# No. 1 of 2008

## Tuesday, 5 February 2008

## On the

Constitution Amendment (Judicial Pensions) Bill 2007

Consumer Credit (Victoria) and Other Acts Amendment Bill 2007

Crimes Amendment (Child Homicide) Bill 2007

Criminal Procedure Legislation Amendment Bill 2007

Emergency Services Legislation Amendment Bill 2007

Infringements and Other Acts Amendment Bill 2007

Legislation Reform (Repeals No. 2) Bill 2007

Liquor Control Reform Amendment Bill 2007

Police Regulation Amendment Bill 2007

Professional Boxing and Combat Sports Amendment Bill 2007

Relationships Bill 2007

Victorian Energy Efficiency Target 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 $110.12).*

**'*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 –

Constitution Amendment (Judicial Pensions) Bill 2007
Consumer Credit (Victoria) and Other Acts Amendment Bill 2007
Crimes Amendment (Child Homicide) Bill 2007
Infringements and Other Acts Amendment Bill 2007
Legislation Reform (Repeals No. 2) Bill 2007
Professional Boxing and Combat Sports Amendment Bill 2007
Relationships Bill 2007

## The Committee notes the following correspondence –

Criminal Procedure Legislation Amendment Bill 2007
Emergency Services Legislation Amendment Bill 2007
Liquor Control Reform Amendment Bill 2007
Police Regulation Amendment Bill 2007
Victorian Energy Efficiency Target Bill 2007


### Role of the Committee

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

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

# Constitution Amendment (Judicial Pensions) Bill 2007

| | |
|---|---|
| **Introduced** | 4 December 2007 |
| **Second Reading Speech** | 6 December 2007 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Rob Hulls MLA |
| **Portfolio responsibility** | Attorney-General |

## Purpose

The Bill facilitates the division of constitutionally protected pension entitlements in divorce property proceedings and extends entitlement to a reversionary pension to de facto and same-sex partners of judicial and other constitutionally protected officers and their children.

The Bill therefore amends the –

- *Attorney-General and Solicitor-General Act 1972*
- *Constitution Act 1975*
- *County Court Act 1958*
- *Magistrates' Court Act 1989*
- *Public Prosecutions Act 1994*
- *Supreme Court Act 1986*

The Committee notes these extracts from the Second Reading Speech –

> *Since the introduction of the Family Law Legislation Amendment (Superannuation) Act 2001 (Cth), superannuation entitlements have been divisible in divorce property proceedings by agreement or court order.*
>
> …
>
> *Consistent with the government's approach to other defined benefit superannuation schemes, this Bill adopts the 'separate interest' method of splitting superannuation entitlements in divorce property proceedings for Victorian constitutionally protected officers.*
>
> …
>
> *This Bill replaces the terms 'spouse' and 'widow' with the term 'partner' throughout the governing Acts. 'Partner' will be defined to include married, de facto and same-sex partners, in the same way as it has been defined in the State Superannuation Act 1988 and the Parliamentary Salaries and Superannuation Act 1968. It will also include partners in 'registered relationships' as defined in the Relationships Bill 2007, if passed by Parliament. In doing so de facto and same-sex partners of judicial and other constitutionally protected officers will be entitled to a reversionary pension under the schemes for the first time.*

## Submission received

The Committee received a written submission from the Victorian Gay and Lesbian Lobby.

## Content and Committee comment

**[Clauses]**

[2]. Other than Part 6 the Bill will commence on Royal Assent. Part 6 will commence on the day on which section 73 of the *Relationships Act 2007* comes into operation.

> Note: *Section 73 of the Relationships Act 2007 will, if passed by Parliament, commence on 1 December 2008 or on a day or days to be proclaimed.*

[5]. Inserts new subsection (5A) in section 7A of the *Constitution Act 1975* to apply amended section 83 (see clause 8) to the pension entitlements of the Governor, to enable the benefit or pension entitlements of the Governor to be divided according to the separate interest method in divorce property proceedings under the Commonwealth family law.

[6]. Substitutes references to "spouse" with "partner" in sections of the *Constitution Act 1975* which relate to the pensions of Supreme Court judges. These amendments extend entitlement to a reversionary pension to a de facto or same-sex partner of a Supreme Court judge and to their children.

[8]. Inserts new subsections (8) to (22) in section 83 of the *Constitution Act 1975* necessary to enable benefit or pension entitlements of Supreme Court judges and the Director of Public Prosecutions to be divided in accordance with the separate interest method under the Commonwealth *Family Law Act 1975* and *Family Law (Superannuation) Regulations 2001* in divorce property proceedings.

[9 to 15]. Makes the relevant amendments to the *County Court Act 1958* to give effect to the superannuation changes referred to in the extracts of the Second Reading Speech above for the Judges and Masters of the County Court.

[16 to 18]. Makes consequential amendments to the *Supreme Court Act 1986* to give effect to the superannuation changes referred to in the extracts of the Second Reading Speech above for the Judges and Masters of the Supreme Court.

[19 to 21. Amend the other relevant Acts to extend the superannuation entitlements to other relevant judicial and statutory office holders.

[22 and 23]. Amend the *Constitution Act 1975* and the *Country Court Act 1958* as a consequence of the intended enactment of the *Relationship Act 2007* (currently before the Parliament – *also reported in this Digest*).

[24]. Provides for the automatic repeal of this amending Act on 1 December 2009.

***The Committee reports to Parliament pursuant to a term of reference provided in section 17(a)(i) of the Parliamentary Committees Act 2003, – 'trespasses unduly on rights or freedoms' – independence of the judiciary – separation of powers.***

*The Committee notes the submission made to it in considering this Bill and is concerned that the application of the amendments made by this Bill may arguably result in unequal or reduced pension rights to some persons who may be entitled to reversionary pensions.*

*The Committee observes that any diminution of rights whilst in office of members of the judiciary and other senior constitutionally protected officers may engage broader rights and freedoms issues concerning the independence of the judiciary*

*and the doctrine of the separation of powers.*

*In respect to the possible diminution of rights the Committee refers to the Charter Report below and will seek further advice from the Attorney-General.*

## Charter Report

**Keywords: Marital status discrimination – Sexual orientation discrimination – Pension for unmarried partners of former constitutional and judicial officers – Meaning of 'partner' – Retrospective entitlement limited to opposite sex partners – Incompatibility with human rights**

Charter s. 8(3) provides that everyone has 'the right to equal and effective protection against discrimination.' Discrimination includes discrimination on the basis of martial status (including being a domestic partner) and sexual orientation. Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society.' Charter s. 32 requires the interpretation of statutory provisions compatibly with human rights 'so far as it is possible to do so'.

The Committee notes that the Bill extends the pension entitlements of constitutional and judicial officers' spouses and children to those officers' 'partner[s]' and their children. The Committee also notes that clauses 3 (inserting a new section 5A into the *Constitution Act 1975*) and 9 (inserting a new section 3AA(1) into the *County Court Act 1958*) generally define 'partner' (in para. (b) of the definition) to mean an officer's 'spouse or domestic partner'. The Committee further notes that under clauses 22 and 23 (if the *Relationships Bill 2007* is enacted), the definition of 'domestic partner' will include a person in a registered relationship with the officer.

The Statement of Compatibility remarks that the Bill's amendments:

> *positively engage sections 8(2) and (3) of the charter. They remove discrimination on the basis of gender, marital status and sexual orientation and ensure that de facto and same-sex partners of Victorian constitutionally protected officers are afforded the same rights and entitlements as married spouses.*

The Committee considers that the Bill generally promotes the Charter rights of domestic partners of constitutional and judicial officers against discrimination on the basis of marital status.

However, the Committee further notes that clauses 3 and 9 define 'partner' differently (in para. (a) of the definition) in the case of an officer 'who became entitled to benefits under [the *Constitution Act 1975* or the *County Court Act 1958*] before the commencement' of those clauses. For such an officer, the pension entitlements previously available to the officer's spouse and children will now be available to:

> *(i) the [officer]'s husband, wife, widower or widow; or*
>
> *(ii) a person of the opposite sex who, though not married to the [officer], in the opinion of the Minister lives with the [officer], or lived with the [officer] at the date of the [officer's] death, on a bona fide domestic basis as the [officer's] husband or wife*

and to such a person's children. The Committee observes that this definition extends entitlements to officers' opposite-sex domestic partners and their children, but not their same-sex domestic partners and their children. The Committee considers that para. (a) of the definition of partner in clauses 3 and 9 therefore engages the Charter rights of those officers and their partners not to be discriminated against on the basis of their sexual orientation.

The Statement of Compatibility does not address para. (a) of the definition of partner in clauses 3 and 9, but the Explanatory Memorandum remarks that the definition 'is consistent with that used in section 10 of the *Parliamentary Salaries and Superannuation Act 1968*.' The Committee observes that that definition was introduced by the *Statute Law Amendment (Relationships) Act 2001* at a time when

opposite-sex domestic partners of members of parliament were entitled to a pension. By contrast, the present pension for constitutional and judicial officers is limited to married partners. Therefore, unlike s. 10 of the *Parliamentary Salaries and Superannuation Act 1968*, which did not change pension entitlements for former members of parliament, para. (a) of the definition of partner in clauses 3 and 9 changes the pension entitlements of former constitutional and judicial officers, making them identical to the pre-2001 entitlements of members of parliament.

The Committee also observes that the terms 'husband, wife, widow or widower', 'person of the opposite sex' and 'as the person's husband or wife' contained in para (a)(i) are gender-specific words that may be less amenable to reinterpretation to include same-sex partners under Charter s. 32 than the gender-neutral word 'spouse' that para (a)(i) replaces: see *Quilter v Attorney-General* [1998] 1 NZLR 523, 580. The Committee further observes that whereas domestic partners of officers covered by para. (b) of the definition of partner in clauses 3 and 9 will (if the *Relationships Bill 2007* is enacted) be able to prove their future entitlement to a pension (i.e. their status as a domestic partner of an officer when the officer dies) by registering their relationship with that officer, similarly-placed opposite-sex partners of officers covered by para. (a) will not be able to do so. The Committee additionally observes that the scope of para (a) is uncertain, as it is not clear whether or not the phrase 'became entitled to benefits under this Act' applies to officers who died in office (rather than retiring or resigning) or to current officers who are entitled to salaries under the *Constitution Act 1975* or the *County Court Act 1958*.

Whilst the Committee considers that para. (a)(ii) of the definition of partner in clauses 3 and 9 promotes the rights of opposite-sex domestic partners of former constitutional and judicial officers to equal protection of the law without discrimination on the basis of marital status, it denies the same protection to equivalently placed same-sex domestic partners. The Committee notes that the Statement of Compatibility does not provide any justification that would satisfy the requirements of Charter s. 7(2) for excluding one group of domestic partners from protection simply on the basis of their sexual orientation.

***The Committee considers that para. (a)(ii) of the definition of partner in clauses 3 and 9 may be incompatible with Charter s. 8(3).***

***The Committee resolves to seek further clarification from the Attorney-General as follows:***

1. ***What officers are covered by para. (a) of the definition of partner in clauses 3 and 9? In particular:***
    a. ***If an officer died while in office, did he or she ever 'become entitled' to a benefit under the Act?***
    b. ***Does 'benefit under the Act' include a salary entitlement under the Act?***
2. ***Why does para. (a)(i) of the definition of partner in clauses 3 and 9 use the terms 'husband', 'wife', 'widower' and 'widow' instead of the word 'spouse'?***
3. ***Should para. (a)(ii) of the definition of partner in clauses 3 and 9 be extended to include same-sex domestic relationships?***
4. ***Should para. (a)(ii) of the definition of partner in clauses 3 and 9 be extended to include registered relationships (if the Relationships Bill 2007 is enacted)?***

***Pending the Attorney-General's response, the Committee draws attention to para. (a) of the definition of partner in clauses 3 and 9.***

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**Keywords: Independence of the courts – Marital status discrimination – Removal of existing pension entitlements for partners of constitutional and judicial officers where partner becomes a domestic partner of another person – Partner's pension subject to continuing review**

Charter s.8(3) provides that everyone has 'the right to equal and effective protection against discrimination'. Discrimination includes discrimination on the basis of martial status (including the status of being a domestic partner.) Charter s. 24(1) provides that criminal defendants and civil litigants have the right to a decision by an 'independent… court or tribunal.' Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.

The Committee notes that clauses 4(1)(b) & 6(2)(b) (amending ss. 7(3) & 83(2) of the *Constitution Act 1975*) & 10(2)(b) (amending s. 14(3) of the *County Court Act 1958*) provide that the pension entitlements of partners of constitutional and judicial officers cease when the partner dies, marries or 'becomes the domestic partner of another person'. The Committee observes that this reduces officers' pension entitlements, because the current law only provides for the partner pension to cease on death or remarriage. The Committee also observes that the pension entitlements of all partners of judicial and constitutional officers will now be subject to continued review as to whether or not their personal circumstances at any point in time fall within the definition of 'becom[ing] the domestic partner of another person.'

The Committee observes that the Supreme Court of Canada held in *R v Beauregard* [1986] 2 SCR 56, [34] that:

> *the essence of judicial independence for superior court judges is complete freedom from arbitrary interference by both the executive and the legislature. Neither the executive nor the legislature can interfere with the financial security of superior court judges. That security is crucial to the very existence and preservation of judicial independence as we know it.*

The Committee considers that clauses 6(2)(b) & 10(2)(b) may subject the financial security of Victorian superior court judges to interference by both the legislature (by reducing the existing pension entitlements of current and former judges' partners) and the executive (by subjecting the future entitlement of judges' partners to a pension to continued review by public servants responsible for determining their eligibility for the pension.) The Committee therefore considers that clauses 6(2)(b) & 10(2)(b) may engage Victorian litigants' Charter right to decisions by an independent court.

The Committee also observes that entry into a new domestic relationship may have no impact on the financial circumstances of partners of deceased constitutional and judicial officers and that remaining single may impose considerable personal burdens on them. The Committee further observes that partners of members of state superannuation schemes receive their pension until death, whether or not they re-partner; however, the Committee also notes that those schemes are contributory and partner pensions are calculated in a more nuanced way than the pension schemes in the *Constitution Act 1975* and *County Court Act 1958*. Whilst the Committee considers that clauses 4(1)(b), 6(2)(b) & 10(2)(b) may promote the Charter rights of former partners of constitutional and judicial officers who marry to equal treatment with former partners who enter into a domestic relationship, the Committee is also concerned that these clauses may infringe the rights of former partners who enter into a domestic relationship to equal treatment with former partners who remain single.

