencing hearings. The Committee therefore considers that these provisions therefore engage the Charter rights of victims to liberty and security, to the extent that these are advanced by participation in the sentencing of those who committed offences against them.

  The Committee also notes that the Sentencing Advisory Committee recommended that:

  > *[t]he Victorian Government should review whether the current statutory provisions governing the involvement of victims in criminal proceedings are adequate to ensure that victims will be consulted if a defendant requests sentence indication, and enact any amendments required to achieve this effect.*

  The Committee observes that the Bill contains no provisions modifying existing protections for victims' rights in the *Public Prosecutions Act 1994* and the *Victims' Charter Act 2006*.

- **Fair hearing:** The Committee notes that new ss. 50A(5) of the *Magistrates' Court Act 1989* and 23A(9) of the *Crimes (Criminal Trials) Act 1999* provide that decisions about whether or not to give a sentence indication are 'final and conclusive'. The Statement of Compatibility remarks that this 'may infringe the right to a fair hearing' but argues:

  > *[t]he decision to grant or not grant a sentence indication does not infringe this right because it in no way limits the information that may be presented to the court. If a decision not to grant an indication has been made, the hearing or trial proceeds as normal and the accused may produce any material that was available to them to produce before the indication was requested. The bill also provides that if the application for, and determination of, a sentence indication are inadmissible in evidence against the accused.*

  The Committee observes that, although a defendant's rights in subsequent sentencing hearings are preserved, an erroneous refusal to make a sentencing indication may deny defendants the benefits of transparency and a binding maximum sentence on a guilty plea.

  The Committee also notes that new ss. 50A of the *Magistrates' Court Act 1989* and 23A of the *Crimes (Criminal Trials) Act 1999* do not implement the recommendation of the Sentencing Advisory Council that sentence indications be accompanied by an indication of whether or not the type of sentence would be more severe if the defendant did not plead guilty at that time. The Committee observes that defendants who receive a sentence indication may therefore be denied the benefit of a transparent understanding of the impact of a guilty plea on sentencing.

  The Committee further notes that new ss. 50A(4) & 50A(7) of the *Magistrates' Court Act 1989* and new ss. 23A(8) & 23A(11) of the *Crimes (Criminal Trials) Act 1999* provide that sentence indications are not binding on courts 'constituted by a different judge' and 'do not affect any right of appeal against sentence.' The Committee observes that these provisions may result in a person who pleads guilty following a sentencing indication receiving a higher penalty than the one indicated (e.g. if the court is reconstituted between the plea and the

sentencing, or if the Crown successfully appeals against the sentence.) The Committee also observes that, under the NSW indication scheme, defendants in these circumstances were only permitted to withdraw their plea if 'the circumstances in which the plea was entered indicated that it was not really attributable to a genuine consciousness of guilt' (*R v Warfield* (1994) 34 NSWLR 200, 214.)

The Committee therefore considers that these provisions may engage the rights of defendants to a fair hearing.

- **Trial without unreasonable delay:** The Committee notes that new ss. 50A(3) of the *Magistrates' Court Act 1989* and 23A(7) of the *Crimes (Criminal Trials) Act 1999* provide that, if a sentence indication is rejected by a defendant, then the court must be constituted before a different judge unless all the parties otherwise agree. The Committee observes that a re-listing (e.g. if the prosecution insists upon it) may result in significant delays in the defendant's trial. The Committee also observes that the Sentencing Advisory Committee recommended against such a provision in order to avoid such a delay (*Final Report* at p. 118.)

  The Committee also notes that new ss. 50A(7) of the *Magistrates' Court Act 1989* and 23A(11) of the *Crimes (Criminal Trials) Act 1999* provide that the sentencing indication scheme does not affect any right to appeal against sentence. The Committee observes that, if the Crown successfully appeals against a sentence and the defendant is allowed to withdraw his or her plea, then the defendant's trial may be considerably delayed.

  The Committee therefore considers that these provisions may engage a defendant's Charter right to be tried without unreasonable delay.

- **Right to appeal:** The Committee notes that new ss. 50A(7) of the *Magistrates' Court Act 1989* and 23A(11) of the *Crimes (Criminal Trials) Act 1999* only preserve rights relating to appeals against sentence, not appeals against conviction. The Committee is therefore concerned that the effect of new ss. 50A(5) and 23A(9) may be to prevent a defendant from seeking to appeal his or her conviction on the basis that a miscarriage of justice ensued from an erroneous decision to give or not give a sentence indication

The Committee considers that the compatibility of clauses 5 and 7 with victims' Charter rights to liberty and security and defendants' Charter rights to a fair hearing, a trial without unreasonable delay and an appeal, and the balance that these clauses strike between the competing rights, may depend on how the courts implement and apply the sentence indication procedure. The Committee notes that courts, when indicating sentences, sentencing or hearing appeals, are not required to act compatibly with Charter rights under Charter s. 38(1). The Committee also notes that rules made by the courts with respect to sentence indication hearings (as provided for by clauses 9, 10 and 11) do not have to be accompanied by a Human Rights Certificate (see *Subordinate Legislation Act 1994*, s.12A(3)(a).)

