

No. 4 of 2008

Tuesday, 8 April 2008

On the

Animals Legislation Amendment
(Animal Care) Bill 2007

Co-operatives and Private Security
Acts Amendment Bill 2008

Crimes Amendment (Child Homicide)
Bill 2007

Drugs, Poisons and Controlled
Substances Amendment Bill 2008

Education and Training Reform
Amendment Bill 2008

Environment Protection Amendment
(Landfill Levies) Bill 2008

Essential Services Commission
Amendment Bill 2008

Justice Legislation Amendment (Sex
Offences Procedure) Bill 2008

Land (Revocation of Reservations) Bill
2008

Police Integrity Bill 2008

Working with Children Amendment
Bill 2007

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Glossary



- ‘**Article**’ refers to an Article of the International Covenant on Civil and Political Rights;
- ‘**Assembly**’ refers to the Legislative Assembly of the Victorian Parliament;
- ‘**Charter**’ refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;
- ‘**child**’ means a person under 18 years of age;
- ‘**Committee**’ refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;
- ‘**Council**’ refers to the Legislative Council of the Victorian Parliament;
- ‘**court**’ refers to the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court as the circumstances require;
- ‘**Covenant**’ refers to the International Covenant on Civil and Political Rights;
- ‘**human rights**’ refers to the rights set out in Part 2 of the Charter;
- ‘**penalty units**’ refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (*currently one penalty unit equals \$110.12*).
- ‘**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 –

Co-operatives and Private Security Acts Amendment Bill 2008
Education and Training Reform Amendment Bill 2008
Environment Protection Amendment (Landfill Levies) Bill 2008
Essential Services Commission Amendment Bill 2008
Justice Legislation Amendment (Sex Offences Procedure) Bill 2008
Land (Revocation of Reservations) Bill 2008
Police Integrity Bill 2008

The Committee notes the following correspondence –

Animals Legislation Amendment (Animal Care) Bill 2007
Crimes Amendment (Child Homicide) Bill 2007
Drugs, Poisons and Controlled Substances Amendment Bill 2008
Working with Children Amendment 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.

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Co-operatives and Private Security Acts Amendment Bill 2008

Introduced	12 March 2008
Second Reading Speech	13 March 2008
House	Legislative Assembly
Member introducing Bill	Mr. Tony Robinson MLA
Portfolio responsibility	Minister for Consumer Affairs

Purpose

The Bill amends the *Co-operatives Act 1996* to make provision –

- for the issue of co-operative capital units ('CCU') by Victorian co-operatives as a means of raising funds for the expansion of its operations,
- for the recognition in Victoria of co-operatives that are registered in another State or Territory, and
- for the Registrar of Co-operatives to exempt smaller co-operatives from the requirement to audit their annual financial statements.

The Bill also amends the *Private Security Act 2004* to extend the timeframe for completion of a statutory review of that Act by one year to 1 June 2009.

Note: *Section 178 of the Private Security Act 2004 requires the Minister to undertake a review of the Act as soon as possible after 3 years from the commencement of the Act. The majority of the provisions of the Act came into operation on 1 July 2005.*

Content and Committee comment

[Clauses]

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

Co-operatives Act 1996

[3 to 13]. Provides for the issue of CCU. (*Also note the Charter Report below in respect to the question whether CCU constitute property for the purposes of the Charter*).

[11]. Amends section 238 to make provision for CCU's and also to omit certain section references to provide the Registrar a discretion to exempt certain co-operatives from the need to comply with audit requirements under the Act.

[14]. Substitutes new Part 14 of the Act to establish a scheme for recognition of foreign co operatives. New section 371(2)(c) allows for the production of any document the Registrar may require or that are prescribed by the regulations. (*Also note the Charter Report below in respect to the requirement to produce certain documents and the Registrar's duty to act in conformity with section 38 of the Charter*).

Private Security Act 2004

[18]. Amends section 178(3) of the Act to substitute “by 1 June 2009”. The effect of the amendment will allow a report prepared by the responsible Minister on the operation of the Act to be tabled by that date rather than 1 June 2008.

[19]. Provides that this Act is repealed on the first anniversary of its commencement.

Charter Report

Privacy and reputation – Property rights – Regulation of co-operative capital units – Information about individuals associated with foreign co-operatives

Charter s.13(a) provides that everyone has the right ‘not to have his or her privacy unlawfully or arbitrarily interfered with’. Charter s.20 provides that people ‘must not be deprived of property other than in accordance with law.’ Charter s.6(1) provides that ‘only persons have human rights’ under the Charter. Charter s. 38 makes it ‘unlawful for a public authority to act in a way that is incompatible with a human right’ unless it ‘could not reasonably have acted differently’ because of another law.

The Committee observes that co-operatives are not persons, but that owners of co-operative capital units, as well as employees of co-operatives, are persons and, therefore, have rights under the Charter.

The Committee notes that clause 13, inserting a new section 268A into the *Co-operatives Act 1996*, establishes co-operative capital units (CCU.) The Committee considers that CCU may be property for the purposes of Charter s.20. The Committee observes that new sections 268A(2) and (3) make CCU generally subject to regular property law. The Committee therefore considers that clause 13 is compatible with the Charter property rights of future owners of CCU not to be deprived of that ownership ‘otherwise than in accordance with law.’

The Committee also notes that clause 14, inserting a new section 371 into the *Co-operatives Act 1996*, provides that, where a foreign co-operative proposes to operate in Victoria, its directors must sign a statement identifying ‘the full name and address of’ every Victorian agent for the co-operative (new section 371(2)(iv)) and (for non-participating co-operatives) ‘the full name, date of birth and address of’ every director of the co-operative (new section 371(3)(c)). The Committee further notes that new section 371(2)(c) provides that a co-operative must supply ‘any other documents or information that the Registrar may require’.

The Statement of Compatibility remarks:

The information is gathered for a reasonable purpose and is not arbitrary or unlawful. In relation to directors it enables the registrar of co-operatives to confirm that a person who is acting as a director or is otherwise directly or indirectly concerned with the management of the co-operative is lawfully able to do so under the act...

Collecting the full name and address in Victoria of a person acting as an agent of a foreign cooperative is required so that the registrar of co-operatives and members of the public who have dealings with the co-operative have a clearly identified contact point in the jurisdiction.

Whilst the Statement of Compatibility does not address new section 371(2)(c), the Committee observes that the Registrar is a public authority under Charter s.38 and that there appear to be no laws that would make it reasonable for the Registrar to request documents in a way that is incompatible with an individual’s Charter rights. The Committee therefore considers that clause 14 is compatible with Charter privacy rights of individuals associated with foreign co-operatives proposing to operate in Victoria.

The Committee makes no further comment.

Education and Training Reform Amendment Bill 2008

Introduced	11 March 2008
Second Reading Speech	12 March 2008
House	Legislative Assembly
Member introducing Bill	Mr. Bronwyn Pike MLA
Portfolio responsibility	Minister for Education

Purpose

The Bill amends the *Education and Training Reform Act 2006* (the 'Act') to –

- provide students (below the age of 25 years) to be allocated with Victorian student numbers,
- provide for the establishment and maintenance of a Student Register,
- expand the functions of the Victorian Curriculum and Assessment Authority (the 'VCAA') relating to early childhood and the testing of students,
- provide for the chief executive officer of the VCAA to issue a reprimand in relation to minor breaches of examination rules and provide for a review of such a reprimand by an appeals committee member,
- make a number of statute law revision amendments to the Act.

Content and Committee comment

[Clauses]

[2]. Some provisions come into operation on the day after Royal Assent. The remaining provisions of the Bill come into operation on proclamation but not later than by 1 January 2009.

[6 to 8]. Amend the Act and provide a power for the chief executive officer of the VCAA to issue a reprimand in relation to minor breaches of examination rules and provide for a review of such a reprimand by an appeals committee member.

Victorian student number

[11]. Inserts a new Part 5.3A into the Act to make provision for the allocation of Victorian student numbers to all students below the age of 25 being educated with a Victorian education or training provider registered with the Victorian Registration and Qualifications Authority (except universities) and to create a Student Register as a central repository for Victorian student numbers and information relating to students allocated with those numbers.

New section 5.3A.7 requires that the Secretary must establish and maintain a Student Register containing specific information relating to students who have been allocated a Victorian student number.

New section 5.3A.9 allows the Secretary to authorise specific persons and bodies to access, use or disclose a Victorian student number and related information for a limited number of educational or training purposes. New section 5.3A.10 creates an offence for unauthorised use of the Victorian student number and related information by the authorised users specified in section 5.3A.9, other than statutory authorities.

New section 5.3A.17 requires the Secretary to allocate Victorian student numbers to students who were enrolled with education or training providers or registered for home schooling immediately before the commencement date and who continue to be so enrolled or registered and to notify the relevant education or training provider or the Authority of the number allocated.

[19]. Provides for the automatic repeal of this Amending Act on 1 January 2010.

Charter Report

Recognition and equality before the law – Age discrimination – Privacy – Information on the Student Register – Scheme limited to students aged less than 25

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 and ‘occurs if a person treats someone with an attribute less favourably than the person treats or would treat someone without that attribute in the same or similar circumstances’. Charter s.13 gives people the right not to have their ‘privacy unlawfully or arbitrarily interfered with’.

The Committee notes that clause 11, inserting new sections 5.3.A.4 and 5.3.A.7 into the *Education and Training Reform Act 2006*, requires that education and training providers (other than universities) supply the full name, date of birth, gender, enrolment and cancellation dates of Victorian students to the Secretary of the Department of Education, and to notify the Secretary of any changes to that information. The Committee also notes that new section 5.3.A.9 authorises the disclosure of that information to various bodies for various purposes.

The Statement of Compatibility remarks:

The restrictions imposed on the type of information that must be provided in order for a student to be allocated a Victorian student number, coupled with the safeguards surrounding the maintenance and use of that information in the Victorian student register, clearly show that any interference with the right to privacy, in the context of the operation of this bill, is reasonable and not arbitrary. In addition, there are clear and reasonable policy objectives behind the collection, maintenance and use of such information, namely for the overall purpose of more effective program evaluation and improved delivery of education and training services in order to increase retention rates to lead to a more highly skilled and educated workforce.

The Committee considers that clause 11 does not limit Victorian students’ Charter right to privacy.

The Committee also notes clause 11, inserting a new section 5.3.A.2, limits the Victorian student number scheme ‘to students of less than 25 years of age.’ The Statement of Compatibility remarks that this section:

does not raise the right to equal protection of the law without discrimination under section 8 of the charter because the requirement to provide personal information, which is imposed on students under the age of 25 years does not adversely affect those students so as to cause them disadvantage in comparison to students over 25 years who are not required to provide such information.

The Committee observes that the effect of new section 5.3.A.2 is that students under 25 will have their personal information placed on a student register, when otherwise identical students 25 or over (e.g. who may be enrolled in the same class at a Victorian TAFE) will not have their information placed on such a register. The Committee therefore considers that new section 5.3.A.2 may cause some students to be treated less favourably than differently aged but otherwise identical students.

The Committee will seek further information from the Minister as to why students aged 25 and over are not included in the Victorian Student Numbers and Student Register scheme. Pending the Minister’s response, the Committee draws attention to new section 5.3.A.2.

The Committee makes no further comment.

Environment Protection Amendment (Landfill Levies) Bill 2008

Introduced	11 March 2008
Second Reading Speech	12 March 2008
House	Legislative Assembly
Member introducing Bill	Mr. Peter Batchelor MLA
Minister responsible	Hon. Gavin Jennings MLC
Portfolio responsibility	Minister for Environment and Climate Change

Purpose

The Bill increases certain prescribed industrial waste levies and to make minor amendments to improve the operation of the *Environment Protection Act 1970* (the 'Act').

Content and Committee comment

[Clauses]

[2]. Other than clauses 4 and 5 the provisions in the Bill commence on the day after Royal Assent. Clause 5 will commence on 1 July 2008.

Retrospective commencement

Clause 4 is deemed to have come into operation on 1 July 2007.

Note: From the explanatory memorandum – *Clause 4 synchronises section 71(1)(aa) of the Principal Act with amendments which came into force on 1 July 2007 through the Environment Protection (Amendment) Act 2006 (the Amendment Act). It was an oversight that section 71(1)(aa) was not updated by the Amendment Act, hence the retrospective commencement date. Section 71(1)(aa) is a regulation-making power. The retrospective commencement will not detrimentally affect any person because no regulations have yet been made using this power as amended.*

[4]. Amends section 71(1)(aa) of the Act. The Amendment Act modified the Environment Protection Authority's licensing system to allow amalgamated corporate licences from 1 July 2007. The legislative intent, as seen in section 24 of the Amendment Act, was that the new corporate licences would attract the same fee as the sum of the fees for each licensed premises so that the changes would be cost neutral.

Section 71(1)(aa) provides the power to make regulations for licence fees. Section 71(1)(aa) should also have been modified by the Amendment Act, to allow for regulations prescribing fees which reflect the change in licence structure and are cost neutral with the former licence-for-each-premises structure.

[5]. Increases certain prescribed industrial waste levies set out in Schedule E of the Act.

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

The Committee makes no further comment.

