

No. 7 of 2008

Tuesday, 10 June 2008

On the

Children's Legislation Amendment
Bill 2008

Courts Legislation Amendment
(Juries and Other Matters) Bill 2008

Crimes (Controlled Operations)
Amendment Bill 2008

Melbourne Cricket Ground
Amendment Bill 2008

Unclaimed Money Bill 2008

Wildlife Amendment (Marine
Mammals) 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 –

Courts Legislation Amendment (Juries and Other Matters) Bill 2008
Crimes (Controlled Operations) Amendment Bill 2008
Melbourne Cricket Ground Amendment Bill 2008
Unclaimed Money Bill 2008
Wildlife Amendment (Marine Mammals) Bill 2008

The Committee notes the following correspondence –

Children's 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. 7 of 2008

Courts Legislation Amendment (Juries and Other Matters) Bill 2008

| | |
|--------------------------|----------------------|
| Introduced | 27 May 2008 |
| Second Reading Speech | 29 May 2008 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose

The Bill amends the —

- *Constitution Act 1975* with respect to the recognition for pension purposes of certain prior service of persons appointed as judges of the Supreme Court;
- *Juries Act 2000* in relation to the powers of the Juries Commissioner, the remuneration and allowances for jury service and investigations by jurors; and
- *Magistrates' Court Act 1989* in relation to persons who may witness statements to be tendered in committal proceedings.

Note: The amendments in 2003 to the Constitution Act 1975 inadvertently disadvantaged judges appointed to the Supreme Court of Victoria from the County Court of Victoria by not recognising previously existing pension entitlements.

Content and Committee comment

[Clauses]

Juries Act 2000

[4]. Inserts new subsections (4B), (4C) and (4D) into section 29. New subsection (4B) places beyond doubt the power of the Juries Commissioner to exclude a person from a pool from which a panel will be chosen if the Juries Commissioner is satisfied that the person is unavailable to sit on a trial due to the likely length of the trial.

[6]. Amends the Act to permit the Juries Commissioner to receive from past or present jurors issues or complaints concerning the deliberations of a jury or the disclosure of information about those deliberations. If the complaint is made after a trial, the Juries Commissioner must refer it to Victoria Police for investigation.

[7]. *Jury or panel member not to make unauthorised inquiries relating to a trial* – Inserts new sections 78A, 78B and 78C to prohibit investigations by panel members and jurors.

New section 78A(1) provides that a panel member or juror for any criminal or civil trial must not make an enquiry for the purpose of obtaining information about a party, or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror. The provision includes a penalty of 120 penalty units for a breach.

New section 78A(3) provides that a juror is not prevented from making an enquiry of the court or another member of the jury as long as it is within the proper exercise of his or her functions as a juror. It also provides that a juror is not prevented from making an enquiry authorised by the trial judge.

New section 78A(5) provides that the making of an enquiry includes consulting with any person, conducting any research, viewing or inspecting any place or object which has any relevance to the trial, conducting an experiment and requesting any other person to make an enquiry.

New section 78B enables a judge to examine on oath a person who is on a panel for a trial or a juror in a trial to determine whether the person has engaged in conduct that may contravene section 78A(1).

Privilege against self-incrimination – use limitation – New section 78C provides that a person is not excused from complying with a requirement to give evidence under section 78B on the ground of self-incrimination in relation to an offence against section 78A. It also provides that any evidence given by the person is not admissible in evidence against the juror in criminal proceedings in relation to an offence against section 78A.

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

The Committee makes no further comment.

Crimes (Controlled Operations) Amendment Bill 2008

| | |
|---------------------------------|----------------------|
| Introduced | 28 May 2008 |
| Second Reading Speech | 29 May 2008 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Rob Hulls MLA |
| Portfolio responsibility | Attorney-General |

Purpose

The Bill amends the *Crimes (Controlled Operations) Act 2004* (the 'Act') to repeal provisions relating to the Australian Crime Commission and to make consequential amendments to the *Major Crime Legislation (Office of Police Integrity) Act 2004*.

The purpose of the Bill is set out in the Statement of Compatibility –

The Bill removes all references to the Australian Crime Commission (ACC) and the Commonwealth Ombudsman from relevant definitions in section 3 of the Crimes (Controlled Operations) Act 2004 (the Act).

The Bill also makes consequential amendments to the Act and to the Major Crime Legislation (Office of Police Integrity) Act 2004.