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

1. ***What mechanisms are in place to ensure that victims are adequately consulted prior to a sentence indication hearing?***
2. ***Given that s.50A(5) of the Magistrates' Court Act 1989 and s.23A(9) of the Crimes (Criminal Trials) Act 1999 provide that a decision to give or not give a sentence indication is final and conclusive, what protections exist to ensure that defendants will receive a fair hearing on the question of whether or not to give a sentence indication?***
3. ***Will judges making a sentence indication be required to indicate whether or not a more severe type of sentence would be imposed if a guilty plea was not made at that time? Is there a reason why a transparent statement of the benefit provided by the discount should not also be available to defendants contemplating whether or not to plead guilty following a sentence indication?***

4. ***If a defendant pleads guilty following a sentence indication but the court is reconstituted prior to the sentencing, will the new judge be bound by the sentence indication? Is there a reason why the new judge should not be bound by the sentence indication in this circumstance?***

5. ***If, due to a reconstitution of the court or a successful Crown appeal against sentence, a defendant who pled guilty after a sentence indication receives a higher sentence than the one indicated, will the defendant be automatically entitled to withdraw the guilty plea? If not, will defendants be warned of this possibility at the sentence indication hearing?***

6. ***Will clauses 5 and 7 potentially result in trials being unreasonably delayed?***

7. ***Should the new s.50A(7) of the Magistrates' Court Act 1989 and s.23A(11) of the Crimes (Criminal Trials) Act 1999 preserve rights to appeal against conviction, as well as sentence?***

Pending the Attorney-General's response, the Committee draws attention to clauses 5 and 7.

[C]

Keywords: Retrospective penalties – Wilful exposure – Introduction of a maximum penalty – Whether greater or reduced penalty

Charter s.27(2) bars a person who commits a criminal offence from receiving a greater penalty 'than the penalty that applied when the offence was committed.' Charter s.27(3) provides that a person who commits a criminal offence whose penalty is reduced before the person is sentenced is 'eligible for the reduced penalty.'

The Committee notes that clause 12, amending s.320 of the *Crimes Act 1958*, introduces a maximum penalty for the offence of wilful exposure.

The Committee observes that clause 12 will reduce the maximum penalty for this offence in two ways:

- Presently, defendants convicted of this common law offence may, in theory, be sentenced to any term of imprisonment or fine. Under clause 12, the maximum sentence for a single offence will be five years, 600 penalty units or 500 hours of community work.
- Presently, defendants charged with common law wilful exposure must be tried on indictment. A side-effect of providing a defined maximum penalty is that the offence may be tried summarily in the Magistrates' Court, where the maximum sentence for any offence is two years.

The Committee therefore considers that clause 12 engages the Charter right of defendants who are yet to be sentenced for wilful exposure to be 'eligible' for these reduced maximum penalties.

However, the Committee also observes that clause 12 may increase the actual penalty imposed on people convicted of wilful exposure, because courts must have regard to the maximum penalty under s. 5(2)(a) of the *Sentencing Act 1991*. A maximum penalty is to be treated by the courts as providing 'the yardstick against which all cases falling within that class of proscribed conduct are measured' and as the appropriate penalty for the 'worst type of case falling within the prohibition.' For 'a common law offence without an accompanying maximum statutory penalty, courts will take as their measure the maximum penalty for a cognate offence under state or federal law, unless special circumstances dictate otherwise.' (see Fox & Freiberg, *Sentencing*, OUP, 1999, [3.602], [3.603] & [3.605].) The Committee further notes that the maximum penalty for the summary offence of obscene exposure in Victoria is two years and that the maximum penalties for similar offences in other Australian jurisdictions range from six months (in NSW, the Northern Territory, South Australia and Western Australia) to one year (in the ACT and Queensland.) The Committee observes that courts, when sentencing defendants, are not required to act compatibly with defendants' Charter rights under Charter s.38(1).

The Committee considers that, to the extent that Victorian courts will have regard to the higher maximum penalty of five years when sentencing offenders for wilful exposure in the future, clause 12 engages the Charter right of defendants who committed the offence before its commencement not to receive this 'greater penalty'.