Essential Services Commission Amendment Bill 2008

Introduced	12 March 2008
Second Reading Speech	13 March 2008
House	Legislative Assembly
Member introducing Bill	Mr. Tim Holding MLA
Portfolio responsibility	Minister for Finance

Purpose

The Bill amends the *Essential Services Commission Act 2001* (the ‘Act’).

Note 1: Section 66 of the Act required the Act to be reviewed within 5 years of its commencement to determine whether the objectives of the Act are effective or whether the Act needs to be amended to further facilitate the objectives or to insert new objectives. The Act came into operation on 1 January 2002.

Note 2: Section 3 of the Act provides that ‘essential service’ means a service (including the supply of goods) provided by — (a) the electricity industry; (b) the gas industry; (c) the ports industry; (d) the grain handling industry; (e) the rail industry; (f) the water industry; (g) any other industry prescribed for the purpose of this definition.

The Committee notes this extract from the Second Reading Speech –

In summary, then, the principal purposes of the Bill are:

- *to introduce a simpler legislative framework;*
- *to refine the current objective;*
- *to revise and recast the facilitating objectives as matters the Commission is to have regard to when undertaking its functions;*
- *to provide the Commission with the power to make codes and impose appropriate penalties for their breach;*
- *to clarify that the Commission is able to inquire into any matter referred by the Minister for finance in consultation with relevant ministers, and provide that when conducting inquiries into industries that are not regulated, the minister for finance is to determine the information powers available to the Commission;*
- *to standardise the powers and penalties available to the Commission across the ESC act to reduce the regulatory burden and increase regulatory certainty;*
- *to provide the Commission with powers to access information from regulated and related third parties, and clarify processes and decisions on the release of commercial-in-confidence information;*
- *to introduce a proportional penalty framework; and*
- *to introduce new provisions relating to access regimes to ensure that, as agreed at the Council of Australian Governments, regulation of Victorian regimes is consistent with the nationally agreed approach.*

Content and Committee comment

[Clauses]

[2]. The provisions in the Act come into operation on proclamation but not later than by 1 July 2009.



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 its Practice Note No.1 of 2005 concerning provisions that delay the commencement of a Bill by more than 12 months.

The Committee once again draws attention to Practice Note No.1 of 2005.

The Committee will seek further advice from the Minister as to the necessity or desirability of including a delayed commencement provision and point out that the reasoning justifying such a provision should be available to Members at the time the Bill is introduced in the Parliament.

[14]. Substitutes section 37(1) to provide a broad power for the Commission to require a person to provide relevant information or a document if it believes that the person has information or a document that it considers necessary for the performance of any of its functions or the exercising of any of its powers. New section 37(1A) provides the Commission with the power to require a person to appear before the Commission to provide the information or a document.

[21]. Inserts a new Part 6 (new sections 47 to 51) into the Act setting out the Commission's code-making powers.

New section 48 provides that the Code of Practice may adopt, incorporate or apply any matter contained in a document, code, standard, rule, method formula or specifications that are published by any authority or body.

New section 49 provides for the regulatory scrutiny of codes made under Part 6 of the Act or under any relevant legislation. The regulatory scrutiny of Codes of Practice is similar to a regulatory impact statement process, with the primary difference being that the regulatory statement prepared by the Commission is not subject to independent assessment and requires the Chairperson to ensure that a copy of the regulatory statement and the compliance certificate is given to the Scrutiny of Acts and Regulations Committee of the Parliament, as soon as is practicable after the Code is made.

New section 51 provides that either House of Parliament may disallow a Code of Practice in full or in part and applies Part 5 of the *Subordinate Legislation Act 1994*, which provides for scrutiny, suspension and disallowance of a Code of Practice as if it were a statutory rule.

[23]. Inserts a new section 54A that sets out the civil penalty the Commission may impose.

[24]. Amends section 55 of the Act to clarify that a person representing a consumer group has a right to an appeal and extends the time limits in which an appeal may be lodged.

[25]. Amends section 56 and deals with the composition of and procedures before an appeal panel.

[26]. Provides that the Act must be again reviewed by the Minister by 31 December 2016.

[29]. This amending Act is repealed on the first anniversary of its commencement.

Charter Report

Reasonable limits on human rights – Regulation of commercial conduct – Movement – Privacy – Expression

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 amends the *Essential Services Commission Act 2001*, whose 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:

- **Movement** (Charter s.12): a provision giving the Essential Services Commission the power to require a person to appear before it (clause 14, inserting a new section 37(1A))
- **Privacy and expression** (Charter ss.13(a) & 15(2)): provisions giving the Essential Services Commission general powers to obtain information where it ‘considers that it is necessary to do so for the purposes of performing its functions or exercising its powers’ from anyone who it ‘has reason to believe has any relevant information or document’ (clauses 12 & 14, substituting ss. 36 and 37(1)); and requiring entities to supply information requested by the Commission (clause 15, inserting a new section 37A.)

The Committee observes that the Bill largely implements the recommendations of Roger Beale’s *Review of the Essential Services Commission Act 2001*, which expressly considered the compatibility of its various recommendations with the Charter. The Statement of Compatibility contends that these provisions (in the context of other protective provisions in the Bill or existing Act) do not infringe the rights to privacy or expression and reasonably limit freedom of movement. The Statement of Compatibility also remarks that the Bill preserves existing rights against self-incrimination in s. 37 and promotes the right to a fair hearing by providing for the competence of appeal panels (in clause 25.)

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.

Justice Legislation Amendment (Sex Offences Procedure) Bill 2008

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

Purpose

The Bill amends provisions relating to proceedings for sex offences in the *Crimes Act 1958*; the *Crimes (Criminal Trials) Act 1999*; the *Evidence Act 1958*; and the *Magistrates' Court Act 1989* and the *Sentencing Act 1991*.

The Bill further provides an additional offence to which life-time reporting obligations apply under the *Sex Offenders Registration Act 2004*.

Extract from the Second Reading Speech –

In summary, the main amendments in the Bill are to –

- *extend the time requirement for the holding of a special hearing from 21 days to three months.*
- *provide that the County Court trial for relevant sex offence matters must commence within three months after the Magistrates Court committal unless it is in the interests of justice to extend this time.*

Content and Committee comment

[Clauses]

[2]. The provisions in the Act come into operation on proclamation but not later than by 1 July 2008.

Crimes Act 1958

[3]. Amends section 359A of the Act by inserting a new subsection (2AA) to provide that trials for sexual offences involving child complainants and complainants with a cognitive impairment must commence within three months from the date on which the defendant is committed to stand trial. The section also provides that juries in such trials must also be empanelled within the same three month period.

New subsection (2AAB) provides that a court may only grant an extension of the three month period referred to in new subsection (2AA) if it is in the interests of justice to do so. New subsection (2AAC) provides that a court can grant an extension of time of the three month period referred to in new subsection (2AA) for a period not exceeding three months.

[9]. Amends the *Evidence Act 1958* to allow the admission into evidence at trial of a recording of evidence notwithstanding that the complainant was under 18 when the recording was made but has subsequently turned 18 years of age when the trial commences.

[12]. Amends section 41G of the *Evidence Act 1958* to extend from 21 days to 3 months the time to hold a special hearing.

[15]. Inserts new subsection 6B(2)(ab), an additional category of serious sexual offender, under the *Sentencing Act 1991*. The subsection covers an offender who has been convicted of the offence of persistent sexual abuse of a child under 16 (under section 47A(1) of the *Crimes Act 1958*).

Sex Offenders Registration Act 2004

[18]. Amends section 34(1) of the Act by inserting an additional category of offence that attracts a lifetime reporting obligation being a serious single offence of “persistent sexual abuse of a child under 16” (an offence under section 47A(1) of the *Crimes Act 1958*).

[19]. Inserts a new section 73C in the Act and is a transitional provision that provides that the amendment made by clause 18 apply to any sentence imposed after the commencement of the amendment regardless of when the offence was committed.

Note: *A sex offender registration order is made by the court on sentencing a person for a prescribed offence and made on application of the prosecution (s.11(6)). A reporting obligation may be for a period of 8 years, 15 years or for life. The obligatory reporting periods are reduced for juvenile offenders. A sentence of life-time reporting obligation under section 34(c) of the Act is appealable to the Supreme Court pursuant to section 39 of the Act after a period of 15 years has passed and provided that no other comparable foreign jurisdiction registration order is operable and the person is not on parole in respect of that registrable offence. Under section 39 the court may suspend the reporting obligation.*

[20]. Provides for the repeal of this amending Bill on 1 July 2009.

Charter Report

Fair hearing – Examination of witnesses – Admissibility of previous representations of certain complainants in criminal proceedings

Charter s 24(1) provides that litigants have the right to a decision ‘after a fair... hearing’. Charter s. 25(2)(g) provides that each criminal defendant has a right to ‘examine, or have examined, witnesses against him or her, unless otherwise provided for by law’. Charter s. 32(1) provides that statutes must be interpreted compatibly with human rights ‘[s]o far as it is possible to do so consistently with their purpose’.

The Committee notes that clauses 10 and 12 (amending existing ss. 41D & 41G of the *Evidence Act 1958*) extend existing provisions making previous representations of child and cognitively impaired complainants admissible in certain criminal proceedings. The Committee considers that clauses 10 and 12 engage the Charter rights of criminal defendants to fair hearings and to examine witnesses against them.

The Statement of Compatibility remarks:

Clause 10 requires the evidence to be relevant and sufficiently probative and provides the judge with discretion to exclude the evidence. If such evidence is admitted, the judge must give appropriate warnings to the jury. Accordingly, the right to a fair trial is preserved by clause 10 and is not limited.

The Committee observes that clause 10(2) reduces the existing requirements for judges to give warnings to the jury with respect to evidence of previous representations.

The Committee also observes that the United States Supreme Court has held that a judicial assessment of reliability is an inadequate substitute for giving the defendant an opportunity to cross-examine the maker of a previous representation, at least where that representation was a formal statement made to the police: *Crawford v Washington* 541 US 36 (2004). The Committee further observes that s. 41D permits the admission of statements made by child complainants to police in the course of a criminal investigation: *Gately v R* [2007] HCA 55. The Committee therefore considers that the compatibility of clauses 10 and 12 with the Charter rights of defendants to a fair hearing and to examine witnesses against them may depend on the extent to which the defence has an adequate opportunity to cross-examine the makers of the statements dealt with by those clauses.

The Committee notes that existing provisions provide for an opportunity for the defence to cross-examine the complainant with respect to the representations whose admissibility is affected by the bill as follows:

- Clause 10: the complainant must be ‘available to give evidence’ at the trial where the previous representation is to be admitted (s. 41D(1))
- Clause 12: the complainant can be cross-examined at the special hearing (s. 41G(2)) and, with the court’s leave, can be cross-examined at the trial (s. 41H(7)-(9))

Whilst the Committee is concerned that, for some previous representations, such cross-examination may be less effective than the usual procedure of all admitted statements being both made and cross-examined during the trial itself, the Committee observes that the discretions in existing ss. 41D(2) & 41H(2) permit a court to exclude such statements. The Committee also observes that both the wording and purpose of these provisions are compatible with the provisions being interpreted under Charter s. 32(1) in a way that preserves defendants’ rights to a fair hearing and to minimum criminal process guarantees. The Committee therefore concludes that clauses 10 and 12 are compatible with the Charter rights of defendants to a fair hearing and to examine witnesses against them.

Retrospective increases in penalty – Life-long reporting obligation – Adequacy of Statement of Compatibility

Charter s. 27(2) bars the imposition of a penalty ‘for a criminal offence that is greater than the penalty that applied to the offence when it was committed’.

The Committee notes that clause 18, amending s. 34 of the *Sex Offenders Registration Act 2004*, provides that offenders who commit the offence of persistent child sexual abuse will be subject to a life-long reporting obligation, replacing the existing law that requires at least two sexual offences before a reporting obligation becomes life-long. The Committee also notes that clause 19, inserting a new section 73C into the *Sex Offenders Registration Act 2004*, provides for the retrospective operation of clause 18 to persons who are yet to be sentenced for a registrable offence.

The Statement of Compatibility remarks:

Section 27 applies to penalties only, and the clause does not impose any new or increased penalties on offenders. Reporting obligations as a sex offender are not considered a penalty under Sentencing Act 1991 and the Sex Offenders Monitoring Act 2004. Accordingly, the right is not engaged and therefore not limited.

The Committee observes that overseas courts, interpreting similar provisions to Charter s. 27(2), have held that the meaning of ‘penalty’ is not determined by local statutes. Rather, whether an imposition is a penalty also depends on whether or not it is imposed following conviction for a criminal offence, its nature and purpose, the procedures involved in its making and implementation and its severity. The Committee also observes that courts in the United States, Canada and Europe have all held that similar reporting requirements for sex offenders are not a penalty, due to their protective purpose and the relatively mild nature of their imposition.

The Committee further observes that the offence of persistent child sexual abuse requires proof that the defendant committed at least three sexual offences and that conviction for any two such offences automatically triggers a life-long reporting obligation under the existing law. The Committee therefore considers that clause 19 is compatible with defendants’ Charter rights not to be subject to retrospective penalties.