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

- ***whether or not clauses 6(2)(b) and 10(2)(b), to the extent that they reduce the entitlements of current and former judges and/or subject the future entitlements of judges' partners to continued review by a public servant, are compatible with the independence of courts from Parliament and the executive; and***
- ***whether or not clauses 4(1)(b), 6(2)(b) and 10(2)(b) discriminate against officers' partners who enter into a new domestic relationship (in comparison to partners who do not re-partner);***
- ***whether or not those clauses are reasonable limits on human rights according to the test in Charter s. 7(2).***

***The Committee makes no further comment.***

# Consumer Credit (Victoria) and Other Acts Amendment Bill 2007

| | |
|---|---|
| **Introduced** | 4 December 2007 |
| **Second Reading Speech** | 6 December 2007 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Tony Robinson MLA |
| **Portfolio responsibility** | Minister for Consumer Affairs |

## Purpose

The Bill amends the –

- *Consumer Credit (Victoria) Act 1995* in relation to the registration of credit providers and to allow certain proceedings under the Consumer Credit (Victoria) Code to be brought in a court rather than VCAT if the Director of Consumer Affairs Victoria so determines;
- *Credit (Administration) Act 1984* to empower the Director of Consumer Affairs Victoria to bring proceedings on behalf of consumers under the Consumer Credit (Victoria) Code and Division 5 of Part 4A of the *Consumer Credit (Victoria) Act 1995*;
- *Fair Trading Act 1999* to re-enact certain provisions of the *Credit Reporting Act 1978* relating to the correction of errors in credit records and repeals the *Credit Reporting Act 1978*.
- *Residential Tenancies Act 1997* to provide that certain agreements are to be tenancy agreements even if the rental term exceeds 5 years if the tenant also has a right or option to purchase the rented premises;
- *Sale of Land Act 1962* to re-enact with amendments the provisions relating to terms contracts.

The Bill also makes amendments to other Acts in relation to owners corporations.

## Content and Committee comment

**[Clauses]**

[2]. Other than sections 4 to 24 and Parts 5 and 6 the provisions in the Bill come into operation on Royal Assent. The remaining provision come into operation not later than by 1 July 2009.

The Committee notes the explanatory memorandum concerning the provisions that have delayed commencement.

- *Sections 4 to 24 will come into operation on a day or days to be proclaimed. These provisions insert the amendments in relation to the registration scheme for credit providers and new requirements for registered credit providers to be members of an external dispute resolution scheme. Their commencement is deferred in order to allow the Business Licensing Authority to make the necessary administrative changes to the current registration scheme for credit providers and for currently registered credit providers to become members of an approved external dispute resolution scheme.*
- *Part 5 will come into operation on a day to be proclaimed in order for advice of the changes to be disseminated to legal drafters. Part 5 brings certain tenancy agreements, known as "rent-to-buy contracts", under the operation of the Residential Tenancies Act 1997.*
- *Part 6 will come into operation on a day to be proclaimed in order for the provisions to include consequential amendments which have been made in the Conveyancers Act 2006 and*

*which has not yet come into operation. Part 6 re-enacts the terms contracts provisions in the Sale of Land Act 1962.*

***Consumer Credit (Victoria) Act 1995***

[6]. Inserts new sections 12A and 12B into the Act to provide that a registered credit provider must not carry on business as a credit provider unless the credit provider is a member of an approved external dispute resolution scheme and sets out the requirements for a natural person or body corporate to be eligible for registration as a credit provider.

[9]. Inserts new sections 14A, 14B, 14C and 14D into the Act.

Section 14D provides that the Authority may refer the application to the Chief Commissioner of Police, who must make any inquiries in relation to the application that the Chief Commissioner considers appropriate and must give the Authority a report on the result of those inquires. A report may include recommendations.

[19]. Inserts a new section 35A to provide that any person whose interests are affected by a decision of the Authority under Part 4 of the Act may apply to the VCAT for a review of the decision.

***Fair Trading Act 1999***

[27]. Inserts a new Part 5A which re enacts certain provisions from the *Credit Reporting Act 1978* (to be repealed by clause 39).

New section 93B provides that a consumer who disputes the accuracy or completeness in relation to the consumer of any information compiled by a credit reporting agent may serve a notice requesting the agent to correct the information.

Section 93C provides that where a credit reporting agent fails to make the amendment requested by the consumer or the consumer is not satisfied with the amendment, supplement or deletion, the consumer may apply to the Magistrates' Court for an order requiring the credit reporting agent to make any or any further amendment, supplement or deletion from the information.

Section 93D provides that the Court may order a credit reporting agent to amend, supplement or delete any item of information concerning the consumer that the Court is satisfied is inaccurate, misleading or irrelevant to the purpose for which the information is kept or which should be amended, supplemented or deleted by reason of effluxion of time and to give any person to whom the agent has provided information with respect to the consumer, full particulars of the amendment, supplement or deletion. A credit reporting agent who does not comply with an order under new section 93D commits an offence and is liable to the penalty set out in the section.

***Sale of Land Act 1962***

[33]. Inserts a new Division 4 of Part I which re-enacts the terms contracts provisions and groups them together in one Division.

Section 29J re-enacts the current section 4(4) and provides for the consequences of a failure by the vendor, without lawful excuse, to comply with a notice served by the purchaser under section 29H. The vendor is deemed to have breached a condition of the terms contract and the purchaser is entitled to all civil remedies for that breach. The vendor is also guilty of an offence.

Section 29T re-enacts the current section 7(5) and sets out the consequences of a failure by the purchaser to comply with a notice under section 29Q without lawful excuse. The purchaser is deemed to have breached a condition of the contract and the vendor is entitled to all civil remedies for that breach. The purchaser is also guilty of an offence and subject to the penalty set out in the section.

***The Committee notes that the provisions raise an issue concerning the presumption of innocence (see Charter Report). The Committee notes that in appropriate cases the establishment of a lawful excuse is a matter readily available to the defendant and in terms of giving efficacy to the proposed law may be considered a reasonable limitation to the presumption.***

***The Committee notes these extracts from the Statement of Compatibility –***

> *The right to be presumed innocent reflects a fundamental common-law principle. However, the courts have recognised that the right may be subject to limits and have held that reverse onus provisions are more likely to be consistent with human rights if they require the accused to prove an exception, proviso or excuse rather than disprove an element of the offence; where the conduct regulated by the offence is generally unlawful; where the information required to exonerate the defendant is readily available to the defendant; and where the level of penalty is at the lower end of the scale.*
>
> *The purpose of the limitation of the right is to provide the defendant with an opportunity to avoid liability for the offence in circumstances where the defendant has a lawful excuse for not complying with the notice served by the other party to the contract.*
>
> *The onus of proving a lawful excuse creates an evidential rather than legal burden and only applies where a defendant seeks to rely upon the ability to raise a lawful excuse to the offence. Section 130 of the Magistrates' Court Act 1989 would apply on summary prosecution so that a defendant claiming he or she had a lawful excuse would have to adduce or point to evidence that suggests a reasonable possibility that the exception applies. That is, once the defendant presents or points to evidence of a lawful excuse, the onus returns to the prosecuting authority.*
>
> *Further, the onus relates to matters that are within the knowledge of the defendant and not difficult for the defendant to establish.*

[39]. Repeals the *Credit Reporting Act 1978*.

[40]. Repeals this Act on 1 July 2010.

## Charter Report

**Keywords: Reasonable limits on rights – Regulation of commercial conduct – Privacy – Presumption of innocence**

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

The Committee notes that the Bill's subject-matter is the regulation of commercial conduct and the enforcement of that regulation. 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:

- **Privacy** (Charter s. 13(a)): provisions requiring applicants for credit provider registration to supply certain information, including criminal history information (clause 7, amending s. 13 of the *Consumer Credit (Victoria) Act 1995*); permitting the Business Licensing Authority to demand certain information from applicants and credit providers (and to refuse or revoke registration if the demand is not met) (clauses 9 and 15, inserting new sections 14B & 24A into the *Consumer Credit (Victoria) Act 1995*); and requiring that certain information about credit providers be made available on a public register (clause 11, replacing s. 19 of the *Consumer Credit (Victoria) Act 1995*.)
- **Presumption of innocence** (Charter s. 25(1)): provisions placing an evidential burden on defendants charged with refusing to comply with certain requests or notices relating to property

and mortgages to establish a 'lawful excuse' for not doing so (clause 33, inserting new sections 29J & 29T into the *Sale of Land Act 1962*.)

The Statement of Compatibility contends that these provisions do not infringe the right to privacy and reasonably limit the presumption of innocence. Having considered the above Charter rights and provisions, the Committee is satisfied that the measures so engaged do not warrant any special mention or adverse comment in respect to possible incompatibility with human rights.

***The Committee makes no further comment.***

# Crimes Amendment (Child Homicide) Bill 2007

| | |
|---|---|
| **Introduced** | 5 December 2007 |
| **Second Reading Speech** | 6 December 2007 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Mr Rob Hulls MLA |
| **Portfolio responsibility** | Attorney-General |

## Purpose

The Bill amends the *Crimes Act 1958* (the 'Act') to create a new offence of child homicide, to increase the maximum penalty for the offence of negligently causing serious injury and to split the offence of dangerous driving causing death or serious injury into separate offences with different maximum penalties.

> Note: *The transitional provision in clause 6 states that all amendments made by the Act apply only to offences alleged to have been committed on or after the commencement of the Act.*

## Content and Committee comment

**[Clauses]**

[2]. Provides that the Bill will come into operation on the day after Royal Assent.

***Child homicide***

[3]. Inserts a new section 5A into the Act to create the new offence of child homicide.

The new offence incorporates the elements of the common law offence of manslaughter but has as an additional element that the victim is a child under 6 years of age. The new offence has the same maximum penalty as manslaughter.

***Negligently causing serious injury***

[4]. Increases the penalty for negligently causing serious injury in section 24 from level 6 imprisonment (5 years maximum) to level 5 imprisonment (10 years maximum).

***Dangerous driving causing death or serious injury***

[5]. Amends section 319(1) of, and inserts a new section 319(1A) into the Act.

Section 319(1) currently provides for the offence of dangerous driving causing death or serious injury and is amended by removing the alternative element of serious injury from the offence. The resulting offence of dangerous driving causing death will carry an increased penalty of level 5 imprisonment (10 years maximum) (currently 5 years).

A new subsection (1A) is also inserted to create a separate offence of dangerous driving causing serious injury. The offence will carry the same penalty (level 6 imprisonment, 5 years maximum) as the existing offence of dangerous driving causing death or serious injury.

[7]. Makes amendments to the *Children, Youth and Families Act 2005*, the *Coroners Act 1985*, the *Crimes Act 1958* and the *Sentencing Act 1991* that are consequential to the insertion of the new offence of Child Homicide.

***Children, Youth and Families Act 2005***

[8]. Make amendments to a number of sections in the Act to include the offence of 'defensive homicide'.

The Committee notes that the explanatory memorandum for clause 8 provides –

> *'amends section 356(1), (2)(a), (3) and (4), as well as section 516(1)(b), of the Children, Youth and Families Act 2005 to include the offence of defensive homicide'**.
>
> ***Defensive homicide – Section 9AD of the Crimes Act 1958.*

## Charter Report

**Keywords: Age discrimination – Protection of children – Separate offence for manslaughter of children under six – Availability of evidential provisions for drug and alcohol testing in relation to motor vehicle use where the victim is under six**

Charter s. 8(3) provides that everyone 'is entitled to the equal protection of the law without discrimination.' Discrimination includes discrimination on the basis of age. Charter s. 17(2) provides that '[e]very child has the right, without discrimination, to such protection as… is needed by him or her by reason of being a child.'

The Committee notes that clause 3, inserting a new section 5A into the *Crimes Act 1958*, creates an offence of child homicide. The Statement of Compatibility remarks that the creation of the new offence 'enables higher penalties to be imposed' for manslaughter where the victim is under six years old. The Committee observes that the new offence has the same definition and maximum penalty as manslaughter. The Second-Reading Speech remarks that the new offence 'will give scope to the courts to establish a new sentencing practice' in cases of manslaughter where the victim is under six. The Committee considers that clause 3 may promote children's Charter rights to protection from potentially fatal violence.

The Committee also notes that clause 3's protection only extends to children under six years old. The Committee therefore observes that clause 3 engages the Charter's rights to equal protection of the law without discrimination on the basis of age. The Second Reading Speech remarks:

> *Children under [6 years old] are generally more likely to become victims of homicide than older children. This is due to a range of factors. They include the greater physical vulnerability of young children compared to older children. They also include the particular stresses posed by caring for babies and young children and the fact that physical abuse of children under school age is less likely to be detected through social contacts than the physical abuse of older children.*

Whilst the Committee is concerned that the Statement of Compatibility does not address the question of age discrimination, the Committee considers that clause 3 is a reasonable limit on the Charter's equality rights.

The Committee also notes that clause 3 provides that a person who commits manslaughter on a child under six is 'guilty of child homicide and not of manslaughter'. The Committee observes that narrowing the definition of manslaughter in this way makes existing Victorian statutory provisions relating to manslaughter unavailable in investigations and trials when the victim is under six years old. The Committee also observes that, while clause 7 amends a number of such provisions to include the new offence of child homicide, it does not amend ss. 57-57B and 58* of the *Road Safety Act 1986*, which facilitate the proof of drug and alcohol testing results relevant to motor vehicle control in trials for a number of offences, including manslaughter. The Committee is therefore concerned that clause 3, by making it harder to prosecute manslaughter caused by a motor vehicle in cases where the victim is under 6, may infringe such children's Charter rights to protection without discrimination.

Note: *Sections 57, 57A, 57B and 58 concern evidentiary provisions respectively applying to blood tests, urine tests, oral fluid tests and breath tests. The sections facilitate the reception of evidence of these tests in certain legal proceedings including murder or manslaughter.*

***The Committee will seek further advice from the Attorney-General as to whether the evidentiary provisions of Road Safety Act 1986 (sections 57-57B and 58) also apply to the new offence of 'child homicide' introduced by clause 3 of the Bill.***

***Pending the Attorney-General's response, the Committee draws attention to these provisions.***

***The Committee makes no further comment.***

# Infringements and Other Acts Amendment Bill 2007

| | |
|---|---|
| **Introduced** | 4 December 2007 |
| **Second Reading Speech** | 6 December 2007 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Mr Rob Hulls MLA |
| **Portfolio responsibility** | Attorney-General |

## Purpose

The Bill —

- provides for a trial expansion of the infringements regime, during which certain offences under the *Summary Offences Act 1966*, the *Liquor Control Reform Act 1998*, and theft which is "shop theft" under the *Crimes Act 1958* will be enforceable by infringement notice; and
- makes miscellaneous amendments to the *Infringements Act 2006* (the 'Act') to refine the operation of the current infringement processes and amend other Acts which interact with the Act; and
- amends the *Supreme Court Act 1986* to provide the Sheriff with the power to temporarily restrain a person who resists the execution of a civil warrant.

## Content and Committee comment

**[Clauses]**

[2]. Other than section 11 the provisions come into operation on proclamation but not later than by 1 January 2009. Section 11 comes into operation on proclamation but not later than by 1 January 2011.

> Note: *Section 11 provides for the repeal of the three year trial program introduced by the Bill in the three Acts mentioned in the first dot point of the purpose section above.*

***Liquor Control Reform Act 1998 [5 to 8]***

[5]. Amends section 113 of the Act by re-enacting the offences originally set out in paragraphs in section 113(1) into separate subsections. The offences relate to consuming or having liquor on unlicensed premises.

Further the failure or refusal by a drunk, violent or quarrelsome person to leave licensed premises as requested, is repealed and re-enacted in a new section 114(2).

[7]. Provides police members with the power to serve infringement notices for offences committed under sections 113(1), 113(1A), 113(1B), 113(1C) and 114(2).

[8]. Despite clause 7 above an infringement notice cannot be issued to a person who is under 18 years of age at the time of the alleged offence, for the offences under section 113 or 114 of the Act that are enforceable by infringement notice for the purposes of the trial expansion.

