No. 6 of 2008

Tuesday, 27 May 2008

On the

Appropriation (2008/2009) Bill 2008

Appropriation (Parliament 2008/2009) Bill 2008

Constitution Amendment (Judicial Pensions) Bill 2007

Courts Legislation Amendment (Associate Judges) Bill 2008

Criminal Procedure Legislation Amendment Bill 2007

Drugs, Poisons and Controlled Substances (Volatile Substances) (Repeal) Bill 2008

Justice Legislation Amendment Bill 2008

National Gas (Victoria) Bill 2008

Public Health and Wellbeing Bill 2008

State Taxation Acts Amendment Bill 2008

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Glossary

'*Article*' refers to an Article of the International Covenant on Civil and Political Rights;

'*Assembly*' refers to the Legislative Assembly of the Victorian Parliament;

'*Charter*' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006;*

'*child*' means a person under 18 years of age;

'*Committee*' refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;

'*Council*' refers to the Legislative Council of the Victorian Parliament;

'*court'* refers to the Supreme Court, the County Court, the Magistrates' Court or the Children's Court as the circumstances require;

'*Covenant*' refers to the International Covenant on Civil and Political Rights;

'*human rights'* refers to the rights set out in Part 2 of the Charter;

'***penalty units'*** refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette *(currently one penalty unit equals $113.42).*

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.

'***VCAT***' refers to the Victorian Civil and Administrative Tribunal;

Useful provisions

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

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

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

(a) the nature of the right; and

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

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

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

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

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

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

Terms of Reference

Parliamentary Committees Act 2003

17. Scrutiny of Acts and Regulations Committee

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

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

  (i) trespasses unduly upon rights or freedoms;

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

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

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

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

  (vi) inappropriately delegates legislative power;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Committee has considered the following Bills –

Appropriation (2008/2009) Bill 2008

Appropriation (Parliament 2008/2009) Bill 2008

Drugs, Poisons and Controlled Substances (Volatile Substances) (Repeal) Bill 2008

National Gas (Victoria) Bill 2008

Public Health and Wellbeing Bill 2008

State Taxation Acts Amendment Bill 2008

The Committee notes the following correspondence –

Constitution Amendment (Judicial Pensions) Bill 2007

Courts Legislation Amendment (Associate Judges) Bill 2008

Criminal Procedure Legislation Amendment Bill 2007

Justice Legislation Amendment 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. 6 of 2008

Appropriation (2008/2009) Bill 2008

Introduced	6 May 2008
Second Reading Speech	6 May 2008
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Responsible Minister	Hon. John Lenders MLC
Portfolio responsibility	Treasurer

Purpose

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund for the ordinary annual services of the Government for the 2008/2009 financial year.

Content and Committee comment

[Clauses]

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

[3]. Provides that the Treasurer may issue the stated amount out of the Consolidated Fund in respect of the financial year 2008/2009 for the purposes set out in Schedule 1 to the Bill.

[4]. Provides that the Consolidated Fund is appropriated to the extent necessary for the purposes included in clause 3.

The Committee makes no further comment.

Appropriation (Parliament 2008/2009) Bill 2008

Introduced	6 May 2008
Second Reading Speech	6 May 2008
House	Legislative Assembly
Member introducing Bill	Hon. John Brumby MLA
Minister responsible	Hon. John Lenders MLA
Portfolio responsibility	Treasurer

Purpose

This Bill provides appropriation authority for payments of certain sums out of the Consolidated Fund to the Parliament for the 2008/2009 financial year.

Content and Committee comment

[Clauses]

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

[3]. Provides that the Treasurer may issue the stated amount out of the Consolidated Fund in respect of the financial year 2008/2009 for the purposes set out in Schedule 1 to the Bill.

[4]. Provides that the Consolidated Fund is appropriated to the extent necessary for the purposes included in clause 3.

The Committee makes no further comment.

Drugs, Poisons and Controlled Substances (Volatile Substances) (Repeal) Bill 2008

Introduced	7 May 2008
Second Reading Speech	8 May 2008
House	Legislative Assembly
Member introducing Bill	Hon. Lisa Neville MLA
Portfolio responsibility	Minister for Mental Health

Purpose

The Bill repeals the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003* (the amending Act) which for a trial period of 2 years inserted Division 2 into Part IV of the *Drugs, Poisons and Controlled Substances Act 1981* (the Act) giving the police particular powers when dealing with persons under 18 years of age using inhalants. The Bill will enable Division 2 of Part IV of the Act to continue in operation because the sunset provision contained in section 5 of the amending Act is proposed to be repealed.

Note 1: *The amending Act allowed the new scheme to operate for 2 years from its commencement. The 2006 amending (extension of provisions) Act amended the original sunset provision to extend the scheme to 4 years from its commencement. The amending Act commenced operation on 1 July 2004.*

Note 2: Section 1 (the purpose section) of the amending Act provides –

The purpose of this Act is to amend the Drugs, Poisons and Controlled Substances Act 1981 to enable members of the police force —

(a) to search persons without warrant in certain circumstances for the purpose of seizing volatile substances or items used to inhale volatile substances; and

(b) to apprehend and detain persons under 18 years of age to protect them and others from the effects of inhaling volatile substances.

Note 3: *The Committee reported on the amending Act in Alert Digest No.3 of 2003. The explanatory memorandum to the amending Act can be found in the annual volume of the Acts of Parliament 2003, Volume 3 (40 – 60) commencing on page 2229.*

The provisions of the amending Act (inserting new sections 60A to 60T into the Act) include –

- *A purpose section stating that the provisions in the new Division do not create any offence of possessing or inhaling volatile substances or an item used to inhale a volatile substance,*
- *A limitation that provides that the powers in the new Division may only be used in a public place or on private premises with the consent of the occupier or owner of the premises,*
- *A power for police to use reasonable force to search a person under the age of 18 for volatile substances without a warrant,*
- *Search any person (irrespective of age), vehicle, package or thing in a person's possession for a volatile substance or an item used to inhale a volatile substance ('an item') where the police have reasonable grounds to belief that the person intends to provide a volatile substance or an item to a person under 18 years of age to inhale.*
- *Request an explanation why any person is carrying or in possession of volatile substances,*
- *Seize volatile substances whether an explanation is given or not as to why the person is carrying or in possession of the volatile substance,*

- *Apprehend and detain a person under 18 years of age where there are reasonable grounds for believing that such a person has inhaled or inhaling volatile substances and is likely to cause immediate bodily harm to themselves or any other person.*
- *Detain a person for such time until the person may be released into the care of a person able to take care of the detained person where the other person consents to care of the detained person. Detention must not be in a police gaol, cell or lock-up and the detained person must not be interviewed by police in relation to any offence,*
- *Dispose and forfeiture of volatile substances to the Crown.*

Content and Committee comment

[Clauses]

[2]. The provisions in the Bill come into operation on 30 June 2008.

[3]. Repeals the amending Act which inserted the new Division 2 in Part IV of the Act for a 2 year (later extended) trial period. Section 5 of the amending Act contained the sunset provision which was to come into force at the end of the trial period. The repeal of the amending Act allows the amendments to remain in force as the sunset provision will not come into operation.

[4]. Repeals this amending Act on 30 June 2009.

Charter Report

Privacy – Property – Liberty – Drug use by children – Harm minimisation – 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. 17(2) provides that children are entitled to such protection as is in their 'best interest'.

The Committee notes that clause 3 repeals the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003*, s. 5 of which is a sunset clause for Division 2 of Part IV of the *Drugs, Poisons and Controlled Substances Act 1981*. The Committee observes that the compatibility of clause 3 with the Charter therefore depends on the compatibility of existing Division 2 of Part IV with the Charter.

The Committee also notes that Division 2 of Part IV deals with the detection and prevention of inhaling of volatile substances by 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:

- **Privacy** (Charter ss.13(a)): provisions for the search, without warrant, of children who are reasonably suspected of inhaling volatile substances (s. 60E) and of people who are reasonably suspected of supplying volatile substances or items to children to use to inhale (s. 60F)
- **Property** (Charter s.20): provisions for the seizure of items that are suspected of being used by or given to a child to inhale (ss.60J & 60K)
- **Liberty** (Charter s.21(1)): provisions for the detention of children who are likely to harm themselves or another person and to hold them until they are released into the care of a person who is capable of caring for them (ss.60L & 60M)

The Statement of Compatibility contends that these provisions (in the context of other protective provisions in the Act) do not infringe the rights to privacy, property or liberty, and also promote the right of children to protection.

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 also considers that clause 3 promotes the Charter right of children to such protection as is in their best interests.

Age discrimination – Search, seizure and detention of people suspected of inhaling – Whether discrimination against children – Whether discrimination against adults

Charter s. 8(2) provides that everyone has the right to 'enjoy his or her human rights without discrimination'. Charter s. 8(3) provides that everyone is entitled to 'equal protection of the law without discrimination'. Discrimination includes discrimination on the basis of age. 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 existing s. 60A of the Drugs, Poisons and Controlled Substances Act 1981 provides that the purpose of Division 2 of Part IV is 'to protect the health and welfare of persons under 18 years of age'. The Committee also notes that the following provisions of Division 2 are limited to persons under 18 years of age:

- The requirement for police exercising their powers to take into account the best interests of the person (s.60B)
- Provisions for searching a person or seizing items based on that person's suspected inhaling (ss.60F, 60J(a) & 60K(a))
- Provisions for searching for or seizing items based on the suspicion that the items will be given to a person to inhale (ss. 60F, 60J(b-c) & 60K(b)(ii-iii))
- Provisions for detaining people likely to harm themselves or others until someone is available to care for them (ss.60L(a) & 60(1))
- Provisions barring the return of items to people unless accompanied by a parent or guardian (s.60N(4))

The Committee considers that clause 3 may engage the rights of people aged under 18 to enjoy their rights without discrimination. The Committee also considers that clause 3 may engage the rights of people aged 18 or over to equal protection of the law.

The Statement of Compatibility remarks:

> *The powers of the police contained in division 2 of Part IV will remain in the Drugs, Poisons and Controlled Substances Act 1981 because studies have shown that young people are more likely to be involved in inhaling volatile substances because of the cost, availability and accessibility. Whilst under the influence of volatile substances, young persons are more likely to have accidents and injure themselves in some way.*

The Committee observes that the question of the compatibility of clause 3 with the Charter's rights to equality may depend on whether or not the restrictions of the other provisions to people aged under 18 are reasonable limitations on those rights according to the test in Charter s.7(2).The Minister remarked in her Second Reading Speech:

> *The reviewed data shows that the majority of chroming incidents occur in the age group of people up to the age of 18. In 2004-05 the MAS attended 123 incidents of inhalant abuse in the under-18 age group. This equates to 51 per cent of all attendances by MAS staff being to young people aged under 18. Public hospital accident and emergency departments show a similar trend, reporting that where inhalant abuse was the primary concern, 62 per cent of presentations in 2004-05 and 53 per cent in 2005-06 occurred in the under-18 age group.*

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

- clause 3 discriminates against the right of people under 18 to equal enjoyment of their rights to privacy, property and liberty without discrimination
- clause 3 discriminates against the right of people 18 or over to equal protection of the law from dangers to health and wellbeing caused by inhalants without discrimination
- in either case, clause 3 is a reasonable limit on the Charter's rights against discrimination according to the test in Charter s. 7(2)

The Committee makes no further comment.

National Gas (Victoria) Bill 2008

Introduced	7 May 2008
Second Reading Speech	8 May 2008
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Minister for Energy and Resources

Purpose

The Bill —

- applies the National Gas Law (NGL) and National Gas Rules (NGR) as laws of Victoria and will repeal the *Gas Pipelines Access (Victoria)* Act *1998*;
- provides for transitional arrangements in relation to access arrangements relating to pipeline services provided by means of distribution pipelines;
- provides for the transfer of responsibility for Victorian specific economic regulation of pipeline services provided by means of distribution pipelines from the Essential Services Commission (ESC) to the Australian Energy regulator (AER).

Content and Committee comment

[Clauses]

[2]. The Bill comes into operation on proclamation.

> **Note:** From the explanatory memorandum – *The clause does not specify a default commencement date because the Bill is implementing a nationally agreed legislative scheme. It is the intention of the scheme that it comes into operation on the same day in all of the participating jurisdictions. The clause provides for maximum flexibility in relation to the commencement of the Bill to ensure that the nationally agreed legislative scheme will commence in Victoria on the nationally agreed day.*

[7]. Applies, as a law of Victoria, the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia. The applied Law is to be referred to as the National Gas (Victoria) Law.

[8]. Applies, as regulations for the purposes of the National Gas (Victoria) Law, the regulations in force under Part 3 of the *National Gas (South Australia) Act 2008* of South Australia. The applied regulations are to be referred to as the National Gas (Victoria) Regulations.

Parliamentary Committees Act 2003, section 17(a)(vii) – 'insufficiently subjects the exercise of legislative power to parliamentary scrutiny'

The Committee commented on the predecessor legislation to this Bill, the Gas Pipelines Access (Victoria) Bill, in Alert Digest No. 3 of 1998. The Committee there raised a number of concerns that are typically found in national schemes legislation or application of laws Acts. The principal issue for the Committee concerns Parliamentary scrutiny of such proposed laws. In this Bill the Parliament is asked to apply the law of South Australia (the lead jurisdiction) as a law of Victoria. The National Gas (South Australia) Act 2008 (the 'South Australian Act') to be applied is an appendix to the Victorian Bill and this appendix consists of –

- *the South Australian explanatory memorandum,*
- *the South Australian Act (sections 1 to 22) and*
- *the schedule to the South Australian Act which is the National Gas Law to be applied in each jurisdiction.*

The Committee notes that in respect to clause 7 of the Bill adopting the National Gas Law (as set out in the schedule of the South Australian Act) the Committee's counterpart scrutiny committees in New South Wales and Queensland made the following observations –

> Legislation Review Committee (NSW) – *Although the NSW Parliament has the present Bill before it there is no scope to debate the need for any modification of the National Gas Law as it has already been signed off by all parties including NSW. The Committee is of the opinion that it would be an advantage if the NSW Parliament could be given an earlier opportunity, possibly through an exposure draft, to express its views on future national scheme legislation rather than have it presented for adoption in a final form that has already been agreed to or implemented by the Commonwealth and the other Australian States.*
>
> Scrutiny of Legislation Committee (Qld) – *The Committee in common with the legislative scrutiny committees of the parliaments of other States and the Commonwealth, has identified concerns that elements of intergovernmental legislative schemes might undermine the institution of Parliament. In relation to amendments to uniform legislation, the committee's concerns relate to the degree of flexibility retained by each jurisdiction in its consideration of proposed amendments.*
>
> *The Committee refers to Parliament the question whether the bill has sufficient regard to the institution of Parliament.*

Clause 8 of the Victorian Bill also applies the regulations made under Part 3 of the South Australian Act (sections 10 – 13) as the Victoria regulations which may be referred to as the National Gas (Victoria) Regulations.

Section 11 of the South Australian Act expressly provides that Parliamentary disallowance of the regulations is excluded. The section also provides that regulations may only be made on the unanimous recommendations of the Ministers of the participating jurisdictions.

The Committee notes its comments made in May 1998 –

> *The Committee is also troubled at the prospect of the Victorian Parliament adopting regulations which are made interstate. Again, there is no chance of appropriate scrutiny or input. It seems to the Committee that this is not sound Parliamentary practice.*

Once again, in respect to the regulations the Committee notes the response of the then Minister the Hon. Alan Stockdale MLA in May 1998 –

> *In order to balance the objective of effecting Victoria's commitments to national competition policy reform under COAG Agreements with the objective of appropriate scrutiny, I invite the Committee to be involved in the process leading up to the approval of the "lead regulations"*

The Committee notes that there may be good reasons where national scheme regulations are involved to not allow for parliamentary disallowance, however the Committee is of the view that does not mean that such regulations should not be subject to some form of parliamentary or independent oversight.

Having considered these matters the Committee will seek further advice from the Minister concerning the following –

1. ***Will the regulations or any amendments to the regulations be subject to***

parliamentary or independent review or scrutiny by any jurisdiction?