The underlying purpose of the Bill is to remove a constitutional impediment to the Act commencing operation.

The Bill will enable, as an interim measure, the implementation of the controlled operations regime in Victoria, and will enable Victorian law enforcement agencies to conduct controlled operations under the regime contained in the Act.

In due course, if and when the Commonwealth Parliament amends its own controlled operations legislation, the Victorian government proposes to introduce complementary and constitutionally valid amendments enabling the ACC to avail itself of the Victorian controlled operations regime.

Content and Committee comment

[Clauses]

[2]. The Act, except for Part 2, comes into effect on the day after the day on which the Act receives the Royal Assent. Part 2 comes into operation on a day or days to be proclaimed.

Note: *The reason for this two stage approach is to amend the amendments to the Act to be made by the Major Crime Legislation (Office of Police Integrity) Act 2004, prior to proclamation of that Act and the Principal Act.*

[9]. Provides for the automatic repeal of this amending Bill on the first anniversary of its commencement.

The Committee makes no further comment.

Melbourne Cricket Ground Amendment Bill 2008

| | |
|---------------------------------|------------------------|
| Introduced | 28 May 2008 |
| Second Reading Speech | 29 May 2008 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. James Merlino MLA |
| Portfolio responsibility | Minister for Sport |

Purpose

The purpose of the Bill is to amend the *Melbourne Cricket Ground Act 1933* to facilitate the proposed widening of the southern concourse of the Melbourne Cricket Ground from Gate 1 to light tower 4.

The Bill permanently reserves the stratum in the Crown Allotment as part of the site for the Melbourne Cricket Ground under the *Crown Land (Reserves) Act 1978* and deems the relevant stratum to be part of the land reserved as the Ground under the Order in Council dated 20 February 1934.

Note: From the explanatory memorandum – *To avoid doubt, the Bill removes any right of way in relation to any stratum in the Crown Allotment that is or is being used as a road. There are, however, no known rights of way in relation to the stratum.*

Content and Committee comment

[Clauses]

[3]. Inserts a new section 11F into the *Melbourne Cricket Ground Act 1933* which provides for a stratum to be added to the MCG.

[4]. Provides for the automatic repeal of this amending Act on the first anniversary of its commencement.

The Committee makes no further comment.

Unclaimed Money Bill 2008

| | |
|---------------------------------|----------------------|
| Introduced | 27 May 2008 |
| Second Reading Speech | 29 May 2008 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Tim Holding MLA |
| Portfolio responsibility | Minister for Finance |

Purpose

The purpose of the Act is to re-enact with amendments the law relating to unclaimed money so as to continue to provide for —

- the collection and safekeeping of unclaimed money and unclaimed superannuation benefits;
- the collection of information needed to identify and locate the owner of unclaimed money;
- the keeping of registers of details (including business registers, the unclaimed money register and the register of unclaimed superannuation benefits) relating to unclaimed money and unclaimed superannuation benefits so that the owner can be identified and located;
- the publication of sufficient information for the purposes of identifying and locating the owner of unclaimed money and unclaimed superannuation benefits;
- the payment, into the Consolidated Fund, of money paid into Court which is unclaimed;

The Bill will repeal the *Unclaimed Moneys Act 1962*.

Note: *The object of this Bill is to safeguard and collect unclaimed money and to ensure the rightful owners of such money can be identified and located. Unclaimed money includes money paid into court, general unclaimed money such as share dividends, salaries and wages, rent and bonds, debentures and interest and unrepresented cheques and unclaimed superannuation benefits.*

Content and Committee comment

[Clauses]

Presumption of innocence – onus to provide evidentiary facts to found a defence – Clauses 17 to 19 and 70(6)

[17]. Creates an offence where a person fails to make entries, without reasonable excuse, in the business register as required under section 11(1). A reasonable excuse may include an honest and reasonable mistake, or circumstances which are beyond the control of a business including fires, flood or natural disasters, key personnel not being available due to sudden resignation, illness or death, or computer malfunction.

[18]. Creates an offence where a business fails, without reasonable excuse, to make payment and lodge returns to the Registrar as required under section 12(1). A reasonable excuse may include an honest and reasonable mistake, or circumstances which are beyond the control of a business including fires, flood or natural disasters, key personnel not being available due to sudden resignation, illness or death, or computer malfunction.