The Statement of Compatibility remarks:

> *If a person is sentenced for this offence after the commencement of this bill, he or she will be sentenced in accordance with this new reduced maximum penalty, irrespective of when the offence was committed.*

The Committee notes the Bill does not contain transitional provisions for clause 12. The Committee also notes that similar changes in 1997 imposing maximum penalties for a variety of common law offences were accompanied by a provision expressly providing for those changes to be prospective in operation (see now s. 585D(1) of the *Crimes Act 1958*.) While the Committee observes that it is likely that clause 12 will be held by the courts to be retrospective in operation, under either s. 114(2) of the *Sentencing Act 1991* or the common law, the Committee feels that it may be appropriate for the Bill to expressly provide for the application of clause 12 to offences of wilful exposure committed before its commencement where the offender has not yet been sentenced.

The Committee considers that, in light of the possibly mixed effect of clause 12 of sentencing for wilful exposure, any transitional provision might appropriately provide that courts sentencing defendants who committed wilful exposure prior to the commencement of clause 12 should determine two sentences – one under clause 12 and one under the previous law – and impose whichever is the lesser.

The Committee will seek further advice from the Minister as to the following matters in respect of clause 12.

1. ***Given s.5(2)(a) of the Sentencing Act 1991, will clause 12 lead to increased sentences for some people who commit the offence of wilful exposure?***
2. ***What transitional arrangements will apply to the amended section 320 of the Crimes Act 1958?***
3. ***Given the possibly mixed effect of clause 12 on actual sentences for wilful exposure, would it be appropriate to provide that, for defendants who committed the offence of wilful exposure prior to the commencement of clause 12, courts should determine two sentences – one under clause 12 and one under the previous law – and impose whichever is the lesser?***

Pending the Attorney-General's response, the Committee draws attention to clause 12.

[D]

Keywords: Right to be informed promptly of a criminal charge – Right to trial without unreasonable delay – Discretion not to strike out charge when issuer of a summons fails to file the charge and summons within seven days of signing the charge-sheet – Listing of matter, serving of summons and access to court copy of charge-sheet contingent on filing of charge-sheet

Charter s.25(2)(a) provides that people charged with a criminal offence have the right 'to be informed promptly and in detail of the nature and reason for the charge'. Charter s.25(2)(c) provides that people charged with a criminal offence have the right 'to be tried without unreasonable delay'.

The Committee notes that clause 13, amending s.30 of the *Magistrates' Court Act 1989*, provides that, if the issuer of a summons fails to comply with s.30(2)(a), the court 'may' strike out the charge. The existing law provides that the court 'must' strike out the charge in this circumstance.

So, the effect of clause 13 is to provide courts with a discretion not to strike out the charge when s.30(2)(a) is not complied with.

The Committee also notes that s.30(2)(a) requires the issuer of a summons to file the charge and summons with a court registrar within seven days of signing the charge-sheet. In *DPP v Sher* [2000] VSC 268, the court explained the purpose of s.30(2)(a) as follows:

> *The alternative procedure under s.30 permits the informant to issue a summons after signing the charge sheet. The purpose of requiring filing within seven days is because the signing of the charge sheet commences the proceeding and this involves the court and accordingly it is necessary that the charge and summons be disclosed to the court so that the court can thereafter control the proceeding.*

The Committee further notes that s.30(2)(b) provides that, when a summons is issued, the charge is deemed to have commenced 'at the time the charge-sheet is signed'. The Committee therefore considers that the Charter rights for people charged with a criminal offence, including the rights to be promptly informed of the charge and to be tried without reasonable delay, are engaged when the charge-sheet is signed.

The Statement of Compatibility remarks, with respect to the right to be notified of the charge:

> *This amendment does not alter the notice that the accused receives when they are charged with an offence. This is because the accused gets notice of the charge when they are issued with a summons to attend court.*

However, the Committee notes that various processes beneficial to a defendant are contingent on the filing of a charge-sheet with the court:

- After the charge-sheet is filed, the defendant is entitled to a free copy of the charge-sheet from the court (s. 32(1)). (The defendant is also entitled to a copy of the charge-sheet and particulars of the charge from the informant.)
- After the court takes control of the proceeding, it can list the matter to be heard.
- After the matter is listed, the informant is required to serve a summons on the defendant 7 days before the mention hearing (and 14 days before a committal mention.)

The Committee observes that a delay in filing a charge-sheet may therefore delay both the notice that the defendant receives of the charge and the trial itself. The Committee also observes that courts, when listing matters of hearing and when deciding whether or not to strike out a charge, are not required to act compatibly with defendants' rights under Charter s.38(1) (see *R v Williams* [2007] VSC 2, [50]).

The Committee therefore considers that clause 13, by permitting a charge commenced by the signing of a charge-sheet to continue despite the charge-sheet not being promptly filed with the court, engages the Charter rights of defendants charged under the procedure in s.30 to be promptly notified of the charge and to be tried without unreasonable delay.

