No. 9 of 2008

Tuesday, 29 July 2008

On the

Building Amendment Bill 2008

Evidence Bill 2008

Family Violence Protection Bill 2008

Heritage Amendment Bill 2008

National Gas (Victoria) Bill 2008

Public Health and Wellbeing Bill 2008

Public Holidays Amendment Bill 2008

Victorian Law Foundation Bill 2008

Table of Contents

Page Nos.

Alert Digest No. 9 of 2008

Building Amendment Bill 2008 1
Family Violence Protection Bill 2008 14
Heritage Amendment Bill 2008 26
Public Holidays Amendment Bill 2008 27
Victorian Law Foundation Bill 2008 29

Ministerial Correspondence

National Gas (Victoria) Bill 2008 31
Public Health and Wellbeing Bill 2008 34

Appendices

1 – Index of Bills in 2008 43
2 – Committee Comments classified by Terms of Reference 45
3 – Ministerial Correspondence 47

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 –

Building Amendment Bill 2008
Evidence Bill 2008
Family Violence Protection Bill 2008
Heritage Amendment Bill 2008
Public Holidays Amendment Bill 2008
Victorian Law Foundation Bill 2008

The Committee notes the following correspondence –

National Gas (Victoria) Bill 2008
Public Health and Wellbeing Bill 2008

Scrutiny of Acts and Regulations Committee

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. 9 of 2008

Building Amendment Bill 2008

Introduced	25 June 2008
Second Reading Speech	26 June 2008
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Minister responsible	Hon. Justin Madden MLC
Portfolio responsibility	Minister for Planning

Purpose

The Bill amends the *Building Act 1993* (the 'Act') to enhance consumer protection and building practitioner and plumber standards by providing a range of improvements to the disciplinary powers of the Building Practitioners Board (BPB) and the Plumbing Industry Commission to enable the system to deal more effectively with builders and plumbers who do not comply with the requirements of the Act.

The Bill provides a mechanism to reinforce the responsibility of a registered builder who is a director of a building company for work carried out by the company. The amendments deem the director to be responsible for the conduct of the company.

The Bill clarifies the roles of municipal and private building surveyors and provides for 2 classes of building surveyor as part of national reforms.

The Bill provides amendments to improve the operation of regulatory schemes established under the Act.

Content and Committee comment

[Clauses]

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

Inappropriate delegation of legislative powers – delayed commencement

The Committee notes the delayed commencement and observes that no reasons are given in any of the explanatory material for the reasons for such a delay.

The Committee will seek further advice from the Minister for the need to delay commencement by more than one year.

The Committee once again draws attention to Practice Note No.1 of 2005 concerning indefinite or delayed commencement of Acts.

[5]. *Good character evidence* - Inserts a new section 169(2)(ca) in the Act to require an applicant for registration as a building practitioner to provide information relevant to their good character to the Building Practitioners Board (the 'BPB'). The information will be prescribed in regulations, and will include such matters as solvency, convictions under an indictable offences against the person, registration or licensing by a body or jurisdiction

outside Victoria and any disciplinary actions taken by that body or under that jurisdiction against the applicant, any insurance claim history and conditions imposed by an insurer.

[6]. *Duty to advise change of circumstances impinging on good character* - Inserts a new section 172A to require a registered building practitioner to notify the BPB without delay of any change to the prescribed information relevant to their good character, which was provided at the time of application under new section 169(2)(ca). Breach of section 172A is an offence, carrying a penalty of 10 penalty units.

[8]. *Suspension of registration when in the public interest* - Extends the BPB's discretion under section 178(3) of the Act to suspend a building practitioner's registration pending the holding and determination of an inquiry if the Board considers it is in the interests of the public to do so. Currently the Board may exercise this discretion if it considers it is in the *interests of the safety of the public* to do so.

A person whose registration has been suspended must give notice of the suspension as soon as possible to any person who has a contract with them, arising out of their work as a building practitioner.

[9]. Amends section 179 to provide additional grounds for the BPB to inquire into the conduct of registered building practitioners and allows the PBP to require a practitioner to undertake a specified course of training. The clause allows the BPB to disqualify a practitioner from being registered for a period of up to 3 years.

[10]. Inserts a new section 179B to provide that where a company or partnership fails to comply with the Act or regulations in carrying out building work, the failure is taken to be the conduct (and failure to comply) of the registered building practitioner who is a director or partner of the company or partnership for the purposes of inquiries by the BPB under sections 178, 179 and 179A.

Extract from the Statement of Compatibility –

> ***Section 25(1)* – Right to be presumed innocent***
>
> *Clause 10 (section 179B -- conduct of company or partnership to be conduct of building practitioner director or partner)*
>
> *This proposal deems the director of a company to be responsible for the professional conduct of the company for the purposes of inquiry by the BPB, where they are a registered building practitioner, nominated as the registered building practitioner on the building permit. The BPB is a professional disciplinary body.*
>
> *The right to be presumed innocent is not engaged because the measure relates only to inquiry by the BPB, and does not involve any criminal offence or infringement or hearing by a court.*
>
> *Charter section 25(1)

[11]. Inserts a new section 182(4) into the Act to require a person whose registration has been cancelled or suspended under sections 179 or 180 of the Act to give notice, as soon as possible after the decision to cancel or suspend takes effect or is confirmed on appeal, to any person who has a contract with the practitioner, arising out of their work as a building practitioner. They must also give a copy of this notice to the BPB.

[19]. Amends section 221T and 221ZB of the Act to allow the Commission to use photographs of plumbers for identification purposes and inclusion on their licence or registration documents.

The Committee makes no further comment.

Evidence Bill 2008

Introduced	24 June 2008
Second Reading Speech	26 June 2008
House	Legislative Assembly
Member introducing Act	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The proposed new principal Act makes provision for the law of evidence that is uniform with Commonwealth and New South Wales law (the Uniform Evidence Acts (the 'UEAs')). The Act sets out the rules of evidence that apply to all proceedings in courts.

Extract from the Second Reading Speech –

> *Overview of Bill*
>
> *The purpose of the Bill is to promote and maintain uniformity and harmonisation of evidence laws across Australian jurisdictions. The Bill clarifies evidence laws by 'codifying' complex common law rules, rewriting current statutory rules of evidence in a clear and concise manner and organising these rules in a logical order.*
>
> *The policy behind the Bill is that all relevant and reliable evidence that is of an appropriate probative value should be admissible in court proceedings, unless such evidence would cause unfair prejudice to a party to those proceedings.*
>
> *The Bill contains overarching provisions giving broad judicial discretions to exclude evidence or limit its use in certain circumstances.*
>
> *These judicial discretions operate as safeguards that protect and balance the rights of parties to proceedings (civil and criminal), the rights of witnesses and the importance of the court hearing all relevant, reliable and probative evidence. They are consistent with and give effect to the rights under the charter, particularly the right to a fair hearing under section 24(1). The overarching judicial discretions and safeguards operate together with other specific safeguards in the Bill.*
>
> *The primary purpose of the Bill is to set out the rules of evidence that apply to all proceedings in a relevant court with the aim of ensuring a fair hearing for persons appearing before the courts.*
>
> **Notes:**
>
> *(1) The introductory note explains that the UEAs and this Act are drafted in identical terms except for minor drafting variations that are required to accord with the drafting style of each jurisdiction. Major differences in content are identified by annotations in the text referencing the UEAs.*
>
> *(2) This Act is the first of two Acts to introduce model uniform evidence law into Victoria. A further Act will be introduced at a later date to repeal relevant parts of the Evidence Act 1958 (Vic) the subject matter of which is addressed in this Act, and to make other relevant amendments and transitional arrangements across the Victorian statute book.*

Content and Committee comment

[Clauses]

[2]. Clauses 1 to 3 and the Dictionary are to commence on the day after Royal Assent. The remaining provisions are to commence on proclamation but not later than by 1 January 2010.

Inappropriate delegation of legislative powers – delayed commencement

The Committee notes the delayed commencement and observes that no reasons are given in any of the explanatory material for the reasons for such a delay.

The Committee will seek further advice from the Attorney-General for the need to delay commencement by more than one year.

The Committee once again draws attention to Practice Note No.1 of 2005 concerning indefinite or delayed commencement of Acts.

[4]. The Act is to apply to all proceedings in a Victorian court. [8]. The Act will however not override special existing evidentiary provisions in other Acts.

[10]. Preserves the operation of laws relating to the privileges of any Australian Parliament.

Chapter 2 – Adducing evidence

[12]. Declares that (except as provided otherwise by the Act) every person is a competent and compellable witness.

[13]. Sets out the test for determining a witness's competence to give evidence. The test focuses on the lack of capacity to understand or answer a question. A person is presumed to be competent to give evidence unless it is proven that he or she is incompetent.

[15 to 16]. Makes specific provision in respect to the compellability of a Head of State, Member of Parliament, Judges and jurors.

[17]. *Defendants competence and compellability* – Provides for rules of competence and compellability for defendants in criminal proceedings and for any associated defendant(s) (a defined term). A defendant is not competent to give evidence as a witness for the prosecution.

An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.

[18]. *Compellability of spouses, partners, parent or child of a defendant* – Provides that in a criminal proceeding generally, a person who is the spouse, de facto partner, parent or child of a defendant may object to being required to give evidence or to give evidence about a particular communication.

There must be a likelihood that harm would or might be caused to the person or to the relationship between the defendant and the person if the person gives the evidence and the nature and extent of any harm outweighs the desirability of the evidence being given. If the court finds that the nature and extent of the harm outweighs the desirability of the witness giving evidence, the witness must not be required to give the particular evidence in question, or to give evidence at all.

> **Note:** *In respect to Aboriginal persons the Committee notes the following extract from the Statement of Compatibility –*
>
> > *Kinship ties play an important role in Aboriginal communities…*
> >
> > *The judicial discretion to excuse a person from giving evidence does not extend to all persons who have a relationship with the defendant, for example, siblings, aunts or uncles.*

Where a person has kinship ties with the defendant, other than as a spouse, de facto partner, parent or child, they may be compelled to give evidence against the defendant. While this will not necessarily result in a severance of the kinship ties it has the potential to cause harm to the kinship relationship, and the right in section 19(2) may therefore limited….*

It would be undesirable to extend the operation of clause 18 to all persons who share kinship ties with a defendant, as this is potentially a very broad class of people and would undermine the ability to ensure that important evidence can be obtained.

**Charter 19(2) – Cultural rights*

[20]. Applies only to criminal proceedings for indictable offences and permits certain comment by the judge or any party (other than the prosecutor) on a failure by a defendant, his or her spouse or de facto partner or child, to give evidence. Such comment must not suggest that the failure to give evidence was because the defendant was, or believed that he or she was, guilty of the offence concerned.

Note: *The Committee's inquiry into the Right to Silence (Final Report, March 1999) made the following recommendation –*

Recommendation 4

The Committee recommends that s 399(3) of the Crimes Act 1958 (Vic) be repealed, and replaced with a provision based on s 20(2) of the Evidence Act 1995 (Cwth) and Evidence Act 1995 (NSW). This would allow the trial judge to comment on an accused person's failure to testify, and so direct the jury in accordance with the common law as it would otherwise apply in Victoria.

[21 to 25]. Provides for oaths and affirmations for sworn evidence. There is no provision for a right to make an unsworn statement.

[30]. A witness can use an interpreter unless he or she can speak and understand English sufficiently to understand questions and give adequate replies.

[31]. Provides that witnesses who cannot speak or hear adequately can be questioned, and give evidence, in any appropriate way.

[36]. Enables a court to order a person who is present at proceedings to give evidence or produce documents if the person could be compelled by way of subpoena, summons or other order to testify and produce the documents.

[38]. *Hostile witnesses* – Allows a party, with the leave of the court, to cross-examine its own witness in certain circumstances.