[19]. Creates an offence where a trustee fails, without reasonable excuse, to comply with their obligations under section 14(1) of the Bill. A reasonable excuse may include an honest and reasonable mistake, or circumstances which are beyond the control of a business including fires, flood or natural disasters, key personnel not being available due to sudden resignation, illness or death, or computer malfunction.

Part 4 of the Bill outlines the Registrar's obligations and powers in respect of unclaimed money.

Presumption of innocence – Evidentiary burden on defendant

[26]. Provides that if a body corporate contravenes a provision of the Bill, a person who is concerned in, or takes part in, the management of the body corporate is deemed to have contravened the same provision.

A person will not be deemed to have contravened the provision if they can point to evidence in the proceeding, which shows any of the following matters —

- the person did not know the body corporate had contravened the provision;
- the person was not in a position to influence the conduct of the body corporate in relation to its contravention of the provision; or
- the person used all due diligence to prevent the contravention of the provision by the body corporate.

Note: From the explanatory memorandum – *If a person can point to evidence of these matters, the Registrar will be required to disprove that evidence beyond reasonable doubt.*

The persons who are considered to be concerned in, or take part in, the management of a body corporate for the purpose of this clause are —

- a director of a body corporate;
- a secretary of a body corporate;
- a receiver or manager of property of the body corporate;
- an official manager or deputy official manager of a body corporate;
- a liquidator of a body corporate appointed in a voluntary winding up of the body corporate;
- a trustee or other person administering a compromise or arrangement between the body corporate and another person or persons. *[Refer to Charter Report below].*

[33]. An owner of unclaimed money may apply to the Registrar for payment of unclaimed money that has been paid to the Registrar by a business or trustee (sections 12 and 14). The Registrar may pay the unclaimed money to the applicant, if the Registrar is satisfied that the person is the owner of the money. The applicant bears the onus of establishing that they are the owner of the unclaimed money.

[59]. Provides for the right of review or appeal by a business or trustee dissatisfied with the Registrar's determination of their objection or the Registrar's failure to determine their objection by requesting that the matter be referred to the VCAT or be treated as an appeal to be set down for hearing by the Court.

[70]. Sets out the powers of entry, search and inspection for the purposes of an authorised investigation. These include powers to inspect premises, require a person to produce a document, operate a device to produce a document, retain a document and, require a person to answer questions and give reasonable assistance to an authorised officer.

Subclause (6) creates an offence where a person hinders or obstructs, or without reasonable excuse fails to reasonably co-operate with an authorised officer carrying out an authorised investigation, or answers a question with an answer he or she knows is false or misleading.

Presumption of innocence - clauses 17, 18, 19, and 70(6) – Onus to present evidentiary facts of a reasonable excuse

The Committee notes these extracts from the Statement of Compatibility –

The relevant clauses require the defendant to point to evidence that he or she had a reasonable excuse for failing to comply with particular provisions in the Bill. This may limit the right to be presumed innocent if the effect of the defence is that, in the absence of any evidence of reasonable excuse, a person can be convicted without the prosecution proving all the elements of the offence in the usual way. The limitation will only apply where a defendant is charged with an offence under clauses 17, 18, 19 and 70(6).

In addition, when evidence of reasonable excuse is adduced the prosecution will have the burden of disproving the matters raised beyond reasonable doubt. In this respect, the nature and extent of the limitation are confined.

In the circumstances the Committee accepts the desirability to include a reverse onus provision for the defendant to establish evidentiary facts on the balance of probabilities.

Privilege against self-incrimination – use limitations

[74]. Provides protection against self-incrimination.

A person may refuse or fail to give information, produce documents or answer questions that the person is required to give, produce or answer under the investigations provisions if giving the information, producing the documents or answering the questions would tend to incriminate the person.

The provision however does not excuse a person from giving information, producing documents or answering questions that the person is required to give, produce or answer on the ground that giving the information, producing the documents or answering the questions would tend to incriminate the person in respect of an offence against this Bill.

Information given, documents produced or questions answered by a person as required by the investigation provisions of this Bill are not admissible in evidence against the person in any proceeding in respect of an offence against this Bill.

Charter Report

Presumption of innocence – Individual liability for offences committed by entities he or she is involved in managing – 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. 25(1) provides that everyone has the ‘right to be presumed innocent until proved guilty according to law.’

