

# **No. 9 of 2007**

**Tuesday, 17 July 2007**

**On the**

Energy Legislation Amendment  
Bill 2007

Infertility Treatment Amendment  
Bill 2007

Planning and Environment  
Amendment Bill 2007

Summary Offences Amendment  
(Upskirting) Bill 2007

Superannuation Legislation  
Amendment (Contribution Splitting  
and Other Matters) Bill 2007

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## Glossary



- ‘**Article**’ refers to an Article of the International Covenant on Civil and Political Rights;
- ‘**Assembly**’ refers to the Legislative Assembly of the Victorian Parliament;
- ‘**Charter**’ refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;
- ‘**child**’ means a person under 18 years of age;
- ‘**Committee**’ refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;
- ‘**Council**’ refers to the Legislative Council of the Victorian Parliament;
- ‘**court**’ refers to the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court as the circumstances require;
- ‘**Covenant**’ refers to the International Covenant on Civil and Political Rights;
- ‘**human rights**’ refers to the rights set out in Part 2 of the Charter;
- ‘**penalty units**’ refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (*currently one penalty unit equals \$107.43*).
- ‘**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 imitiation; 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–**

Energy Legislation Amendment Bill 2007  
Planning and Environment Amendment Bill 2007  
Summary Offences Amendment (Upskirting) Bill 2007

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

Infertility Treatment Amendment Bill 2007  
Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007



### **Role of the Committee**

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

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

# Alert Digest No. 9 of 2007

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## Energy Legislation Amendment Bill 2007

<b>Introduced</b>	19 June 2007
<b>Second Reading Speech</b>	20 June 2007
<b>House</b>	Legislative Assembly
<b>Minister responsible</b>	Hon. Peter Batchelor MLA
<b>Portfolio responsibility</b>	Minister for Energy and Resources

### Purpose

The Bill amends the *Electricity Industry Act 2000* (the 'Act') to provide for fair and reasonable prices, terms and conditions for electricity generated by small renewable energy generation facilities and purchased by certain electricity retailers.

The Bill also amends the *Gas Industry Act 2001* to clarify the subject-matters the Market and System Operation Rules may deal with.

### Content and Committee comment

#### [Clauses]

[2]. Other than sections 3 and 5 the provisions in the Bill will come into operation the day after Royal Assent. Sections 3 and 5 will come into operation not later than by 1 January 2008.

[3]. Inserts a new Division 5A (new sections 40F to 40N) into Part 2 of the Act to set out the terms and conditions for the purchase of small renewable energy generation electricity.

[9]. Provides for the automatic repeal of this amending Act on 1 January 2009.

*The Committee makes no further comment.*

## Planning and Environment Amendment Bill 2007

<b>Introduced</b>	19 June 2007
<b>Second Reading Speech</b>	21 June 2007
<b>House</b>	Legislative Assembly
<b>Minister responsible</b>	Hon. John Thwaites MLA
Minister responsible	Hon. Justin Madden MLC
<b>Portfolio responsibility</b>	Minister for Planning and the Minister for Water, Environment and Climate Change

### Purpose

The Bill amends the –

- *Planning and Environment Act 1987* (the ‘Act’) to extend the powers of the Victorian Civil and Administrative Tribunal (VCAT) to cancel or amend planning permits issued at its direction.
- *Transfer of Land Act 1958* to provide for approved forms to be made available electronically.
- *Subdivision Act 1988* to make minor amendments.

### Content and Committee comment

#### [Clauses]

[2]. Other than section 9 the provisions in the Bill come into operation on the day after Royal Assent. Section 9 is to commence on proclamation but not later than by 1 September 2008. Section 9 concerns the form of the planning register

*Note: The Second Reading Speech and the explanatory memorandum states that the reason for the delayed commencement is to enable consequential regulations to be developed concerning the form of the planning register.*

[4 to 6]. Clarify the responsibilities of a municipal council as a planning authority within its municipal district.

[11 to 14]. Provides a procedure to ensure that those permits issued at the direction of VCAT are able to be amended or cancelled and inserts a new section 90(1)(e) to ensure that a person who makes a request under the new provisions is entitled to be heard at the VCAT.

[21]. Amends section 40(1)(c) of the *Subdivision Act 1988* to clarify that an applicant for subdivision may apply to the VCAT for review of a decision of a municipal council or referral authority to require alterations to an engineering plan.