[41]. *Improper questions may be disallowed* – Enables the court to disallow improper questions put to any witness during cross-examination. The clause imposes an obligation on the court to disallow improper questions being put to a vulnerable witness (or inform the witness that the question need not be answered).

Note: *An improper question includes questions that are misleading or confusing, unduly annoying, harassing, intimidating, offensive or repetitive, put in a belittling, insulting or inappropriate manner or if the only basis of the question is a stereotype. The court has discretion to disallow these questions in relation to any witness, but must disallow them in relation to vulnerable witnesses (defined by the section).*

Chapter 3 – Admissibility of evidence

[55]. Provides that evidence is relevant if it could rationally affect (whether directly or indirectly) the assessment of the probability of the existence of a fact in issue.

[56]. Declares that relevant evidence is admissible except as otherwise provided by the Act. Irrelevant evidence is not admissible.

Hearsay evidence

[59 to 75]. Sets out the general exclusionary rule against the admissibility of hearsay evidence ("the hearsay rule") and sets out a number of exceptions to the rule.

> **Note:** *The hearsay rule prevents the admission of evidence of a previous representation of a person (what someone else was heard to say) for the purposes of proving the existence of the fact asserted by that person in the representation.*

Opinions

[76 to 80]. States the general exclusionary rule that opinion evidence is not admissible to prove a fact asserted by the opinion ("the opinion rule") and provides where that general rule of exclusion does not apply such as specialist knowledge (expert evidence).

Admissions

[81 to 90]. Sets out exceptions to the hearsay and opinion rules relating to admissions.

[84]. If the party against whom evidence of an admission is being led raises an issue in the proceeding about whether the admission was influenced by violent, oppressive, inhuman or degrading conduct, or by a threat of such conduct, evidence of the admission is not admissible unless the court is satisfied that the admission was not influenced by that conduct or by a threat of that conduct.

[85]. Relates to the reliability of admissions by defendants in a criminal proceeding.

[86]. Makes inadmissible in a criminal proceeding any document (other than a sound or video recording, or transcript of such a recording) purporting to be a record of interview by an investigating official with a defendant unless the defendant acknowledged the document as a true record by signing or otherwise marking it.

[89]. Prohibits unfavourable inferences (including an inference of consciousness of guilt or an inference relevant to a party's credibility) being drawn in a criminal proceeding from a failure by a person to answer a question, or respond to a representation, from an investigating official performing functions in connection with the investigation of the commission, or possible commission, of an offence.

[90]. Provides that, if in a criminal proceeding, having regard to the circumstances in which an admission was made, it would be unfair to an accused to use evidence of the admission in the prosecution case, the court may refuse to admit the admission at all, or admit the admission, but limit its use.

Tendency and coincidence

[94 to 101]. This Part provides for the admissibility of evidence relating to conduct, reputation, character and tendency of parties and witnesses, that is relevant to a fact in issue in the proceedings but does not apply to evidence that relates only to the credibility of a witness, evidence in a proceeding so far as it relates to bail or sentencing or to evidence of character, reputation, conduct or tendency of a person that is a fact in issue in the proceeding.

[97]. Sets out the exclusionary rule for tendency evidence. However tendency evidence can be admitted if appropriate notice is given (or the court dispenses with the notice requirement) and the court finds that the evidence has significant probative value.

[98]. Sets out the exclusionary rule for coincidence evidence. The rule ("the coincidence rule") prevents the admission of evidence of the occurrence of two or more events that is being tendered to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.

However coincidence evidence can be admitted under this clause if appropriate notice is given and the court finds that the evidence of the two or more events has significant probative value.

[101]. Provides a further consideration in relation to the admissibility of both tendency and coincidence evidence adduced in a criminal proceeding. In such a proceeding, where tendency or coincidence evidence is not ruled out by clauses 97 or 98, the court must then consider whether the probative value of such evidence substantially outweighs any prejudicial effect that it may have on the defendant.

Credibility evidence

[101A to 108C]. The Division deals with the "credibility rule" and additional protections and exceptions to that rule and provides that in general, credibility evidence about a witness is not admissible and sets out exceptions to the rule.

[106]. The credibility rule does not apply to rebutting a witness's denials by other evidence.

Character evidence

[110 to 112]. The Part sets out rules relating to evidence of the character of a defendant in a criminal proceeding.

[110]. Provides exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule for evidence adduced by a defendant about his or her own good character and evidence adduced to rebut such evidence.

Identification evidence

[113 to 116]. The Part sets out exclusionary rules for visual identification evidence in a criminal proceeding and provides for the giving of warnings to juries about identification evidence.

Privileges

[117 to 134]. The Part sets out evidence that is protected from disclosure on grounds of privilege or for public policy considerations.

[118 to 120]. Clarify the circumstances under which “client legal privilege" can arise.

[120]. Deals with client legal privilege of unrepresented parties.

[121 to 126]. Provides for the circumstances where the loss of client legal privilege may apply.

[127]. *Religious confessions* – Entitles members of the clergy to refuse to divulge both the contents of religious confessions made to them in their professional capacity and the fact that they have been made.

[128]. *Self-incrimination* – sets out the process which the court is to undertake when a witness objects to giving particular evidence, or evidence on a particular matter, on the grounds that the evidence may tend to prove he or she has committed an offence or is liable to a civil penalty.

The court must determine whether there are reasonable grounds for the objection and if it finds that there are, the court is to advise the witness that they do not need to give the evidence unless required to do so by the court. In such circumstances, where the witness gives the evidence, whether required to by the court or otherwise, the court is to give the witness a certificate.

The court can only require the witness to give the evidence if the evidence does not tend to prove the witness has committed an offence or may be liable to a civil penalty under the law of a foreign country and the interests of justice require that the witness give the evidence. A certificate makes the evidence (and evidence obtained as a consequence of its being given) inadmissible in any Australian proceeding, except a criminal proceeding in respect of the falsity of the evidence.

[128A]. Provides a process to deal with objections on the grounds of self-incrimination when complying with a search order (Anton Piller order) or a freezing order (Mareva injunction) in civil proceedings other than under the proceeds of crime legislation.

It provides that the privilege against self-incrimination under the Act applies to disclosure orders. The principal provisions are outlined below.

Evidence excluded in the public interest

[129]. *Judicial reasons* – Evidence excluded in the public interest prohibits (subject to some exceptions) evidence of the reasons for a decision, or of the deliberations of a judge or an arbitrator being given by the judge or arbitrator, or by a person under his or her direction or control, or by tendering a document prepared by any of these persons. The section does not apply to published reasons for decisions.

The section also prohibits evidence of the reasons for a decision or the deliberations of a member of a jury in a proceeding being adduced by any jury member in another proceeding. The prohibition does not apply to certain types of cases such an offence for attempting to pervert the course of justice.

[130]. *Public interest privilege* – Requires a court to prevent evidence of matters of state (for example, matters affecting international relations or law enforcement) being adduced if the public interest in admitting the evidence is outweighed by the public interest in preserving its secrecy or confidentiality.

[131]. *Settlement negotiations* – Provides that evidence is not to be adduced of communications made between, or documents prepared by, parties in dispute in connection with attempts to settle the dispute (this does not include attempts to settle criminal proceedings).

[132]. A court must satisfy itself that a witness or party is aware of his or her rights to claim a privilege under this Part if it appears that the witness or party may have a ground for making an application or objection under it.

[133]. A court can call for and examine any document in respect of which a claim for privilege under this Part is made so that it may determine the claim.

Discretionary and mandatory exclusions

[135]. The court has a general discretion to exclude evidence if its probative value is substantially outweighed by the danger of it being unfairly prejudicial to a party, misleading or confusing or possibly causing or resulting in undue waste of time.

[137]. The court must exclude prosecution evidence in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the accused.

[138]. *Discretion to exclude improperly or illegally obtained evidence* – Enables the court to exclude evidence obtained improperly, unlawfully or in consequence of an impropriety or a contravention of the law. Such evidence is excluded unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in the particular way it was obtained. The clause is intended to reflect, with some modifications, the exclusionary discretion at common law that is known as the rule in *Bunning v Cross* (1978) 141 CLR 54.

[139]. Sets out the circumstances in which evidence of a statement made or act done by a person during questioning by investigating officials is to be taken to have been improperly obtained for the purpose of clause 138.

Chapter 4 – Proof

[140 and 141]. *Standard of proof in civil and criminal proceedings* – Provides that the standard of proof in civil and criminal proceedings is respectively, proof on the balance of probabilities and proof beyond reasonable doubt. In a case where the defendant is required to prove some evidentiary fact for example, a reverse onus requirement to prove 'reasonable excuse or an exception or proviso, the standard of proof is on the balance of probabilities.

[142]. *Standard of proof concerning admissibility of evidence or other matter* – The standard of proof for a finding of fact necessary for deciding a question whether evidence should or should not be admitted in a proceeding, or any other question arising under the Act (if the Act does not otherwise provide) is proof on the balance of probabilities.

Judicial notice

[143 to 145]. Makes it unnecessary to adduce evidence about matters of law, including the provisions and coming into operation of Acts and statutory rules, about knowledge that is not reasonably open to question and that is either common knowledge in the locality where the proceeding is being heard or can be verified by consulting authoritative sources.

Warnings and information

[165]. *Unreliable evidence* – Allows any party in a jury trial to ask the judge to give a warning to the jury about the unreliability of evidence to which the clause applies and the need for care in determining the weight to attach to the evidence and sets out the types of evidence that may be unreliable and includes hearsay evidence, evidence of admissions and evidence affected by the age or ill-health of the witness.

[165A]. *Evidence of children* – Deals with warnings in relation to children's evidence.

[165B]. *Prejudicial effect of delay* – Deals with warnings to juries in criminal proceedings where a delay as been found by the court to have resulted in a significant forensic disadvantage to the defendant.

Chapter 5 – Miscellaneous

[184]. *Defendant may admit matters or give consents* – Enables a defendant in or before a criminal proceeding, to make any admissions and give any consent that a party to a civil proceeding can make. A defendant's consent will not be effective in criminal proceedings unless he or she has been advised to consent by his or her lawyer, or if the court is satisfied that the defendant appreciates the consequences of doing so.

[187]. Declares that, for the purposes of a law of the State, a body corporate does not have a privilege against self-incrimination.

[188]. Empowers a court to impound documents tendered or produced before the court.

[189]. Sets out the circumstances in which a voir dire (the determination of a preliminary question in the absence of a jury) is to be held.

[190]. *Waiver of rules of evidence* – Allows the court, with the consent of the parties, to waive the rules relating to the manner of giving evidence, the exclusionary rules and the rules relating to the method of proof of documents. A defendant's consent will not be effective in a criminal proceeding unless he or she has been advised to consent by his or her lawyer, or the court is satisfied that the defendant understands the consequences of the consent.

[194]. *Court may issue warrant to attend* – Provides powers for the court to issue a warrant to bring a witness before the court who has failed to attend court, including circumstances where the court is satisfied that the witness is avoiding service or is unlikely to attend.

[195]. *Prohibited question not to be published* – Makes it an offence to print or publish (without express court permission) an improper question, or any question disallowed by the court because the answer would contravene the credibility rule or any question in respect of which leave has been refused.

Schedule 1

Schedule 1 provides for the form of the oaths and affirmations that may be taken or made by witnesses and interpreters.

Dictionary

The dictionary defines various words and expressions used in the Act.

Charter Report

Protection of families – Cultural rights – Extended families of and people with kinship ties to defendants must give evidence even if it harms their relationship with the defendant – Whether reasonable limit

Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'. Charter s. 17(1) provides that '[f]amilies are the fundamental group unit of society and are entitled to be protected by… the State'. Charter s. 19(2)(c) provides that 'Aboriginal persons… must not be denied the right… to maintain their kinship ties.'