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

1. ***Will clause 13 potentially lengthen the period between the commencement of proceedings and the defendant's access to the court's copy of the charge-sheet?***
2. ***Will clause 13 potentially lengthen the period between the commencement of proceedings and the service of a summons on the defendant?***
3. ***Will clause 13 potentially lengthen the period between the commencement of proceedings and the trial?***

Pending the Attorney-General's response, the Committee draws attention to clause 13.

[E]

Keywords: Right not to speak – Defendant asked to plead either guilty or not guilty after committal – Whether reasonably necessary to respect rights or promote national security, public order, public health or public morality - Whether demonstrably justified reasonable limit

Charter s.15(2) provides people with a right to 'freedom of expression'. Similar rights have been held by overseas courts to include a right not to speak.

The Committee notes that clause 15, amending cl.24 of Schedule 5 to the *Magistrates' Court Act 1989*, provides that a magistrate, after committing a defendant for trial, must 'ask the defendant whether the defendant pleads guilty or not guilty to the charge'. The existing law does not contain this requirement and the practice has been that defendants may choose not to make a plea, thus 'reserving' it until the trial. The Committee observes that the effect of clause 15 is that a refusal to plea after a committal will be treated as a plea of 'not guilty'.

The Statement of Compatibility remarks:

> *Requiring an accused to choose whether to plead guilty or not guilty at the end of a committal proceeding (where the court has decided to commit the accused for trial) does not limit the accused's right to a fair trial because an accused may plead not guilty. That is, any accused who is undecided and may have reserved their plea under current laws can instead plead not guilty. A plea may also be changed to guilty at any time up to and during the trial.*

While the Committee agrees that a requirement to plead either guilty or not guilty after a committal is compatible with the defendant's Charter right to a fair trial (and also the defendant's Charter right not to be compelled to confess guilt), the Committee observes that some defendants may not want to plead either guilty or not guilty after a committal (e.g. because they are seeking further legal advice.) The Committee therefore considers that the abolition of a right to reserve a plea engages the Charter rights of defendants not to speak. The Committee notes that the Statement of Compatibility does not address how clause 15 is compatible with Charter s.15(2).

The Second Reading Speech remarks that clause 15:

> *will improve the accountability of decisions made by defendants, particularly given that sentencing discounts benefit those who make decisions at the earliest opportunity.*

The Committee observes that people who make no plea after their committal under the existing law receive no sentencing benefit in comparison to people who plead not guilty at that stage. The Committee also observes that clause 15 separately requires a judge to inform defendants who are committed for trial of the sentencing benefits of pleading guilty at that stage.

The Committee notes that Charter s.15(3) provides that freedom of expression:

> *may be subject to lawful restrictions reasonably necessary —*
>
> *(a) to respect the rights and reputation of other persons; or*
>
> *(b) for the protection of national security, public order, public health or public morality.*

The Committee also notes that Charter s.7(2) provides that Charter rights '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'.

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

1. ***Is clause 15 reasonably necessary to respect others' rights or to protect national security, public order, public health or public morality?***

2. Is clause 15 a demonstrably justified reasonable limit on defendants' right not to speak according to the test in Charter s.7(2)?

Pending the Attorney-General's response, the Committee draws attention to this provision.

[F]

Keywords: Reduced penalty – Expansion of summary offence of wilful damage – Indictable offence of wilful damage carries greater penalty – Whether expansion of the summary offence should be retrospective

Charter s.27(1) provides that a person 'must not be found guilty of conduct that was not a criminal offence when it was engaged in.' Charter s.27(3) provides that a person who commits a criminal offence whose penalty 'is reduced' before the person is sentenced is 'eligible for the reduced penalty.'

The Committee notes that clause 16, amending s. 9 of the *Summary Offences Act 1966*, widens the offence of 'wilfully injuring or damaging any property' to apply to an 'injury done to the value of $5000', rather than $500.

The Statement of Compatibility remarks:

> *Conduct amounting to the offence of wilful damage may also constitute the indictable offence of damage or destruction of property in section 197(1) of the Crimes Act 1958. Currently a person who causes damage worth more than $500 must be charged with the indictable offence, which has a maximum penalty of 10 years imprisonment. After the commencement of the amendment, a person who causes damage of under $5000 will benefit from the reduced penalty that applies to the offence of wilful damage (6 months imprisonment.)*

The Committee observes that Charter s.27(3) requires that any benefit of a reduced penalty be extended, not merely to people who cause damage after the enactment of clause 16, but also to anyone who caused wilful damage prior to the enactment of clause 16 who has not yet been sentenced.

The Committee also notes that the Bill does not provide for the transitional operation of clause 16. The Committee observes that, as clause 16 increases the scope of a criminal offence, it may be interpreted as applying only prospectively. The Committee therefore considers that clause 16 may be incompatible with the Charter right of people who damaged property to a value between $500 and $5000 prior to the commencement of clause 16 and who have not yet been sentenced to be 'eligible for the reduced penalty' for the summary offence that clause 16 makes available.