[23]. Provides for the automatic repeal of this amending Act on 1 September 2009.

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

## Summary Offences Amendment (Upskirting) Bill 2007

<b>Introduced</b>	19 June 2007
<b>Second Reading Speech</b>	21 June 2007
<b>House</b>	Legislative Assembly
<b>Minister responsible</b>	Hon. Rob. Hulls MLA
<b>Portfolio responsibility</b>	Attorney-General

### Purpose

The Bill amends the *Summary Offences Act 1966* (the 'Act') so as to make it an offence in certain circumstances to observe, or capture or distribute visual images of, the genital or anal region of a person's body; and confer the power to issue a search warrant in respect of the offences.

The Committee notes this extract from the Statement of Compatibility –

*In summary, the Bill:*

- *makes it an offence to use an aid or device (such as a mirror or drilling a hole in a wall) to deliberately observe another person's genital or anal region (intimate body parts) in circumstances where it is reasonable for the other person to expect such observation could not otherwise be undertaken;*
- *makes it an offence to visually capture (such as photograph or film) another person's intimate body parts in circumstances where it is reasonable for the other person to expect such a visual image could not be made;*
- *makes it an offence to distribute (for example by sending, supplying or transmitting) a visual image made of another person's intimate body parts, without their consent to any distribution;*
- *provides that where the subject of the visual image is incapable of giving consent, or is a child, that visual image can only be distributed in circumstances in which a reasonable person would regard the distribution as acceptable. However, the bill does not purport to interfere or replace current child pornography laws. A note is contained in the bill that the Crimes Act 1958 sets out current child pornography laws;*
- *confers power to issue a search warrant in respect of an alleged visual capture or distribution offence.*

### Content and Committee comment

#### [Clauses]

[2]. Provides that the Bill comes into operation on the day after the day on which it receives the Royal Assent.

[3]. Inserts a new Division 4A in Part I of the Act containing 9 new sections (sections 40 to 41G).

*New section 41* provides that an offence may be committed even if the subject of the observation or visual capturing is in a public place and makes it clear that the location of the proposed offence is immaterial, and may include a public place (depending on the elements and circumstances surrounding the alleged offending).

*New section 41A* makes it an offence to utilise a device to deliberately observe another person's genital or anal region in circumstances in which a reasonable person would expect that region could not be observed.

This is a summary offence punishable by a maximum penalty of 3 months' imprisonment.

*New section 41B* makes it an offence to intentionally visually record or otherwise visually capture another person's anal or genital region in circumstances in which a reasonable person would expect that region could not be so recorded or otherwise visually captured.

This is a summary offence punishable by a maximum penalty of 2 years' imprisonment.

*New section 41C* makes it an offence for the person who visually captures another person's genital or anal region to then distribute it.

This is a summary offence punishable by a maximum penalty of 2 years' imprisonment.

*New section 41D(1)* provides that the offences under section 41A (observation) or section 41B (visual capturing) do not apply to three particular sets of circumstances.

Paragraph (a) provides an exception where the subject of the observation or visual capturing has given express or implied consent to that action.

Paragraph (b) provides an exception for observation or visual capturing that is carried out by a person who merely accesses the Internet or a broadcasting or datacasting service.

Paragraph (c) provides an exception for law enforcement officers acting reasonably in the course of their duty.

*New section 41D(2)* provides that the offence under section 41C (distribution) does not apply to three particular sets of circumstances.

Paragraph (a) provides an exception where the subject of the visual image has given express consent, or there is implied consent, for distribution of that image to occur for a particular purpose.

Paragraph (b) provides an exception that may apply where the subject of the visual image is a child or is otherwise incapable of giving consent to distribution.

Paragraph (c) provides an exception for law enforcement officers acting reasonably in the course of their duty.

*New section 41E* provides that a member of the police force may apply to a magistrate for the issue of a warrant to search a particular place if that member believes on reasonable grounds that an offence has been committed against section 41A (observation), 41B (visual capturing) or 41C (distribution). The granting of a warrant must state listed conditions and must be in accordance with the *Magistrates' Court Act 1989*.

*Note: From the explanatory memorandum – Members of the police force do not currently have the right to apply for search warrants in relation to most summary offences. The power is appropriate in relation to the offences in this Bill, given they involve a potential breach of the privacy of people's intimate body parts.*

*New section 41F* provides that police may seize any thing in addition to those things described in the warrant if the thing is a like thing, will afford evidence about an offence against the new section 41A, 41B or 41C, or is necessary to prevent its concealment, loss or use in the commission of such an offence.

