

No. 2 of 2009

Tuesday, 24 February 2009

On the

Gambling Regulation Amendment
(Licensing) Bill 2009

Serious Sex Offenders Monitoring
Amendment Act 2009

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Glossary



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

Useful provisions

Section 7 of the **Charter** provides –

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

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

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

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



Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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

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

The Committee has considered the following Bills –

Gambling Regulation Amendment (Licensing) Bill 2009
Serious Sex Offenders Monitoring Amendment Act 2009



Role of the Committee

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

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

Alert Digest No. 2 of 2009

Gambling Regulation Amendment (Licensing) Bill 2009

Introduced	3 February 2009
Second Reading Speech	5 February 2009
House	Legislative Assembly
Member introducing Bill	Hon. Tony Robinson MLA
Portfolio responsibility	Minister for Gaming

Purpose

The Bill amends the *Gambling Regulation Act 2003* (the 'Act') to —

- substantially restructure the gaming industry by —
 - providing for a new licence for the monitoring of the conduct of gaming;
 - providing for the creation and allocation of gaming machine entitlements under which gaming by means of gaming machines will be authorised; and
 - imposing certain ownership and related person restrictions in relation to licensees and persons on the Roll;
- authorise the conduct of a betting exchange;
- make further provision in relation to simulated games and simulated racing events; and

Background

Extracts from the Second Reading Speech (relevant **[clause]** references added) —

1. *The Commission will continue to approve and regulate venue operator licensing. This approval process will also continue to require a planning permit and involve a social and economic impact assessment.*
2. *Following the expiry of the existing gaming operators' licences in 2012, the State will not issue any further gaming operator licences. Rather, approved hotels and clubs will be able to bid directly for 10-year gaming machine entitlements, which will authorise venues to possess and operate gaming machines. [18], [25], [27].*
3. *The State will allocate gaming machine entitlements to approved venue operators through a competitive bidding process, which is expected to be completed in 2010. Only persons holding a venue operator's licence will be permitted to bid for gaming machine entitlements. [25]*
4. *The Bill provides for the term of all venue operator licences to be extended from a current term of 5 years to 10 years to bring them into line with the term of gaming machine entitlements. [18]*
5. *The amendments also provide that venue operators' licences will only be granted to applicants who are not natural persons. [15 and 17]*
6. *The Bill includes prohibitions on profit-sharing arrangements between a venue operator and certain participants in the gaming machine industry. ...In addition to these restrictions, the Melbourne casino licensee will not be allowed to operate gaming machines outside the casino. Nor will the casino licensee be permitted to apply for the monitoring licence. ... the*

- Bill places a restriction on the ownership of hotel gaming machine entitlements so that no one will be able to own more than 35 per cent of hotel gaming machine entitlements. [10]*
- 7. The Bill provides that venue operators will be able to transfer their gaming machine entitlements to other licensed venue operators. ...To deter speculative bidding in gaming machine entitlements, the Bill provides that, from the period following the initial allocation of entitlements in 2010 until six months after the commencement of the new industry structure, a venue operator who transfers their gaming machine entitlements for a profit will be required to pay a tax of 50 per cent of the profit made. [25]*
 - 8. ...the taxation revenue collected from gaming machines will go into the Hospitals and Charities Fund to support Victoria's public health system. [25], [32-33]*
 - 9. An independent monitoring function will also be established by this legislation to monitor gaming machine transactions in venues and ensure the integrity and transparency of gaming venues. The Bill provides for a new monitoring licence, which ensures that gaming machine monitoring services are provided independently of venues.the monitor cannot hold a venue operator's licence or be a manufacturer of gaming machines at the same time. ... Similar restrictions will apply to venue operators and persons listed on the roll of manufacturers, suppliers and testers. [10], [13], [23], [28], [41]*
 - 10. The Bill includes amendments that will tighten up the laws against advertising that, either directly or indirectly, promotes the playing of gaming machines. The prohibition in the Bill will provide for a complete ban on gaming machine advertising by the current gaming operators. [63 and 64], [76]*
 - 11. The Bill includes a prohibition on gaming operators from conducting trade promotion lotteries. [65 to 68], [77]*
 - 12. ...the government has provided for the successful post-2012 wagering and betting licensee to establish and operate a betting exchange in Victoria, and also provided the right to offer approved simulated racing games. ... Simulated racing products will be able to be provided by the successful licensees under both the wagering and betting licence and the keno licence. The wagering and betting licensee will only be able to conduct simulated horse, harness and greyhound racing games. Oversight of these products is ensured by requiring both licensees to apply to the Commission for approval of these games before they can be offered to the public under the relevant licence. [44 to 62]*
 - 13. The Bill also implements the government's announcement of a 60 per cent drop in wagering taxes post-2012, when the gaming and wagering licences will be separated. [60 to 62]*

The Committee makes no further comment.