The Committee notes that clause 12(b) provides that all competent persons can be compelled to testify in a court. The Committee also notes that clause 18 provides that spouses, de facto partners, children and parents of a criminal defendant who object to giving evidence can only be made to give evidence if there is no likely harm to be caused in their relationship with the defendant or the desirability of them giving the evidence outweighs the

extent of that harm. The Committee observes that clause 18 does not extend to the extended family of a defendant, including people with kinship ties to an Aboriginal defendant. The Committee considers that clauses 12(b) and 18 may limit the Charter rights of criminal defendants to protection of their family relationship and, in the case of Aboriginal defendants, to maintain their kinship ties.

The Statement of Compatibility remarks:

> *It would be undesirable to extend the operation of clause 18 to all persons who share kinship ties with a defendant, as this is potentially a very broad class of people and would undermine the ability to ensure that important evidence can be obtained. The definition of spouse, de facto partner, parent or child will include a broad class of persons who share kinship ties with the defendant, and the provision provides an appropriate balance between the preservation and maintenance of close relationships and the need to maximise the ability to adduce relevant, probative evidence.*

The Committee observes that if clause 18 were extended to a wider range of relationships, those people would still be required to testify if the desirability of doing so outweighs the extent of any harm that would be caused to their relationship with the defendant.

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

- ***whether or not the restriction of clause 18, providing discretionary protection from compelled testimony, to the immediate family of criminal defendants is a limitation on the Charter right of the extended families of criminal defendants to protection by the State and of Aboriginal persons to maintain their kinship ties with criminal defendants***
- ***if so, whether or not clauses 12(b) and 18, by requiring that non-immediate family of criminal defendants testify even when the desirability of them doing so is outweighed by the harm that would be caused to their family relationships, are a reasonable limit on the right of families and Aboriginal persons according to the test set out in Charter s. 7(2)***

Fair hearing for criminal defendants – Admission of hearsay, opinion and admission evidence against criminal defendants – Exclusion of certain defence evidence – Whether reasonable limits

Charter s. 7(2) provides that human rights may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'. Charter s. 24(1) provides that all criminal charges must be determined 'after a fair… hearing'.

The Committee notes that Chapter 3 of the bill sets out when evidence can and cannot be used in legal proceedings. The Committee observes that the bill generally widens the categories of evidence that can be received in a court or tribunal, including the following categories of evidence of prosecution evidence that are currently automatically inadmissible under Victorian law:

- hearsay evidence consisting of unintentional assertions of fact (clause 59(1))
- hearsay evidence admitted for a non-hearsay purpose (clause 60)
- first-hand hearsay if certain conditions are satisfied (clauses 65(2) and 66(2))
- opinions about the ultimate issue in the trial or matters of common knowledge (clause 80)
- admissions that were prompted by threats or promises by a person in authority (although such evidence must satisfy a test of reliability in some circumstances) (clause 85)

The Committee also observes that the bill includes provisions that potentially exclude evidence of a criminal defendant's innocence, including the following categories of evidence:

- second-hand hearsay evidence that falls outside defined exceptions (clause 65(8))
- tendency or coincidence evidence that lacks significant probative value (clauses 97 and 98)
- evidence rebutting witnesses' answers about their credibility that falls outside defined exceptions (clause 106)
- religious confessions (clause 127)
- evidence relating to matters of state where the public interest favours exclusion (clause 130)
- evidence whose probative value is substantially outweighed by the danger of unfair prejudice, confusion or time-wasting (clause 135)

The Committee considers that these clauses engage the Charter right of criminal defendants to a fair hearing.

The Statement of Compatibility remarks:

> *[W]hat amounts to a 'fair' hearing takes account of all relevant interests including those of the accused, the victim, witnesses and society. For example, it may be in the interests of the accused to know the name of a police informant. However, the right to a fair hearing is not breached by the privilege in respect of public interest immunity in clause 130, which enables that information to be withheld from the accused where those interests are outweighed by the public interest in preserving secrecy or confidentiality.*
>
> *The balancing of rights required by the charter has essentially been undertaken by both the Australian Law Reform Commission and the Victorian Law Reform Commission on whose reports this bill is based. In addition, in most cases the courts are given a broad discretion, which will ensure that the provisions are applied to ensure a fair hearing in the individual circumstances of the case. Further, clause 11 of the bill expressly preserves the powers of a court with respect to abuse of process.*

The Committee observes that the clauses discussed above are all drawn from model legislation developed in other Australian jurisdictions in the early 1990s and that recent law reform commission reports preceded the adoption of the Charter. The Committee also observes that the bill's purpose of achieving uniformity with other jurisdictions that presently lack a Charter-like statute (clause 1) and the exemption of courts and tribunals in their non-administrative functions from the Charter's obligation to act compatibly with human rights (Charter s. 4(1)(j)) may mean that the Charter has little impact on the operation of the bill. The Committee further observes that the High Court has held that neither the remedy of abuse of process nor the discretions contained in the bill can be used in a way that undermines statutory rules of evidence and exceptions to them: *PJE v R* S154/95 (9/9/96); *Papakosmas v R* [1999] HCA 37, [39], [97].

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

- ***whether or not clauses 59(1), 60, 65(2), 65(8), 66(2), 80, 85, 97, 98, 106, 127, 130 & 135 limit the Charter right of criminal defendants to a fair hearing***
- ***if so, whether or not they are reasonable limits the rights of criminal defendants according to the test set out in Charter s. 7(2)***

Fair hearing – Discretion to admit evidence obtained in breach of Charter rights – Admission favoured in trials of serious offences – 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. 24(1) provides that all criminal charges must be determined 'after a fair… hearing'.

The Committee notes that clause 138(1), while providing for the exclusion of evidence obtained illegally or improperly, also provides for the admission of the evidence if a court finds that the desirability of admitting it outweighs the undesirability of admitting it. The Committee observes that the effect of clause 138(1) is that courts may admit evidence obtained in breach of Charter rights. The Committee also observes that this provision has been held in New South Wales to favour admission when the offence being tried is a serious one: *R v Dalley* (2002) 132 A Crim R 169, 171. The Committee therefore considers that clause 138(1) may engage the Charter rights of persons being investigated in relation to serious criminal offences, including their right to a fair hearing before those charges are determined by a court

The Statement of Compatibility remarks:

> *[T]he right to a fair hearing involves the balancing of all relevant interests. The balancing approach undertaken pursuant to clause 138 is similar to that developed by the New Zealand courts in respect of the right to a fair trial under the New Zealand Bill of Rights Act. As the New Zealand courts have recognised, a prima facie exclusionary rule does not give sufficient weight to the interests of the community or the victim; namely, that persons who are guilty of serious offences should not go unpunished: R v. Shaheed [2002] 2 NZLR 377.*

The Committee observes that the Charter already incorporates a provision (Charter s. 7(2)) for the balancing of rights against other interests; a further balancing may double-count those competing interests. The Committee also observes that, whereas the New Zealand courts requires that a breach of human rights be given 'considerable weight' in the balancing exercise, clause 138(3)(f) only requires that a breach of a right in the *International Covenant on Civil and Political Rights* (which lacks some of the rights protected by the Charter) be taken 'into account'. The Committee further observes that United States courts have long required the mandatory exclusion of evidence obtained in breach of its bill of rights in order to deter future breaches and that Canadian courts require the exclusion of all evidence (including real evidence) compelled from the defendant's body.

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

- ***whether or not clause 138(1), by permitting the use in criminal prosecutions of evidence obtained through a breach of Charter rights, especially in trials of serious offences, limits the Charter rights of people investigated and charged with serious offences***
- ***if so, whether or not clause 138(1) is a reasonable limit on the Charter rights of people investigated and charged with serious offences according to the test set out in Charter s. 7(2)***

The Committee makes no further comment.

Family Violence Protection Bill 2008

Introduced	24 June 2008
Second Reading Speech	26 June 2008
House	Legislative Assembly
Member introducing Act	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill establishes a system of civil intervention and protection orders for persons who have experienced violence from a member of their family. The new Act will replace the system originally established by the *Crimes (Family Violence) Act 1987.*

The Act provides for –

- Police powers of preventative detention prior to an intervention order being sought or made allowing police to hold a person while protective measures are being put in place and issue a family violence safety notice prior to the court considering an application for a family violence intervention order.
- Police powers of entry and search and seizure of firearms, certain weapons, firearms authorities and ammunition.
- Registration of civil protection orders made to protect family members in other States and Territories and in New Zealand.
- A regime for those who abuse the court system and harass family members by vexatiously making applications under the Act, to be declared vexatious litigants and have restrictions placed upon their access to the court system under the Act.

Content and Committee comment

[Clauses]

Part 1 – Preliminary

[1 and 2]. Provide for the purposes of the Act and how they are to be achieved.

[3]. Sections 1 (purpose) and section 224 (relating to certain interstate orders under the *Crimes (Family Violence) Act 1987*) commence on Royal Assent. The remaining provisions commence on proclamation but not later than by 1 October 2009.

Inappropriate delegation of legislative powers – delayed commencement

The Committee notes the delayed commencement and observes that no reasons are given in any of the explanatory material for the necessity or desirability of a delay in commencement of greater than one year.

The Committee will seek further advice from the Attorney-General for the need to delay commencement by more than one year.

The Committee again draws attention to Practice Note No. 1 of 2005 issued by the Committee in October 2005 concerning indefinite or delayed commencement of Acts.

Part 2 – Interpretation

[5 to 7]. Defines the meaning of *family violence* and includes the economic abuse of a family member; a definition of *economic abuse*, a term that is used in the definition of *family violence;* and a definition of *emotional or psychological abuse*, a term that is used in the definition of *family violence*.

[8 to 10]. Provides key definitions for *family member, domestic partner* and *relative.*

Part 3 – Police protection before court orders – Holding powers and family violence safety notice

Part 3 provides police officers with protective powers prior to an intervention order being made. It includes a power for police to hold a person while protective measures are being put in place and issue a family violence safety notice prior to the court considering an application for a family violence intervention order.

Holding powers

[14]. A police officer may direct a person to, remain at the place where the person is when the direction is given; or go to, and remain at, a place stated by the officer; or remain in the company of the police officer; or another police officer stated in the direction; or another person stated by the police officer. The direction may be given orally or in writing.

A direction to remain in the company of another person who is not a police officer may only be given with that person's consent.

At the time of giving the direction, the police officer must inform the directed person that refusing or failing to comply with the direction may result in their apprehension and detention (c.15) and that, if apprehended and detained under that clause, it is an offence to escape or attempt to escape.

[15]. Provides a detention power where a person refuses or fails to comply with a direction under clause 14. Police may use such force as is reasonably necessary to apprehend and detain a person directed under clause 14 where that person refuses or fails to comply with that direction.

A person may be detained at a police station or other place. A person may only be detained at a police gaol (within the meaning of the *Corrections Act 1986*) where the police officer considers this location is necessary for the protection of any person or property or to prevent the person escaping from detention.

Rights or freedoms – Detention without judicial involvement – Whether detention is punitive or preventative and remedial in character

The Committee draws attention to the provisions that allow for preventative detention in a police gaol of a person who refuses to comply with a direction where the police officer considers that such detention is necessary for the protection of any person or property or to prevent the person escaping from detention.

The Committee observes that it has previously reported on Acts that included provisions for preventative detention at the direction or order of non-judicial officers. The Committee accepts that limited short term detention, in this case for up to 6 hours, may be justified where there is a reasonable nexus with a legitimate preventative and non-punitive purpose.

The question whether the detention provisions in the Act are to be characterised as preventative or remedial and if they are whether they are reasonable and necessary in the circumstances is a matter for the consideration of the Parliament.

