



SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

56th Parliament
Annual Review 2008
Regulations 2008

Ordered to be Printed

By Authority. Government Printer for the State of Victoria.
N° 201 Session 2006-09

Parliament of Victoria, Australia

**Scrutiny of Acts and Regulations
Committee**

**Subordinate Legislation
Regulations 2008**

Bibliography
ISBN 978 0 7311 3075 8
ISSN 1328 7249



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TERMS OF REFERENCE

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the *Parliamentary Committees Act 2003* are:—

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 on rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent on 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.

PRINCIPLES OF REGULATION REVIEW

The principles of regulation review are set out in Section 21 of the *Subordinate Legislation Act 1994*:—

21. Review of statutory rules by the Scrutiny Committee

- (1) The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament—
 - (a) does not appear to be within the powers conferred by the authorising Act;
 - (b) without clear and express authority being conferred by the authorising Act—
 - (i) has a retrospective effect; or
 - (ii) imposes any tax, fee, fine, imprisonment or other penalty; or
 - (iii) purports to shift the onus of proof to a person accused of an offence; or
 - (iv) provides for the sub-delegation of powers delegated by the authorising Act;
 - (c) appears to be inconsistent with the general objectives of the authorising Act;
 - (d) makes unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of that Act;
 - (e) contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation;
 - (f) unduly trespasses on rights and liberties of the person previously established by law;
 - (g) makes rights and liberties of the person unduly dependent upon administrative and not upon judicial decisions;
 - (ga) 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*;
 - (gb) 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*;
 - (h) is inconsistent with principles of justice and fairness;
 - (ha) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
 - (i) requires explanation as to its form or intention;
 - (j) has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature;
 - (k) is likely to result in administration and compliance costs which outweigh the likely benefits sought to be achieved by the statutory rule.

- (2) A report of the Scrutiny Committee under this section may contain any recommendations that the Scrutiny Committee considers appropriate, including a recommendation that a statutory rule should be—
- (a) disallowed in whole or in part; or
 - (b) amended as suggested in the report.

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CHAIRPERSONS' FOREWORD

We are proud to present the Annual Review of the operations of the Regulation Review Subcommittee to the Parliament of Victoria. The Subcommittee has reviewed the 2008 statutory rule series.

The Subcommittee has continued to work effectively and systematically through 170 regulations. Each regulation has been carefully considered. Twenty-eight regulations were accompanied by Regulatory Impact Statements. Often those regulations accompanied by Regulatory Impact Statements have large numbers of submissions. Each submission is considered in the context of the regulation and its objectives. This can be time consuming.

Many of the issues this year have been raised in the context of human rights. The Subcommittee has written to Ministers posing questions and requesting further advice. The scrutiny of human rights is still a relatively new area for the Subcommittee. The Subcommittee has found it interesting and challenging. A complete review of the Subcommittee's work in this area can be found in Chapter 2. The Subcommittee thanks Ministers for their responses.

We wish to acknowledge the hard work of the Subcommittee members. Their constant attendance at meetings ensured that every statutory rule was reviewed in accordance with the strict legislative timeframe. We thank members. The meetings have been very productive. We also thank our staff for their commitment and dedication. Ms Helen Mason performs the scrutiny of the regulations. We thank her for the provision of timely, informative legal advice. We thank Mrs Victoria Kalapac for her constant, efficient administrative support. Mr Simon Dinsbergs has also kindly provided additional administrative support when required. We thank Dr Jeremy Gans, a legal consultant for the provision of human rights advice.

In September 2002 the Scrutiny of Acts and Regulations tabled a report "*Inquiry into the Subordinate Legislation Act 1994*". In that report the Committee made some fifty-five recommendations in relation to the operation of the *Subordinate Legislation Act 1994*. The Subcommittee understands that changes are mooted in relation to the review of regulations. The area of regulation review continues to evolve. The Subcommittee looks forward to performing the tasks presented to it.

Ken Jasper MP
Chairperson
Regulation Review
Subcommittee

Mr Carlo Carli MP
Chairperson
Scrutiny of Acts and
Regulations Committee

July 2009

CHAPTER 1 – INTRODUCTION

This *Annual Review* examines the major issues arising out of the scrutiny of regulations made in Victoria in 2008 by the Regulation Review Subcommittee (the Subcommittee).

WHAT IS THE REGULATION REVIEW SUBCOMMITTEE?

The Scrutiny of Acts and Regulations Committee (the Committee) is a joint investigatory Committee of the Parliament of Victoria. It has members from the Upper and Lower Houses, the Government and the Opposition. The Regulation Review Subcommittee is a subcommittee of the Committee. The Subcommittee scrutinises regulations and conducts inquiries related to regulations.¹

WHAT ARE ‘REGULATIONS’?

Regulations are often referred to as ‘subordinate legislation’ or ‘statutory rules’. Legislation made by Parliament is referred to as primary legislation or Acts of Parliament. Legislation cannot be made by bodies other than Parliament unless Parliament authorises those bodies (by means of an Act of Parliament) to make ‘subordinate legislation’ or ‘statutory rules’. The Subcommittee prefers the word ‘regulations’ to ‘subordinate legislation’ or ‘statutory rules’. It is of the view that this is a more commonly understood term. In this *Annual Review* ‘regulations’ will be used to refer to all ‘statutory rules’ or ‘subordinate legislation’.

The term ‘regulations’ encompasses a variety of legislative instruments such as statutory rules, court rules, local laws, orders-in-council, proclamations, notices, guidelines, ministerial directions, codes of practice and so on. The power to make regulations is delegated by Parliament to the Executive and other non-Parliamentary bodies including government departments, statutory authorities and agencies. The powers delegated to the Executive by Parliament are contained in Acts of Parliament.

PARLIAMENTARY OVERSIGHT

The validity of a regulation depends upon the regulation-making power conferred by the Act under which the regulation is made. Parliament authorises the Executive to make regulations because there is insufficient time to debate and pass all the legislation which needs to be enacted. This is particularly the case where the proposed legislation is very technical or scientific.

While regulations are sometimes perceived to be of lesser importance than Acts of Parliament, regulations do control and prohibit the conduct of citizens and may adversely affect the rights and liberties of citizens in much the same way as Acts of Parliament. The potential for abuse of the regulation-making power and erosion of citizens’ rights always exists. As Mr Justice Stephen commented in *Watson v. Lee*² the history of delegated legislation:–

¹ Prior to 1 May 2000 the Regulation Review Subcommittee was known as the Subordinate Legislation Subcommittee.

² (1979) 155 CLR 374 at 394.

reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed "requires an adequate measure of control if it is not to degenerate into arbitrary government".

Parliamentary scrutiny committees, with power to examine regulations made by the Executive, are one of the most important safeguards against the misuse of Executive power. Since the 1930s most Westminster style Parliaments have kept control over regulations through the use of scrutiny committees. Scrutiny committees exist in all Australian states and territories. Some of these scrutiny committees examine bills and regulations, while others examine only regulations.³

Victoria has scrutinised regulations since 1956.⁴ From 1982 to 1992 the Legal and Constitutional Committee was responsible for scrutinising regulations. In 1992, the Committee was created by the *Parliamentary Committees (Amendment) Act 1992* (Vic). It scrutinises regulations and bills.

SCOPE OF THE SUBORDINATE LEGISLATION ACT 1994

The *Subordinate Legislation Act 1994* (Vic) (the Act) contains the procedures for making regulations. It sets out the scrutiny functions of the Subcommittee. Only those regulations which come within the definition of 'statutory rule' as contained in section 3 of the Act are subject to the Act. Section 3 defines 'statutory rule' to include:–⁵

- Regulations made, approved or consented to by the Governor-in-Council;
- Regulations which may be disallowed by the Governor-in-Council excluding regulations made by local authorities;
- Rules relating to a court or tribunal or the procedure, practice or costs of a court or tribunal;
- Instruments prescribed to be statutory rules by the Governor-in-Council; and
- Instruments deemed to be statutory rules by their own authorising Act.

Regulations in the form of statutory rules constitute only a small portion of the continually growing number of different types of regulations made each year. Some examples of regulations which fall outside the definition of 'statutory rule' are – guidelines, ministerial directions, local laws, codes of practice, notices, declarations and licences. Regulations which fall outside the definition of 'statutory rule' are not subject to:–

- The procedures of the Act. However they remain subject to any requirements contained in legislation under which they are made;

³ Australian jurisdictions which examine regulations and bills include the ACT, the Commonwealth, New South Wales, Queensland, Victoria and Western Australia and those committees include – Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) (ACT), Senate Standing Committee for the Scrutiny of Bills (Cth); Senate Standing Committee on Regulations and Ordinances (Cth); Legislation Review Committee (NSW), Scrutiny of Legislation Committee (Qld), Scrutiny of Acts and Regulations Committee (Vic), Legislation Committee (WA) and Delegated Legislation Committee (WA).

Australian jurisdictions which examine regulations only include Northern Territory, South Australia and Tasmania and those committees include – Subordinate Legislation and Tabled Papers Committee (NT); Legislation Review Committee (SA); and Standing Committee on Subordinate Legislation (Tas).

⁴ *Subordinate Legislation Act 1956* (Vic).