The Committee further notes that clause 5, amending Schedule 8 to the *Crimes Act 1958*, expands the categories of offences that can attract an order for a forensic sample upon conviction or mental impairment verdict under existing ss. 464ZF & 464ZFAAA. The Committee observes that the bill does not provide for the transitional operation of clause 5. The Committee also observes that the effect of s. 114 of the *Sentencing Act 1991* is that, to the extent that this provision increases the penalty for

an offence, its effect will be prospective only. The Committee therefore considers that clause 5 is compatible with defendants' Charter rights not to be subject to retrospective penalties.

The Committee observes that the Statement incorrectly states that 'clause 10 does not apply retrospectively', whereas clause 13, inserting a new section 160 into the *Evidence Act 1958*, provides for the retrospective operation of clause 10 to offences committed before its commencement. The Committee also observes that the Statement of Compatibility, in discussing transitional provisions of the Bill, incorrectly refers to clause 19 as clause 9 and to clause 16 as clause 10. The Committee further observes that the Statement incorrectly refers to the *Sex Offenders Registration Act 2004* as the '*Sex Offenders Monitoring Act 2004*'; the *Serious Sex Offenders Monitoring Act 2005* provides for much stronger controls on certain sex offenders.

The Committee will write to the Minister expressing its concern about these errors in the Statement of Compatibility.

The Committee makes no further comment.

Land (Revocation of Reservations) Bill 2008

Introduced	12 March 2008
Second Reading Speech	13 March 2008
House	Legislative Assembly
Member introducing Bill	Mr. Bob Cameron MLA
Minister responsible	Hon. Justin Madden MLC
Portfolio responsibility	Minister for Planning

Purpose

The purpose of the Bill are to revoke the permanent reservation of certain land at Yarrawonga; to revoke the permanent reservation and related Crown grant of land occupied by the Talbot Free Library; to revoke the permanent reservation of certain land at Marlo, Boorhaman and Brimin; and to revoke the permanent reservation of land occupied by Mount Duneed Primary School.

Content and Committee comment

[Clauses]

[2]. The provisions in the Bill come into operation on the day after Royal Assent.

[6]. Revokes the permanent reservation as a site for public purposes of land at Marlo but also preserves a lease that is currently in place between the Minister for Environment and Climate Change and the owner of a property that is adjacent to that land.

[10]. Provides for what happens when a reservation is revoked. On the revocation of an Order in Council reserving land, the land is deemed to be unalienated land of the Crown. Any regulations under the *Crown Land (Reserves) Act 1978* or appointment of a committee of management or trustees relating to the land are also revoked.

Charter Report

Freedom of Movement – Property rights – Discharge of all property interests in land

Charter s.12 provides that everyone has ‘the right to move freely within Victoria.’ Charter s.20 provides that people ‘must not be deprived of property other than in accordance with law.’ Charter 6(1) provides that ‘only persons have human rights’ under the Charter.

The Committee notes that clause 10 provides that the various revocations of reservations provided for by the Bill discharge ‘all trusts, limitations, reservations, restrictions, encumbrances, estates and interests’ from that land.

The Statement of Compatibility remarks:

The only proprietary interest in the affected land that is held by an individual is explicitly preserved in clause 7 of the Bill. These revocations will make no material difference to the current level of public access to the land.

The Committee considers that the Bill is compatible with the Charter rights to movement and property.

The Committee observes that the Statement’s reference to clause 7 is incorrect. The relevant provision is clause 6(2).

The Committee makes no further comment.

Police Integrity Bill 2008

Introduced	11 March 2008
Second Reading Speech	13 March 2008
House	Legislative Assembly
Member introducing Bill	Hon. Bob Cameron MLA
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

The Bill —

- re-establishes the Office of Police Integrity under this proposed stand alone Act and sets out the functions of the Office and of the Director, Police Integrity;
- amends the *Police Regulation Act 1958* (the ‘PRA’) to consolidate provisions relating to the Director, Police Integrity and Office of Police Integrity into the new Act; and
- makes necessary consequential amendments to other Acts.

Glossary

<i>Director</i>	<i>means the Director of Police Integrity</i>
<i>OPI</i>	<i>means the Office of Police Integrity</i>
<i>PRA</i>	<i>means the Police Regulation Act 1958</i>
<i>SIM</i>	<i>means the Special Investigations Monitor</i>

Content and Committee comment

[Clauses]

[2]. Provides that Division 1 of Part 8 of the Bill (except clause 142) comes into operation on the day after Royal Assent. That Division makes amendments to the PRA, intended to come into operation as soon as practicable after the passage of the Bill.

Clause 142 makes amendments to the PRA to reflect the commencement of the remainder of the Bill. Clause 142 will commence with the remainder of the Bill on a day or days to be proclaimed.

All provisions of the Bill must commence by 31 December 2009.

Note: From the explanatory memorandum – *The commencement of the remainder of the Bill has been delayed to allow the Commonwealth to amend its Telecommunications (Interception and Access) Act 1979 to replace references to the PRA with references to this Bill.*

[5–8]. Provides that there continues to be an Office of Police Integrity (‘OPI’). The Office is the same body as that established by section 102A of the PRA and sets out the functions and powers of the OPI and provides that the OPI is to have a Director, called the Director, Police Integrity (the Director) and sets out the objects, functions and powers of the Director.

Note: *The OPI was established pursuant to the Major Crime Legislation (Office of Police Integrity) Act 2004 which came into operation on 16 November 2004.*

The Director to be an independent officer of the Parliament

[9]. Provides that the Director is an independent officer of the Parliament.

[10–16]. Provides that the Governor in Council may appoint an eligible person as Director and deals with the terms of employment and conditions of the Director.

[17]. Deals with staffing including secondments and the engagement of external persons and bodies to provide services.

[19]. Provides that the Director may request the Chief Commissioner of Victoria Police to second members of Victoria Police to the OPI to assist the Director in the performance of the functions of the Office or the Director.

Seconded police retain immunities but are not subject to direction by Chief Commissioner

[20]. A seconded member of Victoria Police is subject to the sole direction and control of the Director. The seconded member retains all his or her powers and duties as a member of Victoria Police and his or her immunity in respect of the exercise of those powers or performance of those duties. Neither the Chief Commissioner nor any other member of Victoria Police has the authority to give instructions to the seconded member.

A member's rank is not affected by a secondment to the OPI. Any period of secondment is taken to be a period of service with Victoria Police.

Power of delegation

[21]. The Director may delegate certain powers of the Director under certain circumstances by instrument. The Director may only delegate a coercive power (as defined in clause 3) or a power under clause 24 (allowing disclosure of information to law enforcement agencies and corresponding authorities) to a senior relevant person (a person who has the qualifications that would make the eligible for appointment as the Director under clause 10). The Director may delegate any other power other than a coercive power or power under clause 24 (disclosure of information) to a relevant person as defined by the Bill (staff or a person who has taken an oath).

Disclosure of information

[22 to 27]. Deals with disclosure of information to official bodies and provides relevant offences for unauthorised disclosure.

Drug and alcohol testing of OPI personnel

[30–37]. Deals with testing of OPI personnel for alcohol or drugs of dependence.

Note: *The definitions are closely modelled on the definitions of these terms for the drug and alcohol testing scheme for members of Victoria Police as inserted into the Police Regulation Act 1958 by the Police Regulation Amendment Act 2007.*

Clause 30 provides for important definitions including for ‘critical incident’ and ‘serious injury’.

‘critical incident’ means an incident involving a member of OPI personnel while that member was on duty which —

(a) resulted in the death of, or serious injury to, a person; and

(b) also involved any one or more of the following—

(i) the discharge of a firearm by the member;

(ii) the use of force by the member;

(iii) *the use of a motor vehicle by the member (including as a passenger) in the course of the member's duties;*

(iv) *the death of, or serious injury to, the person while the person was in the custody of the member;*

'serious injury' includes an injury that is in the opinion of the Director, of such natures, or occurred in such circumstances, that the infliction of it is likely to bring the OPI into disrepute or diminish public confidence in it.

Clause 31 provides that the Director may require OPI personnel to undertake a breath, urine or blood drug test.

Clause 31(4) provides a protection against liability for a registered medical practitioner in respect of anything done by him or her in the course of taking a sample which he or she believes on reasonable grounds was required or allowed to be taken under this Division.

Blood sample may be taken from unconscious personnel involved in a critical incident

Clause 33 provides that a registered medical practitioner may, at the direction of the Director, take a blood sample for testing for the presence of alcohol or a drug of dependence from a member of OPI personnel involved in a critical incident who is unconscious or otherwise unable to comply with a direction to provide a sample. The member may refuse to consent to the use of any evidence derived from the sample when they become conscious.

Drug testing information may be used in certain proceedings

Clause 34 provides that evidence from a sample obtained under clauses 31 or 33 is generally inadmissible in any proceedings, including coronial inquests and inquiries, except for certain prescribed proceedings and those arising out of, or connected with a *critical incident*. Evidence obtained under clause 33 (sample taken from unconscious personnel) cannot be used for these proceedings if the member from whom the sample was taken refuses to consent to its use.

Complaints about Police

[38 to 42]. A person may complain to the Director about a member of the police force. (*see section 86L of the PRA*).

[44]. Allows the OPI to conduct 'own motion investigations'.

Privilege against self-incrimination abrogated but use limitation provided – Police must give information to the Director

[47]. Provides that the Director may direct any member of Victoria Police to give any relevant information, produce any relevant document or answer any relevant question for an investigation into a possible breach of discipline.

A member of Victoria Police who does not comply with such a direction will have committed a breach of discipline under section 69(1)(ac) of the PRA (as inserted into the PRA by clause 142(2)(a)).

The clause further provides that any information, document or answer given in accordance with a direction under clause 47 is not admissible in evidence before any court or person acting judicially, except in proceedings for perjury; or a breach of discipline by a member of Victoria Police; or failure to comply with a direction; or review proceedings for the dismissal of a member of Victoria Police under Division 1 of Part IV of the PRA.

Rights and Freedoms – Privilege against self-incrimination – Derivative use of information received at compulsory examination

The Committee has made observations in respect to derivative use of information provided at a compulsory investigation in its Human Rights report below.

Documents not subject to the Freedom of Information Act 1982

[51]. The *Freedom of Information Act 1982* does not apply to a document that discloses information that relates to a complaint investigated by the Director under Part 3; or an investigation under Part 3 a report on that investigation (including a progress report) which is in the possession of certain prescribed relevant persons or bodies (OPI and SIM documents).

Power to issue witness summons including power to require immediate attendance – Person in custody may be summoned - Summons may be subject to a confidentiality notice making it an offence to disclose the existence of the summons - Witnesses to be informed of certain matters prior to questioning

[53]. Provides that the Director may issue a person with a witness summons to attend an examination before the Director to give evidence; or to attend at a specified time and place to produce specified documents or things to the Director; or to attend at an examination before the Director to give evidence and produce specified documents or things.

The Director must not issue a summons to a person known to be under the age of 16.

[56]. The Director may issue a summons for immediate attendance if the Director reasonably believes delaying the attendance is likely to result in evidence being lost or destroyed; or an offence being commissioned; or an offender's escape; or serious prejudice to the conduct of the investigation to which the summons relates.

[57]. The Director may issue a witness summons to a person already held in a prison or police gaol.

[58]. The Director may issue a confidentiality notice to a summoned person stating that the summons is a confidential document. It is an offence to disclose to anyone the existence of the document or the subject-matter of the investigation to which the summons relates, except in the circumstances specified in the notice or where the person has a reasonable excuse.

[59]. Makes it an offence for a person to whom a confidentiality notice is directed to fail, without reasonable excuse, to comply with the notice while it has effect. It sets out the circumstances in which a person has a reasonable excuse for failing to comply with a confidentiality notice. For example, a person may disclose the existence of the witness summons or subject-matter of the investigation for the purposes of seeking legal advice in relation to the summons or making a complaint to the Ombudsman.

[60]. Sets out the circumstances in which a confidentiality notice issued by the Director will cease to have effect.

[61]. The Director may conduct an examination for the purposes of an investigation and is not bound by the rules of evidence in conducting an examination.

[62]. Requires the Director to comply with certain preliminary requirements before asking a question of a witness at an examination or receiving a document or other thing from a witness including to inform the witness that the privilege against self-incrimination does not apply, although there are restrictions on the use of the evidence obtained in the course of the examination and that legal professional privilege can be claimed (except by public authorities and public officers).

If the witness is a public officer, the Director must inform the witness that legal professional privilege does not apply); inform the witness of any confidentiality requirements applying to the evidence or the issue of the witness summons; inform the witness, where applicable, to his or her right to legal representation at the examination; inform the witness, where applicable, to his or her right to have an interpreter, parent or guardian or independent person present at the examination; inform the witness of his or her right to complain to the Special Investigations Monitor.

Legal representation at an examination – Provision of interpreter where necessary – Parent or guardian where witness aged under 18 years but over 16 years – Independent person where person has a mental impairment

[64]. Witnesses may be represented or accompanied by certain people in an examination such as a legal practitioner and (where necessary) an interpreter. If the witness so wishes, the Director must direct that a parent or guardian of a witness under the age of 18 be present for the examination of that witness. If the Director believes a witness has a mental impairment, the Director must direct an independent person to be present for the examination of that witness.