> Note: *The infringement penalty for the consumption or supply of liquor on unlicensed premises under section 113(1), (1A), (1B), (1C) or 114(2) will be 2 penalty units.*

***Summary Offences Act 1966***

[9]. Amends section 60AA of the Act to provide that, during the trial expansion of the infringements system, a police member may serve an infringement notice on a person who is aged 18 years or more for the following offences —

- wilful damage to property being under the value of $500 (section 9(1)(c));
- indecent, abusive or obscene language (section 17(1)(c)); and
- offensive behaviour (section 17(1)(d)).

Note: *The penalty applicable when these trial offences are enforced by infringement notice will be 2 penalty units.*

***Crimes Act 1958***

[10]. Inserts new section 74A providing for "shop theft", which is a "sub set" of the indictable offence of theft. Shop theft covers theft from retail premises of goods that are displayed or offered for sale for less than $600. It may be enforced by infringement notice and an infringement penalty of 2 penalty units applies.

Note: From the Second reading Speech – *The Bill creates a new 'infringeable' version of the offence of theft in the Crimes Act 1958. This provision makes it an infringeable offence to steal goods valued at, or displayed for sale for, up to $600 from retail premises. The new offence is only to be used to deal with first-time, minor and 'one-off' offending, where restitution has been made or the retailer does not require it. It will not be used in relation to conduct involving repeat offenders, syndicates or workplace theft.*

*The infringeable offence of shop theft remains, like the 'parent' offence, an indictable offence that is also triable summarily. The powers and safeguards provided for the investigation of indictable offences apply in relation to the new infringeable offence. In practice, this will mean that police are able to use their investigative powers under the Crimes Act 1958 before deciding what enforcement action to take – i.e., whether to give a caution, issue an infringement notice or proceed by charge and summons. A defendant who receives an infringement notice for shop theft and elects to have the matter dealt with by the court has the same legal rights and liabilities as would apply if the matter had originally proceeded by charge and summons. If the police issue an infringement notice but subsequently find that, in the light of further information, it is preferable to take proceedings in court, the police may withdraw the notice and proceed by charge and summons.*

***Repeal of amendments relating to the trial period***

[11]. Repeals the relevant sections of the Acts amended by this Bill by clauses 7 to 10 being the trial period of the new offences for which an infringement notice may be issued that are currently prosecuted by charge and summons. If the trial is not extended the repeal will occur on or prior to 1 July 2011.

***Amendments to the Infringements Act 2006***

[22]. Inserts a new section 71A to establish that when proceedings commence in relation to a matter for which an infringement notice for an indictable offence was originally issued, the matter proceeds as if it had commenced by charge and summons under section 53 of the *Magistrates' Court Act 1989*.

[28 to 37]. Amend Part 8 of the Act, which sets out the circumstances in which the driver licence or the registration of a motor vehicle or trailer belonging to a person in default of an infringement warrant can be suspended. The effect of the amendments is to provide that a person remains in default unless and until all infringement warrants have been dealt with.

[39] Clarifies how Part 11 of the Act applies when one or more than one infringement warrant has been issued against a fine defaulter. Part 11 provides that a charge can be made over real property or the property sold where the amount owed on an infringement warrants exceed $10,000. The amendment ensures that all money owed on all infringements warrants against a person may be taken into account in determining whether the threshold level for the making of such an order has been reached.

***Infringement notice offences - Consultation certificate – Subordinate Legislation Act 1994***

[43]. Amends section 6A of the *Subordinate Legislation Act 1994*, which requires a Minister to consult with the Department of Justice before making a statutory rule that creates or varies an offence enforceable by infringement notice. The amendment clarifies that an infringements offence consultation certificate is needed whenever a statutory rule will result in an offence being enforceable by infringement notice or vary the infringement penalty, regardless of whether the offence is located in the proposed statutory rule or in principal legislation.

***Use of force – execution of warrant***

[44]. Amends the *Supreme Court Act 1986* to enable the sheriff or a person so directed by the sheriff, when executing a civil warrant, to temporarily restrain a person who hinders the execution of the warrant.

> Note: *Section 82H of the Magistrates' Court Act 1989 provides power to restrain a person to the sheriff for the execution of criminal warrants.*

[46]. Provides for the automatic repeal of the amending Act on 1 July 2012.

## Charter Report

**Keywords: Reasonable limits on rights – Age-appropriate criminal procedures – Enforcement of the criminal law – Age discrimination – Property – Liberty**

Charter s. 7(2) provides that human rights may be 'subject by law only to such reasonable limits as can be demonstrably justified in a free and democratic society.' Charter s. 25(3) provides that every 'child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.'

The Committee notes that the Bill's subject-matter relates to the enforcement of the criminal law. 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:

- **Age discrimination** (Charter s.8(3)): provisions excluding children under 18 from a trial expansion of the infringement system (clause 8, amending s. 141 of the *Liquor Control Reform Act 1998*; clause 9, amending s. 60AA of the *Summary Offences Act 1966*; and clause 10, inserting a new section 74A into the *Crimes Act 1958*)
- **Property** (Charter s. 20): provisions altering the threshold for the availability of warrants to recover money owed pursuant to infringement warrants (clauses 38 & 39, substituting s. 122 and amending ss. 134, 136, 137 & 146 of the *Infringements Act 2006*)
- **Liberty** (Charter s. 21(1)): provisions for imprisonment of a person in lieu of payment of a partially discharged fine (clause 40, amending s. 160 of the *Infringements Act 2006*); and for restraint of a person who is hindering the execution of a warrant (clause 44, inserting a new s. 121A into the *Supreme Court Act 1986*)

The Statement of Compatibility contends that the Charter's rights to property and liberty are not limited by the Bill. In relation to the question of age discrimination, the Statement contends that the provisions are a reasonable limit on the Charter's equality rights and, in particular, remarks that:

> *The removal of children from the scope of the trial means that young offenders will continue to be dealt with either through the formal cautioning program in place for children, or by the Children's Court. The court is the appropriate venue to offer an individualised approach to young offenders.*

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 the exclusion of children from the trial promotes children's Charter right to age-appropriate criminal procedures.

***The Committee makes no further comment.***

# Legislation Reform (Repeals No. 2) Bill 2007

| | |
|---|---|
| **Introduced** | 4 December 2007 |
| **Second Reading Speech** | 6 December 2007 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Mr. John Brumby MLA |
| **Portfolio responsibility** | Premier |

## Purpose

The Bill repeals spent or redundant Acts.

## Content and Committee comment

**[Clauses]**

[2]. The Act comes into force on Royal Assent.

[3]. Provides for the 55 Acts listed in the Schedule to be repealed. The Acts in the Schedule comprise 7 principal Acts and 48 amending Acts.

[4]. Provides for the automatic repeal of this Act on the first anniversary of the day on which the Act receives Royal Assent.

***Schedule***

The Schedule divides the Acts to be repealed into 2 categories –

- Spent principal Acts, and
- Spent amending Acts with transitional, validation, saving or substantive provisions.

Note: *The explanatory memorandum provides background material concerning each of the Acts to repealed and points our that any residual effect of transitional provisions in those Acts will be saved by the operation of section 14 of the Interpretation of Legislation Act 1984.*

Note: *A motion passed by the Legislative Assembly on 6 December 2007 referred this Bill to the Committee for inquiry, consideration and report.*

***The Committee makes no further comment.***

# Professional Boxing and Combat Sports Amendment Bill 2007

| | |
|---|---|
| **Introduced** | 4 December 2007 |
| **Second Reading Speech** | 6 December 2007 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Mr. James Merlino MLA |
| **Portfolio responsibility** | Minister for Sport, Recreation and Youth Affairs |

## Purpose

The amends the *Professional Boxing and Combat Sports Act 1985* (the 'Act') to –

- provide for powers, duties and functions to be exercised by the Professional Boxing and Combat Sports Board,
- provide for the Minister to give directions to the Board,
- enable the Board to prevent contestants who lack the necessary professional skills from competing in professional contests,
- provide for a list of persons who may act as timekeepers,
- provide a range of consequential regulation making powers and otherwise improve the operation of the Act.

## Content and Committee comment

**[Clauses]**

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

[6 and 7]. Provides for the power to license persons involved in professional contests, such as judges, trainers and referees and the power to issue permits to conduct promotions is to be transferred from the Minister to the Board.

[13]. Provides for the substitution of a new section 10B which transfers the power to cancel or suspend the registration of a professional contestant from the Minister to the Board. The section provides the circumstances in which the Board must and where it may cancel or suspend a contestants registration.

***Compulsory medical examinations and fitness tests***

[15]. Provides for a new Division 3 of Part II of the Act to be substituted to require professional contestants to present themselves for medical examination within 24 hours before and after a contest, and at any other time as directed by the Board, and for medical examinations or fitness tests required under the regulations.

Contestants, including those registered in another State or Territory, are obliged to refrain from competing in a professional contest if a medical practitioner has declared the contestant unfit, and not to compete again until he or she has been declared fit in accordance with the Act or the regulations.

[18]. Provides for the substitution of Division 5 of Part II relating to the Board. The clause incorporates previous provisions regarding the establishment, composition, functions, powers and immunity of the Board.

[27]. Provides for this amending Act to be repealed on 1 July 2009.

## 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.***

***The Committee makes no further comment.***

# Relationships Bill 2007

| | |
|---|---|
| **Introduced** | 4 December 2007 |
| **Second Reading Speech** | 6 December 2007 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Rob Hulls MLA |
| **Portfolio responsibility** | Attorney-General |

## Purpose

The Bill —

- establishes a register for the registration of domestic relationships in Victoria;
- provides for relationship agreements;
- provides for the adjustment of property interests between partners;
- provides for the rights of domestic partners to maintenance;
- repeals Part IX of the *Property Law Act 1958*;
- makes consequential amendments to Victorian Acts that currently recognise domestic partners and relationships, in order to make provision for registered relationships.

> Note: *Registration will provide conclusive proof of the existence of a domestic relationship. Partners in registered relationships will not have to provide any further evidence to establish that their relationship exists. This will make it easier for domestic partners to access their rights under Victorian law.*

The Bill also provides a single location for statutory requirements governing property matters in the event of a breakdown of a domestic relationship. The Bill provides for the enforcement of relationship agreements made between domestic partners, allows for the adjustment of property interests between domestic partners and establishes a limited scheme for maintenance.

## Content and Committee comment

**[Clauses]**

[2]. Other than two items in Schedule 1 the Act will come into operation on proclamation but not later than by 1 December 2008. Items 25 and 69 of Schedule 1 will commence on proclamation but not later than by 1 July 2009.

> Note: *Schedule 1 includes consequential amendments to the Freedom of Information Act 1982 and the Consumer Credit (Victoria) Act 1995. However, if the consequential amendments to those Acts do not come into operation before 1 July 2009, they will come into operation on that day. This extended commencement date is necessary to match the commencement date for amendments to those Acts that are currently before the Parliament.*

[6]. Two persons who are in a registrable relationship may apply to the Registrar for registration of that relationship. They must live in Victoria and cannot be married or in relationship that is already registered in Victoria, or in another relationship that could be registered in Victoria.

[10]. The Registrar may register or refuse to register a relationship application within a reasonable time after 28 days from the time of the application.

***The Committee reports to Parliament pursuant to a term of reference provided in section 17(a)(ii) of the Parliamentary Committees Act 2003, – 'makes rights, freedoms or obligations dependent on insufficiently defined administrative***

***powers'.***

*The Committee observes that the criteria and requirements in sections 6 and 7 of the proposed Act for an application for registration appear to be reasonably prescribed and self-evident, however the Committee notes that the reasons to refuse to register a relationship are not so prescribed in the legislation and that as a result the administrative powers of the registrar appear to be insufficiently defined.*

*The Committee will seek further advice from the Attorney-General concerning the desirability to prescribe and limit the registrar's powers under section 10(3)(b) of the proposed Act.*

*The Committee further reports on the registrar's powers in respect to this issue in the Charter Report below.*

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

[11]. Registration is automatically revoked by the death or marriage of either person in the relationship. It may also be revoked if one or both of the persons in the relationship apply to the Registrar for revocation.

[16]. A court, on application by an interested person or on the court's own motion, may order the revocation of the registration of a registered relationship.

[18 and 19]. Sets out the Registrar's powers of inquiry in relation to the Relationships Register and provides for when the Registrar may or must make a correction of or amendment to the Relationships Register.

[20]. Requires the Registrar, as far as practicable, to protect the privacy of persons to whom the entries in the Relationships Register relate, as well as any other persons named in those entries, when providing information extracted from the Register.

[21]. The Registrar may search the Relationships Register for an entry about a particular registered relationship. The Registrar may reject the application if the applicant does not have an adequate reason for wanting the information, having regard to the connection between the applicant and the subjects of the entry, the age of the entry, the contents of the entry and any other relevant factors.

***Access to information on the Register***

[24]. Allows the Registrar to grant access to the Relationships Register or to provide information extracted from the Register. Access or information may be provided to a person or organisation that has an adequate reason for wanting the access or information.

> Note: *In deciding whether a person or organisation has an adequate reason for wanting the access or information, the Registrar must have regard to the nature of the applicant's interest, the sensitivity of the information, the use to be made of the information and other relevant factors. In making the decision about the access or information, the Registrar must, as far as practicable, protect the privacy of persons to whom the entries in the Register relate, as well as any other persons named in those entries.*

[26]. Allows the Registrar to collect information, other than registrable information, relating to registered relationships and to keep separate records of that information.

[27]. Allows the Registrar to provide additional services in connection with the provision of services relating to the registration of a registrable relationship. This includes providing information from the

Relationships Register, or from other records, in the form of a decorative certificate. The Registrar may charge a fee for the additional services which does not bear a relation to the cost of providing the service.

> Note: *A charge under section 27 is at the absolute discretion of the Registrar.*

[28]. Allows a person whose interests are affected by a decision of the Registrar under the Bill to apply to the VCAT for review of the decision.

***Relationship agreements, property and maintenance***

[35]. Sets out the definitions that apply in Part 3.2, which relates to relationship agreements made between domestic partners.

> Note: *The provisions of the Part are not dependant on the registration of a relationship under the Act. Where a domestic relationship is not registered, all of the circumstances of the relationship are to be taken into account in determining whether a domestic relationship exists or has existed. Clause 35(2) lists a number of circumstances that may be relevant in a particular case, including the degree of mutual commitment to a shared life and the duration of the relationship.*

[36]. A relationship agreement is to be dealt with according to the law of contract.

[37]. A court may vary or set aside a relationship agreement where circumstances have changed and it would be unfair to enforce the agreement or if it has been made as a result of fraud or duress or for any other reason that would allow a contract to be varied or set aside.

[38]. Sets out what the effect will be on certain provisions of a relationship agreement when one or both of the domestic partners dies.

***Property and maintenance***

[40]. Empowers a court in proceedings between domestic partners with respect to property to declare existing title or rights partners have in the property and to make orders giving effect to the declaration.

[41]. A domestic partner can apply to a court for either an order for the adjustment of property interests or for maintenance, or both.

[42]. Sets out residential and other prerequisites for making an order for the adjustment of property interests or for maintenance in circumstances where there is no registered relationship.

[43]. Sets out time limits of 2 years after the relationship ended for the making of an application for adjustment or maintenance orders. However, the court may grant leave to extend the time limit if hardship would result if leave were not granted.

[45]. *Property adjustment* – Allows a court to make an order for the adjustment of property interests that seems just and equitable having regard to a number of specified factors.