The Committee notes that clause 26 provides that various defined people concerned in the management of a body corporate that has contravened a provision of the Act are ‘taken to have contravened the same provision.’ The Committee also notes that the Bill includes provisions for a variety of criminal offences relating to the failure to meet statutory obligations relating to unclaimed money. The Committee further notes that clause 27 provides that,

where a partnership or unincorporated offence is guilty of an offence, all members of the partnership or management committee are guilty. The Committee observes that, in contrast to other statutory presumptions that typically appear in regulatory legislation, these presumptions attribute liability to one individual for the acts of another. The Committee considers that clauses 26 and 27 therefore engage the Charter right of people concerned in the management of a body corporate, partnership or unincorporated association to be presumed innocent of a criminal offence.

The Committee further notes that clause 26(2) provides that the prosecution must still prove such an individual's actual guilt if the individual 'gives evidence in the proceeding' that he or she had no knowledge, influence or ability to stop the corporation's contravention. The Committee observes that this is less burdensome than a requirement to prove these matters and that the House of Lords held in *Attorney-General's Reference No 4 of 2004* [2005] 1 AC 264, [54] that an evidential burden is acceptable where a person's liability is presumed based on his or her involvement in an organisation. However, the Committee observes that the requirement to 'give' evidence is more onerous than a requirement to satisfy an evidential burden, which only requires the defendant to 'point to' evidence (e.g. including the prosecution's evidence about the entity's breach, while may, of its nature, suggest that a particular individual knew nothing about it.) The Committee notes that the explanatory memorandum to clause 26(2) refers to the ability of an individual to 'point to' evidence, but that language does not appear in the actual clause.

The Committee additionally notes that clause 27 provides no equivalent defence for members of partnerships or unincorporated associations (whereas a defence of due diligence is provided for in other statutes, e.g. s. 99 of the *Rail Safety Act 2004*.)

The Statement of Compatibility remarks, in relation to clause 26:

This provision is necessary so that a person cannot avoid liability behind the corporate veil. The matters which indicate a person should not be convicted are principally in the knowledge of the defendant. Therefore, it is reasonable that they adduce evidence which puts these matters in issue.

The Statement of Compatibility does not address clause 27.

The Committee refers to Parliament for its consideration the questions of whether or not:

- ***clauses 26 or 27 limit the right of managers of bodies corporate and members of partnerships and management committees of unincorporated associations to be presumed innocent of offences in relation to unclaimed money committed by those entities***
- ***clause 26, in light of its exception for when an individual 'gives evidence' distancing himself or herself from the offence, is a reasonable limit on the Charter right of people involved in the management of bodies corporate to be presumed innocent according to the test in Charter s7(2)***
- ***clause 27, which makes members absolutely liable for all offences committed by their partnership or unincorporated association, is a reasonable limit on the Charter right of those members to be presumed innocent according to the test in Charter s7(2)***

The Committee makes no further comment.

Wildlife Amendment (Marine Mammals) Bill 2008

| | |
|---------------------------------|---|
| Introduced | 28 May 2008 |
| Second Reading Speech | 29 May 2008 |
| House | Legislative Assembly |
| Member introducing Bill | Hon. Peter Batchelor MLA |
| Responsible Minister | Hon. Gavin Jennings MLC |
| Portfolio responsibility | Minister for Environment and Climate Change |

Purpose

This Bill amends the *Wildlife Act 1975* (the 'Act') to further provide for permits as to whale watching tours and whale swim tours, and provide for seal tour permits.

Content and Committee comment

[Clauses]

[2]. Provides that the Bill other than clauses (3(1), 22 and 30 come into operation on the day after Royal Assent. The remaining clauses come into operation on proclamation but not later than by 1 December 2009. *Note: The delayed commencement of the specified clauses is to allow sufficient time for the making of new regulations arising from the changes to be effected by these clauses.*

Presumption of innocence – defendant to establish reasonable excuse

[25]. Amends section 81 of the Act by inserting subsections (3) to (9).

New subsection (3)(a) provides that an authorised officer may direct a person not to approach a whale at a distance which is less than 500 metres from the whale or any lesser distance specified by the authorised officer and new subsection (3)(b) provides that an authorised officer may direct a person to move away from a whale by up to 500 metres from the whale or any lesser distance specified by the authorised officer. New subsections (4)(a) and (4)(b) mirror subsections (3)(a) and (3)(b) except that they apply to operators of vessels. New subsection (6) provides that it is an offence if a person fails to comply with a direction of an authorised officer given under subsections (3) or (4) unless the person *has a reasonable excuse for not doing so*.

