

# **No. 5 of 2008**

**Tuesday, 6 May 2008**

**On the**

Cancer Amendment (HPV)  
Bill 2008

Children's Legislation Amendment  
Bill 2008

Education and Training Reform  
Amendment Bill 2008

Energy and Resources Legislation  
Amendment Bill 2008

Essential Services Commission  
Amendment Bill 2008

Gambling Regulation Amendment  
(Licensing) Bill 2008

Justice Legislation Amendment  
Bill 2008

Justice Legislation Amendment  
(Sex Offences Procedure) Bill 2008

Legislation Reform (Repeals No. 3)  
Bill 2008

Public Sector Employment (Award  
Entitlements) Amendment Bill 2008

The Uniting Church in Australia  
Amendment Bill 2008

Victorian Water Substitution Target  
Bill 2007

Police Integrity Bill 2008

# Table of Contents

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	<b>Page Nos.</b>
<b>Alert Digest No. 5 of 2008</b>	
Cancer Amendment (HPV) Bill 2008	1
Children's Legislation Amendment Bill 2008	3
Energy and Resources Legislation Amendment Bill 2008	8
Gambling Regulation Amendment (Licensing) Bill 2008	10
Justice Legislation Amendment Bill 2008	14
Legislation Reform (Repeals No. 3) Bill 2008	27
Public Sector Employment (Award Entitlements) Amendment Bill 2008	28
The Uniting Church in Australia Amendment Bill 2008	29
Victorian Water Substitution Target Bill 2007	30
<b>Ministerial Correspondence</b>	
Education and Training Reform Amendment Bill 2008	33
Essential Services Commission (Amendment) Bill 2007	35
Justice Legislation Amendment (Sex Offences Procedure) Bill 2008	36
Police Integrity Bill 2008	38
<b>Appendices</b>	
1 – Index of Bills in 2008	45
2 – Committee Comments classified by Terms of Reference	47
3 – Ministerial Correspondence	49

## Glossary



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

## Useful provisions

Section 7 of the **Charter** provides –

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

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

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

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



# Terms of Reference

## *Parliamentary Committees Act 2003*

### **17. Scrutiny of Acts and Regulations Committee**

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

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

## **The Committee has considered the following Bills –**

Cancer Amendment (HPV) Bill 2008  
Children's Legislation Amendment Bill 2008  
Energy and Resources Legislation Amendment Bill 2008  
Gambling Regulation Amendment (Licensing) Bill 2008  
Justice Legislation Amendment Bill 2008  
Legislation Reform (Repeals No. 3) Bill 2008  
Public Sector Employment (Award Entitlements) Amendment Bill 2008  
The Uniting Church in Australia Amendment Bill 2008  
Victorian Water Substitution Target Bill 2007

## **The Committee notes the following correspondence –**

Education and Training Reform Amendment Bill 2008  
Essential Services Commission Amendment Bill 2008  
Justice Legislation Amendment (Sex Offences Procedure) Bill 2008  
Police Integrity Bill 2008



### **Role of the Committee**

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

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

# Alert Digest No. 5 of 2008

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## Cancer Amendment (HPV) Bill 2008

<b>Introduced</b>	16 April 2008
<b>Second Reading Speech</b>	17 April 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Daniel Andrews MLA
<b>Portfolio responsibility</b>	Minister for Health

### Purpose

This Bill amends the *Cancer Act 1958* (the 'Act') by extending the definition of 'cancer test' in section 59(1) to include a test for a precursor to cancer. The amendment will enable reports of tests for precursors to cancer, such as the human papilloma virus, to be forwarded to an organisation that maintains a prescribed register.

The Committee notes these extracts from the Second Reading Speech –

*The Bill seeks to amend the Cancer Act 1958 to enable the Victorian cervical cytology register to lawfully collect and record women's test results for human papilloma virus, commonly known as HPV.*

...

*Whilst the Act currently enables results of tests for cancer to be forwarded to a prescribed register such as the Victorian cervical cytology register, the definition of 'cancer test' does not extend to tests for 'precursors to cancer', such as HPV. This Bill will broaden the definition of 'cancer test' to enable tests for precursors to cancer to be reported to and recorded by a prescribed register.*

...

*This Bill will provide a legislative framework for reporting and recording test results of precursors to cancer other than HPV. However, it will only support the capture of information about other precursors to cancer where a prescribed register is established to record this information. This will avoid the unnecessary capture of test results that do not serve to improve health outcomes for Victorians.*

*The proposed amendment maintains current provisions in the Act which require that people are informed of their right to object to their test results being recorded, to opt off the register, or not have their information reported to the register in the first instance. The amendment appropriately balances healthcare considerations with patient privacy.*

### Content and Committee comment

#### [Clauses]

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

[3 and 4]. Respectively amends the definition of 'cancer test' in section 59(1) and amends section 62 in respect to registers of results from cancer tests to include a test for a precursor to cancer.

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

## **Charter Report**

### **Right to life – Privacy – Register of results of tests for precursors to cancer**

Charter s. 9 gives everyone ‘the right to life’. Charter s. 13(a) provides that everyone has the right ‘not to have his or her privacy unlawfully or arbitrarily interfered with’.

The Committee notes that clause 3, amending s. 59(1) of the *Cancer Act 1958*, expands the definition of ‘cancer test’ to include tests to determine whether a person is suffering from a precursor to cancer. The Committee also notes that existing s. 62 permits practitioners who perform a cancer test or persons in charge of places where such tests are performed to forward the results for inclusion in a register (to be used to follow-up test results and for research into cancer.) The Committee considers that clause 3 engages the Charter rights of people who are tested not to have their privacy unlawfully or arbitrarily interfered with.

The Committee further notes that existing ss. 62(3) & (4) require that people who are tested must be informed of their right to object. If they object, their information must not be forwarded. The Committee additionally notes that the Bill does not extend the mandatory cancer reporting requirement in existing s.60 to include people suffering from precursors to cancer.

The Statement of Compatibility remarks:

*The proposed amendments are considered to be reasonable from a privacy perspective because they appropriately balance healthcare considerations with patient privacy....*

*I consider that the Bill promotes the right to life because the amendments will facilitate best practice screening and treatment of women who have a higher cervical cancer risk associated with the human papilloma virus.*

The Committee considers that clause 3 is compatible with the Charter’s right to privacy and also promotes the Charter’s right to life.

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

## Children's Legislation Amendment Bill 2008

<b>Introduced</b>	8 April 2008
<b>Second Reading Speech</b>	10 April 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Maxine Morand MLA
<b>Portfolio responsibility</b>	Minister for Children and Early Childhood Development

### Purpose

This Bill amends the *Children's Services Act 1996* (the 'Act') to further provide for the licensing and regulation of children's services and increases penalties applicable to a number of offences under the Act.

### Content and Committee comment

#### [Clauses]

[2]. A number of sections commence on Royal Assent and the remaining provisions come into operation on proclamation but not later than by 25 May 2009.

**Note:** In respect to the delayed commencement provision the explanatory memorandum provides – *This is to allow sufficient time for the making of new regulations arising from the changes made by the Bill.*

[6 and 7]. Respectively increases the penalty for the offence of carrying on an unlicensed children's service and advertising an unlicensed children's service.

[8]. Substitutes a new Part 3 of the Act (sections 9 to 25U) concerning the approval of premises and licensing of persons to operate a Children's Services.

Section 24 allows the Secretary to require certain testing of a person in respect of whom a fit and proper person check is being carried out in order to determine the suitability of that person including to submit to a medical or psychiatric test.

[9]. Amends section 26 to increase the penalties for the offence of failing to take reasonable precautions to ensure children are protected from hazard or harm likely to cause injury and applies the offence to family day carers.

[11]. Amends section 27 to extend the requirement that children must be adequately supervised to family day carers and increases the penalties for the existing offence for proprietors and staff involving inadequate supervision of children.

[12]. *Rights and freedoms – Corporal punishment and discipline of children – cruel and unusual punishment* – Amends section 28 to increase penalties applying to the prohibition against corporal punishment and unreasonable discipline of a child at a children's service licensed under the Act and extends the offence to family day carers, in respect of children in their care. (*Also refer to the Charter Report below*).

**Note:** Inserted subsection (3) provides – *A family day carer must not subject any child being cared for or educated by the carer as a family day carer to (a) any form of corporal punishment; or (b) any discipline which is unreasonable in the circumstances. Penalty: 120 penalty units.*

[14]. Inserts new sections 29A to 29C which replicate provisions currently provided in the regulations concerning child/staff ratios, the authorisation to administer medication, and the

requirement for proprietors of a children's service to notify the Secretary of certain serious incidents relating to the safety of children.

*Monitoring powers – entry to residence*

[22]. Amends section 36 concerning powers of entry to include a power of entry (new s.36(1)(a)(ii)) to any part of a family day carer's residence used as a family day care service during the hours that service is being provided.

[24]. Amends section 38 to extend the offence related search and seizure power of an authorised officer to apply to premises in respect of which approval of premises has been granted, any part of a family day carer's residence that is used to provide care or education to children, family day care venues, and the principal office of a family day care service.

[26]. *Protection against self-incrimination applies to natural persons* - Amends section 42 to clarify that the protection against self-incrimination applies to natural persons only.

[27 and 28\*]. *Privilege against self-incrimination modified – use limitation in criminal proceedings other than for false information* - Inserts a new section 42A to give the Secretary the power to obtain information, documents and evidence relating to a contravention of a serious offence from any person who is or has been a licensee, nominee or a staff member of a children's service. It is an offence to refuse or fail to comply with a notice under this section to the extent the person is capable of complying with it or to knowingly provide false or misleading information or evidence, or to obstruct or hinder the Secretary in exercising a power under this section.

A person is not excused from answering a question, providing information or producing or permitting the inspection of a document on the grounds of self incrimination; however, in the case of a natural person, the information is not admissible in evidence against that person in any criminal proceedings other than proceedings under the section, or in the case of a body corporate, in criminal proceedings other than proceedings under the Act. (*Also refer to the Charter Report below*).