Serious Sex Offenders Monitoring Amendment Act 2009

Introduced	3 February 2009
Second Reading Speech	3 February 2009
Royal Assent	10 February 2009*
House	Legislative Assembly
Member introducing Bill	Hon. Bob Cameron MLA
Portfolio responsibility	Minister for Corrections

* **Note:** *The Act received Royal Assent on 10 February 2009 and the Committee provides this report pursuant to section 17(c) of the Parliamentary Committees Act 2003.*

Purpose and Background

[Sections of the amending Act]

Test to be applied for making or reviewing an extended supervision order

Following the Court of Appeals decision in *RJE v. Secretary to the Department of Justice* this amending Act clarifies the legal test as to when a court may make or review an extended supervision order under the *Serious Sex Offenders Monitoring Act 2005* (the 'Act').

The amending Act inserted new subsections in sections 11 and 23 (making and reviewing extended supervision orders) of the Act to provide that for the purposes of subsection (1) in each of those sections, *an offender is likely to commit a relevant offence if there is a risk of the offender committing a relevant offence and that risk is both real and ongoing and cannot sensibly be ignored having regard to the nature and gravity of the possible offending.*

Further new subsections to each of those sections provide that for the avoidance of doubt those sections *permit a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.* [4 & 5]

Declaratory savings provisions catching previous orders but preserving existing rights

The Act provided a saving provision that to avoid any doubt sections 11 and 23 as in force before the commencement day of the amending Act are taken always to have permitted a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not. [6(1)]

Additionally the amending Act provides that the declaratory savings provision in [6(1)] does not affect the rights of the parties in the proceeding known as *RJE v Secretary to the Department of Justice* (No. 131 of 2008) in the Court of Appeal. [6(2)]

Charter Report

Limiting rights – Procedure for deprivation of liberty – Extended supervision orders – Risk that 'cannot sensibly be ignored' – Whether demonstrably justified in a free society – Whether limitation 'under law' – Adequacy of statement of compatibility

Summary: The Act allows a court to make an extended supervision order if there is a risk of re-offending that 'cannot sensibly be ignored having regard to the nature and gravity of the possible offending'. The Committee is concerned that this test maybe too low for a significant rights limitation and may be overly susceptible to varying application amongst

individual judges. The Committee is also concerned that the statement of compatibility does not address the factors set out in the Charter's test for reasonable limits on rights.

The Committee notes that s. 4 defined the term 'likely to commit a relevant offence' in s. 11 of the principal Act, with the result that **a court can now impose an extended supervision order if it is satisfied that there is a risk that an offender will commit a relevant offence that:**

- 'is both real and ongoing'; and
- **'cannot sensibly be ignored having regard to the nature and gravity of the possible offending'**

As the Committee observed in its *Alert Digest No. 5 of 2008*, extended supervision orders involve a number of significant limits on Charter rights.

The Statement of Compatibility observes:

Section 7(2) of the charter requires a balance between the rights of offenders as well as the rights of the community, particularly potentially vulnerable victims including children. Whether it is reasonable and justifiable to impose restrictions upon rights of offenders depends not only on the likelihood of reoffending but also on the nature and gravity of the potential reoffending. In my view the test should reflect this, and enable ESOs to be made even where it cannot be proved that an individual is more likely than not to re-offend.

While agreeing that protecting others' rights is a legitimate reason to limit an offender's rights, the Committee feels that s. 4 raised separate Charter concerns:

First, under the Charter all measures that limit rights, including those that promote others' rights, must be ones that 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'¹. The Committee observes that extended supervision orders, which impose significant rights limitations beyond those provided for by the criminal justice system, raise the question of the minimum threshold of risk that can ever justify such measures. One judge of the Court of Appeal recently held that there can be no justification for imposing significant limits on people who probably won't re-offend.² While the Committee agrees with the statement of compatibility that extended supervision orders may be justifiable in such circumstances for very serious offences such as the rape of a child, **the Committee is concerned that a threshold requirement that a risk 'cannot sensibly be ignored' may be too low for such significant rights limitations in a 'society based on human dignity, equality and freedom'.**

Second, even for reasonable limits, the Charter requires that all rights restrictions be made 'under law' and specifically that 'a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'.³ **The Committee is concerned that the test of whether or not a risk 'cannot sensibly be ignored' may be overly susceptible to varying application amongst individual judges,** based on their own views of what is and isn't 'sensible' in this unusual context. While all extended supervision orders are reviewed at least every three years and all decisions may be appealed, the Committee feels such processes may be too slow and onerous to prevent the development of significant discrepancies in the imposition of orders. The Committee is also concerned that the Victorian Court of Appeal, in ruling that the unamended legislation imposes a higher threshold, also held:

¹ Charter s. 7(2).