Presumption of innocence – evidentiary onus to establish reasonable excuse

The Committee notes that the defence of reasonable excuse may require an accused person to present or point to evidence which raises a reasonable possibility that they have a reasonable excuse, in accordance with section 130 of the Magistrates' Court Act 1989. Whether or not a person has such an excuse will generally be a matter peculiarly within the knowledge of the accused and that in the absence of a requirement for an accused to point to facts relating to a reasonable excuse, it would be difficult for a prosecuting authority to investigate and prove the absence of any reasonable excuse.

The Committee accepts the regulatory offence requiring a defendant to show reasonable excuse is acceptable.

[36]. Provides for the automatic repeal of the Bill on 1 December 2010.

The Committee makes no further comment.

Ministerial Correspondence

Children's Legislation Amendment Bill 2008

The Bill was introduced into the Legislative Assembly on 8 April 2008 by the Hon. Maxine Morand MLA. The Committee considered the Bill on 5 May 2008 and made the following comments in Alert Digest No. 5 of 2008 tabled in the Parliament on 6 May 2008.

Committee's Comment

Charter Report

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

Charter s.14(2) provides that a person 'must not be restrained in a way that limits his or her freedom to have or adopt a religion or belief in observance, practice or teaching.' Charter s. 19(1) provides that a person of a distinct cultural or religious background 'must not be denied the right to enjoy his or her culture' or to 'practice his or her religion'. Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.

The Committee notes that clause 12(3) (inserting a new section 28(3) into the Children's Services Act 1996) makes it an offence for a family day carer to subject a child being educated or cared for by the carer to: (a) any form of corporal punishment; or (b) any discipline which is unreasonable in the circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

Minister’s Response

Thank you for your letter of 7 May 2008 outlining the Scrutiny of Acts and Regulations Committee’s comments in relation to the Children’s Legislation Amendment Bill 2008 (the Bill).

In the extract from the Alert Digest No.5 of 2008 you sought clarification as to clause 12 of the Bill as it relates to the discipline of young children being cared for by children’s services and family day carers. Your concern that the ban in clause 12 on ‘any discipline which is unreasonable in the circumstances’ may be too vague to be considered a ‘law’ limiting a human right under the Charter has been carefully considered and a response has been prepared to address the issues cited in the two specific questions you have posed, that is

- 1. What types of conduct falls within the prohibition on ‘any discipline which is unreasonable in the circumstances’ in existing sections 28(1)(b) and (2)(b) and new section 28(3)(b) of the Children’s Services Act 1996 (Act)?*
- 2. What information is available to proprietors and staff of children’s services and family day carers that will enable them to assess whether or not a particular act falls within the meaning of ‘discipline’ and whether or not a particular type of discipline is ‘unreasonable in the circumstances’?*

Legal issue

In relation to the expression ‘prescribed by law’ in the European Convention on Human Rights, the European Court of Human Rights has said that the law must be adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct. In relation to the second requirement the Court has stated:

‘he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive

rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.' The Sunday Times v The United Kingdom, 2 EHRR 245.

The potential limit raised by the Committee relates to disciplinary measures that may be required by a person's religious belief, but which may be prohibited by the provision. The Committee does not identify any specific religious practice in relation to the discipline of children in respect of which the Committee considers there may be some doubt as to whether it would be regarded as 'unreasonable in the circumstances'. Identifying all such practices, assuming any exist, would be an impossible task and a flexible provision is required in order to ensure effective protection of children.

Types of conduct

There has been an obligation on proprietors and staff members of children's services not to subject any child being cared for or educated by the service to unreasonable discipline since the Children's Services Act (Act) came into force on 1 June 1998. From 25 May 2009 it is intended that this obligation will also apply to family day carers.

'Discipline' is defined as 'punishment inflicted by way of correction and training (Macquarie dictionary, 4th Ed.) The term 'discipline' is well understood by the sector to mean conduct used to manage children's behaviour, particularly that with a punitive or corrective element. Regulation 20(2)(e) of the Children's Services Regulations 1998 (Regulations) requires that the proprietor ensure that the policy of the service with regard to behaviour management is available for inspection at the children's service. To formulate this policy, proprietors of children's services need to consider methods of managing behaviour or 'disciplining' children which may be used by the staff members directly involved in caring for and educating the children at the service.