**\*Note:** *On proclamation of the remaining provisions before 26 May 2009 section 42A will also apply to a family day carer.*

[30]. *Notice to take emergency action* – Inserts new section 43A into the Act, which allows the Secretary to issue a notice to take emergency action, if the Secretary is satisfied that a children's service is operating in a manner that poses a risk to the health, welfare or safety of a child being cared for or educated by the service.

[33]. Inserts new sections 53A, 53B and 53C into the Act.

New section 53A deals with the registration of family day carers.

New section 53B allows the Secretary to publish information about children's services on the Department's Internet site. The information may include compliance information, and enforcement actions taken under the Act or the regulations; however the Secretary must first notify the licensee of the Secretary's proposal to publish that information and that the licensee may seek review of the proposal under section 54A.

Section 53C allows the Secretary to provide statistical, compliance and enforcement information to a Government Department, public authority or municipal council for a purpose relating to the health, safety and wellbeing of children or the operation of children's services. The provision also allows the Secretary to provide any information believed to show a contravention of another Act by a children's service to a Government Department or public authority, for a purpose relating to the health, safety and wellbeing of children.

Information provided or published under section 53B or 53C must not include identifying information of any person except a licensee.

[34]. Inserts new section 54A to provide an internal review mechanism to licensees in respect of a proposal by the Secretary to publish information relating to the children's service on the Internet under section 53B(1).

[36]. Amends the regulation making powers to allow regulations to be made in respect to police and other security checks and in respect to family day carers.

[40]. Provides a schedule of transitional provisions in respect to licensing of family day care services and allows regulations to be made which may be retrospective to the date of Royal Assent to the Bill.

[42]. Provides that this amendment Bill is repealed on 25 May 2010.

## Charter Report

### **Freedom of religion or belief – Cultural rights – Discipline of young children by family day carers – Corporal punishment – Discipline which is unreasonable in the circumstances – Whether reasonable limit**

Charter s.14(2) provides that a person 'must not be restrained in a way that limits his or her freedom to have or adopt a religion or belief in observance, practice or teaching.' Charter s. 19(1) provides that a person of a distinct cultural or religious background 'must not be denied the right to enjoy his or her culture' or to 'practice his or her religion'. 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 clause 12(3) (inserting a new section 28(3) into the *Children's Services Act 1996*) makes it an offence for a family day carer to subject a child being educated or cared for by the carer to: (a) *any form of corporal punishment; or (b) any discipline which is unreasonable in the circumstances.*

The Committee also notes that clauses 12(1) and 12(2) (amending existing s. 28 of the *Children's Services Act 1996*) increase the penalty for equivalent offences that apply to proprietors and staff of children's services.

The Committee observes that the House of Lords has held that a law limiting how children may be disciplined by teachers or carers may engage the right to freedom of religion of parents who believe that such discipline is 'divinely-ordained in the best interests of the child': *R v. Secretary of State for Education and Employment ex parte Williamson* [2005] UKHL 15. The Committee considers that clause 12 may engage the Charter right of Victorian parents who hold beliefs about discipline not to have those beliefs interfered with or to be denied the right to practice those beliefs.

The Committee also observes that the House of Lords held, in relation to a similar ban on institutional corporal punishment:

*[T]he means chosen to achieve this aim are appropriate and not disproportionate in their adverse impact on parents who believe that carefully-controlled administration of corporal punishment to a mild degree can be beneficial, for this reason: the legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. On this Parliament was entitled, if it saw fit, to lead and guide public opinion. Parliament was further entitled to take the view that a universal ban was the appropriate way to achieve the desired end. Parliament was entitled to decide that... a universal ban is preferable to a selective ban which exempts schools where the parents or*

*teachers have an ideological belief in the efficacy and desirability of a mild degree of carefully-controlled corporal punishment.*

*(R v. Secretary of State for Education and Employment ex parte Williamson [2005] UKHL 15, [50])*

The Committee considers that clause 12, to the extent that it bans corporal punishment, is a reasonable limit under Charter s. 7(2) on the rights of parents who believe in the use of such punishment.

However, the Committee is concerned that the additional ban in clause 12 on ‘any discipline which is unreasonable in the circumstances’ may be too vague to be considered a ‘law’ limiting a human right under Charter s. 7(2). The Committee observes that the European Court of Human Rights has remarked that a provision that limits a human right:

*...cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*

*(Sunday Times v UK [1979] ECHR 1, [49])*

**The Committee will seek further information from the Minister as to:**

- 1. What types of conduct fall within the prohibition on ‘any discipline which is unreasonable in the circumstances’ in existing ss. 28(1)(b) & (2)(b) and new section 28(3)(b)?**
- 2. What information is available to proprietors and staff of children’s services and family day carers that will enable them to assess whether or not a particular act falls within the meaning of ‘discipline’ and whether or not a particular type of discipline is ‘unreasonable in the circumstances’?**

**Pending the Minister’s response, the Committee draws attention to clause 12.**

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### **Reasonable limits on rights – Regulation of children’s services – Movement – Privacy – Expression – Fair hearing – Self-incrimination**

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 *Children’s Services Act 1996*, whose subject-matter is the regulation of services for the care and education of young children. 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 Secretary of the Department of Education and Early Childhood Development the power to require a person connected with a children’s service to appear before him or her (clause 27, inserting a new section 42A(1)(c))
- **Privacy** (Charter ss. 13(a)): provisions requiring applicants for licences to provide information, including information as to whether the applicant is a ‘fit and proper person to operate a children’s service’ (clause 8, replacing existing ss. 18 & 22); a provision permitting the Secretary of the Department of Education and Early Childhood Development to require applicants to submit to medical or psychiatric examinations

(clause 8, replacing existing s. 24); a provision permitting the Secretary of the Department of Education and Early Childhood Development to publish on the internet information about a children's service, including its compliance with obligations and actions taken under the Act in respect of the service (clause 33, inserting a new s53B); and provisions extending officers' powers to enter and search premises to include the purpose of monitoring past compliance and entering premises used for family day care (clauses 22 & 24, amending existing ss. 36 & 38)

- **Expression, fair hearing and self-incrimination** (Charter ss. 15(2), 24(1) & 25(2)(k)): provisions requiring proprietors of children's services to notify the Secretary of the Department of Education and Early Childhood Development of various defined serious incidents involving children (clause 14, inserting a new s. 29C); and provisions giving the Secretary of the Department of Education and Early Childhood Development the power to require a person associated with a children's service to provide information or evidence, including self-incriminatory evidence (clause 27, inserting a new section 42A)

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, expression or self-incrimination and are a reasonable limit on the rights to movement and (to the extent that it is limited) a fair hearing.

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.***

## Energy and Resources Legislation Amendment Bill 2008

<b>Introduced</b>	16 April 2008
<b>Second Reading Speech</b>	17 April 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Peter Batchelor MLA
<b>Portfolio responsibility</b>	Minister for Energy and Resources

### Purpose

The Bill amends the *Electricity Industry Act 2000*, the *Electricity Safety Act 1998*, the *Electricity Safety Amendment Act 2007*, the *Geothermal Energy Resources Act 2005*, the *Mineral Resources (Sustainable Development) Act 1990*, the *Petroleum Act 1998* and the *Pipelines Act 2005*.

### Content and Committee comment

#### [Clauses]

[2]. The provisions in the Bill (other than section 8 which will be proclaimed to coincide with the commencement of Part 2 of the *Electricity Safety Amendment Act 2007*), will come into operation on the day after Royal Assent. If section 8 does not come into operation before 1 January 2010, it comes into operation on that day.

**Note:** *The Committee has previously noted the delayed commencement provision applying to the Electricity Safety Amendment Act 2007. The explanatory memorandum there noted the need for regulations to be made.*

[5]. Amends section 45(4) of the *Electricity Safety Act 1998* to increase the penalty for licensed electrical inspectors who fail to record defects in electrical work when issuing a certificate of inspection.

[6]. *Presumption of innocence – evidentiary burden on defendant – reasonable belief* – The clause substitutes section 93 and inserts a new section 93A in the *Electricity Safety Act 1998* in respect to the operation of cathodic protection systems and provides the owner of such a system a defence of reasonable belief in circumstances where the system is operated by a person other than the owner. (Also refer to Charter Report below).

[18]. *Rights and freedoms – compulsory acquisition of property – compensation scheme – Ministerial discretion – relevant considerations.* Inserts new section 95(1A) in the *Pipelines Act 2005* concerning the matters the Minister may consider when deciding to agree to compulsory acquisition of land under the *Land Acquisition and Compensation Act 1996* for the purposes of a relevant pipeline. (Also refer to Charter Report below).

[22]. Provides for the automatic repeal of this amending Act on 1 January 2011.

### Charter Report

#### Reasonable limits on rights – Energy and resources regulation – Property – Presumption of innocence

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

The Committee notes that the Bill amends various Acts that regulate aspects of the energy and resources sectors. The Committee observes that such regulation 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:

- **Property** (Charter s.20): a provision permitting the Minister considering an application for compulsory acquisition of an easement to consider whether the applicant has complied with a consultation plan (clause 18, amending existing s. 95 of the *Pipelines Act 2005*)
- **Presumption of innocence** (Charter s. 25(1)): a provision placing an evidentiary onus on the owner of a cathodic protection system charged with failing to ensure the compliance of that system with the Act to point to evidence of the owner's reasonable belief that the operator of the system was complying with the Act (clause 6, inserting a new ss.93A into the *Electricity Safety Act 1998*)

The Statement of Compatibility contends that these provisions do not infringe the rights to property or the presumption of innocence.

Having considered the above Charter rights and provisions, the Committee is satisfied that the measures so engaged do not warrant any special mention or adverse comment in respect to possible incompatibility with human rights.

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

## Gambling Regulation Amendment (Licensing) Bill 2008

<b>Introduced</b>	16 April 2008
<b>Second Reading Speech</b>	17 April 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Tony Robinson MLA
<b>Portfolio responsibility</b>	Minister for Gaming

### Purpose

The Bill amends the *Gambling Regulation Act 2003* to –

- create a wagering and betting licence authorising the conduct of wagering on horse racing, harness racing and greyhound racing and the conduct of approved betting competitions;
- create a keno licence authorising the conduct of keno games;
- permit the extension of a gaming operator's licence;
- provide for the appointment of additional Deputy Chairpersons and commissioners to the Victorian Commission for Gambling Regulation.