2. ***Where future national scheme legislation is negotiated involving application of laws in this jurisdiction will the Minister consider the possibility of releasing draft exposure Bills for scrutiny by a Parliamentary Committee?***
3. ***Will any amendments made to the South Australian Act and or the schedule to that Act come before the Victorian Parliament for counterpart amendment***
4. ***Does Charter section 32 (Interpretation of laws) apply to the National Gas (Victoria) Law, the National Gas (Victoria) Regulations, the National Gas Rules and statutory instruments made under them as they apply in Victoria? (also refer to Charter Report below).***

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

The Committee refers to the Parliament the broader question of whether the Bill has sufficient regard to the institution of Parliament.

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

[16]. Declares that it is the intention of section 14(2) of the Bill to alter or vary section 85 of the *Constitution Act 1975*.

> **Note:** From the explanatory memorandum – *Section 14(2) provides that no proceeding for judicial review or for a declaration, injunction, writ, order or remedy may be brought before the Supreme Court to challenge or question any action, or purported action, of a relevant Minister taken, or purportedly taken, in relation to a cross boundary distribution pipeline unless this jurisdiction has been determined to be the participating jurisdiction with which the cross boundary distribution pipeline is most closely connected. The effect of the provision is that proceedings may only be brought in the Supreme Court of the jurisdiction with which a cross boundary distribution pipeline is most closely connected.*

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

> *Clause 14(1) of the Bill provides that if a pipeline is a cross-boundary pipeline, any action taken under the national gas legislation of a participating jurisdiction in whose jurisdictional area a part of the pipeline is situated (by a relevant minister or court) is taken also to be taken under the national gas legislation of each participating jurisdiction in whose jurisdictional area a part of the pipeline is situated (by a relevant Minister or Court as the case requires).*
>
> *Clause 14(2) of the Bill provides that no proceeding for judicial review or for a declaration, injunction, writ, order or remedy may be brought before the Court to challenge or question any action, or purported action, of a relevant minister taken, or purportedly taken, in relation to a cross boundary distribution pipeline unless this jurisdiction has been determined to be the participating jurisdiction with which the cross boundary distribution pipeline is most closely connected.*
>
> *The relevant minister in relation to a cross-boundary distribution pipeline is determined by the National Competition Council under the national gas law.*
>
> *The reasons for the variation to the application of section 85 of the Constitution Act 1975 are as follows.*
>
> *The purpose of clause 14(2) is to prevent jurisdiction forum shopping in relation to decisions of a relevant minister relating to cross boundary distribution pipelines.*

The effect of the provision is that proceedings may only be brought in the Supreme Court of the jurisdiction with which a cross-boundary distribution pipeline is most closely connected.

Clause 14 of the Bill is a uniform provision that forms part of the nationally consistent scheme for regulation of pipeline services provided by means of transmission and distribution pipelines. It is the intention that it will be enacted in identical terms by all of the parliaments of the state and territory participating jurisdictions. The provision is necessary for the integrity of nationally agreed scheme.

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

The Committee having reviewed the section 85 statement made in the Second Reading Speech, the declaratory and enabling clauses and the explanatory memorandum and having regard to the desirability of giving uniform effect to a national regulatory scheme is of the view that the proposed provisions altering or varying section 85 of the Constitution Act 1975 are appropriate and desirable in all the circumstances.

[39]. Repeals the *Gas Pipeline Access (Victoria) Act 1998*.

Appendix

National Gas (South Australia) Bill 2008

The incorporated South Australian Act (the National Gas Law) includes the following provisions that may test the Committees terms of reference under section 17(a) of the *Parliamentary Committees Act 2003*.

- Search *warrants issued by a Magistrate on the lower threshold of 'reasonably suspects' (clause 35),*
- Power *to obtain information or documents (clause 42),*
- Privilege *against self-incrimination preserved (clause 42(6) and 63),*
- *Legal professional privilege preserved (clauses 42(8) and 62),*
- *Natural justice – public hearing – hearing may be held in private (clause 196), power to summons persons to give evidence before a dispute resolution body, penalty for refusing to answer questions (other than self-incriminating questions) (clauses 201 and 203).*

Charter Report

Interpretation of legislation compatibly with human rights and by reference to relevant human rights decisions – Whether the Charter's interpretation provision applies to the National Gas (Victoria) Law, Regulations Rules and statutory instruments – Absence of an override declaration

Charter s.31 provides that 'Parliament may expressly declare in an Act that that Act has effect despite anything else set out in this Charter'. Charter s.32(1) provides that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' Charter s.32(2) provides that any court judgment 'relevant to a human right may be considered in interpreting a statutory provision'.

Charter s.3 defines 'statutory provision' to include an Act or a subordinate instrument. Section 38 of the *Interpretation of Legislation Act 1984* defines 'Act' to mean 'an Act passed by the Victorian Parliament' and 'subordinate instrument' to mean rules and other legislative documents 'made under' such an Act.

The Committee notes that the Bill applies the following documents as laws of Victoria:

- a schedule ('the National Gas Law') to the *National Gas (South Australia) Act 2008* (SA) (clause 7 of the Bill)
- *regulations* in force under the *National Gas (South Australia) Act 2008* (SA) (clause 8 of the Bill)
- rules made by either a South Australian Minister or the Australian Energy *Market* Commission under Chapter 9 of the National Gas Law (clause 26 of the National Gas Law)
- statutory instruments made pursuant to the National Gas Law and clause 21 of *schedule* 2 to the National Gas Law

The Committee observes that these various documents when they apply in Victoria may not be 'statutory provisions' for the purposes of the Charter.

The Committee also notes that clause 20 of the National Gas Law provides that Schedule 2 to the National Gas Law applies to the National Gas Law and regulations and statutory instruments made under it. The Committee observes that Schedule 2 to the National Gas Law provides for rules on interpretation (clause 7 of Schedule 2 to the National Gas Law, requiring an interpretation that will 'best achieve the purpose' of the National Gas Law) and extrinsic material (clause 8 of Schedule 2 to the National Gas Law, setting out situations when consideration may be given to extrinsic material) that may be inconsistent with Charter ss.32(1) & 32(2).

The Committee is concerned that Charter s.32 may not apply to the National Gas (Victoria) Law, the National Gas (Victoria) Regulations and the National Gas Rules and statutory instruments made under those rules (as applied in Victoria.).

The Committee considers that any document given force of law by the Parliament should be subject to Charter s.32 unless Parliament makes an override declaration in accordance with Charter s.31.

The Committee therefore draws attention to clauses 7 and 8.

Privacy – Expression – Property – Fair hearing – Access to an energy resource – 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'.

The Committee notes that the National Gas Law provides for the regulation of third party access to an energy resource. 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 National Gas Law that are said to engage the following Charter rights:

- **Privacy** (Charter s. 13(a)): provisions for search warrants for things connected to a breach of the National Gas Law, Regulations or Rules (clause 35 of the National Gas Law).
- **Expression** (Charter s. 15(2)): provisions for the Australian Energy Regulator to require a person to provide information required for the Australian Energy Regulator to exercise its function (clause 42 of the National Gas Law); criminalising the provision of false information to the Australian Energy Regulator (clause 60 of the National Gas Law); allowing the Australian Energy Regulator to order a person not to disclose information received during an access dispute (clause 200 of the National Gas Law); requiring persons summonsed before the Australian Energy Regulator to answer questions unless there is a reasonable excuse (clause 203 of the National Gas Law) and barring people associated with a website (the National Gas Services Bulletin Board) from disclosing information received for that website for purposes not connected with the website (clauses 227 & 228 of the National Gas Law).
- **Property** (Charter s. 20): provisions for search warrants for things connected to a breach of the National Gas Law, Regulations or Rules (clause 35 of the National Gas Law).
- **Fair hearing** (Charter s. 24(2)): provisions for private hearings on access to a pipeline unless both parties consent (clause 196 of the National Gas Law).

The Statement of Compatibility contends that these provisions (in the context of other protective provisions in the Act) 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.

However, the Committee is of the view that s.11 of the South Australian legislation which provides that parliamentary disallowance of regulations is excluded undermines the sovereignty of the Victorian Parliament, and other future template legislation should be handled as exposure drafts allowing sufficient opportunity for parliamentary scrutiny.

The Committee makes no further comment.

Public Health and Wellbeing Bill 2008

Introduced	7 May 2008
Second Reading Speech	8 May 2008
House	Legislative Assembly
Member introducing Bill	Hon. Daniel Andrews MLA
Portfolio responsibility	Minister for Health

Purpose

The purpose of the proposed new principal Act (the 'Act') is to provide for a legislative scheme to protect and promote public health and wellbeing in Victoria. The Act repeals the *Health Act 1958* and makes consequential amendments to other relevant Acts.

Glossary

CHO means 'Chief Health Officer'

SMO means 'Senior Medical Officer'

Public submissions invited

The Committee placed public notices in the *Herald-Sun* and *The Age* on Friday 16 May 2008 inviting persons and organisations to make written submissions to the Committee within its terms of reference by Wednesday 28 May 2008.

Depending on the content of any written submissions received the Committee may hold public hearings. The Committee may report on this Bill again in a future Alert Digest.

Content and Committee comment

[Clauses]

[2]. The Act is proposed to come into operation on proclamation but not later than by 1 January 2010.

> **Note:** From the explanatory memorandum – *The commencement period allows for the making of new regulations and for other necessary implementation measures.*

Part 3 (sections 15 to 32) sets out the functions of the Secretary, the Chief Health Officer (CHO) and local councils in administering the Act.

[17]. Sets out the functions of the Secretary including establishing and maintaining a comprehensive information system of the health status of certain persons or classes of persons including the extent and effects of disease, illness and disability.

[19]. Provides a power of delegation for the Secretary by which the Secretary may delegate a power, duty or function of the Secretary under this or any other Act or under regulations under this or any other Act to the persons set out in the section.

[20 to 23]. There is to be appointed a Chief Health Officer ('CHO').

[24 to 28]. The Division sets out the functions of municipal Councils and makes provision for public health and wellbeing plans. The Division further sets out special powers available to the Secretary only during a "state of emergency" declared by the Minister. In that period, the

Secretary may direct a Council or an officer of a Council to perform any function or duty, or exercise any power as directed by the Secretary.

[29 to 32]. The Division deals with environmental officers appointed by municipal Councils and by the Secretary.

Part 4 (sections 33 to 48) provides for **c**onsultative councils (experts and specials) established by Ministerial Order that may analyse and report on matters, inquire into specific areas of medical specialisation, monitor services, collect, publish and disseminate relevant information.

[39]. The Chairperson of a prescribed Consultative Council may request information from a health service provider or a pathology service.

The information requested by the Chairperson may be general or specific in nature and must be considered by the Chairperson to be necessary to the performance of the functions of the prescribed Consultative Council.

This clause provides that a health service provider or pathology service to which this section applies is authorised to provide the requested information.

> **Note:** *Section 227 provides protections to persons who give information they are authorised or required to give under this Act.*

[40]. Provides for the mandatory notification by health service providers and pathology services of prescribed information to prescribed Consultative Councils established by the Minister. Regulations may be made to specify the manner, form and period in which a prescribed health service provider or prescribed pathology service must supply prescribed information to the Council. Failure to comply with the request is an offence that can result in a penalty of up to 10 penalty units.

> **Note:** *Section 227 provides protections to persons who give information they are authorised or required to give under this Act.*

[41]. Provides that a prescribed Consultative Council may provide information to the bodies specified in this section if the Consultative Council determines that it is in the public interest to do so.

[42]. Sets out the confidentiality obligations applying to persons who are or have been members of a prescribed Consultative Council or its sub-committees, or have been employed or engaged or made available to a prescribed Consultative Council or its sub committees.

A person cannot be required to produce before any judicial officer or tribunal documents or information that is within the person's knowledge or control because of his or her relationship with the Consultative Council. Further it is not possible to apply for the documents or information through provisions of the *Freedom of Information Act 1982*.

The provisions of Part 5 and Health Privacy Principle 6 of the *Health Records Act 2001* do not apply to information or documents with the effect that a person cannot seek health information held about him or her by a prescribed Consultative Council.

A Consultative Councils is able to include in documents information that does not identify individuals.

[43]. A person cannot be required to produce documents or copies of documents to a court, tribunal, board, agency or other person if the documents were created for the sole purpose of

providing information to the prescribed Consultative Council and were provided to the prescribed Consultative Council by or on behalf of that person.

It is not possible to apply for the documents or information through the provisions of the *Freedom of Information Act 1982* and Part 5 and Health Privacy Principle 6 of the *Health Records Act 2001* do not apply to documents or information.

[44 to 48]. Are provisions applying to the Consultative Council on Obstetric and Paediatric Mortality and Morbidity (CCOPMM). The CCOPMM may require persons to report on and provide information concerning the birth and death of children.

Part 5 (sections 49 to 57) provides for a State Public Health and Wellbeing Plan.

[50 to 52]. Provides for the conduct by the Secretary of public inquiries into serious public health matters. The Minister has the power to direct the Secretary to conduct a public inquiry and the Secretary may appoint a suitably qualified person or panel of persons to conduct a public inquiry.

[55]. Authorises a person to provide information to the Secretary, the Chief Health Officer or an authorised officer if the person reasonably believes that the disclosure is necessary to assist the Secretary, the Chief Health Officer or the authorised officer to perform a function or duty or exercise a power under this Act or the regulations.

> **Note:** *Section 227 provides protections to persons who give information they are authorised or required to give under this Act.*

Part 6 (sections 58 to 78) sets out the regulatory provisions administered by municipal Councils. For example performing duties in respect to the registration of certain premises, disposal of refuse, animals and remedying public nuisances.

[61]. Creates an offence to cause or knowingly allow a nuisance on any land owned or occupied by a person without a lawful excuse. (See comment below c.203).

[69]. A person must register certain business premises unless they are exempt from registration. (See comment below c.203).

Part 7 (sections 79 to 110) deals with specific regulatory provisions administered by the Secretary.

[79 to 98]. *Cooling tower systems* – The Division makes provision for the registration by the Secretary of cooling tower systems. The register containing details of the location of registered cooling tower systems must be available for inspection by members of the public during normal office hours. The Division also deals with cooling tower system risk management plans and the auditing requirements of such plans and the certification of, and the conduct of approved qualified auditors.

[99 to 110]. *Pest control* – Deals with pest control licences and makes it an offence for a natural person, in the course of the business of a pest control operator, to use any pesticide or class of pesticide without a pest control licence authorising him or her to use that pesticide or class of pesticides and provides exemptions from the offence provision for those using pesticides for the purposes specified, such as horticulture, agriculture, and the control of pest animals to protect an area that is not a commercial building or domestic premises. There are age restrictions applying to such licences.

Part 8 (sections 111 to 165) Management and control of infectious diseases, micro-organisms and medical conditions.

[113]. *Examination and testing order* – Permits the CHO to make an examination and testing order relating to a person who has, or has been exposed to, an infectious disease.

The clause sets out the grounds on which the CHO may take this action, which include that if the person has the disease, there is a serious risk to public health. It also sets out requirements for the form and content of the examination and testing order.

Detention of person – quarantine – isolation

If the person fails to undergo a specified examination or test, the person may be detained, in isolation if necessary given the nature of the disease, at a specified place for a period up to 72 hours for the purpose of testing and examination.

The examination and testing order may be subject to any conditions the CHO considers appropriate.

[115]. Obliges a registered medical practitioner who conducts an examination or test to provide the results to the CHO and to the person on whom the examination or test was conducted.

> **Note:** *Section 227 provides protections to persons who give information they are authorised or required to give under this Act.*

[116]. Makes it an offence for a person to fail to comply with an examination and testing order.

Public Health Order – Obligations to receive treatment and supervision – Detention – Restrictions on movement, residence, behaviour and activity

[117]. The CHO may make a public health order ('Order') relating to a person who has, or has been exposed to, an infectious disease and sets out the grounds on which the CHO may take this action. An Order must not continue to have effect for a period greater than 6 months from the day it is made and must be proportionate to the risk that the person poses to public health.

A person subject to a public health order also has the right under section 45 of the *VCAT Act 1998* to request the CHO to provide a written statement of reasons for the decision.