The reasonableness of any disciplinary measures will always depend on the circumstances (excepting corporal punishment, which is prohibited outright). For example, the physical restraint of a child may be reasonable when the child's safety or the safety of others is at risk from the child's behaviour, but not in other circumstances. Flexibility is necessary in this requirement to allow staff to respond appropriately in emergency and high-risk situations.

Reasonable disciplinary procedures guide children to behave appropriately in a way which respects children's dignity and their stage of development, and does not compromise their safety. Discipline would usually be considered unreasonable if it involved leaving a child unsupervised by staff, including by using 'time out'; excluding a child from the children's service; or humiliating, embarrassing or frightening a child.

Information available

- *Children's Services Licensing Operational Guide – this guide was published by the Department of Human Service in 1998, to assist everyone who owns, operates, manages or works in a children's service to comply with the Act, and to suggest good practices and procedures. The guide contains a section on behaviour guidance, including information about responding to ongoing unacceptable challenging behaviour. The guide points out a number of disciplinary measures which would in most circumstances be considered unreasonable, including 'time out', leaving a child unsupervised by staff, and exclusion from the service, as well as suggesting acceptable practices. The guide also contains information about developing a behaviour guidance policy, and provides a sample policy. A revised version of this guide will be published with the new regulations in May 2009.*
- *Behaviour management policy – All services are required to have a behaviour management policy, which is expected to provide a strategy for responding to children's inappropriate or challenging behaviour in a way that is reasonable and that ensures parental / guardian involvement, and where appropriate the involvement of other professionals. A centre's behaviour management policy would be expected to give clear guidance to staff as to the reasonableness of disciplinary procedures in different circumstances. It is expected that, from 25 May 2009, family day care services will also be*

required to have a behaviour management policy, which will provide guidance to family day carers in this area.

- *Information from the Department's staff, who are authorised under the Act to monitor and provide support, assistance and information to the sector, indicates they adopt a graduated response to breaches of Section 28 of the Act. For example, if an authorised officer observed potentially unreasonable disciplinary practices during a monitoring visit, they would in most cases initially work with the proprietor and/or staff member to attempt to improve behaviour management at the service. Prosecution of a proprietor or staff member under section 28 is only one of a range of sanctions available to the Department, and would usually only be considered in cases of repeated or extremely unreasonable discipline.*
- *National Standards for Family Day Care – these standards provide guidance for family day carers on how interactions with children in their care should be managed. Standard 3.3.2 states that the dignity and rights of the child must be maintained at all times, which means using child management techniques which do not include physical, verbal or emotional punishment (including punishment which humiliates, frightens or threatens a child). Further, when isolation is used as a method of managing unacceptable behaviour, the standards state that the isolation, whether on a chair or in a room, should only be for two or three minutes.*
- *Practice notes – a suite of 6 practice notes about behaviour guidance are being developed and will be finalised and available to the sector prior to section 28(3)(b) coming into force. This includes a practice note relating to discipline of children, in which disciplinary practices which the Department considers unreasonable in most circumstances is discussed, including 'time out' and restraint. Other unreasonable practices such as yelling, withholding food and drinks, and dragging a child, will be listed. The suite also includes a practice note on acceptable strategies to guide children's behaviour, and one on developing a behaviour guidance policy.*

As is evident from the information above the concept of 'discipline which is unreasonable in the circumstances' is well understood by the children's services sector and has been well supported with resources to guide staff to manage children's unacceptable behaviour appropriately.

Taken as a whole there is enough information and guidance to allow persons operating in the children's services sector to understand what is and what is not reasonable when disciplining young children. I therefore feel that the Bill should go forward in its current form without amendment to clause 12 or the related provisions in Section 28 of the Act.

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

*Maxine Morand MP
Minister for Children and Early Childhood Development*

28 May 2008

The Committee thanks the Minister for this response.

**Committee Room
6 June 2008**

Appendix 1

Index of Bills in 2008

Alert Digest Nos.