### Content and Committee comment

#### [Clauses]

[2]. Provides for the provisions of the Bill (except Part 3) to come into operation on the day after the day on which it receives Royal Assent. Part 3 introduces requirements relating to Responsible Gambling Codes of Conduct.

Part 3 (responsible gambling code of conduct) is to come into operation on the later of the day after Royal Assent or the day on which section 49 of the *Gambling Legislation Amendment (Problem Gambling and Other Measures) Act 2007* comes into operation.

**Note:** *The Gambling Legislation Amendment (Problem Gambling and Other Measures) Act 2007 has a forced commencement provision of commencement not later than 1 December 2008.*

[9]. Inserts a new Part 3A in Chapter 4 of the Act and sets out the provisions applying to the new wagering and betting licence.

New section 4.3A.25 sets out the obligations of the wagering and betting licensee with respect to their associates. If it is within the licensee's power to do so, the licensee must ensure that a person does not become an associate except with the prior written approval of the Commission. The Commission must not grant its approval unless satisfied that the person is a suitable person to be associated with the management of a wagering and betting business. If the Commission refuses to grant its approval then it must notify the licensee in writing and the licensee, to the extent that it is within the licensee's power to do so, must ensure that the person does not become an associate or, if the person becomes or has become an associate, that the person ceases to be an associate of the licensee within 28 days after the licensee is notified of the Commission's decision not to grant approval.

New section 4.3A.29 provides that the Minister may suspend a wagering and betting licence where the Minister is satisfied that the licensee or an executive officer of the licensee has been charged with certain offences specified in the section and new section 4.3A.30 provides that a wagering and betting licence is of no effect while it is suspended.

[18]. Inserts a new Chapter 6A to set out the provisions applying to the new keno licence.

New section 6A.3.25 makes provisions similar to 4.3A.25 (see above) in respect to a Keno licensee.

New section 6A.3.29 provides that the Minister may suspend a keno licence in terms similar to 4.3A.29 (see above).

[24]. Inserts new Divisions 1A and 1B into Part 4 of Chapter 10 related to investigations of registrations of interest and applications for the wagering and betting licence and the keno licence.

New section 10.4.7C provides that the Commission may require an interested person who is a natural person to consent to having his or her photograph, finger prints and palm prints taken by the Commission.

New section 10.4.7D provides that, if the Secretary has requested the Commission to carry out an investigation or inquiry under section 10.4.7B, the Commission must refer to the Chief Commissioner of Police a copy of the application or registration of interest; any photograph, finger prints and palm prints obtained under section 10.4.7C; and any supporting documentation.

New section 10.4.7E provides that the Commission may require an interested person to provide any information or produce any records relevant to the investigation of the application or registration of interest as specified in the notice.

**Note:** *Similar provisions to those above apply in Division 1B to transfers of licences and to temporary licences.*

[26]. *Rights and freedoms – Administrative law – Natural justice – Fair hearing – property rights – legitimate expectation of continuation of licence – Right to property* – Inserts a new section 11.1.8 (General - Administrative provisions) to declare that a person does not have any entitlement to, or legitimate expectation of, the grant of a wagering and betting licence or keno licence only because that person is the holder of the wagering licence and gaming licence that were issued on 15 August 1994, or the holder of a gaming operator's licence, or an agent or associate of those licence holders. *(Also refer to Charter Report below).*

**Note:** *\*Legitimate expectation – In administrative law, a reasonable expectation that a legal right or liberty will be obtained or renewed, or will not be unfairly withdrawn without a hearing; Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149; Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648; 93 ALR 51. A legitimate expectation falls short of being a legal right, but has been recognised as an interest protected by procedural fairness. See also Legal right: Natural justice; Procedural fairness; Rights of children.*

*\*Extract from, Butterworths Concise Australian Legal Dictionary, Butterworths, Second Edition 1998, page 266.*

[28 to 34]. Part 3 of the Bill makes consequential amendments to a number of sections in the Act related to the requirement for a licensee or transferee to have in place and implement a Responsible Gambling Code of Conduct and provides for disciplinary offences for breach of that Code.

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

## Charter Report

### **Property rights – Removal of entitlement and legitimate expectation to the grant of a licence – Agent or associate of the holder of a licence – Whether a human being**

Charter s. 3 defines a 'person' to mean a 'human being'. Charter s. 6(1) provides that 'only persons have human rights'. Charter s. 20 provides that a person 'must not be deprived of his or her property other than in accordance with law.'

The Committee notes that clause 26 inserts a new section 11.1.8 into the *Gambling Regulation Act 2003* that provides that:

*For the avoidance of doubt, a person does not have any entitlement to, or legitimate expectation of, the grant of a wagering and betting licence or keno licence only because the person is or was—*

- (a) the holder of the wagering licence and gaming licence that were issued on 15 August 1994; or*
- (b) the holder of a gaming operators licence; or*
- (c) an agent or associate of a person described in paragraph (a) or (b)*

The Committee observes that this clause may remove an existing entitlement or legitimate expectation that a person would obtain a licence. The Committee also observes that the European Court of Human Rights has held that an analogous right to Charter s. 20 in the European Convention for the Protection of Human Rights and Fundamental Freedoms extends to a right not to be deprived of an existing legitimate expectation of a future claim to property (including a licence.)

Whilst the Committee observes that corporations do not have Charter rights, the Committee is concerned that one or more persons who are the subject of new section 11.1.8 (especially para. (c)) may be human beings.

***The Committee will seek further information from the Minister as to whether any of the persons who are the subject of new section 11.1.8 are human beings. Pending the Minister's response, the Committee draws attention to this provision.***

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### **Reasonable limits on rights – Regulation of gambling – Privacy – Expression – Association – Property**

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 *Gambling Regulation Act 2003*, whose subject-matter is the regulation of gambling and the enforcement of that regulation. The Committee observes that such regulation inevitably engages a variety of human rights, but that reasonable provisions will typically satisfy Charter s.7(2), as well as internal limits on particular rights.

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

- **Privacy** (Charter s. 13(a): The Statement of Compatibility identifies a large number of provisions that require applicants for a licence and current licence-holders to supply information for the purpose of assessing probity standards. In addition to verbal information, the requirements extend to providing photographs, fingerprints and palm

prints, for supply to Victoria Police (clause 24, inserting a new sections 10.4.7C & 10.4.7K)

- **Expression** (Charter s. 15(2)): The Statement of Compatibility identifies a large number of provisions that require applicants for a gambling licence and current licence-holders to inform the Minister of defined information. In some instances – where a person has failed to notify a change in previously supplied information – (e.g. clause 24, inserting a new section 10.4.7N) – a criminal penalty is imposed for failure to comply.
- **Property** (Charter s. 20): Provisions requiring a licensee to ensure that a person does not become an associate (including holding a financial interest in the business: see existing s. 1.4.1A) of the licensee without the approval of the Victorian Commission for Gambling Regulation (clauses 9 & 18, inserting new sections 4.3.A.25 & 6.3.A.25) The Committee observes that these provisions may also engage the Charter's 'right to freedom of association with others' (Charter s. 16(2)).

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, expression or property.

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 observes that the Statement of Compatibility contains the following errors:

- In the section on 'Section 13: Privacy and reputation', the Statement describes new section 4.3.A5 as providing for 'the minister, by notice, to call for applications'. However, new section 4.3.A.5 does not provide for such a notice and instead regulates applications by registrants who were 'invited' by the Minister to apply for a licence under new section 4.3.A.3(6).
- In the section on 'Section 15: Freedom of expression', the Statement incorrectly refers to new section 10.4.7M as 'proposed section 10.4.7N' and new section 10.4.7N as 'proposed section 10.4.7O'.

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

## Justice Legislation Amendment Bill 2008

<b>Introduced</b>	15 April 2008
<b>Second Reading Speech</b>	17 April 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Bob Cameron MLA
<b>Portfolio responsibility</b>	Minister for Corrections

### Purpose

The Bill amends the —

*Corrections Act 1986* —

- with respect to the functions of the Secretary and the Commissioner; and
- to abolish the Prison Industry Advisory Committee; and
- makes amendments consequential to the amendments made to the *Serious Sex Offenders Monitoring Act 2005* regarding interim extended supervision orders;

*Firearms Act 1996* —

- to allow the Chief Commissioner to declare certain firearms to be of a particular category; and
- with respect to the licensing of tranquilliser guns;

*Serious Sex Offenders Monitoring Act 2005* —

- to allow for the additional assessment of offenders; and
- to extend the offences in relation to which an extended supervision order may be made to include offences against adults; and
- to provide for the making of interim extended supervision orders; and
- to clarify the powers of the Court of Appeal;

The Bill also makes minor or statute law revisions to the *Administration and Probate Act 1958*, the *Liquor Control Reform Act 1998* and the *Summary Offences Act 1966*.

### Glossary

‘ESO’ means an ‘extended supervision order’

‘IESO’ means an ‘interim extended supervision order’

‘SSOMA’ means the *Serious Sex Offenders Monitoring Act 2005*.

### Content and Committee comment

#### [Clauses]

[2]. Provides that, saving some provisions, the Bill comes into force on the day after Royal Assent. Clauses 6, 13(2), 17, 18, 21, 22 and 25 come into operation on proclamation but not later than by 1 August 2008.