The Committee also considers that a provision applying clause 16 retrospectively would be compatible with Charter s.27(1), either because the conduct criminalised by clause 16 is already criminal under the indictable offence or because clause 16's beneficial effect makes its retrospective application a reasonable limit on Charter s.27(1).

The Committee will seek further advice from the Minister as follows:

1. Will people who wilfully damaged property to a value between $500 and $5000 before the commencement of clause 16 be eligible for the reduced penalty available to people who damage such property after its commencement?

2. Given its beneficial effect, should provision be made to apply clause 16 to offences of wilful damage committed prior to its commencement where the offender has not yet been sentenced?

Pending the Attorney-General's response, the Committee draws attention to clause 16.

[G]

Keywords: Statement of compatibility – Inadequate explanation of how a bill is compatible with human rights

Charter s.28(3)(a) provides that a statement of compatibility must state whether the Bill is compatible with human rights and, if so, how it is compatible'

The Committee notes that the Bill contains a number of complex provisions that engage various Charter rights. The Committee also notes that the Statement of Compatibility largely consists of descriptions of the Bill and its beneficial purpose.

The Committee refers to its *Practice Note No. 2*, which states that 'the Committee considers that the provision to Parliament of reasonable explanatory material is critical to the Parliament's exercise of legislative power in an informed manner.' The Committee considers that the brief and perfunctory discussion in the Statement of Compatibility may render it incapable of informed consideration by members of Parliament.

The Committee resolves to raise this concern with the Attorney-General.

The Committee makes no further comment.

Freedom of Information Amendment Bill 2007

Introduced	20 November 2007
Second Reading Speech	22 November 2007
House	Legislative Assembly
Member introducing Bill	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Freedom of Information Act 1982* (the 'Act') to –

- provide for information to be made available on the Internet for access to the public;
- provide for more information to be made publicly available without the need for a formal freedom of information ("FOI") request;
- remove application fees and permit the waiver of certain charges;
- remove provisions relating to certain conclusive certificates;
- provide a procedure for a person to be declared a vexatious applicant;
- provide for consultation before the disclosure of certain documents (and to provide for extra time for response to FOI requests where consultation is undertaken);
- remove the time limit on the Ombudsman dealing with complaints about certain decisions to refuse access to documents;
- amend the *Ombudsman Act 1973* to clarify certain aspects of the Ombudsman's jurisdiction in relation to the FOI Act;
- amend the *Victorian Civil and Administrative Tribunal Act 1998* in relation to applications declaring a person to be a vexatious applicant.

Content and Committee comment

[Clauses]

[2]. Provides that the Act will commence on proclamation but not later than by 1 July 2009.

> Note: In respect to the delayed commencement provision the explanatory memorandum states – *This is to give sufficient time to prepare for the Act to be brought into operation.*

[4 to 6]. Substitutes a new Part II (new sections 7 to 9) and makes consequential amendments to other sections of the Act to require agencies to publish information concerning their functions and prescribes the standards for that information. A person may challenge the sufficiency of the information required to be published. The provisions in the substituted Part II will only apply to requests and applications under the Act made after the commencement of the substituted Part.

[9]. Repeals sections 17(2A) and 17(2B) to remove application fees for FOI requests.

[11]. Amends sections 21 and 25 to extend the time (by 30 days) in which a response to an FOI request may be made. The Minister or agency must notify the applicant of any extension of time required for a response.

[13]. Amends section 33 in relation to personal information and inserts new subsection 33(2B) to give an agency or Minister a discretion, in deciding whether disclosure of a document would involve the unreasonable disclosure of personal information about any person, to consult with the person who is the subject of that information (or where relevant their next of kin). New subsection 33(2C) provides that, if the person is consulted, the agency or Minister must inform the person that

if he or she consents to the disclosure, he or she is not entitled to apply to VCAT for review of the decision to disclose the document.

[15]. Repeals provisions in section 28 enabling the issue of conclusive certificates in relation to Cabinet documents.

[16]. Amends section 33 to make provision in relation to consent to disclosure of documents under section 34 (documents relating to trade secrets). An agency or Minister must notify the undertaking that if the undertaking consents to the disclosure of the document, the undertaking is not entitled to apply to VCAT for a review of the decision to disclose the document.

[17]. Inserts new section 35(1A) to provide a discretion to a Minister or agency to notify the relevant person or government of a request for access to a document under section 35(1), and seek their view as to whether the information it contains was communicated in confidence and whether its disclosure would be contrary to the public interest.