[51 to 57]. *Maintenance orders* – These clauses deal with a courts powers to make an order for maintenance in favour of a domestic partner unable to support themselves because their earning capacity has been adversely affected by the domestic relationship, or any other reason arising from the relationship, and allows a court to make an interim order for maintenance where the applicant is in immediate financial need. The provisions also deal with the effect on orders of subsequent marriage or new relationships, the cessation of orders, recovery of arrears and variation or orders for periodic maintenance.

[59]. If certain requirements have been met, a court is not to make an order that is inconsistent with the arrangements made in a relationship agreement between domestic partners. The formal requirements

are that an agreement must be in writing, signed by the partner against whom it is to be enforced, and that each partner took independent legal advice as to its effect before entering the agreement.

> Note: *Even where the formal requirements are met, the court is not bound to give effect to the terms of an agreement where the partners have explicitly or impliedly revoked it, the agreement has otherwise ceased to have effect or the court varies or sets aside the agreement under clause 37 of the Bill.*

[60]. Enables a court to order the execution of a deed or instrument where a person refuses or neglects to comply with a direction to do so.

[61]. *Urgent orders may be made in absence of a party* – In urgent cases, a court may make certain orders to protect certain property or aid enforcement of a relevant order, in the absence of a party.

[72]. Provides for the repeal of Part IX of the *Property Law Act 1958*.

> Note: *Part IX of the Act currently deals with property rights and alteration of domestic partners. However, Part IX makes no provision for maintenance orders or for relationship agreements.*

[73]. The Acts specified in Schedule 1 are to be consequentially amended as set out in that Schedule and provides for the automatic repeal of the clause and Schedule 1 on 1 December 2009.

> Note: *The consequential amendments reflect the provision of registered relationships introduced by this Bill in those Acts that already recognize 'domestic partnerships' and correct references made to Part IX of the Property Law Act 1958. The amendments do not effect the continued operation of the provisions in those Acts where there is no registered relationship.*

[75]. Provides for interim fees associated with the Relationships Register.

## Charter Report

**Keywords: Equal protection – Age discrimination – Marital status discrimination – Registration of relationships – Limits on registration – Limits on recognition of registration – Whether equal and effective protection of families**

Charter s. 8(3) provides that everyone is 'entitled to the equal protection of the law without discrimination' and 'has the right to equal and effective protection against discrimination.' Discrimination includes discrimination on the basis of age and marital status (including having a domestic partner.) 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 clauses 10 & 12 provide for the registration of certain relationships and the issuing of a certificate that is admissible evidence of that registration. The Committee also notes the Schedule 1 amends all definitions of 'domestic partner' in Victorian legislation (including the definition in the *Equal Opportunity Act 1995* that is relevant to the definition of discrimination for the purposes of the Charter) to include partners in registered relationships.

Whilst the Committee considers that clauses 10 & 22 and Schedule 1 promote those couples' Charter rights to protection against discrimination, the Committee observes that clause 6 limits registration to persons in 'registrable relationships' who satisfy various registration requirements. In particular, the Committee notes that the following people with domestic partners will not be able to register their relationship (or remain registered):

- people who are under 18 or whose partner is under 18 (definition of 'registrable relationship' in clause 5)
- people who do not provide 'personal or financial commitment of a domestic nature for the benefit of' their partner or vice-versa (definition of 'registrable relationship' in clause 5), but who nevertheless live with them 'on a genuine domestic basis' (definition of 'domestic partner in s. 4 of the *Equal Opportunity Act 1995* and numerous other Victorian statutes)

- people who are not domiciled or resident in Victoria or whose partner is not domiciled or resident in Victoria (clause 6(a))
- people who are married or who have a second domestic partner, or whose partner is married or has a second domestic partner, or who subsequently marry (clauses 6(b), 6(c) & 11(b))

The Committee observes that these categories of people, who are all domestic partners for the purposes of many Victorian laws, are prevented by clauses 5 and 6 from proving that status via registration. The Committee therefore considers that clause 5 and 6 engage the Charter rights of such people to equal and effective protection from discrimination on the basis of marital status (including having a domestic partner.)

The Committee also considers that the definition of 'registrable relationship' in clause 5, by excluding people under 18 from registration, engages the Charter's right to equal protection of the law without discrimination on the basis of age. The Statement of Compatibility remarks:

> *The purpose of the limitation regarding age is to protect persons under 18 years of age who are more vulnerable than adults because of their age, and therefore are less likely to have the maturity and capacity to make an informed decision about registering a relationship and to understand the consequences of registration…*
>
> *It would be an unreasonable administrative burden on the registrar to require them to assess each individual aged 16 or 17 years to determine whether they have sufficient capacity to make the decision. The registrar is also not empowered to undertake judicial functions unlike a court who can authorise a person to marry when aged 16 or 17 in exceptional circumstances.*

The Committee observes that concerns about minors' capacity to understand the consequences of registration may be addressed through a requirement of parental consent and/or by extending the existing jurisdiction of Victorian judges and magistrates in relation to the marriage of minors to include a power to authorise a registrar to register a relationship involving a minor.

The Committee further considers that clauses 6(b), 6(c) & 11(1)(b), which deny registration to people who are married or have more than one domestic partner, engage the Charter's right against marital status discrimination (including discrimination on the basis of having a domestic partner.) The Statement of Compatibility remarks:

> *The purpose of the limitation regarding marital status is to ensure that a person is only in one registered relationship and is not married in order to register a relationship. Legal and practical difficulties would arise if a person had more than one registered partner or both a registered partner and a spouse, for example, where a doctor needs to discuss a person's medical treatment with the next of kin in an emergency situation.*

The Committee observes that domestic relationships, unlike marriage, are not exclusive relationships and that it remains possible for a person to be in multiple domestic relationships, or in one or more domestic relationships and a marriage, or to enter into additional domestic relationships while in a registered relationship. The Committee also observes that all these relationships may attract consequences under Victoria laws, including the definition of next of kin (which does not distinguish between spouses, registered domestic partners or unregistered domestic partners: see s. 3 of the *Human Tissue Act 1982*, which is picked up by the *Health Act 1958* and the *Health Services Act 1988*.) The Committee further observes that clause 6(c) (and the requirement of a statutory declaration in clause 7(a)(iii)) may cause difficulties for a relationship when one party wasn't aware that the other party is in a registrable relationship with someone else (e.g. a 'mistress'.)

The Committee finally notes that Schedule 1 does not modify Victorian laws that define the terms 'de facto relationship' (*Adoption Act 1984*, s. 4; *Infertility Treatment Act 1995*, s. 3); 'de facto spouse' (*Adoption Act 1984*, s. 4; *Crimes Act 1958*, s. 35; *Drugs, Poisons and Controlled Substances Act 1981*, s. 61; *Terrorism (Community Protection) Act 2003*, s. 13ZD); and (in a domestic sense) 'partner' (*Emergency Services Superannuation Act 1986*, s. 3; *Parliamentary Salaries and Superannuation Act 1986*, s. 10; *State Employees Retirement Benefits Act 1979*, s. 2; *State Superannuation Act 1988*, s. 3;

*Superannuation (Portability) Act 1989*, s. 3; *Terrorism (Community Protection) Act 2003*, s. 13ZD) to include (as appropriate) opposite-sex or same-sex registered relationships.

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

- ***whether or not clauses 5, 6 & 11(b), to the extent that they deny the benefits of registration to some domestic partner, infringe their rights to equal and effective protection against discrimination;***
- ***whether or not clause 5, to the extent that it denies the benefits of registration to minors and their domestic partners, discriminates against them on the basis of age;***
- ***whether or not clauses 6(b), 6(c) & 11(b), to the extent that they deny the benefits of registration to people who are married or in two or more domestic relationships, or whose domestic partners are married or in two or more domestic relationships, discriminate against them on the basis of their marital status (including having a domestic partner);***
- ***if so, whether or not these clauses are reasonable limits on human rights according to the test in Charter s. 7(2).***

***The Committee resolves to seek further clarification from the Attorney-General as whether registration is conclusive proof that a person's domestic partner will satisfy the definition of 'de facto' and (used in a domestic sense) 'partner' where those terms are used in Victorian legislation.***

***Pending the Attorney-General's response, the Committee draws attention to these provisions.***

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**Keywords: Privacy and family – Registrar's powers to require information or make inquiries – Requirement to enter particulars of registered relationships into the register – Registrar's discretion to refuse to register a registrable relationship – Court's power to revoke the registration of a registered relationship – Unlawful interferences in privacy and family**

Charter s. 13(a) provides that everyone 'has the right… not to have his or her privacy [or] family… unlawfully or arbitrarily interfered with.' An interference is unlawful unless it is authorised by a law that is certain, appropriately circumscribed and accessible. 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 clauses 7(d) & 8 require applicants for registration of a registered relationship to provide 'any other document or information that the Registrar [of Births, Deaths and Marriages] requires for the purposes of determining the application'. The Committee also notes that clause 18 provides the Registrar with powers to verify information provided in connection with an application or to check the correctness of particulars on the register, including a power to require any 'person who may be able to provide information relevant to' such an inquiry to do so or face a criminal penalty. The Committee considers that clauses 7(d), 8 & 18 engage applicants' Charter rights not to have their 'privacy… unlawfully or arbitrarily interfered with.'

The Statement of Compatibility remarks:

> *The circumstances in which the bill will authorise the registrar to collect the information in question are circumscribed. The main purpose of obtaining information is to ensure that applicants meet the eligibility requirements for registration and that the register is correct. This is vital to the integrity of the register. Another purpose of obtaining information is to enable the registrar to provide additional services in relation to the registration of a registrable relationship (for example, recording the duration of a relationship prior to registration on a commemorative certificate.) The exercise of these powers is therefore neither unlawful nor arbitrary.*

The Committee observes that the scope of clauses 7(d), 8 and 18 depends on the nature of the particulars in the Relationships Register and the matters that the Registrar is required or permitted to consider in exercise of any of his or her powers in relation to registration of relationships.

The Committee also observes that the Bill does not specify the grounds on which the Registrar may 'refuse to register the relationship' (under clause 10(3)(b)) or the particulars of each registered relationship required under this Act to be included' in the register (under clause 17(2)), including, for example, whether or not the relationship were or remain in a registrable relationship and the past and continued satisfaction of the eligibility requirements in clause 6. The Committee is therefore concerned that clauses 7(d), 8 and 18 may not clearly define what information the Registrar is and isn't entitled to request, demand or inquire about.

The Committee further observes that one of the eligibility requirements for registration is that the applicants are in a 'registrable relationship', which requires that they be a 'couple', that at least one member provide 'personal or financial commitment or support of a domestic nature for the material benefit of the other' and that the relationship is not 'for fee or reward' or 'on behalf of another person'. The Committee additionally observes that clause 35(2) provides that, in determining whether or not a couple are in a domestic relationship (which has the same definition as a 'registrable relationship'), all circumstances can be taken into account including the degree of the couple's mutual commitment, the relationship's duration, the nature of the couple's residence, whether or not a sexual relationship exists, financial arrangements, property arrangements, care for children and the reputation and public aspects of the relationship. The Committee finally observes that clause 6(c) precludes registration if one member of the couple is in a registrable relationship with another person. The Committee is therefore also concerned that clauses 7(d) & 8 may authorise the Registrar to require applicants to reveal highly personal information and that clause 18 may authorise the Registrar to make inquiries into (and demand information from people about) highly personal information.

The Committee is further concerned that the Bill does not specify the circumstances when an application to register a registrable relationship can be refused (under clause 10(3)(b)) or when a court may bar the Registrar from revoking the registration of a registered relationship (under clause 15(b)) or order the revocation if an 'interested person applies' or 'on its own motion' (under clause 16.) In relation to clause 16, the Explanatory Memorandum comments:

> *For example, this would allow a court dealing with property matters arising from a registered relationship that has broken down to order the revocation as a way of finally determining the relationship.*

The Committee observes that no court has the power to order the divorce of a married couple except upon the application of one of the spouses. The Committee also observes that courts and tribunals are exempted from the requirement in Charter s. 38 to act compatibly with human rights.

The Committee further observes that discretionary control by the Registrar or a court of tribunal over the registration of a registrable relationship or the revocation of the registration of a registered relationship may significantly diminish the dignity of the members of those relationships and limit their personal autonomy.

***The Committee considers that clauses 7(d), 8, 10(3)(b), 15(b), 16, 17(2) and 18 are not certain, appropriately circumscribed or accessible and therefore may infringe the Charter rights of people in registrable and registered relationships to not be subject to unlawful interference in their privacy or family. The Committee refers to Parliament for its consideration the question of whether or not these clauses are reasonable and demonstrably justified limits on human rights according to the test in Charter s. 7(2).***

**Keywords: Equal protection of the law – Protection of families and children – Whether registration procedures are as accessible as marriage procedures – Whether revocation procedures are as protective as divorce procedures – Whether reasonable limits on protection**

Charter s. 8(3) provides that everyone is 'entitled to the equal protection of the law without discrimination'. Charter s. 17 provides that '[f]amilies… are entitled to be protected by society and the State' and that every child has 'the right, without discrimination, to such protection as is in his or her best interests'. Discrimination includes discrimination on the basis of marital status and sexual orientation. 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 all the benefits that the Bill affords to registered couples are also available to married couples (who will automatically satisfy the definition of spouse and whose marriage will be registered on the marriage register under Part 5 of the *Births, Deaths and Marriages Act 1996*.) The Committee observes that numerous overseas courts have held that the right to equal protection of the law includes the right of unmarried people to the benefits that the law affords to married people, unless there is an appropriate and non-discriminatory reason to distinguish between them. The Committee considers that the Bill, to the extent that it maintains or permits differences in the legal processes and consequences of registering relationships and marriage, may engage the Charter rights of unmarried people to equal protection of the law and the rights of their children to protection without discrimination.

The Second-Reading speech remarks:

> *A domestic relationship, registered or otherwise, is not, of course, marriage, over which the state has no constitutional power and which is defined by the commonwealth Marriage Act 1961 to exclude same-sex couples.*

The Committee observes that, whilst Victoria has the power to pass valid laws with respect to marriage (and has done so in the past), such laws will currently be of no effect to the extent that they are inconsistent with the *Marriage Act 1961* (Cth) or another Commonwealth law. The Committee also observes that Victoria cannot change the definition of marriage in the *Marriage Act 1961* (Cth) or require other jurisdictions to recognise Victorian relationships in their laws. However, the Committee further observes that Victoria has the power to provide registration and revocation procedures for relationships that are equivalent to those for marriage.

The Committee notes that the registration process in the Bill differs from the process of registering a marriage under Part 5 of the *Births, Deaths and Marriages Act 1996* in the following respects:

- **Eligibility:** Registration of a relationship requires that the partners be in a 'registrable relationship' (including being adults and providing material benefit) (clause 5), residents of Victoria and in no other relationships (clause 6), whereas marriage is available to all unmarried adults (apart from certain relatives) and is available to some minors in some circumstances (Parts II and III of the *Marriage Act 1961* (Cth)).

- **Process:** Registration of a relationship is at the Registrar's discretion and can be revoked by a court without an application from the partners (clauses 10(3)(b) and 16), whereas the Registrar must register all marriages solemnised in Victoria and divorces require an application by a party to the marriage (s. 31 of the Births, Deaths and Marriages Act 1996 & s. 44(1A) of the Family Law Act 1975 (Cth)).