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| Appropriation (Parliament 2008/2009) Bill 2008 | 6 |
| Cancer Amendment (HPV) Bill 2008 | 5 |
| Children's Legislation Amendment Bill 2008 | 5, 7 |
| Constitution Amendment (Judicial Pensions) Bill 2007 | 1, 6 |
| Consumer Credit (Victoria) and Other Acts Amendment Bill 2007 | 1 |
| Co-operatives and Private Security Acts Amendment Bill 2008 | 4 |
| Courts Legislation Amendment (Associate Judges) Bill 2008 | 3, 6 |
| Courts Legislation Amendment (Juries and Other Matters) Bill 2008 | 7 |
| Crimes Amendment (Child Homicide) Bill 2007 | 1, 4 |
| Crimes (Controlled Operations) Amendment Bill 2008 | 7 |
| Criminal Procedure Legislation Amendment Bill 2007 | 1, 2, 6 |
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| Drugs, Poisons and Controlled Substances Amendment Bill 2008 | 3, 4 |
| Drugs, Poisons and Controlled Substances (Volatile Substances) (Repeal) Bill 2008 | 6 |
| Education and Training Reform Amendment Bill 2008 | 4, 5 |
| Energy and Resources Legislation Amendment Bill 2008 | 5 |
| Environment Protection Amendment (Landfill Levies) Bill 2008 | 4 |
| Essential Services Commission Amendment Bill 2008 | 4, 5 |
| Infringements and Other Acts Amendment Bill 2007 | 1 |
| Gambling Regulation Amendment (Licensing) Bill 2008 | 5 |
| Justice Legislation Amendment Bill 2008 | 5, 6 |
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| Legislation Reform (Repeals No. 3) Bill 2008 | 5 |
| Liquor Control Reform Amendment Bill 2007 | 1 |
| Melbourne Cricket Ground Amendment Bill 2008 | 7 |
| National Gas (Victoria) Bill 2008 | 6 |
| Police Integrity Bill 2008 | 4, 5 |
| Police Regulation Amendment Bill 2007 | 1 |
| Port Services Amendment (Public Disclosure) Bill 2008 | 2 |
| Public Health and Wellbeing Bill 2008 | 6 |
| Public Sector Employment (Award Entitlements) Amendment Bill 2008 | 5 |
| Professional Boxing and Combat Sports Amendment Bill 2007 | 1 |
| Relationships Bill 2007 | 1, 3 |
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| The Uniting Church in Australia Amendment Bill 2008 | 5 |
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| Victorian Energy Efficiency Target Bill 2007 | 1 |
| Victorian Water Substitution Target Bill 2007 | 5 |
| Wildlife Amendment (Marine Mammals) Bill 2008 | 7 |
| Working with Children Amendment Bill 2007 | 3, 4 |

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 Integrity Bill 2008 4

Relationships Bill 2007 1

Section 17(b)

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

Police Integrity Bill 2008 4

Appendix 3 Ministerial Correspondence

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

| Bill Title | Minister/ Member | Date of Committee Letter | Date of Minister's Response | Issue Raised in Alert Digest No. | Response Published in Alert Digest No. |
|---|-------------------------------------|---------------------------------|------------------------------------|---|---|
| Working with Children Amendment Bill 2007 | Attorney-General | 19.09.07 | 19.03.08 | 12 of 2007 | 4 of 2008 |
| Emergency Services Legislation Amendment Bill 2007 | Police and Emergency Services | 09.10.07 | - | 13 of 2007 | 1 of 2008 |
| Animals Legislation Amendment (Animal Care) Bill 2007 | Agriculture | 31.10.07 | 12.12.07 | 14 of 2007 | 4 of 2008 |
| Liquor Control Reform Amendment Bill 2007 | Consumer Affairs | 21.11.07 | 04.12.07 | 15 of 2007 | 1 of 2008 |
| Police Regulation Amendment Bill 2007 | Police and Emergency Services | 21.11.07 | 06.12.07 | 15 of 2007 | 1 of 2008 |
| Victorian Energy Efficiency Target Bill 2007 | Energy and Resources | 21.11.07 | 04.12.07 | 15 of 2007 | 1 of 2008 |
| Criminal Procedure Legislation Amendment Bill 2007 | Attorney-General | 04.12.07 | 30.01.08 | 16 of 2007 | 1 of 2008 |
| Crimes Amendment (Child Homicide) Bill 2007 | Attorney-General | 05.02.08 | 25.02.08 | 1 of 2008 | 4 of 2008 |
| Constitution Amendment (Judicial Pensions) Bill 2007 | Attorney-General | 05.02.08 | 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 | |

Scrutiny of Acts and Regulations Committee

| | | | | | |
|---|--|----------|----------|-----------|-----------|
| 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 | 28.05.08 | 5 of 2008 | 7 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 | |