⁵ *Subordinate Legislation Act 1994* (Vic), s. 3.

- Scrutiny by the Subcommittee and generally not subject to Parliamentary review. However it should be noted that some regulations which fall outside the definition of 'statutory rule' are subject to specific Parliamentary review requirements. For example, planning schemes (and amendments) must be tabled in Parliament within 10 sitting days after being approved.⁶

The Committee remains concerned about regulations which fall outside the definition of 'statutory rule' because it means that they are not subject to consistent regulation-making procedures nor generally to Parliamentary review, allowing the potential for powers to be used improperly and for rights to be adversely affected. This issue is discussed in detail in the Committee's *Report on the Subordinate Legislation Act 1994*.⁷

ROLE OF THE SUBCOMMITTEE

The Subcommittee examines and reviews:–

- Regulations within the meaning of 'statutory rule' contained in the Act;
- State Environment Protection Policies and Waste Management Policies made under the *Environment Protection Act 1970* (Vic);

The Subcommittee generally meets once each month to discuss regulations. Meetings of the Subcommittee are not open to the public. However the Subcommittee may invite members of the public or representatives from various organisations or government departments and agencies to address it at one of its meetings. At its meetings the legal adviser presents the Subcommittee with written and verbal advice in respect of each regulation. The Subcommittee members discuss each regulation and any issues and concerns. When the Subcommittee is satisfied that a regulation complies with the Act, it passes a motion of approval.

Where the Subcommittee is dissatisfied with any matters or needs clarification, it corresponds with the responsible Minister. The Subcommittee will highlight its concerns to the Minister. It will seek in the first instance an explanation or amendment of the regulation. If the Subcommittee does not receive a satisfactory explanation it may prepare a report to Parliament. This report is submitted to all members of the Committee for formal approval and adoption.⁸ The Committee may adopt or reject the report or part of it or make any changes it deems necessary.⁹ A report to Parliament may include a recommendation that a regulation be amended or disallowed in whole or in part. Alternately a report provided by way of information to the Parliament may simply outline the Committee's concerns. As a regulation has already commenced operation by the time it comes before the Subcommittee, the power to recommend disallowance is only used in exceptional circumstances. Generally, such a power would be used where all other efforts to resolve the issue have failed.

Where the Committee decides to report to Parliament it may also recommend that a regulation be suspended whilst Parliament considers the issues contained in the report.¹⁰ Such a course may be undertaken in the interests of justice and fairness. When regulations are suspended in this manner they are deemed not to have been made. This means they have no effect. People are not required to comply with them during the period of suspension.¹¹

⁶ *Planning and Environment Act 1987* (Vic).

⁷ This Report was tabled in Parliament in September 2002.

⁸ The Regulation Review Subcommittee has all the powers and privileges of the full Committee. However it cannot report directly to Parliament.

⁹ *Parliamentary Committees Act 1968* (Vic), s. 4L(5).

¹⁰ *Subordinate Legislation Act 1994* (Vic), s. 22(1).

¹¹ *Ibid.*, s. 22(5).

DISALLOWANCE

Any Member of either House of Parliament may give notice of a disallowance motion but must do so within eighteen sitting days of the tabling of the regulation in that House. Disallowance will not be effective unless that House passes a disallowance resolution within twelve sitting days of the disallowance notice. If the Committee wants to Report to Parliament recommending disallowance, it must also comply with the eighteen sitting day requirement. This means that the Subcommittee must review and discuss all regulations within strict time limits.

SCRUTINY OF REGULATIONS

The Subcommittee scrutinises regulations after they have been made to determine whether they comply with the legislative principles specified in the Act.¹² These principles require the Subcommittee to ensure that regulations do not unduly trespass on rights and freedoms and comply with the procedural and practical requirements of the Act. The Subcommittee does not comment on matters involving government policy. The review focuses on the technical criteria contained in the Act. More specifically, under section 21 of the Act the Subcommittee ensures that regulations:—

- Are within the powers of the authorising Act;
- Do not, without clear and express authority;
 - have a retrospective effect;
 - impose a tax, fee, fine, imprisonment or other penalty;
 - purport to shift the onus of proof to a person accused of an offence;
 - provide for the sub-delegation of powers delegated by the authorising Act;
- Are consistent with the general objectives of the authorising Act;
- Do not make unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of the authorising Act;
- Do not contain any matters which should be contained in an Act of Parliament rather than subordinate legislation;
- Do not unduly trespass on rights and liberties of the person previously established by law;
- Do not make rights and liberties of the person unduly dependent on administrative rather than judicial decisions;
- Do not authorise or require any acts or practices which may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000* (Vic);
- Do not authorise or require any acts or practices which may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2000* (Vic);
- Are consistent with principles of justice and fairness;
- Is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- Do not require explanation as to form or intention;
- Do not substantially or materially contravene the practical requirements of the Act or the Premier's Guidelines;¹³ and

¹² *Subordinate Legislation Act 1994* (Vic), s. 21.

¹³ Department of Premier and Cabinet, Premier's Guidelines, December 2004.

- Are not likely to result in administration and compliance costs which outweigh the benefits sought to be achieved.

The Subcommittee also ensures compliance with the procedural requirements of the Act. Where a Regulatory Impact Statement (RIS) has been prepared, some of the procedural issues the Subcommittee examines include whether:–

- all appropriate certificates have been received by the Subcommittee;
- consultation is adequate and in particular whether appropriate organisations and individuals have been consulted;
- certificates are dated and signed by the responsible Minister;
- certificates contain all the required information; and
- the RIS is adequate and in particular whether it properly explains the nature and extent of the problem to be dealt with by the new regulation; the extent to which alternatives have been considered and the appropriateness of those alternatives; the costs and benefits of the proposed regulations and whether the benefits outweigh the costs.

Where a regulation is excepted or exempted from the RIS process, some of the procedural requirements the Subcommittee examines include whether:–

- the regulation is correctly exempted or excepted or whether it should have been made with a RIS;
- the regulation is exempted or excepted under the appropriate category in the Act;
- the exemption or exception certificate specifies the section under which the exemption or exception was granted;
- the exemption or exception certificate is signed and dated by the responsible Minister;
- the exemption certificate contains reasons for granting the exemption as required by section 9(2);
- a regulation exempted by a Premier's certificate sunsets within twelve months.

The Subcommittee also ensures that:–

- explanatory memoranda clearly set out the nature and extent of any changes and the reasons for the changes; and
- there is compliance with all notice, gazettal and tabling requirements of the Act.

SCRUTINY OF ENVIRONMENT PROTECTION AND WASTE MANAGEMENT POLICIES

The Subcommittee also has responsibility for reviewing policies made under Part 3 of the *Environment Protection Act 1970* (Vic). These policies include State Environment Protection Policies and Waste Management Policies.

More specifically State Environment Protection Policies include:–

- policies concerning the environment generally;¹⁴
- policies concerning the removal, disposal or reduction of litter in the environment;¹⁵

¹⁴ *Environment Protection Act 1970* (Vic), s. 16(1).

¹⁵ *Ibid.*, s. 16(1B).

- policies concerning the re-use and recycling of substances.¹⁶

Until recently waste management policies made under the *Environment Protection Act 1970 (Vic)* applied only to industrial waste. With changes brought about by the *Environment Protection (Resource Efficiency) Act 2002 (Vic)* waste management policies now apply to waste generally.¹⁷ Waste management policies are now enacted under s. 16A of the *Environment Protection Act 1970 (Vic)*.¹⁸

Waste Management Policies include policies dealing with:—¹⁹

- the generation, storage, treatment, transport and disposal and general handling of waste;
- the procedures to be implemented in the recycling, recovery, reclamation and re-use of waste and recycled substances;
- the methods of disposal of specified substances;
- the routes and methods of transportation of waste;
- the location of treatment and disposal plants;
- the allocation of responsibility for waste management operations and disposal; and
- the use and disposal of notifiable chemicals.

State Environment Protection Policies and Waste Management Policies are made by the Governor-in-Council on the recommendation of the Environment Protection Authority (EPA) by publishing an Order declaring the policy in the *Victorian Government Gazette*.²⁰ These policies must be tabled in each House of Parliament on or before the sixth sitting day after the Order is published in the *Victorian Government Gazette*.²¹

Section 18A of the *Environment Protection Act 1970 (Vic)* sets out the requirements which must be followed when making State Environment Protection Policies and Waste Management Policies. Certain policies are excluded from the provisions concerning the preparation of policies. For example, the variation of a State Environment Protection Policy or Waste Management Policy which the EPA determines to be fundamentally declaratory, machinery or administrative in nature. Otherwise the following procedures must be followed:—

- during a minimum period of twenty-one days, the EPA must publish on three occasions in a relevant newspaper – notice of intention to declare a policy. The notice must include the area affected and advise that any person affected may submit information to the EPA;
- the EPA must consider information provided to it by any person affected or likely to be affected;
- the EPA must consult with any government department or statutory authority whose responsibilities may be affected by the policy;
- the EPA must prepare a draft policy;
- the EPA must prepare a draft impact assessment;
- during a minimum period of twenty-one days the EPA must publish on three occasions in a relevant newspaper – notice of preparation of a draft policy. The notice must include the reasons for and objectives of the policy, a description of the area affected, details of where a

¹⁶ Ibid., s. 16(1C).