**Statute law revision – Amendments that have or may have a retrospective application**

1. *Clause 13(1) amending the SSOMA is deemed to have come into operation on 1 October 2006. Clause 13(1) substitutes the words "section 93A" (Hospital security orders) for the words "section 93(1)(e)" in the definition of custodial sentence in the SSOMA. The reference in the definition section to section 93(1)(e) is incorrect as a consequence of previous amendments made by the Sentencing and Mental Health Acts (Amendment) Act 2005 (the Act). The retrospective operation of the clause will align with the commencement of the relevant provisions of the Act.*
2. *Clause 26 makes a statute law revision to the Administration and Probate Act 1958. Section 3(1) of the Administration and Probate Act 1958 will be amended by the Relationships Act 2008 (the Act) and comes into operation, or is deemed to have come into operation, on the day on which item 2.1(b) in Schedule 1 to the Relationships Act 2008 comes or came into operation (as the case requires). The Act has received Royal Assent but has not yet come into operation.*
3. *Clause 28 comes into operation, or is deemed to have come into operation, on the day on which section 9(1) of the Infringements and Other Acts Amendment Act 2008 (the amending Act) comes or came into operation (as the case requires). The amendments clarify a previous amendment made to the Summary Offences Act 1966 in respect to the offence of wilful damage of property being enforceable by infringement notice where the property value is under \$500. The amending Act has received Royal Assent but has not yet come into operation. Refer to the explanatory memorandum for detailed explanation.*

**Corrections Act 1986**

[3 and 5]. Repeals provisions relevant to the now defunct Prison Industry Advisory Committee.

[6]. Makes consequential amendments to provide for the new IESO including the ability to photograph a person who is made a subject to an IESO.

**Firearms Act 1996**

[10]. Inserts new section 9(3)(c) to provide that the Chief Commissioner may licence a person to possess, carry or use more than one registered tranquilliser guns if satisfied that the person has a genuine need to possess, carry or use more than one tranquilliser gun.

**Serious Sex Offenders Monitoring Act 2005 (clauses 13 to 25)***Attendance for medical examination*

[14 and 15]. Substitutes a new section 7A(3) to clarify the offence of failing to comply with a direction of the Secretary to attend a medical examination for the purposes of an assessment report and inserts a new section 7B which creates a new power enabling a medical expert preparing an assessment report to seek an additional assessment from another medical expert for the purposes of preparing the assessment report. It also extends the Secretary's powers to direct an offender to attend a specified medical expert for a personal examination for the purposes of the additional assessment and creates a new offence in respect of a failure to comply with such a direction *without reasonable excuse*.

<p><b>Rights and freedoms – Presumption of innocence – Reverse onus to prove evidentiary facts – Offender must not fail, without reasonable excuse to attend a medical examination</b></p>
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<p><i>The Committee notes that an evidential onus on an offender to prove 'reasonable excuse' raises the rights and freedoms issue of the 'presumption of innocence'. The Committee notes that by reason of section 30 of the Magistrates' Court Act 1989 the evidential burden would</i></p>
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*be on the offender to point to or present sufficient evidence to raise the reasonable possibility of the existence of a reasonable excuse and it would then fall to the prosecution to rebut the existence of that excuse beyond reasonable doubt.*

*The Committee observes that such reverse onus provisions in proposed legislation may be justified in circumstances where a defence is solely or peculiarly within the knowledge of the offender.*

#### *Interim extended supervision orders (IESO)*

[17]. Inserts new Division 4A in Part 2 (new sections 25A to 25N) to provide for IESO.

New section 25A provides that the Secretary can apply for an IESO in respect of an offender who is the subject of an application for an extended supervision order or of an application for a renewal of an extended supervision order.

New section 25C the court must ensure that a person subject to an IESO application must have a reasonable opportunity to obtain legal representation.

New section 25D sets out the circumstances in which a court may make an IESO. The Secretary must have applied for an ESO or for the renewal of an ESO. The court must be satisfied, amongst other things that the order is justified and it is in the public interest to make the order.

New sections 25G and 25M provide that an interim extended supervision order can be made or renewed for a period of up to 4 months, and cannot exceed a period of 4 months unless the court making or extending the order considers that exceptional circumstances exist.

New section 25H provides that sections 15 (conditions of an ESO), 16 (instructions and directions in relation to an ESO), 16A (person on a victim register may make a submission) and 16B (how victim submissions are dealt with by the Adult Parole Board) apply to an IESO.

#### ***Rights and freedoms***

***Separation of powers – Judicial powers – Board may give a direction to offender to reside in premises that are situated on land that is within the perimeter of a prison – Whether direction punitive or preventative and rehabilitative – Whether cruel and unusual punishment***

The Committee observes that all of the provisions of sections 15 and 16 (and others) are to apply to the proposed IESO's.

The Committee notes the provisions raise many human rights issues that are identified in the Statement of Compatibility. The Committee observes that it reported on the Act, when it was introduced in February 2005. The Committee also reported on an amending Act in October 2006 when amendments were made to the Act with the insertion of new section 16(3A) (see below) giving the Adult Parole Board a discretion to require that an offender (as part of the conditions of an ESO) live in premises that are situated on land within the perimeter of a prison but that does not form part of the prison. In that report the Committee considered whether such a law could be regarded as punitive and therefore a form of additional punishment to a judicially determined sentence. If such a law could be characterised as punitive it may be offend the principal of the separation of powers allowing sentences to be imposed other than by judicial merits adjudication. The provisions may also be repugnant to the exercise of judicial power by non-judicial bodies within the meaning of Chapter III of the Commonwealth constitution.

The Committee further observes that if the requirement to reside within the perimeter of a prison constitutes a form of unusual punishment it may be characterised as an undue trespass to rights and freedoms. The question for Parliament to consider is whether the laws are properly characterised as punitive or preventative and rehabilitative. (*The Committee further considers this question in its Charter Report below*).

***Rights and freedoms – Cruel, inhuman or degrading treatment - Compulsory medical treatment of offender***

The Committee observes that section 16(3)(d) relating to treatment or rehabilitation programs will now apply to the new IESO scheme proposed by the Bill. The Committee observes that the question whether non-consensual medical treatment constitutes inhuman or degrading treatment is discussed in the Statement of Compatibility. (*Refer also to the Charter Report below*).

***Natural justice – Offender may be excluded from or absent at hearing of application for orders***

The Committee notes that the insertion of a new Division 4A will be subject to the provisions of the existing Division 5 of Part 2 of the Act including section 29 that provides that in certain circumstances the hearing of an application for an ESO (and as proposed by the Bill, an IESO) may be held in the absence of the offender. In brief the reasons why the offender may not be present at the hearing include exclusion of the offender on ground of misbehaviour or absence for illness or other reason. On grounds other than exclusion for misbehaviour the hearing may only proceed if doing so will not prejudice the offender and it is in the interests of justice to do so.

The Committee considers that these provisions do not unduly abridge the right to a fair hearing (trial) (*see also the Charter Report below*).

***Retrospective application of laws – scheme to apply to new categories of past offences – Whether scheme is punitive or protective and rehabilitative***

The Committee observes that amendments to the Act expand the ‘relevant offences’ to which the monitoring and reporting obligations under the Act will now apply to offences committed against adult victims. As the Statement of Compatibility observes ‘*the application of clause 24 therefore has a ‘retrospective’ impact to the extent that at the time the relevant offence was committed, the offender would not have been eligible for the scheme*’.

The Committee observes that if the scheme is properly to be characterised as punitive in nature rather than protective and rehabilitative then the laws may be repugnant to the notion that legislation should not impose a retrospective higher penalty to the punishment prevailing at the time the offence was committed. (*The Committee considers this question in its Charter Report below*).

**Note 1:** The provisions of sections 15 and 16 of the SSOMA are –

15. Conditions of extended supervision order

(3) *The conditions of an extended supervision order are that during the period of the order the offender must —*

- (a) *not commit, whether in or outside Victoria, another relevant offence or an offence that, if committed in Victoria, would be a relevant offence;*
- (b) *attend at any place as directed by the Secretary or the Adult Parole Board for the purpose of supervision, assessment or monitoring;*
- (c) *report to, and receive visits from, the Secretary or any person nominated by the Secretary for the purposes of this paragraph;*

- (d) *notify the Secretary of any change of name or employment at least 2 clear working days before the change;*
- (e) *not move to a new address without the prior written consent of the Secretary;*
- (f) *not leave Victoria except with the permission of the Secretary granted either generally or in relation to the particular case;*
- (g) *obey all lawful instructions and directions of the Secretary given under section 16(1);*
- (h) *obey all lawful instructions and directions of the Adult Parole Board given under section 16(2).*

16. Instructions and directions in relation to extended supervision order

- (1) *For the purposes of section 15(3)(g) the Secretary may give to an offender who is subject to an extended supervision order any instruction or direction that the Secretary considers necessary to ensure the effective and efficient implementation and administration of the conditions of the order.*
- (2) *For the purposes of section 15(3)(h) the Adult Parole Board may give to an offender who is subject to an extended supervision order any instruction or direction that the Board considers necessary to achieve the purposes of the conditions of the order set out in section 15(2).*
- (3) *Without limiting subsection (2), instructions or directions given by the Adult Parole Board may include instructions or directions as to—*
  - (a) *where the offender may reside;*
  - (b) *times at which the offender must be at home;*
  - (c) *places or areas that the offender must not visit or may only visit at specified times;*
  - (d) *treatment or rehabilitation programs or activities that the offender must attend and participate in;*
  - (e) *the types of employment in which the offender must not engage;*
  - (f) *community activities in which the offender must not engage;*
  - (g) *persons or classes of person with whom the offender must not have contact;*
  - (h) *forms of monitoring (including electronic monitoring) of compliance with the extended supervision order to which the offender must submit;*
  - (i) *personal examinations by a medical expert for which the offender must attend for the purpose of the Board being given a report by the expert to assist it in determining the need for, or form of, any instruction or direction under this section.*
- (3A) *Without limiting subsection (2) or (3)(a), an instruction or direction given by the Adult Parole Board under subsection (2) as to where an offender may reside may require the offender to reside at premises that are situated on land that is within the perimeter of a prison (whether within or outside any walls erected on prison land) but does not form part of the prison.*

**Note: 2** *Cruel and unusual punishment – Other than the provisions of section 10(b) of the Charter (cruel, inhuman or degrading treatment) by force of the Imperial Acts Application Act 1980 there are incorporated in Victorian statute law certain enactments of the Parliament of the United Kingdom. Unless Victorian law provides otherwise or is inconsistent with the Imperial Act these enactments apply in Victoria to the extent that they may provide interpretive guidance to Victorian statute law, namely –*

*10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.*

*[1688] I William and Mary Sess II (Bill of Rights) c.II*

New section 25M sets out the circumstances in which the Secretary may request an extension of an IESO.