[16]. Police may search a person if the person has been apprehended and detained under the holding powers.

[17]. Provides some procedural requirements for persons who are under a clause 14 direction at a police station and persons under a clause 15 detention.

[18]. Limits the duration of the direction power, inclusive of the detention power to 6 hours from the time the initial direction is given, or for a further period if ordered by the court. [19]. Allows a police officer to apply to the court for an extension of the period of the direction or detention beyond 6 hours up to a total of 10 hours.

[22]. Prohibits a police officer from interviewing or questioning a person under the direction or detention in relation to any offence or alleged offence.

Family violence safety notices – After hours protection

[24 and 25]. *After hours (outside of court hours) protection* – Provides for the circumstances in which a police officer may apply to another police officer of the rank of Sergeant or above for a family violence safety notice ('safety notice') to be issued until an application for a family violence intervention order can be decided by the court. The application may only be made outside normal hours (i.e. before 9 am and after 5 pm) and on weekends and public holidays. The application may be made in person or by telephone or other electronic communication.

[29]. The conditions that may be included in a safety notice are the same as those that may be included on a family violence intervention order under section 81, except for conditions that cancel or suspend a firearms authority or weapons approval.

> **Note:** *If the respondent has a firearms authority or weapons approval, it is intended that the responding police officer will use powers under section 163 to seize any firearms or weapons.*

[31]. A safety notice is taken to be an application for a family violence intervention order by the police officer who applied for the notice and a summons for the respondent to appear at the first mention date which must be within 72 hours of the service of the safety notice.

[37 and 38]. It is an offence to contravene a safety notice. Police may arrest a person without a warrant if the officer believes on reasonable grounds that the person has contravened a safety notice. The *Bail Act 1977* will apply to those arrested under this power.

[41]. The Division concerning safety notices expires 2 years after commencement.

Part 4 – Family Violence Intervention Orders

The Part sets out how an application for a family violence intervention order (an order) is made, how proceedings are conducted, the power of the court to make interim and final orders, the conditions that may be included in an order and how long an order will last. The Part also provides how an order can be varied, revoked or extended and how a decision can be appealed.

[45]. A police officer or an affected family member can apply for an order in person or any other person can apply on their behalf with the affected family member's consent.

[49]. A registrar may issue a summons requiring the respondent to attend court once an application has been made.

[50]. In certain circumstances a Magistrate or registrar may issue a warrant to arrest the respondent once an application for a family violence intervention order has been made.

[52]. The *Bail Act 1977* applies if a warrant has been issued under clause 50.

Interim orders

[53]. The court may make an interim order, if there is an application for a family violence intervention order and the court is satisfied that an interim order is necessary for the safety of a family member, to protect a child or preserve property of a family member; or the parties consent to or do not oppose the making of an interim order; or a family violence safety notice has been issued and the court is satisfied there are no circumstances that would justify discontinuing protection.

[54]. *Right to a fair trial – right to be heard* – An interim order may be made if the respondent has not been served with the application or is not present in court.

> **Note:** From the Second Reading Speech – *Interim orders can be made without the respondent present but are only effective once they are served on the respondent.*

Family violence intervention orders (Final orders)

[62]. The court must decide on its own initiative whether to allow a child (who is not an applicant or respondent) to be legally represented.

[65]. *Fair hearing – Rules of evidence may not apply* – The court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary, except in criminal matters where an order has been contravened. However certain provisions of the *Evidence Act 1958* which provide protection for witnesses apply.

[66]. Evidence may be admitted via affidavit or sworn statement but the court, by leave, may require a person giving such evidence to attend in person as a witness and be cross-examined.

[67]. *Fair hearing – Witnesses for a party* – A child, other than an applicant or respondent for an order, may not give evidence without the leave of the court

[68]. *Fair hearing – Public hearing* – The Magistrates' Court has a discretion to close court proceedings, or limit those who may attend, to protect a witness, affected family member or protected person from undue distress or embarrassment.

[69]. Provides alternative arrangements for conducting proceedings including the use of closed circuit television, permitting support persons while a person gives evidence and requiring legal representatives to remain seated.

[70]. *Fair hearing – Right to cross-examine* – Restricts personal cross-examination by the respondent of protected witnesses (defined by the section). A person may be declared a protected witness if the person has a cognitive impairment or otherwise needs the protection of the court.

A protected witness must not be personally cross-examined by the respondent unless the protected person is an adult who has consented to being cross-examined and the court decides it would not have a harmful impact. If the protected witness is an adult with a cognitive impairment, the court must also be satisfied that the protected witness is able to give valid consent and would be competent to give evidence. The court must be reasonably satisfied that the respondent has had an opportunity to seek legal representation to cross-examine a protected witness.

[74]. The court may make a final order if the court has found that the respondent has on the balance of probabilities committed family violence, in accordance with the definition of family violence in clause 5, and is likely to do so again.

[75]. The court may make a final order if there is a police application that the affected family member has not consented to.

A final order can be made without the protected person's consent on a police application with any conditions, if the protected person is a child, has a guardian and the guardian has consented to the application or the person is cognitively impaired.

[76]. The court can make final orders in respect to persons associated with the respondent (an additional respondent) or affected family member (an additional applicant).

[77]. The court may make a final order to protect a child if the parties have not made an application on behalf of the child.

[78]. The court may make a final order by consent. If the respondent is a child the court must be satisfied that there are grounds to make the order.

The court may however conduct a hearing if it believes it is in the interests of justice to do so.

Conditions of family violence intervention orders

[79 to 95]. Provides for the conditions that may be included in an order.

[81]. *Exclusion from the home – home privacy* – The conditions that may be included in a family violence intervention include the exclusion of the respondent from the protected person's residence.

[82 and 83]. The court must consider whether the respondent should be excluded from the residence as a condition of the family violence intervention order.

[86 to 88]. The court may make conditions related to personal property that may be made as part of an order (subject to contrary orders made by relevant courts in respect to property).

[92]. If the court is satisfied that there are no *Family Law Act* orders on foot and the court is satisfied that the protected person's and the child's safety would not be jeopardised by the respondent having contact with the child, then the court must prescribe conditions making these negotiations between the protected person and the respondent on child contact as safe as possible for the protected person.

[93]. The court must prohibit a respondent from contact with a child under an order if the court decides such contact poses a risk to the protected person's or child's safety.

[97 and 98]. *Duration of final order* – The court may specify a period that a final order will remain in force. If the respondent is a child, the order should not last for longer than 12 months unless there are exceptional circumstances.

Appeals to County Court and Supreme Court

[114]. Provides for who may appeal against the making of a family violence intervention order or a refusal to make such an order. A vexatious litigant must be granted leave under section 96 before they can appeal a decision on an application.

[117]. An appeal against a decision does not operate as a stay of the Magistrates' Court or Children's Court decision, unless it is a counselling order. However the court may make an

order staying the original decision pending the determination of the appeal. The court may impose bail conditions on an appellant to ensure the safety of a protected person or to ensure a party's attendance at the appeal.

[118]. If the applicant for a family violence intervention order was not the protected person and that applicant is appealing a decision, the appeal cannot proceed unless the protected person or those with responsibility for the protected person (such as a parent or guardian) consents to the appeal (*also refer to the section 85 of the Constitution Act 1975 report below*).

[119]. An appeal against a decision of the original court is by way of a rehearing and sets out the powers of an appeal court in relation to the original decision.

[120]. No appeal is permissible against a decision of the County or Supreme Court determining an appeal from a Magistrates' Court or Children's Court (*also refer to the section 85 of the Constitution Act 1975 report below*).

[122]. A person may seek a rehearing of an application if an order has been made and that person was not served with the application, nor made aware of it under an order for substituted service. An application for a rehearing does not operate as a stay on the final order or order declaring a person to be vexatious.

[123]. Contravening an order is a criminal offence.

[124]. A police officer may arrest a person without a warrant if the officer believes on reasonable grounds that the person has contravened a family violence intervention order. The *Bail Act 1977* will apply in case of an arrest under this section.

Part 5 – Counselling orders

[126 to 144]. The Part provides for counselling orders and provides that, if the Family Violence Court Division makes a final order and the requirements for the application of the Part are satisfied, it must make an order requiring the respondent to be assessed as to their eligibility for counselling. The court may then order a respondent to a family violence intervention order to attend counselling if it receives a report and is satisfied that the respondent is eligible to attend counselling.

Presumption of innocence

[129(5) and 130(4)]. Provide that it is an offence to fail to attend an interview or for subsequent counselling without a *reasonable excuse.*

The Committee notes the reverse onus provision requiring the respondent to establish evidentiary facts of an exception or proviso such as 'reasonable excuse' and accepts that such reverse onus provisions may be acceptable where such facts are peculiarly within the knowledge of the respondent.

> **Note:** From the Statement of Compatibility – *Provisions that merely place an evidential burden on a defendant (that is, the burden of showing that there is sufficient evidence to raise an issue) with respect to any available exception or defence do not generally limit the right to be presumed innocent because the prosecution still bears the legal burden of disproving that matter beyond reasonable doubt.*

[143]. The Act allows for the collection of health information within the bounds provided in the *Health Records Act 2001*.

Part 6 – Jurisdiction of courts and proceedings

[150]. Restricts the presence of children in proceedings under the Act.

[155]. A family violence intervention order can be made if there are also criminal proceedings for the same conduct.

> **Note:** *Concurrent proceedings may co-exist because a family violence intervention order is a civil remedy.*

Part 7 – Enforcement powers

[157]. *Search without warrant* – Police officers may enter and search premises for a person in a number of circumstances without a warrant.

[158]. It is an offence to fail to surrender firearms or weapons when directed to do so by police. Surrender may be required immediately or directed to occur at a specified place and time within 48 hours.

It is an offence not to comply with such a direction *without lawful excuse*.

The Committee notes the reverse onus provision requiring the respondent to establish evidentiary facts of an exception or proviso such as 'reasonable excuse' and accepts that such reverse onus provisions may be acceptable where such facts are peculiarly within the knowledge of the respondent.

> **Note:** From the Statement of Compatibility – *Provisions that merely place an evidential burden on a defendant (that is, the burden of showing that there is sufficient evidence to raise an issue) with respect to any available exception or defence do not generally limit the right to be presumed innocent because the prosecution still bears the legal burden of disproving that matter beyond reasonable doubt.*

[159]. Police may search certain premises or vehicles *without a warrant* if an officer is aware or has reasonable grounds to suspect firearms or weapons are in the respondent's possession.

[160]. *Search of premises or vehicle with warrant* – Police may apply to a magistrate for the issue of a search warrant in relation to particular premises or a vehicle. The provisions of the *Magistrates' Court Act 1989* apply to such warrants.

Part 8 – Restriction on publication of proceedings

[166 to 169]. Restricts the publication of proceedings (or pictures) in the Magistrates' Court.

Part 9 – Relationship with other Acts

[170 to 176]. Provides for the application and interaction of other Acts with this Act.

Part 10 – Interstate and New Zealand orders

[177 to 187]. Provides for registration of corresponding interstate and New Zealand orders in the court.

Part 11 – Vexatious litigants

[188 to 200]. *Right to a fair hearing* – Makes provision for prohibiting certain declared vexatious litigants from commencing proceedings under the Act.

A person who is declared a vexatious litigant cannot begin any proceedings under the Act against the person protected by the order or their children without the leave of the court. Leave of the court may be given by any magistrate.

With the leave of the relevant appeal court, a person may appeal against a vexatious litigant order made against them.

Part 12 – Service of documents

[201 to 207]. Deals with service of orders, manner of service, proof of service and like matters.

Part 13 – Miscellaneous

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

[208]. Declares that it is the intention of clauses 118 and 120 to alter or vary section 85 of the *Constitution Act 1975*.