*New section 41G* provides that, before executing a search warrant, a police member must—

- announce that he or she is authorised by a warrant to enter the place; and
- give any person at the place an opportunity to allow entry.

A police member can immediately enter a place if she or he believes on reasonable grounds that this is required to ensure the safety of any person or that the effective execution of the search warrant is not frustrated.



***Charter of Human Rights and Responsibilities Act 2006***

**Statement of Compatibility**

*In the section of the Statement of Compatibility headed 'Section 13(a) – right to privacy' the Committee notes the incorrect references to the new sections 41B and 41C. These should be respectively references to new sections 41A and 41B, and the reference to new section 41D should be a reference to 41C.*

**General comment**

*The Committee accepts that the offence provisions proposed by this Bill may engage a number of Charter rights. The Committee observes that the rights so engaged are competing rights which are usefully canvassed in the Statement of Compatibility.*

*The Committee refers to the Parliament the question whether a reasonable and proportionate balance has been achieved by the measures introduced by this Bill.*

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

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



# Ministerial Correspondence

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## Infertility Treatment Amendment Bill 2007

The Bill was introduced into the Legislative Assembly on 13 March 2007, by the Hon. Bronwyn Pike MLA. The Committee considered the Bill on 16 April 2007 and made the following comments in Alert Digest No. 4 of 2007 tabled in the Parliament on 17 April 2007.

### Committee's Comment

*The Committee provides this report to Parliament pursuant to terms of reference provided in section 30 of the 'Charter' and section 17(a)(viii) of the Parliamentary Committees Act 2003 concerning incompatibility with human rights*

#### **1. Section 9 of the Charter (right to life)**

**Keywords: Right to life – Person defined as a human being – Charter excludes laws concerning abortion and child destruction – Whether embryo or foetus a 'human being' (person) for the purposes of the Charter**

*The Committee notes that the most fundamental of all human rights is that 'every person has the right to life and has the right not to be arbitrarily deprived of life' and that this right is recognised in International law as absolute.*

*The Committee observes that all human rights in the Charter are subject to the reasonable limitations provision in section 7 of the Charter (reasonable limitations that may be demonstrably justified in a democratic society). The Committee observes that given this absolute right recognised in International law any limitation would have to be exceptional and manifestly demonstrable.*

*The Committee notes that section 6 of the Charter provides that all persons have the human rights set out in Part 2 of the Charter. 'Person' is defined by section 3 of the Charter as meaning a 'human being'. The Charter provides no guidance or definition of 'human being'.*

*The Committee observes that the right to life in section 9 of the Charter is qualified by section 48 of the Charter which excludes from the Charter's ambit, laws in respect to 'abortion' and 'child destruction'. However, section 9 is otherwise unqualified and provides no guidance whether 'a human being' includes an embryo or foetus. The Committee observes that the common law legal position in Victoria is that a human being is not a legal person until he or she is born. The Committee further observes that the Human Rights Act 2004 of the Australian Capital Territory qualifies the right to life as a right 'applying to a person from the time of birth'.\**

*The Committee considered the difficult question of providing a definition of 'human being' for the purposes of the Charter right and concluded that as this area of law involved fundamental questions of ethics and personal conscience the Committee would instead, refer for Parliament's consideration the question of whether any of the provisions of the Infertility Treatment Amendment Bill 2007 tests or infringes the 'right to life' within the meaning of the Charter.*

*\*Human Rights Act 2004 (ACT), section 9(2).*

#### **2. Section 10(c) of the Charter (person must not be subjected to experimentation without full, free and informed consent)**

**Keywords: Medical and scientific research – embryo donation – non-therapeutic volunteer donors – medical risks – whether consent to experimentation full, free and informed.**

*The proposed legislation would allow the development of stem cell lines by somatic cell nuclear transfer ('SCNT'). To successfully pursue this research demands a sufficient supply of human eggs ('oocytes'). Ensuring women have full, free and informed consent in these circumstances presented the Committee with some challenging issues.*

*Egg donations are not like blood donations because the process involves significant discomfort, hardship and risks. Nor are donations like bone marrow or live organ donations in which there are substantial risks but the donations are clearly for therapeutic purposes rather than scientific research.*