Restriction on legal assistance (or other independent assistance) where the practitioner also represents another witness or is a suspect in the examination

The Director may refuse to allow a witness to be represented by someone who is, or who is representing, another witness (in the same or a different examination).

The Director may refuse to allow a witness to be represented by someone who is, or who is representing, a person involved (or suspected of being involved) in a matter being investigated.

The Director may refuse to allow a witness to be represented by a person who is, or is representing, another witness in the same examination or another examination.

The Director may refuse to allow a witness to be represented by a specific person or law practice.

Rights and Freedoms – Legal representation of choice

The Committee notes the provisions may in certain circumstances abrogate the right of a person to legal assistance of their choice. The Committee notes that there is a necessary balance to be struck between the need for effective investigations and the right of the individual to access to trusted legal advice of their choosing.

Whether the limitation to the individual's right is proportionate and necessary to the achievement of other broader public policy objectives.

[65]. An examination is not generally open to the public. However, the Director may open the examination to the public if he or she considers that it is in the public interest to do so.

[66]. A witness may be examined or cross-examined by the Director, a legal practitioner representing a witness, or by another person authorised by the Director to the extent that the Director thinks appropriate.

Video-recording of examination

[67]. Requires a person's attendance of the Director to be video-recorded if a person is summonsed to attend the Director in an examination, or if a person voluntarily attending the Director. Only evidence that is video-recorded is admissible in evidence except in exceptional circumstances (s.67(4)).

Offence to fail to answer a question or fail to produce a document

[68]. Makes it an indictable offence for a person to fail to attend the Director as required by a witness summons. It also makes it an indictable offence for a witness to fail to answer a question he or she is required to answer by the Director, or to fail to produce a document or other thing required to be produced by the summons.

Privilege against self-incrimination abrogated but use limitation provided

[69]. A person cannot claim the privilege against self-incrimination as the basis for refusing to give information or answer a question at an examination, or to produce a document or thing that is required by a witness summons.

However the provision restricts the use that can be made of information, documents or things given in an examination.

Note: From the explanatory memorandum – *Such answers, information, documents or things cannot be used against the person in any court, except in proceedings for perjury or giving false information; or a breach of discipline by a member of Victoria Police; or failure to comply with a direction under clause 47 (the provision that allows the Director to require a member of Victoria Police to give information and documents or answer questions for the purposes of an investigation into a complaint concerning a possible breach of discipline); or an offence referred to in clause 68(3) (failure to attend the Director as required by a witness summons; failure to answer a question or produce a document at an examination); or contempt of the Director.*

Rights and Freedoms – Privilege against self-incrimination – Derivative use of information received at compulsory examination

The Committee has made observations in respect to derivative use of information provided at a compulsory investigation in its Human Rights report below.

Legal professional privilege – Privilege abrogated in respect of public authorities except in criminal proceedings

[70 to 73]. A person may refuse to comply with a requirement to answer a question at an examination or produce a document before the Director if doing so would disclose a communication that is subject to legal professional privilege.

The clause also provides that a legal practitioner may refuse to answer a question at an examination or produce a document before the Director if the answer or the document contains a privileged communication made by or to the legal practitioner. In these circumstances, the legal practitioner must give the Director the name and address of the person to whom or by whom the communication was made. The privilege does not apply to a public authority or public officer except in the case of criminal proceedings (whenever commenced) in which the authority or officer is a party.

The sections also deal with the determination of claims to legal professional privilege by a court.

[74]. No statutory or common law requirement of confidentiality or secrecy (Crown privilege) applies to the disclosure of information for the purposes of an examination or investigation by the Director.

Legal assistance to witnesses

[75 and 77]. The Secretary may approve legal assistance to a witness in an examination and may provide for regulations concerning the scale of costs and related matters.

Contempt of Director and Bail when person arrested for contempt

[78]. A person is guilty of contempt of the Director if the person fails, without reasonable excuse, to comply with a summons by failing to produce a document or thing; or refusing to be sworn or to make an affirmation when called or examined as a witness; or failing to answer any question relevant to the subject-matter of the investigation when called or examined as a witness.

A person is also guilty of contempt of the Director if he or she engages in any other conduct which would constitute contempt of the Supreme Court if the Director were the Supreme Court.

[80]. Provides a bail application process where a person is arrested and detained on a charge of contempt of the Director and it is not practicable for the person to be brought immediately before the Supreme Court.

Director may require witness be kept in custody pending appearance before Supreme Court

[81]. The Director may direct that a person arrested for contempt be held in custody pending appearance before the Supreme Court. If such a direction is given the person must be provided with accommodation and meals comparable to that provided to a jury kept together overnight.

No double jeopardy

[83]. If an act or omission constitutes both an offence under the Bill and a contempt of the Director (under clause 78), proceedings can be brought against the offender for the offence, for contempt, or for both. However, the person cannot be punished more than once for the same act or omission.

Arrest of recalcitrant witnesses

[84]. The Director may apply to a magistrate seeking the issue of an arrest warrant for a person whom the Director reasonably believes has been duly served with a witness summons and who has failed to appear as required.

Bail for persons arrested

[85]. Provides a bail application process where a person is arrested and detained for failing to comply with a witness summons and it is not practicable for the person to be brought immediately before the Director.

Witness may be detained

[86]. The Director may direct that a person arrested for failing to attend as required by a witness summons be detained in prison or police custody pending appearance before the Director. If such a direction is given the person must be provided with accommodation and meals comparable to that provided to a jury kept together overnight.

Powers of entry, search and seizure

[87 to 89]. For the purposes of the Act's search and seizure provisions an authorised officers may enter public authority premises at any time but must not enter parts of premises which are used for residential purposes.

[93]. A magistrate may issue a search warrant upon application by the Director. The relevant provisions of *the Magistrates' Court Act 1989* apply to search warrants.

[99 to 101]. Applies if a person executing a search warrant (the searcher) seeks to inspect, copy or seize an item which another person (the claimant) claims is subject to privilege and provides for applications for privilege and court determination of such claims.

Defensive equipment and firearms

[102]. The Director, by instrument, may authorise a member of staff of the OPI to possess, carry and use 'defensive equipment' (see clause 3) for the purposes of an investigation.

[103]. The Director, by instrument, may authorise a member of staff of the OPI to possess, carry and use a firearm for the purposes of an investigation.

Who is a protected person

[104]. Defines a protected person as the Director; the Acting Director, a member of staff of the OPI and persons engaged by the Director who have taken an oath or affirmation under section 18(2).

Public interest immunity from production or discovery – protected documents

[105 to 108]. Makes provision for protected documents that are not subject to production / discovery. A special counsel may be appointed for a person seeking the production of a protected document.

Immunity of protected persons acting in good faith – Section 85 of the Constitution Act 1958

[109]. Provides a protected person (clause 104) with an immunity against civil and criminal proceedings in respect of any act professed to be done under the Bill, unless that act was done in bad faith. This immunity does not extend to acts done in the course of, or which result in, critical incidents (defined in clause 30). Clause 110 provides that where a critical incident is involved and the person acts in good faith the liability attaches instead to the State.

Neither civil nor criminal proceedings arising from acts done under this Bill (except acts involving critical incidents) may be brought against protected persons without leave of the Supreme Court. Before granting leave, the Court must be satisfied that there are substantial reasons to believe that the protected person has acted in bad faith.

Clause 109 provides proceedings may not be brought against the Director in relation to the issuing of a certificate under clause 106 (protected document) unless it was issued in bad faith. Nor can the court order that the Director be restrained from carrying out or compelled to carry out any investigation.

The clause further provides that a protected person cannot be called to give evidence about any matter which has come to his or her knowledge in the course of carrying out functions under the Bill.

Critical incident personal immunity – Acts done in good faith – Liability attaches to the State

[110]. Provides that, in relation to critical incidents (clause 30), a protected person is not personally liable for an act or omission done in good faith if it is done while the person is performing a function or exercising a power under the Bill, or if it is done in the reasonable belief that he or is performing a function or exercising a power under the Bill. Any liability that would attach to a protected person attaches instead to the State.

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

Clause 130 declares that it is the intention of [109] to alter or vary section 85 of the *Constitution Act 1975*.

The Committee notes the section 85 statement in the Minister's Second Reading Speech –

Section 86J of the Police Regulation Act 1958 currently limits the liability of the Director, OPI staff and persons engaged by the Director who have taken an oath or affirmation under section 102D. The capacity of any person to bring proceedings against the Director and these officers are limited to those acts that are done in bad faith. The provision also limits the scope of orders that may be made by a court in relation to the Director, OPI staff and persons engaged by the Director who have taken an oath or affirmation under section 102D, and prohibits the Director and these officers from being called to give evidence.

Clause 109 of the Bill replaces section 86J. Clause 109 similarly provides that proceedings against a 'protected person' are limited to acts done in bad faith. A 'protected person' includes the Director, OPI staff and persons engaged by the director who have taken an oath or affirmation under section 18(2) of the Bill.

Clause 109 also limits the scope of orders that may be made by a court in relation to the Director, OPI staff and persons engaged by the Director who have taken an oath or affirmation under section 18(2), and prohibits the Director and these officers from being called to give evidence in any legal proceeding. Clause 130 of the Bill provides that it is the intention of section 109 of the Bill to alter or vary section 85 of the Constitution Act 1975.

The protection of these persons is required to prevent the Director's investigations from being impeded by legal challenges and proceedings on grounds other than allegations of bad faith. The existing protection in the Police Regulation Act 1958 has been successful in allowing the Director and OPI staff to perform their current functions, and the protection afforded to them under the current law should continue for that reason.

It is necessary that the Bill commences in two stages.

Accordingly, clause 135 of the Bill will insert a new section 86KJ into the Police Regulation Act 1958 to ensure that the protection afforded to the Director and his staff under the current law continues prior to the commencement of the new clauses 109 and 130 of the Bill.

This new section 86KJ will initially replace section 86J (which will be repealed). Section 86KJ provides that proceedings against a 'protected person' are limited to acts done in bad faith. A 'protected person' includes the Director, OPI staff and persons engaged by the Director who have taken an oath or affirmation under section 102D of the Police Regulation Act 1958. Section 86KJ also limits the scope of orders that may be made by a court in relation to the Director, OPI staff and persons engaged by the Director who have taken an oath or affirmation under section 102D. The provision also prohibits the Director and these officers from being called to give evidence.

Clause 140 of the Bill provides that it is the intention of section 86KJ of the Police Regulation Act 1958 to alter or vary section 85 of the Constitution Act 1975.

Both clause 109 and the proposed section 86KJ provide the protection necessary for the Director and staff of the OPI to perform their significant public functions properly and efficiently, without the prospect of delay or interference by legal actions, on grounds other than allegations of bad faith.

Clause 142 of the Bill will amend section 107 of the Whistleblowers Protection Act 2001.*

Section 107 grants immunity in relation to acts done under the Whistleblowers Protection Act 2001 to the director, OPI staff and persons engaged by the director who have taken an oath or affirmation. Section 110 of the Whistleblowers Protection Act 2001 expressly states that section 107 intended to alter or vary section 85 of the Constitution Act 1975.

Clause 142 makes the consequential amendments to section 107 of the Whistleblowers Protection Act 2001 listed in item 14.12 in schedule 2. These amendments update references to the provisions under which persons are engaged by the director and, accordingly, fall within the protection of section 107. The government does not consider it necessary to make a section 85 statement in relation to clause 142* as it does not make any substantive amendments to section 107 or increase the possible range of persons who are protected under that section.*

Note: * The reference should be to clause 143 not 142.



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

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

Witness and legal practitioner immunity at an examination

[111]. A legal practitioner who represents the Director or another person during an examination or for the purposes of an investigation has the equivalent protection and immunity as a legal practitioner when representing a party in a Supreme Court proceeding. A witness in an examination or during an investigation also has the same protection and immunity as a witness in a Supreme Court proceeding.

Reverse onus offence to wilfully hinder, resist or obstruct or fail to obey lawful requirement of Director

[113]. It is an offence for a person without lawful excuse to wilfully obstruct, hinder or resist the Director or another person in the exercise of powers under this Act. The burden of proving a lawful excuse lies on the person accused.

Rights and Freedoms – Reverse onus of proof of evidentiary facts on the balance of probabilities

The Committee notes the reverse onus provision and accepts that in certain circumstances the burden of proof of certain facts (an evidentiary burden of ‘lawful or reasonable excuse’ on the balance of probabilities) lies more conveniently with an accused person rather than the more difficult proof of a negative by the prosecution. In these circumstances it may be justified for legislation to provide for a reverse onus of those exculpating facts.

The Committee accepts that such a reverse onus provision raises the question of the presumption of innocence and the Committee notes that this is discussed in the Statement of Compatibility and a useful section 7(2) ‘reasonable limitations’ discussion is included.

Special Investigations Monitor (SIM) – Clauses 114 to 127

Note: *The SIM is established pursuant to the Major Crime (Special Investigations Monitor) Act 2004 which came into operation on 16 November 2004.*

[114–117]. The SIM monitors the Director and OPI compliance with the Bill; assesses the relevance and appropriateness of questioning in examinations by the Director, and of the Director's decisions to require the production of documents or other things and investigates complaints against the OPI and makes reports and recommendations to the Parliament. The Director must report certain summons, warrants and other matters to the SIM.