¹⁷ See definition of 'waste' in the *Environment Protection Act 1970 (Vic)*, s. 4.

¹⁸ Previously Industrial Waste Management Policies were made under section 16(1A) of the *Environment Protection Act 1970 (Vic)*.

¹⁹ *Environment Protection Act 1970 (Vic)*, s. 16A.

²⁰ Ibid., s. 16(1).

²¹ Ibid., s. 18D(1).

copy of the draft policy may be obtained and specify that any person likely to be affected may make a submission;

- the EPA must allow a period of at least three months for submissions;
- the EPA must consider all submissions; and
- the EPA must write a separate letter to each person who has lodged a submission.

Section 18C of the *Environment Protection Act 1970 (Vic)* sets out the matters which a policy impact assessment must discuss:–

- the purposes of the policy;
- the alternatives for achieving the objectives, including consideration of not declaring the policy or varying the existing policy; and
- an assessment of the possible financial, social and environmental impacts of each alternative in qualitative and, where practicable, in quantitative terms.

A copy of the following documents must be forwarded to the Committee:–

- the final policy impact assessment;
- a summary of submissions;
- a statement of the EPA's evaluation of the submissions and any changes made to the draft policy;
- a copy of the review panel's advice if there was a review panel.

The Committee may report to Parliament where these policies are beyond power or do not comply with the provisions of the *Environment Protection Act 1970 (Vic)*. Section 18D(3) provides that the Committee may report to Parliament where a policy:–

- does not appear to be within the powers conferred by the *Environment Protection Act 1970 (Vic)*;
- has been prepared in contravention of the *Environment Protection Act 1970 (Vic)*; or
- contains any matter in contravention of *Environment Protection Act 1970 (Vic)*.

Initial reviews of State Environment Protection Policies and Waste Management Policies are carried out by the Subcommittee. Where the Subcommittee is unable to resolve any issues, it may recommend to the Committee that a report be made to Parliament. A report to Parliament by the Committee may make any recommendations considered appropriate including that a policy be disallowed in whole or in part.²²

The disallowance provisions contained in sections 23 and 24 of the Act apply to State Environment Protection Policies and Waste Management Policies.²³ This means that the eighteen sitting day deadline applies, that is the Committee must table a motion for disallowance within eighteen sitting days after the policy has been tabled before that House.

²² *Ibid.*, s. 18D(4).

²³ *Ibid.*, s. 18D(6).

THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

The *Charter of Human Rights and Responsibilities 2006* (the Charter) commenced operation on 1 January 2006. Pursuant to the Charter the Subcommittee is required to consider every statutory rule in the context of human rights. The compatibility of each statutory rule with the Charter is examined. This applies to all statutory rules in the 2008 series, the subject of this report. Mention is made here of this area of scrutiny for the sake of completeness. It is discussed in further detail in Chapter 2.

CHAPTER 2 – SIGNIFICANT ISSUES

In 2008, the Subcommittee held eight meetings. During those meetings it considered 170 statutory rules made during 2008. Of those rules twenty-eight were accompanied by Regulatory Impact Statements. Of the total regulations made thirty-three were actually considered by the Subcommittee in early 2009.

The Subcommittee did not make any reports to Parliament during 2009. However, the Subcommittee sought further clarification in relation to four statutory rules. In each instance, it wrote to the responsible Minister. Generally, the Subcommittee received satisfactory responses to the issues raised. The Subcommittee thanks the Ministers for their responses. It also sent an additional five letters to Ministers making general comments and including commendations.

Generally, the Subcommittee has classified the issues it encounters into particular categories. This year the Subcommittee did not encounter any significant problems. From the Subcommittee's perspective, the area of regulation review is working well. The majority of the issues raised were in relation to the area of human rights. Communication from Departments is generally punctual and addresses concerns. The Subcommittee wishes to thank departmental officers for the prompt and friendly manner with which they respond to queries. This greatly facilitates the work of reviewing regulations.

For the sake of consistency the areas which have been discussed on previous occasions are listed as follows:–

(A) The statutory rule has been prepared in contravention of any of the provisions of the Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature	11
(B) Consultation	11
(C) Consideration of submissions – General expectation – Response required	12
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(K) Human Rights	18
<i>SR No. 25 – Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008</i>	21
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(A) THE STATUTORY RULE HAS BEEN PREPARED IN CONTRAVENTION OF ANY OF THE PROVISIONS OF THE ACT OR OF THE GUIDELINES WITH RESPECT TO THE STATUTORY RULE AND THE CONTRAVENTION IS OF A SUBSTANTIAL OR MATERIAL NATURE

Under section 21(1)(j) of the Act the Subcommittee examines regulations to ensure that they have been properly prepared. It examines them to see whether they have been prepared in contravention of any of the provisions of the Act or of the Premier's Guidelines with respect to the statutory rule. It examines the regulations to see whether the contravention is of a substantial or material nature.

This year no statutory rules came within this category.

(B) CONSULTATION

Section 6 of the Act sets out the requirements for consultation. These requirements apply to regulations made with or without RISs. Responsible Ministers must ensure that there is consultation "where the guidelines require consultation"²⁴ with "any sector of the public on which an appreciable economic or social burden may be imposed."²⁵

The Premier's Guidelines²⁶ provide as follows:—

5.19 If the proposed statutory rule is likely to impose any appreciable burden, cost or disadvantage on any sector of the public, consultation must take place with that sector, eg business groups, community groups, special interest groups. That consultation should include discussion of the need for and method of the proposed regulation.

The Premier's Guidelines indicate that the "nature and degree of consultation that is appropriate for any particular rule will vary with the nature of that rule".²⁷ This places the final responsibility on Ministers to ensure that appropriate consultation takes place and includes all those affected by a proposed regulation.

While the Premier's Guidelines provide assistance with the consultation process, the Subcommittee acknowledges that some sections are unclear and ambiguous. This makes it difficult for department and agency officers to determine in what circumstances consultation should take place. There is, for example, an inconsistency between the Act and the Premier's Guidelines as to whether consultation **must** or **should** occur in accordance with the Premier's Guidelines. It is the strong preference of the Subcommittee that consultation take place with all those affected by a particular regulation and that the current ambiguities be resolved.

The Subcommittee considers it is important for all consultation certificates to provide details of all those consulted. Generally, however the Subcommittee's experience is that the consultation process in relation to statutory rules has been thorough and appropriate.

²⁴ Section 6, *Subordinate Legislation Act 1994*.

²⁵ *Ibid*, Section 6(b).

²⁶ Paragraph 5.19, Premier's Guidelines, December 2004.

²⁷ *Ibid*, Paragraph 5.13

(C) CONSIDERATION OF SUBMISSIONS – GENERAL EXPECTATION – RESPONSE REQUIRED

General Expectations

Section 11(3) of the Act imposes a duty on Ministers “to consider all submissions and comments received on a draft statutory rule where a RIS has been prepared”.²⁸ The Premier’s Guidelines also emphasise the need for proper consultation²⁹ before a regulation is made.

The Subcommittee considers that appropriate consultation is essential for the effectiveness of the regulatory system. The Subcommittee expects that submissions will be appropriately considered. To that end, a considered response from the Department to an individual submission is tangible evidence that matters have been considered. The Subcommittee’s firm view is that responses ought to be sent to those who have taken the time and effort to send in a submission.

Submissions received by the Subcommittee

The Subcommittee understands that occasionally there may be a large number of submissions in respect of a particular regulation. However, the Subcommittee’s view is that the number of submissions does not alter the expectation that an appropriate response should be sent. It simply means that there are a large number of people who have issues with the proposed regulation. Whilst this may mean an increased workload occasionally, the Subcommittee’s strong view is that this is simply a part of the democratic regulatory process. Appropriate weight and consideration ought to be given to the submissions sent in. Transparency is a critical part of the process. The Minister is required to perform his or her duty in accordance with section 11(3) of the Act. The Subcommittee’s firm view is that publication of a response to issues on a website is a quite inadequate response.

The Subcommittee has frequently been provided with a thorough summary of the issues raised during the RIS process. The Subcommittee’s view is that transparency is an important part of the regulatory statement process. To that end, the Subcommittee’s view is that an appropriate response ought to be communicated to those members of the public involved in the process. Frequently, the labour already undertaken has borne fruit in terms of illuminating issues. The Subcommittee is of the firm view that this needs to be shared to add a further degree of transparency.

The Subcommittee has generally noticed a considerable improvement in the quality of responses prepared by the Departments in respect of submissions. Generally, Departments prepare a table summary of the issues raised in the submissions. This is the case particularly where there are a large number of submissions. The Subcommittee finds this to be extremely helpful. This year, in many regulations where there were a large number of submissions, Departments have sent a general letter covering the various themes to those who made submissions. In other instances, where there were a few submissions Departments have written individual letters to those who made submissions, discussing the various matters raised in detail.

Email

The Subcommittee has had requests from various Departments seeking clarification as to the means of communicating responses. The Subcommittee has considered the issue of response by email. In its deliberations, the Subcommittee will consider the response itself rather than the form in which it is sent. The Subcommittee appreciates that electronic and technological changes of course mean that email is an efficient and cost effective means of responding. Email is an

²⁸ Section 11(3), *Subordinate Legislation Act 1994*.