*An egg donor for stem cell research is subject to the same treatment as an egg donor for IVF treatment. However the reason for the donation is quite different, since SCNT is to advance medical knowledge rather than reproduction. Egg donation after induced ovulation presents certain risks to the donor and the aim is non-therapeutic scientific research.*

*The Committee received a number of submissions and conducted a hearing. The Committee was presented with two conflicting arguments. Submissions argued that women should be free to make altruistic decisions to further science. Other submissions argued that science and women's welfare in egg donation are conflicting to the point that they are incompatible with the women's human rights. Some submissions referred to the World Medical Assembly's Helsinki Declaration. The Declaration of Helsinki is a statement of ethical principles to provide guidance to physicians and other participants in medical research involving human subjects. Relevantly the Declaration provides –*

- 16. Every medical research project involving human subjects should be preceded by careful assessment of predictable risks and burdens in comparison with foreseeable benefits to the subject or to others. This does not preclude the participation of healthy volunteers in medical research. The design of all studies should be publicly available.*
- 17. Physicians should abstain from engaging in research projects involving human subjects unless they are confident that the risks involved have been adequately assessed and can be satisfactorily managed. Physicians should cease any investigation if the risks are found to outweigh the potential benefits or if there is conclusive proof of positive and beneficial results.*
- 18. Medical research involving human subjects should only be conducted if the importance of the objective outweighs the inherent risks and burdens to the subject. This is especially important when the human subjects are healthy volunteers.*
- 19. Medical research is only justified if there is a reasonable likelihood that the populations in which the research is carried out stand to benefit from the results of the research.*
- 20. The subjects must be volunteers and informed participants in the research project.*

*The Helsinki declaration suggests that the researcher in medical research has to go beyond full, free and informed consent with the added obligation to do no harm.*

*In the hearings it was pointed out that that concerns of risks, informed consent and scientific research occur in other areas of medical research. In this research the obligations of medical researchers remains to reduce risk, secure informed consent and to protect the life and health of the person on whom biomedical research is being carried out.*

*It was suggested to the Committee that this puts healthy egg donors into the same category as other healthy subjects who are subject to experimental drugs and procedures under ethical board sanctioned medical research.*

*It is the Committee's belief that to ensure full, free and informed consent demands there are certain obligations on researchers. Researchers need to minimise risks. The donors must be sufficiently and independently informed of all known and potential risks. Donors must be aware of the discomfort of the procedure and they are only able to donate for altruistic reasons.*

*In the case of IVF patients who may be asked to donate eggs that have failed to fertilise or to share some fresh eggs, there must be a strict separation between the patient's treatment team and the researchers requesting the eggs, otherwise they might feel pressured to donate. Similarly relatives*

and co-workers of those doing research on eggs would be in a relationship of dependence with the researchers and therefore should not be allowed to provide eggs for research. Real care needs to be taken to ensure there are no financial or other inducements, and that vulnerable and dependent groups are not recruited.

The Committee considered that there are human rights concerns regarding issues of consent and relationships of dependency. In time these concerns may be addressed by the 'Ethical guidelines on the use of assisted reproductive technology in clinical practice and research', however the Committee notes that these guidelines have not been finalised in time for Members consideration of this Bill.

The Committee resolved to write to the Health Minister outlining these concerns and seeking further information concerning the following matters –

1. The independence from research entities of counselling services (medical and other counselling) provided to potential donors;
2. The extent and nature of medical and other advice given to potential donors and whether such advice covers general and donor specific health risks that may arise from, or as a consequence of the medical procedures involved in embryo donation;
3. Whether there will be provided post donation medical and other counselling and monitoring of the physical and mental health of donors;
4. Whether donors will be entitled to free additional health insurance covering the general and specific risks arising out of or as a consequence of embryo donation;
5. The practices and procedures to be established minimising the possible exploitation of women in vulnerable groups and the special care that may be needed to ensure 'informed consent' is realistic; and
6. The extent of any prohibitions or regulation in respect to undue inducements to potential donors (other than reimbursement of reasonable direct costs and health insurance).

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

### 3. Statement of Compatibility

**Keywords: Provisions of Bill fairly raise question of Charter right under section 10(c) concerning 'full, free and informed consent' – Sufficiency of Statement of Compatibility – Need for section 7(2) consideration – Parliamentary scrutiny of exercise of legislative power.**

The Committee notes the Statement of Compatibility ('Statement') provided by the Minister introducing the Bill states that no human rights issue is raised by the Bill.