- **Cost:** Registration costs $180 and revocation of registration costs $58.50 (clause 75(1)), whereas registration of a soleminised marriage and removal of that registration following divorce are free (although solemnisation and divorce may themselves be costly.)

The Committee considers that these differences, to the extent that they would prevent or deter an unmarried couple from accessing the benefits of registration in circumstances where a similarly placed

opposite-sex couple would not be prevented or deterred from accessing the same benefits via marriage, may infringe the Charter rights of those couples and their children to equal protection of the law.

The Committee also notes that the revocation process in the Bill differs from divorce under Parts V and VI of the *Family Law Act 1975* (Cth) in the following respects:

- **Marriage to someone else:** Registration is automatically revoked when one partner marries (clause 11), whereas marriage by a married person does not end the marriage and is both invalid and criminal (s. 94 of the *Marriage Act 1961* (Cth))

- **Availability:** Revocation is available 90 days after a party lodges a revocation application (clause 15), whereas divorce require a court order and prior separation of the couple for at least 12 months (s. 48(2) of the *Family Law Act 1975* (Cth).)

- **Reconciliation:** Revocation does not require any consideration of reconciliation, whereas, in the case of a couple married for under two years, they must first have considered reconciliation with the assistance of a professional counsellor (s. 44(1B) of the *Family Law Act 1975* (Cth))

- **Children:** Revocation is available regardless of the circumstances of children of the relationship, whereas divorce generally cannot be ordered unless a court is satisfied 'that proper arrangement has been made in all the circumstances for the care, welfare and development' of children of the marriage (s. 55A of the *Family Law Act 1975* (Cth))

Whilst the Committee considers that clauses 11 and 15 may provide less protection to families and children from the consequences of relationship breakdown than are available to equivalent married couples and their children, the Committee also observes that the introduction of similar constraints on revocation of registration of a registered relationship may deter some unmarried couples from registration and its accompanying benefits. However, the Committee further observes that permitting couples to elect, on or after registration, to be bound by such constraints may not attract this consequence.

The Committee additionally notes that the property dispute resolution procedure provided to domestic partners (including partners in a registered relationship) in Chapter 3 of the Bill differs in many respects from the property dispute resolution procedures available to married couples under the *Family Law Act 1975* (Cth). In relation to Chapter 3, the Second Reading Speech remarks:

> *[I]t is only necessary to enact these property-related provisions because of the Howard government's failure to act on Victoria's referral of powers made by the Commonwealth Powers (De Facto Relationships) Act 2004 in respect of same-sex domestic partners. When it made this referral, the Victorian government recognised that the current situation, which requires former domestic partners to use both the state and federal jurisdictions, means that they are subject to great expense and effort when dealing with the often difficult legal circumstances surrounding the breakdown of a relationship.*

The Committee considers that the cost of unnecessarily duplicating the Commonwealth's family law processes at a state level may justify lesser protections in Victorian law for unmarried couples as a temporary measure pending an anticipated extension of protections in Commonwealth statutes, according to the test in Charter s. 7(2) for reasonable limits on protection.

***The Committee refers to Parliament for its consideration the following questions:***

- ***whether or not the following provisions relating to registration of relationships:***

- ***the requirements that the couple be in a registrable relationship (including being adults and providing material benefit), live in Victoria and not be in a relationship with anyone else (clauses 5 & 6)***
- ***the discretions of the Registrar not to register the relationship and of a court to revoke registration without any application by a party (clauses 10(3)(b) & 16)***
- ***the $180 cost of registering and the $58.50 cost of revocation***

***make registration less accessible to couples than marriage is to equivalent opposite-sex couples;***

- ***whether or not the following provisions relating to revocation of registration:***
  - ***automatic revocation when a party marries (clause 11)***
  - ***revocation 90 days after a party applies (clause 15)***
  - ***revocation not subject to any requirement of prior separation, consideration of reconciliation, counselling or proper arrangements for children (clause 15)***

  ***provide less protection to registered couples and their children when a relationship breaks down than equivalent married couples and their children receive in the event that a marriage breaks down.***

- ***if so, whether the relevant clauses are reasonable limits on the Charter rights of unmarried couples and their children to equal protection without discrimination on the basis of marital status and to protection by the State according to the test in Charter s. 7(2).***

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**Keywords: Reasonable limits on rights – Registration and property disputes – Sexual orientation discrimination – Privacy – Property – Fair hearing**

Charter s. 7(2) provides that human rights may be 'subject by law only 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 registration and property disputes. 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:

- **Sexual orientation discrimination** (Charter s.8(3)): a definition of 'child' that excludes the children of same-sex partners, but where all substantive provisions provide equally for those children (clause 39)
- **Privacy** (Charter s. 13(a)): provisions for searching and accessing information on the relationships register (clauses 21 & 24)
- **Property** (Charter s. 20): provisions for courts to make orders about possession of property, to adjust the interests of partners with respect to property, to make orders for a party to provide maintenance and to order the transfer and sale of property (clauses 40, 45, 51 & 58)
- **Fair hearing** (Charter s. 24(1)): provision for urgent orders or injunctions in the absence of a party to protect property or to allow other orders to be enforced (clause 61)

The Statement of Compatibility contends that the Charter's rights against sexual orientation discrimination and to privacy and property are not limited by the Bill and that the Charter's right to a fair hearing is reasonably 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.

***The Committee makes no further comment.***

# Criminal Procedure Legislation Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 20 November 2007 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 3 December 2007 and made the following comments in Alert Digest No. 16 of 2007 tabled in the Parliament on 4 December 2007.

## Committee's Comment

**Charter Report**

**[B]**

*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]**

*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]**

*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]**

*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]**

*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]**

*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.*

## Minister's Response

*I refer to your letter dated 4 December 2007 regarding your Committee's consideration of the Criminal Procedure Legislation Amendment Bill 2007.*

*The Committee has raised a number of issues concerning Parts [B] - [F] of the Charter Report and Part [G] concerning the sufficiency of the Statement of Compatibility.*

*Because of the detailed commentary and issues provided by the Committee, I have included a detailed response in attachment A. By way of overview, I wish to make a number of comments about the issues raised by the Committee.*

*The Criminal Procedure Legislation Amendment Bill 2007 is an amending Bill that amends 8 Acts, despite being only 17 pages long. The provisions usually amend one aspect of a larger process. As a result, to understand the full nature of an amendment made by this Bill, it is necessary to consider one*

*or more other Acts and sometimes the manner in which criminal proceedings operate in practice, which is not always evident from the main Acts themselves.*

*Criminal procedure laws are complex and can be difficult to understand based purely on the provisions in key Acts. The Government has indicated that it is overhauling criminal procedure legislation to make processes and the law simpler, clearer and more accessible.*

*The Committee has raised some issues concerning how this Bill will affect victims. This Government respects and promotes victims rights. This Bill will not remove or reduce the rights of victims. The Bill will assist some victims in recovering from the effects of crime more quickly where the new processes encourage accused to plead guilty at an earlier stage of proceedings.*

*An accused may plead guilty at different stages in proceedings. While many accused currently plead guilty at an early stage of proceedings, a significant number of accused plead guilty at a later stage in proceedings. One of the objectives of sentencing indications and discounts reforms is to encourage more accused to plead guilty at an earlier stage, rather than a later stage of proceedings. The provisions have been carefully constructed to ensure that this encouragement only applies to those who are guilty and who will ultimately plead guilty, to do so at an earlier stage of proceedings.*

*The new procedures do not enable a person to be sentenced at an earlier stage than is currently possible. Therefore, a victim can continue to make a victim impact statement as either part of the sentencing indication process or as part of the plea hearing.*

*The Sentencing Advisory Council (the Council) in its Report on Sentence Indication and Specialised Sentence Discounts recommended that the Government should consider whether existing provisions concerning the involvement of victims in criminal proceedings are adequate to ensure that victims will be consulted where an accused requests a sentence indication.*

*The Government has reviewed those provisions. Section 9 of the Victims' Charter Act 2006 requires the prosecution to give the victim a range of information about the trial as soon as is reasonably practicable, including any decisions about changing charges or accepting a plea to a lesser charge, details about the hearing of the charges and the outcomes of criminal proceedings and appeals.*

*The general obligation on the prosecution to consult with the victim and give consideration to the concerns of victims, combined with the requirement to keep victims informed of developments, creates a statutory obligation on the prosecution to confer with the victim and a corresponding right of victims to be consulted as part of the sentence indication process.*

*The prosecution is already required to discuss with the victim any plea negotiations being conducted with the accused. Existing provisions properly protect the rights and interests of the victim under a sentence indication scheme. Therefore, the Government considers that no further legislative change is required to ensure that the prosecution properly consults victims.*

*The sentence discount and indications scheme will provide greater transparency in the sentencing process and more information to an accused to assist them in making a decision about whether to plead guilty. The reforms are not about, and will not have the effect of, inducing accused persons who are in fact not guilty to plead guilty.*

*The Council carefully considered these issues, researching and analysing other schemes in a number of other jurisdictions. I refer you to their Report, which was released in September 2007. For instance, in Scotland, which has a very similar approach to the one contained in this Bill, their scheme has not led to more pleas of guilty, but has led to pleas of guilty being identified at an earlier stage.*

*There are a number of other matters raised by the Committee, which depend upon the manner in which the criminal procedure operates. In a number of instances, I have outlined in detail in the Attachment how these reforms will operate in conjunction with existing law and practice. As a result, in a number of instances I consider that the human rights issues raised by the Committee will not arise because the factual circumstance will not arise.*

*I trust that the very detailed explanation of the manner in which the provisions in the Bill will operate in the context of criminal procedure generally, in Attachment A, addresses the Committee's concerns regarding the Bill's compliance with the Charter.*

*If you would be assisted by a briefing from officers from my Department on the details of the issues you have raised, please contact Mr Stan Winford from my office (965 11 146) to arrange a suitable time.*

*ROB HULLS MP*
*Attorney-General*

*30 January 2007*

**ATTACHMENT A**

***[A] Sentence discounts and indications: whether compulsion to plead guilty***

***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***

***Summary of response***

*The Committee raise the issue of whether sentence discounts and indications will compel an accused to plead guilty. The Sentencing Advisory Council considered this issue and tailored its sentencing indications and discounts recommendations to operate in a way that would not result in any compulsion or improper inducement. Under the Bill, a sentencing indication may only be given where the accused has sought an indication and the accused is free to choose whether to seek an indication. The Council recommended an approach to sentencing discounts, based on existing Victorian law, which is very similar to the approach used in NSW and Scotland. Analysis of NSW and Scottish systems indicate that this approach to sentence discounts has not resulted in accused being compelled to plead guilty (or improperly induced to plead guilty). The Bill implements the Council's recommendations. The Bill is not incompatible with the accused's charter right not to be compelled to plead guilty.*

***Details of response***

*The Committee asks whether sentencing indications and discounts may be incompatible with the accused's Charter right not to be compelled to plead guilty (section 25(2)(k) of the Charter).*

*This issue involves considering whether if the accused either knows what sentence is, or is likely, to be imposed (or not imposed) or that the sentence may be reduced if they plead guilty, this amounts to an accused being compelled to plead guilty.*

*Sentencing indications and discounts: evidence of their impact*

*The Sentencing Advisory Council specifically considered this issue: "Specifying the reduction in sentence available or given for a guilty plea is intended to encourage defendants who are intending to plead guilty to do so as early as possible without inducing or coercing defendants to change their plea decision on that account." (Report, p.134, emphasis added)*

*The Council refer to studies in NSW and Scotland which demonstrate that such a result can be achieved. Specifically, the Report said: "The [Scottish] study found that the proportion of pleas entered at an early stage rose dramatically while the proportion of matters concluded by a guilty plea nevertheless remained relatively stable." (Report, p.27)*

*The Council concluded that this empirical evidence supports the conclusion that it is possible to have sentence indications and discounts without inducing guilty pleas:*

> *The research conducted in New South Wales and Scotland suggests that it is possible to make reforms to law and procedure that will encourage defendants to advance the stage at which they enter a guilty plea without improperly inducing defendants to change their plea from not guilty to guilty. (Report, p.29)*

*Why discretion in fixing the amount of any discount is preferable*

*The Committee suggest that not limiting the amount of a discount that the court may give could place pressure on the accused to plead guilty. I note that this issue was considered by the Sentencing Advisory Council and it was their view that set quantity discounts would have a greater risk of improperly inducing a plea of guilty. The Sentencing Advisory Council concluded and recommended that the courts retain fill1 discretion as to the amount of any discount that may be given due to a plea of guilty.*

*The amount of any discount provided for a guilty plea is not unlimited. Section 5(2) of the Sentencing Act 1991 provides that in sentencing an offender, the court must have regard to a range of factors including the maximum penalty for an offence, the nature and gravity of the offence and the offender's degree of culpability. In practice, this limits the amount of any discount that may be given in any matter.*

*Furthermore, the amendments contained in this Bill do not change basic sentencing principles. Since 1991, in fixing a sentence, courts have been required to take into account "whether the offender pleaded guilty and, if so, the stage at which the offender did so or indicated an intention to do so" (section 5(2)(e) of the Sentencing Act 1991). This provision does not require a court to provide a discount; that*

*remains a matter for the sentencing court to determine on a case-by-case basis. The amendments contained in this Bill do not change this basic sentencing principle. The only change this Bill makes is to require that the amount of a discount, where one is provided, to be stated as part of the sentencing comments made by the magistrate or judge.*

*The Bill does not amend the requirement to give a discount, nor the weight that can be given to a guilty plea. Appropriate sentences, proportionate to the crime committed, must still be imposed by the courts.*

*More information will help some accused*

*The processes established by the Bill for sentencing indications will enable an accused to obtain more information about the likely sentence that may be imposed. Knowledge that a sentence may be reduced because of an early plea of guilty does not amount to an improper inducement to plead guilty.*

*However, if the information that can be gained from a sentencing indication is not going to assist the accused, the accused can decide not to get this information. A sentence indication must be applied for by the accused. Neither the prosecution nor the court may initiate this process. The prosecution must consent to a sentencing indication being provided.*

*The prosecution will only consent where it considers that the imposition of a sentence not involving an immediately servable term of imprisonment is reasonably available (and does not involve appellable error), otherwise it will consider that it is wasting its resources on a court hearing that will be of no value. Further, the court may decline to provide a sentencing indication for any reason.*

*Sentencing indications are therefore only likely to be given where there is a genuine issue concerning whether an immediately servable term of imprisonment is likely to be imposed. Further, having obtained this information, the accused may still choose to plead not guilty. As the Sentencing Advisory Council noted:*

> *The process preserves the accused's right to put the prosecution case to the test, by giving the accused the option of seeking sentence indication. The defence can weigh up the likely benefits and risks of sentence indication before making a request for it. While the request for an indicative sentence implies that the accused is willing to plead guilty as charged, the request for sentence indication does not commit the accused to pleading guilty or compromise a not guilty plea; the accused may 'reject' an indicative sentence and elect to contest the matter without prejudice. (Report, p.74)*

*In my view, improving the information available to an accused person prior to the person deciding whether to plead guilty or not guilty does not involve any improper inducement. Accordingly, in my view sentencing indications and discounts do not infringe or limit the right of an accused to not be compelled to plead guilty.*