[118 and 119]. A person who has attended the Director, either voluntarily or in accordance with a witness summons, to provide information, produce a document or other thing, or to give evidence may make a complaint to the SIM. The SIM may refuse to investigate a trivial or vexatious complaint.

SIM has entry and access powers to OPI premises

[123]. Provides that the SIM may, after notifying the Director, enter at any premises occupied by the OPI and is entitled to complete access to all records of the OPI; and may require the Director, a

member of staff of the OPI or a person engaged by the Office under the Act to give any relevant information in the person's possession.

Officers must provide information to the SIM

[124]. A member of OPI personnel must comply with a written notice to attend before the SIM to answer questions, provide any information or to produce any document or thing in his or her possession. It is an offence to fail to do so.

Privilege against self-incrimination and legal professional privilege do not apply but use limitation provided

[125]. Provides that neither the privilege against self-incrimination nor legal professional privilege provide a reasonable excuse for refusing to produce a document or thing, to answer a question, or to provide information under clause 124.

However documents or things produced, answers to questions, and information provided under section 124 cannot be used in legal proceedings against the member of OPI personnel, except in proceedings for —

- perjury or giving false information; or
- an offence referred to in section 124(4) (failure to produce document, answer question or provide information) ; or
- breach of discipline actions where a member of OPI personnel is also a member of Victoria Police.

Further the section does not affect the right of OPI personnel to object to answering a question or producing a document on the grounds of legal professional privilege in relation to a criminal proceedings to which the person is a party.

Rights and Freedoms – Privilege against self-incrimination – Derivative use of information received at compulsory examination

The Committee has made observations in respect to derivative use of information provided at a compulsory investigation in its Human Rights report below.

Letters to the Director by persons in custody to be unopened except in special circumstances

[129]. A letter written by a person in custody to the Director, or by the Director to a person in custody, must be immediately forwarded unopened to the intended recipient by the person in charge of the place where the person is detained. If the person in charge suspects that a letter contains drugs, weapons or other contraband, the letter may be opened and the person opening the letter is not guilty of an offence.

[130]. Provides a limitation to the jurisdiction of the Supreme Court in respect of section 109 of the proposed Act. (Refer to clause 109 and section 85 of the Constitution Act 1975 report and statement above).

Police Regulation Act 1958

[133 to 144]. Amend the *Police Regulation Act 1958* (the 'PRA') and largely replicate the provisions in the Bill which will be found in the new stand-alone Act (clauses to 132). These provisions commence on the day after Royal Assent and are not dependent on the necessary consequential amendments to be made by the Commonwealth.

For example –

New section 86 KJ provides for the legal immunity of ‘protected persons’ (*see clause 140 and section 85, Constitution Act 1958 report and statement*).

New section 86VAD of the PRA replicates clause 69 and provides that the privilege against self-incrimination is abrogated and provides the same use limitations as in clause 69.

New section 86VAE of the PRA replicates clause 70 and provides that legal professional privilege applies.

New section 86VAF of the PRA replicates clause 71 and provides a procedure for determining claims of legal professional privilege.

[140]. Inserts a new subsection, section 129A(5), into the PRA to declare that it is the intention of section 86KJ of the PRA to alter or vary section 85 of the *Constitution Act 1975* (*see section 85 report and statement*).

Schedule 1 provides transitional provisions necessary to move from the arrangements for the Director, staff and actions taken under the PRA before and after the commencement of the new stand-alone Act.

Schedule 2 makes consequential amendments to other Acts.

Charter Report

Deprivation of life – Authority for Office of Police Integrity personnel to use firearms – Effect of authority – Use for purposes other than protection

Charter s. 9 provides that everyone has the right ‘not to be arbitrarily deprived of life.’

The Committee notes that clause 103(1) provides that the Director of Police Integrity may ‘authorise’ a member of the staff of the Office of Police integrity to ‘use a firearm for the purposes of an investigation’. The Committee observes that the ‘use’ of a firearm may include the discharge of the firearm in the direction of another person. The Committee considers that clause 103 may engage the Charter right of anyone investigated by the Director not to be arbitrarily deprived of life.

The Committee also notes that clause 109(2) provides that staff of the Office of Police Integrity can be sued or prosecuted in respect of a ‘critical incident’, including where a person is killed or seriously injured as the result of the discharge of a firearm. The Committee observes that, whilst this clause allows such proceedings to be initiated, it does not identify whether or not an authorisation under clause 103(1) provides a defence to civil or criminal liability.

The Committee further notes that clause 103(2) provides that an authority under clause 103(1) may only be given:

‘if, in the opinion of the Director, the member reasonably requires to use a firearm —

- (a) to enable the member to perform functions and exercise powers of the Director or an authorised officer in relation to the investigation; and*
- (b) for the protection of the member when performing those functions or exercising those powers.’*

The Committee additionally notes that the explanatory memorandum remarks that authorisations under clause 103 are only available where the Director is satisfied that the use is required:

‘to perform the functions or exercise powers of the Director or an authorised officer in an investigation, or to ensure the safety of that member in performing those functions or exercising those powers.’

The Committee observes that it is not clear whether or not the Director can authorise a person to use firearms for purposes other than the protection of the person.

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

- 1. Will the Director of Police Integrity's authority under clause 103(1) for a member of staff of the Office of Police Integrity to use a firearm provide a defence to civil or criminal liability (to the extent of the authority) resulting from the discharge of that firearm by that member?*
- 2. For what purposes other than protection of the member will the Director of Police Integrity be able to authorise the discharge of a firearm by a member of the staff of the Office of Police Integrity?*

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

Fair hearing – Compelled self-incrimination – Use of evidence derived from compulsory self-incriminatory questioning in criminal proceedings – Function of Director of Police Integrity to publicly expose serious misconduct – Compulsory questioning during ongoing criminal proceedings

Charter s.24(1) provides that people charged with a criminal offence have 'the right to have the charge decided after a fair hearing.' Charter s. 25(2)(k) provides that such people are entitled to a guarantee that they cannot 'be compelled to testify against' themselves.

The Committee notes that clauses 69(1) and 125(1) provide that a person being examined by the Director of Police Integrity or the Special Investigations Monitor must answer questions even if those answers might tend to incriminate him or her. The Committee notes that clauses 69(3) and 125(4) provide that any answers given by a person under compulsory examination cannot be admitted as evidence against him or her in most judicial proceedings, apart from proceedings relating to compliance with the directives of the Director of Police Integrity, the Special Investigations Monitor or Victoria Police disciplinary proceedings.

The Statement of Compatibility remarks, in relation to Charter s. 25(2)(k):

The right has been interpreted as not precluding compulsory questioning, in separate proceedings, provided there is a use immunity: see particularly the decision of the Court of Final Appeal of Hong Kong (including Sir Anthony Mason) in HKSAR v Lee Ming Tee [2001] HKFCA 14... The use immunity is sufficient to ensure the accused is not indirectly made a witness against himself.

The Committee therefore considers that clauses 69(1) and 125(1) are compatible with the Charter right of witnesses who are or become criminal defendants not to be compelled to testify against themselves.

The Committee also notes that clause 24 permits the Director to disclose information obtained from an examination to a law enforcement agency and that clause 121(1) provides that the Special Investigations Monitor may make recommendations to the Director. The Committee therefore observes that answers compelled from a person under clauses 69(1) and 125(1) may be used by law enforcement agencies to identify and obtain other evidence that can be used against that person in a prosecution.

The Committee further notes that clauses 69(3) and 125(4) do not prevent the admission of such evidence. The Committee observes that Australian evidence law does not provide a basis for a court to refuse to admit evidence merely because it was obtained as a result of information obtained during a compulsory examination of the person being tried. The Committee also observes that United States and Canadian courts have held that the use of evidence derived from compelled answers (where such evidence could not have been obtained but for those answers) is incompatible with defendants' rights to due process in those countries' respective constitutions: *Kastigar v United States* 406 US 441, (1972); *R v S.(R.J.)* [1995] 1 SCR 451. The Committee therefore considers that clauses 69(1) and

125(1) may limit the Charter rights of criminal defendants who have previously been compulsorily examined about subjects that could have led to or aided their investigation or prosecution to a fair hearing of the charge against them.

The Committee additionally observes that overseas decisions have held the admission of evidence derived from compulsory questioning in a later criminal prosecution of the person questioned may be compatible with fair hearing rights where the compulsory questioning was for a narrow regulatory purpose and directed to persons who had freely chosen to make themselves subject to such inquiries. For example, the Hong Kong decision cited by the Statement of Compatibility related to questioning by an agency responsible for regulating public share trading about public share trading activities and occurred long before any criminal prosecution.

The Committee notes that the relevant function of the Special Investigations Monitor's is limited to ensuring compliance with the Police Integrity Act by staff of the Office of Police Integrity. The Committee therefore considers that clause 125(4) is compatible with Charter s. 24(1).

However, the Committee also notes that the relevant function of the Director of Police Integrity is to 'publicly expose serious misconduct' (clause 6(2)(d)) and that 'serious misconduct' is defined by clause 3 to include any indictable offence punishable by imprisonment, any conduct that affects Victoria Police's reputation or public confidence and any disgraceful or improper conduct (whether in the member's official capacity or otherwise.) The Committee observes that the function in clause 6(2)(d) may extend to the investigation of virtually any crime committed by a police officer, including crimes that are committed privately by the police officer. The Committee also observes that the Director's function in clause 6(2)(d) may also include investigating criminal conduct by private citizens, to the extent that that conduct relates to possible misconduct by a police officer. The Committee considers that clause 69(1), by permitting this function to be exercised through the compulsory self-incriminating questioning of all such persons and not providing for the inadmissibility in a later prosecution of such a person of evidence that would not have been obtained but for that questioning, may be incompatible with the Charter right of compulsorily questioned people to a fair hearing on any criminal charges they later face.

The Committee further notes that clause 46 provides that the Director of Police Integrity can exercise his or her compulsory questioning powers on a person even though that person is currently the subject of criminal proceedings that relate to the matter being investigated. The Statement of Compatibility remarks:

That is not to say that the DPI or SIM could use the compulsory questioning powers for the purpose of gathering further evidence against an accused for the purposes of the criminal proceeding. It may only use its powers for the purposes set out in the Bill. However, the fact that a person has been charged with an offence relating to a complaint, should not prevent the OPI from conducting or continuing to conduct an investigation and identifying, for example, the extent of the involvement of other persons in corrupt police practices...

The Committee observes that the Director's function under clause 6(2)(d) of 'publicly exposing serious misconduct' may encompass assisting prosecutors in ongoing prosecutions in relation to such misconduct, including the use of compulsory questioning of the defendant under clause 69(1) and the disclosure of intelligence derived from that questioning to police and prosecutors under clause 24. The Committee also observes that the goal of investigating 'other persons in corrupt practices' through the compulsory questioning of a person presently facing criminal charges would still be served if evidence that would not have been obtained but for that compulsory questioning was inadmissible in any prosecution of the person who was questioned.

The Committee will seek advice from the Minister as follows:

- 1. Where the Director of Police Integrity compels a police officer or summonsed witness to give self-incriminatory information under clause 69(1), why is the immunity provided by clause 69(3) limited to the use of that information in a later criminal prosecution of the witness, rather than extending to other evidence that could not otherwise have been obtained?***

2. *Where the Director of Police Integrity compulsorily examines a person under clause 69(1) in relation to whom other proceedings are on foot, will intelligence derived from that questioning be available to State agencies who are involved in or a party to those proceedings?*

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

Fair hearing – Inadmissibility of drug and alcohol testing – Protected documents procedure

Charter s.24(1) provides that people charged with a criminal offence have 'the right to have the charge decided after a fair hearing.'

The Committee notes that clause 34 provides that evidence derived from the drug or alcohol testing of a member of staff of the Office of Police Integrity is inadmissible except in certain proceedings.

The Committee recalls its *Alert Digest No 15 of 2007*, which reported on a similar provision in the Police Regulation Amendment Bill 2007 (clause 5, inserting a new section 85E into the *Police Regulation Act 1958*.) The Committee expressed a concern that such a rule of evidence may engage the Charter right of some criminal defendants to a fair hearing by excluding evidence that might be relevant to the defence case.

In his response to the Committee's concern, the Minister remarked that the section:

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.

The Committee observes that clauses 107 and 108 of the present Bill provide a procedure for permitting courts to determine whether or not to admit 'protected documents'. The Statement of Compatibility remarks:

The procedures for criminal proceedings in clauses 107 to 108 replace the existing procedures adopted by courts in dealing with public interest immunity claims. They give effect to the balancing exercise required when competing interests are at issue and enable greater participation of an accused without undermining the reasons why the documents should be kept confidential.

The Committee also observes that a document setting out the results of drug or alcohol testing may be a 'protected document' where it is held by the Office of Police Integrity.