However, the Committee does consider that the Bill fairly raises a Charter implication under section 10(c).

Section 10(c) of the Charter provides that –

*'A person must not be subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent'.*

The Committee considers that material such as explanatory memoranda and statements of compatibility assist the Parliament in its deliberations and in particular assist the Committee in its scrutiny functions under the Charter and the Parliamentary Committees Act 2003. The Committee draws attention to Practice Note No. 1 of 2005 where it endorsed the following observation made by the Australian Senate's Standing Committee on the Scrutiny of Bills –

*'The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In particular, the committee expects that an explanation will be given for any provision within a bill that appears to test or infringe the committee's terms of reference and provide reasons or justification for this.'*

*\*\*Senate Standing Committee for the Scrutiny of Bills – The Quality of Explanatory Memoranda Accompanying Bills, 24 March 2004*

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

*The Committee observes that in some earlier Statements accompanying Bills there has been a brief reasoning why provisions that appear to test a Charter right are considered nevertheless to be compatible because of other competing public policy objectives.*

*In respect to this Bill the Committee considers that the Parliament would have been better informed with at least a brief discussion concerning the pivotal question of when human rights may be limited within the meaning of section 7(2) of the Charter.*

*In approaching the Committee's new reporting function in respect to provisions that may test or infringe a Charter right the Committee will consider a statement of compatibility as having the same status as an explanatory memorandum and where the Committee considers a Statement to be inadequate the Committee will draw this to the attention of Members.*

*The Committee will write to the Minister expressing its concerns in respect to this Statement of Compatibility.*

## **Minister's Response**

*Thank you for your correspondence of 18 April 2007 regarding the Infertility Treatment Amendment Bill 2007.*

*As you will be aware the Infertility Treatment Amendment Bill 2007 mirrors the Commonwealth's Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act (2006), which was assented to on 12 December 2006. All research activities carried out under this Bill will be under licence from the National Health and Medical Research Council (NHMRC).*

*As part of this licensing function the NHMRC has developed updated Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research. These guidelines underpin the conduct and practice of research activities that take place in accordance with the legislation.*

*I have raised the issues identified by SARC with the CEO of the NHMRC for consideration in the development of the Ethical Guidelines.*

*I appreciate the interest of your committee and thank you for bringing these important matters to my attention.*

*Hon Bronwyn Pike MP  
Minister for Health*

*28 June 2007*

***The Committee notes the Minister's response. The Committee further observes that the Minister did not address the question of the adequacy of the Statement of Compatibility for this Bill.***

## Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007

The Bill was introduced into the Legislative Assembly on 22 May 2007, by the Hon. Tim Holding MLA. The Committee considered the Bill on 4 June 2007 and made the following comments in Alert Digest No. 7 of 2007 tabled in the Parliament on 5 June 2007.

### Committee's Comment

#### *Charter of Human Rights and Responsibilities Act 2006*

*Victorian legislation incompatible with section 8 of the Charter 'Recognition and equality before the law' – Commonwealth laws define 'spouse' as heterosexual married or de facto couples effectively denying same benefit to same sex couples – denial is a prohibited discrimination on the basis of sexual orientation – Equal Opportunity Act 1996, section 6(1) 'sexual orientation' – whether denial of benefit reasonable and proportionate – whether override declaration is necessary or desirable*

*The Committee notes the extracts from the Statement of Compatibility and the Second Reading Speech and observes that the Statement of Compatibility raises an issue that clearly engages the equal protection provision (section 8) of the Charter in respect to contribution splitting for the purposes of taxation benefits under Commonwealth superannuation legislation. The amendments in the Bill have the effect of adopting the definition of spouse used in the Commonwealth Act. The effect of this is that the taxation benefit is denied to same sex couples.*

*The Committee observes that the legislation will directly engage section 8(2) and (3) of the Charter which provides –*

- (2) Every person has the right to enjoy his or her human rights without discrimination.*
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.*

*The Committee further observes that 'discrimination' is defined by the Charter as discrimination within the meaning of the Equal Opportunity Act 1995 on the basis of an attribute set out in section 6 of that Act. One of those attributes (section 6(1)) prohibits discrimination on the grounds of 'sexual orientation'.*