An order may impose a number of restrictions or obligations that a person subject to a public health order may be required to comply with. These range from participating in counselling, to undergoing assessment by a psychiatrist or neurologist, to refraining from carrying out specified activities or behaviour absolutely or unless specified conditions are complied with, refraining from visiting a specified place or class of place, residing at a specified place during specified times and informing the CHO of a change of residence, to submitting to the supervision of a nominated person, to receiving a specified treatment and to submitting to detention or detention and isolation as specified.

A person may be directed not to use public transport or attend school or work (either absolutely or unless stated conditions are observed) in order to minimise the person's contact with others.

[119]. The CHO may request a registered medical practitioner to provide information in relation to a person to the CHO for the purpose of making a decision about a public health

order, the registered medical practitioner must provide that information in writing to the CHO as soon as is reasonably practicable.

> **Note:** *Section 227 provides protections to persons who give information they are authorised or required to give under this Act.*

[120]. It is an offence for a person to fail to comply with a public health order.

[121 and 122]. A person subject to a public health order may apply to the CHO for an internal review of the order or an external review before the VCAT. Unless a stay is applied for and granted by VCAT the order will remain in force pending the outcome of the review.

> **Note:** *Discrimination against a person on the basis that they have an infectious disease is lawful under both the Equal Opportunity Act (Vic), section 80 and the Disability Discrimination Act 1992 (Cth), section 38.*

Enforcement of order

[123]. An authorised officer who is a registered medical practitioner may enforce an examination and testing order or a public health order and may request the assistance of a member of the police force.

A requirement in an examination and testing orders or a public health order that a person undergo any examination, test, pharmacological treatment or prophylaxis cannot be enforced by the use of force.

The clause provides that a member of the police force may use reasonable force to detain the person subject to an order under this section and to take that person to a place where an examination or test is to be carried out, or to another place where the person is required to be under the order. The reasons why a person is arrested or detained under this section must be explained to the person arrested or detained.

The clause provides that if he or she believes it necessary to enforce an order under this Division, an authorised officer may apply to the Magistrates' Court for a warrant for the arrest of a person subject to the order. The warrant may specify any conditions to which it is subject.

[124]. No action lies against a registered health practitioner who in good faith and with reasonable care takes specified action in accordance with an order.

> **Note:** *Refer to section 85 Constitution Act 1975 statement and report at [240] below.*

[125]. The CHO must facilitate any reasonable request for communication with others made by a person detained under an order.

Notifiable conditions – obligations to notify the Secretary of certain information

[126]. The Governor in Council may by Order declare an infectious disease or micro-organism to be a notifiable condition or notifiable micro-organism and sets out the details of notification that must be specified in the Order. An Order made under this provision is reviewable under Part 5 (Scrutiny, Suspension and Disallowance) of the *Subordinate Legislation Act 1994* as though it was a 'statutory rule' within the meaning of that Act.

[127 to 130]. A registered medical practitioner, pathology service or laboratory must notify the Secretary of a notifiable condition and sets out the details that must be provided with the notification. Failure to comply with these requirements is an offence.

> **Note:** *A notifiable condition is defined in section 3 of the Act. Notifiable diseases and conditions will be prescribed in regulations.*

HIV and other prescribed diseases (Division 4 – ss. 131 to 133)

[131 and 132]. *Information to be provided prior to testing and post test counselling* – A registered medical practitioner must not carry out on any person an HIV (or other prescribed disease) test unless the person has been given certain information prescribed by the regulations and also provides requirements relating to post-test counselling where positive tests are recorded for HIV and other prescribed diseases.

[133]. ***Court may be closed*** – Provides for the making of orders for the closure of a court or tribunal if the court or tribunal is satisfied that social or economic consequences to a person may follow the disclosure of information regarding HIV or other prescribed disease during court or tribunal proceedings.

[134]. *Order for test where incident has occurred* – The CHO may make an order for a person involved in a workplace incident to be tested for a specified infectious disease.

If it is necessary to enforce an order the CHO may apply to the Magistrates' Court for an order to authorise a member of the police force to use reasonable force to take the person named in the order to the place specified in the order; or restrain the person named in the order so as to enable a registered medical practitioner to take a sample of blood or urine; or take the person named in the order to the place specified in the order and restrain the person named in the order so as to enable a registered medical practitioner to take a sample of blood or urine.

The clause also provides for circumstances in which an order may be made when the person to be tested has died, or is unconscious or otherwise lacks capacity to consent to being tested.

> **Note:** *Orders made under this section are not a response to a serious risk to public health, but a response to a particular type of risk of infection to which caregivers and custodians may be exposed in the occupational setting.*

[136]. *Access and disclosure of information* – Where an order is made under section 134 the CHO may examine relevant health information held by the Department in relation to that person. The CHO may also require a health service provider to provide to the CHO any relevant health information held by it in relation to that person.

The section provides that the CHO can only use the information obtained under this section for the purposes of the Division.

The clause outlines the conditions under which the CHO may disclose health information about a person obtained under this section to another person involved in an incident and limits the disclosure of identifying information about a person by another person to whom it has been provided for the purposes of this section.

Health information about a person obtained under this section is not admissible in any legal proceedings including a criminal prosecution.

[137]. Enables a Senior Medical Officer ('SMO') (as defined by the section) to make the same orders as under clause 134 with respect to an incident relating to the health service where the SMO is employed. However the enforcement provisions do not apply to section 137 (*see ss. 134(3) and 134(4)*).

[138]. Where testing occurs under section 134 the relevant person must be counselled by a registered medical practitioner.

[139]. A registered medical practitioner or pathologist who conducts a test under, or in relation to, an order or authorisation must communicate the results to the CHO or the SMO who ordered or authorised the test without delay.

On receiving the test results, CHO or senior medical officer must without delay give notice of the test results to the specified persons including the person tested.

Health information about a person obtained under this section is not admissible in any legal proceedings including a criminal prosecution.

[140]. A person receiving a test result under section 134 must not disclose information which would identify another person upon whom a test was performed.

[142] *Immunity for actions performed in good faith* – No action lies against a registered health practitioner who in good faith and with reasonable care takes a sample of blood or urine, or conducts a test in accordance with the Division or provides information about tests results or counselling authorised by the Division.

> **Note:** *Refer to section 85 Constitution Act 1975 statement and report at clause 240 below.*

[144 to 149]. Division 7 of Part 8 concerns immunisation and requires parents of primary school children to provide an immunisation status certificate ('ISC') to the school in respect to vaccine-preventable diseases. An ISC may include a statutory declaration by the parent declaring that the child has been vaccinated against the vaccine-preventable disease.

Blood and tissue donations – Statutory defence – Immunity of donors

[150]. The Division declares that it applies to any legal action in tort, in contract, under statute or otherwise by or on behalf of a person who claims to have been infected with an infectious disease (being HIV, Hepatitis C or a prescribed disease) by donated blood or blood products made from donated blood, or by donated tissue. It provides a statutory defence in specified circumstances to any action commenced after this section comes into effect.

> **Note:** The Statement of Compatibility provides – *This division extends a scheme of statutory defences to actions brought on or on behalf of a person who claims to have been infected with HIV, hepatitis C or a prescribed disease because he or she was given blood, blood products or tissue donated by another person. The purpose of the division is to help maintain the viability of the Australian Red Cross Society and to encourage those who regularly donate or are considering donating blood in good faith to continue doing so.*

[151]. *Blood donations – Red Cross and other health services – statutory defence* – Provides a defence in legal proceedings and sets out the circumstances in which the statutory defence is available (see Table 1 in the Schedule).

> **Note:** *The defence provides protection from legal liability to the Australian Red Cross Society and other health services, to those employed by them, and to registered health professionals that deal appropriately with donated blood for the benefit of the community.*

[152]. *Tissue donations – health services – statutory defence* – Provides a defence in legal proceedings and sets out the circumstances in which the statutory defence is available (see Table 2 in the Schedule).

> **Note:** *The defence provides protection from legal liability for health services, registered medical practitioners and others that deal with donated tissue in the course of infertility treatment and other medical treatment.*

[154 and 155]. No action lies against a donor for the transmission of an infectious disease to another person from his or her donation unless the donor has been prosecuted and found guilty of the offence of knowingly making a false statement on the donation form. It is an offence for a person to knowingly make a false statement in relation to his or her donation of blood or tissue.

Autopsies

[156]. Permits the CHO to order an autopsy to be conducted in circumstances where public health may be at risk or where a death was caused by an infectious disease. The CHO may order that a body to be transported to a particular registered medical practitioner. It is an offence for a person to fail to give possession of the body to a registered medical practitioner when directed to do so by the CHO.

[157]. The CHO must notify the senior next of kin of a person of a decision to perform an autopsy on that person. The senior next of kin may apply to the Supreme Court at any time within 48 hours after receiving notice for an order preventing the autopsy.

Brothels and escort agencies

[158 to 165]. The Division contains regulatory requirements for the control of infectious disease by proprietors of brothels and escort agencies and deals with the storage, use and disposal of condoms.

[160]. It is an offence for the proprietor of a brothel or an escort agency to require a sex worker to provide a service to a client if the sex worker has refused to provide the service because the sex worker suspects the client is infected with an infectious disease or because the client has refused to use a condom.

Part 9 (sections 166 to 186) Provides for authorised officers and for entry, search and seizure powers and search warrants.

[167]. An authorised officer may request a person to provide information in the course of an investigation where there is a risk to public health. A person is authorised by this section to provide the information requested.

> **Note:** *Section 227 provides protections to persons who give information they are authorised or required to give under this Act.*

[168 to 170]. Deals with powers of entry either with consent of the occupier or with a search warrant issued by a court in accordance with the provisions and forms of the *Magistrates' Court Act 1989*.

An authorised officer may enter a public place and, with the consent of the occupier, may enter other premises including residential premises, for this purpose.

[175]. Sets out the powers that may be exercised by an authorised officer who enters premises under powers conferred by this Act.

[176]. Provides on entry of premises by an authorised officer a power to direct a person to produce a document, operate equipment or answer questions. A person must comply unless they have a reasonable excuse. (See comment below c.203).

[183]. It is an offence to hinder or obstruct an authorised officer without a reasonable excuse. (See comment below c.203).

[185]. Permits a person to complain to the Secretary about the exercise of powers by authorised officers which must be investigated and a written report made to the complainant.

Part 10 (sections 187 to 204) – Protection and enforcement provisions (sections 187 to 204*).*

Entry without warrant to residential premises – Limited purpose entry

[187]. Declares that entry can only be to the part of the residential premises to which entry is necessary for the purposes for which the power is conferred.

[188]. The CHO may direct a person to provide information that the CHO believes is necessary to investigate a risk to public health or to manage or control a risk to public health. It is an offence for a person not to comply with a direction of the CHO. *A person is not guilty of the offence if they had a reasonable excuse*. Before directing a person the CHO must warn the person that refusal to comply is an offence, and that the person may refuse to provide any information that would tend to incriminate them. (See comment below c.203).

> **Note:** *Section 227 provides protections to persons who give information they are authorised or required to give under this Act.*

[190 to 193]. *Public health risk powers* – Prescribes the public health risk powers that on the authority of the CHO may give to an authorised officer and may be given to a person either orally or in writing, including (amongst others) the power to close premises, require information to be given, search for and seize things, direct a person not to enter or remain at premises (in the first instance for up to 4 hours subsequently renewable up to 12 hours), provide name and address, require cleaning or disinfection, the destruction of things and to take action to eliminate or reduce risk to public health. Refusing to obey a direction *without lawful excuse* is an offence. (See comment below c.203).

> **Note:** *A requirement to give information is subject to the privilege against self-incrimination (see section 212).*

[194]. The Secretary or a municipal council may issue an improvement notice requiring the person to remedy the contravention or likely contravention, or a prohibition notice prohibiting the carrying on of an activity in a specified way.

[196].The CHO, the Secretary or a Council may apply to the Magistrates' Court for an injunction compelling a person to comply with an improvement or prohibition notice or restraining a person from contravening an improvement notice.

[197]. Allows a person to be summoned to appear before a magistrate where an improvement or prohibition notice relating to a nuisance has been issued and the person fails to comply with the notice or where the nuisance although abated, is likely to recur.

> *197(7). A person who fails to comply with an order under subsection (4) is guilty of an offence unless the person satisfies the Magistrates' Court that the person has, in seeking to comply with the order, exercised due diligence.*

Presumption of innocence – Reverse onus – defendant to show 'due diligence'

The Committee observes that improvement or prohibition notices deal with protection against public health risks.

The Committee notes the provision provides a defence imposing on the defendant a legal burden to satisfy the Magistrates' Court (on the balance of probabilities) that they had exercised due diligence in seeking to comply with the order.

The Committee notes these extracts from the Statement of Compatibility –

> *As knowledge of the measures the defendant has taken to comply with the order will be peculiarly within the defendant's knowledge, it would be relatively easy for the defendant to prove, on the balance of probabilities, that he or she has exercised due diligence in seeking to comply with the order.……...*
>
> *It is necessary to structure the offence in this way because evidence of the steps the defendant has taken to comply with the order will be in the possession of the defendant rather than the prosecution.*

In the circumstances the Committee accepts the necessity to include a revers onus provision.

The Committee draws attention to the provision.

Emergency powers – Power to detain, prevent entry, restrict movement or give direction to a person in an emergency area

[198]. The Minister may, on the advice of the CHO and after consultation with the Co-ordinator in Chief and the State Co-ordinator under the *Emergency Management Act 1986*, declare a state of emergency arising out of circumstances causing a serious risk to public health.

The clause sets out requirements for the publication by the mass media and in the Government Gazette of the making, varying or revoking an emergency declaration. The declaration may be for a period of 4 weeks, and may be extended, but that the total period that a declaration is in force cannot exceed 6 months. It also sets out requirements for the reporting to a Parliament of the making of a declaration under this section.

[199]. During a state of emergency the CHO may authorise authorised officers to exercise any of the public health risk powers found in section 190 of this Act, or the emergency powers found in section 200, if the CHO believes that it is necessary to do so to eliminate or reduce a serious risk to public health.

[200]. Prescribes the emergency powers that may be exercised in an emergency and requirements regarding the exercise of emergency powers.

These powers enable authorised officers to detain persons in the emergency area, restrict the movement of persons within the emergency area, prevent persons from entering the emergency area and give any direction reasonably necessary to protect public health.

Authorised officers must explain, if practicable, the reasons for detention to the detained person. If a person is subject to detention under this section, an authorised officer must at least once every 24 hours review whether the continued detention of the person is reasonably necessary.

An authorised officer must give written notice to the CHO of a decision to detain a person, and a decision to continue to detain a person after reviewing the detention after 24 hours.

Rights and freedoms – Preventive detention authorised other than by judicial merits determination – Whether detention punitive or preventative in character – Whether justified and not a trespass on judicial powers

The Committee notes the provisions in sections 190 and 200 respectively allow for detention of persons at particular premises in specified circumstances involving risks to public health.

Section 190 allows for up to 12 hours detention upon direction by the Chief Health Officer and section 200 allows for longer periods where a state of emergency has been declared under section 198. The Committee also observes that in respect to detention in the latter case section 204 provides for compensation where powers are exercised on insufficient grounds.

The Committee observes that the provisions are exercised by executive authority without judicial involvement. Instances of such detention are of particular concern to the Committee in respect to the scrutiny of provisions under both the 'rights and freedoms' and Charter rights terms of reference. The Committee observes that there may be man special circumstances where preventative detention may be necessary. The Committee's concern is to ensure that the detention is justifiable having regard to well defined clear public policy and that the measure is not punitive in character and is no more intrusive to liberty of the person and freedom of movement as is warranted in all the circumstances.

In this respect the Committee observes these extracts from judgments in two High Court cases.It is accepted that in some circumstances, it is valid to confer powers on both non-judicial and judicial bodies to authorise detention, for example, in cases of infectious disease or mental illness. These categories are not closed. (Per Callinan and Heydon JJ in Fardon v Attorney-General (Qld) (2004) 78 ALJR 1519 at 1561 at [214]).

> 'The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature… depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective. The categories of non-punitive, involuntary detention are not closed'. (Per Gummow J in Kruger v The Commonwealth (1997) 190 CLR 1 at 162).