[20]. Substitutes a new section 39 to extend the powers of the Court of Appeal on an appeal against an ESO so that the court can make an order quashing the relevant decision and remit the matter back to the court that made the original order in accordance with any directions made by the Court of Appeal.

[21]. Inserts new section 39A to give the Court of Appeal the power to make an IESO.

[23]. Inserts a new section 51 being the transitional provisions for the amendments made to the Act by the Bill.

The provisions in clause 17 relating to an IESO will apply on and after the date of commencement whether an application for, or a renewal, or a review of an ESO has been made before, on or after that date of commencement.

The amendments to the Schedule made by clause 24 which extend relevant offences to include adult victims, will apply from the day after Royal Assent.

### **Act to apply to offences against adults**

[24]. Makes a number of amendments to the Schedule to extend the offences in that Schedule to include certain offences against adult victims.

The clause also inserts a new item 19 into the Schedule being the offence against section 60AB of the *Crimes Act 1958* (sexual servitude) and new item 20A being the offence against section 60AD of the *Crimes Act 1958* (deceptive recruiting for commercial services).

[28]. Makes an amendment to the *Summary Offences Act 1966* (Refer to note 3 under clause 2 above).

[29]. Provides for the automatic repeal of this amending Act on 1 August 2009.

## **Charter Report**

**Cruel, inhuman or degrading treatment – Non-consensual medical treatment – Movement – Privacy – Religion and belief – Expression – Association – Liberty – Extensions to extended supervision order scheme – Adult Parole Board may give an offender any directions it considers necessary to ensure that the community is adequately protected by monitoring the offender – Where discretion to limit many human rights exempted from natural justice, statutory review procedures and human rights obligations – Whether reasonable limit**

Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'. Charter s.32(1) requires that Victorian legislation be 'interpreted in a way that is compatible with human rights' 'so far as it is possible to do so consistently with their purpose'. Charter s. 38(1) provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.'

The Committee notes that existing ss.15 & 16 of the *Serious Sex Offenders Monitoring Act 2005* either require or permit people who are the subject of extended supervision orders to comply with a large number of conditions, including being required to:

- obey all lawful instructions and directions of the Secretary to the Department of Justice 'that the Secretary considers necessary to ensure the effective and efficient implementation and administration of the conditions of the order' (ss. 15(3)(g) & 16(1))

- obey all lawful instructions and directions of the Adult Parole Board ‘that the Board considers necessary to achieve the purposes’ of ensuring ‘that the community is adequately protected by monitoring the offender’ and promoting ‘the rehabilitation, and the care and treatment, of the offender’ (ss. 15(2), 15(3)(h) & 16(2))

The Committee also notes that clause 17, inserting a new section 25H into the Act, provides that ss. 15 & 16 apply with respect to interim extended supervision orders. The Committee further notes that clause 24, amending the Schedule to the Act, provides that various sex offenders whose victims were adults and offenders convicted of sexual servitude or deceptive recruiting for commercial sexual services are eligible for extended supervision orders and, hence, may become subject to ss. 15 & 16.

The Committee considers that clauses 17 and 24 may limit the following Charter rights of offenders who may now be subject to an interim or standard extended supervision order:

- **Charter s. 10(c): prohibition on non-consensual medical treatment:** see s. 16(3)(d), permitting the Adult Parole Board to make directions as to ‘treatment programs or activities that the offender must attend and participate in’.
- **Charter s. 12: right to move freely within Victoria:** see s. 15(3)(b), which requires the offender to ‘attend at any place as directed by the Secretary or the Adult Parole Board for the purpose of supervision, assessment or monitoring’; and ss. 16(3)(b) & (c), which permit the Adult Parole Board to make directions as to ‘times at which the offender must be at home’; and ‘places or areas that the offender must not visit’.
- **Charter s. 12: right to enter or leave Victoria:** see s. 15(3)(f), which provides that the offender must ‘not leave Victoria except with the permission of the Secretary’.
- **Charter s. 12: right to choose where to live:** see s. 15(3)(e), which provides that the offender must ‘not move to a new address without the prior written consent of the Secretary’ and ss. 16(3)(a), (b) & (c), which permit the Adult Parole Board to make directions as to ‘where the offender may reside’.
- **Charter s. 13(a): right not to be subject to certain interferences with privacy:** see ss. 16(3)(h) & (i), which permit the Adult Parole Board to make directions as to ‘forms of monitoring (including electronic monitoring) of compliance’ and ‘personal examinations by a medical expert for which the offender must attend’.
- **Charter s. 14(2): right to demonstrate his or her religion or belief as part of a community:** see s. 16(f), which permits the Adult Parole Board to make directions as to ‘community activities in which the offender must not engage’.
- **Charter s. 15(2): right to freedom of expression:** see *Fletcher v Secretary to the Department of Justice* [2006] VSC 354, where the Adult Parole Board imposed a condition barring an offender from using or accessing the internet.
- **Charter s. 16(2): right to freedom of association with others:** see s. 16(3)(h), which permits the Adult Parole Board to make directions as to ‘persons or classes of persons with whom the offender must not have contact’.
- **Charter s. 21(1): right to liberty:** see all of ss. 15 & 16.

The Statement of Compatibility argues that clauses 17 and 24 do not infringe the rights to privacy and liberty (as the intrusions and deprivations are not arbitrary) and are compatible with the remaining rights because of the operation of Charter s.7(2). The Statement of Compatibility also argues that the clauses promote the Charter rights of potential victims of eligible offenders to equality, life, privacy, liberty and security.

Whilst the Committee considers that the purposes in s.15(2) of the Act and the Charter rights of potential victims are compelling reasons to limit eligible offenders’ rights in accordance with the Charter’s limitation provisions, the Committee is concerned that the discretion given

to the Adult Parole Board as to whether those rights will be limited in particular cases is extremely broad.

The Statement of Compatibility remarks:

*Whilst these rights may be limited in individual cases, it is necessary to have a broad power to impose such restrictions, tailored to the individual circumstances, in order to protect the community.*

*The extent of this limitation would need to be assessed on a case-by-case basis, having regard to the specific instructions and directions given by the APB in relation to the personal circumstances of the offender. However, it is fair to presume that the limitation that may occur in respect of this right would be reasonable, vis-à-vis s7 of the Charter, given that in order to be lawful the limitation would need to be for an important and legitimate purpose (i.e. those set out in s15(2) of the SSOMA) and any derogation from these purposes would render the decision ultra vires. It is also worthwhile noting that the breadth of the discretionary powers... is necessary in order to tailor instructions to particular offenders; and the individual risks they represent. Bearing in mind that these are discretionary powers, it is important to recognise that the limitation of the right will be curtailed by principles of administrative law. That is, any decision that was in fact disproportionate to an offenders individual risks could be challenged on the grounds that it was either incompatible with human rights (see s32 of the Charter); or unreasonable (broad ultra vires) or an abuse of discretionary power.*

The Committee observes that the two purposes in s.15(2) are conflicting, so that the capacity for either of them to limit the Adult Parole Board's authority is limited. The Committee also observes that the interpretation rule in Charter s.32 is limited by the requirements that any new interpretation be both 'possible' and 'consistent with the purposes' of the statute. The Committee further observes that the Supreme Court's jurisdiction under the common law to overturn a decision of the Adult Parole Board under s. 16(2) is 'limited', 'supervisory', 'is not concerned with the merits of the decision under review' and 'is not concerned with whether the decision was fair or correct': *Fletcher v Secretary to the Department of Justice* [2006] VSC 354, [36]-[37].

The Committee additionally observes that the Adult Parole Board is:

- not bound by the rules of natural justice (s.69, *Corrections Act 1986*)
- not subject to statutory appeal to the Court of Appeal (s. 36(1), defining 'relevant decision', in Part 3 of the *Serious Sex Offenders Monitoring Act 2005*)
- not subject to review by VCAT (s.3 defining 'tribunal', *Administrative Law Act 1978*)
- not subject to ombudsman inquiries (including human rights inquiries) (s.13(3)(aa), *Ombudsman Act 1973*)
- not currently a public authority under the Charter (s.4(a), *Charter of Human Rights and Responsibilities (Public Authorities)(Interim) Regulations 2007*).

The latter means that the Adult Parole Board is not currently required to act compatibly with Charter rights or to consider relevant Charter rights when making its decisions.

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

- 1. Why are the Adult Parole Board's decisions under s. 16(2) not subject to the rules of natural justice or to any statutory review or inquiries?**
- 2. Why is the Adult Parole Board exempted from the obligation to act compatibly with human rights and to consider relevant human rights when making decisions under s. 16(2)? Will the exemption in the Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007 be renewed in 2009?**

***Pending the Minister's response, the Committee refers to Parliament for its consideration the question of whether or not clauses 17 and 24, by expanding the operation of the Adult Parole Board's discretion under s. 16(2) to restrict many Charter rights of offenders who are the subject of extended supervision orders, without that discretion being subject to natural justice, statutory review or the Charter's human rights obligations, are reasonable limits on those Charter rights under Charter s. 7(2).***

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**Retrospective criminal laws – Right not to be tried or punished more than once – Retrospective extension of extended supervision order scheme – Whether extended supervision order is punishment or penalty – Whether reasonable limit**

Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'. Charter s. 26 provides that a person 'must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted'. 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 23, inserting a new section 51(8) into the *Serious Sex Offenders Monitoring Act 2005*, provides that the amendments made by clause 24 'apply on and after the commencement of clause 23 whether a person was sentenced in respect of a relevant offence before, on or after that commencement'. The Committee also notes that clause 24 extends the definition of 'relevant offences' for the purposes of extended supervision orders to include offenders whose victims are adults and offenders who commit the offences of sexual servitude and deceptive recruiting for commercial sexual services. The Committee further notes that clause 23 prevents the application of s. 114 of the *Sentencing Act 1991*, which would otherwise ensure that any amendment that increased a penalty did not apply retrospectively.