*The Committee notes that section 31 of the Charter provides that the Parliament may declare that an Act or a provision of an Act has effect despite being incompatible with one or more of the human rights set out in the Charter. The Committee also observes that an override declaration will only be made in exceptional circumstances (section 31(4)).*

*Notwithstanding the reasoning given in the Statement of Compatibility and by the Minister to justify the amendments in respect to contribution splitting the Committee cannot conclude that the provisions are compatible with the Charter. The Committee considers that there may be some justification for the amendments in order that some couples have the taxation benefits but does not consider that these reasons alter the fact that the laws are incompatible with the non-discrimination provisions in section 8(2) of the Victorian Charter.*

*Having concluded that the amendments are incompatible with the Charter the Committee has considered whether even the strongest and most cogent section 7(2) analysis (reasonable limitations) can ever conclude that a law which discriminates on the basis of sexual orientation without any further qualification can be rendered compatible simply because a benefit may be obtained by other persons without that attribute. The Committee observes that the denial of the benefit to same sex couples is absolute and unqualified. It is a denial on the basis of the attribute, notwithstanding, for example, the length of the relationship, even if that could be considered a legitimate criteria to impose a qualifying limitation which may then attract the taxation benefit.*

*The Committee then considered the question of the circumstances that would have to exist before 'the exceptional circumstances' threshold could ever be crossed so as to engage the 'override provisions' of the Charter.*

*The Committee considers that if the Parliament enacts legislation that permits discrimination on the basis of one of the protected attributes under the Charter to achieve consistency with Commonwealth laws, that this may amount to 'exceptional circumstances' within the meaning of section 31(4) of the Charter.*

*The Committee will seek further advice from the Minister whether the provisions should require an override declaration by the Parliament.*

*Pending the Minister's response the Committee draws attention to the provisions in the Bill.*

## **Minister's Response**

*Thank you for your letter of 5 June 2007 in which you advise that the Scrutiny of Acts and Regulations Committee does not view the Superannuation Legislation Amendment (Contribution Splitting and Other Matters) Bill 2007 as compatible with the Charter of Human Rights and Responsibilities.*

*I understand that despite the reasoning given in the Statement of Compatibility, the Committee has concluded that certain provisions in the Bill are not compatible with the Charter. Furthermore, the Committee believes that it may be appropriate to use the 'override provisions' of the Charter.*

*I appreciate the Committee's comments on this issue and understand the importance of its responsibility in scrutinising bills introduced into Parliament and in particular, the Committee's role in assessing the compatibility of proposed bills with the human rights set out in the Charter.*

*At the outset, I would like to emphasise that the Government strongly believes that superannuation contribution splitting should be available to persons in same-sex relationships. Regrettably, constraints imposed by the relevant Commonwealth superannuation law prevent the Victorian Government from extending this facility to same-sex couples in the ESSPLAN scheme.*

*Expert legal and taxation advice obtained by the Government confirmed that legislating to permit contribution splitting by same-sex couples could result in dire financial consequences for both the scheme and its members through the loss of valuable tax concessions. If the Bill did adopt a broad definition of 'spouse' that included same-sex partners, any splitting of superannuation contributions between them would not comply with the Commonwealth Act and would be ineffective for income tax purposes.*

*To this end, I have written to the Federal Treasurer urging the Commonwealth Government to consider amending its definition of spouse to include same-sex couples and to make other legislative amendments necessary to permit contribution splitting for same-sex couples (copy attached).*

*The Charter of Human Rights and Responsibilities Act 2006 is new legislation which only came into effect on 1 January 2007. This being the case, the Department of Treasury and Finance, on the advice of the Human Rights Unit of the Department of Justice, sought legal advice from counsel on the question of Charter compatibility and in settling the Statement of Compatibility. Counsel advised that achieving consistency with a Commonwealth law may be a sufficiently important objective to justify limiting human rights, with this being assessed on a case by case basis.*

*To address your query about Parliament's ability to override the Charter, I note that the circumstances of an override are to be exceptional. The explanatory memorandum to the relevant section of the Charter provides examples of exceptional circumstances, such as threats to national security or a state of emergency that threatens the safety, security and welfare of Victorians.*

*I have considered the Committee's view on this matter at length and appreciate its position. However, it is my belief that the analysis of reasonable limitations was thorough, incorporating specialist technical knowledge and expert legal advice. Therefore, while I have given serious*