²⁹ Sections 5.12 - 5.17, Premier’s Guidelines, December, 2004.

appropriate way to communicate provided the response itself is detailed, sufficient and deals with the particular issues at hand. For an example, an email to many recipients attaching a formal letter from the Department is appropriate provided the letter itself is sufficient. Posting letters to those who do not have an email address of course remains an appropriate manner with which to deal with submissions.

The Subcommittee considered the matter of responses to the submission in relation to SR No. 158 – *Victorian Energy Efficiency Target Regulations 2008*. The Subcommittee advised the Minister of its expectations.

Example 1:

SR No. 158 – Victorian Energy Efficiency Regulations 2008

Subcommittee's Letter³⁰

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 29 April 2009.

The Subcommittee made the following observation in its Annual Review, August 2008 at page 11:

The Subcommittee considers that appropriate consultation is essential for the effectiveness of the regulatory system. The Subcommittee expects that submissions will be appropriately considered. To that end, a considered response from the Department to an individual submission is tangible evidence that matters have been considered. The Subcommittee's firm view is that responses ought to be sent to those who have taken the time and effort to send in a submission.

The Subcommittee notes that these are very technical regulations. Twenty-two submissions were received in response to the advertisement of the Regulatory Impact Statement. The Subcommittee understands that the submissions were reviewed by a Victorian Government Panel comprised of the Department of Primary Industries, Sustainability Victoria and the Essential Services Commission. A helpful thirteen page response was prepared by the Department of Primary Industries. This was forwarded to those who prepared submissions.

The response was useful for those who sent in submissions. The Regulations however represent an important part of change towards the implementation of a national emissions trading scheme. The Subcommittee is of the view that given this is such a technical area and as there were only twenty two submissions, an individual response ought to have been sent to those who sent in submissions in addition to the aforementioned document.

Kindly convey the Subcommittee's expectations to those involved in the Regulatory Impact Statement process.

Minister's Response³¹

Thank you for your letter of 29 April 2009 regarding the Victorian Energy Efficiency Target (VEET) Regulations. The Minister has asked that I reply on his behalf.

³⁰ Letter dated 29 April 2009 to the Hon. Peter Batchelor MP, Minister for Energy and Resources, from the Regulation Review Subcommittee.

³¹ Letter dated 14 May 2009 to the Regulation Review Subcommittee from the Chief of Staff, Office of the Minister for Energy and Resources.

I note the Regulation Review Subcommittee's expectations regarding the development of the VEET Regulations and can advise that they have been conveyed to those involved in the process.

(D) TECHNICAL MATTERS – INCOMPLETE CERTIFICATES – DATES OF PUBLICATION IN THE GOVERNMENT GAZETTE AND NEWSPAPER – PREMIER'S CERTIFICATE – DETAILS OF 'SPECIAL CIRCUMSTANCES'

The Subcommittee is concerned to ensure technical compliance with the Act. Pursuant to section 11(a) and (b) of the Act, the RIS must be published in the Government Gazette and a daily newspaper circulating generally throughout Victoria. All relevant certificates should accompany the regulations and be signed and dated. Failure to do so will ensure a letter from the Subcommittee requesting rectification of the matter.

The Subcommittee had no concerns in respect of this area this year.

(E) SETTING A PACKAGE OF FEES – 'THE BASKET APPROACH' – THE PREMIER'S GUIDELINES

The Premier's Guidelines³² provide as follows: -

5.25 It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

By way of example in SR No. 57 – *Plumbing (Fees Amendment) Regulations 2005*³³ increased a number of fees. This was done using the 'basket' approach. In this instance, four of the seventeen fee increases exceeded the Treasurer's approved rate of 2.25% although the actual monetary increases were extremely small. In addition, the package as a whole fell within the Treasurer's approved rate. The increases were 0.03% above the approved rate. The table set out below illustrates the dollar value of the four fee increases which were marginally above the approved rate. In real terms, the largest monetary amount above an increase of 2.5% was eight cents. The smallest monetary amount above an increase of 2.5% was three cents.

Item	Current Fee	Proposed Fee	Dollar Increase Based on 2.5%	% Increase	Actual Increase
For registration under section 221O or a renewal of registration under section 2221ZB	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For provisional registration or renewal of provisional registration	\$79.00	\$81.00	\$1.97	2.53%	\$2.00
For restricted registration or a renewal of restricted registration	\$237.00	\$243.00	\$5.92	2.53%	\$6.00
For an application to modify the plumbing regulations under section 221ZCO	\$79.00	\$81.00	\$1.97	2.53%	\$2.00

³² Sections 5.12 - 5.17, Premier's Guidelines, December, 2004.

³³ Annual Review 2005 – Regulations; p. 21

The Subcommittee is bound by the Premier's Guidelines. A strict interpretation of the Premier's Guidelines leads to the view that as a matter of principle individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However, the Subcommittee is of the view that fee increases and the Premier's Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each regulation will be examined on its merits and in context.

During the year when necessary there have been informal discussions with officers from the various Departments and the Legal Adviser. The discussions suggest that a strict interpretation of the Premier's Guidelines occasionally may make it difficult for Departments in practical terms in setting a package of routine fee increases. Ultimately, regulations are the practical arm of the legislation. They need to function and be made in a commonsense and practical manner where possible. The Subcommittee welcomes input from Departments.

(F) SIGHTING OF MATERIAL INCORPORATED BY REFERENCE

Regulations often include a table of applied, adopted or incorporated matter in accordance with the requirements of regulation 6 of the *Subordinate Legislation Regulations 1994*. Such a table lists all the material applied, adopted or incorporated by reference in the regulations. Occasionally, the Subcommittee is placed in the position where it has to consider and or approve regulations without sighting the material which is incorporated into them. Where the Subcommittee does not sight the material it cannot form a view as to whether it conforms with the requirements of the Act.

The Premier's Guidelines provide some assistance:³⁴

7.03 Section 32 of the Interpretation of Legislation Act 1984 prescribes the procedural requirements which must be fulfilled whenever a statutory rule applies, adopts or incorporates material by reference. Section 32(5) of the Interpretation of Legislation Act 1984 provides that a failure to comply with the tabling requirements does not affect the validity, operation or effect of a statutory rule but agencies should nevertheless ensure compliance with the requirements of section 32 as amended by the Subordinate Legislation Act 1994.

7.04 When considering whether to incorporate a particular document in a statutory rule it should be remembered:

that the provisions of the rule will only refer to the incorporated material and members of the public affected by the rule must see the incorporated document before they can understand the contents and effect of the rule;

that the incorporated material may not be readily available at a reasonable cost;

that the procedures set out in section 32 are designed to facilitate Parliamentary oversight of incorporation of material and to ensure that such material is publicly available so that members of the public affected by the rule can have access to the rules with which they must comply.

³⁴ Sections 7.03 – 7.08, Premier's Guidelines, December 2004.

- 7.05 *It needs to be remembered that the incorporated material may not be a single document. The problem is exacerbated by the drafting style adopted by the Standards Association of Australia as these standards are frequently not self contained but adopt the provisions of other standards. This can create a chain of material incorporated by reference leading to the possibility that the need to table a particular document will be overlooked.*
- 7.06 *Consideration should also be given in drafting statutory rules as to whether the reference to an Australian Standard should be to a specific standard (eg AS 1234) or to a specific version of a standard by reference to its date (eg AS 1234, 1997). The latter approach means that if a later amended version of a standard is to be adopted it will require the amendment of the statutory rule and the undertaking of the RIS process. The former approach may result in significant changes to the effect of the statutory rule with no automatic mechanism to review the changes to the costs and benefits of the statutory rule.*
- 7.07 *The aim of the procedures set out in section 32 of the Interpretation of Legislation Act 1984 is to guarantee the availability of any material which is incorporated into a statutory rule by reference, to ensure that citizens may have access to the laws with which they must comply.*
- 7.08 *In deciding whether to incorporate material by reference, agencies need to take care to balance the drafting convenience with ease of access to the incorporated material and understanding of it by those affected by it or required to comply with it. Agencies should reserve the use of incorporated detailed and extensive technical material to regulations concerning industries familiar with and using the material. The use of the material then has the benefit of removing duplication. In such cases agencies should also consider whether performance standards are the more appropriate means of regulations.*

The Subcommittee's preference is that all material is provided to it simultaneously so that it can all be considered in the context of the regulation.

This year the Subcommittee has again noticed that generally material incorporated by reference has been provided to it with the original material in respect of the regulation. This certainly makes the Subcommittee's task easier. The Subcommittee wishes to acknowledge and thank those Departments who make the effort to forward to it additional material.

(G) SECTION 9(1)(A) – SECTION 21(1)(L) – REQUIRES EXPLANATION AS TO ITS FORM OR INTENTION

This year the Subcommittee did not seek further explanation in relation to any statutory rules.

(H) OTHER MATTERS – THE 'BALANCED SCORECARD APPROACH' – WHAT IS IT?

The 'Balanced Scorecard Approach' – What is it?