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

> *Clause 118 provides that if the applicant for a family violence intervention order was not the protected person and that applicant is appealing a decision, then the appeal cannot proceed unless the protected person or those with responsibility for the protected person (such as a parent or guardian) consents to the appeal. The reason for varying the Supreme Court's jurisdiction in this manner is to ensure that a protected person or a person with the responsibility for a protected person can decide what matters are appealed on their behalf or on behalf of those for whom they have responsibility.*
>
> *Clause 120 provides that there is no further appeal from an appeal decision of the Supreme Court. This is appropriate as the rights of the parties in such cases have been tested in a hearing by the President of the Children's Court and the Supreme Court and further appeals could result in a proliferation of proceedings. This may result in the attendance of those subject to family violence at numerous traumatic court hearings. If new facts and circumstances emerge, then the respondent for an order may seek a variation or revocation of the family violence intervention order from the Magistrates' Court.*

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

[209 to 211]. Make provision for the making of rules of court and regulations.

Part 14 – Repeals, transitional and validation provisions

The Part repeals the *Crimes (Family Violence) Act 1987* and makes provision for the continuance of existing orders and clarifies how applications for various orders that are not finalised at the time the Act comes into force are to be handled.

Part 15 – Repeal of counselling order provisions

[225 to 232]. Have the effect of repealing Part 5 (Counselling Orders) and those provisions in the Act and the *Magistrates' Court Act 1989* which relate to the power of the courts to make

counselling orders when final intervention orders are made in the Family Violence Court Division of the Magistrates' Court.

> **Note:** *Court ordered behaviour change counselling for those who have committed family violence is a trial program being conducted at Ballarat and Heidelberg Magistrates' Court. At the conclusion of the trial on 30 June 2009, the relevant provisions of the Act and Magistrates' Court Act 1989 will be repealed. Depending on the evaluation of the trial, amendments may be required at a later date to the Act to provide ongoing court powers to order behaviour change counselling. Clause 231 is a transitional provision that ensures that even when the counselling provisions are repealed they continue to apply to any counselling orders made under the Act before the repeal.*

Part 16 – Consequential amendments

[233 to 272]. Make consequential amendments to a number of Acts.

The Committee notes this extract from the Second Reading Speech –

> *The Act makes a range of changes to the Residential Tenancies Act 1997 to ensure that there are mechanisms to align residential tenancies with the family violence intervention order system. These amendments may enable victims to remain in their home where they wish to and therefore reduce the risk of homelessness, poverty and social dislocation following family violence.*

[272]. Provides for the repeal of Part 16 of the Act one year after that Part commences.

Charter Report

Right of detainees to be informed of reason for detention and proceedings to be brought – Direction to person to remain at or go to place other than police station – Person must only be told of the consequences of not complying with the direction

Charter s. 21(4) provides that a 'person who is… detained must be informed at the time of… detention of the reason for the… detention… and must be promptly informed about any proceedings to be brought against him or her.' The New Zealand Court of Appeal has held that a restriction on movement can be a detention for the purposes of a similar rights provision if it is not 'a mere brief or otherwise insignificant impediment' and is instead 'a more substantial or significant deprivation of liberty: *Police v Smith and Herewini* [1994] 2 NZLR 306.

The Committee notes that clause 14 provides that a police officer may direct a person (in circumstances set out in clause 13) 'to remain at the place where the person is when the direction is given', 'to go to, and remain at, a place stated by the officer' or 'to remain in the company of' the officer or another person.' The Committee observes that such a direction remains in effect for up to six hours (clause 19(1)) and that non-compliance empowers a police officer to use force to apprehend the person (clause 15(1)). The Committee therefore considers that a person given such a direction may be regarded as 'detained' for the purposes of the Charter.

The Committee notes that while clause 17(2)(b) requires the giving of a notice setting out rights and responsibilities under the bill, this requirement is limited to people directed to remain at or go to a police station (clause 17(1)(a)) and only applies once that person has arrived at a police station (clause 17(3)(a)). The Committee observes that a police officer who tells a person to remain at or go to another place is only required to tell the directed person the consequences of not complying (clause 14(4)). The Committee therefore considers that clauses 14 and 17 may limit the Charter right of such people to be told to the reasons for their detention and to be promptly informed about any proceedings to be brought against him or her.

The Committee draws attention to clauses 14 and 17 and the requirement in Charter s. 21(4) that detainees be immediately informed of the reason for their detention and promptly told about any proceedings to be brought.

Movement – Property – Fair hearing – Respondents to applications for family violence intervention orders barred from challenging evidence of protected witnesses unless they hire a private lawyer or consent to charges for the services of a legal aid lawyer – 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. 12 gives everyone the 'right to move freely within Victoria'. Charter s. 20 provides that a person 'must not be deprived of his or her property other than in accordance with law.' Charter s. 24(1) provides that all civil proceedings must be determined 'after a fair… hearing'. The Committee observes that the UK House of Lords has held that injunctions to prevent anti-social behaviour are civil proceedings for the purposes of the right to a fair hearing: *Clingham v Royal Borough of Kensington and Chelsea* [2002] UKHL 39.

The Committee notes that clause 70(3) bars respondents to an application for a family violence intervention order from personally cross-examining protected witnesses (including the person allegedly affected by the family violence, any child, any family member of either the applicant or the respondent, any person with a cognitive impairment or anyone a court declares as needing protection.) The only exception is where an adult witness consents and the court finds that personal cross-examination will not harm the witness.

The Committee also notes that clause 71(1) provides that a court must order Victoria Legal Aid to provide legal representation to unrepresented respondents for the purposes of cross-examining a protected witness; however, clause 71(3) provides that Victoria Legal Aid may impose conditions set out in s. 27 of the *Legal Aid Act 1978*, including that the respondents:

- pay a specified amount to the cost of the legal representation
- make payments in respect of the lawyer's out-of-court expenses
- accept a charge over any property they have an interest in, including their home
- pay interest at up to 70% of the penalty interest rate on these debts.

The Committee observes that the effect of clause 71(3) is that respondents can only cross-examine protected witnesses if they either obtain a lawyer of their own or agree to bear (at the discretion of Victoria Legal Aid) the financial cost of having a legal aid lawyer conduct the cross-examination. Whilst the Committee considers that it is appropriate for Victoria Legal Aid to recover costs from people who choose to have a publicly-funded legal representative, the Committee is concerned that such a choice may be considered not to exist when the law bars people from representing themselves.

The Committee further notes that clause 71(4) provides that a respondent who does not arrange for or accept arrangements for a lawyer to cross-examine the witness or 'otherwise refuses to co-operate' must be warned by the court that 'neither the respondent nor the respondent's witnesses may give evidence about' the events relevant to the application that are within the witness's knowledge. The explanatory memorandum remarks:

> *This subclause is intended to ensure that if the respondent does not avail themselves of legal representation to cross-examine protected witnesses about matters relevant to the application, the respondent and their witnesses will not be able to give evidence on those matters.*

The Committee observes that clause 71(4) may prevent a respondent from calling evidence to contradict allegations made by a witness called by an applicant. The Committee also observes that clause 71(4) appears to mimic the rule of evidence known as the rule in *Browne v Dunn* (which has the purpose of ensuring that parties to litigation have timely notice of contrary factual claims by the other party); however, it is much stricter than that rule (which is ordinarily enforced through less drastic remedies, such as allowing witnesses to be recalled and drawing adverse inferences) and, moreover, the rules of evidence do not in any event apply in proceedings for family violence intervention orders (clause 65.)

In short, the combined effect of clauses 70(3), 71(3) and 71(4) is that a respondent to an application for a family violence intervention order must either accept the financial cost of having a lawyer conduct the cross-examination of protected witnesses (payable once they have the means to pay) or be barred from challenging the testimony of such witnesses (either through cross-examination or calling contradictory evidence.)

The Second Reading Speech remarks, in relation to clause 70(3):

> *This prohibition is designed to protect victims and other vulnerable persons, who can find direct questioning by the respondent both intimidating and traumatic.*

Whilst the Committee considers that this purpose is a very important one that promotes the Charter rights of protected witnesses and their families, the Committee observes that respondents face serious consequences if a family violence intervention order is given, including significant limits on their movements and the possibility of being ordered to move out of their home. The Committee considers that if a final order is made in circumstances where a respondent has been prevented from challenging evidence put by the applicant, then such an order may be considered so arbitrary that it may limit a number of Charter rights, including the rights to freedom of movement and to property.

The Committee considers that the compatibility of clauses 70(3), 71(3) and 71(4) with human rights may depend on whether or not they satisfy the test for limits on human rights in Charter s. 7(2), including whether or not imposing a financial cost on respondents who wish to challenge the evidence of a protected witness who is giving evidence against them is a proportionate response to the problem of intimidation and trauma of witnesses and whether or not any less intrusive measures are available to achieve that purpose.

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

- ***whether or not clauses 70(3), 71(3) & 71(4), by requiring respondents to an application for a family violence intervention order to either accept the financial cost of having a lawyer conduct the cross-examination of a protected witness (payable once they have the means) or be barred from challenging the testimony of such witnesses (either through cross-examination or calling contradictory evidence), limit the Charter rights of those respondents to movement, property and a fair hearing***
- ***if so, whether or not clauses 70(3), 71(3) & 71(4) satisfy the test for reasonable limits on rights in Charter s7(2) and, in particular, are a proportionate, minimally intrusive way of achieving the purpose of protecting witnesses from trauma and intimidation***

Fair hearing – Criminal defendants who refuse to cooperate in their lawyer's cross-examination of a witness barred from calling contradictory evidence

Charter s. 24(1) provides that all criminal charges must be determined 'after a fair… hearing'.

The Committee notes that clause 244, amending s. 37CA(1) of the *Evidence Act 1958*, expands existing provisions barring criminal defendants from personally cross-examining protected witnesses to include defendants charged with conduct amounting to family violence. The Committee observes that existing ss. 37CA(6) & (7) of the *Evidence Act 1958* provide for the appointment of a Legal Aid lawyer for unrepresented defendants and, in contrast to clause 71(3), do not require that such defendants accept the financial cost of such a lawyer.

However, the Committee also notes that existing s. 37CA(9) provides that defendants who refuse legal representation or do not cooperate must be warned that they cannot call evidence that contradicts the testimony of a protected witness. The Committee observes that existing s. 37CA(9) appears to mimic the rule of evidence known as the rule in *Browne v Dunn*; however, it is much stricter than that rule (which is ordinarily enforced through less drastic remedies, such as allowing witnesses to be recalled and drawing adverse inferences). The Committee also observes that the High Court of Australia has cast doubt on whether the rule in *Browne v Dunn* should be applied to criminal defendants at all, at least 'without serious qualification', given the prosecution's burden of proof: *MWJ v R* [2005] HCA 74, [41]. The Committee therefore considers that clause 244 may limit the Charter rights of family violence defendants to a fair hearing.

The Committee draws attention to clause 244, existing s. 37CA(9) of the Evidence Act 1958 and the Charter right to a fair hearing.

The Committee makes no further comment.

Heritage Amendment Bill 2008

Introduced	24 June 2008
Second Reading Speech	26 June 2008
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Portfolio responsibility	Minister for Community Development

Purpose

The Bill amends the *Heritage Act 1995* (the 'Act') and provides for a number of changes to its operation. In particular –

- the Heritage Council's heritage registration processes are being amended to ensure only a single hearing is required on whether or not a place should be included in the heritage register;
- abolishes the Historic Shipwrecks Advisory Committee and removes references to that Committee in the Act;
- a new infringeable offence of not complying with a heritage permit and its conditions is created;
- a provision is amended to clarify that financial security can be used to ensure compliance with a condition on a heritage permit; and
- the certificate section of the heritage register is amended to include reference to world heritage environs areas.