*consideration to the Committee's views, I do not consider it necessary to amend the Statement of Compatibility that has previously been settled by counsel.*

*I would also note that one of the features of the Charter is its promotion of transparency in relation to the policies that are reflected in legislation introduced by the Government. While the Government and the Committee may differ on how the relevant provisions of this Bill should be characterised, the Statement of Compatibility and the Second Reading Speech leave no doubt as to the underlying reasons why the Government is proceeding with these amendments in the form that has been adopted, and to that extent the purpose of the Charter in promoting transparency has been served.*

*TIM HOLDING MP*

*Minister for Finance, WorkCover and the Transport Accident Commission*

*3 July 2007*

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

**Committee Room  
16 July 2007**



# Appendix 1

## Index of Bills in 2007

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Appropriation (Parliament 2007/2008) Bill 2007	6
Building Amendment (Plumbing) Bill 2007	5
Control of Weapons Amendment (Penalties) Bill 2006	1
Courts Legislation Amendment (Judicial Education and Other Matters) Bill 2007	7
Crimes Amendment (DNA Database) Bill 2007	6
Drugs, Poisons and Controlled Substances Amendment (Repeal of Part X) Bill 2007	3
Energy Legislation Amendment Bill 2007	9
Equal Opportunity Amendment Bill 2007	5
Fair Trading and Consumer Acts Amendment Bill 2007	5, 6
Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007	4
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Murray-Darling Basin Amendment Bill 2006	1
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Parliamentary Legislation Amendment Bill 2007	2
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# Appendix 2

## Committee Comments classified by Terms of Reference

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### Alert Digest Nos.

#### Section 17(a)

*(i) trespasses unduly upon rights and freedoms.*

Public Prosecutions Amendment Bill 2006	1
Senate Elections Amendment Bill 2006	1

*(vi) inappropriately delegates legislative power.*

Accident Towing Services Bill 2007	5
Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007	4
Road Legislation Amendment Bill 2007	4

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

Fair Trading and Consumer Acts Amendment Bill 2007	5
Infertility Treatment Amendment Bill 2007	4
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## Appendix 3

### Ministerial Correspondence

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**Table of correspondence between the Committee and Ministers during 2006-07**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter</b>	<b>Date of Minister's Response</b>	<b>Issue Raised in Alert Digest No.</b>	<b>Response Published in Alert Digest No.</b>
Justice Legislation (Further Miscellaneous Amendments) Bill	Attorney-General	31.5.06	13.10.06	5 of 2006	1 of 2007
Water (Governance) Bill	Water	22.8.06	1.11.06	9 of 2006	1 of 2007
Funerals Bill	Attorney-General	22.8.06		9 of 2006	
Public Sector Acts (Further Workplace Protection and Other Matters) Bill	Industrial Relations	13.9.06		10 of 2006	
Road Legislation (Projects and Road Safety) Bill	Transport	13.9.06	18.10.06	10 of 2006	1 of 2007
Serious Sex Offenders Monitoring (Amendment) Bill	Corrections	16.10.06		12 of 2006	
Public Prosecutions Amendment Bill 2006	Attorney-General	13.2.07	26.2.07	1 of 2007	3 of 2007
Senate Elections Amendment Bill 2006	Attorney-General	13.2.07		1 of 2007	
Water Amendment (Critical Water Infrastructure Projects) Bill 2006	Water	13.2.07	20.3.07	1 of 2007	4 of 2007
Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007	Gaming	17.4.07	27.4.07	4 of 2007	5 of 2007
Roads Legislation Amendment Bill 2007	Roads and Ports	17.4.07		4 of 2007	
Infertility Treatment Amendment Bill 2007	Health	28.3.07	3.7.07	4 of 2007	9 of 2007
Accident Towing Services Bill 2007	Roads and Ports	1.5.07	18.5.07	5 of 2007	6 of 2007
Fair Trading and Consumer Acts Amendment Bill 2007	Consumer Affairs	1.5.07	3.5.07	5 of 2007	6 of 2007

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter</b>	<b>Date of Minister's Response</b>	<b>Issue Raised in Alert Digest No.</b>	<b>Response Published in Alert Digest No.</b>
Superannuation Legislation Amendment (Contribution and Other Matters) Bill 2007	Finance	5.6.07	3.7.07	7 of 2007	9 of 2007