The Committee observes that the effect of clause 23 is that some finally convicted offenders will now be potentially subject to extended supervision orders, even though they were not subject to them when they were convicted. The Committee also observes that the effect of clause 23 is that some offenders who committed offences at a time when those offences were not relevant offences for the purposes of extended supervision orders may in the future be subject to extended supervision orders in respect of those offences. The Committee considers that, to the extent that an extended supervision order is a punishment or a penalty, clause 23 may limit the Charter rights of such offenders against double jeopardy and retrospective increases in penalties.

The Statement of Compatibility argues that extended supervision orders are neither punishments nor penalties as the purposes of extended supervision orders 'do not include punishment' and:

*The authority to impose an ESO is not drawn from what was done in the sentencing of the offender; rather the Act simply takes as the factum of the application for an ESO the status of the offender as a person who is serving a custodial sentence...*

The Committee observes that the meaning of 'punishment' and 'penalty' in the Charter is not determined by any Victorian law. The Statement of Compatibility argues that its view that extended supervision orders are not punishments or penalties is supported by judgments of the High Court interpreting Chapter 3 of the Commonwealth Constitution. However, the Committee observes that the High Court's judgments concerned the separation of powers and are 'not concerned with wider issues', including 'substantial questions of civil liberty': *Fardon v Attorney-General (Qld)* [2004] HCA 46, [3] (per Gleeson CJ).

The Statement of Compatibility remarks:

*The approach of the High Court is consistent with the approach of Courts in a number of other jurisdictions under human rights legislation where protective measures are imposed upon persons who have been convicted of certain offences, including sex offenders.*

The Committee observes that decisions of the United States Supreme Court and the United Kingdom courts that held that somewhat similar schemes were not punishments turned on a finding that the relevant proceedings for imposing the supervision orders were civil, rather than criminal, proceedings. However, s. 26 of the *Serious Sex Offenders Monitoring Act 2005* expressly provides that proceedings for an extended supervision order are 'criminal in nature'.

The Committee also observes that New Zealand's Attorney-General reported to that nation's Parliament that a bill to enact an extended supervision scheme that was very similar to Victoria's 'should be viewed as "punishment" for the purposes of' the double jeopardy provision of the *New Zealand Bill of Rights Act 1990* (*Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill* but c.f. the report of the New Zealand Parliament's Justice and Electoral Committee, noting that '[i]t is possible to consider retrospective application of the extended supervision regime not to be "punishment".')

The Committee further observes that New Zealand's Court of Appeal recently held that the same legislation, now enacted as Part 1A of the *Parole Act 2002* (NZ), 'amounts to punishment' for the purposes of the New Zealand Bill of Rights Act's provisions on retroactive penalties and double jeopardy: *Belcher v Chief Executive of the Department of Corrections* [2006] NZCA 262, [49]. At para [47] of that judgment, the Court of Appeal listed fourteen characteristics of the New Zealand extended supervision order regime that supported its conclusion. The Committee observes that the *Serious Sex Offenders Monitoring Act 2005* matches eleven of those fourteen characteristics and that the three differences are arguably minor. In particular, whereas the New Zealand Act permits an offender to be placed in home detention, the Victorian Act permits an offender to be told where to reside (including living within the perimeter of a prison) and when to be at home.

The Committee therefore considers that clause 23 may limit the Charter rights of some past offenders not to be subject to double jeopardy or retrospective increases in penalty. The Committee observes that the question of whether or not clause 23 is compatible with human rights may therefore depend on whether or not that clause satisfies the test for reasonable limits on rights set out in Charter s. 7(2). The Committee also observes that the Statement of Compatibility does not address this question.

The Committee further observes that the New Zealand Attorney-General's view (in the report mentioned above) is that the New Zealand extended supervision order regime 'is not capable of justification under' New Zealand's equivalent to Charter s.7(2). She remarked that individuals who have already been sentenced:

*may well have made decisions about how to plead to charges they faced on the basis that the only punishment they were thereby liable to was a term of imprisonment (of possibly relatively short duration – a significant factor if the defendant had been remanded in custody pending trial.)*

The Committee additionally observes that the New Zealand courts are yet to determine whether or not the New Zealand extended supervision regime is compatible with the *New Zealand Bill of Rights Act 1990*.

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

- ***whether or not extended supervision orders are penalties or punishments; and***

- ***if they are, whether or not clause 23's retrospective application of the extended supervision order scheme to past offenders who committed sexual crimes against adults and to past offenders who committed the crimes of sexual servitude and deceptive recruiting for commercial sexual services is a reasonable limit on those offenders' Charter rights against double jeopardy and retrospective penalties.***
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### **Fair hearing – Reasonable limits on rights – Criminal justice procedures – Privacy – Liberty – Presumption of innocence**

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

The Committee notes that the Bill amends various Acts that regulate criminal justice procedures. The Committee observes that such regulation inevitably engages a variety of human rights, but that reasonable provisions will typically satisfy Charter s. 7(2), as well as internal limits on particular rights.

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

- **Privacy** (Charter s.13(a)): provisions for victims to be notified about interim extended supervision orders and extending the current victim notification scheme (clause 6(a), amending ss. 30A of the *Corrections Act 1996*; clause 24, amending the schedule to the *Serious Sex Offenders Monitoring Act 2005*); provisions for the subjects of interim extended supervision orders to be monitored at community corrections centres, including taking photographs (clause 6(e), amending s. 104E of the *Corrections Act 1996*); provisions for a medical expert to seek an assessment of an eligible offender from an additional medical expert, for the offender to be directed to comply and for additional assessments to be made (clause 15, inserting a new 7B into the *Serious Sex Offenders Monitoring Act 2005*); and provisions extending the operation of existing provisions requiring offenders to report to, receive visits from and notify the Secretary of the Department of Justice of any change of name or employment; and to be directed to undergo monitoring and personal examinations (clauses 15 and 24, inserting new section 25H into and amending the schedule to the *Serious Sex Offenders Monitoring Act 2005*).
- **Liberty** (Charter s.21(1)): a provision that does not specify a time limit for interim extended supervision orders imposed by the Court of Appeal when remitting a matter to a lower court (clause 21, inserting a new section 39A(3) into the *Serious Sex Offenders Monitoring Act 2005*).
- **Fair hearing** (Charter s. 24(1)): a provision allowing an offender to be excluded from the courtroom during interim extended supervision order hearings (clause 17, inserting a new Division 4A into Part 2 of the *Serious Sex Offenders Monitoring Act 2005*).
- **Presumption of innocence** (Charter s.25(1)): a provision placing an evidentiary onus on offenders charged with disobeying a direction to attend a medical examination to point to evidence establishing a reasonable excuse (clauses 14 & 15, amending s. 7A(3) and inserting a new section 7B(4) into the *Serious Sex Offenders Monitoring Act 2005*).

The Statement of Compatibility contends that these provisions do not infringe the above rights.

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.

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## Statement of Compatibility – References to court decisions – Further explanation where arguable that a right is limited

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 notes that the Statement of Compatibility, when addressing the question of whether or not an extended supervision order is a penalty, stated that a view that orders are not punishments or penalties:

*is consistent with the approach of Courts in a number of other jurisdictions under human rights legislation where protective measures are imposed upon persons who have been convicted of certain offences, including sex offences.*

The Committee observes that the recent unanimous decision of five judges of New Zealand's Court of Appeal in *Belcher v Chief Executive of the Department of Corrections* [2006] NZCA 262 held that a very similar regime for extended supervision orders was a punishment for the purposes of very similar human rights provisions.

Whilst the Committee acknowledges that Statements of Compatibility are not intended to be read by lawyers and that views can reasonably differ on the interpretation and significance of relevant legal authorities, the Committee feels that, where a general claim is made about the approach of 'Courts in a number of other jurisdictions under human rights legislation' to a particular question, the Statement should also draw Parliament's attention to any recent decision of a senior court in a significant comparative jurisdiction concerning similar legislation that is contrary to the approach described. The Committee therefore considers that the Statement should have addressed the *Belcher* decision in its discussion of the compatibility of the bill with Charter ss. 26 and 27(2).

The Committee also notes that the Statement, having concluding that extended supervision orders are not punishments or penalties, did not address whether or not, in the event that Parliament considered that the orders were punishments or penalties, their retrospective application to certain past offenders was a reasonable limit on the Charter rights of those offenders against double jeopardy and retrospective penalties. The Committee observes that, for Parliament to make an assessment of whether or not a provision is compatible with human rights, it is important that the Statement of Compatibility explain whether or how a provision that arguably limits a right is a reasonable limit under Charter s. 7(2).

The Committee recalls its *Alert Digest No. 15 of 2007* where, in response to Ministerial correspondence arguing that a traffic offence hearing was not a 'criminal proceeding' for the purposes of Charter s. 25(2), the Committee stated:

*The Committee considers that, where a provision of a Bill engages or infringes Charter s.25(2) with respect to a matter that even arguably fits the definition of a criminal offence, the Statement of Compatibility should address whether and, if so, how that provision is compatible with Charter ss. 24 and 25(2).*

The Committee is of the opinion that a similar approach should be taken to the words 'punishment' and 'penalty' in Charter ss. 26 and 27.

The Committee therefore considers that, where a provision engages or infringes Charter ss. 26 and 27 with respect to a matter that even arguably fits the definition of a 'punishment' or a

'penalty', the Statement should address whether and, if so, how that provision would satisfy the test in Charter s.7(2).

***The Committee will write to the Minister expressing its concerns about these aspects of the Statement of Compatibility.***

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

## Legislation Reform (Repeals No. 3) Bill 2008

Introduced	15 April 2008
Second Reading Speech	17 April 2008
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Portfolio responsibility	Premier

### Purpose

The Bill repeals specified redundant and spent Acts and amends the *Road Safety Act 1986* to re-enact certain transitional application provisions currently provided for in an Act to be repealed by the Bill.

### Content and Committee comment

#### [Clauses]

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

[3]. Provides for the Acts listed in Schedule 1 to be repealed.

[4]. Provides for the *Road Safety Act 1986* to be amended as set out in Schedule 2 to re-enact transitional provisions found in a 1991 amending Act which is to be repealed by this statute law revision bill.