Generally a RIS which accompanies the regulations includes a summary of alternatives. Often the summary of alternatives includes a Table. The Table contains a subjective assessment of the proposed regulations and the alternatives compared to the 'Base Case' using the 'Balanced Scorecard Approach'.

The Subcommittee does not always find that the use of such a Table provides great illumination in the context of an assessment of alternatives. On one view, the inclusion of such a Table to the

average reader of the RIS adds little in terms of understanding and clarity. If such a Table is to be used, then there ought to be appropriate commentary which explains it.

However, the Subcommittee notes that many of the RISs this year have included a much more detailed explanation. This is of assistance to the Subcommittee. However it is also of more assistance to the average reader of the RIS. The Subcommittee acknowledges these efforts and hopes this trend will continue.

(I) SECTION 9(1)(A) – IS THERE ANY APPRECIABLE ECONOMIC OR SOCIAL BURDEN ON ANY SECTOR OF THE PUBLIC?

Many regulations are accompanied by a section 9(1)(a) certificate of exemption which states that they do not impose an appreciable economic or social burden on any sector of the public.

Paragraph 5.33 of the Premier's Guidelines³⁵ set out the particular requirements in respect of the exemption certificates.

The Minister must include in the exemption certificate detailed reasons as to why the proposed rule does not impose an appreciable economic or social burden on a sector of the public under section 9(2). It will not be sufficient to simply assert that there is no appreciable economic or social burden on a sector of the public in the exemption certificate.

The Subcommittee also takes the view that it is not sufficient to simply assert that there is no appreciable economic or social burden on a sector of the public in the exemption certificate. The Subcommittee expects that detailed reasons will be given as to why there is no appreciable economic or social burden on a sector of the public and will examine those reasons closely.

The Subcommittee considered the issue of whether or not a regulation imposes an appreciable economic or social burden on a sector of the public in relation to SR No. 132 – *Guardianship and Administration (Fees) Regulations 2008*. In this instance it considered the fees imposed on a sector of the public in the context of the Disability Support Pension. The Subcommittee wrote to the Minister.

Example 1:

SR No. 132 – Guardianship and Administration (Fees) Regulations 2008

Subcommittee's Letter³⁶

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 11 February 2009.

The Subcommittee is of the firm view that the threshold at which fees are to be imposed should remain above the Disability Support Pension. The Subcommittee also notes that the threshold at which fees are to be imposed will be monitored regularly.

The Subcommittee acknowledges the high standard of the exemption certificates provided to it. The quality of the work presented to the Subcommittee has made its consideration of these matters easier. The detailed nature of the exemption certificates signifies to the Subcommittee a very real attempt to grapple with whether there "is an appreciable economic or social burden" imposed or not. The Subcommittee is guided by the Premier's Guidelines. It also uses a common sense approach. Each regulation will be considered in its context and on its merits.

³⁵ Section 5.33, Premier's Guidelines, December 2004.

³⁶ Letter dated 11 February 2009 to the Attorney General, the Hon. Rob Hulls MP, from the Regulation Review Subcommittee

(J) COMMENDATION

The Subcommittee commends Ministers to the particular attention to detail in respect of the work presented to it. The Subcommittee acknowledges properly drawn certificates. The Subcommittee also acknowledges the excellent work by many Departments in responding to the large number of people and organisations who sent in submissions in respect of a particular RIS.

(K) HUMAN RIGHTS

History

SARC has a considerable history in terms of the protection of human rights. The review of subordinate legislation has been conducted in the Victorian Parliament since 1956. The scrutiny of bills³⁷ was first mooted and indeed recommended in 1987 in a "Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights"³⁸ prepared by the Legal and Constitutional Committee, the predecessor to this Committee. The scrutiny of bills commenced in Victoria in 1993. Section 21(f) of the *Subordinate Legislation Act 1994* uses the language of human rights. For several years, the Subcommittee has had to consider whether a regulation:–

Unduly trespasses on rights and liberties of the person previously established by law.

Rights

The Chair's introduction to the First Annual Report³⁹ is useful in considering the concept of rights. It demonstrates the complexities associated with rights.

⁴⁰Human rights have been generally argued to include civil and political rights and legal and political rights⁴¹. There is much greater division on the status of socio-economic rights and cultural rights.....The legislative charter of the Committee is broad. The word 'rights' include natural rights and other moral rights established by the writings of the philosophers, jurists and churchmen. It most certainly includes the positive, empirical category of legal rights – rights whose existence is established by examining existing statutes, codes and decisions comprising the common law of Victoria. There are also internationally acknowledged human rights which can be found in the instruments of international and domestic law.

It is now some fifteen years since the Committee was required to grapple with the concept of rights. The Australian Capital Territory introduced a statutory Bill of Rights in 2004. The idea of a Bill of Rights for Victoria was floated in 2004. The Victorian Government appointed a Human Rights Consultation Committee in 2005. During 2005 that Committee heard submissions and compiled a report. The report recommended a Bill of Rights in December 2005. The *Charter of Human Rights and Responsibilities 2006* (the Charter) was enacted in July 2006 and commenced operation on 1 January 2007. As a result of the introduction of the Charter and other legislative amendments there are now defined human rights which the Subcommittee must consider in the scrutiny of subordinate legislation.

³⁷ Scrutiny of Acts and Regulations Committee, First Annual Report, April 1994, p. vii.

³⁸ Legal and Constitutional Committee, Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights, April 1987 pp. 123.

³⁹ Scrutiny of Acts and Regulations Committee, First Annual Report, April 1994, p. ix.

⁴⁰ Ibid.

⁴¹ Legal and Constitutional Committee, Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights, April 1987, Chapter 2 pp. 8-18.

Legislative Scheme and Requirements

The Charter of Human Rights and Responsibilities Act 2007

The *Charter of Human Rights and Responsibilities Act 2007* (the Charter) commenced on 1 January 2007. Section 30 of the Charter is set out: –

30. Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note: The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the Subordinate Legislation Act 1994.

The Subordinate Legislation Act 1994 – section 21(ha)

Amendments were also made to the *Subordinate Legislation Act 1994*. The general principle of review is set out in section 21(ha) of the *Subordinate Legislation Act 1994*. Section 21(ha) is set out: –

Section 21. Review of statutory rules by the Scrutiny Committee

- (1) *The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament-*

.....

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

The particular responsibilities of the Subcommittee to review Human Rights certificates are set out in section 12A.

12A. Human Rights Certificate

- (1) *The responsible Minister must ensure that a human rights certificate is prepared in respect of a proposed statutory rule, unless the proposed statutory rules is exempted under sub-section (3)*
- (2) *A human rights certificate must-*
- (a) *certify whether, in the opinion of the responsible Minister, the proposed statutory rule does or does not limit any human right set out in the Charter of Human Rights and Responsibilities; and*
 - (b) *if it certifies that, in the opinion of the rule does limit a human right set out in the Charter of Human Rights and Responsibilities, set out –*
 - (i) *the nature of the human right limited; and*
 - (ii) *the importance of the purpose of the limitation; and*
 - (iii) *the nature and extent of the limitation; and*
 - (iv) *the relationship between the limitations and its purpose; and*
 - (v) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

- (3) *Sub-section (1) does not apply if the responsible Minister certifies in writing that in his or her opinion –*
- (a) *The proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or*
- (b) *The proposed statutory rule only –*
- (i) *prescribes under section 4(1)(a) an instrument or class of instrument to be a statutory rule: or*
- (ii) *exempts under section 4(1)(b) an instrument or class of instrument from the operation of this Act; or*
- (iii) *extends under section 5(4) the operation of a statutory rule that would otherwise be revoked by virtue of section 5.*

Subcommittee's obligations – What are human rights?

Compatibility – Ensure that human rights protected and promoted by the Charter are protected in subordinate legislation.

Essentially, the Subcommittee is required to consider whether each statutory rule is compatible with human rights as enunciated in the Charter. The Subcommittee needs to ensure that the human rights protected and promoted in the Charter are also protected in subordinate legislation.

In order to properly scrutinise and assess every statutory rule and the section 12A certificate, the Subcommittee must have a working knowledge of and consider the particular human rights set out in Part 2 of the Charter. The human rights are set out below.

- Recognition and equality before the law.
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom from forced work
- Freedom of movement
- Privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Protection of families and children
- Taking part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Children in the criminal process
- Fair hearing
- Rights in criminal proceedings

- Right not to be tried or punished more than once
- Retrospective criminal laws

These human rights are based in part on the International Covenant on Civil and Political Rights (ICCPR). The Subcommittee needs to consider whether there is any possibility that these human rights may be breached.

If a statutory rule does not comply with the Charter, there is a possibility that it may fall outside the scope of the authorising Act.

The Subcommittee is required to consider the compatibility of the regulations with the Charter and to report to Parliament where it considers a statutory rule to be incompatible with the Charter. The Subcommittee must consider the section 12A Human Rights certificate provided by each Minister in respect of each statutory rule. First, the Subcommittee must consider whether it agrees an assessment that a particular regulation does not limit any human right set out in the Charter. However, if there is some limitation in respect of a human right, the Subcommittee must consider:-

- The nature of the human right limited; and
- The importance of the purpose of the limitation; and
- The nature and extent of the limitation; and
- The relationship between the limitation and its purpose; and
- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

If the Subcommittee decides on the basis of the information that the proposed regulations are incompatible with the Charter, it may report this to the Parliament.