***[B] Sentence indications***

*I note at the outset that at the conclusion of section A, the Committee indicates that "courts, when sentencing defendants or indicating sentences, are not required to act compatibly with defendant's Charter rights under Charter s.38(1)." However, in the first paragraph of section B the Committee, in discussing the right to a fair hearing, states that this "includes all aspects of the post-charge procedure, including sentencing and appeals." It is not clear what distinction the Committee was seeking to make in section A but my response proceeds on the basis that the Charter is relevant to sentencing.*

***l. What mechanisms are in place to ensure that victims are adequately consulted prior to a sentence indication hearing?***

***Summary of response***

*The Committee seeks further information about mechanisms to ensure victims are adequately consulted before a sentence indication hearing. The Victims Charter requires the prosecution to inform the victim about sentence indication hearings. A victim can continue to make a victim impact statement as either part of the sentencing indication process or as part of the plea hearing. No further legislative change is required.*

***Details of response***

*This Government is committed to ensuring that victims' rights are respected and promoted. This Bill does not remove or reduce the rights of victims.*

*Many accused currently plead guilty at early stages of proceedings. An early plea can often benefit a victim by assisting them in recovering from the effects of crime. One of the objectives of sentencing indications and discounts reforms is to encourage those who are guilty and will ultimately plead guilty, to do so at an earlier stage of proceedings.*

*The Sentencing Advisory Council recommended that the Government should consider whether existing provisions concerning the involvement of victims in criminal proceedings are adequate to ensure that victims will be consulted if an accused requests a sentence indication.*

*The Government has reviewed those provisions. Section 9 of the Victims' Charter requires the prosecution to give the victim a range of information about the trial soon as reasonably practicable, including any charge decisions, sentences, outcomes of criminal proceedings and appeals.*

*The general obligation on the prosecution to consult with the victim and give consideration to the concerns of victim, combined with the requirement to keep victims informed of developments, creates a statutory obligation on the prosecution to confer with the victim and a corresponding right of victims to be consulted as part of the sentence indication process.*

*The prosecution is already required to discuss with the victim any plea negotiations being conducted with the accused.*

*These processes are consistent with providing victims with an opportunity to participate in proceedings through the use of a victim impact statement. A victim can continue to make a victim impact statement as either part of the sentencing indication process or as part of the plea hearing.*

*Accordingly, no change is required to existing legislation to properly protect the rights and interests of the victim under a sentence indication scheme.*

***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?***

***Summary of response***

*The Committee raise the issue of ensuring a fair hearing on the question of whether or not to give a sentence indication. The Sentencing Advisory Council considered this issue and recommended that the decision to give or not to give a sentence indication be completely discretionary, and final and conclusive. Sentence indications do not involve any determination of guilt and cannot operate to the detriment of the accused. The accused will receive the same procedural fairness considerations that arise in relation to many applications regularly heard in the courts. Giving the court complete discretion to refuse to give an indication balances the requirement that the sentence indication be binding. If it were not discretionary, it would defeat the aims of the scheme.*

***Details of response***

*The Sentencing Advisory Council recommended that the decision to give or not to give a sentence indication be completely discretionary, and be final and conclusive. Points 5 and 9 of Recommendation 6 from the Council (which outlines the sentence indication framework):*

> *5. The judge should have the discretion to refuse to provide an indication. The judge should not provide an indicative sentence unless he or she is satisfied that the material available is sufficient to provide a binding indication.*
>
> *9. A refusal by a judge to give an indication should not be reviewable.*

*The second reading speech to this Bill indicated that the reason for restricting the review of a decision to give or not to give a sentence indication is to ensure that this decision is final and so that the substantive proceedings, whether a trial or a plea hearing, can proceed without delay.*

*The right for proceedings to be heard without delay is protected under section 25 of the Charter of Rights and Responsibilities.*

*Furthermore, if review and appeal rights were not restricted, they could defeat one of the purposes behind the introduction of this reform, which is to reduce delay.*

*Sentence indications do not involve any determination of guilt and cannot operate to the detriment of the accused. For example, if the accused does not get a sentence indication, or does get an indication of an immediately servable term of imprisonment, the accused can still contest the charges - and if the accused is found guilty or pleads guilty, there is no restriction on the sentence that can be imposed by the court. An accused can still get a non-custodial sentence.*

*Giving the court complete discretion to refuse to give an indication balances the requirement that the sentence indication be binding. The Sentencing Advisory Council explicitly recommended that the court must have sufficient materials on which to provide a binding sentence indication.*

*If a sentence indication is not granted, the accused may still plead guilty at that time, irrespective of whether or not an indication has been granted, and benefit from a greater discount being given for their earlier plea of guilty.*

*There is no limit on how many times the accused may apply for a sentence indication.*

*Within this context, an accused may apply for a sentence indication and a court decides whether to provide a sentence indication. Within the hearing of the application itself, courts will provide the applicant with an opportunity to persuade the court to provide an indication. It is not necessary to spell out such fundamental processes of procedural fairness that arise in relation to many applications regularly heard in the courts. Courts operate on the basis that procedural fairness applies unless it is clearly excluded by Parliament.*

***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?***

***Summary of response***

*The Committee raise the issue of whether a sentence indication should also include an indicative sentence discount for a plea of guilty. The Sentencing Advisory Council considered this issue and recommended that the requirement to provide an indicative sentence discount as apart of a sentence indication should be implemented by way of a practice note or direction. Courts can develop practice notes and directions after the Bill has been passed by parliament.*

***Details of response***

*The Sentencing Advisory Council recommended that the requirement to include an indication of a discount when providing a sentence indication not be implemented legislatively.*

*0n page 90 of the final Report, the Council states:*

> *We therefore recommend that the requirement to state the credit, if any, given for a guilty plea in an indicative sentence be achieved by the Chief Magistrate making provision for this in a practice note or direction, rather than by including such a recommendation in the legislation.*

*This approach reflects the Council's objective to ensure that the Court's discretion when determining the scope of an indication is not confined.*

*Recommendations 3 and 8 explicitly give effect to the Council's approach:*

> *Recommendation 3: The Chief Magistrate should issue a note or direction to require a magistrate, when providing an indication of the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, to state whether, but for such a guilty plea, a more severe sentence would be indicated.*
>
> *Recommendations 8: The Chief Judge should issue a note or direction to require a judicial officer, when providing a sentence indication, to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe sentence (an immediate term of imprisonment) would be indicated.*

*The courts can introduce practice notes and directions after the Bill has been passed by parliament.*

***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?***

***Summary of response***

*The Committee ask whether any new judge should be bound by a sentence indication in the case where an accused person has accepted an indication (ie, pleaded guilty). If an accused has pleaded guilty, a court will consider itself to be part heard in the sentencing process. A new judge would only be appointed in the very unlikely circumstance that the magistrate or judge dies or becomes incapacitated between the plea hearing and the sentence being imposed. Court practices adequately addresses this situation.*

***Details of response***

*If an accused person pleads guilty following a sentence indication, that court is bound by the indication.*

*The only situation in which a court might be reconstituted after an accused person has pleaded guilty in response to a sentence indication, is in the very unlikely circumstance that a magistrate or judge dies or becomes incapacitated between the entry of the plea of guilty and sentencing. In the Magistrates' Court, the entry of the plea and sentencing usually occur on the same day.*

*However, if this factual situation did arise, in accordance with court practices generally, a new judge or magistrate could:*

- *consider themselves bound by the sentencing indication or simply reach the same conclusion as their predecessor; or*
- *commence proceedings again and effectively vacate the sentence indication and either conduct a fresh sentence indication or the accused may choose to plead not guilty.*

*In either of these situations, there would be no disadvantage to the accused.*

***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?***

***Summary of response***

*The Committee ask whether an accused person who has accepted a sentence indication can withdraw that plea following a successful crown appeal that leads to a higher sentence. The Sentencing Advisory Council considered this issue and recommended that both parties retain their right to appeal final sentence. The scheme does not change current criminal procedure. Currently, both parties can appeal final sentence whether or not the accused pleaded guilty or proceeded to trial; there is no automatic right to withdraw a plea of guilty just because a higher sentence is imposed.*

***Details of response***

*Currently, both parties can appeal a final sentence whether or not the accused pleaded guilty or proceeded to trial. There is no automatic right to withdraw a plea of guilty just because a higher sentence is imposed by the Court of Appeal in current criminal procedure. When a defendant pleads guilty, there has always been a chance that the sentence will be appealed by the prosecution and a higher sentence imposed on appeal. This is the case even where the prosecution indicates that it will not be asking, for instance, the court to impose a sentence involving an immediately servable sentence of imprisonment as part of plea negotiations. This is not changed by the new scheme.*

*The Sentencing Advisory Council recommended that the parties retain their right to appeal a final sentence. This is consistent with section 25(4) of the Charter concerning rights of appeal.*

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

***Summary of response***

*The Committee ask whether the clauses which allow the court to be reconstituted following an indication that is not accepted, will potentially result in trials being unreasonably delayed. The scheme has been devised as far as possible to avoid unreasonable delays and ensure expediency in the new processes. This measure safeguards the accused person's right to a fair trial if they choose not to accept an indication, which is protected by section 24 of the Charter. Furthermore, the right to be tried*

*without unreasonable delay is not engaged where the delay is attributed to the actions of the accused person.*

***Details of response***

*Allowing the court to be reconstituted before a different magistrate or judge protects the accused person's right to a fair trial where the accused decides not to accept an indication, and allays any concerns the accused may have about receiving a fair trial. The right to a fair trial is protected by section 24 of the Charter.*

*The scheme will assist some accused persons to make their plea decisions. However, the accused decides whether or not to request an indication, and if the accused does so but does not accept the indication or get the indication they were hoping for, the accused can insist on a different trial judge. This preserves the accused's right to a fair trial.*

*Clause 5 reflects existing practice in the Magistrates' Court and has not, and is unlikely to, result in unreasonable delay in the Magistrates' Court.*

*In the County Court, it is only if a sentencing indication is made late in proceedings that this may delay the commencement of the trial. If the accused makes application for a sentence indication early in proceedings, this risk can be avoided. Following improvements made to the committal system introduced by this Government in the Courts Legislation (Jurisdiction) Act 2006, the accused should receive legal advice at an early stage in proceedings, enabling the accused to decide at an early stage whether to apply for a sentence indication.*

*Whether a delay is 'unreasonable' will depend on the nature of the case and a range of factors, including whether the delay is attributable to the accused. Therefore, where the delay is attributable to or caused by the conduct of the accused in requesting a sentencing indication late in proceedings, it is unlikely that a court would find that the right to be tried without unreasonable delay in section 25(2)(c) of the Charter had been infringed.*

***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?***

***Summary of response***

*The Committee asks whether the new provisions should preserve the right to appeal against conviction. It is not necessary to clarify that the right to appeal against conviction is not affected by the reforms, as the reforms do not relate to convictions.*

***Details of response***

*The Bill does not change any rights of appeal against conviction or sentence, only against the sentence indication proceeding itself.*

*The Bill simply clarifies that the right to appeal against sentence is not affected by the reforms.*

*It is not necessary to also clarify that the right to appeal against conviction is not affected by the reforms, as the reforms do not relate to convictions.*

***[C] Wilful exposure***

*The Committee has raised a number of issues about the introduction of a maximum penalty of 5 years imprisonment for the indictable offence of wilful exposure.*

*As the Committee notes, the introduction of this maximum penalty reduces the maximum penalty.*

***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?***

***Summary of response***

*The Committee asks whether the introduction of a maximum penalty for the indictable offence of wilful exposure will lead to increased sentences for some offenders. As the Committee notes, the new penalty in the Bill reduces the maximum penalty, for this offence. The actual sentence imposed in a particular case will depend upon the particular circumstances of the case before the court. The reduction in the maximum penalty should not lead to higher sentences being imposed.*

***Details of response***

*Section 5(2)(a) of the Sentencing Act I991 indicates that in sentencing an offender the court must have regard to the maximum penalty prescribed for the offence. The offence of wilful exposure is an indictable offence and the maximum penalty is currently at large (ie not limited).*

*The Bill provides that the maximum penalty for this offence be 5 years imprisonment. Very few indictable offences in the Crimes Act have lower penalties.*

*Section 5(2)(a) of the Sentencing Act indicates that in sentencing an offender the court must have regard to the maximum penalty prescribed for the offence. The court must also have regard to other factors, including current sentencing practices. As Fox and Frieberg in Sentencing: State and Federal Law in Victoria (2nd ed, 1999) indicate, when a common law penalty is at large, the courts will have regard to cognate or similar offences. The court will also have regard to the seriousness of the offence by virtue of its classification, namely, indictable offences are more serious than summary offences.*

*The actual sentence imposed in any case will depend upon the particular circumstances of the case before the court. Sentencing in each case depends upon a range of factors including the circumstances of the offence and the personal circumstances of the offender. Because of this range of factors, and that this offence is not commonly prosecuted, it would be very difficult to draw any conclusions about whether the 'actual' sentences imposed are different because of the fixing of a maximum penalty.*

*The question asked by the Committee also suggests that the Committee is seeking a response to what is likely to be considered by a judicial officer when sentencing. As I understand it, the Committee is asking whether the maximum penalty for this offence has been increased in practice, while accepting that the maximum penalty has been reduced to 5 years imprisonment as a matter of law. The Committee suggests that the de facto maximum penalty currently applied may be less than 5 years because of similarities with other offences.*

*As a matter of logic, the maximum penalty cannot be both increased and reduced by the fixing of one maximum penalty. This could only be the result in practice if there was an error in the sentencing process.*

*The Committee draws attention to the offence of obscene exposure, which is a summary offence in Victoria and to similar offences in other jurisdictions. The offence of obscene exposure is similar, but not the same as wilful exposure. These offences contain some different elements and are classified differently. The common law offence of wilful exposure can apply even if exposure does not occur within view of a public place. Accordingly, the offence can apply where a person wilfully and frequently exposes themselves to one particular victim. The common law indictable offence caters for this kind of aggravating circumstance in a way in which the summary offence does not.*

*Differences in both the elements of the offence and the classification of the offence mean that courts will have more regard to other indictable offences than the summary offences which the Committee raise as cognate offences. For instance, comparison could be made with indictable offences such as those involving indecent acts with or in the presence of a child under 16 or indecent assaults. These offences carry maximum penalties of 10 years imprisonment under the Crimes Act.*

*Accordingly, the reduction in the maximum penalty for the offence of wilful exposure should not lead to higher sentences being imposed.*

***2. What transitional arrangements will apply to the amended section 320 of the Crimes Act 1958?***

***Summary of response***

*The Committee raise the issue of transitional arrangements for the new maximum penalty, for wilful exposure. It was not necessary to include a transitional provision in the Bill because it is covered by section 114(2) of the Sentencing Act.*

***Details of response***

*Section 114(2) of the Sentencing Act provides that if an Act reduces the maximum penalty for the offence, 'the reduction extends to the offences committed before the commencement of the provision' where a person has not been sentenced for the offence.*

*As the Committee accepts, this new maximum penalty reduces the maximum penalty for the offence.*

***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?***

***Summary of response***

*The Committee ask whether the courts should be able to consider the sentence it would impose under both the common law and the new provision, and to impose the lesser of the two penalties. This scenario will not arise because as the Committee has indicated, the new penalty reduces the maximum penalty for this offence. Even if this were not the case, such an approach would be very complex.*