² *R J E v Secretary to the Department of Justice* [2008] VSCA 265, [107]

³ Charter ss. 7(2) & 21(3).

If the undisputed opinion of the expert assessor was that the offender was likely to commit a relevant sex offence if released unsupervised, it is difficult to imagine on what other grounds a judge might fail to be satisfied that the likelihood existed.⁴

Such deference to expert assessments of likelihood appears to be inappropriate in light of the new definition inserted by s. 4, which is much lower and contains a significant qualitative component. While the Court of Appeal will doubtless eventually review this remark, lower courts may, in the meantime, feel obliged to follow it in applying the new test.

Finally, **the Committee is concerned that the statement of compatibility does not address the factors set out in Charter s. 7(2).**⁵ In particular, there is no assessment of 'reasonably available' alternatives, such as the 'unacceptable risk' test recommended by the Victorian Sentencing Advisory Council.⁶ The Committee is also concerned that the statement of compatibility described the bill's provisions defining 'likely' as 'clarifying' that definition. The Committee observes that new test differs significantly from both previous interpretations by the Victorian Court of Appeal, by replacing a wholly quantitative assessment of probability with a partially qualitative risk assessment.

The Committee will write to the Minister seeking further information as to whether or not the Court of Appeal's remarks on the 'undisputed opinion of the expert assessor' continue to bind judges applying the new test introduced in sections 4 and 5. It will also write expressing its concern about the statement of compatibility. Pending the Minister's response, the Committee draws attention to ss. 4 and 5 and the requirements of Charter ss. 7(2) and 21(3).

Retrospective penalties – Procedures for deprivation of liberty – Amendments apply to offences committed and orders made before commencement

Summary: The Committee reiterates its view that an extended supervision order may amount to a 'penalty' for the purposes of the Charter's right against retrospective increases in penalties. The Committee is also concerned that the changed rules for existing orders may be contrary to the procedural rights of persons subject to those orders.

The Committee notes that s. 4 amended rules that regulate whether or not 'eligible offenders' can be subject to an extended supervision orders. The change may result in some existing offenders being subject to orders that wouldn't have been made under the previous rules. The Committee is concerned that such changes in the law may cause significant unfairness, for example because some people may have decided to plead guilty on the basis of the legal advice about the state of the previous law.

The Statement of Compatibility remarks that:

...an ESO... does not impose a retrospective punishment on the offender contrary to section 27 of the Charter, because the making of an ESO is protective rather than punitive in nature (see especially Fardon v. Attorney-General (Qld) (2004) 223 CLR 575.)

⁴ *R J E v Secretary to the Department of Justice* [2008] VSCA 265, [19]

⁵ These factors are '(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and the purpose'; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

⁶ Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention: Final Report*, May 2007, Recommendation 17-A (1).

The Committee reiterates its observation, stated in *Alert Digest No. 5 of 2008*, that an extended supervision order may amount to a ‘penalty’ for the purposes of the Charter’s right against retrospective increases in penalties.⁷ Indeed, such a ruling was made in the very New Zealand case that developed the definition of ‘likely’ inserted by ss. 4 and 5.⁸

The Committee also notes that s. 5 amended rules for when an extended supervision order can be renewed or revoked. If this change applies to people who are currently the subject of extended supervision orders, then orders made for a duration determined by the previous definition of ‘likely’ will now be subject to review under a different definition. **The Committee is concerned that changing the rules for review or revocation of existing orders may be contrary to the Charter right of people presently subject to such orders not to ‘be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law’.⁹**

The Committee will write to the Minister seeking further information as to whether or not the amendments made by s. 5 apply to extended supervision orders in place prior to the Act’s commencement date. Pending the Minister’s response, the Committee draws attention to the retrospective operation of the Act.

Dialogue about human rights – Whether Charter operating as intended

Summary: The Committee will write to the Attorney-General expressing its concern about the operation of the Charter’s human rights dialogue in relation to this Act.

The Committee notes that the Act is the first occasion where Parliament has responded to a major court judgment where the Charter was raised and extensively debated at the hearing. The Charter’s intended operation in this circumstance was described at its enactment as follows:¹⁰

It is a model which encourages and promotes dialogue about human rights between all the institutions of government -- the Parliament, the courts and the executive. It ensures that human rights are taken into account when developing new laws and policies. It ensures that the courts consider human rights when interpreting laws. And above all else, it promotes the need to respect and promote human rights across government and in the community.