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

1. *Will defendants who want to inspect or adduce documents that set out the results of drug and alcohol testing of police (under Division 4A of Part IV of the Police Regulation Act 1958) or OPI personnel (under Division 5 of Part 2 of the Bill) be able to use the 'protected document' procedure in clauses 107 and 108 to gain access to those documents in order to adduce them in court?*
2. *Given the procedure in clauses 107 and 108, what is the need for clause 34?*

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

Reasonable limits on rights – Investigation of police misconduct – Age discrimination – Medical treatment without consent – Movement – Privacy – Expression – Protection of children –

Liberty – Fair hearing – Presumption of innocence – Legal assistance – Standard of Statement of Compatibility

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 provides for all aspects of the investigation of alleged police misconduct. 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 comprehensively identifies many provisions of the Bill that are said to engage the following Charter rights:

- **Age discrimination and protection of children** (Charter ss. 8(3) & 17(2)): provisions exempting children under 16 from being compulsorily examined but permitting the compulsory examination (with parent or guardian involvement) of 16 and 17 year olds (clauses 53(3), 55, 62(1)(a) & (b), 63 & 64(3))
- **Medical treatment without consent** (Charter s. 10(c)): provisions for drug and alcohol testing of OPI personnel (clauses 31 & 33). (The Statement also identifies these provisions as engaging the rights to movement, liberty and security.)
- **Movement** (Charter s. 12): provisions for the Director of Police Integrity to summon witnesses to attend an examination or face a criminal penalty (clauses 53 & 68; see also clauses 136 & 137); and for the Special Investigations Monitor to summons personnel of the Office of Police Integrity to attend an examination (clause 124)
- **Privacy** (Charter s. 13(a)): provisions:
 - for the disclosure of information by the Director of Police Integrity to police, the Privacy Commissioner, the Ombudsman and the Auditor-General (clauses 24-27)
 - for drug and alcohol testing of OPI personnel (clauses 31 & 33)
 - for the Director of Police Integrity to require information and documents from police officers and witnesses (clauses 47 & 53; see also clause 136)
 - for warrantless searches of premises occupied by a public authority (clause 88; see also clause 139)
 - for search warrants for all premises (clause 93; see also clause 139)
 - for reporting summons, arrest and examination information to the Special Investigations Monitor (clauses 115-117)
 - for the Special Investigations Monitor to require information from personnel of the Office of Police Integrity (clause 124); and
 - for letters from people in custody to the Director of Police Integrity to be opened to search for drugs, weapons or contraband (clause 129(4)).

The statement also identifies the compulsory examination provisions (clauses 47, 53 and 124) as engaging the right to freedom of expression.

- **Expression** (Charter s. 15(2)): provisions barring Office of Police Integrity employees from disclosing information received and barring everyone from disclosing certain information about investigations under the Act, except in defined circumstances (clauses 22 & 23); and exempting documents relating to OPI investigations from the *Freedom of Information Act 1982* (clause 51)
- **Liberty** (Charter s. 21(1)): provisions for arrest and custody of persons for contempt (clauses 79 & 81); and for arrest and custody of recalcitrant witnesses (clauses 84 & 86)

- **Fair hearing** (Charter s. 24(1)): provisions for opening examinations to the public (subject to a weighing of benefits and costs by the Director of Police Integrity and a requirement that the Director take all reasonable steps to avoid prejudice to the trial of anyone currently facing criminal charges) (clauses 46(2) & 65); and for limiting the disclosure in court of most documents held by the Office of Police Integrity (subject to a process in criminal matters for courts to determine whether or not the document should be admitted; providing for a special counsel to advocate for the defendant in some circumstances; and permitting courts to admit protected documents in exceptional circumstances) (clauses 104 to 108)
- **Presumption of innocence** (Charter s. 25(1)): provisions requiring defendants charged with contempt to establish a reasonable excuse for failing to comply with a request for information or to be examined (clause 78); and for defendants charged with obstruction offences to prove (on the balance of probabilities) that they have a lawful excuse for wilfully obstructing or failing to comply with a lawful request by the Director of Police Integrity (clause 113)
- **Legal assistance** (Charter s. 25(2)(d)): a provision requiring public officers to disclose confidential legal discussions, other than discussions relating to their own criminal prosecution (clause 70)

The Statement of Compatibility contends that these provisions do not infringe the rights to privacy, expression or liberty and reasonably limit the rights against age discrimination, against medical treatment without consent, to freedom of movement, to protection of children and to the presumption of innocence. The Statement of Compatibility also remarks that the Bill furthers the rights against disability and language discrimination and to life, freedom from degrading treatment, protection of children, liberty & security and humane treatment in custody. In relation to clauses 31 & 33 (providing for alcohol and drug testing of OPI personnel) the Committee recalls its *Alert Digest No 15 of 2007*, which reported on similar provisions in the Police Regulation Amendment Bill 2007.

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 commends the Statement of Compatibility for its comprehensive and clear analysis of a large number of complex provisions and rights. The Committee recalls its *Practice Note No 2*, which states:

The Committee has determined that it will characterise a Statement of Compatibility as a form of explanatory memoranda equivalent in status to an explanatory memorandum accompanying a Bill.

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 makes no further comment.

Ministerial Correspondence

Animals Legislation Amendment (Animal Care) Bill 2007

The Bill was introduced into the Legislative Assembly on 10 October 2007 by the Hon. Joe Helper MLA. The Committee considered the Bill on 29 October 2007 and made the following comments in Alert Digest No. 14 of 2007 tabled in the Parliament on 30 October 2007.

Committee's Comment

Charter Report

Keywords – Reasonable limits on rights – Keeping and welfare of animals – Forced work – Privacy – Property – Presumption of innocence – Adequacy of 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'. Charter s.28(3)(a) provides that a statement of compatibility must state how a Bill is compatible with human rights.

The Committee notes that the Bill extends and amends various provisions relating to the keeping and welfare of animals. The provisions are generally typical of legislative schemes to regulate private behaviour that may harm others (including, in this instance, humans and animals.)

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

- **Forced work** (Charter s.11): *Provisions requiring people to comply with orders or directions to ensure that animals cannot escape their property (clause 29 inserting new section 84W into the Domestic Animals Act 1994; clause 62 inserting new sections 16B & 25B into the Impounding of Livestock Act 1994.)*
- **Privacy** (Charter s.13(a)): *Provisions empowering certain officers to –*
 - o *enter premises with an owner or occupier's permission or a court warrant (clause 29 inserting new sections 84C & 84E into the Domestic Animals Act 1994; clause 95 inserting new sections 24G & 24K into the Prevention of Cruelty to Animals Act 1986);*
 - o *enter non-residential premises without a warrant in certain emergencies (clause 95 inserting new sections 23, 24 & 24ZR(2) into the Prevention of Cruelty to Animals Act 1986);*
 - o *require people suspected of offences to supply their name and address upon request (clause 28(2) amending s74A of the Domestic Animals Act 1994, clause 29 inserting a new section 84R into the Domestic Animals Act 1994; clause 95 inserting new section 24ZT into the Prevention of Cruelty to Animals Act 1986).*
- **Property** (Charter s.20): *Provisions empowering –*
 - o *officers to sell or destroy pets and livestock in various defined circumstances (clause 29, inserting new sections 84O, 84P, 84S & 84T into the Domestic Animals Act 1994; clauses 65, 66 & 67 amending, respectively ss.18, 21 & 22 of the Impounding of Livestock Act 1994);*
 - o *officers to dispose of animals that are unclaimed, at risk, diseased or distressed (clause 95, inserting new sections 23(4)(b), 24(1)(b)(i), 24F(b), 24T, 24W, 24X & 24Z into the Prevention of Cruelty to Animals Act 1986);*
 - o *courts to order the forfeiture of a seized animal or thing where a person has been found guilty of an animal cruelty offence (clause 95 inserting new sections 24ZD & 24ZN into the Prevention of Cruelty to Animals Act 1986).*

- **Presumption of innocence** (Charter s.25(1)): A provision that deems the owner of a vehicle to be its driver for the purpose of the offence of driving with an unsecured dog, unless the owner can prove that he or she provided adequate information concerning the identity of the driver or the sale or theft of the vehicle.

In each instance the Statement of Compatibility contends that the respective rights, to the extent that they are infringed at all, are reasonably limited by the Bill according to the test set out in Charter s.7(2). Having considered the above 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.

However, the Committee is concerned that the Statement of Compatibility, which is very lengthy and deals with a large and complex amendment bill, does not identify by clause or section number any of the many provisions that it discusses. 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.' While appreciating the Statement's comprehensiveness, the Committee considers that the absence of express references to clause or section numbers in relation to such a complex bill may render the statement incapable of informed consideration by members of Parliament.

The Committee resolves to raise this concern with the Minister.

Keywords – Privacy – Powers of entry and questioning without emergencies or court warrants – Entry and observation of non-residential premises housing animals for purpose of animal cruelty laws– Requirement for occupiers of premises searched under animal cruelty laws to provide information to the extent reasonably necessary to determine whether an offence has been committed – Whether unlawful

Charter s.13(a) gives people the right not to have their 'privacy unlawfully or arbitrarily interfered with'. An interference with privacy is unlawful unless it is authorised by a law that is certain, appropriately circumscribed and accessible.

The Committee notes that clause 95 provides for two intrusive enforcement powers that require neither an emergency nor a court warrant. New section 24L of the Prevention of Cruelty to Animals Act 1986 provides that a 'specialist inspector' may enter non-residential premises housing animals and observe structures and practices 'for the purposes of' Parts 2 and 2A of the Act (dealing, respectively, with the protection of animals and enforcement) and regulations under the Act. The Statement of Compatibility remarks:

This power is a re-enactment of an existing power under the Act. The power can only be exercised with the written authority of the minister, and not in relation to a person's dwelling, therefore minimising the interference with privacy.

New section 24ZQ(1)(a) provides that occupiers (or their employees or agents) of premises lawfully searched under the Act must 'give information... orally or in writing' as required by the inspector '[t]o the extent that is reasonably necessary to determine whether an offence' against the Act 'has been or is about to be committed.' The Statement of Compatibility remarks:

These powers are largely a re-enactment of existing powers. The power to request information may only be exercised to the extent that is reasonably necessary to determine whether an offence against the act or regulations has been or is about to be committed.

The Committee observes that all provisions of bills introduced into Parliament after 1st January 2007, including re-enactments of existing laws, are subject to scrutiny for compatibility with human rights under the Charter. The Committee also observes that Charter s13(a)'s right not to be subject to arbitrary or unlawful interferences applies to even minimal interferences with privacy, including entry into non-residential premises. The Committee further observes that the broad questioning power in the new section 24ZQ(1)(a) does not appear to be contained in the existing Act.

While the Committee considers that any interferences with privacy authorised by new sections 24L & 24ZQ(1)(a) are not arbitrary (in light of their express connections to the purpose of preventing cruelty to animals), the Committee is concerned that both powers may be too broad (in both drafting and effect) to be considered lawful interferences with the Charter's right to privacy, in the absence of context-

specific constraints such as a belief that an emergency exists or a court warrant. In the case of the new section 24ZQ(1)(a), the Committee is also concerned that individuals questioned may be unaware that they do not have to comply with a request for information that 'would tend to incriminate the person' (as provided by new section 24ZV(1)).

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

1. *Why does the new section 24L permit entry into private premises in the absence of an emergency or a court warrant?*
2. *Why does the new section 24L refer generally to 'the purposes' of Parts 2 and 2A and the regulations of the Act, rather than setting out specific situations when specialist inspectors can enter non-residential premises housing animals?*
3. *Why does new section s24ZQ(1)(a) permit inspectors to require people to provide information in the absence of an emergency or a specific court warrant to that effect?*
4. *Why does the new section s24ZQ(1)(a) refer to questioning 'to the extent that is necessary to determine whether an offence has been or is about to be committed' rather than setting out specific questions that an inspector may require a person to answer?*
5. *Will people questioned under new section 24ZQ(1)(a) be told of their right not to provide self-incriminatory information?*

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

Minister's Response

Thank you for your letter of 31 October 2007. As requested, this response addresses the matters to which the Scrutiny of Acts and Regulations Committee (the Committee) seeks further clarification in relation to the Animals Legislation Amendment (Animal Care) Bill 2007 (the Bill).

The Committee mentions in its letter that the Statement of Compatibility does not identify by clause or section number any of the many provisions of the Bill that it discusses. As the Committee acknowledges, the Statement of Compatibility is very lengthy and deals with a large and complex Bill that amends three separate Acts. Further, the operation and effect of many of the provisions under the Bill are quite similar and engage the Charter of Human Rights and Responsibilities in the same way. For this reason, it seemed more appropriate to deal with these provisions generically, rendering the document comprehensive and easier to read, rather than trying to deal with each and every provision separately. The Statement does; however, refer to the specific Acts that engage a particular right.

The Committee has also requested clarification in relation to new sections 24L and 24ZQ(1)(a) of the Prevention of Cruelty to Animals Act 1986 (the POCTA Act). Responses to these specific matters raised by the Committee are set out as follows:

1. Why does new section 24L of the POCTA Act permit entry into private premises in the absence of an emergency or a court warrant?