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

***The Committee notes that this Bill has been referred to it on 17 April 2008 for further inquiry, consideration and report. The Committee intends to table its report on 26 May 2008.***

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

## **Public Sector Employment (Award Entitlements) Amendment Bill 2008**

<b>Introduced</b>	15 April 2008
<b>Second Reading Speech</b>	17 April 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Portfolio responsibility</b>	Minister for Industrial Relations

### **Purpose**

The Bill amends the *Public Sector Employment (Award Entitlements) Act 2006* to repeal provisions relating to the Victorian public sector fairness test for workplace agreements. The Bill also repeals redundant provisions and spent provisions that made consequential amendments to the *Workplace Rights Advocate Act 2005* and the *Commonwealth Powers (Industrial Relations) Act 1996*.

### **Content and Committee comment**

#### **[Clauses]**

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

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

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

## The Uniting Church in Australia Amendment Bill 2008

<b>Introduced</b>	8 April 2008
<b>Second Reading Speech</b>	10 April 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Private Bill</b>	

### Purpose

The Bill amends *The Uniting Church in Australia Act 1977* (the 'Act') to update the definition of Synod, to provide for procedural matters relating to The Uniting Church in Australia Property Trust (Victoria), to make certain other consequential and minor amendments to improve the operation of the Act and to make consequential amendments to 2 other Acts.

### Content and Committee comment

#### [Clauses]

[2]. Other than section 4 the provisions will commence on the day after Royal Assent. Section 4 will commence on 21 September 2008.

[4]. Amends section 12 of the Act to increase from 5 to 7 the number of members of the Uniting Church in Australia Property Trust (Victoria) that are to be appointed by the Synod.

[9]. Provides for the automatic repeal of this Act on 21 September 2009.

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

## Victorian Water Substitution Target Bill 2007

<b>Introduced</b>	16 April 2008
<b>Second Reading Speech</b>	16 April 2008
<b>House</b>	Legislative Council
<b>Member introducing Bill</b>	Hon. Peter Hall MLC
<b>Portfolio responsibility</b>	Minister for Environment and Climate Change
<b>Private Members Bill</b>	

### Purpose

The purpose of the Bill is to promote a reduction in the use of potable water by establishing the Victorian Water Substitution Target scheme (the 'VWST' scheme) which provides for the creation and acquisition of water substitution certificates; and requires the surrender of water substitution certificates.

### Content and Committee comment

#### [Clauses]

[2]. The Act will commence on proclamation but not later than by 1 January 2010.

**Note:** Extract from the Second reading Speech – *The intention would be that the scheme commence as soon as possible following the making of regulations under the Bill.*

[6]. Provides that the Essential Services Commission (ESC) is responsible for the general administration, enforcement, monitoring and auditing of the provisions of the Act.

[39 to 42]. Provides a power of entry to premises either by consent or by means of a monitoring warrant.

[45 and 46]. *Privilege against self-incrimination preserved but not in respect to requirement to produce documents* – An authorised officer may require information and a person must not, without reasonable excuse, fail to answer a question or produce a document required under section 45.

It is a reasonable excuse for an individual to refuse or fail to answer a question or produce a document under section 45 if the answering of the question or the production of the document would tend to incriminate the person however it is not a reasonable excuse for an individual to refuse or fail to produce a document that the person is required to keep by this Act, if the production of the document would tend to incriminate the person.

[50]. Makes provision for monitoring warrants according to the rules applying to warrants under the *Magistrates' Court Act 1989*.

[51]. An affected person in relation to a reviewable decision may request that the ESC reconsider the decision including a decision to refuse an application for accreditation or to suspend a person's accreditation.

[55 and 56]. The ESC may obtain information and documents and may by notice require a person to appear before the ESC to give information or provide a document. A person must not, without reasonable excuse, fail to comply with a notice given to the person under section 55.

[57]. *Protection against self-incrimination* - It is a reasonable excuse for an individual to refuse or fail to give information or evidence or produce a document under section 55 if the

giving of the information or evidence or the production of the document would tend to incriminate the person.

[60 and 61]. Provides for offences relating to the disclosure of confidential or commercially-sensitive information obtained during the exercise of a power or the performance of a function under, or in connection with, this Act offences other than in prescribed circumstances.

[70 and 71] Provides for regulations to be made for the purposes of the Act and for the review of the Act by 31 December 2012.

[72 and 73]. Make consequential amendments to the *Essential Services Commission Act 2001*.

[74]. Repeals Part 9 (sections 72 to 74 – consequential amendments) on 1 January 2011.

## Charter Report

### Reasonable limits – Water substitution certificate scheme – Movement – Privacy – Property

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

The Committee notes that the Bill relates to the regulation of trading (specifically water substitution certificate trading) 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 s7(2), as well as internal limits on particular rights.

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

- **Movement:** (Charter s12): a provision requiring individuals whom the ESC believes has information relevant to the operation of the Bill to appear before the Commission (clause 55(2)(c))
- **Privacy** (Charter s13(a)): provisions
  - requiring applicants for accreditation to disclose information considered necessary for the purposes of the Victorian Water Substitution Target scheme to the ESC (clause 8)
  - requiring the disclosure of information in certificates, notices and registers pursuant to the scheme (clauses 19, 35 , 52, 53 & 54)
  - requiring authorised officers to carry an identity card (clause 37)
  - providing for search of premises for items relating to certificates or scheme acquisitions pursuant to the occupier’s consent or a monitoring warrant issued by a magistrate (clauses 39 to 43)
  - requiring persons at a premises entered pursuant to the occupier’s consent or a monitoring warrant to disclose information and documents relating to certificates or scheme acquisitions to an authorised officer (clauses 44 & 45).
  - requiring persons who the ESC believes have information or documents relevant to the operation of the Bill to give that information and produce those documents (clause 55)

The Statement of Compatibility also characterises the latter provisions as engaging the right to freedom of expression.

- **Property** (Charter s20): Provisions for the surrender of water substitution target certificates if an offence under the Bill is committed (clause 35); the provision of documents to authorised officers who enter premises pursuant to the occupier's consent or a monitoring warrant (clauses 44 & 45); and the copying and retention of documents supplied to the Essential Services Commission pursuant to its examination powers under clause 55 (clauses 58 & 59)

In each instance the Statement of Compatibility contends that the respective rights are not infringed.

The Committee observes that the provisions of the Bill are similar to the Victorian Energy Efficiency Target Bill 2007, considered by the Committee in its *Alert Digest No. 15 of 2007*. In its report on that Bill, the Committee sought further information from the Minister concerning that Bill's equivalent to clause 55, including its breadth and the use of coercive powers and criminal sanctions on people who aren't involved in the trading scheme. The Minister's response to the Committee's questions is set out in *Alert Digest No. 1 of 2008*.

Having considered the above Charter rights and provisions, the Committee is satisfied that the all of 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.***

# Ministerial Correspondence

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## Education and Training Reform Amendment Bill 2008

The Bill was introduced into the Legislative Assembly on 11 March 2008 by the Hon. Bronwyn Pike MLA. The Committee considered the Bill on 7 April 2008 and made the following comments in Alert Digest No. 4 of 2008 tabled in the Parliament on 8 April 2008.

### Committee's Comment

#### 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.**

## **Minister's Response**

*Thank you for your letter of 8 April 2008 outlining the Scrutiny of Acts and Regulations Committee's comments in relation to the Education and Training Reform Amendment Bill 2008 ('the Bill').*

*In your correspondence you seek further information as to why students aged 25 and over are not included in the Victorian Student Number and Victorian Student Register Scheme ('the Scheme') pursuant to section 5.3A.2 of the Bill.*

*The objective of the Scheme is to produce more effective program evaluation and improved delivery of education and training services in order to increase retention rates of students completing year 12 or an equivalent qualification, and to improve existing pathways between secondary and post secondary education.*

*The age of 25 years has been nominated as the upper age limit for the allocation of Victorian student numbers on the basis that the age of 24 is a commonly used standard for defining the maximum age of "young people". Student progress is monitored using the nationally comparable measure of the proportion of 20-24 year olds that have completed Year 12 or equivalent. This measure is calculated by the Australian Bureau of Statistics using their annual Survey of Education and Work. Furthermore, this age range is most relevant for the purposes of the Department of Education and Early Childhood Development as most students undertaking year 12 or equivalent are aged below 25 years.*

*In the past 5 years fewer than 1% of students completing VCE have been aged 25 years or over. These students have generally returned to study of their own volition and are therefore not at the same risk of leaving the education system without obtaining a qualification.*

*The introduction of the Scheme is pivotal to the development of the Victorian Government's Ultranet, an online knowledge management framework for schools. It is envisaged that the Ultranet will provide important opportunities for teachers, students and parents to access and share curriculum content, collaborate in learning activities and record progress against individual learning plans. It is proposed that Department of Education and Early Childhood Development officers will be authorised to utilise the Victorian Student Number for research purposes, to better support schools. It is for this reason that a legislative framework for the implementation of the VSN-VSR Scheme is in place prior to the scheduled introduction of the Ultranet in 2009.*

*I have discussed the scope of the Scheme with the Minister for Skills and Workforce Participation. We recognised that the process of expanding the range of users was a complex one and could only take place after extensive consultation with all stakeholders in the post compulsory sector. We agreed that the Bill should go forward in its current form on the condition that the proposed extension of the Scheme to students aged 25 and over be explored in the near future.*

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

*Hon Bronwyn Pike MP,  
Minister for Education*

*16 April 2008*

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

## Essential Services Commission (Amendment) Bill 2007

The Bill was introduced into the Legislative Assembly on 12 March 2008 by the Hon. Tim Holding MLA. The Committee considered the Bill on 7 April 2008 and made the following comments in Alert Digest No. 4 of 2008 tabled in the Parliament on 8 April 2008.