[18]. Amends section 50 to reflect other amendments made by this Bill. New sections 50(3) and 50(3A) relate to new sections 33(2C) and 34(3), and provide that an individual or undertaking that consents to disclosure of a document under those sections may not seek review by VCAT of a decision to disclose the document.

Orders declaring persons to be vexatious applicants

[20]. Inserts new Part VIA into the Act to enable a person to be declared a vexatious applicant.

New section 61A(1) enables an agency or Minister to apply to the VCAT for an order declaring a person to be a vexatious applicant. New section 61B provides that the Tribunal may, on an application under section 61A, make an order declaring the person to be a vexatious applicant.

New section 61D provides that a person has the right to be heard before the Tribunal makes an order under section 61B.

New section 61E provides that an order may prevent a person making any request or application under the Act, or it may prevent a person making a specified type of request or application under the Act, without leave of the Tribunal. New section 61F provides that a declared vexatious applicant may seek leave from the Tribunal to make an application.

New section 61H permits the Tribunal, in determining whether to make an order under section 61B, to take into account any applications or requests made before the commencement of the new Part VIA.

[21]. Amends section 57 to provide that the Ombudsman may not intervene in a Part VIA proceedings.

[25]. Provides for the automatic repeal of the amending Act on 1 July 2010.

Charter Report

Keywords: Privacy – Right to information – Right to a court or tribunal decision – Freedom of information requests – Third party consultation – Vexatious litigants

Charter s.13(a) provides that everyone's privacy must not be 'unlawfully or arbitrarily interfered with.' Charter s.15(2) provides everyone with a right to freedom of expression, including the 'freedom to seek, receive and impart information'. Charter s.24(1) provides that 'a party to a civil proceeding has the right to have the proceeding decided by a court or tribunal'. The Committee

observes that a similar provision to Charter s.24(1) has been held by the *European Court of Human Rights* to include a right to institute proceedings before a court or tribunal with respect to civil law disputes (*Golder v United Kingdom* [1975] ECHR 1, [36].)

The Committee notes that various provisions of the Bill amend procedures for the release of documents held by government agencies that may involve the disclosure of personal information, trade secrets or confidential information. The Committee observes that these procedures engage the following Charter rights:

- **Privacy:** Provisions for the person affected to consent to the release of the document (clauses 13(2) and 16, amending ss.33 and 34 of the Act)
- **Right to information:** Provision for the Minister to extend the period for determining an application by 30 days to allow for consultation (clause 11, amending s.21 of the Act)
- **Right to a court or tribunal decision:** Provisions barring people who consent to the release of documents from commencing proceedings before the VCAT (the 'Tribunal') with respect to that release (clause 18(3), amending s.50 of the Act)

The Statement of Compatibility remarks that:

> *…the consultation process is important because it enables agencies and Ministers to seek the views of affected third parties so that those views may be taken into account in deciding whether to release the documents. This allows for an appropriate balancing of the rights of third parties and the rights of the FOI applicant.*

The Committee considers that clauses 11, 13(2), 16 and 18(3) together strike a reasonable balance between the rights of applicants and third parties and therefore do not infringe the Charter's rights to privacy, information and decision by a court or tribunal.

The Committee also notes that clause 20, inserting a new s.61E into the Act, provides a power for the Tribunal to bar certain people from seeking information under the Act without obtaining leave from the Tribunal and complying with other terms or conditions set by the Tribunal. The Committee considers that this provision engages such people's Charter right to seek and receive information. The Committee also considers that, as unsuccessful FOI applications can be appealed to the Tribunal, this provision also engages such people's Charter right to a decision by a court or tribunal.

The Statement of Compatibility remarks that the purpose of clause 20:

> *…is to prevent the wasteful use of government resources in processing unmeritorious FOI applications…. [A]pplications which have the effect of disrupting the operation of government bodies are outside the letter and the spirit of the FOI scheme.*

The Committee observes that the Charter's right to seek and receive information may be subject to reasonable limitations to protect public order under Charter s.15(3) and that the right to a decision by a court or tribunal has been held to be satisfied by a right to seek leave in a judicial proceeding to commence an application (*H v United Kingdom*, European Commission on Human Rights, (1985) 45 DR 281.)

The Committee also observes that clause 20 provides for a Tribunal hearing to determine whether a person should be barred from making an application without leave; requires a finding that the person has made repeated applications that obstruct or interfere with agencies' operations; and preserves the right of such people to seek leave from the Tribunal to make any application that is not an abuse of process. The Committee therefore considers that clause 20 is compatible with such people's rights to information and a decision by a court or tribunal.

The Committee makes no further comment.

Equal Opportunity Amendment (Family Responsibilities) Bill 2007

The Bill was introduced into the Legislative Assembly on 9 October 2007 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 29 October 2007 and made the following comments in Alert Digest No. 14 of 2007 tabled in the Parliament on 30 October 2007.