The question whether the preventative detention measures in section 190 and 200 are justifiable and proportionate to achieve a non-punitive objective is a question for Parliament's consideration.

[203]. It is an offence for a person to fail to comply without reasonable excuse with a direction or other requirement of an authorised officer given or made in exercising powers under an authorisation given under section 199.

Presumption of innocence – Burden of proof - Defendant must provide reasonable excuse - Proof of evidentiary facts.

The Committee notes that a number of provisions in the Bill that create summary offences provide that the defendant bears an evidential burden to prove, on the balance of probabilities some evidential fact to raise an available excuse, exemption, exception or proviso (a defence) to the offence . The Committee observes that in such cases section 130 of the Magistrates' Court Act 1989 applies. Once the excuse or other defence is raised the prosecution still bears the legal burden of disproving the defence and proving the elements of the offence beyond reasonable doubt.

The clauses in the Bill that raise this issue, the offence and excuse or exemption are –

- *61 Knowingly allow or suffer a nuisance to exist on any land owned or occupied by a person – without lawful excuse.*
- *69 Failure to register premises – but not an exempt business.*
- *176 Direct a person to produce a document, operate equipment, answer a question – without lawful excuse.*
- *183 Hinder and obstruct an authorized officer – without reasonable excuse.*
- *188 CHO may direct person to provide information necessary to investigate whether there is a risk to public health or to manage and control such risk – failure to do so without a reasonable excuse.*

193	*Failure to comply with a direction or requirement in the exercise of a public risk power under 190 – without reasonable excuse.*
203	*Failure to comply with a direction or requirement in the exercise of a power given under authorization under 199 – without reasonable excuse.*
261	*False and misleading statements without reasonable grounds for believing that at the time the information statement or document was given was true or was not misleading.*

Compensation

[204]. Allows a person who suffers loss as a result of an authorisation by the CHO to an authorised officer to apply to the Secretary for compensation, if the person considers there were insufficient grounds for the giving of that authorisation.

An applicant may appeal to the VCAT for review of a decision made by the Secretary.

Part 11 (sections 205 to 239) – *General provisions – Reviews and appeals – Offences*

[205]. Applies to decisions made by a municipal council regarding the registration of prescribed accommodation and business premises under sections 74 or 76 of the Act.

[206]. Applies to decisions made by the Secretary under section 94 in relation to approved auditors or under sections 101 and 105 in relation to pest control licences.

[207]. Sets out the right to apply to the VCAT for review of a decision made by a Council, or by the Secretary.

[208]. A persons served with an improvement or prohibition notice may appeal to the Magistrates' Court within 21 days.

[209]. The Secretary or a Council may serve an infringement notice on a person that the Secretary or Council has reason to believe has committed a prescribed offence. The provisions of the *Infringements Act 2006* apply to such a notice.

[211]. It is an offence to destroy any records required to be kept under the Act.

Protection against self-incrimination preserved except in respect to the provision of documents

[212 and 213]. A natural person may refuse or fail to give information under this Act or the regulations if giving the information would tend to incriminate the person. This clause does not apply to the provision of a person's name and address, or to the production of documents that the person is required to keep under the Act or regulations and [213] Preserves legal professional privilege for the purposes of the Act or regulations.

Protection of persons giving information

[227]. Provides that the giving of information that is authorised or required to be given under the Act does not constitute unprofessional conduct or a breach of professional ethics and the giving of the information does not make the person giving it subject to any liability in respect of it, and does not constitute a contravention of any other Act or law, including common law.

[229 to 231]. Provides for action to be taken if a person fails to comply with a direction, requirement or notice given in the exercise of public health risk powers under section 190, or emergency powers under section 200 of the Act, or fails to comply with an improvement or prohibition notice issued in relation to a direction or other requirement given in the exercise of

those powers. The CHO may authorise a person or Council to take any action necessary to ensure compliance with the direction, requirement or notice and provides for cost recovery by the Secretary or a Council if they have performed the action in the place of the person who has been directed to do so and has not complied. A Council may recover from an occupier any expenses incurred in the abatement of any nuisance.

[232 to 239]. Provides for the making of general or specific regulations (e.g. cooling towers and pest control) and fees to give effect to the various purposes of the Act.

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

[240]. Declares that it is the intention of the section to alter or vary section 85 of the *Constitution Act 1975* to the extent necessary to prevent the bringing before the Supreme Court of an action of a kind referred to in section 124 or 142.

> **Note:** *These sections provide that no action lies against a registered medical practitioner who in good faith and with reasonable care conducts an activity ordered or authorised under an order or authorisation made by the Chief Health Officer or a senior medical officer. The clause establishes that the Supreme Court cannot hear such an action.*

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

> *Section 124 provides that no action will lie against a registered medical practitioner who in good faith and with reasonable care conducts a test, examination and assessment, or provides counselling, pharmacological treatment or prophylaxis, in relation to an examination and testing order or a public health order made under Division 2 of Part 8 of the Act.*
>
> *Division 2 deals with the management and control of infectious diseases, and empowers the chief health officer to order a person to undergo any of a range of measures to reduce the risk they may pose to public health. Often these measures, such as an examination or counselling about the nature of the disease, will be undertaken by a registered medical practitioner.*
>
> *Similarly, section 142 provides that no action lies against a registered medical practitioner who in good faith and with reasonable care takes a blood or urine sample, conducts a test or provides test results or counselling in relation to a test on a person who has been involved in an incident with a caregiver or custodian. In relation to these incidents, the chief health officer may order that a test be conducted on a person who has refused to be tested, and a registered medical practitioner will be asked to perform the test and provide results.*
>
> *The aim of sections 124 and 142 is to protect registered medical practitioners who implement measures ordered by the Chief Health Officer as part of the response to a threat to the health and wellbeing of the community. It is appropriate that registered medical practitioners be protected from legal liability for their actions in these circumstances. If registered medical practitioners were not provided with this protection, the regulatory framework for the protection of the public from infectious disease would not be effective.*

Parliamentary Committees Act 2003, section 17(b) – provisions that alter or very section 85 of the Constitution Act 1975 – limitation of the jurisdiction of the Supreme Court'.

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

[241]. Repeals, on proclamation, a number of redundant sections of the *Health Act 1958* before the Act commences. [242]. Repeals the *Health Act 1958* and provides necessary savings provisions.

[243 to 245]. Provides the transitional provisions in relation to Consultative Councils existing under the *Health Act 1958* and that relevantly apply to blood and tissue donations and cooling tower systems registered under the *Building Act 1993*.

[250]. Amends section 22A of the *Coroner's Act 1985* to provide that the Coroner must (rather than may as previously) notify the Consultative Council on Obstetric and Paediatric Mortality and Morbidity of the particulars of the death of a child reported to a coroner.

[261]. Amends the *Food Act 1984* to make it an offence to give false or misleading information, statements or documents unless a reasonable grounds exist that at the time the information was given it was true or not misleading. (See comment under section 203).

[267]. Amends the *VCAT Act 1998* and inserts a new Part16B relating to a review of a public health order made under the Act. The new Part allows the VCAT, where it considers that it is in the public interest to do so, to hold confidential proceedings in order to avoid the identification of any party to the proceedings. The VCAT may also withhold any information or evidence from a party if the withholding of information or evidence may prevent serious harm to the health of a party or any other person.

SCHEDULE

Contains Table 1 and Table 2 referred to in sections 151 and 152 of this Act respectively. The tables relate to legal actions and proceedings arising from blood and tissue donations.

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People believed to have an infectious disease – People involved in an incident with a caregiver or custodian – People who may have died of an infectious disease – People in an area where a state of emergency has been declared – Equality – Non-consensual medical treatment – Movement – Privacy – Religion – Association – Families – Cultural Rights – Liberty

Part 2 of the Charter sets out people's human rights, including:

- **Charter s. 8(2):** 'the right to enjoy his or her human rights without discrimination'. Discrimination includes discrimination on the basis of 'impairment', including the presence of organisms that can cause an infectious disease.
- **Charter s. 10(c):** 'a person must not be subjected to medical treatment without his or her full, free and informed consent.'
- **Charter s.12:** 'the right to move freely within Victoria'.
- **Charter s.13(a):** 'the right not to have his or her privacy unlawfully or arbitrarily interfered with'.
- **Charter s.14(2):** 'the freedom to demonstrate his or her religion or belief in practice as part of a community and in public'.
- **Charter s.16(2):** 'the right to freedom of association with others'.
- **Charter s.17:** 'families are entitled to be protected by the State'.
- **Charter s.19(1):** 'persons' must not be denied the right, in community with other persons of their background, to enjoy his or her culture'.
- **Charter s.21(1):** 'the right to liberty and security'.

The Committee notes that various provisions of the Bill engage or limit a number of rights in relation to the following categories of people:

People believed to have an infectious disease

The Committee notes that clauses 113 and 117 provide for orders in relation to such people where they are believed to pose a serious risk to health and have (where practicable) been given information about the disease and risk:

- **Examination and testing order** (clause 113): where the Chief Health Officer believes that the person is likely to transmit the disease and an order is necessary to ascertain whether the person has a disease, he or she can order the person to be examined or tested by a medical practitioner and, if the person doesn't comply with the order, to be detained for up to 72 hours at a time.
- **Public health order** (clause 117): where the Chief Health Officer believes that the person can prevent the disease from posing a serious risk to public health and an order is necessary to eliminate or reduce that risk, he or she can order the person to attend counselling; be psychiatrically assessed; refrain from particular acts, behaviour or locations, reside at a specified place at specified times; notify the Officer of changes in name or residence; and be the subject of specialised supervision, prophylaxis, pharmacological treatment and detention or isolation.

The Committee observes that clause 123(3) provides that force cannot be used to enforce an order for examination, testing, pharmacological treatment or the use of a prophylaxis, but that clause 123(4) provides that force can be used to move a person to a particular place required by an order (e.g. to detain someone or to ensure that they leave or remain at a particular place.)

The Committee considers that clauses 113 and 117 may engage the Charter rights of persons who are the subject of such orders against discrimination on the basis of physical impairment and non-consensual medical treatment, and to movement, privacy, freedom of religion, association, protection of families, cultural rights and liberty.

The Statement of Compatibility remarks:

> *These limitations are reasonable and demonstrably justified in a free and democratic society because of the importance of protecting the community from the spread of infectious disease; a person cannot be physically forced to receive medical treatment (broadly defined); and the maximum penalty that may be imposed on a person who fails to comply with an examination and testing order or a public health order is a fine rather than a term of imprisonment.*

People involved in incidents with caregivers or custodians

The Committee also notes that clauses 134 & 137 provide for orders in relation to (defined) caregivers or custodians where an incident has occurred where any of those involved may transmit a specified infectious disease to any others involved, at least one person has consented to be tested for the disease and an order is necessary in the interest of rapid diagnosis, clinical management and treatment:

- The Chief Health Officer may order a person who has been offered counselling and has refused to be tested for the disease to be tested to give a blood or urine sample at a specified place (clause 134(c)(i))
- A magistrate may, on the application of the Chief Health Officer and if it finds that the circumstances are so exceptional as to justify it, authorise a police officer to use reasonable force to move the person to specified place and restrain him or her so that a medical practitioner can take a sample of blood or urine (clause 134(3))

- The Chief Health Officer or a senior medical officer may order the testing of a person who is unconscious or lacks the capacity to consent (clauses 134(c)(ii) & 137(3))

The Committee considers that clauses 134 and 137 may engage the Charter rights of people who are the subject of an order against non-consensual medical treatment and to privacy and liberty.

The Statement of Compatibility remarks:

> *While the risk of acquiring HIV or hepatitis following occupational exposure to contaminated blood is low, such an incident may cause significant distress to the relevant person and his or her family. Knowing whether the person who was the source of the exposure (the source) has a specified infectious disease can minimise the anxiety of the exposed person as well as inform decisions about the person's medical treatment. The purpose of this division is to provide a framework for obtaining information about whether the source has a specified infectious disease in those rare circumstances where that person is unable or refuses to be tested for a specified infectious disease.*
>
> *A less restrictive means available to achieve the purpose would be to make it an offence for a person to fail to comply with an order but not enable the order to be enforced by use of reasonable force. However, this measure is considered inadequate because there may occasionally be people who refuse to comply with the order.*

People who may have died of an infectious disease

The Committee further notes that clause 156 authorises an order for an autopsy if the Chief Health Officer believes a person may have died of an infectious disease and an autopsy is necessary to determine whether there is a serious risk to public health. The Committee considers that clause 156 may engage the Charter rights of the deceased and his or her family to privacy, freedom of religion and cultural rights.

The Statement of Compatibility remarks:

> *There is a direct and rational connection between the need for an autopsy in certain cases and the purpose of minimising or preventing the spread of an infectious disease. If the deceased's family strongly objects to the conduct of an autopsy on the body the senior next of kin may apply for an order from the Supreme Court that the autopsy not be performed in the circumstances. In the context of autopsies performed under the Coroners Act 1985, the Supreme Court has attached considerable weight to the religious and cultural beliefs of the deceased person's family.*

The Committee observes that the autopsy may proceed before there is time to seek an order from the Supreme Court if the Chief Health Officer 'believes that an autopsy must be performed immediately'.

People in an area where a state of emergency has been declared

The Committee additionally notes that clause 199 authorises the Chief Health Officer, where a state of emergency has been declared, to authorise authorised officers to exercise public health powers (a variety of actions to reduce a risk to public health at a premises) or emergency powers (a variety of actions to control the movement of persons in and out of an emergency area.) The Committee considers that clause 199 engages the Charter rights of people in an emergency area to movement, privacy, association, property, liberty and security.

The Statement of Compatibility remarks:

> *The purpose of the limitation is to control the movement of persons during a state of emergency which may help to contain the emergency. It may be necessary to exercise this*

power, for example, if there was an outbreak in a geographically confined area of a highly infectious disease that caused unusually severe illness in order to slow the spread of the disease.

The Committee observes that confining people in an area where there is an outbreak of a highly infectious disease may increase the risk that those people will be exposed to that disease.

The Committee considers that the compatibility of clauses 113, 117, 133, 137, 156 & 199 with the Charter may depend on whether or not they satisfy the test in Charter s. 7(2) that they are 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' and, in particular, whether or not there is 'any less restrictive means reasonably available to achieve' the purpose of preventing serious risks to health.

The Committee refers to Parliament for its consideration the question of whether or not clauses 113, 117, 133, 137, 156 & 199 are the least restrictive means reasonably available to achieve the purpose of preventing serious risks to health.