Content and Committee comment

[Clauses]

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

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

The Committee makes no further comment.

Public Holidays Amendment Bill 2008

Introduced	24 June 2008
Second Reading Speech	26 June 2008
House	Legislative Assembly
Member introducing Bill	Hon. Joe Helper MLA
Portfolio responsibility	Minister for Small Business

Purpose

The Bill amends the *Public Holidays Act 1993* to provide greater certainty as to public holiday arrangements in Victoria, repeal provisions relating to the appointment of additional and substituted public holidays by non-metropolitan Councils and to provide for a public holiday on Melbourne Cup Day or a substituted day to be observed in all parts of Victoria.

Major points from the Second Reading Speech –

- The Bill provides the same number of public holidays (11) to all Victorians.
- The Bill ensures that a public holiday will be held on Melbourne Cup Day or an alternate day in every metropolitan and municipal district throughout Victoria. Non-metropolitan regions that had not previously received a Melbourne Cup Day holiday will have a Melbourne Cup Day public holiday from this year onwards.
- The Bill will formalise in legislation for substituted public holidays where a public holiday falls on a weekend.
- Public holidays already gazetted for 2008 will stand.

Content and Committee comment

[Clauses]

[2]. Provides for the Act to come into operation on the day after the day on which it receives the Royal Assent.

[5]. Substitutes a new section 6 in the Act and provides for the official public holidays.

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

Charter Report

Equal protection – Freedom of religion and belief – Western Christian holidays deemed public holidays for the purposes of employee holiday entitlements and statutory time limits – Whether unequal protection of the law – 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. 8(3) provides that everyone is entitled to 'equal protection of the law without discrimination'. Discrimination includes discrimination on the basis of having or not having a particular religious belief. Charter s. 14(2) provides that no-one can 'be coerced or restrained in a way that limits his or her freedom to... adopt a religion or belief in… practice [or] observance'.

The Committee notes that clause 5, substituting existing s. 6 of the *Public Holidays Act 1993*, provides for public holidays on a number of Western Christian holidays: Good Friday, Easter

Saturday, Easter Monday, Christmas Day and Boxing Day. The Committee observes that the effect of clause 5 is to exempt those Christian holidays from the definition of working or business days in various Victorian statutes, to generally suspend the operation of statutory time limits on those days (see s. 44 of the *Interpretation of Legislation Act 1984*) and to trigger automatic holiday entitlements on those days in most employment contracts.

The Statement of Compatibility remarks:

> *While it could be argued that the appointment of these days as public holidays treats Christians and adherents to non-Christian religions differently, I do not consider that any benefit is conferred on or detriment suffered by either group. All persons are entitled the same number of days of holiday leave. The bill does not limit employers' obligations, under the Equal Opportunity Act 1995, to make reasonable allowance for employees' religious beliefs, including in relation to terms of requests for leave to enable employees to observe their religious holidays.*

The Committee observes that clause 5 gives Western Christians automatic entitlements to observe their religious holidays, whereas members of other religions must rely on the operation of anti-discrimination law. The Committee also observes that, whereas Western Christians do not need to use their leave entitlements to observe Easter and Christmas, members of other religions must use their leave entitlements to observe their religious holidays. The Committee therefore considers that clause 5 may limit the right of members of other religions to equal protection of the law (including equal and effective protection against discrimination.)

The Statement of Compatibility remarks:

> *The 2006 Australian census states that 63.9 per cent of Australians identify as being of Christian religion. In declaring certain days based on Christian holidays as public holidays, the law goes no further than is required to achieve the objective of common, certain public holidays for all persons employed under Victorian law….*
>
> *It would not achieve the purpose of certainty and consistency in public holiday legislation to prescribe the same number of public holidays per year but permit employees to select the days on which they observe their holidays.*

The Committee observes that the 2006 census indicates that 55.9% of Victorians identify as Western Christians and 32.5% identify as having other religious beliefs or no religion (with a further 11.6% not stating.)

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

- ***whether or not clause 5, by automatically facilitating only Western Christians' observance of religious holidays, limits the Charter right of members of other religions to equal protection of the law and equal protection against discrimination;***

- ***if so, whether or not clause 5, given its purpose of achieving certainty and consistency in public holiday legislation, is a reasonable limit on the Charter rights of members of other religions***

The Committee makes no further comment.

Victorian Law Foundation Bill 2008

Introduced	25 June 2008
Second Reading Speech	26 June 2008
House	Legislative Assembly
Member introducing Bill	Hon. Peter Batchelor MLA
Minister responsible	Hon. Rob Hulls MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill –

- provides for the continuation of the Victoria Law Foundation (the Foundation).
- re-enacts with amendments the laws relating to the governance of the Foundation.
- modernises the governance provisions and focuses the Foundation's objectives on providing community legal education and information on the law and access to the law to the people of Victoria.
- repeals the *Victoria Law Foundation Act 1978*.

> **Note:** From the Second Reading Speech – *The Victoria Law Foundation (VLF) was established in 1967 to improve access to justice. …The VLF provides grants to community legal centres for community legal education programs, publishes plain English legal resources, coordinates events such as Law Week, provides resources for law libraries and conducts other activities to educate the community and the legal profession about the law.*

Content and Committee comment

[Clauses]

[2]. The Bill comes into operation on the day it is proclaimed but not later than by 1 July 2009.

[4 to 8]. Provides that there continues to be a body corporate called the Foundation which has perpetual succession and an official seal and may do and suffer all things a body corporate may do and suffer and sets out the functions and powers of the Foundation. The Foundation is to be constituted by not less than 6 and not more than 8 members appointed by the Minister after consultation with the Chief Justice of the Supreme Court, the Law Institute and the Victorian Bar. The Part also sets out the terms and conditions of the members of the Foundation and the requirements for meetings of the Foundation and other procedural and formal requirements.

[12]. Allows the Foundation to appoint an Executive Director and any other employees or consultants.

[14]. Repeals the *Victoria Law Foundation Act 1978*.

The Committee makes no further comment.

National Gas (Victoria) Bill 2008

The Bill was introduced into the Legislative Assembly on 7 May 2008 by the Hon. Peter Batchelor MLA. The Committee considered the Bill on 26 May 2008 and made the following comments in Alert Digest No. 6 of 2008 tabled in the Parliament on 27 May 2008.

Committee's Comment

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

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

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

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

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

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

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

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

The Committee notes its comments made in May 1998 –

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

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

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

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

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

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

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

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

Minister's Response

I refer to your letter dated 30 May 2008, regarding the National Gas (Victoria) Bill 2008.

I understand the Scrutiny of Acts and Regulations Committee, raised concerns with respect to the implementation of the National Gas (South Australia) Act 2008, to be applied as a law in Victoria under the National Gas (Victoria) Bill 2008.

The National Gas Law has been developed over a period of approximately three years. During this period, a substantial amount of consultation has taken place between jurisdictions, industry and various stakeholders in order to develop uniform legislation. A large volume of consultation and information papers, energy market reform bulletins and submissions have been produced. These are available on the Ministerial Council on Energy website.

Answers to the specific questions raised by the Committee are provided below:

1. *Will the regulations or any amendments to the regulations be subject to parliamentary or independent review or scrutiny by any jurisdiction?*

   As stated by Minister Conlon in the South Australian Parliament on 9 April 2008, this Bill allows Regulations to be made where they are contemplated by, or necessary or expedient for the purpose of, the National Gas Law. Regulations cannot be made to implement extensive changes. Regulations will only deal with the prescription of civil

penalty and conduct provisions, designated pipelines, some transitional issues and other minor and machinery matters. An important safeguard is that Regulations can only be made with the unanimous agreement of all relevant Ministerial Council on Energy Ministers.

2. *Where future national scheme legislation is negotiated involving application of laws in this jurisdiction, will the Minister consider the possibility of releasing draft exposure Bills for scrutiny by a Parliamentary Committee?*

   I would be happy to consider the possibility of releasing draft exposure Bills for scrutiny by a Parliamentary Committee on future national scheme legislation should such a request be made by the Scrutiny of Acts and Regulations Committee.

   I would also like to note that two exposure drafts of the National Gas Law were released prior to the introduction of the National Gas Law into the South Australian Parliament. The release of the two exposure drafts provided an opportunity for all interested parties to provide comment.

3. *Will any amendments made to the South Australian Act and or the schedule to that Act come before the Victorian Parliament for counterpart amendment.*

   Any amendments made to the South Australian Act or the schedule to that Act will not come before the Victorian Parliament for counterpart amendment. Any proposed amendments to the South Australian Act will, however, require unanimous agreement by all jurisdictions through the Ministerial Council on Energy.

4. *Does Charter section 32 (interpretation of laws) apply to the National Gas (Victoria) Law, the National Gas (Victoria) Regulations, the National Gas Rules and statutory instruments made under them as they apply in Victoria?*

   As the National Gas (Victoria) Law, the National Gas (Victoria) Regulations, and the National Gas Rules are Victorian law, Charter 32 of the Victorian Charter of Human Rights and Responsibilities Act 2006 does apply.

I thank you for raising these issues with me.

Peter Batchelor MP
Minister for Energy and Resources

24 June 2008

The Committee thanks the Minister for this response.

Public Health and Wellbeing Bill 2008

The Committee originally reported on the Bill in Alert Digest No. 6 of 2008 tabled in the Parliament on 27 May 2008. The Committee held a public hearing in relation to the Public Health and Wellbeing Bill 2008 on 4 June 2008. It received submissions and heard evidence.

On 24 June 2008 the Committee wrote to the Minister, forwarding copies of submissions received and the transcript of evidence concerning the Bill, for consideration and comment.

Committee's letter

The Committee considered this Bill at its meeting on 26 May 2008 and reported on its provisions in Alert Digest No. 6 of 2008 which was tabled in the Parliament on 27 May 2008. The Committee noted in this report that it would invite written submissions on the Bill and hold public hearings. The Committee further noted that it may prepare and table a further report following public consultation.

At its meeting yesterday the Committee resolved that before deciding to table any further report on this Bill it would forward all submissions and transcripts to you for your Department's consideration and comment.

The Committee received three written submissions from the –

- *Office of the Victorian Privacy Commissioner (dated 27 May 2008); and the*
- *Victorian AIDS Council Inc. Gay Men's Health Centre Inc. (first submission undated and a second supplementary submission dated 5 June 2008).*

The Committee took further evidence at its public hearings from the second of those organisations.

I attach for your Department's information the written submissions and the transcript of evidence (Hansard) from the public hearing.

The Committee would appreciate your advice or comments in respect to any of the issues raised by these submissions or at the hearings in due course. The Committee would be grateful if a copy of any response or comment your Department may provide could also be forwarded as a Word document by e-mail attachment to our Senior Legal Adviser, at – <andrew.homer@parliament.vic.gov.au>. This will assist the Committee to reproduce your response if the Committee later determines to prepare and table any further report on this Bill in a future Alert Digest.

Please do not hesitate to contact me should you wish to discuss any of the matters raised by the Committee in its Alert Digest.

Carlo Carli, MP
Chairperson

Minister's response

Thank you for your letter dated 24 June 2008 in which you invited me to comment on the submissions received by the Scrutiny of Acts and Regulations Committee (the Committee) with respect to the Public Health and Wellbeing Bill 2008 (the Bill). The Committee received written submissions from the Victorian Privacy Commissioner, Ms Helen Versey, and the Victorian AIDS Council and Gay Men's Health Centre (the AIDS Council). Mr Michael Kennedy, Executive Director of the AIDS Council, gave evidence at the public hearing the Committee held.