***Details of response***

*This is a hypothetical question, which depends upon whether there is any difference between the de facto maximum penalty for this offence and the proposed new lower statutory maximum penalty. As I have indicated, I do not agree with this approach to applying sentencing laws for this offence.*

*Even if I did accept that such an outcome were possible, it is essential that the law provides greater certainty for its citizens than such an approach presents. Sentencing is a complex, difficult and important task. Introducing this approach would add a further layer of complexity to the sentencing task, increasing the risk of errors. The Government's Justice Statement aims to reduce complexity in the criminal law and build community confidence by making the law clear and understandable.*

***[D] Amendments to the power of the court to strike out a charge-sheet***

***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?***

***Summary of response***

*The Committee ask whether the amendments to the power of the court to strike out a charge-sheet could delay the accused's access to the court's copy of the charge-sheet. This amendment will not lengthen proceedings. The accused will already have their own copy of the charge-sheet and summons; there is usually no need for the accused to access the court's copy. Furthermore, actual access to the court's copy of the charge-sheet would not be affected by this amendment, because the bill does not affect the requirement on the informant to file a copy of a charge in the court within 7 days of issuing a charge and summons.*

***Details of response***

*A police officer or a public official may issue a charge-sheet and summons under section 30(1) of the Magistrates' Court Act 1989 (the MCA). Where this occurs, both the signed charge-sheet and the summons must be filed with the registrar within 7 days after signing the charge-sheet.*

*The onus is on the issuing police officer or public official to prove that he or she has complied with this filing requirement. Section 30(3) of the MCA requires the court to strike out the charge if it appears to the court that the charge-sheet and summons have not been filed within 7 days. The court does not have any discretion to take into consideration other factors and circumstances.*

*Clause 13 of the Bill provides the Magistrates' Court with discretion to strike out a charge where the prosecution cannot prove that it filed a copy of a charge in the court within 7 days of issuing a charge and summons.*

*As indicated in the Statement of Compatibility, this amendment does not include any change to the requirement to serve a copy of the charge-sheet on the accused. It does not delay the proceedings. The issue of whether the informant has complied with the 7 day requirement will only arise if the accused is present at court to raise this issue. This means that the accused has notice of the proceeding. Accordingly, this amendment should not lengthen proceedings.*

***2. Will clause 13 potentially lengthen the period between the commencement of proceedings and the service of a summons on the defendant?***

***Summary of response 1***

*The Committee ask whether the amendments could delay service of a summons on the accused. This amendment does not change the requirement to serve a copy of the charge-sheet on the accused, so the there will be no change to the timing of the service of a summons on an accused.*

***Details of response***

*This amendment does not change the requirements imposed on the informant to file the charge-sheet within 7 days after signing the charge-sheet.*

*This amendment will not change in any way whether the charge-sheet is in fact filed. The accused will already have their own copy of the charge-sheet and summons. This reform relates to the court's copy of the summons, not the summons served on the accused.*

*Furthermore, if the accused has suffered any prejudice, the accused may seek to have the charge struck out by the court. As the note to this amendment indicates, the Court may award costs if a proceeding is struck out.*

***3. Will clause 13 potentially lengthen the period between the commencement of proceedings and the trial?***

***Summary of response***

*The Committee ask whether the amendments could lengthen the period between the commencement of proceedings and the trial. This period is not affected in any way by the filing requirements, because there is no separate step involved in the court listing a matter and a summons being issued. When a summons is issued, it includes a date indicating when the matter will be listed for a hearing, irrespective of whether the filing requirements are correctly complied with.*

***Details of response***

*The Committee indicates that a charge-sheet must be filed in court to enable the court to take control of a proceeding, list a matter and after the matter is listed the informant must serve a summons within specified time periods.*

*Section 30 of the MCA provides that at the time of signing a charge-sheet, the informant must issue a summons. Section 33 requires that the summons must direct the accused to attend the proper venue on a certain date and at a certain time.*

*Accordingly, when a summons is issued, the summons will have a return date indicating when the matter will be listed for hearing in court. Upon being served with the summons the accused will know that he or she must attend court on a specified day. This means that there is no separate step involved in the court listing a matter and then a summons being issued.*

*Further, the summons that is served on the accused contains a copy of the charge, thereby ensuring that the accused has notice at the first available opportunity of the charge.*

***[E] Amendments to the committal proceedings***

***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)?***

***Summary of response***

*The Committee raise the issue of whether the amendment abolishing reversed pleas engages the right to remain silent and if so whether it is reasonably necessary and is demonstrably justified. The amendment does not in any way affect the accused's right not to speak, and does not engage the right to remain silent. The accused is not compelled to speak by the court; if an accused person does not speak, their plea is taken to be not guilty. This Bill does not limit the right to freedom of expression.*

***Details of response***

*The Committee raise these two issues on the assumption that the abolition of asking an accused whether he or she reserves their plea 'engages the Charter rights of defendants not to speak.' The Committee operates on the assumption that a person who reserves their plea, does not speak. In fact, an accused almost always reserves their plea by speaking and stating that they reserve their plea.*

*Currently, at the conclusion of committal proceedings, if the court has decided to commit the accused for trial, the magistrate must ask the accused whether he or she pleads guilty or not guilty to the charge, or whether the accused wished to reserve their plea. The court must also inform the accused 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.*

*The amendment in clause 15 of the Bill changes this by indicating that the magistrate should no longer indicate that the accused may reserve their plea. The magistrate must continue to ask whether the accused pleads guilty or not guilty to the charge.*

*The Committee indicates that the 'existing law does not contain this requirement'. In this regard, I refer the Committee to clause 12 and Form 12A of the Magistrates' Court (Committals) Rules 1999 which set out these requirements.*

*The current law and clause 15 of the Bill indicate what the magistrate must ask a person to do at the conclusion of the proceedings. The defendant may then answer or not answer. There is no mechanism which compels the defendant to speak in answer to the question asked by the court. As the Committee notes, if a person does not answer, this in effect will be treated as a plea of not guilty. As indicated in the Statement of Compatibility, this is consistent with the Charter right to a fair trial and the presumption of innocence.*

*Accordingly, to the extent that it can be said that the Charter right to freedom of expression is engaged by clause 15 of this Bill, it is not limited by that clause.*

***[F] Wilful damage***

***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?***

***Summary of response***

*The Committee ask whether people who carry out conduct which does not currently fall under the amended offence of wilful damage, but would following the amendment, be prosecuted for the offence of wilful damage (in order to be subject to the penalty for that offence). Because the Bill amends an element of the offence it is not possible, for it to apply retrospectively, ie, to conduct which occurred before the commencement of the amendment.*

***Details of response***

*As the Committee notes, the amendments to this offence operate prospectively. A transitional provision was not necessary for clause 16 because section 14(2) of the Interpretation of Legislation Act 1984 applies. Section 14(2) also accords with the common law presumption against retrospectivity which is 'most strictly applied' in relation to offence provisions (see Pearce and Geddes, Statutory Interpretation in Australia, Chapters 9 and 10). Parliamentary Counsel also advised that no transitional provision was required in all of the circumstances.*

*The threshold of the value of the property under which a person can be charged with the summary offence of wilful damage is an element of that offence. It is currently limited to less than $500 worth of "injury" to the property. The amendment to the offence, by increasing the amount of injury to property from $500 to $5,000 alters a key element of the offence.*

*The rights against retrospective criminal liability in the common law and in section 27 of the Charter provide that where the substance of an offence is amended, that amendment must not apply retrospectively.*

*However, the Committee ask whether this provision can be made to operate retrospectively on the basis that it may be of benefit to people charged with a different offence, namely destroying or damaging property (section 197 of the Crimes Act). This is an indictable offence, triable by jury. Making the amendments apply retrospectively would remove a right to trial by jury that existed at the time the offence was alleged to have been committed.*

*Section 27 of the Charter provides that a person is eligible for a reduced penalty if the penalty for an offence is reduced, it does not extend to penalties for other offences. This is particularly the case where the amendments to an offence expand the operation of an offence and therefore operate prospectively.*

*Accordingly, these amendments do not operate retrospectively.*

***The Committee thanks the Attorney-General for this response.***

# Emergency Services Legislation Amendment Bill 2007

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

## Committee's Comment

**[78]**

*The Committee reports to Parliament pursuant to a term of reference provided in section 17(a)(ii) of the Parliamentary Committees Act 2003, – 'makes rights, freedoms or obligations dependent on insufficiently defined administrative powers'.*

*The Committee notes that the delegation power will allow the Chief Officer to delegate to 'any person by name'. The Committee had consistently pointed out that such wide delegation provisions should be accompanied by reasonable explanatory material. Once again the Committee refers to its Practice Note No. 1 of October 2005 concerning such provisions and the desirability of avoiding needless, repetitive Ministerial correspondence.*

*The Committee will seek further explanatory material from the Minister.*

*Pending further advice the Committee draws attention to the provisions.*

**[121]**

*The Committee reports to Parliament pursuant to a term of reference provided in section 17(a)(ii) of the Parliamentary Committees Act 2003, – 'makes rights, freedoms or obligations dependent on insufficiently defined administrative powers'.*

*The Committee draws attention to its Practice Note No. 1 of October 2005. Amongst other matters the Practice Note requests that explanatory material provided to Parliament include reasons why wide delegation provisions such as 'to any person' are considered necessary or desirable.*

*The Committee as a matter or routine will seek further advice from the Minister where the explanatory memorandum fails to adequately justify such provisions.*

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

## Minister's Response

*Thank you for your correspondence of 9 October 2007 which outlined the Scrutiny of Acts and Regulations Committee's comments in relation to the Emergency Services Legislation Amendment Bill 2007 ('The Bill').*

*You raise concerns that the delegation provisions in clauses 78 and 121 of the Bill may 'make rights, freedoms or obligations dependent on insufficiently defined administrative powers' within the meaning of section 17(a)(ii) of the Parliamentary Committees Act 2003. The Committee notes that the delegation power will allow the Chief Officer to delegate to 'any person by name' (cl 78) and the Chief Executive Officer to delegate to 'any other person by name' (cl 121).*

*I note the Committee's concerns that sufficiently explanatory material was not provided for these provisions in the explanatory memorandum that accompanied the Bill. In response I have provided further detail on the-changes to these provisions below.*

***Clause 78 – Metropolitan Fire Brigades Act 1958.***

*Clause 78 of the Bill amends section 31A of the Metropolitan Fire Brigades Act 1958 ('MFB Act') to provide for a more appropriate suite of powers which the Chief Officer may delegate. The proposed*

*amendment enables the Chief Officer of the MFESB to delegate the power to form an opinion as to whether a fire prevention notice should be served on the owner or occupier of land to* ***any other officer****.*

*The power to delegate to 'any other officer' is not a wider power than the one currently given under the MFB Act. Currently section 31A allows for the Chief Officer '. . . to delegate to any person by name or to the holder of an office or position approved by the Board, either generally or otherwise ...'*

*The proposed amendment to section 3 1A does not broaden the class of person to whom the delegation can be made. Rather, it amends the scope of the matter that may be delegated. The proposed amendment will now allow a Chief Officer to delegate the power to 'form an opinion as to whether a fire prevention notice should be served' only. As such, the new delegation power is not unlimited.*

*I note that under the current provision it is administratively difficult to have the Chief Officer personally form the opinion as to whether a fire prevention notice should be served. This new power of delegation will facilitate a more effective, flexible and prompt mechanism to serve fire prevention notices. It will also ensure that the MFESB can promptly address safety risks.*

***Clause 121 – Victorian State Emergency Services Act 2005***

*Clause 121 of the Bill amends section 26 of the State Emergency Service Act 2005 ('VICSES Act') to allow for greater administrative flexibility. The amended delegation power includes, as you have pointed out, a power to delegate to 'any other person by name'.*

*The power to delegate to 'any other person by name' is already present in the current provision of the Act. Section 26 of the VICSES Act, currently states:*

*The Chief Executive Officer may, by instrument, delegate to any person by name or to the holder of an office or position approved by the Authority, any responsibility, power, authority, duty or function conferred on the Chief Executive Officer under this Act or the Regulation, except this power of delegation.*

*The proposed amendment seeks to clarify the Chief Executive Officer's authority to delegate certain matters to the Unit Controller. The amendment aims to restructure the existing provision to clarify the powers of delegation in favour of Unit Controllers. Unit Controllers are volunteers and are appointed by the Director of Operations as the Chief Officer of individual registered VICSES Units.*

*The amendment provides for greater administrative flexibility by enabling Unit Controllers to perform daily functions such as paying bills and entering into small service contracts. The delegation power is not unlimited. The matters which may be delegated are restricted to the powers and responsibilities specifically given to him/her in the VICSES Act.*

*I also note that there is a requirement for both of the clauses in question, that the delegation be made by instrument. This ensures that there is a record of the power being exercised providing transparency, accountability and certainty as to the powers that are delegated.*

*I trust that this satisfies your concerns.*

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

***The Committee thanks the Minister for this response.***

# Liquor Control Reform Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 3 October 2007 by the Hon. Tony Robinson MLA. The Committee considered the Bill on 19 November 2007 and made the following comments in Alert Digest No. 15 of 2007 tabled in the Parliament on 20 November 2007.