Regulation of activities that may pose a health risk – Equality – Movement – Privacy – Expression – Property – Liberty – Presumption of innocence – Whether reasonable limits

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 regulates activities that may pose a health risk. The Committee observes that the regulation of activities 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 various provisions of the Bill that are said to engage the following Charter rights:

- **Equality** (Charter s. 8): provisions barring persons under 16 from having a pest control licence and requiring persons under 18 who are given a pest control licence to be supervised by a licence-holder over 18 (clause 101(3)(a) & 103(1)(d))
- **Freedom of movement & liberty** (Charter ss.12 & 21(1)): a provision authorising authorised officers to direct people to or from a premises for a time not exceeding four hours to investigate or ameliorate a risk to public health (clause 190(1)(b))
- **Privacy** (Charter s. 13(a)): provisions:
  - barring people from causing nuisances that are dangerous to health or noxious or injurious to personal comfort (clause 61); and requiring local councils to remedy such nuisances, including by entry to unoccupied land or land whether the owner can't be located (clauses 60 & 66)
  - requiring people conducting prescribed businesses that pose a risk to public health to register their premises with a local council and supply information about the premises to the council (clauses 69 & 71)
  - requiring applicants to register a cooling tower or for a pest control licence to supply information required or prescribed by the Secretary to the Department of Human Services (clauses 81(2) & 101(1))
  - requiring authorised officers to show their identity cards when exercising a power (clause 166)

- authorising authorised officers to ask questions necessary to investigate a public health risk after informing the person asked that they aren't required to answer; and to enter public places or premises with the consent of the occupier (clauses 167 & 168)
- authorising authorised officers to enter any premises where necessary to investigate or ameliorate an immediate risk to public health; any premises where used for specified businesses at any reasonable hour in the daytime or any time when the premises are open to the public; and any premises with a search warrant for the purpose of monitoring compliance with the Act or regulations; and to exercise a variety of powers including search, seizure and directing persons on the premises to provide information (clauses 168, 169, 175 & 176)
- requiring people to provide information that the Chief Health Officer or anyone authorised by that Officer believes is necessary to investigate or manage a risk to public health (clauses 188(1), 190(1)(d) & 190(1)(e))
- authorising authorised officers to inspect any premises where a risk to public health may be spread (clause 190(1)(f))
- authorising authorised officers to enter relevant land to ensure compliance with a requirement that a person has failed to comply with (clause 229(4)(a))

- **Expression** (Charter s.15(2)): provisions:
  - requiring people conducting prescribed businesses that pose a risk to public health to supply information about the premises to their local council (clause 71)
  - requiring applicants and holders of cooling tower registration to notify the Secretary to the Department of Human Services of information and changes to that information (clauses 81, 87 & 88)
  - requiring holders of pest control licences to maintain prescribed records (clause 108) requiring brothel proprietors and escort agency proprietors to provide information about sexually transmitted infections to sex workers and clients (clause 162)
  - requiring people on premises entered by authorised officers without consent to answer questions unless they have a reasonable excuse (clause 176(2))
  - barring people from impersonating authorised officers (clause 184)
  - requiring people to provide information that the Chief Health Officer or anyone authorised by that Officer believes is necessary to investigate or manage a risk to public health (clauses 188(1), 190(1)(d) & 190(1)(e))
  - barring people from providing false information to the Secretary to the Department of Human Services, the Chief Health Officer or an authorised officer or damaging records required under the Act or regulations (clauses 210, 211 & 261, substituting s. 59 and inserting a new section 59A into the *Food Act 1984*)
- **Property** (Charter s. 20): provisions authorising authorised officers to seize property and to destroy it in some circumstances (clauses 175(d), 178(1), 179(2), 181 & 182); to direct people to or from a premises for a time not exceeding four hours to investigate or ameliorate a risk to public health (clause 190(1)(b)); and to recover costs or enter land when a person has failed to comply with an order (clauses 228, 229 & 261, inserting a new section 59C into the *Food Act 1984*)
- **Presumption of innocence** (Charter s. 25(1)): provisions placing a burden of proof on people charged with failing to comply with an order to ameliorate a nuisance to satisfy the court that they exercised due diligence (clause 197(7)); and on people charged with giving false information to prove that they reasonably believed that the information was not misleading (clauses 210(3) & 261, substituting s. 59(3) of the *Food Act 1984*)

- **Self-incrimination** (Charter s. 25(2)(k)): a provision exempting documents and a person's name and address from the privilege against self-incrimination (clause 212(2))

The Statement of Compatibility contends that these provisions (in the context of other protective provisions in the Act) do not infringe the rights to privacy, expression, property or self-incrimination and are reasonable limits on the rights to equality, movement, liberty and the presumption of innocence. Having considered the above Charter rights and provisions, the Committee is satisfied, with the exception of the regulation of activities in brothels and by escorts, discussed below, that the measures so engaged do not warrant any special mention or adverse comment in respect to possible incompatibility with human rights.

Activities in brothels and by escorts – Activities in brothels and by escorts – Ban on display or use of medical examinations of sex workers – Whether compatible with freedom **of expression – Ban on sex workers being required to perform services in particular circumstances – Entry without warrant – Whether compatible with right to privacy**

Charter s. 13(a) provides that everyone 'has the right not to have his or her privacy unlawfully or arbitrarily interfered with'. Charter s. 15(2) provides that everyone has the 'right to freedom of expression which includes the freedom to seek, receive and impart information of all kinds.'

The Committee notes that Division 10 of Part 8 regulates brothels and escort agencies as follows. The Committee observes that activities in brothels and by escorts are intimate activities and attract a high degree of stigma and embarrassment. The Committee considers that these provisions may engage the Charter rights of sex workers and clients to privacy. The Committee feels that, in this context, three of the provisions of the bill raise concerns:

- **Clause 160, which bars proprietors from requiring sex workers to provide services to clients who are suspected of having an infectious disease or who refuse to wear a condom:** Whilst the Committee appreciates the beneficial purpose of this clause, the Committee is concerned that a provision barring proprietors from requiring sex workers to provide services to clients in certain narrow circumstances (punishable by a fine) may be misunderstood as implying that it is ever lawful for sex workers to ever be required to engage in sexual activities with clients. The Committee observes that any such conduct by employers of sex workers may constitute a sexual offence under Division 8A of Part 1 of the *Crimes Act 1958*.
- **Clause 161, which requires proprietors to take reasonable steps to prevent the display or use of evidence of a medical examination of a sex worker to induce a client to believe that a sex worker is free from an infectious disease:** The Committee considers that this provision engages the right of sex workers and clients to freedom of expression. The Committee observes that the statement of compatibility does not address the compatibility of clause 161 with Charter s. 15(2).
- **Clause 169(1)(e), empowering authorised officers to enter brothels without warrant at any reasonable hour in the daytime and at any time such premises are open to the public to ensure compliance with the Bill:** The Committee observes that Division 10 of Part 8 of the Bill requires brothel proprietors to comply with a number of requirements, including encouraging condom use and providing condoms, health information, clean linen and towels, and working baths and showers. The Committee is concerned that the entry without warrant of authorised officers to ensure compliance with these requirements may expose sex workers and clients to a significant and distressing interference with their privacy.

The Committee draws attention to clause 160 and refers to Parliament for its consideration the question of whether or not clauses 161 & 169(1)(e) is compatible with the Charter rights of sex workers and clients to privacy and expression.

Regulation of information about health risks – Privacy – Expression – Fair hearing – Whether reasonable limits

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 regulates information about health risks. The Committee observes that the regulation of information 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 many provisions of the Bill that are said to engage the following Charter rights:

- **Privacy** (Charter s. 13(a)): provisions:
  - giving the Secretary to the Department of Human Services a function of maintaining an information system of 'the health status of persons and classes of persons in Victoria' (clause 17(2)(e))
  - authorising the chair of a Consultative Council to disclose information obtained to other Consultative Councils; and to specified people 'in the public interest'; and to collect information and to require a health service provider or pathology service to provide information (clauses 37(1), 38(2)(h), 39, 40 & 41(1))
  - preventing the disclosure of information held by Consultative Councils to the public, including to people to whom the information relates (clauses 42 & 43)
  - requiring information about a child's death or a birth to be given to the Consultative Council on Obstetric and Paediatric Mortality and Morbidity; and to maintain the data for research purposes (clauses 46(1)(c), 47 & 48)
  - requiring the publication of the report of a public inquiry into a serious public health matter ordered by the Secretary to the Department of Human Services (clause 52(2))
  - authorising anyone to disclose information to authorised department officers for the purposes of the Act (clause 55)
  - authorising the Secretary to the Department of Human Services to disclose information for health purposes to Australian governments and statutory bodies pursuant to gazetted agreements (clause 56)
  - authorising the sharing of information between the Department and the Consultative Councils for the purposes of the Act (clause 57)
  - requiring medical practitioners to supply information to the Chief Health Officer relating to people who are the subject of examination and testing orders and public health orders (clauses 115 & 119)
  - requiring medical practitioners and pathology services to notify the Secretary to the Department of Human Services of 'notifiable' infectious diseases and micro-organisms in a patient (clauses 127 & 128)
  - authorising the Chief Health Officer to require a health service provider to reveal information about a caregiver or custodian who may have been exposed to an infectious disease (clause 136(1)(b))

- requiring parents of a child to notify any primary school the child attends of that child's immunisation status (clause 145)
- conditioning a statutory immunity from civil liability with respect to blood an and tissue donations on the taking of information from donors using a form approved by the Secretary to the Department of Human Services (clauses 151, 152 and the schedule, Table 1, items 2 & 3, column 2(b)(i) & (c)(i) & Table 2, item 1, column 2(a)(i) & (c)(i))
- requiring the Registrar of Births, Deaths and Marriages and the coroner to notify the Consultative Council on Obstetric and Paediatric Mortality and Morbidity about certain deaths (clauses 247(3)(b) & (d), amending s. 49B of the Births*, Deaths and Marriages Registration Act 1996*; and 250, inserting a new section 22A into the *Coroners Act 1985*)

- **Expression** (Charter s. 15(2)): provisions:
  - preventing the disclosure of information held by Consultative Councils to the public, including to people to whom the information relates (clauses 42 & 43)
  - authorising a convenor of a public inquiry into a serious public health matter ordered by the Secretary to the Department of Human Services to compel people to give evidence (clause 51(2));
  - requiring medical practitioners to supply information to the Chief Health Officer relating to people who are the subject of examination and testing orders and public health orders (clauses 115 & 119)
  - requiring medical practitioners and pathology services to notify the Secretary to the Department of Human Services of 'notifiable' infectious diseases and micro-organisms in a patient (clauses 127 & 128)
  - requiring proprietors of food premises and vending machines where tests have found micro-organisms in food to provide the Secretary to the Department of Human Services with details specified in regulations (clause 130(5))
  - requiring the provision of information to a patient before a HIV test is performed and before the results are given (clauses 131 & 132)
  - requiring health service providers and people who perform tests to provide the Chief Health Officer with information about a caregiver or custodian who may have been exposed to an infectious disease, and barring the release of the identity of such a person (clauses 136(2), 139 & 140)
  - requiring parents of a child to notify any primary school the child attends of that child's immunisation status (clause 145)
- **Fair hearing** (Charter s. 24): a provision enabling courts or tribunals to close or suppress proceedings relating to any prescribed disease due to the consequences of disclosure to any person (clause 133); and suppressing proceedings in the Victorian Civil and Administrative Tribunal relating to a public health order unless the Tribunal orders otherwise (clause 267, inserting a new clause 66G into Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*)

The Statement of Compatibility contends that these provisions (in the context of other protective provisions in the Act) do not infringe the above rights. Having considered the above Charter rights and provisions, the Committee is satisfied, with the exception of questions for prospective blood and tissue donors, discussed below, that the measures so engaged do not warrant any special mention or adverse comment in respect to possible incompatibility with human rights.

Information from prospective blood and tissue donors – Questioning prospective blood donors about the sexual activity – Whether discrimination on the basis of sexual orientation

Charter s. 8(2) provides that everyone has 'the right to enjoy his or her human rights without discrimination'. Discrimination includes discrimination on the basis of sexual orientation. 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 clauses 151 & 152, in combination with the schedule, effectively require prospective blood and tissue donors (other than semen donors) to supply information in accordance with an approved form published in the Government Gazette. The Committee also notes that clause 155(1) makes it a criminal offence, punishable by imprisonment, to make a false statement in this context. The Committee further notes that clause 242(2) continues the effect of the form currently used for this purpose under Division 7 of Part VI of the *Health Act 1958*.

The Committee understands that donors are currently asked whether they have engaged in male-to-male sexual activity in the proceeding twelve months. The Committee therefore considers that clauses 151 and 152, in combination with the schedule and clause 242(2), may engage the rights of gay and bisexual male prospective donors to equal enjoyment of their Charter right to privacy without discrimination on the basis of their sexual orientation.

The Statement of Compatibility remarks:

> *The statement is the first step in a two step screening process of blood donors (the second step is the testing of a sample of the donor's blood.) It is not sufficient to rely on testing alone because:*
>
> - *infection with some contaminants involves a window period…*
> - *of the possibility of new variants of known viruses developing…*
> - *of the possibility of human error in carrying out the tests…*
> - *tests are not always 100 per cent effective…*
>
> *Requiring people who wish to donate blood or tissue to provide the information that is needed to assess the risk of their blood or tissue being contaminated is reasonable in all the circumstances…*

The Statement does not address the specific question concerning male-to-male sexual activity. The Committee observes that male-to-male sexual activity can transmit infectious diseases and that gay and bisexual men may have a higher rate of infection by HIV and other diseases than other groups. The Committee also observes that the current question does not distinguish between safe and unsafe sexual activity and between monogamous and non-monogamous activities.

The Committee refers to Parliament for its consideration the question of whether or not clauses 151 and 152, in combination with the schedule and clause 242(2), are compatible with the Charter right of gay and bisexual male prospective blood and tissue donors to equal enjoyment of their right to privacy without discrimination on the basis of sexuality.

The Committee makes no further comment.

State Taxation Acts Amendment Bill 2008

Introduced	6 May 2008
Second Reading Speech	7 May 2008
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Minister for Finance

Purpose

The Bill amends the *Duties Act 2000* to provide for —

- increased thresholds for general duty and principal place of residence and pensioner concessions;
- removal of the need for an election between the principal place of residence concession and the first home owner bonus;
- further duty exemptions;
- greater certainty in relation to the calculation of duty for properties that are sold off the plan;
- clarity in respect of the exemption relating to certain transactions concerning dutiable property that is subject to a unit trust scheme.

The *First Home Owner Grant Act 2000* is amended to give an additional grant to first homebuyers purchasing a newly constructed home in regional Victoria.

The *Land Tax Act 2005* is amended to provide —

- threshold increases, including raising the tax free threshold from $225,000 to $250,000 for 2009 and onwards (and from a tax free threshold of $20,000 to $25,000 for lands held by trusts);
- a rate reduction in the top rate of land tax from 2·5% to 2·25% for 2009 onwards;
- an exemption for property used as long term shared supported accommodation for young people with disabilities. This includes a provision that special land tax will apply if the land subsequently ceases to be used for the exempt purpose as is consistent with existing similar exemptions.

The *Payroll Tax Act 2007* is amended to —

- reduce the rate of tax applicable from 1 July 2008;
- clarify the exemption for non-profit organisations;
- modify the grouping provisions;
- make some technical amendments to the provisions dealing with payroll tax registration and the calculation of annual payroll tax.

Content and Committee comment

[Clauses]

[2]. The provisions in the Bill come into operation on the day after Royal Assent or before 1 January 2009.

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

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Equality before the law – Privacy – Expression – Property rights – Adjustment and administration of taxation laws – 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'.

The Committee notes that the Bill provides for the adjustment and administration of taxation laws. 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:

- **Equality** (Charter s.8): provisions providing more favourable treatment to disabled persons and pensioners (clauses 8, 10 & 18, inserting new section 38A into and amending ss. 59, 60 & 60A of the *Duties Act 2000*; and inserting new section 76A into the *Land Tax Act 2005*.) The Statement of Compatibility also refers to benefits to regional Victorians; however, living in regional or metropolitan Victoria is not an attribute for the purposes of discrimination under the Charter.
- **Privacy, freedom of expression and property rights** (Charter ss.13(a), 15(2) & 20): various provisions requiring people to provide information or documents to the Commissioner of State Revenue for the purposes of calculating taxation liabilities or benefits (clauses 3, 4, 6 & 18, amending s. 21, inserting new section 21D and amending s. 32V of the *Duties Act 2000*; and inserting a new section 78A into the *Land Tax Act 2005*)

The Statement of Compatibility contends that these provisions (in the context of other protective provisions in the Act) do not infringe the rights to privacy, expression and property and are reasonable limits on the right to equality. 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.

Constitution Amendment (Judicial Pensions) Bill 2007

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

Committee's Comment

Charter Report

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

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

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

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

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

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

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

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

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

The Statement of Compatibility does not address para. (a) of the definition of partner in clauses 3 and 9, but the Explanatory Memorandum remarks that the definition 'is consistent with that used in section 10 of the Parliamentary Salaries and Superannuation Act 1968.' The Committee observes that that definition was introduced by the Statute Law Amendment (Relationships) Act 2001 at a time when opposite-sex domestic partners of members of parliament were entitled to a pension. By contrast, the present pension for constitutional and judicial officers is limited to married partners. Therefore, unlike s. 10 of the Parliamentary Salaries and Superannuation Act 1968, which did not change pension entitlements for former members of parliament, para. (a) of the definition of partner in clauses 3 and 9 changes the pension entitlements of former constitutional and judicial officers, making them identical to the pre-2001 entitlements of members of parliament.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- ***whether or not clauses 6(2)(b) and 10(2)(b), to the extent that they reduce the entitlements of current and former judges and/or subject the future entitlements of judges' partners to continued review by a public servant, are compatible with the independence of courts from Parliament and the executive; and***

- ***whether or not clauses 4(1)(b), 6(2)(b) and 10(2)(b) discriminate against officers' partners who enter into a new domestic relationship (in comparison to partners who do not re-partner);***
- ***whether or not those clauses are reasonable limits on human rights according to the test in Charter s. 7(2).***

The Committee makes no further comment.