Committee's Comment

[6] *The Committee notes that the explanatory memorandum provides no advice for the reason for including sections 51 and 52 in the amendments made to section 7(1). The Committee draws attention to its Practice Note No. 1 in respect to the standard and content expected by the Committee of an explanatory memorandum. The Committee will seek further advice from the Attorney-General.*

Minister's Response

Thank you for your correspondence of 31 October 2007 on behalf of the Scrutiny of Acts and Regulations Committee regarding the Equal Opportunity Amendment (Family Responsibilities) Bill 2007 (the Bill).

The Committee notes that clause 6 of the Bill amends section 7 of the Equal Opportunity Act 1995 (the Act) to provide that discrimination means direct or indirect discrimination on the basis of an attribute, or a contravention of section 13A, 14A, 15A, 31A, 51 or 52. The Committee has asked for advice about the reason for including sections 51 and 52, which are existing sections of the Act, in the amendments made to section 7(1).

The Bill amends the Act to expand the range of what constitutes discrimination against parents or carers in employment and employment related areas. The Bill requires an employer, a principal or a firm not to unreasonably refuse to accommodate the parental or carer responsibilities of a person offered employment, an employee, a contract worker, a person invited to become a partner in a firm, or a partner in a firm. It will be discrimination for an employer, principal or firm to contravene this requirement. A person will be able to make a complaint about the contravention to the Victorian Equal Opportunity and Human Rights Commission but will not have to prove direct or indirect discrimination (as defined in the Act) to make out the complaint.

This approach is similar to the way current sections 51 and 52 of the Act operate. Section 51 prohibits discrimination by a person who refuses to allow reasonable alterations to be made to accommodation in order to meet the special needs of a person with an impairment. Section 52 prohibits discrimination by a person who refuses to provide accommodation to a person with an impairment because that person has a guide dog. It is understood that a person is able to make a complaint about the contravention of these sections without having to prove direct or indirect discrimination. However, this is not clear on the face of the Act. The Bill therefore clarifies that a contravention of sections 51 or 52 constitutes discrimination.

I thank you for the opportunity to respond to the Committee's request for further advice. I trust that this response allays the Committee's concern.

ROB HULLS MP, Attorney-General

19 November 2007

The Committee thanks the Attorney-General for this response.

Port Services Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 9 October 2007 by the Hon. Tim Pallas MLA. The Committee considered the Bill on 29 October 2007 and made the following comments in Alert Digest No. 14 of 2007 tabled in the Parliament on 30 October 2007.

Committee's Comment

Charter Report

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

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

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

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

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

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

> *where there is a reasonable prospect that a provision in a Bill may test or infringe Charter compatibility that issue should be drawn to the attention of the Parliament and a reasoned, even if brief, analysis of why the provision is nevertheless considered compatible with the Charter should be outlined.*

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

Minister's Response

Thank you for your letter of 31 0ctober2007 advising as to the observations of the Scrutiny of Acts and Regulations Committee (Committee), on aspects of the Statement of Compatibility accompanying the Port Services Amendment Bill 2007.

I refer to the Committee's view that clause 14 of the Bill inserting a new Part 5A into the Port Services Act 1995 engages ss15(2) (right to freedom of expression), and 16(1) (right of peaceful assembly), of the Charter of Human Rights and Responsibilities Act 2006 (the Charter). 1 also note that the Committee concluded that the limitations on the right to freedom of expression and right of peaceful assembly were reasonable.

Your letter nevertheless draws attention to the concern of the Committee that the Statement of Compatibility does not refer to the compatibility of the new Part 5A with these rights, except in relation to a minor enforcement provision.

Following advice from my officers and following consultation by my officers with the Department of Justice, I was advised the rights were not raised by the proposed provisions as the Bill does not expressly prohibit protest activity or peaceful assembly. Part 5A primarily restricts and is intended to restrict freedom of movement (apart from freedom of expression in relation to the proposed enforcement provision, being section 88D).

If any other rights were to be potentially affected, this would be as an operational result of restricting freedom of movement, rather than as a direct consequence of an express restriction or prohibition in the Bill. On one view, any restriction on freedom of movement would indirectly and as a secondary or operational effect, restrict freedom of expression and peaceful assembly because persons could not impart information nor congregate where the movement or access was restricted.

In relation to the right to freedom of expression, it is agreed that in the operation of proposed section 84 and application of section 85, there is potential to restrict freedom of expression if the declaration were cast so that protestors could not enter the restricted access areas or protest activity could not occur within it.

In relation to the right to peaceful assembly, it is also agreed that an operational consequence of creating a restricted access area is that persons restricted could not therefore assemble together in that area and that if the declaration were cast so that protestors could not enter or protest activity could not occur within the restricted access area, the freedom of assembly of protestors would be restricted.