### Committee's Comment

[2]

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

*The Committee refers to 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.*

### Minister's Response

*Thank you for your letter of 8 April 2008 seeking clarification on the delayed commencement date of the Essential Services Commission (ESC) Amendment Bill 2008 ('the Bill').*

*The default commencement date for the Bill is 1 July 2009. As noted in your letter this does not appear to be compatible with the Committee Practice Note – No. 1 of 17 October 2005, as the commencement date is more than 12 months from Royal Assent.*

*I understand the default commencement date was conservatively selected to allow sufficient time to adequately consult all affected stakeholders. This includes preparation of the new procedures the ESC will implement after this Bill is passed. It is expected that it will be possible to proclaim this Bill before 1 July 2009. This will be well within the 12 months recommended by the Committee.*

*Thank you for the opportunity to respond to the issues raised by the Committee in relation to this Bill. If you require a further briefing or further information, please contact Mr Steve Martin from the Department of Treasury and Finance on 9651 6470.*

*Tim Holding MP  
Minister for Finance, WorkCover  
and the Transport Accident Commission*

*17 April 2008*

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

## Justice Legislation Amendment (Sex Offences Procedure) Bill 2008

The Bill was introduced into the Legislative Assembly on 11 March 2008 by the Hon. Rob Hulls MLA. The Committee considered the Bill on 7 April 2008 and made the following comments in Alert Digest No. 4 of 2008 tabled in the Parliament on 8 April 2008.

### Committee's comment

#### Charter Report

#### ***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 & 464ZF AAA. 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.**

## **Minister's Response**

*Thank you for your letter dated 8 April 2008 regarding your Committee's consideration of the Justice Legislation Amendment (Sex Offences Procedure) Bill 2008.*

*You have drawn my attention to the Committee's report (Alert Digest No. 4 of 2008) in which it identified some typographical errors in the Statement of Compatibility.*

*I thank the Committee for bringing these issues to my attention. The typographical errors have been amended and a revised version will be tabled in the Legislative Council and Hansard has also been notified of the changes.*

*ROB HULLS MP  
Attorney-General*

*21 April 2008*

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

## Police Integrity Bill 2008

The Bill was introduced into the Legislative Assembly on 11 March 2008 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 7 April 2008 and made the following comments in Alert Digest No. 4 of 2008 tabled in the Parliament on 8 April 2008.

### Committee's Comment

#### 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 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.***

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### ***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.**

## **Minister's Response**

Thank you for your letter of 8 April 2008 in which you seek advice in relation to the Police Integrity Bill 2008.

The Police Integrity Bill 2008 ('the Bill'):

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

I note that your letter includes six questions which I will respond to in turn below.

**Will the Director, 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?**

An authority under clause 103 does not provide a defence for any criminal or civil liability for the discharge of a firearm. The purpose of the section is to provide a scheme to regulate when OPI staff may possess, carry and use firearms. If a firearm is possessed, carried or used by OPI staff without an authority from the Director under clause 103, this may be evidence of bad faith.

**For what purposes other than protection of the member will the Director, Police Integrity be able to authorise the discharge of a firearm by a member of the staff of the Office of Police Integrity?**

The Director can only authorise the possession, carrying or use of a firearm for the purpose of protecting the member. The use of the word 'and' in clause 103(2)(a) prevails over the use of the word 'or' in the explanatory memorandum.

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

The purpose of the immunity in clause 69(3) is to protect the human rights of a witness subject to compulsory questioning during an examination by the Director. Clause 69(3) prevents the use of a self-incriminating answer, document or thing in any criminal proceeding, except those in respect of a failure to provide the information or in respect of giving false information. The 'use' immunity provided by clause 69(3) does not extend to derivative evidence (evidence that would not have been obtained but for the self-incriminating evidence) and is drafted in this way for two reasons.

First, the immunity is consistent with the Charter of Human Rights and Responsibilities (the Charter). Section 25(2)(k) of the Charter provides that a person charged with a criminal offence is entitled 'not to be compelled to testify against himself or herself or to confess guilt'. Accordingly, the immunity from self-incrimination is limited in the Bill to criminal proceedings to which the witness is a party.

Second, the 'direct use' immunity is consistent with the approach generally taken in Australia. Statutory restrictions on the indirect or derivative use of evidence compelled from an accused against an accused are rare. Superior courts in other jurisdictions have accepted that the right to a fair trial may preclude the use of certain types of derivative evidence. However, as you note in your letter, Australian courts have not taken this approach. Ultimately, if the prosecution seeks to lead evidence derived from answers given in response to coercive questioning, the court retains its discretion whether the evidence should be admitted in the particular case.

**Where the Director, 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?**

Where a proceeding is on foot, the prosecuting authority is already of the view that sufficient evidence exists for the prosecution to succeed. Clause 46 states that the Director must take all reasonable steps to ensure that the conduct of the investigation does not prejudice those proceedings. This provision reflects the common law position that coercive questioning on matters which form the basis of criminal proceedings constitutes an interference with the due administration of criminal justice (see *Hammond v Commonwealth* (1982) CLR 188). Accordingly, if coercive questioning powers are used to bolster a prosecution's case and obtain additional evidence where proceedings have commenced, the risk of interference in the administration of justice would only be overcome in extraordinary circumstances.

Where intelligence, as opposed to evidence, is inadvertently obtained during an examination and not from the Director's path of questioning, the Director may be obliged to share the

*intelligence with the relevant prosecuting agency. However, this would only arise where the public interest requires the Director to forward the information to the relevant agency.*

***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 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?***

*The procedures in clauses 107 and 108 ('protected document procedures') do not circumvent the inadmissibility of drug and alcohol testing under clause 34 of the Bill and section 85E of the PRA. If a defendant seeks to obtain the results of tests of OPI personnel or police, the evidence will be inadmissible except in the circumstances set out in subclause 34(2) (for OPI personnel) and subsection 85E(2) of the PRA (for police). These provisions operate to protect the privacy of OPI personnel and police in all but a limited list of proceedings. For example, drug and alcohol test results may be admissible in a criminal proceeding that arises out of, or is connected with a critical incident.*

*The purpose of the protected document procedures is to provide the courts with special procedures for dealing with public interest immunity claims by the OPI. The procedures clarify how OPI objections may be determined and do not give defendants additional avenues or grounds for obtaining evidence.*

*Clauses 107 and 108 will only apply to documents containing test results where the admissibility of the document is not restricted (as explained above) and the OPI claims the document is a 'protected document'. For example, where a member of OPI personnel seriously injures a person with the discharge of a firearm, a drug or alcohol test result will be admissible under clause 34. However, the OPI may object to the production of the test result on the grounds that it is a protected document or thing. The court would then determine the OPI's claim using one or more of the procedures in clauses 107 and 108.*

***Given the procedure in clauses 107 and 108, what is the need for clause 34?***

*I refer to and repeat the response to the previous question. The procedures in clauses 107 and 108 serve the purpose of protecting the public interest in keeping sensitive OPI information confidential. Clause 34, on the other hand, operates to protect the personal privacy of OPI operatives.*

*Bob Cameron MP  
Minister for Police & Emergency Services*

*18 April 2008*

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

**Committee Room  
5 May 2008**

# Appendix 1

## Index of Bills in 2008

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### Alert Digest Nos.

Animals Legislation Amendment (Animal Care) Bill 2007	3, 4
Cancer Amendment (HPV) Bill 2008	5
Children's Legislation Amendment Bill 2008	5
Constitution Amendment (Judicial Pensions) Bill 2007	1
Consumer Credit (Victoria) and Other Acts Amendment Bill 2007	1
Co-operatives and Private Security Acts Amendment Bill 2008	4
Courts Legislation Amendment (Associate Judges) Bill 2008	3
Crimes Amendment (Child Homicide) Bill 2007	1, 4
Criminal Procedure Legislation Amendment Bill 2007	1, 2
Crown Land (Reserves) Amendment (Carlton Gardens) Bill 2008	2
Drugs, Poisons and Controlled Substances Amendment Bill 2008	3, 4
Education and Training Reform Amendment Bill 2008	4, 5
Energy and Resources Legislation Amendment Bill 2008	5
Environment Protection Amendment (Landfill Levies) Bill 2008	4
Essential Services Commission Amendment Bill 2008	4, 5
Infringements and Other Acts Amendment Bill 2007	1
Gambling Regulation Amendment (Licensing) Bill 2008	5
Justice Legislation Amendment Bill 2008	5
Justice Legislation Amendment (Sex Offences Procedure) Bill 2008	4, 5
Land (Revocation of Reservations) Bill 2008	4
Legislation Reform (Repeals No. 2) Bill 2007	1
Legislation Reform (Repeals No. 3) Bill 2008	5
Liquor Control Reform Amendment Bill 2007	1
Police Integrity Bill 2008	4, 5
Police Regulation Amendment Bill 2007	1
Port Services Amendment (Public Disclosure) Bill 2008	2
Public Sector Employment (Award Entitlements) Amendment Bill 2008	5
Professional Boxing and Combat Sports Amendment Bill 2007	1
Relationships Bill 2007	1, 3
The Uniting Church in Australia Amendment Bill 2008	5
Victorian Energy Efficiency Target Bill 2007	1
Victorian Water Substitution Target Bill 2007	5
Working with Children Amendment Bill 2007	3, 4

# Appendix 2

## Committee Comments classified by Terms of Reference

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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.**

Children's Legislation Amendment Bill 2008 5

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

Gambling Regulation Amendment (Licensing) Bill 2008 5

Justice Legislation Amendment Bill 2008 5

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	

**Scrutiny of Acts and Regulations Committee**


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Courts Legislation Amendment (Associate Judges) Bill 2008	Attorney-General	11.03.08	04.04.08	3 of 2008	4 of 2008
Drugs, Poisons and Controlled Substances Amendment Bill 2008	Health	12.03.08		3 of 2008	
Education and Training Reform Amendment Bill 2008	Education	08.04.08	16.04.08	4 of 2008	5 of 2008
Essential Services Commission (Amendment) Bill 2007	Finance	08.04.08	17.04.08	4 of 2008	5 of 2008
Justice Legislation Amendment (Sex Offenders Procedure) Bill 2008	Attorney-General	08.04.08	21.04.08	4 of 2008	5 of 2008
Police Integrity Bill 2008	Police & Emergency Services	08.04.08	18.04.08	4 of 2008	5 of 2008