Minister's Response

Thank you for your letter of 5 February 2008 enclosing a copy of the report of the Scrutiny of Acts and Regulations Committee (the Committee) in Alert Digest No.1 of 2008 regarding the Constitution Amendment (Judicial Pensions) Bill 2007 (the Bill).

The Alert Digest report makes a number of detailed observations on the Bill which I have endeavoured to address in the attached paper.

If the Committee requires clarification of any of the matters raised in the paper, please do not hesitate to contact me or Ms Ruth Andrew of the Courts and Services Unit, Department of Justice.(9603 9219).

ROB HULLS MP
Attorney-General

21 May 2008

ATTORNEY-GENERAL'S RESPONSE TO ISSUES RAISED BY THE SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

1. INTRODUCTION

The Constitution Amendment (Judicial Pensions) Bill 2007 (the Bill) was introduced into Parliament on 4 December 2007 to:

- *provide for the division of constitutionally protected pension entitlements according to the separate interest method of dividing superannuation entitlements in divorce property proceedings under the Family Law Act 1975 (Cth); and*
- *provide partners of constitutionally protected officers with equal entitlement to a reversionary pension, irrespective of their marital status or gender.*

The Bill was passed in the Lower House with minor amendments (which do not affect the issues discussed in this paper) on 16 April 2008.

The issues raised by the Scrutiny of Acts and Regulations Committee (the Committee) in the extract from Alert Digest No. 1 of 2008 (the Digest) are directed at the Bill's reversionary pension provisions. The Digest indicates that:

- *in the Committee's view the definition of "partner" in paragraph (a)(ii) of clauses 3 and 9 of the Bill may be incompatible with s.8 (3) the Charter of Human Rights and Responsibilities Act 2006 (the Charter), and that the Committee seeks the Attorney-General's clarification of aspects of the definition; and*
- *the Committee refers to Parliament three questions involving:*
    - *whether the Bill reduces current pension entitlements, if so whether this is compatible with the independence of the courts from Parliament;*
    - *whether the Bill discriminates against the surviving partners of judges and other constitutionally protected officers who enter into new domestic relationships; and*
    - *if so, whether this aspect of the Bill is a reasonable limit on human rights under Charter s.7(2).*

The Bill amends a number of Acts which govern the pension entitlements of a number of constitutionally protected office-holders, including judges and masters of the Supreme Court and County Court, the Chief Magistrate, the Director of Public Prosecutions, the Chief Crown Prosecutor, Senior Crown Prosecutors, the Solicitor-General and the Governor. The Acts include the Constitution Act 1975, the Supreme Court Act 1986, the County Court Act 1958, the Attorney-General and Solicitor-General Act 1972, the Magistrates' Court Act 1989 and the Public Prosecutions Act 1994.

For ease of reference, these pension entitlements are referred to as the "judicial pension" and the "judicial pension scheme" throughout this paper. Judges and other officers entitled to a judicial pension are referred to as "constitutionally protected officers".

2. DEFINITION OF "PARTNER"

2.1 Matters on which clarification is sought

In its Charter Report, the Committee considers that paragraph (a)(ii) of the definition of "partner" in clauses 3 and 9 of the Bill may be incompatible with s.8(3) of the Charter and seeks clarification from the Attorney-General on the following issues:

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

2.2 Definition of "partner"

The Committee has observed that paragraph (a) of clauses 3 and 9 of the Bill defines "partner" to include a married spouse or opposite-sex domestic partner. In all other cases, including those who become entitled to receive a pension after passage of the Bill, the term is defined to include married spouses, opposite-sex domestic partners and same-sex domestic partners.

The Committee considers that while use of a split definition in the Bill promotes the rights of opposite-sex domestic partners of retired officers, it raises an issue of discrimination on the basis of sexual orientation for similarly placed same-sex domestic partners, which has not been satisfactorily addressed in the Statement of Compatibility to meet the requirements of s.7(2) of the Charter.

The Bill completes the process of significant reform commenced by the Statute Law Amendment (Relationships) Act 2001, which amended a large number of Acts to recognise the rights and obligations of partners in domestic relationships irrespective of the gender of each partner.

The Act, if passed, will ensure that in future the married partners, opposite-sex domestic partners and same-sex domestic partners of constitutionally protected officers will have the same entitlements to a reversionary pension, irrespective of gender, marital status, or sexual orientation.

The Bill defines the terms "spouse", "domestic partner" and "partner" explicitly in statute for the first time in judicial pension legislation, replacing the term "spouse" wherever used throughout the governing Acts, with the term "partner". This definition is intended to preserve the current eligibility of partners of constitutionally protected officers, and to effect reforms to the judicial

pension scheme to ensure that constitutionally protected officers and their families are not discriminated against on the basis of their marital status or sexual orientation in future.

The term "partner" has been defined in clauses 3 and 9 of the Bill to ensure that all existing reversionary judicial pension entitlements are preserved and extended to domestic partners as well as spouses. The definition is consistent with the definition of "partner" in the State Superannuation Act 1988 and the Parliamentary Salaries and Superannuation Act 1968.

Prior to the 2001 amendments, the State Superannuation Act 1988 and the Parliamentary Salaries and Superannuation Act 1968 made provision for opposite-sex domestic partners to receive a reversionary pension. By contrast, the judicial pension scheme made no such provision: reversionary pensions were only made available to surviving spouses.

Because the judicial pension legislation did not define "spouse", it was considered that a judicial reversionary pension was available only to the surviving married spouse of a constitutionally protected officer. Advice obtained by the Department of Justice indicates that current interpretations of the term "spouse" as it applies to reversionary pension arrangements could also give (and may in fact have already given) rise to reversionary pension entitlements to the surviving partners of opposite-sex relationships. On the other hand, the availability of equivalent entitlements to persons living in same-sex relationships was probably non-existant.

Whilst the current legislation could be interpreted to apply to opposite-sex de facto relationships, it is clear that it does not apply to same-sex relationships. Given this, it cannot be said that the provision discriminates against persons in same-sex relationships. They cannot be regarded as being in the same or similar circumstances as persons in opposite-sex de facto relationships since they do not have an existing entitlement which require clarification. Further, making the legislation prospective risks interfering with existing entitlements of persons in opposite-sex de facto relationships.

On this basis, it is considered that paragraph (a) of the definition of "partner" in clauses 3 and 9 of the Bill does not operate to retrospectively provide opposite-sex partners with entitlements that did not previously exist, and accordingly achieves the same result as the 2001 amendments made to the Parliamentary Salaries and Superannuation Act 1968. On this basis, it is considered that the definition is compatible with the Charter.

2.3 Officers covered by paragraph (a) of the definition of "partner"

The various pieces of legislation establishing judicial pension schemes can be distinguished from other forms of superannuation legislation because of their non-contributory nature and their linkage to the independence of constitutionally protected officers (see below). Accordingly, the legislation and subsequent amendments include only the essential provisions necessary to provide for pension entitlements of constitutionally protected officers.

On this basis, it is considered that the expression "a person who became entitled to benefits under this Act" in paragraph (a) of the definition of "partner" means a constitutionally protected officer who became entitled to receive a pension upon their retirement, resignation or disability. The expression does not include a salary entitlement.

2.4 Use of the terms "husband, wife, widower or widow"

The Bill defines "spouse" explicitly for the first time in the governing Acts as "a person to whom the person is, or was at the time of the person's death, married."

The gender specific terms "husband, wife, widower or widow" are used in paragraph (a)(i) of the definition of "partner" in clauses 3 and 9 of the Bill, to specifically describe the instances of a married spouse, whether male or female, to preserve the state of eligibility that existed prior to the passage of this Bill, on the basis that marriage can only occur between opposite-sex partners at the present time.

Subsection 83(2) of the Constitution Act 1975 and the proviso in section 14(3) of the County Court Act 1958 preclude a person from entitlement to a reversionary pension where they become the spouse of the officer after their resignation or retirement. The occasion to

interpret and apply the terms "husband, wife, widower or widow" as they are used in this context, would therefore not arise even in the event of legislative reform which would enable marriage between same-sex partners, because the terms relate only to persons who are the married partners of officers in receipt of a pension prior to the commencement of the Act, if passed.

On this basis the use of these terms in this context is considered reasonable.

2.5 If a constitutionally protected officer died in office, will he or she ever "become entitled" to a benefit under the Act

In the event of an officer dying in office, a reversionary pension accrues to the officer's partner and does not form part of the deceased officer's estate.

In this sense, a constitutionally protected officer, who dies in office, does not "become entitled" to a benefit under the Act, but rather their death gives rise to eligibility to a reversionary pension which belongs to their partner or, in some cases, their children.

2.6 Registered relationships amendments

The Committee observes that amendments consequential upon the passage of the Relationships Bill 2007 (now the Relationships Act 2008) will mean that opposite-sex domestic partners of officers who have retired prior to commencement of the Constitution Amendment (Judicial Pensions) Act 2008 (the Act) will be required to prove their entitlement under the test set out under paragraph (a)(ii) of the definition of "partner" in clauses 3 and 9 of the Bill, whereas opposite-sex domestic partners of officers who retire after the commencement of the Act will be able to prove their relationship conclusively by registering their relationship.

The Relationships Act 2008 establishes a system for registering domestic relationships and providing conclusive evidence of such relationships where recognised under Victorian law. The registration scheme being introduced by the Relationships Act 2008 will build on the recognition afforded to domestic relationships by the Statute Law Amendment (Relationships) Act 2001. The Act is not intended to affect the entitlements of domestic partners prior to 2001. As such, amendments consequential on the passage of the Relationships Act 2008 amend only the second part of the definition of "partner" wherever it is used in various Acts, to include registered domestic relationships in the term "domestic partner".

The Committee's observations do not identify the basis upon which this is an issue under the Charter. The Committee's observations compare the domestic partners of officers covered by paragraph (b) of the definition with those of officers covered by paragraph (a). Any distinction drawn is on the basis of the date upon which the judicial officer became entitled to benefits under the Act, not upon marital status or any other attribute in the Equal Opportunity Act 1995 which could amount to discrimination under the Charter. Accordingly, it is considered that these proposed amendments are not inconsistent with the Charter.

3. IMPACT OF BILL ON INDEPENDENCE OF THE COURTS

3.1 Matters referred to Parliament for its consideration

The Committee has referred the following questions to Parliament for its consideration:

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

3.2 Nature of the judicial pension

The judicial pension scheme should be distinguished from other forms of superannuation, including those established under State Superannuation Act 1988 and the Parliamentary Salaries and Superannuation Act 1968 on three grounds.

First, the judicial pension is a non-contributory defined benefit scheme. Unlike superannuation and other pension funds, a judicial pension is not "earned" as part of a "total remuneration package". It is an entitlement created by statute and paid to those officers who meet certain statutory criteria.

Pension payments are unfunded and are sourced directly from the Consolidated Fund. To qualify for a judicial pension, an officer must have served at least 10 years in office and reached a minimum retirement age of 65 years, although for some older appointees the minimum retirement age is 60 years.

Retired officers are entitled to a fortnightly pension payable at the rate of 60% of the annual salary for the time being applicable to the office the officer held immediately before retirement. On the death of the officer, a reversionary pension is currently payable to the officer's surviving spouse until that person's death or re-marriage.

Secondly, the judicial pension has links to the concept of judicial independence. Together with security of tenure, the payment of adequate remuneration to judges and the protection of remuneration entitlements, helps ensure the independence of the judiciary and its reputation for impartiality.

The judicial pension structure is said to promote the reality and appearance of judicial independence by eliminating what might otherwise be seen as a temptation for judges to tailor their approach to their post-retirement interests, to ensure the timely retirement of judges whose ability may be impaired by illness by providing appropriate disability benefits, and by ensuring that appointees to judicial office remain in office and do not trade on their positions as former judges.

Thirdly, the current judicial pension scheme should be seen in its historical context. The current scheme dates from the 1940s. The entitlement to a reversionary pension reflects the fact that the judiciary was an exclusively male preserve until the 1980s and that marriage was the only form of publicly acknowledged domestic relationship until relatively recently.

3.3 Continued review of reversionary pension entitlements (clauses 6(2)(b) and 10(2)(b))

Clauses 6(2)(b) and 10(2)(b) extend reversionary pension entitlements beyond their current availability to the surviving spouses of deceased judges or retired deceased judges. It is not accepted that clauses 6(2)(b) and 10(2)(b) reduce the entitlements of current or former judges. It is considered that these amendments are necessary to ensure consistency in the application of the availability of the reversionary pension to all domestic partners.

As noted, under current arrangements, the surviving spouse of a deceased judge or deceased retired judge is entitled to a reversionary pension until death or remarriage. The extension of this concept to the partners of deceased judges or deceased retired judges is considered reasonable given that the reversionary pension entitlement is both generous and non-contributory in nature.

It is not considered, as the Committee suggests, that the proposed arrangements interfere with the financial security of the State's judges or their surviving partners. An entitlement to a reversionary pension is referable to the surviving partner's relationship with the deceased judge. The original policy basis for the reversionary pension recognised the traditionally weaker financial position of a judge's widow. This fundamental policy setting has not been altered.

The Attorney-General, as the Minister responsible for administering Part III of the Constitution Act 1975, is considered to be the appropriate person to make decisions concerning the

continued payment of a reversionary pension. The Attorney-General is already responsible for making similar determinations, such as applications by members of the judiciary for retirement on the grounds of ill-health.

Similar approaches can be found in legislation dealing with property, inheritance, injury compensation and pension benefits. It can also be found in judicial pension schemes in other States where ministers are responsible for both administering the schemes and for applying statutory criteria for considering a whether a constitutionally protected officer was living in a domestic relationship for the purpose of determining an entitlement to a reversionary pension.

Such determinations are administrative in nature, intended to involve an objective and disinterested assessment of the facts of the relationship. Whilst the Minister will receive advice to assist in making the determination, due to the sensitivity of issues involved and the particular role and status of judicial officers, the power to make determinations is not delegated.

3.4 Reduction of pension entitlements and prejudicing those who choose to re-partner (clauses 4(1)(b), 6(2)(b) and 10(2)(b))

The Committee considers that amendments to provisions which provide that a reversionary pension shall cease upon their death, marriage or becoming the domestic partner of another person, will prejudice partners who wish to enter into a new relationship. The Committee also observed that the Bill will reduce officers' pension entitlements by amending provisions which provide that a partner's reversionary pension will cease upon their death or remarriage, to provide that it will cease upon a partner's death, marriage or upon becoming the domestic partner of another person.

It is conceded that persons in receipt of a judicial reversionary pension who re-partner do not receive equal treatment with persons in receipt of a judicial reversionary pension who remain single. This is considered reasonable given the original purpose of the reversionary pension and the purpose of the Bill.

In this regard, the Committee's attention is drawn to the recent decision of the House of Lords in R (Hooper) v. Secretary of State for Work and Pensions[i] *which involved the timing of the removal of certain discriminatory consequences of widows' pension available under social security legislation. The Law Lords afforded considerable deference to Parliament in this regard, noting that the discrimination in fact arose as a result of maintaining an out-of-date benefit, rather than in failing to extend it. Lord Hoffman stated:*

> *I can quite understand that if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider appropriate for making a change. Up to the point at which that time is exceeded, there is no violation of a Convention right.*

Similarly, whilst the policy justification for the Victorian reversionary pensions scheme may have been overtaken by societal changes, there will still be judicial officers and their wives who fall within the original purposes of the scheme. However, the fact that the reversionary pension, which has its historical origins as a widows' pension, relates to judicial officers poses additional challenges in amending the scheme.

While the issue could be reviewed as part of a more general review of the judicial pension scheme and the nature of the entitlements available under that scheme, it would not be possible simply to replace the existing reversionary pension with a more subjective test directed at the financial hardship for which the scheme was originally established. Meanwhile, it is considered that the Bill's overall purpose of giving domestic relationships and marriages equal recognition could not be achieved in a less restrictive manner at the present time.