## Committee's Comment

**[2]**

***The Committee reports to Parliament pursuant to a term of reference provided in section 17(a)(vi) of the Parliamentary Committees Act 2003, – 'inappropriately delegates legislative power'.***

*The Committee refers to Scrutiny Committee Practice Note No. 1 of October 2005 concerning delayed commencement provisions of more than 1 year from the time a Bill is introduced in the Parliament.*

*The Committee will request the Minister to draw this matter to the attention of his Department's legislation officers.*

*The Committee will seek further advice from the Minister concerning the necessity to include such a delayed commencement provision.*

**Charter Report**

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

1. *Why is there no limit in new section 147(1) on the size of areas that may be designated by the Director of Liquor Licensing?*
2. *Why does new section 148(1) prevent courts from making interim orders suspending a designation except in exceptional circumstances?*
3. *Will new section 148(2) permit the prosecution of people who breach banning notices or exclusion orders despite a later finding by a court that the Director's designation of the relevant area was invalid?*
4. *Given the availability of circumstantial evidence to disprove reasonable mistakes and reasonably unavoidable circumstances, the powers in new sections 148H &148L and the criminal offence in new section 148Q, why are the reverse burdens of proof in new sections 148F(3) & 148J(3) necessary to enforce compliance with banning notices and exclusion orders?*

*Pending the Minister's response, the Committee refers to Parliament for its consideration the question of whether or not clause 5 is a reasonable limit on the Charter's rights to movement, liberty and the presumption of innocence according to the test set out in Charter s.7(2).*

## Minister's Response

*Thank you for your letter regarding the Committee's consideration of this Bill, and advising of the matters on which the Committee has requested further advice.*

*I will address each of those matters in turn.*

***Delayed Commencement***

*The Committee queries the necessity for the default commencement provisions in respect of clauses 4 to 7 of the Bill, noting this, as it is outside the recommended default commencement date of 12 months from the time that a Bill is introduced into Parliament.*

*Clauses 4 to 7 of the Bill provide for the implementation of the banning notice and exclusion order regime. The implementation of this scheme will require substantial changes to the operational procedures of Victoria Police, the Director of Liquor Licensing and the Courts. Whilst it is anticipated that clauses 4 to 7 of the Bill will commence before 1 July 2009, the extended commencement provisions are designed to ensure there is sufficient time to implement these new procedures, and appropriately advise the general community of the designated precinct areas to support the effective operation of the scheme.*

***Declaration of Designated Areas – no limitation on the size of areas that may be declared***

*Clause 5 of the Bill inserts new section 147 into the Act providing for the Director of Liquor Licensing to declare a designated area for the purposes of the banning notice/exclusion order scheme. To declare a designated area, the Director must believe that:-*

- *alcohol related violence or disorder has occurred in a public place that is in the immediate vicinity (i.e. within 100 metres) of licensed premises within the area; and*
- *the exercise of banning notice/exclusion order powers in relation to the area is likely to be an effective means of reducing or preventing the occurrence of alcohol related violence or disorder in the area.*

*The Director must also consult with the Chief Commissioner of Police in declaring an area.*

*The Committee has observed that "there are no constraints as to the size of the area designated by the Director, but rather, that the area must merely contain a public place affected by relevant violence near licensed premises", and has questioned why there are no limits on the size of the area that must be declared.*

*It would not be appropriate to limit the size of a designated area in the legislation. The declaration of designated areas must be based on the Director of Liquor Licensing's belief that alcohol related violence and disorder has occurred in a public place near licensed premises* ***and*** *that the banning notice/exclusion order scheme is reasonably likely to be an effective means of reducing or preventing such alcohol related violence and disorder. The imposition of an arbitrary size limit would limit the Director's ability to declare an area having regard to the criteria in the Act.*

*However it should be noted that new section 148A(1)(a) allows the Director to revoke a declaration at any time, and new section 148A(1)(b) requires the Director to do so if he or she believes the grounds for making the declaration no longer exist.*

***Why does new section 148(1) prevent courts from making interim orders suspending a designation except in exceptional circumstances?***

***Will new section 148(2) permit the prosecution of people who breach banning notices or exclusion orders despite a later finding by a court that the Director's designation of the relevant area was invalid?***

*New section 148(1) is intended to ensure that no stay may be ordered, in other than exceptional circumstances, with respect to the declaration of a designated area, pending a Court's consideration of a challenge to the validity of the declaration. The intention of the Bill is to address alcohol related violence and disorder in designated entertainment precincts in a timely fashion. The implementation of the banning notice/exclusion order scheme depends on the declaration of a designated area. To ensure the effective operation of the scheme, it is essential that its operation is not restricted pending the outcome of possibly lengthy Court proceedings.*

*New section 148(2) is clearly intended to ensure the validity of any action taken under Part 2 of the Act in reliance on a banning notice or exclusion order including any criminal proceedings against a person in respect of a breach of a banning notice or exclusion order.*

***Given the availability of circumstantial evidence to disprove reasonable mistakes and reasonably unavoidable circumstances, the powers in new sections 148H and 148L and the criminal offence in new section 148Q, why are the reverse burdens of proof in new sections 148F(3) and 148J(3) necessary to enforce compliance with banning notices and exclusion orders?***

*As indicated in the Statement of Compatibility the purpose of the imposition of a burden of proof on the defendant is to provide the defendant with an opportunity to escape liability in circumstances of honest and reasonable mistakes or total absence of fault without undermining the ability to enforce compliance with banning notices and exclusion orders. The onus only relates to matters that are within the knowledge of the defendant. Requiring the prosecution to prove the absence of these matters as part of the case against the defendant would render the offences unworkable in practice. The capacity of police to remove persons subject to a banning notice or exclusion order from a designated area or licensed premises is intended as an alternative enforcement measure for police.*

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

*TONY ROBINSON*
*Minister for Consumer Affairs*

*4 December 2007*

***The Committee thanks the Minister for this response.***

# Police Regulation Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 31 October 2007 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 19 November 2007 and made the following comments in Alert Digest No. 15 of 2007 tabled in the Parliament on 20 November 2007.

## Committee's Comment

**Charter Report**

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

1. *Will new section 85E prevent criminal defendants from making legitimate lines of inquiry as discussed by the High Court of Australia in Wakeley & Bartling v R [1990] HCA 23?*
2. *Will the limitations on disclosure in new sections 85F, 85G and clause 11 prevent police or prosecutors from fulfilling their obligations to disclose relevant information to criminal defendants?*
3. *Given the existing rules of evidence restricting irrelevant 'fishing expeditions', why is new section 85E needed?*

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

## Minister's Response

*Thank you for your letter of 21 November 2007 in which you seek advice in relation to amendments to the Police Regulation Act 1958 contained in the Police Regulation Amendment Bill 2007.*

*The Police Regulation Amendment Bill 2007 amends the Police Regulation Act 1958 by:*

- *Introducing provisions to support an alcohol and other drug testing regime for police officers;*
- *Separates the office of the Director, Police Integrity from the Office of the Ombudsman;*
- *Retain the contempt of the Director provisions; and*
- *Set out provisions for the appointment of the Director, Police Integrity.*

*I note that the concerns set out in your letter relate only to proposed section 85E, 85F, 85G and the confidentiality provisions of clause 11 of the Bill.*

***Will new section 85E prevent criminal defendants from making legitimate lines of inquiry as discussed by the High Court of Australia in Wakeley & Bartling v R [1990] HCA 23?***

*The Victoria Police alcohol and other drugs policy, to which this Bill provides legislative support, is primarily a welfare-based policy directed at assisting in the rehabilitation of police officers with alcohol or other drug problems. In order to protect the integrity of the program and encourage police officers with a problem to participate in the program it is important that the name of the police officer and the result of a test taken under the legislation be suppressed in all but the circumstances outlined in section 85E(2).*

*The effect of the proposal is that the result of any test taken from a police officer is effectively treated as akin to a health record within the meaning of the Health Records Act 2001, except in the very limited circumstances set out in sections 85C or 85E of the Police Regulation Act 1958.*

*Your letter refers to the High Court decision in Wakeling and Bartling v R [1990] HCA 23, which involved the admissibility of evidence of consumption of a drug of dependence by a deceased police officer and complaints by the applicants that the trial judge refused to allow cross-examination into the cause of death of that police officer. In this case, the court faced a rather unique situation in that the person whose evidence was in question was dead and obviously unable to be called to give evidence and be cross-examined. The applicants sought to have evidence of the presence of a drug in the deceased police member's blood admitted through the evidence of the person who performed the autopsy. The trial judge ruled that such evidence was not relevant, incorrectly as the High Court determined.*

*The provision proposed in the Police Regulation Amendment Bill 2007 does not prevent a police officer being cross-examined as to whether or not he or she has consumed alcohol or a drug of dependence, if evidence of such consumption is relevant to the issue at trial. In the case of a deceased police officer, under the current proposal relevant evidence of consumption of alcohol or drug will be admissible if it has been introduced into evidence at a coronial proceeding as it will then be in the public arena.*

*Making test results generally available would also risk the privilege of police officers against self-incrimination, a privilege that extends to all members of the community. It is consistent for such potentially self-incriminatory evidence to be inadmissible before a court, as it is in other circumstances, such as, under sections 86PA (8) and 86Q of the Police Regulation Act 1958.*

***Will the limitations on disclosure in new sections 85F, 85G and clause 11 prevent police or prosecutors from fulfilling their obligations to disclose relevant information to criminal defendants?***

*The limitations on disclosure imposed by sections 85F, 85G and clause 11 will not remove the obligations of police and prosecutors to disclose relevant information as where evidence of the test result may be relevant, that is in legal proceedings following a critical incident, disclosure will still be required. In other cases where testing has been conducted unrelated to the incident that led to the charging of the defendant, the test result will be irrelevant to the charges against the defendant and the police officer will in any case be available for cross-examination.*

***Given the existing rules of evidence restricting irrelevant 'fishing expeditions', why is the new section 85E needed?***

*Section 85E is necessary to protect what is primarily akin to a health record from being adduced in evidence where it is irrelevant. Failure to protect such test results from production would place the underlying program at risk and discourage police officers who have an alcohol or drug of dependence problem from seeking treatment and rehabilitation.*

*The protections offered by the new provisions are important to protect what is primarily a welfare-based program, which provides appropriate punitive responses to police officers who behave inappropriately.*

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

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

*6 December 2007*

***The Committee thanks the Minister for this response.***

# Victorian Energy Efficiency Target Bill 2007

The Bill was introduced into the Legislative Assembly on 31 October 2007 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 19 November 2007 and made the following comments in Alert Digest No. 15 of 2007 tabled in the Parliament on 20 November 2007.

## Committee's Comment

**Charter Report**

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

1. *Why does clause 60 refer generally to any person who the Essential Services Commission has reason to believe has information or documents, rather than setting out specific people or classes of people that may be given a notice by the Commission?*
2. *Why does clause 60 refer generally to any information or documents that are 'relevant to the operation of this Act', rather than setting out specific matters that a person may be required to reveal to the Commission?*
3. *Why does clause 60 include the power to summon an individual to appear before the Commission?*
4. *Why is clause 60 directly enforced by criminal offence provisions, rather than by sanctions under the VEET scheme or a power for a court, on application, to order a person to comply with a particular request?*

*Pending the Minister's response, the Committee refers to Parliament for its consideration of whether or not clause 60, in combination with the criminal offence provisions in clauses 61 and 68, is a reasonable limit on the rights to privacy and liberty according to the test set out in Charter s7(2).*

## Minister's Response

*I refer to your letter dated 21 November 2007.*

*Clause 60 of the above Bill enables the Essential Services Commission (the Commission) to require the production of information from a person when the Commission has reason to believe that the person has information or a document that is relevant to the operation of the Act. The purpose of this provision is to ensure that the Commission, as the regulator, has the power to investigate potential breaches of the Victorian Energy Efficiency Target (VEET) scheme established by the Bill. The Commission must be able to effectively regulate this certificate trading scheme so as to ensure that it operates with integrity; to do that it must have reasonable powers of investigation. Without such powers breaches may not be able to be investigated or prosecutions may be abandoned.*

*In your letter, clause 60 is compared to clause 50, which is a similar but more restricted provision. The limitations in clause 50 are appropriate given the powers there are exercisable by authorised officers rather than the Commission. Clause 60 itself is limited to circumstances where the Commission has reason to believe that a person has relevant information or a document. This limitation, coupled with the general obligation for a public authority to act in accordance with its statutory obligations, which includes acting compatibly with the Charter, appropriately constrains the Commission's powers of inquiry.*

*Answers to the specific questions raised by your letter are provided in turn below.*

***Answers to Questions Raised by the Committee***

1. *Why does clause 60 refer generally to any person who the Essential Services Commission has reason to believe has information or documents, rather than setting out specific people or classes of people that may be given a notice by the Commission?*

   *It is integral to the operation of the Act and the integrity of the VEET scheme that the Commission should have the ability to make inquiries when investigating matters under the Act. This is the primary purpose of clause 60. In particular, this clause will equip the Commission to investigate possible frauds.*

   *Clause 60 imposes a prerequisite that the Commission have "reason to believe" a person has relevant information or documents to the operation of the Act.*

   *It is important that the Commission should be able to issue clause 60 notices to persons who have relevant information or documents. Given the nature of the VEET scheme, with its particular focus on residential premises, such persons will not necessarily be persons otherwise subject to the Act (i.e. accredited persons or energy suppliers) but rather could be retailers of energy efficient appliances, trades people or administrators of prescribed greenhouse gas schemes.*

   *Limiting the classes of persons to whom clause 60 notices could be issued would unduly restrict the Commission in investigating possible frauds.*

2. *Why does clause 60 refer generally to any information or documents that are 'relevant to the operation of this Act', rather than setting out specific matters that a person may be required to reveal to the Commission?*

   *The written notice issued by the Commission under clause 60 will specify the information or documents that are to be given to the Commission. The information or documents must be relevant to the operation of the Act. Setting out in the Act specific matters that a person may be required to produce to the Commission in a given situation will unduly restrict the Commission's ability to obtain information or documents and could hamper the Commission when investigating suspected fraud.*

3. *Why does clause 60 include the power to summon an individual to appear before the Commission?*

   *Clause 60(2)(c) and (d) enables the Commission to require that a person appear before it at a time and place specified to provide certain information or produce a document either orally or in writing. Attendance may be considered necessary where information is not available in writing or, if in writing, requires explanation.*

   *Accordingly, clause 60(2)(c) and (d) supports the Commission's investigation powers for the proper administration of the VEET scheme.*

4. *Why is clause 60 directly enforced by criminal offence provisions, rather than by sanctions under the VEET scheme or a power for a court, on application, to order a person to comply with a particular request?*

   *Sanctions under the VEET scheme may be an adequate deterrent and punishment for accredited persons or relevant entities participating in the scheme regulated by the Act, but would not be effective for parties that are not participants in the VEET scheme (including those whose accreditation is suspended).*

   *Clause 60 only applies to a person that the Commission has reason to believe holds information or documentation that is relevant to the operation of the Act and is designed to detect and thereby prevent fraud.*

   *The defence in clause 61 operates to protect people who have a reasonable excuse for not providing information or a document required by a clause 60 notice. Thus, the provision operates as a strict liability offence (not an absolute liability offence). A reasonable excuse includes refusal or failure to give information or evidence or produce a document if it would tend to incriminate the person (see clause 62). It would also be reasonable to refuse to provide information that was not relevant to the operation of the Act. In accordance with section 130 of the Magistrates' Court Act 1989, a defendant wishing to rely on the reasonable excuse defence need only adduce or point to evidence that puts the matter in issue. The legal burden then lies with the prosecution to prove the matter beyond reasonable doubt. Accordingly, although failure to comply with clause 60 attracts criminal penalties, adequate defences are provided for under the Bill.*

*Peter Batchelor MP*
*Minister for Energy and Resources*

*4 December 2007*

***The Committee thanks the Minister for this response.***

## Committee Room
## 4 February 2008

# Appendix 1
# Index of Bills in 2008

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| Constitution Amendment (Judicial Pensions) Bill 2007 | 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.

**Alert Digest Nos.**

## Section 17(a)

***(i) trespasses unduly upon rights and freedoms.***

Constitution Amendment (Judicial Pensions) Bill 2007 1

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

Relationships Bill 2007 1

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

Constitution Amendment (Judicial Pensions) Bill 2007 1
Crimes Amendment (Child Homicide) Bill 2007 1
Relationships Bill 2007 1

# 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 | 19.9.07 | | 12 of 2007 | |
| Emergency Services Legislation Amendment Bill 2007 | Police and Emergency Services | 9.10.07 | | 13 of 2007 | 1 of 2008 |
| Animals Legislation Amendment (Animal Care) Bill 2007 | Agriculture | 31.10.07 | | 14 of 2007 | |
| Liquor Control Reform Amendment Bill 2007 | Consumer Affairs | 21.11.07 | 4.12.07 | 15 of 2007 | 1 of 2008 |
| Police Regulation Amendment Bill 2007 | Police and Emergency Services | 21.11.07 | 6.12.07 | 15 of 2007 | 1 of 2008 |
| Victorian Energy Efficiency Target Bill 2007 | Energy and Resources | 21.11.07 | 4.12.07 | 15 of 2007 | 1 of 2008 |
| Criminal Procedure Legislation Amendment Bill 2007 | Attorney-General | 4.12.07 | 30.1.08 | 16 of 2007 | 1 of 2008 |