The Committee is concerned that the Charter may not have operated as intended in relation to this Act in three respects:

First, the majority of the Court of Appeal did not consider the Charter when interpreting the previous versions of ss. 11 and 23 of the principal Act. Rather, the majority held that its ‘interpretative task does not attract the operation of s. 32(1) of the Charter’. The Committee observes that, as a result, the Parliament did not have the benefit of an authoritative judicial ruling on the compatibility of the existing ss. 11 and 23 with human rights when considering the enactment of amendments to those sections that lower the threshold for making extended supervision orders.

Second, the Bill’s statement of compatibility did not follow the format used in other statements. In particular, as already outlined, the statement, despite concluding that the

⁷ Charter s. 27(2).

⁸ *Belcher v Department of Corrections* [2006] NZCA 262, [11], [49]

⁹ Charter s. 21(3).

¹⁰ Second Reading Speech for the Charter of Human Rights and Responsibilities Bill 2006, 4th May 2006.

Bill limited some rights, referred only to the concept of balancing competing rights and did not address the factors set out in Charter s. 7(2)'s test for limiting rights. The Committee is concerned that the bill may not have complied with the requirement in Charter s. 28 that every bill be accompanied by a statement explaining 'how' it is compatible with human rights. The Committee considers that a fully compliant statement of compatibility is especially important when legislation that engages many human rights is developed and enacted speedily.

Third, the Bill was enacted without a report by this Committee. The Committee reiterates its concern stated in *Alert Digest No. 1 of 2009* about non-compliance with Charter s. 30.

The Committee will write to the Attorney-General expressing its concern about the operation of the Charter's human rights dialogue in relation to this Act. Pending the Attorney-General's response, the Committee draws attention to Charter ss. 28, 30 and 32.

The Committee makes no further comment.

**Committee Room
23 February 2009**

Appendix 1

Index of Bills in 2009

Alert Digest Nos.

Associations Incorporation Amendment Bill 2008	1
Assisted Reproductive Treatment Bill 2008	1
Bus Safety Bill 2008	1
Criminal Procedure Bill 2008	1
Duties Amendment Bill 2008	1
Equal Opportunity Amendment (Governance) Bill 2008	1
Fair Trading and Other Acts Amendment Bill 2008	1
Gambling Regulation Amendment (Licensing) Bill 2009	2
Liquor Control Reform Amendment (Enforcement) Bill 2008	1
Melbourne Cricket Ground Bill 2008	1
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1
Relationships Amendment (Caring Relationships) Bill 2008	1
Resources Industry Legislation Amendment Bill 2008	1
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Serious Sex Offenders Monitoring Amendment Act 2009	2
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1
Transport Legislation General Amendments Bill 2008	1
Transport Legislation Miscellaneous Amendments Bill 2008	1
Workplace Rights Advocate (Repeal) Bill 2008	1

Appendix 2

Committee Comments classified by Terms of Reference

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)

(vi) inappropriately delegates legislative power

Bus Safety Bill 2008	1
Criminal Procedure Bill 2008	1

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

Bus Safety Bill 2008	1
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Serious Sex Offenders Monitoring Amendment Act 2008	2
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1

Section 17(b)

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

Criminal Procedure Bill 2008	1
Equal Opportunity Amendment (Governance) Bill 2008	1

Appendix 3

Ministerial Correspondence

Table of correspondence between the Committee and Ministers during 2008-09

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Port Services Amendment (Public Disclosure) Bill 2008	Hon. David Davis MLC	28.02.08	2 of 2008
Assisted Reproductive Treatment Bill 2008	Health	06.11.08 08.12.08	12 of 2008 1 of 2009
Major Crime Legislation Amendment Bill 2008	Attorney-General	02.12.08	15 of 2008
Primary Industries Legislation Amendment Bill 2008	Agriculture	02.12.08	15 of 2008
Relationships Amendment (Caring Relationships) Bill 2008	Attorney-General	02.12.08 19.12.08	15 of 2008 1 of 2009
Bus Safety Bill 2008	Public Transport	04.02.09	1 of 2009
Criminal Procedure Bill 2008	Attorney-General	04.02.09	1 of 2009
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	Attorney-General	04.02.09	1 of 2009
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	Finance	04.02.09	1 of 2009
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	Public Transport	04.02.09	1 of 2009
Serious Sex Offenders Monitoring Amendment Act 2009	Corrections	24.02.09	2 of 2009