New section 24L is an existing provision under the POCTA Act and to date, has been used infrequently. The purpose of the section is essentially to provide an auditing power for the Minister to allow inspection of non-residential premises in non-emergency circumstances. It permits the Minister for Agriculture to appoint an appropriately qualified inspector to inspect animal welfare conditions at locations where large numbers of animals are congregated and may be at risk of poor welfare development, such as large animal transportation facilities, and to ensure they are compliant with animal welfare standards provided by the 31 Codes of Practice. Other existing powers only permit investigation of alleged cruelty offences under the Act or Regulations. Inspectors appointed under section 24L are either senior level inspectors or persons with specialist qualifications in a particular veterinary field (who if not inspectors themselves; would be accompanied by an experienced inspector).

2. Why does the new section 24L refer generally to 'the purposes' of Parts 2 and 2A and the regulations of the Act, rather than setting out specific situations when specialist inspectors can enter non-residential premises housing animals?

Specialist inspectors may be required to exercise their power of entry under section 24L of the Act for the purpose of preventing or investigating alleged animal cruelty offences under Part 2 of the Act and the regulations, and to ensure that an inspector's enforcement powers are properly exercised under Part 2A of the Act and the regulations. There are a number of provisions that relate to animal cruelty and enforcement powers under these Parts and the regulations, and therefore, for drafting reasons, section 24L refers more broadly to 'the purposes' of Parts 2 and 2A of the Act and the regulations.

3. Why does new section 24ZQ(1)(a) permit inspectors to require people to provide information in the absence of an emergency or a specific court warrant to that effect?

The power under section 24ZQ(1)(a) of the Act is confined to situations where it is reasonably necessary to determine whether an offence against the Act or regulations has been or is about to be committed or cruelty to an animal is likely to occur, and where the inspector is exercising a power of entry under the Act. In all cases (with the exception of new section 24L of the Act), an inspector will have entered the premises in an emergency situation or under a warrant. This power is important and can often prove vital in emergency situations where, for example, a cruelty offence is about to be committed and the inspector needs to be informed of the location of the animal, as well as in assisting investigations for alleged cruelty offences.

4. Why does the new section 24ZQ(1)(a) refer to questioning 'to the extent that is necessary to determine whether an offence has been or is about to be committed' rather than setting out specific questions that an inspector may require a person to answer?

The line of questioning under section 24ZQ(1)(a) of the Act will depend on the individual situation and be determined on a case by case basis. It is impossible to identify the questions the inspector may need to ask in view of the large number of animal species, management systems and environmental circumstances that can be encountered. The type of questions must; however, be confined for the purpose of determining whether an offence against the Act or regulations has been or is about to be committed.

5. Will people questioned under new section 24ZQ(1)(a) be told of their right not to provide self-incriminating information?

The right not to be compelled to testify against oneself or to confess guilt in section 25(2)(k) of the Charter is engaged once a person is charged. The new section 24ZV provides further protection against self-incrimination prior to a person being charged. All inspectors will be advised by the Department through training and professional conduct programs that they should inform people of their right to protection against self-incrimination under new section 24ZV of the Act, when exercising this power.

*Joe Helper MP
Minister for Agriculture*

12 December 2007

The Committee thanks the Minister for his response.

The Committee notes the Minister's reply to the Committee's concern that the Statement of Compatibility 'did not identify by clause and section number' the provisions it discussed. The Committee observes that the Minister's reply addresses a different issue: whether or not a Statement of Compatibility should 'deal with each and every provision separately'. Whilst the Committee agrees that a Statement of Compatibility may appropriately discuss provisions that raise common issues together, the Committee reiterates its view that it is always essential to identify the provisions being discussed by clause and section number, so that members of parliament can readily cross-reference the discussion in the Statement with the relevant provision in the Bill.

Crimes Amendment (Child Homicide) Bill 2007

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

Committee's Comment

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 'every 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.

Minister's Response

In the Charter Report for the Crimes Amendment (Child Homicide) Bill 2007 the Committee asks whether sections 57-57B and 58 of the Road Safety Act 1986 apply to the new offence of child homicide.

These Road Safety Act provisions facilitate admission of drug and alcohol testing results relevant to trials for a number of offences, including culpable driving causing death, and manslaughter and murder arising out of the driving of a motor vehicle.

Clause 3 of the Bill provides that a person who kills a child under six years old in circumstances that would otherwise constitute manslaughter is guilty of child homicide and not of manslaughter. The Committee observed that narrowing the definition of manslaughter in this way makes the relevant Road Safety Act provisions relating to manslaughter unavailable in proceedings where the victim is under six years old. The Committee is therefore concerned that by "making it harder to prosecute manslaughter caused by a motor vehicle in cases where the victim is under 6", clause 3 infringes the right of these children to protection without discrimination.

While the Bill changes the definition of manslaughter to exclude cases where the victim is under six years old, the offence of culpable driving causing death has not changed and can be prosecuted in these situations. Child homicide does not replace the offence of culpable driving causing death in situations where a child under six years old is killed by a motor vehicle.

Culpable driving causing death and child homicide concern very different situations. As I indicated in my Second Reading Speech, child homicide is concerned with the situation where an unstable parent violently reacts in the home to the stress of caring for a baby or very young child. Where someone under six years old is killed by a motor vehicle, the accused can be charged with culpable driving causing death. The practice of the Director of Public Prosecutions where a person is killed by a motor vehicle is to charge the offence of culpable driving causing death rather than manslaughter. By charging a person with culpable driving causing death when a child under six years old is killed by a motor vehicle the prosecution can lead evidence under the Road Safety Act provisions. As a result, the Road Safety Act provisions will apply in the same manner irrespective of the age of the person killed by a motor vehicle.

I trust that the above explanation addresses the Committee's concerns.

ROB HULLS MP
Attorney-General

25 February 2008

The Committee thanks the Attorney-General for this response.

Drugs, Poisons and Controlled Substances Amendment Bill 2008

The Bill was introduced into the Legislative Assembly on 26 February 2008 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 7 March 2008 and made the following comments in Alert Digest No. 3 of 2008 tabled in the Parliament on 11 March 2008.

Committee's Comment

Charter Report

Keywords: *Liberty and security – Permit required for medical practitioner to administer, supply or prescribe a Schedule 9 poison to a patient – Whether a ‘law’*

Charter s.21(1) gives everyone ‘the right to liberty and security’. The right to liberty includes a right ‘to make decisions that are of fundamental personal importance’: B(R) v Children’s Aid Society of Metropolitan Toronto [1995] 1 SCR 315, 368. The right to security includes ‘a right to access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction’: R v Morgentaler [1988] 1 SCR 30, 34. Charter s. 7(2) provides that human rights ‘may be subject under law only to such reasonable limits as can be demonstrably justified’.

The Committee notes that clause 7 (inserting new sections 33A-33D into the Drugs, Poisons and Controlled Substances Act 1981) bars a ‘registered medical practitioner who considers it necessary to administer, supply or prescribe a Schedule 9 poison to or for one of his or her patients’ from doing so without a permit. New section 33B provides that the Secretary of the Department of Health Services may issue a permit, including any ‘terms and conditions that the Secretary considers appropriate’, and may also amend, suspend or revoke such a permit. New sections 33C & 33D provide for criminal offences for medical practitioners who administer, supply or prescribe a Schedule 9 poison in breach of the conditions of a permit or without a permit.

The Second-Reading Speech remarks:

Schedule 9 poisons include heroin, LSD and cannabis. It is therefore appropriate to clarify the requirement for a permit to be held by a practitioner before proceeding to treat a patient with a schedule 9 poison. This is consistent with current requirements under the Drugs, Poisons and Controlled Substances Regulations 2006.

The Committee observes that existing ss. 34 & 35 only regulate the supply of schedule 9 poisons to drug-dependent people or to anyone for more than eight continuous weeks; however, existing reg. 7 of the regulations criminalises the supply of a schedule 9 drug (and related conduct) to anyone without a permit.

The Committee also observes that a Canadian court has held that a law that prevents a person from obtaining marijuana for medical treatment ‘violates his right to liberty and security of the person’: R v Parker (2000) 49 OR (3d) 481; 177 DLR (4th) 385, [10]. The Committee considers that clause 7 may limit the Charter right of Victorian patients with medical conditions that require treatment with schedule 9 drugs to liberty and security.

The Committee further observes that there are well-known policy reasons to regulate the use and movement of schedule 9 poisons anywhere in the community and considers that those reasons may justify the limitation of Charter rights under Charter s. 7(2). However, the Committee notes that Charter s. 7(2) provides that only a ‘law’ may limit Charter rights and that overseas courts interpreting similar provisions have held that such a law must be appropriately circumscribed and accessible.

The Committee is concerned that new section 33B does not contain any criteria or other limitation on the Secretary’s discretion to grant or refuse a permit, or the terms on which it is granted or when it may be suspended or revoked. The Committee observes that the Canadian court mentioned above held that a similar provision was incompatible with that nation’s Charter as ‘the plenary discretion vested in the

Minister precludes a finding that this is a reasonable limit' under the Canadian equivalent to Charter s. 7(2): R v Parker (2000) 49 OR (3d) 481; 177 DLR (4th) 385, [174]-[193].

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

- 1. In what circumstances will the Secretary refuse to grant a permit under new section 33B to a medical practitioner who believes that a schedule 9 drug is necessary to treat a particular patient?***
- 2. Will those circumstances and any other guidelines or criteria that the Secretary will consider be publicly available?***

Pending the Minister's response, the Committee draws attention to clause 7.

Keywords: Adequacy of statement of compatibility

The Committee notes that the Statement of Compatibility does not address the compatibility of new sections 33A-33D with the rights of Victorian patients with medical conditions treatable by Schedule 9 poisons to liberty and security of the person. The Committee reiterates its view stated in Alert Digest No. 9 of 2007 that:

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

The Committee observes that a provision of a bill may engage a Charter right even when it replicates an existing provision contained in another law (e.g. in this instance, the regulations to the principal Act.) This is especially the case when the existing provision was enacted prior to the commencement of the Charter.

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

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

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

The Committee will raise these concerns with the Minister.

Minister's Response

I refer to your letter dated 12 March 2008 regarding your Committee's consideration of the Drugs, Poisons and Controlled Substances Amendment Bill 2008.

The Committee has raised particular concerns about the compatibility of clause 7 of the Bill, with section 21(1) of the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Victorian Charter), the right to "liberty and security".

The new provisions

Clause 7 inserts a new Subdivision 3 into Part 3 of the Drugs, Poisons and Controlled Substances Act 1981 (the Act) that deals with Schedule 9 poisons. Schedule 9 poisons are poisons that have no known therapeutic benefit, and that have a trafficable value. They include heroin, LSD and cannabis.

A permit is currently required in order for a medical practitioner to treat with a Schedule 9 permit, and it is currently an offence for a practitioner to prescribe these drugs without a permit. The Bill maintains these requirements.

The Bill gives the Secretary a new power to impose conditions on a Schedule 9 permit (new section 33B(2)), and a power to revoke or suspend the permit (new section 33B(3)).

General concerns raised by the Committee

The Committee notes that the Statement of Compatibility does not address the “compatibility of the new sections 33A – 33D with the rights of Victorian patients with medical conditions treatable by schedule 9 poisons to liberty and security of the person.”

The Committee raises the concern that “clause 7 may limit the Charter right of Victorian patients with medical conditions that require treatment with Schedule 9 drugs to liberty and security”. A number of Canadian decisions concerning article 7 of the Canadian Charter have been cited in support of this proposition.

It is important to note that the Canadian provision to which the Committee refers is not analogous to the Victorian provision.

Article 7 of the Canadian Charter of Rights and Freedoms (the Canadian provision) provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 21(1) of the Victorian Charter provides:

Every person has the right to liberty and security.

Section 21(1) of the Victorian Charter excludes a right to access medical procedures. This is made clear in the explanatory memorandum to the Victorian Charter, which states that clause 21 -

*“is intended to operate in a different manner to article 7 of the Canadian Charter of Rights and Freedoms which guarantees the right to “life, liberty and security of the person” in that the Victorian provision is not intended to extend to such matters as a right to bodily integrity, personal **autonomy or a right to access medical procedures**”.*

Therefore, the provisions in question do not engage the right to liberty and security of the person.

Nature of permit system

To understand the nature of the amendments, it is necessary to consider the nature of the permit system under the Act.

The function of the system is not to obstruct or veto the clinical judgements of practitioners, but to protect the community by monitoring the flow of drugs of dependence, and to minimise the risk of substance dependence by preventing patients from obtaining the same drug from more than one doctor simultaneously.

Practicalities of Schedule 9 permit applications

To put this into context, I emphasise that Schedule 9 poisons are poisons with no established therapeutic application. I understand that there has never been an application made, and consequently no permit ever granted, to treat a patient with a Schedule 9 poison.

Schedule 9 poisons have been included in the Bill in order to cover the eventuality that a practitioner wishes to prescribe a Schedule 9 poison that is available overseas and registered for a therapeutic use in an overseas country.

However, it is envisaged that if a poison in Schedule 9 was found to have a legitimate use for the therapeutic treatment of a patient, by the time it had gone through the processes of establishing quality, safety and efficacy required under the Therapeutic Goods Act 1989, it would be rescheduled to a Schedule 8 poison.