At present reversionary pensions cease upon the death or subsequent marriage of a deceased constitutionally protected officer's spouse. The Bill provides that a domestic

[i] [2005] 1 WLR 1681

partner's entitlement to a reversionary pension ceases upon the death or subsequent re-partnering of the domestic spouse. That is, the Bill preserves the nature of existing constitutionally protected entitlements, while ensuring that the judicial pension scheme gives equal and consistent recognition to all domestic relationships.

Failure to amend the reversionary pension provisions would give rise to differential treatment between partners of constitutionally protected officers who choose to enter a domestic relationship (who will not be disentitled by virtue of that new relationship) and those who choose to marry (who will be disentitled by re-marriage).

On the other hand, the Committee's observations, if adopted, could affect the particular nature of the judicial pension. As noted, the judicial pension must be distinguished from other forms of superannuation on structural and constitutional grounds. Because the judicial pension does not form part of a "remuneration package", it cannot be assumed that the Committee's observations concerning the rights of former partners should apply to reversionary pensions.

Accordingly, it is considered that careful consideration would need to be given to the question of whether and to what extent the Committee's observations concerning extending the availability of the reversionary pension would impact on the nature of the judicial pension scheme, including their impact on the appropriation of the Consolidated Fund.

In these circumstances, it is considered that the proposed amendments are reasonable and do not limit human rights so as to be incompatible with the Charter.

The Committee thanks the Minister for this response.

Courts Legislation Amendment (Associate Judges) Bill 2008

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

Committee's Comment

Charter Report

Keywords: Age discrimination – Independent court – Associate judges – Jurisdiction in hearings – Appointment and retirement ages

Charter s.8 provides that everyone is 'entitled to the equal protection of the law without discrimination'. Discrimination includes discrimination on the basis of age. Charter s. 24 provides that criminal defendants and civil litigants have 'the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal'. Charter s. 7(2) provides that human rights 'may be subject under law only to such reasonable limits as can be demonstrably justified'.

The Committee notes that clauses 18 (amending s. 17 of the Supreme Court Act 1986) and 44 (inserting a new section 3BA into the County Court Act 1958) gives associate judges jurisdiction to hear all civil and criminal matters. The Committee considers that the Bill therefore may engage the Charter rights of all Victorian litigants' to decisions by a 'competent, independent and impartial' court.

The Committee observes that clauses 28 (substituting s. 104 of the Supreme Court Act 1986) and 53 (substituting s. 17A of the County Court Act 1958) provide associate judges with equivalent protections against removal from office to those that apply to judges. The Committee also observes that clause 73 (inserting new sections 143 & 144 into the Supreme Court Act 1986) provides for the continuation of existing masters' appointments and former masters' pension entitlements. The Committee further observes that clause 36 (substituting s. 105 of the Supreme Court Act 1986) only permits the appointment of acting associate judges when a current associate judge is 'absent or temporarily unable to perform the duties of office', rather than the wider circumstances permitted by s. 80D of the Constitution Act 1975 (in relation to judges) or the existing s. 105 (in relation to masters.) The Committee therefore considers that the Bill is compatible with Victorian litigants' Charter right to decisions by an independent court.

The Committee also notes that clauses 28 (substituting s. 104 of the Supreme Court Act 1986) and 53 (substituting s. 17A of the County Court Act 1958) prevent the appointment of people over seventy as associate judges and generally provide that the appointments of associate judges cease when they turn seventy. The Committee considers that clauses 28 and 53 may limit potential and actual associate judges' Charter right to equal protection of the law without discrimination on the basis of age.

The Statement of Compatibility remarks that this limitation:

> *…ensures that associate judges are competent and maintains public confidence in the judiciary while preserving the independence of the judiciary and minimising intrusive performance evaluations of associate judges by the executive.*

The Committee observes that the Supreme Court of Canada, in a different context, has held that a mandatory retirement age is a reasonable limit on equality rights for employees who otherwise have been given tenured positions to further their independence (Mckinney v University of Guelph [1990] 3 SCR 229.) The Committee therefore considers that clauses 28 and 53 are a reasonable limit on the Charter's right against age discrimination according to the test set out in Charter s. 7(2).

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

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

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

The Committee will raise this concern with the Minister.

Minister's Response

Thank you for your letter dated 11 March 2008, enclosing Alert Digest No. 3 of 2008 of the Scrutiny of Acts and Regulations Committee ('the Committee'), which was tabled in the Parliament on that day.

I note that the Committee considered that the Bill is compatible with the right of a person charged with a criminal office or a party to a civil proceeding to have the charge or proceeding decided by a competent, independent and impartial court and that the Bill's provisions providing that appointments of associate judges cease when they are seventy are a reasonable limit on the Charter right to equal protection of the law without discrimination on the basis of age.

The Committee notes that the Statement of Compatibility does not include express references to clause numbers of the Bill, as recommended by the Committee. In the future, the Department will have regard to the Committee's recommended practice.

It is gratifying that the Committee considers that the Bill is compatible with the Charter in its substantive provisions.

A response to the Committee's comments on the Bill is attached.

ROB HULLS MP
Attorney-General

13 May 2008

Comments on the Charter Report on the Courts Legislation Amendment (Associate Judges) Bill 2008 in Alert Digest No. 3 of 2008

Charter section

Charter s. 8 provides that everyone is 'entitled to the equal protection of the law without discrimination'. Discrimination includes discrimination on the basis of age.

It is noted that the committee considers that clauses 28 and 53 are a reasonable limit on the Charter's right against age discrimination. The clauses prevent the appointment of people over seventy as associate judges and generally provide that the appointments of associate judges cease when they turn seventy.

Charter section

Charter s.24 provides that criminal defendants and civil litigants have the 'right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal.'

It is noted that the Committee considers that clauses 18 and 44 of the Bill are compatible with Victorian litigants' Charter right to decisions by an independent court. The clauses give associate judges jurisdiction to hear all civil and criminal matters.

Express references to clause or section numbers

The Committee notes that the Statement of Compatibility does not identify by clause or section number the provisions it discusses.

The Bill has, nevertheless, received informed consideration by members of Parliament.

However, the Committee's concern is noted and accepted.

The Committee thanks the Minister for this response.

Criminal Procedure Legislation Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 20 November 2007 by the Hon. Rob Hulls MLA. The Committee reported on the Bill in Alert Digest No. 16 of 2007 tabled in the Parliament on 4 December 2007 and sought further information from the Minister.

The Minister's response was carried in Alert Digest No. 1 of 2008. After considering the response the Committee resolved to write to the Minister in the following terms:

> *The Committee thanks the Attorney-General for his response.*
>
> *The Committee notes that the Attorney-General refers to empirical studies from NSW and Scotland as a basis for concluding that 'it is possible to have sentence indications and discounts without inducing guilty pleas.' (emphasis added.) The Committee observes that neither of those jurisdictions had (at the time of the study) a sentence indication system, such as the one proposed in clauses 5 & 7. As the Committee observed in its report, the sentence indication procedure 'may place… defendants under heightened pressure to plead guilty.'* ***The Committee remains concerned that clauses 5 and 7 may be incompatible with defendants' Charter rights not to be compelled to plead guilty and reiterates its reference of this issue to Parliament for its consideration.***
>
> *The Committee also notes that that the Attorney-General's answer to the following query from the Committee:*
>
> > *5. If, due to a reconstitution of the court or a successful Crown appeal against sentence, a defendant who pled guilty after a sentence indication receives a higher sentence than the one indicated, will the defendant be automatically entitled to withdraw the guilty plea? If not, will defendants be warned of this possibility at the sentence indication hearing? (emphasis added)*
>
> *did not address the second question.* ***The Committee refers to Parliament for its consideration the question of whether or not clauses 5 and 7, by not requiring that defendants to be warned of the possibility that a higher sentence than the one indicated may be imposed, is incompatible with defendant's Charter rights to a fair hearing.***
>
> *The Committee further notes that the Attorney-General, after expressing his view that clause 15, which changes court practice by removing an express option to reserve a plea after a committal, does not limit the Charter right of defendants to freedom of expression, does not address the Committee's queries as to whether or not clause 15 falls within the Charter's provisions for limits on freedom of expression. The Committee reiterates its view that the removal of an option to not plead at all (including the treatment of the defendant's silence as a not guilty plea) may limit the defendant's right not to speak.* ***The Committee refers to Parliament for its consideration the questions of:***
>
> - ***whether or not clause 15 limits the Charter right not to speak***
> - ***if so, whether or not clause 15 is either:***
>   - ***reasonably necessary to respect others' rights or to protect national security, public order, public health or public morality, according to the test in Charter s. 15(3); or***
>   - ***a demonstrably justified reasonable limit on defendants' right not to speak according to the test in Charter s. 7(2)***
>
> *The Committee additionally notes that the Attorney-General responds to the Committee's concern that clause 16 (which expands the definition of the summary offence of wilful damage without retrospective effect) may be contrary to Charter s. 27(3) (which requires that people who have not yet been sentenced be eligible for a reduced penalty) by arguing that the definition of the indictable offence of damaging property should not be changed retrospectively. The Committee observes that clause 16 does not affect the definition of the indictable offence, but rather the definition of the summary offence. The Committee reiterates its view that clause 16, by not operating retrospectively, may be incompatible with the Charter*

right of people who damaged property to a value between $500 and $5000 and have not yet been sentenced to be 'eligible for the reduced penalty' that clause 16 makes available. ***The Committee refers to Parliament for its consideration the question of whether or not clause 16 is compatible with Charter s. 27(3).***

The Committee finally notes that the Attorney-General's response addresses in detail a number of rights engaged by the Bill that were not addressed in the Statement of Compatibility. The Committee observes that the Attorney-General has not responded to the Committee's concerns about that Statement of Compatibility.

The Committee will write to the Attorney-General with respect to the above additional concerns.

Minister's Response

I refer to your letter dated 28 February 2008. The Committee has noted five issues and sought my further response to these issues. The Committee's Alert Digest No.2 was available to members of Parliament during the course of the hearings of the Legislation Committee of the Legislative Council where the Hon. Mr Tee, as my nominee, gave evidence to the Committee, in response to questions, some of which arose from Alert Digest No.2.

1. The Committee remains concerned that clauses 5 and 7 may be incompatible with defendants' Charter rights not to be compelled to plead guilty and reiterates its reference of this issue to Parliament for its consideration.

The Sentencing Advisory Council (SAC) considered that one of the causes of delay in criminal proceedings arises from an accused making a decision to plead guilty at a late stage (rather than an early stage) of proceedings. The SAC found that while more than one third of all accused indicate at the conclusion of committal proceedings that they will plead guilty in the County or Supreme Courts, more than two thirds of all cases are finalised by guilty plea (SAC Discussion Paper, pp.8-9). The SAC also observed a concerning trend; the proportion of guilty pleas entered after the trial had been listed almost doubled between 2002/03 and 2004/05 (SAC Discussion Paper, p.7). This is a very large number of accused pleading guilty at a late stage in proceedings. Sentencing indications may result in more accused, who are going to plead guilty anyway, pleading guilty at an earlier stage of proceedings.

The Scottish and NSW research indicates that sentencing discounts have been effective. In those jurisdictions, more accused make their plea decision at an earlier stage because sentence discounts provide greater transparency in the sentencing process.

Sentence indication can provide even more transparency and give the accused more information which will help them make a decision about whether to plead guilty by 'removing unwarranted concerns as to their sentence' (SAC Report p.125)

The Council consulted with offenders to identify influences on their plea decisions and their views on sentence indications. The Council found that some offenders had the view that sentence indications would strengthen an accused's confidence, leading to more accused pleading guilty at an early stage (SAC Report p.76). A number of offenders thought a sentence indication could be a significant help. In particular the Council noted that offenders indicated that:

- *accused may 'have a better idea of what was happening'*
- *some accused 'hold out' because of the 'fear of the unknown'*
- *'having some indication of the sentence from the judge would assist them in planning for the future, especially if they are facing a term of imprisonment.' (SAC Report p.79)*

Therefore, sentence indications will help the accused to be better informed when making plea decisions and will not compel them to plead guilty.

2. The Committee refers to Parliament for its consideration the question of whether or not clauses 5 and 7, by not requiring that defendants to be warned [sic] of the

possibility that a higher sentence than the one indicated may be imposed, is incompatible with defendant's Charter rights to a fair hearing.

In the Magistrates' Court (clause 5), this issue will not arise because the accused can make a de novo appeal in the County Court. A de novo appeal gives a person convicted in the Magistrates' Court the ability to have their conviction or sentence heard again in the County Court, meaning the accused can re-enter a plea.

Regarding the higher courts (clause 7), the Committee raises two circumstances in which an accused may plead guilty and then receive a higher sentence than was indicated in a sentence indication.

First, an accused may plead guilty following an indication, but before being sentenced, the judge may die or become seriously incapacitated and therefore cannot sentence the accused.

Sentencing will usually occur within a very short time after a plea has been entered, especially where the court is already sufficiently aware of the case to have been able to provide a sentence indication. Further, this scenario will only arise if the new judge considers that an immediately servable sentence of imprisonment must be imposed but the first judge had indicated that an immediately servable sentence of imprisonment would not be imposed. This confluence of events is theoretically possible but highly unlikely. Even if a judge was contemplating such action in this scenario, the judge would need to act in accordance with the requirements of procedural fairness and any decision made by the sentencing judge would be subject to appeal processes.

The Committee's assumption is that the accused will remain bound by their plea of guilty. In addition to being bound by the Charter of Human Rights in interpreting these provisions to ensure that the accused receives a fair trial, the court is also required to accord procedural fairness to the accused. The Supreme Court of Victoria in Brand & Hein v Parson [1994] 1 VR 252 accepted that fundamental rules of procedural fairness are implied in legislation. For example, the Court noted that:

> *'Where the most severe sanction known to the criminal law is contemplated, namely the deprivation of personal liberty, a requirement of procedural fairness which alerts an appellant to his or her situation of jeopardy and enables the formulation of a response to it is easily to be implied into the relevant legislation." (at 257).*

There is no Australian jurisprudence on the specific issue raised by the Committee. However, in New Zealand the Supreme Court has indicated that procedural fairness will apply in this situation to protect the accused. For example, in the New Zealand Supreme Court case of R v Sipa (2006) 22 CRNZ 978, the court noted that where there is an appeal on sentence by the prosecution following a sentence indication, the respondent can seek to have the conviction quashed and the matter remitted to the sentencing court for the guilty plea to be vacated and a plea of guilty not entered.

Second, it is theoretically possible that the prosecution may appeal against a sentence indication, submitting that the sentencing judge was in error in not imposing an immediately servable term of imprisonment. It is very unlikely that this would ever occur because the prosecution has a veto on the sentence indication application. It is not at apparent why the DPP would agree to a sentence indication if the DPP thought that a sentence which was not immediately servable in prison would constitute an appellable error. Accordingly:

- *(a) if the prosecution submit to the trial court that a sentence which was not immediately servable in prison was not outside the range of appropriate sentences, and*
- *(b) the trial court imposes such a sentence, and*
- *(c) the prosecution appeal on the basis that the sentence was outside the range of appropriate sentences –*

it is reasonable to expect that the Court of Appeal would not look upon their appeal favourably.

The discretion vested in the ultimate appellate judges to use procedural fairness, and procedural fairness principles implied in legislation, are sufficient protection built into the system.

3. The Committee refers to Parliament for its consideration the question of whether or not clause 15 limits the Charter right not to speak.

Section 15 of the Charter establishes a number of rights relating to freedom of expression. It protects the right to hold an opinion without interference; and the right to seek, receive and impart both information and 'ideas of all kinds' whether within or outside of Victoria, and whether orally, in writing, in print, by way of art or in another medium. The scope of the right includes things such as reporting of judicial proceedings; picketing and protesting; censorship and classification; busking; commercial expression – advertising; public servants expressing political opinions; interception of prisoner's mail and monitoring of telephone calls; and telephone interception.