Both the Victorian Privacy Commissioner and the Victorian AIDS Council expressed concern that certain aspects of the Bill do not strike an appropriate balance between ensuring that

Victoria has the ability to respond to existing and emerging risks to public health and protecting the rights of individuals who may be affected by measures taken to improve public health. I hope that the following information explains why the Bill needs to provide for the limitation of certain rights protected by the Charter of Human Rights and Responsibilities Act 2006 (the Charter) in order to effectively promote and protect public health in Victoria.

Submissions made by the AIDS Council

Mr Kennedy referred in his evidence to the importance of the informal compact that has developed in Australia between people living with HIV/AIDS and expressed concern that the Bill and the way it is implemented could undermine that compact. The partnership that has developed between affected communities, community based organizations and non-government organizations, governments at all levels, researchers, and health care providers has been the cornerstone of Australia's successful response to the HIV/AIDS epidemic. The Brumby Government is committed to reinforcing this partnership in order to reduce the rate of transmission of HIV/AIDS in Victoria and to improve the health of people living with HIV/AIDS. The Government is also dedicated to developing strategies that combat the stigma, discrimination and social exclusion that people living with HIV/AIDS continue to experience. These objectives will underpin the way in which the new Act is implemented.

The Bill has been carefully crafted with a view to ensuring there are a range of mechanisms that will effectively protect the rights of individuals who have or may have an infectious disease. For example, I draw the Committee's attention to clause 111 of the Bill, which sets out the principles that are to apply for the purposes of the application, operation and interpretation of Part 8 of the Bill, which provides a legislative framework for managing and controlling infectious diseases, micro-organisms and medical conditions. One of these principles is that the spread of an infectious disease should be prevented or minimized with the minimum restriction on the rights of any person. It should also be remembered that section 38 of the Charter will require those who make decisions under the new Act to give proper consideration to relevant human rights, including a person's right not to be subjected to medical treatment without one's full, free and informed consent and the right not to have one's privacy unlawfully or arbitrarily interfered with.

<u>Clause 56 – Does it allow information to be disclosed to the police?</u>

The AIDS Council has expressed particular concern that clause 56 would allow the Secretary to the Department of Human Services (DHS) to disclose information about an individual to Victoria Police, without informing the individual that the information has been disclosed.

Both the Information Privacy Act 2000 and the Health Records Act 2001 already enable the Secretary to the Department of Human Services to disclose personal information and health information to Victoria Police in a range of circumstances, including where DHS reasonably believes that the disclosure is reasonably necessary for the detection and investigation of a criminal offence or to lessen or prevent a serious threat to public health (see IPP 2.1(g) in the Information Privacy Act and HPP 2.2(h) and (i) in the Health Records Act).

I also note that the purpose of clause 56 is to enable the Secretary to disclose information to a department or government agency of the Commonwealth, another State or Territory, or a body which is prescribed for the purposes of the provision. As the Explanatory Memorandum for the Bill observes, it is envisaged that such arrangements may include the sharing of information in relation to communicable diseases to enhance Australia's ability to identify and respond quickly to public health events of national significance, and the sharing of information to protect against the international spread of disease. Clause 56 is not intended to enable the Secretary to disclose information to another government department or holder of a statutory office under a Victorian Act.

Should the Bill only authorise the making of a public health order with respect to a person who is known to have an infectious disease?

The AIDS Council has contended that the CHO should only have the power to make a public health order with respect to a person if the CHO is sure that the person has an infectious disease. If the CHO believed-but was not certain-that a person has an infectious disease and the person refuses to voluntarily undergo a medical examination or test, the CHO would usually make an examination and testing order in order to confirm whether the person has the infectious disease in question. If the test or examination results indicated that the person has an infectious disease, and the person refused to voluntarily take steps to minimise the risk he or she poses to public health, the CHO would consider whether to make a public health order with respect to that person.

In some circumstances, however, it will be appropriate for the CHO to require a person to comply with measures that will minimize the risk of spreading the disease to others even though the CHO is not certain that the person has been infected with an infectious disease. The Principles to be Considered when Developing Best Practice Legislation for the Management of Infected Persons who Knowingly Place Others at Risk prepared by the National Public Health Partnership in December 2003 acknowledges that, in practice:

> *the application of the distinction between suspicion of infection and confirmation by a positive test is complicated by delays in laboratory confirmation, the accuracy of laboratory testing and the effect of sero-conversion. There may be exceptional circumstances where coercive action is required before an infection is confirmed.*

This power would most commonly be used to respond to an emerging infectious disease for which no laboratory confirmation is yet available. This was the situation in the early weeks of the Severe Acute Respiratory Syndrome (SARS) epidemic. If the route of transmission is known, but no definitive test is available, the Chief Health Officer may wish to make a public health order to ensure that the person's movements and/or behaviour were such that the risk of infecting other persons was minimised.

Should the CHO's power to require a person to receive specified prophylaxis (including vaccination) not apply to people who conscientiously object to vaccination?

The AIDS Council has submitted that the power to require a person subject to a public health order to undergo prophylaxis is incompatible with section 10(1)(c) of the Charter and trespasses unduly on people's rights and freedoms.

The CHO could only require a person to undergo prophylaxis if the CHO considered that there was no less restrictive order that could be made which would be equally effective in minimizing the risk that the person poses to public health. Moreover, if the CHO were considering making an order that required a person to undergo prophylaxis, one of the factors the CHO would have to take into account is the possible side-effects and discomfort that may be caused to the person if he or she is required to undergo specified prophylaxis (see clause 117(2)(c)). If a person subject to a public health order disagreed that the order should have been made, he or she could apply to the CHO or the Victorian Civil and Administrative Tribunal (VCAT) for a review of the order (see clauses 121 and 122). The person could also apply under section 50(3) of the Victorian Civil and Administrative Tribunal Act 1998 for an order that stayed the operation of the order made by the CHO, thereby ensuring that the prophylaxis is not administered before the order was reviewed.

I note that the AIDS Council drew the Committee's attention to pages 69 - 70 of the Review of the Health Act 1958: Draft policy paper-for consultation (the draft policy paper), which envisaged that the power to require a person to undergo prophylaxis would be subject to a number of exceptions, including where the person conscientiously objects to the prophylaxis. These recommendations only related to the proposal to confer a range of powers (to be known as "epidemic powers") on the CHO, and not public health orders. After further consideration, it was decided that it was unnecessary to include such coercive powers in the Bill as the Quarantine Act 1908 (Cth) already contains powers to isolate persons and to provide prophylaxis and treatment in relation to a quarantinable disease.

Could the CHO make a public health order that required a person to undergo pharmaceutical treatment for HIV?

The AIDS Council has indicated that it does not support the inclusion of a power in the Bill to compel people to comply with specified pharmacological treatment for HIV. Clause 117(5) of the Bill would enable the CHO to require a person who poses a serious risk to public health to take a diverse range of measures in order to minimise the risk of a person spreading an infectious disease. When deciding which measures a person subject to a public health order must comply with, the CHO will have to take into account a range of considerations, including the means by which the particular infectious disease is transmitted, whether the disease can be treated by taking medication, and, if so, what side-effects the person may experience if she or he is required to take that form of treatment. As the Statement of Compatibility for the Bill observed, it is anticipated that the power to require a person to undergo pharmacological treatment will be predominantly exercised to require people with tuberculosis (TB) to take anti-tuberculosis medication. In general, a person with TB who has taken anti-TB drugs for several weeks is no longer infectious, and after six months of pharmacotherapy is permanently cured of the disease.

I have been advised by my department that it is highly unlikely that the CHO would make a public health order under the new Act that required a person with HIV/AIDS to undergo any of the pharmacological treatments currently available that reduce the risk of HIV transmission. This is partly because these treatments will only reduce the person's infectivity if they are taken indefinitely. If a person decided to discontinue taking treatment once they were no longer subject to a public health order, the person's infectivity would increase and the person would be at risk of developing drug resistance. As HIV/AIDS cannot be spread through ordinary social contact, a person with HIV can virtually eliminate the risk of transmission by refraining from certain activities (such as engaging in unsafe sexual practices, sharing injecting equipment and donating blood or tissue). As a result, it is envisaged that public health orders made under the new Act with respect to people with HIV/AIDS will require the person to refrain from activities that pose a risk of transmission. If a person refused to comply with these restrictions, it may be necessary for the CHO to make an order requiring the person to be detained and/or isolated.

Should the CHO be required to give a statement of reasons to each person who is subject to a public health order?

The AIDS Council has recommended that the Bill should require the CHO to give all people who are subject to a public health order a statement of reasons for the decision to make the order, instead of merely giving people the right to ask for a written statement of reasons.

I agree that it is important that a person who is subject to a public health order understands why the decision has been made, and it is for this reason the Bill provides that a public health order must specify the purpose of the order, the infectious disease the CHO believes the person has or has been exposed to and the basis for this belief. Decisions made by the CHO must also be based on cogent and reliable evidence. Unfortunately, it will not always be possible to give a person a detailed statement of reasons at the same time as the person is given a public health order because such orders sometimes need to be made very quickly. A person can, however, always request the CHO to provide a more detailed statement of reasons for the decision.

Provision of pre and post test information to people who are required by an examination and testing order to undergo a test for HIV

The AIDS Council has suggested that clauses 131 and 132 (which provide that certain information is to be given to a person who requests to be tested for HIV and that additional information is to be given if the results of the test are positive) should apply to all people who are tested for HIV.

The needs of people who request to be tested for HIV are not identical to the needs of those people who are required by an examination and testing order to undergo a test. For example, one of the main purposes of requiring that certain information is provided to people who request to be tested is to ensure they can give informed consent to the test. In contrast, it is

irrelevant whether a person who is required by law to be tested is able to give informed consent.

I agree, however, that all people who receive a positive result for HIV should be provided with a wide range of information. In practice, if the CHO made an examination and testing order that required a person to be tested for HIV and the results of the test were positive, the CHO or another appropriately qualified and experienced departmental officer would discuss a wide range of issues with the person, including their immediate need for care and support and the steps they need to take to minimise the risk of transmitting the disease to others. In addition, DHS would provide the person with a range of assistance that would be tailored to the person's particular needs. For example, the person would be referred to appropriate support services, which might include counselling, peer group support organisations, and assistance with housing or supported accommodation.

Clause 137 – Senior Medical Officer may authorise tests

The purpose of clause 137 of the Bill is to promote the occupational health and safety of people who have been exposed to blood or other body fluids during the course of their work in connection with a hospital and who may therefore have contracted a specified infectious disease. As the Statement of Compatibility for the Bill explained, knowing whether the person who was the source of the exposure has a specified infectious disease can minimise the anxiety of the exposed person as well as inform decisions about the person's medical treatment. For this reason the source of an occupational exposure is routinely asked to provide their informed consent to be tested for HIV and various types of hepatitis. Consent to be tested is usually provided in these circumstances.

Occasionally, however, the source of the exposure is unable to consent to be tested because the person is unconscious or has died For this reason, clause 137 of the Bill would continue to enable a senior medical officer to authorise a person who is dead or is unconscious or otherwise does not have the capacity to consent to be tested for a prescribed disease. It is important to note that a senior medical officer could not make an order requiring a person to be tested in circumstances where the person has refused to agree to tested-the CHO will continue to be the only person who has this power.

When making an order under section 137 of the new Act, the senior medical officer would not be acting as a delegate of the CHO. As a result, section 143 of the new Act will not require the CHO to report on the number of orders made each year by senior medical officers. However, the new Act will give the CHO the power to direct authorised senior medical officers to keep particular records about the orders they make and to provide reports to the CHO about the number of orders they have made and the circumstances surrounding the making of those orders (see clause 141(1)(f)). The CHO could therefore exercise this power to direct all authorized senior medical officers to provide the CHO with information about the number of orders they have made and an outlined of the circumstances in which they were made. Further consideration will be given to whether it is desirable to make such a direction.