The Operation of the Charter in Relation to Statutory Rule Series 2008

The Subcommittee has considered the Charter in relation to a number of statutory rules this year. Where necessary, the relevant section 12A Human Rights certificate accompanies a regulation. The Subcommittee then considers the regulation, the section 12A certificate and any issues raised.

The Subcommittee considered the issue of compatibility of the section 12A certificate with the Charter in relation to SR No. 25 – *Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008*. The Subcommittee was concerned about the ambiguity of a regulation in permitting the disclosure of test results to criminal defendants facing trial.

Example 1:

SR No. 25 – Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008

Subcommittee's Letter⁴²

Dear Minister

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 18 June 2008. The Subcommittee has not yet approved the Regulations.

⁴² Letter dated 27 June 2007 to the Hon. Bob Cameron, MP, Minister for Police & Emergency Services, from the Regulation Review Subcommittee.

The Subcommittee seeks your advice in respect of the following matters.

Right to privacy

Regulation 49 sets out those matters related to the taking of a blood or urine sample. The section 12A Human Rights certificate deals with a number of issues. However, it does not address the right to privacy. The taking of a urine sample involves partial nudity and the performance of an intimate bodily function, therefore engaging section 13 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

Regulation 49 contains a number of protections for privacy. However some presence and surveillance of a person urinating may be necessary to avoid an attempt to corrupt or replace the sample. Regulation 49 does not contain the usual requirement that, in such circumstances, the person observing must be the same sex as the person urinating.

Would such a requirement be appropriate?

Confidentiality

Section 24(1) of the Charter provides that people charged with a criminal offence have 'the right to have the charge decided after a fair hearing'. Regulation 62 deals with the confidentiality of test results. The section 12A certificate does not address the compatibility of Regulation 62 with section 24 of the Charter.

In its report, the Scrutiny of Acts and Regulations Committee (the Committee) made enquiries of the Minister in relation to the limitations on disclosure in the principal Act including section 85F. The following reply was published in Alert Digest No.1 of 2008:-

The limitations on disclosure imposed by sections 85F, 85G and clause 11 will not remove the obligations of police and prosecutors to disclose relevant information as where evidence of the test result may be relevant, that is in legal proceedings following a critical incident, disclosure will still be required. In other cases where testing has been conducted unrelated to the incident that led to the charging of the defendant, the test result will be irrelevant to the charges against the defendant and the police officer will in any case be available for cross-examination.

Regulation 62 sets out the restrictions on confidentiality that section 85F requires the Commissioner to ensure. In particular, new regulation 62(2) sets out an exhaustive list of when 'a person' may disclose test results. Disclosure would therefore appear to be forbidden except in circumstances set out in that list.

There are two circumstances in the list that may cover disclosure to criminal defendants.

1. Where disclosure of a result 'is necessary under Division 4A of Part IV' of the Act;
2. Where disclosure of a result 'is necessary for the investigation of any offence'.

The first circumstance is unclear. It is not clear whether it covers disclosure of results to a defendant in one of the criminal trials where, according to section 85E the evidence may be permitted. Is such disclosure 'necessary under Division 4A'? The second circumstance refers to an 'investigation' which is a term that typically means an investigation by the police or prosecution. Is disclosure of a sample result that assists the defence case 'necessary for the investigation of' an offence with which a defendant is charged?

The Subcommittee is concerned about the ambiguities. Does Regulation 62 permit the disclosure of test results to criminal defendants facing trial consistently with the Minister's correspondence to the Committee on the Police Regulation Amendment Bill 2007?

The Subcommittee is concerned that Regulation 62, without further amendment to clarify that test results may be disclosed to criminal defendants in accordance with the law on disclosure may be incompatible with the right to a fair hearing pursuant to section 24 of the Charter.

The Subcommittee requests your response by no later than Thursday 24 July so that it may reconsider the Regulations.

Minister's Response⁴³

Dear Sir

Thank you for your letter dated 23 June 2008.

I am pleased to respond to the matters raised by the Subcommittee.

Right to Privacy

Regulation 49 provides privacy protection to members of the police force who are directed to provide a urine sample under section 85B of the Police Regulation Act 1958 (the Act). This regulation allows the sample to be given with no more clothing removed or visual inspection than is necessary for the sample to be given.

The supervision of a police member providing a urine sample is to ensure that the sample is obtained in without being adulterated, diluted or substituted. Urine samples will be collected by laboratories or drug testing services with experience in the collection and handling of urine samples. These services have facilities that will allow police members to provide a sample in a toilet stall with coloured water in the toilet bowl and no access to other water sources. It should not be necessary for the police member to give the urine sample with the medical practitioner or paramedical staff member of that service having close visual inspection of the urination.

Accordingly, it is not considered necessary that the laboratory or drug collection service be required to ensure that the medical practitioner or paramedical staff member collecting a urine sample is the same sex as the police member giving the sample.

The Australian / New Zealand Standard – Procedures for the collection, detection and quantification of drugs of abuse in urine (AS/NZ 4308:2001) requires that the process of collecting a urine sample should allow for individual privacy but do not require that the donor provide the sample in the presence of a person of the same gender.

Confidentiality

The Sub-Committee's analysis that Regulation 62 prevents the disclosure of test results, with the exception of the matters listed in regulation 62(2), is correct. However, I am not of the view that regulation 62(2) will operate to prevent the disclosure of the results of testing police members for the presence of drug and alcohol to a defendant in relevant criminal proceedings relevant to the taking of the test.

Regulation 62 must be interpreted in the context of section 85E(2) of the Act which provides that the results of testing police members are admissible:

⁴³ Letter dated 23 July 2008 to the Regulation Review Subcommittee from the Hon. Bob Cameron, MP, Minister for Police & Emergency Services.

“in a proceeding arising out of or connected with the investigation of any offence under Part IV or Part IVA in respect of a member;” These are investigations by:

- the Chief Commissioner of a possible breach of discipline (including being charged with an offence) by police members under section 70;*
- Chief Commissioner of whether a police member has committed an offence punishable by imprisonment under section 79;*
- Chief Commissioner or the Director of Police Integrity of complaints against members of the Police force by the in Part IVA.)*
- “in a proceeding arising out of, or connected with, a critical incident.” (A “critical incident” is defined in section 85A of the Act.)*

Regulation 62(2)(b) allows the disclosure of the test results where “necessary under Division 4A of Part IV of the Act”. It was not intended that this regulation be interpreted so that the disclosure is “necessary” in the sense of being an indispensable incident of the operation of that Division of the Act (i.e. as if the disclosure is necessary for the purposes of Division 4A of Part IV of the Act). The intention of regulation 62(2)(b) is that test results may be disclosed if that disclosure is necessary (e.g. in the case of the prosecutor’s duty to disclose relevant information and evidence in criminal proceedings) and in such cases the test results can be disclosed under that Division. For example, criminal proceedings that arise out of a critical incident, are cases where the test results are admissible and their disclosure would be necessary if they are relevant to those proceedings.

Regulation 62(2)(c) allows for the disclosure of the test results that are “necessary for the investigation of any offence”. If the test results are part of the relevant material needed for the investigation of an offence, I am not of the view that the results could be claimed to lose that character if it later appears that they will assist the defendant’s case.

In both examples, disclosure of test results in unrelated criminal proceedings is not appropriate and is excluded under the Act.

My advice to the Scrutiny of Acts and Regulations Committee dated 6 December 2007 is not affected by regulation 62. Police and prosecutors will be obliged to disclose test results where these are relevant in any criminal proceedings following a critical incident or arising from an investigation under the Act.

I am pleased to provide any further advice to assist the Sub-Committee.

I trust this clarifies these matters for the Sub-Committee.

Section 12A Human Rights Certificate⁴⁴

I, Bob Cameron, Minister for Police and Emergency Services, certify under section 12A(2) of the Subordinate Legislation Act 1994 that, in my opinion the proposed Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008 do limit a human right set out in the Charter of Human Rights and Responsibilities as follows-

⁴⁴ Section 12A Human Rights Certificate, for SR No. 25 – Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008, prepared by the Hon. Bob Cameron, MP, Minister for Police & Emergency Services, dated 7 April 2008.

Freedom of movement

1. *Nature of the right limited*

The right of members of Victoria Police to move freely within Victoria.

2. *The importance of the purpose of the limitation*

The purpose of the Regulations is to:

- *protect community safety by ensuring that the broad range of police powers (including detention and the use of force) are not misused;*
- *ensure the health and safety of Victoria Police as a workplace; and*
- *maintain high ethical standards of the police force.*

This purpose of the limitation on the right of freedom of movement achieves a pressing and substantial need in a free and democratic society by enabling the testing of members for the consumption of alcohol or a drug of dependence in appropriate circumstances. The limitation on the freedom to move freely is of fundamental importance to ensure that testing can be conducted and the above purposes of the proposed Regulations are achieved.

3. *The nature and extent of the limitation*

The proposed Regulations will require a member of the police force who has been directed to provide a sample of breath, urine or blood for testing for the presence of alcohol or a drug of dependence to remain at or attend a specified place so that a sample can be taken. The freedom of a member of the police force to move freely in Victoria may be limited to a minimal degree by the requirement that he or she remain at or attend a specified place for the taking of that sample. The restriction on the members' freedom of movement is for a minimal time to allow a sample to be taken.