Specific information sought by the Committee

1. ***In what circumstances will the Secretary refuse to grant a permit under new section 33B to a medical practitioner who believes that a schedule 9 drug is necessary to treat a particular patient?***

Under the present legislation, when issuing a permit, the Secretary considers the criteria set out in Regulation 8 of the Drugs, Poisons and Controlled Substances Regulations 2006. New Regulations will be made after the Bill has been passed by Parliament; however no policy change is intended.

The Regulations require that the practitioner must establish patient identity and provide evidence of therapeutic need.

If these considerations are addressed, a permit will be issued unless there is a pre-existing permit for that patient in that time period.

If a practitioner is making a higher number of applications than might be expected for the condition being treated, or there is some other anomaly which might indicate that the drug is being obtained for reasons other than therapeutic need (e.g. addiction or trafficking), the permit may be withheld or conditions imposed until the issue is investigated.

2. ***Will those circumstances and any other guidelines or criteria that the Secretary will consider be publicly available?***

The Regulations, a guide to the Regulations and summaries for health professionals are all available on the Department of Human Service's website.

Records of individual permit applications are not made publicly available, for privacy reasons. If a treating doctor or patient is dissatisfied with the outcome of a permit application, the usual administrative review processes would be open to them.

I trust that this information satisfies your concerns.

**HON DANIEL ANDREWS MP
MINISTER FOR HEALTH**

3 April 2008

The Committee thanks the Minister for his response.

The Committee notes the Minister's reference to the explanatory memorandum to Charter s. 21 and the distinction it draws between that that section of the Charter and the Canadian jurisprudence cited by the Committee in its report on the Bill. Whilst the Committee agrees that clause 7 therefore may not engage the Charter right to liberty and security, the Committee observes that the clause 7, for similar reasons to those discussed in its report, may engage the Charter rights of patients with medical conditions that require treatment with schedule 9 drugs to life, freedom from cruel or inhuman treatment and privacy. The Committee draws Parliament's attention to clause 7's compatibility with those rights and to the explanation of clause 7's operation and purpose provided by the Minister.

Working with Children Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 21 August 2007 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 17 September 2007 and made the following comments in Alert Digest No. 12 of 2008 tabled in the Parliament on 18 September 2007.

Committee's Comment

[10]

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’ – Administrative law – Exercise of discretion using criteria based on inconclusive charge (finally dealt with) made against a person where no merits determination is made.

The Committee notes that the amendments will allow the Secretary to exercise an administrative discretion (if exceptional circumstances exist) to issue a negative assessment or revoke an existing assessment using as the criteria, charges that are ‘finally dealt with’ such as the withdrawal or dismissal of a charge, where there is a significant link between the final dealing and a risk to the safety of children. The Committee observes that such a criteria constitute circumstances where there is no conclusive judicial merits determination.

The Committee notes that the issue of a negative notice of assessment or revocation of an existing assessment based on such exceptional grounds is reviewable by VCAT (proposed amended section 26(5)).

The Committee considers that the exercise of administrative powers based on such non-merits criteria is unusual and may trespass on a person’s rights and freedoms. The Committee raises this issue in greater detail in the Charter Report below.

The Committee will raise the issue with the Attorney-General to seek further advice.

Charter Report

Keywords – Statement of compatibility – Incorrect description of offence – Loitering near schools etc

The Committee notes that, in the section of the Statement of Compatibility titled ‘unlawful and arbitrary interferences’, the offence of ‘loitering near schools’ etc in s60B of the Crimes Act 1958 is incorrectly described in the following terms:

To be charged with the offence, a person must:

- *have been charged with a specified sexual offence (all of which are currently included as ‘relevant offences’ under the act); and*
- *be in or near a place frequented by children, ‘without reasonable excuse’.*

In fact, s60B provides that, to be charged with this offence, a person must loiter near a school or certain public places after have been found guilty of a specified sexual offence. Merely being charged with such an offence is insufficient.

The Committee resolves to write to the Attorney-General outlining this concern.

Keywords – Presumption of innocence – Discretion to refuse or revoke assessment notice in exceptional circumstances – Criminal charges finally dealt with without a finding of guilty or not guilty – Secretary’s finding of a significant link between a final dealing and a risk to safety of children – Protection of children

The Committee observes that the Statement of Compatibility does not address the compatibility of clauses 10 & 12 (amending ss 17 & 23 of the Working With Children Act 2005) with Charter s25(1). Charter s25(1) gives ‘a person charged with a criminal offence... the right to be presumed innocent

until proved guilty according to law.’ The Committee notes that the European Court of Human Rights has held that an equivalent provision under the European Convention on Human Rights and Fundamental Freedoms ‘may be infringed not only by a judge or court but also by other public authorities’ (*Allenet de Ribemont v France* [1995] ECHR 5, [36]) and that the purpose of the presumption of innocence ‘is to protect the accused against any judicial decision or other statements by State officials amounting to an assessment of the applicant’s guilt without him having previously been proved guilty according to law.’ (*Rushiti v Austria* [2000] ECHR 106, [31])

The Committee notes that clauses 10 & 12 provide that the Secretary’s new powers to refuse or revoke a person’s assessment notice (making it an offence for the person to work with children) in exceptional circumstances on the basis of the applicant’s criminal record apply not only to pending charges and to offences where the applicant has been found guilty but also to charges that have been ‘finally dealt with’ without a finding of guilty or not guilty. Section 6 of the Act lists the following ways a charge can be finally dealt with without a finding of guilty or not guilty:

- the charge is withdrawn (including a *nolle prosequi*, i.e. formal discontinuation of the charge by the prosecutor)
- the charge is dismissed by a court
- the person is discharged by a court following a committal hearing

The Committee observes that none of these determinations amount to proof of guilt according to law. The Committee notes that the European Court of Human Rights has held that the presumption of innocence continues to apply when a court has ‘closed the proceedings’ against a person but did not ‘determine the question of guilt’ (*Allenet de Ribemont v France* [1995] ECHR 5, [35].)

The Committee notes that clauses 10 and 12 provide that the new powers may only be applied to a person on the basis of a charge that has been finally dealt with if the Secretary is satisfied that there is a significant link between the final dealing and a risk to the safety of children posed by the person. The Committee observes that such a finding may involve (and may to be seen to involve) a conclusion by the Secretary that the charge was well founded. The Committee therefore considers that any refusal or revocation of an application by the Secretary on the basis of a charge that has been finally dealt with (other than by a finding of guilty) may breach the presumption of innocence of the person who is the subject of the charge.

Charter s17(2) provides that ‘every child has the right... to such protection as is in his or her best interests and is needed by him or her by reason of being a child.’ The Committee notes that the evident purpose of clauses 10 & 12 is to protect children and that the Secretary’s new power to refuse or revoke an application is limited to ‘exceptional circumstances’ and is subject to review by the Victorian Civil and Administrative Tribunal. The Committee observes that, as the Statement of Compatibility does not discuss the compatibility of clauses 10 & 12 with Charter s25(1), it does not address whether or not they strike a reasonable balance between Charter s25(1) and Charter s17(2).

The Committee resolves to write to the Attorney-General outlining this concern. Pending the Minister’s response, the Committee draws attention to the provision.

Minister’s Response

Thank you for your letter commenting on the Working with Children Amendment Bill, which has since passed into law as the Working with Children Amendment Act 2007 (the Amendment Act). I apologise for the delay in responding.

The Amendment Act aims to enhance the existing decision-making mechanisms within the Working with Children Act 2005 (the Act) and makes a number of technical amendments addressing practical and legal issues that have arisen in the first year of operation of the Working with Children Check (WWCC) scheme. I will respond to the Committee’s specific comments in turn.

‘Exceptional Circumstances’ Discretion

The Committee comments that the ‘exceptional circumstances’ discretion will allow the Secretary to the Department of Justice to issue a negative assessment or revoke an existing assessment notice based on

charges that have been withdrawn or dismissed and that "the exercise of administrative powers based on such non-merits criteria is unusual and may trespass on a person's rights and freedoms."

Response

In considering the Committee's comments, advice was obtained which did not concur with the Committee's interpretation. I note that I have previously committed to a 3 year review of the Act. The review will commence this year and given that the Committee's interpretation differs from the advice received, it would be appropriate that the Committee's observations be considered in this review.

Section 60B of the Crimes Act 1958

The Committee reported that the Statement of Compatibility for the Bill incorrectly described the elements of the offence of 'loitering near schools etc' as per section 60B of the Crimes Act 1958. The Statement noted that to be charged with 'loitering near schools etc' a person must have been previously charged with a specified sexual offence. The Committee rightly noted that

"In fact, s60B provides that, to be charged with this offence, a person must loiter near a school or certain public places after having been found guilty of a specified sexual offence. Merely being charged with such an offence is insufficient."

Response

I note and agree with the Committee's observation regarding the incorrect description of the offence of "loitering near schools etc" contained in the Statement of Compatibility, but note that this does not affect the operation of the Act with respect to the offence.

Right to be Presumed Innocent Until Proved Guilty

The Committee reported that the Statement of Compatibility did not address the compatibility of the new 'exceptional circumstances' discretion in light of Charter s25(1), which gives "a person charged with a criminal offence... the right to be presumed innocent until proved guilty according to law."

The Committee noted that

"the European Court of Human Rights has held that an equivalent provision under the European Convention on Human Rights and Fundamental Freedoms 'may be infringed not only by a judge or court but also by other public authorities' ... "

Response

I note that the right to be presumed innocent is a right in criminal proceedings, and accordingly, protects a person in the context of a trial. It has also been held to be relevant to pre-trial matters such as bail, and post-trial matters such as sentencing. These are all, however, stages of the criminal process. The cases cited by the Committee involve statements made in the context of, or in close connection with, criminal proceedings. As noted above, the presumption of innocence does not apply outside of this context. Taking into account proceedings for certain crimes in assessing an application for a WWC does not engage the right, as it is a process which occurs outside of the criminal process.

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

*ROB HULLS MP
Attorney-General*

19 March 2008

The Committee thanks the Attorney-General for his response.

The Committee notes the Attorney-General's view that the Charter's right to be presumed innocent does not apply outside of the context of criminal proceedings. The Committee observes that this interpretation would mean that defendants would lose their right to be presumed innocent of the charges against them simply because those charges are dropped. The Committee also observes that Charter s. 25(1) provides that criminal defendants have 'the right to be presumed innocent until

proved guilty according to law' and that – aside from its title – it does not refer to criminal proceedings. The Committee further observes that human rights laws should be “interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory”: Allenet de Ribemont v France [1995] ECHR 5. The Committee additionally observes that the amendments to ss. 17 and 23 of the Working with Children Act 2005 made by clauses 10 and 12 of the bill, by requiring the Secretary to consider whether there is a significant link between a final dealing and the safety of children, may be regarded as connecting the Secretary’s decision to the earlier criminal proceedings. The Committee therefore reiterates its view that these provisions may limit the Charter’s right to the presumption of innocence.

Committee Room

7 April 2008

Appendix 1

Index of Bills in 2008

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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

(vi) inappropriately delegates legislative power.

Essential Service Commission Amendmnet Bill 2008 4

(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

Drugs, Poisons and Controlled Substances Amendment Bill 2008 3

Education and Training Reform Amendment Bill 2008 4

Justice Legislation Amendment (Sex Offenders Procedure) Bill 2008 4

Police Integrity Bill 2008 4

Relationships Bill 2007 1

Section 17(b)

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

Police Integrity Bill 2008 4

Appendix 3

Ministerial Correspondence

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

Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Working with Children Amendment Bill 2007	Attorney-General	19.09.07	19.03.08	12 of 2007	4 of 2008
Emergency Services Legislation Amendment Bill 2007	Police and Emergency Services	09.10.07	-	13 of 2007	1 of 2008
Animals Legislation Amendment (Animal Care) Bill 2007	Agriculture	31.10.07	12.12.07	14 of 2007	4 of 2008
Liquor Control Reform Amendment Bill 2007	Consumer Affairs	21.11.07	04.12.07	15 of 2007	1 of 2008
Police Regulation Amendment Bill 2007	Police and Emergency Services	21.11.07	06.12.07	15 of 2007	1 of 2008
Victorian Energy Efficiency Target Bill 2007	Energy and Resources	21.11.07	04.12.07	15 of 2007	1 of 2008
Criminal Procedure Legislation Amendment Bill 2007	Attorney-General	04.12.07	30.01.08	16 of 2007	1 of 2008
Crimes Amendment (Child Homicide) Bill 2007	Attorney-General	05.02.08	25.02.08	1 of 2008	4 of 2008
Constitution Amendment (Judicial Pensions) Bill 2007	Attorney-General	05.02.08		1 of 2008	
Crimes Amendment (Child Homicide) Bill 2007	Attorney-General	05.02.08		1 of 2008	
Professional Boxing and Combat Sports Amendment Bill 2007	Sport, Recreation and Youth Affairs	05.02.08		1 of 2008	
Relationships Bill 2007	Attorney-General	05.02.08	03.03.08	1 of 2008	3 of 2008
Criminal Procedure Legislation Amendment Bill 2007	Attorney-General	28.02.08		2 of 2008	
Port Services Amendment (Public Disclosure) Bill 2008	Hon. David Davis MLC	28.02.08		2 of 2008	
Courts Legislation Amendment (Associate Judges) Bill 2008	Attorney-General	11.03.08	04.04.08	3 of 2008	4 of 2008
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