Proposal relating to contact tracing

As the AIDS Council has noted, the Draft Policy Paper proposed to give authorised officers the power to require a person to provide information that would enable them to conduct contact tracing. It was ultimately decided that it was unnecessary to include provisions in the Bill that specifically related to contact tracing because there are other powers in the Bill that enable a person to be directed to provide information. For example, clause 188 of the Bill would enable the CHO to direct a person to provide information the CHO believes necessary to investigate where there is a risk to public health or to manage or control a risk to public health. The CHO will be required to handle this information in accordance with the Information Privacy Act and the Health Records Act.

Submission by the Victorian Privacy Commissioner

Clause 37 – Disclosure of information by one Consultative Council to another

The Privacy Commissioner has contended that clause 37 effectively authorises the collection and disclosure of personal information within the meaning of the Information Privacy Act "where the value of that information may be largely speculative". It is worth bearing in mind that the Chairperson of the Council must comply with section 38 of the Charter when deciding whether certain information is disclosed to another Consultative Council. As a result, if the Chairperson of the Council disclosed personal information or health information within the meaning of the Health Records Act in circumstances where he or she had no objective basis for believing that the information was relevant, the Chairperson would clearly have failed to give proper consideration to the rights protected by section 13 of the Charter, and therefore would have acted unlawfully. I therefore do not consider it is necessary to amend clause 37 of the Bill in either of the ways suggested by the Privacy Commissioner.

Clause 38(2)(g) – Concern about function creep

As the Privacy Commissioner has observed, clause 38(2)(g) of the Bill provides that the functions of a prescribed Consultative Council include the performance of "any other prescribed function". If regulations are made that confer additional functions on a prescribed Consultative Council, the breadth of information that prescribed Council may collect and disclose may also expand.

It is important that the Bill enables a new function to be quickly conferred on a Consultative Council so that it can quickly respond to emerging and serious public health problems. As you are aware, regulations are required to be reviewed at least every 10 years. I consider that the sunsetting review process will provide an opportunity to reflect on the scope of functions given to Consultative Councils.

Clause 41 – Disclosure of information held by a prescribed Consultative Council to specified bodies

The Privacy Commissioner has expressed concern that the power to disclose information to one of the bodies specified in clause 41 is too broad, and has recommended that the clause be redrafted so that it explicitly requires that the Consultative Council have an objective basis for its belief that it is in the public interest to disclose the information in question. As discussed above in relation to clause 37 of the Bill, a Consultative Council will be required to exercise this power in accordance with section 38 of the Charter. If the Council did not have an objective basis for its conclusion that disclosure was in the public interest, the Council would have failed to give proper consideration to the rights protected by section 13 of the Charter.

Clauses 42 and 43 – Limitations on the right to access information about oneself

The Privacy Commissioner has argued that clauses 42 and 43 inappropriately deny people the right to access information about oneself and to request that the information be corrected. As the Statement of Compatibility for the Bill noted, the purpose of this limitation is to enable Consultative Councils to continue performing their important quality assurance functions, which in turn promote and protect public health. For example, the function of the Victorian Consultative Council on Anaesthetic Mortality and Morbidity (VCCAMM) is to identify avoidable causes of morbidity or mortality related to anaesthesia and to identify means to improve the safety and quality of anaesthesia practice. The ability of the VCCAMM to perform this task depends on the continued willingness of anaesthetists and other medical practitioners to provide relevant information. Given that information provided may be relevant to potential civil or criminal proceedings, It is unlikely that practitioners would continue to provide information to Councils if that information could be readily disclosed. This would significantly impair the capacity of the Councils to perform their functions. I note that the Privacy Commissioner has not disputed that this would be the effect of allowing individuals to access information held about them by a Consultative Council.

Clause 52 – Obligation to publish the report of a public inquiry

I understand that the Privacy Commissioner is concerned about the manner in which this clause may be interpreted. As noted elsewhere, this clause will be interpreted in accordance with section 32 of the Charter and exercised in accordance with section 38 of the Charter.

Clause 55 – Disclosure of information to specified persons

The Privacy Commissioner has contended that clause 55 of the Bill would allow a person "to disclose otherwise stringently protected information with impunity". The Privacy Commissioner has recommended that the clause should be revised so that a person must have a "more objective basis" for his or her belief that the disclosure is necessary. I have been advised by my department that the clause already requires that the person's belief must have an objective basis,[i] and that revising the clause in the manner recommended by the Privacy Commissioner would make little practical difference to the circumstances in which a person could lawfully provide information.

Clause 56 – Circumstances in which Secretary may disclose information to a relevant body

The Privacy Commissioner is concerned that clause 56 of the Bill will permit "vast data sharing on a national and international scale". The Secretary will have to exercise the discretion to disclose information conferred by section 56 of the new Act in accordance with section 38 of the Charter. The Secretary would also have to have regard to the Charter when negotiating an agreement of a kind referred to in section 56. In my view, this clause strikes an appropriate balance between enabling the Secretary to disclose information for the purposes of promoting or protecting public health and protecting the information privacy rights of individuals.

Clause 57 – Disclosure of information to other administrators

The Privacy Commissioner has submitted that clauses 57(3) and (4) inadequately constrain the purposes for which information may be disclosed, and should only permit information to be disclosed to organisations that exercise similar functions under other Acts or Regulations.

In my view, it is significant that these subclauses only apply to information held by the relevant authority in relation to the registration, licensing and nuisance provisions of the Bill. Given the nature of the information that is likely to be collected under or for the purposes of Parts 6 and 7 of the new Act, I do not consider that it would be appropriate for the Bill to impede the proper administration of other Acts or regulations by imposing unnecessarily tight restrictions on the circumstances in which information may be disclosed.

Clauses 188 and 190 – CHO may direct a person to provide information and public health risk powers

The Privacy Commissioner has contended that clauses 188(1) and 190(1)(d) should be revised by providing that these powers can only be exercised if the repository of the power has an objective basis for his or her belief that it is necessary to do so. My comments in relation to clause 37 of the Bill also apply to clauses 188 and 190.

Power to make regulations

As the Privacy Commissioner has noted, the regulation making powers in the Bill will enable regulations to be made that affect the circumstances in which personal information and health information may be collected, used and disclosed. As you are aware, the Charter and the Subordinate Legislation Act 1994 include a number of mechanisms that will ensure that the regulations made under the Public Health and Wellbeing Act are compatible with the rights protected by the Charter. For example:

---

[i] *See, for example, Gypsy Jokers Motorcycle Club Incorporated v The Commission of Police [2008] HCA 4 per Gummow, Hayne, Heydon and Kiefel)) at [28] and Oblach v Regina [2005] NSWCCA440.*

- *section 32(1) of the Charter requires that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. This will affect the breadth of the power to make regulations under the new Act;*
- *as the responsible Minister, I will be responsible for ensuring that a human rights certificate is prepared in respect of a proposed statutory rule, which must certify whether, in the opinion of the responsible Minister, the proposed statutory rules limits and human right set out in the Charter and, if so, address each of the criteria set out in section 12A(2)(b) of the Subordinate Legislation Act; and*
- *if regulations were purportedly made under the new Act that were inconsistent with the rights protected by the Charter, the regulations would be invalid.*

The Department of Human Services is looking forward to consulting with key stakeholders, including the Privacy Commissioner and the AIDS Council, as well as the wider community on the regulations to be made under the new Act.

Thank you once again for the opportunity to comment on the submissions the Committee has received in relation to this important Bill, and I hope that this information will assist the Committee to evaluate the Bill.

HON DANIEL ANDREWS MP
MINISTER FOR HEALTH

17 July 2008

The Committee thanks the Minister for this response.

Committee Room
28 July 2008

Appendix 1
Index of Bills in 2008

	Alert Digest Nos.
Animals Legislation Amendment (Animal Care) Bill 2007	3, 4
Appropriation (2008/2009) Bill 2008	6
Appropriation (Parliament 2008/2009) Bill 2008	6
Building Amendment Bill 2008	9
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
Crown Land (Reserves) Amendment (Carlton Gardens) Bill 2008	2
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
Evidence Bill 2008	9
Family Violence Protection Bill 2008	9
Heritage Amendment Bill 2008	9
Infringements and Other Acts Amendment Bill 2007	1
Gambling Regulation Amendment (Licensing) Bill 2008	5, 8
Justice Legislation Amendment Bill 2008	5, 6
Justice Legislation Amendment (Sex Offences Procedure) Bill 2008	4, 5
Land (Revocation of Reservations) Bill 2008	4
Land (Revocation of Reservations) (Convention Centre Land) Bill 2008	8
Legislation Reform (Repeals No. 2) Bill 2007	1
Legislation Reform (Repeals No. 3) Bill 2008	5
Liquor Control Reform Amendment Bill 2007	1
Local Government Amendment (Elections) Bill 2008	8
Medical Treatment (Physician Assisted Dying) Bill 2008	8
Melbourne Cricket Ground Amendment Bill 2008	7
National Gas (Victoria) Bill 2008	6, 9
National Parks and Crown Land (Reserves) Acts Amendment Bill 2008	8
Police Integrity Bill 2008	4, 5
Police Regulation Amendment Bill 2007	1
Port Services Amendment (Disposal of Material) Bill 2008	8
Port Services Amendment (Public Disclosure) Bill 2008	2
Public Health and Wellbeing Bill 2008	6, 9
Public Holidays Amendment Bill 2008	9
Public Sector Employment (Award Entitlements) Amendment Bill 2008	5
Professional Boxing and Combat Sports Amendment Bill 2007	1
Relationships Bill 2007	1, 3

State Taxation Acts Amendment Bill 2008 6
Summary Offences Amendment (Tattooing and Body Piercing) Bill 2008 8
Superannuation Legislation Amendment Bill 2008 8
The Uniting Church in Australia Amendment Bill 2008 5
Tobacco (Control of Tobacco Effects on Minors) Bill 2007 8
Unclaimed Money Bill 2008 7
Victorian Energy Efficiency Target Bill 2007 1
Victorian Law Foundation Bill 2008 9
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 Integity Bill 2008 4
Relationships Bill 2007 1

Section 17(b)

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

Police Integrity Bill 2008 4

Appendix 3
Ministerial Correspondence

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

Bill Title	Minister/ Member	Date of Committee Letter	Date of Minister's Response	Issue Raised in Alert Digest No.	Response Published in Alert Digest No.
Working with Children Amendment Bill 2007	Attorney-General	19.09.07	19.03.08	12 of 2007	4 of 2008
Emergency Services Legislation Amendment Bill 2007	Police and Emergency Services	09.10.07	-	13 of 2007	1 of 2008
Animals Legislation Amendment (Animal Care) Bill 2007	Agriculture	31.10.07	12.12.07	14 of 2007	4 of 2008
Liquor Control Reform Amendment Bill 2007	Consumer Affairs	21.11.07	04.12.07	15 of 2007	1 of 2008
Police Regulation Amendment Bill 2007	Police and Emergency Services	21.11.07	06.12.07	15 of 2007	1 of 2008
Victorian Energy Efficiency Target Bill 2007	Energy and Resources	21.11.07	04.12.07	15 of 2007	1 of 2008
Criminal Procedure Legislation Amendment Bill 2007	Attorney-General	04.12.07	30.01.08	16 of 2007	1 of 2008
Crimes Amendment (Child Homicide) Bill 2007	Attorney-General	05.02.08	25.02.08	1 of 2008	4 of 2008
Constitution Amendment (Judicial Pensions) Bill 2007	Attorney-General	05.02.08	21.05.08	1 of 2008	6 of 2008
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	

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.
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	11.06.08	5 of 2008	8 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	24.06.08	6 of 2008	9 of 2008
Public Health and Wellbeing Bill 2008	Health	24.06.08	17.07.08	–	9 of 2008