4. *The relationship between the limitation and its purpose*

The limitation on the freedom of police members who have been directed to provide a sample of breath, urine or blood is directly related to the purpose of that limitation to enable a sample to be taken from those police members and tested for the presence of alcohol or a drug of dependence.

5. *Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

There are no less restrictive means reasonably available to achieve the purpose of the limitation - i.e. enable a sample to be taken from those police members and tested for the presence of alcohol or a drug of dependence.

The right not to be subjected to medical treatment without full, free and informed consent

1. *Nature of the right limited*

The right of members of Victoria Police to not be required to provide a sample of their breath, urine or blood for testing for the presence of alcohol or a drug of dependence.

2. *The importance of the purpose of the limitation*

The purpose of the Regulations is to:

- *protect community safety by ensuring that the broad range of police powers (including detention and the use of force) are not misused;*
- *ensure the health and safety of Victoria Police as a workplace; and*

- *maintain high ethical standards of the police force.*

The purpose of the limitation on the right not to be subjected to medical treatment without full, free and informed consent achieves a pressing and substantial need in a free and democratic society by enabling the testing of members for the consumption of alcohol or a drug of dependence in appropriate circumstances. The limitation on the freedom not to be subjected to medical treatment without their consent is of fundamental importance to ensure that testing can be conducted and the above purposes of the proposed Regulations are achieved.

This purpose of the limitation on the right not to be subjected to medical treatment achieves a pressing and substantial need in a free and democratic society by enabling the Chief Commissioner of Police to:

- *effectively investigate cases where police action has resulted in death or serious injury;*
- *investigate cases where alcohol or drug use may be affecting the ability of an officer to carry out his or her duties; and*
- *investigate and manage the performance of police officers.*

3. The nature and extent of the limitation

The proposed Regulations are ancillary to section 85B(2) of the Police Regulation Act 1958 ("the Act") that allows the Chief Commissioner to direct police members to provide a sample of breath, urine or blood for testing for the presence of alcohol or a drug of dependence. The Regulations will interfere with the right of police members not to be subjected to medical treatment by specifying the nature of the direction given to police members, the information that must be provided to them and requiring them to attend or remain at a place where a sample may be taken.

The limitation on the right not to be subjected to medical treatment without full free and informed consent is confined by section 85B(1) of the Act that allows the compulsory testing of members only when the Chief Commissioner believes that a member:

- *is incapable of or inefficient in performing his or her duties because of the consumption of alcohol or a drug of dependence; or*
- *has been involved in a critical incident (i.e. where death or serious injury results to a person from the discharge of a firearm, use of force or use of a motor vehicle by the member or while in the custody of the member); or*
- *should be tested for alcohol or a drug of dependence for the good order or discipline of the force.*

4. The relationship between the limitation and its purpose

The limitation on the freedom of police members not to be subjected to medical treatment who have been directed to provide a sample of breath, urine or blood is directly related to the purpose of that limitation to enable a sample to be taken from those police members and tested for the presence of alcohol or a drug of dependence.

5. Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

There are no less restrictive means reasonably available to achieve the purpose of the limitation - i.e. enable a sample to be taken from those police members and tested for the presence of alcohol or a drug of dependence.

The right to liberty and security of the person

1. Nature of the right limited

The right of members of Victoria Police to not be detained or deprived of their liberty.

The purpose of the Regulations is to:

- *protect community safety by ensuring that the broad range of police powers (including detention and the use of force) are not misused;*
- *ensure the health and safety of Victoria Police as a workplace; and*
- *maintain high ethical standards of the police force.*

This purpose of the limitation on the right not to be subject to detention or deprived of liberty achieves a pressing and substantial need in a free and democratic society by enabling the testing members for the consumption of alcohol or a drug of dependence in appropriate circumstances. The limitation on liberty is of fundamental importance to ensure that testing can be conducted and the above purposes of the proposed Regulations are achieved.

3. The nature and extent of the limitation

The proposed Regulations will require a member of the police force who has been directed to provide a sample of breath, urine or blood for testing for the presence of alcohol or a drug of dependence to remain at or attend a specified place so that sample can be taken. The right of a member of the police force not to be subjected to detention or deprivation of liberty may be limited to a minimal degree by the requirement that he or she remain at or attend a specified place for the taking of that sample. The member is not physically restrained or prevented from leaving the specified place - if he or she does not attend or leaves that place, that is a breach of discipline under the Act. The deprivation of the members' liberty is for a minimal time to allow a sample to be taken.

4. The relationship between the limitation and its purpose

The limitation on the right of police members not to be subjected to detention or deprivation of liberty who have been directed to provide a sample of breath, urine or blood is directly related to the purpose of that limitation to enable a sample to be taken from those police members and tested for the presence of alcohol or a drug of dependence.

5. Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

There are no less restrictive means reasonably available to achieve the purpose of the limitation - i.e. enable a sample to be taken from those police members and tested for the presence of alcohol or a drug of dependence.

The Subcommittee also considered the implications of the Charter in relation to SR No. 73 – *Transport (Conduct)(Amendment) Regulations 2008* and SR No. 75 – *Transport (Passenger Vehicles)(Miscellaneous Amendment) Regulations 2008*. It made comments in its letter to the Minister.

Example 2:

**SR No. 73 – Transport (Conduct)(Amendment) Regulations 2008 and
SR No. 75 – Transport (Passenger Vehicles)(Miscellaneous Amendment)
Regulations 2008**

Subcommittee's Letter⁴⁵

Dear Minister

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 23 October 2008.

SR 73-2008 – Transport (Conduct)(Amendment) Regulations 2008

Regulation 16 revokes Part 8 of the principal Regulations which provided for a sunset clause on those regulations of 30 June 2008. The effect of Regulation 16 is therefore to extend the existing regulations beyond that date.

The Subcommittee's view is that the Human Rights certificate should have addressed Regulation 16 to the extent that any of the existing regulations limit a human right. The following existing regulations may limit a human right:-

- Existing Regulation 12 requires primary and secondary students travelling on a student concession to vacate their seat for another person at the request of an authorised person. This regulation would seem to limit the Charter of Human Rights and Responsibilities Act 2006 (the Charter) equality right with respect to age.*
- Existing Regulation 19(2)(a) bans the distribution of 'handbills' on public transport without authorisation. This regulation would seem to limit the Charter right to freedom of expression.*

Whilst it seems clear that a case for these limitations could be made under section 7(2) of the Charter please note the Subcommittee's view that where a regulation extends a principal regulation, the Human Rights certificate should address any provisions of the principal regulation which may limit human rights.

SR 75-2008 – Transport (Passenger Vehicles)(Miscellaneous Amendment) Regulations 2008

Similarly Regulation 6 revokes existing Regulation 75 which provides for the expiry of the principal regulations on 1 July 2008. This may limit human rights with respect to the following existing regulations in the principal regulations.

- Existing Regulation 50 requires a person in charge of a child under 15 years of age to vacate their seat if a full fare passenger cannot get a seat. This would seem to limit the Charter right to equality on the basis of age.*
- Existing Regulation 56(2)(a) bars the distribution of handbills without written permission. This would seem to limit the Charter right to freedom of expression.*

Again, whilst it seems clear that a case for these limitations could be made under the Charter please note the Subcommittee's view that where a regulation extends a principal regulation, the Human Rights Certificate should address any provisions of the principal regulation which may limit human rights.

⁴⁵ Letter dated 27 October 2008 to the Hon. Lynne Kosky, MP, Minister for Public Transport, from the Regulation Review Subcommittee.

Minister's Response⁴⁶

Thank you for your letter of 27 October 2008 concerning the human rights certificates for these regulations. I apologise for the delay in replying.

I confirm that the procedure followed by the Department when preparing human rights certificates is that advice is sought from the Human Rights Unit of the Department of Justice. Advice is also sought from the Human Rights Special Counsel at the Victorian Government's Solicitor's Office when required. Charter issues are taken very seriously.

I am advised by my Department that it sought and received advice from the Human Rights Unit of the Department of Justice in relation to both regulations the Subcommittee has commented on. The Unit advised that the certificates 'only need[ed] to address the new human rights issues, not all of the Principal Reg[ulation]s which are being extended because of the revocation of the expiry date'.

I also understand that the Unit commented on the draft Human Rights Certificates prepared by my Department, which were subsequently amended in line with that Unit's suggestions.

I acknowledge the Subcommittee's view and have brought this to the attention of my Department in order to adjust procedures to meet the Committee's requirements in future.

The Subcommittee may also wish to make its views known to the Attorney-General for circulation to the Department of Justice, the Victorian Government Solicitor's Office and other relevant agencies.

I note the Subcommittee's view that it seems clear that a case for the limitations could be made under the Charter for these regulations. I also note that legislation in place when the Charter commenced (which would include the primary regulations) was reviewed in light of the Charter.

If you would like to discuss this further please contact Peter Parsons, DOT Legal, on 9655 2064.