The amendment does not compel the accused to speak at all. Currently a magistrate will ask a person, after giving appropriate warnings, whether they plead guilty, not guilty or wish to reserve their plea. The amendments will mean that the magistrate no longer asks whether the accused wishes to reserve their plea.

An accused remains at liberty not to speak. If the accused does not speak, their plea will be taken to be not guilty. There is no change to the situation or consequence of a person not speaking in response to the magistrate's questions. If a person does not speak, they will be treated as if they have pleaded not guilty, in accordance with the Charter rights concerning the presumption of innocence and according a person a fair hearing. The right to freedom of expression is not limited by this change to the questions asked by a magistrate.

Given the disclosure and testing of the prosecution case through the committal process, the accused should have sufficient information to be in a position to decide his or her plea by the end of the committal proceeding. An accused should only plead guilty if they are sure that this is the appropriate course of action. An accused can always plead not guilty if they are uncertain about what their plea should be and this does not prejudice their position.

Finally, a number of other jurisdictions in Australia, including the ACT which also has a Human Rights Act, require the accused to plead guilty or not guilty at the end of committal proceedings.

4. The Committee refers to Parliament for its consideration the question of whether or not clause 16 is compatible with Charter s. 27(3).

As I noted in the first three paragraphs of my response in January this year concerning the summary offence of wilful damage (found on page 14 of Attachment A to the response), it would limit Charter rights if the amendment to this offence applied retrospectively in the manner raised by the Committee. The approach adopted in the Bill does not operate retrospectively, as is required by the Charter.

The amendment to the threshold of the value of the property under which a person can be charged with the offence of wilful damage alters a key element of that offence. The rights against retrospective criminal liability in the Charter and in the common law dictate that where the substance of an offence is amended, that amendment must not apply retrospectively. During the drafting of the Bill, Parliamentary Counsel also advised that any other approach would be inappropriate.

If the accused is charged with the indictable offence of damaging property intentionally, the accused has a right to trial by jury. If the amendment operated retrospectively, it would retrospectively remove the right to trial by jury.

5. Statement of Compatibility

The Committee states that my response in January 2008 addresses in detail a number of rights engaged by the Bill that were not addressed in the Statement of Compatibility.

As I indicated in my letter of January 2008, criminal procedure is complex and much of my response was devoted to explaining the context in which reforms contained in the Bill would operate. The vast majority of my response was devoted to explaining in detail the operation of criminal procedure and the criminal justice system. Having done so, in many instances this indicated that Charter rights were either not engaged or were engaged but not limited. In my view the Bill does not limit human rights in any way and the Statement of Compatibility more than adequately addressed the human rights issues involved with this Bill.

I trust that this addresses the Committee's concerns.

Hon Rob Hulls MP,
Attorney-General

7 May 2008

The Committee thanks the Minister for this response.

Justice Legislation Amendment Bill 2008

The Bill was introduced into the Legislative Assembly on 15 April 2008 by the Hon. Bob Cameron MLA. The Committee reported on the Bill in Alert Digest No. 5 of 2008 tabled in the Parliament on 6 May 2008 and sought further information from the Minister.

Committee's Comments

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).

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.***

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, 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.

Minister's response

Thank you for your letter of 7 May 2008 in which you seek advice in relation to amendments to the Serious Sex Offenders Monitoring Act 2005 (SSOMA) contained in the Justice Legislation Amendment Bill 2008 (the Bill).

As you would be aware, the Bill amends the SSOMA principally to expand the offences listed in its Schedule to include serious sex offences against adult victims; and to provide for the making of interim extended supervision orders. The Bill also allows for additional assessment reports to be made in respect of offenders who are eligible for an extended supervision order (ESO); and clarifies the powers of the Court of Appeal.

The Government appreciates the careful attention the Committee has given to this Bill, and acknowledges the valuable role the Committee plays in assisting the Parliament in its deliberations on these important matters.

I now turn to each of the questions and concerns expressed by the Committee in its Alert Digest No. 5 of 2008, as tabled in Parliament on 6 May 2008.

1. Are extended supervision orders penalties or punishments?

It is recognised that the scheme of the SSOMA imposes some significant restrictions on the post-sentence lifestyle of serious sex offenders who are subject to an ESO. However, such restrictions serve a legitimate and non-punitive purpose, which is the protection of the community. The scheme is also flexible enough to allow for a careful balancing of offenders' interests against the interests of the community in requiring such protection, so that any restrictions imposed on offenders are tailored and proportionate.

Relevance of Belcher v Chief Executive of the Department of Corrections

The Committee makes a number of observations regarding the judgment of the New Zealand Court of Appeal in Belcher v Chief Executive of the Department of Corrections [2006] NZCA 262 (Belcher), and criticises the Statement of Compatibility for failing to make reference to that judgment.

The issue of whether a scheme providing for extended supervision of sex offenders amounts to a 'penalty' for the purposes of s27 of the Charter of Human Rights and Responsibilities Act 2006 (Charter), or a 'punishment' for the purposes of s26 of the Charter, is a complex legal question.

In considering this issue the Statement of Compatibility gives primacy to the jurisprudence of the High Court of Australia, and in particular, that which is provided by Lim's case (supra) and Fardon v Attorney-General for the State of Queensland [2004] HCA 46 (Fardon). The latter has been treated as the most authoritative judgment on this issue, given that the Court considers relevant human rights issues in the context of post-sentence management of high risk sex offenders.

The Statement of Compatibility also recognises that the approach of the High Court in Fardon is in a constitutional context, and therefore considers whether that approach would still be appropriate under a statutory human rights instrument. Irrespective of that context, it remains that a number of judges addressed the issue of whether the relevant law was punitive or protective in nature. Callinan and Heydon JJ considered that:

> *the Act … is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective rather than a punitive enactment.*

This authoritative analysis is directly relevant to any consideration of a post-sentence supervision scheme in Victoria in respect of high-risk sex offenders.

In accordance with s32 of the Charter, in drafting the Statement of Compatibility, regard has also been had to the jurisprudence of the United Nations Human Rights Committee; and courts in Canada, the United Kingdom, Europe and the United States, wherein schemes for supervision and/or detention of high risk sex offenders have been considered. These jurisdictions also provide compelling commentary on other types of schemes which impose significant restrictions on individuals outside of the criminal justice system. What emerges from this jurisprudence is that although each scheme must be assessed on its own merits, in its characterisation of whether a scheme is punitive, the High Court of Australia has taken an approach that is consistent with the courts in other jurisdictions, where such schemes have been considered under human rights instruments.

On the other hand, the judgment of the New Zealand Court of Appeal in Belcher takes a different approach and reaches a different result from these courts. That judgment considers the Extended Supervision scheme that operates in New Zealand, which can involve home detention. When enacting the legislation, it is noted that the Attorney-General tabled a report in Parliament in which she concluded that the scheme amounted to punishment and was therefore inconsistent with the right against double jeopardy (a view later affirmed in an interim judgment of the Court of Appeal); however in drawing such a conclusion the Attorney-General conceded there was 'room for debate'.

The question of the compatibility of the New Zealand scheme with its human rights legislation remains to be considered by the Supreme Court of New Zealand (its superior court of appeal); while the analysis provided in the interim judgment of the Court of Appeal also conceded that the authorities from other jurisdictions, including Australia, could support a different conclusion. In taking a different approach from other jurisdictions, the Court stated that their conclusion was nonetheless 'more properly representative of [New Zealand's] legal tradition'.

Thus in the light of these factors, in my view the most persuasive jurisprudence on the human rights compatibility of any Victorian post-sentence supervision scheme remains that of the High Court of Australia.

Relevance of section 26 of the SSOMA

The Committee notes that somewhat similar schemes in the United States and the United Kingdom were found to be civil. However, s26 of the SSOMA expressly provides that proceedings for an extended supervision order are 'criminal in nature'. This is 'except as otherwise provided by the Act'.

The principal reason this provision was inserted into the SSOMA, was to make clear to the courts and to the parties involved which procedures should apply to the hearing of an ESO application. The provision was not intended to describe the substance of the proceedings, nor the scheme of the SSOMA more generally.

In Kansas v Hendricks 521 US 346 the United States Supreme Court rejected the argument that the presence of procedural safeguards normally found only in criminal trials rendered the scheme criminal, rather than civil. Thomas J stated that:

> *The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution.*

In the Government's view a similar approach should apply when construing s26 of the SSOMA.

2. If extended supervision orders are penalties or punishments, does the Bill's retrospective application of the ESO scheme to past offenders who committed sexual crimes against adults represent a reasonable limitation on the rights in s26 and s27 of the Charter?

Whilst the High Court has not considered these issues under a statute such as the Charter, it has considered the issues in the context of common law principles protective of human rights, namely 'double jeopardy'. In Fardon each of Gleeson CJ (at para 14), Gummow J (at para 74) and Kirby J (paras 163-166; 180-186) saw these common law principles as relevant. Gummow J said:

> *It is accepted that the common law value expressed by the term "double jeopardy" applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted. The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure. It did not implicate the common law principle in the same way as, for example, the conferral by statute of a right in the prosecution to appeal against sentence.*

As explained in the Statement of Compatibility that accompanied the Bill, and by way of analogy with the above judgment, sections 26 and 27 of the Charter are not limited by the Bill as:

a) the scheme of the SSOMA does not constitute a 'penalty' (see discussion above); and

b) even if it could be characterised as a 'penalty', this would not be 'for' the previous offence; rather, the authority of the courts to impose an ESO on a particular offender is derived by way of reference to the separate normative structure of the SSOMA.

If the broader, New Zealand approach to what constitutes a 'penalty' were adopted in Victoria, the New Zealand Court of Appeal has itself recognised that the public interest served by these provisions may lead to a conclusion that they are reasonable limitations on the rights against retrospective penalties and double jeopardy.

3. Are ss16(3A) and (3B) of the SSOMA punitive or preventative and rehabilitative?

Sections 16(3A) and (3B) are existing provisions in the SSOMA that essentially allow offenders subject to an ESO to be directed by the Adult Parole Board to reside at premises that are situated on land that is within the perimeter of a prison but does not form part of the prison (i.e. land that is de-gazetted as prison land); and that this is to be taken as residing 'in the community' for the purposes of the SSOMA.

The reason offenders may be directed to reside at such premises is principally to ensure that they are accommodated in such a way that ensures their safety, without compromising their supervision by Corrections Victoria, and in turn, the safety of the community. It would be inimical to these offenders' rehabilitation if they were exposed to some of the potential dangers of residing in other accommodation in the community, particularly where they have a high profile as a serious sex offender. A direction under s16(3A) also ensures that offenders' compliance with the mandatory conditions of an ESO (which are imposed by the courts) can be properly monitored. Such directions are therefore consistent with the purposes of the conditions of the SSOMA, set out in s15(2):

- *to ensure that the community is adequately protected by monitoring the offender; and*
- *to promote the rehabilitation and the care and treatment, of the offender.*

It is also appropriate to consider section 16(3A) and (3B) in the context of the Part of the SSOMA in which they appear, and therefore, in the light of their relationship to other directions and instructions that may be given by the Adult Parole Board under s16(3). For instance, under s16(3) the APB may give instructions or directions as to treatment and rehabilitation programs; times when the offender must be home; community activities which the offender must not engage in, and so on. When these other kinds of directions and instructions are taken into account then it is clear that s16(3A) forms part of a protective and rehabilitative scheme, and not one which is punitive.

4. Why are the Adult Parole Board's decisions under s16(2) not subject to the rules of natural justice or to any statutory review or inquiries?

Natural justice

Section 69(2) of the Corrections Act 1986 provides that in exercising its functions (which include functions under the SSOMA) the Adult Parole Board (APB) is not subject to the rules of natural justice.

In considering the merits of this exemption, it should be noted that prisoners who are subject to the decisions of the APB are in fact still under a custodial sentence. As such, their release on parole should not be characterised as 'a right' but it is instead 'a privilege'. It follows from this that offenders being considered for parole by the APB have already had the benefit of natural justice being applied to the question of their liberty by the sentencing court.

Similarly, offenders subject to an ESO have had that ESO imposed by a court following a process that accords with the principles of natural justice. The mandatory (i.e. automatic) conditions of an ESO under section 15 of the SSOMA include that they comply with any direction or instruction of the APB.

As such, the proper characterisation of the APB's functions in regards to parole orders and the SSOMA, is that they administer decisions previously made by the courts in accordance with the principles of natural justice.

Judicial review

Other than not being bound by the rules of natural justice, the APB is in fact subject to all other traditional grounds of judicial review. For instance, a person may challenge a decision of the APB on the grounds that it had no jurisdiction to make the kind of decision it made (narrow ultra vires); that it acted unreasonably (within the meaning of Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223); or abused its discretionary power or took into account a consideration that was irrelevant (broad ultra vires); and so on.

Thus the common law provides a strong safeguard against any decisions of the APB being anything other than lawful and appropriate.

Other safeguards

The composition of the APB also assists in ensuring that decisions are subject to judicial scrutiny and are therefore lawful and reasonable. That is, the APB is Chaired by a Supreme Court judge, the Honourable Justice Simon Whelan; while all in all, it has eleven judicial members, including a retired Supreme Court Judge and one current Supreme Court judge (in addition to the Chair); two retired County Court judges and two current County Court judges; the Deputy Chief Magistrate of Victoria; two current Magistrates and a retired Chief Magistrate. The Board also includes a full-time member who is also lawyer.

Additionally, the APB includes a number of community members with diverse professional and life experience, which assists in ensuring that its decisions are fair and reasonable and in accordance with community values.

Powers of Ombudsman to investigate

The reason the APB is not subject to the investigative powers of the Victorian Ombudsman is that under the Ombudsman Act 1973 (Vic), there can be no investigation of, or administrative action taken against, a body 'presided over by a Judge' (see s13 – Functions and jurisdiction). This exemption is an indication of Parliament's view that the body in question is trustworthy in terms of making reasoned decisions that are within the bounds of the law and which are subject to judicial scrutiny.

Other grounds of statutory review

As noted by the Committee, the APB is also not subject to review under the Administrative Law Act 1978 (Vic). This Act provides an avenue of review in relation to decisions by 'tribunals', however, the definition of 'tribunal' under s2 of that Act excludes bodies that are 'presided over by a Supreme Court judge'. As above, this connotes that Parliament has entrusted such bodies to make reasoned decisions that are within the law and which are subject to judicial scrutiny.

5. 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 s16(2)?

The Government decided to make the Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007 to exempt the APB and the Youth Parole Board from the Charter for a period of a year in order to allow the review of the impact of the Charter on these bodies' work; and to consider the resources that would be required to ensure their compliance with the Charter.

6. Will the exemption in the Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007 be renewed in 2009?

The work referred to above is still underway and a decision will be made before the regulations expire on 31 December 2008.

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

Bob Cameron MP
Minister for Corrections

23 May 2008

The Committee thanks the Minister for this response.

Committee Room
26 May 2008

Appendix 1
Index of Bills in 2008

Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights and freedoms.

Constitution Amendment (Judicial Pensions) Bill 2007 1

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

Relationships Bill 2007 1

(vi) inappropriately delegates legislative power.

Essential Service Commission Amendmnet Bill 2008 4

(vii) insufficiently exercises legislative power to parliamentary scrutiny

National Gas (Victoria) Bill 2008 6

(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 Integity 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	21.05.08	1 of 2008	6 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	07.05.08	2 of 2008	6 of 2008
Port Services Amendment (Public Disclosure) Bill 2008	Hon. David Davis MLC	28.02.08		2 of 2008	

Courts Legislation Amendment (Associate Judges) Bill 2008	Attorney-General	11.03.08	13.05.08	3 of 2008	6 of 2008
Drugs, Poisons and Controlled Substances Amendment Bill 2008	Health	12.03.08	03.04.08	3 of 2008	4 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
Children's Legislation Amendment Bill 2008	Children & Early Childhood Development	07.05.08		5 of 2008	
Gambling Regulation Amendment (Licensing) Bill 2008	Gambling	07.05.08		5 of 2008	
Justice Legislation Amendment Bill 2008	Corrections	07.05.08	23.05.08	5 of 2008	6 of 2008
National Gas (Victoria) Bill 2008	Energy & Resources	27.05.08		6 of 2008	