I agree with the Committee that in any event, clause 14 of the Bill provides a reasonable limit on these rights.

If there were to be any restrictions on protestors or protest activity through the declaration of a restricted access area, these would constitute lawful restrictions reasonably necessary for the protection of public order in accordance with section 15(3)(b) of the Charter.

There may be circumstances where persons seeking to carry out protest activity pose a safety risk to themselves and others in relevant port waters. In such situations, declaration of a restricted access area restricting their access specifically, or a more general category of persons or activities within which they may fall, may be necessary to manage that safety risk and ensure that important works or activities in connection with the functions and powers of Port of Melbourne Corporation or the Victorian Regional Channels Authority are carried out.

Similarly, while any restrictions on protestors or protest activity through the declaration of a restricted access area may restrict the right of those persons to peaceful assembly, the restriction is reasonable and justified under section 7 of the Charter.

Further, the controls on the creation and nature of the restricted access area, such as maximum size of the areas, maximum duration of the declaration, and the requirement that the Minister is satisfied that the areas are required for the relevant ports to carry out their powers or functions and to give effect to their statutory objectives, are appropriate controls to ensure that the restricted access areas are not created arbitrarily and are proportionate to the safety risks they seek to manage.

Finally, in exercising my powers to declare or continue the declaration of a restricted access area, I would make my decision in accordance with my obligations under the Charter to properly consider the Charter rights of individuals (including protestors), and act compatibly with the Charter.

I trust this response is of assistance and if the Committee has any further queries, I would be pleased to assist with further information.

TIM PALLAS MP
Minister for Roads and Ports

29 November 2007

The Committee thanks the Minister for this response.

Committee Room
3 December 2007

Appendix 1
Index of Bills in 2007

Alert Digest Nos.

Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights and freedoms.

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

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

Emergency Services Legislation Amendment Bill 2007	13

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

Justice and Road Legislation Amendment (Law Enforcement) Bill 2007	10

(vi) inappropriately delegates legislative power.

Accident Towing Services Bill 2007	5
Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007	4
Road Legislation Amendment Bill 2007	4
Royal Children's Hospital (Land) Bill	10
Transport Legislation Amendment Bill 2007	13

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

Transport Accident and Accident Compensation Acts Amendment Bill 2007	13
Transport Legislation Amendment Bill 2007	13

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

Animals Legislation Amendment (Animal Care) Bill 2007	14
Criminal Procedure Legislation Amendment Bill 2007	16
Energy Legislation Further Amendment Bill 2007	13
Fair Trading and Consumer Acts Amendment Bill 2007	5
Graffiti Prevention Bill 2007	13
Infertility Treatment Amendment Bill 2007	4

Section 17(b)

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

Appendix 3
Ministerial Correspondence

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

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

Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Superannuation Legislation Amendment (Contribution and Other Matters) Bill 2007	Finance	5.6.07	3.7.07	7 of 2007	9 of 2007
Royal Children's Hospital (Land) Bill	Planning	7.8.07	20.9.07	10 of 2007	13 of 2007
Justice and Road Legislation Amendment (Law Enforcement) Bill 2007	Police and Emergency Services	7.8.07	20.8.07	10 of 2007	12 of 2007
Justice Legislation Amendment Bill 2007	Attorney-General	19.9.07	10.10.07	12 of 2007	14 of 2007
Working with Children Amendment Bill 2007	Attorney-General	19.9.07		12 of 2007	
Crimes Amendment (Rape) Bill 2007	Attorney-General	19.9.07	8.10.07	12 of 2007	14 of 2007
Emergency Services Legislation Amendment Bill 2007	Police and Emergency Services	9.10.07		13 of 2007	
Energy Legislation Further Amendment Bill 2007	Treasurer	9.10.07	23.10.07	13 of 2007	14 of 2007
Transport Accident and Accident Compensation Acts Amendment Bill 2007	Finance	9.10.07	29.10.07	13 of 2007	15 0f 2007
Transport Legislation Amendment Bill 2007	Transport	9.10.07	30.10.07	13 of 2007	15 0f 2007
Animals Legislation Amendment (Animal Care) Bill 2007	Agriculture	31.10.07		14 of 2007	
Equal Opportunity Amendment (Family Responsibilities) Bill 2007	Attorney-General	31.10.07	19.11.07	14 of 2007	16 of 2007
Port Services Amendment Bill 2007	Roads and Ports	31.10.07	29.11.07	14 of 2007	16 of 2007
Liquor Control Reform Amendment Bill 2007	Consumer Affairs	21.11.07		15 of 2007	
Police Regulation Amendment Bill 2007	Police and Emergency Services	21.11.07		15 of 2007	
Victorian Energy Efficiency Target Bill 2007	Energy and Resources	21.11.07		15 of 2007	