Yours sincerely

*Lynne Kosky, MP
MINISTER*

SR No. 73 – Transport (Conduct)(Amendment) Regulations 2008

Section 12A Human Rights Certificate⁴⁷

I, Lynne Kosky, Minister for Public Transport, certify under section 12A(2) of the Subordinate Legislation Act 1994 that, in my opinion, the proposed Transport (Conduct) (Amendment) Regulations 2008 limit a human right set out in the Charter of Human Rights and Responsibilities, and the limit is reasonably and demonstrably justified, for the reasons set out below.

⁴⁶ Letter received 19 June 2009 to the Regulation Review Subcommittee from the Hon. Lynne Kosky, MP, Minister for Public Transport.

⁴⁷ Section 12A Human Rights Certificate, for SR No. 73 – Transport (Conduct)(Amendment) Regulations 2008 prepared by the Hon. Lynne Kosky, MP, Minister for Public Transport, dated 15 June 2008.

The Regulations limit the right to freedom of movement in section 12 of the Charter by:

- *Prohibiting a person from entering or leaving a vehicle in motion (regulation 11)*
- *Prohibiting pedestrians from crossing railway tracks (regulation 13)*
- *Prohibiting persons from entering a pit between platforms and entering onto railway or designated tramway tracks (regulation 14)*
- *Prohibiting a pedestrian from standing on a level crossing between boom gates in certain circumstances (regulation 15).*

The right is limited because the Regulations interfere with the ability of individuals to move through, remain in, or enter or depart from areas of public space.

1. The nature of the human right limited

Section 12 of the Charter provides for the right for every person to move freely within Victoria and to enter and leave it and to have the freedom to choose where to live. It includes the freedom from physical barriers and procedural impediments.

2. The importance of the purpose of the limitation

The purpose of the limitation is for the protection of the safety of individuals, transport workers and the public, and is therefore of critical importance.

3. The nature and extent of the limitation

A person's right to freedom of movement is only limited in clear and circumscribed circumstances.

4. The relationship between the limitation and its purpose

There is direct relationship between the limitation on freedom of involvement and the protection of the safety of individuals, transport workers and the public.

5. Any less restrictive means available to achieve the purpose that the limitation seeks to achieve

There are no less restrictive means reasonably available.

**SR No. 75 – Transport (Passenger Vehicles)
(Miscellaneous Amendment) Regulations 2008**

Section 12A Human Rights Certificate⁴⁸

I, Lynne Kosky, Minister for Public Transport, certify under section 12A(2) of the Subordinate Legislation Act 1994 that, in my opinion the proposed Transport (Passenger Vehicles) (Miscellaneous Amendment) Regulations 2008 limit a human right set out in the Charter of Human Rights and Responsibilities, and the limit is reasonably and demonstrably justified, for the reasons set out below.

The Regulations limit the right to freedom of movement in section 12 of the Charter by prohibiting a person on certain passenger vehicles from entering or leaving or attempting to enter or leave the vehicle whilst it is in motion without reasonable excuse. The right is

⁴⁸ Section 12A Human Rights Certificate, for SR No. 75 – Transport (Passenger Vehicles) (Miscellaneous Amendment) Regulations 2008 prepared by the Hon. Lynne Kosky, MP, Minister for Public Transport, dated 17 June 2008

limited because the Regulations interfere with the ability of individuals to move through, remain in, or enter or depart from areas of public space.

1. *The nature of the human right limited*

Section 12 of the Charter provides for the right for every person to move freely within Victoria and to enter and leave it and to have the freedom to choose where to live. It includes the freedom from physical barriers and procedural impediments.

2. *The importance of the purpose of the limitation*

The purpose of the limitation is for the protection of the safety of individuals, transport workers and the public, and is therefore of critical importance.

3. *The nature and extent of the limitation*

A person's right to freedom of movement is only limited in clear and circumscribed circumstances.

4. *The relationship between the limitation and its purpose*

There is direct relationship between the limitation on freedom of movement and the protection of the safety of individuals, transport workers and the public.

5. *Any less restrictive means available to achieve the purpose that the limitation seeks to achieve*

There are no less restrictive means reasonably available.

The Subcommittee considered the practical implications of a questionnaire given to prospective blood donors. It took the view that it limited the Charter right to equal enjoyment of human rights without discrimination because it required gay men to disclose their private sexual activity and to be subjected to a judgment about their risk of infection with HIV.

Example 3:

SR No. 105 – Health (Infectious Diseases)(Amendment) Regulations 2008

Subcommittee's Letter⁴⁹

Dear Minister

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulation at a meeting on 23 October 2008.

Regulation 8 substitutes the current Schedule 7 of the principal regulations. Pursuant to Regulation 18 of the principal regulations, Schedule 7 is the approved form for the purposes of section 132 of the Health Act 1958, which defines when blood providers will be protected from civil liability. The practical effect of Regulation 8 is to require that every prospective blood donor is given the questionnaire set out in Schedule 7.

⁴⁹ Letter dated 27 October 2008 to the Hon. Daniel Andrews MP Minister for Health, from the Regulation Review Subcommittee.

Schedule 7 includes question 8:-

'Within the last 12 months, have you... had male-to-male sex?'

This question does not limit the Charter of Human Rights and Responsibilities Act 2006 (the Charter) right to privacy, as it is neither arbitrary nor unlawful. However, it does limit the Charter right to equal enjoyment of human rights without discrimination, because it requires gay men to disclose their private sexual activity (and to be subjected to a judgment about their risk of infection with HIV.)

The Committee commented on this Charter issue this year in its report on the Public Health and Wellbeing Bill 2008 where it raised the concern that the question 'does not distinguish between safe and unsafe sexual activity and between monogamous and non-monogamous activities.'

The Human Rights Certificate addresses the first issue (distinguishing between safe and unsafe sexual activity) as follows:-

The reporting of 'safe' or 'unsafe' sexual practices as a mechanism for screening blood is not adequate to protect the blood supply because of the potential for condom breakage, the window period between infection and seroconversion, the possibility that no identifiable seroconversion illness occurs, and the potential for misdiagnosis. The nature of seroconversion illness, when the HIV virus rapidly reproduces throughout the body, is also providing challenges to pathologists and current diagnostic tests are capable of returning false negative results.

However, it does not address the second issue (i.e.: distinguish between monogamous and non-monogamous activities). Two men who have only had sex with each other in the preceding twelve months cannot pose any greater infection risk than someone who had no sex in the last twelve months. The only relevant difference appears to be the risk of infidelity by the prospective donor's sexual partner. However, that risk applies equally to all people in a relationship (or, if the risk is considered to be specific to male-to-male sex, all women in a straight relationship.) Hence, the question's failure to distinguish between equivalent cases may be incompatible with the right to equal enjoyment of the right to privacy without discrimination on the basis of sexual orientation.

The Subcommittee seeks further information as to why question 8 of schedule 7 does not distinguish between monogamous and non-monogamous sexual activity. The following references to the relevant Italian blood donor questionnaire may be instructive. The Subcommittee understands the relevant question is question 38.

<http://www.avis.it>

http://www.avis.it/repository/cont_schedemm/247_documento.pdf

The Subcommittee would appreciate your response to these matters.

Minister's Response⁵⁰

Thank you for your letter dated 27 October 2008 in relation to the Health (Infectious Diseases) (Amendment) Regulations 2008 and the blood donor statement contained in these regulations.

⁵⁰ Letter dated 19 January 2009 to the Regulation Review Subcommittee from the Hon. Daniel Andrews MP Minister for Health.

As you may be aware, the safety of blood products produced by the Australian Red Cross Blood Service (ARCBS) is governed by the Therapeutic Goods Act 1989 ("the Act"), which is administered by the Commonwealth government agency the Therapeutic Goods Administration (TGA). The Therapeutic Goods Order No 81, made pursuant to the Act, states that blood and blood products must meet the requirements of the European Directorate for the Quality of Medicines and Healthcare of the Council of Europe document titled "Guide to the preparation, use and quality assurance of blood components", 14th edition, 2008. This document contains the following statement:

"Since blood establishments are ultimately responsible for the quality and safety of blood components collected, blood establishments must be entitled to decide on the final acceptance or deferral of a donor or prospective donor, considering that the right of blood recipients to the protection of their health, and the resulting obligation to minimise the risk of transmission of infectious diseases override any other consideration, including individuals' willingness to donate blood."

I am aware that some of the questions on the questionnaire may receive an answer that results in the application of that person to donate being deferred to a later date, or rejected altogether.

Changes to the blood donation statement are recommended regularly by the ARCBS to reflect advances in knowledge about infectious disease and the associated risk factors for blood transfusion to ensure that it is up to date and gives maximum protection to patients who receive blood transfusions. I am informed that these changes are discussed and agreed to by the Donor and Patient Safety Committee of the ARCBS together with the Therapeutic Goods Administration.

The ARCBS operates as a national organisation so that blood donated in one Australian jurisdiction may be used in another. The Victorian donor statement reflects the national statement as it operates in other jurisdictions at any point in time. Victoria is the only state which currently prescribes the donation form by law (the Health Act 1958), therefore changes to the Health (Infectious Diseases) Regulations 2001 are required whenever a national change is made.

As you are aware, the Public Health and Wellbeing Act 2008 will be enacted on 1 January 2010. This Act requires donors to complete an approved form (published in the Government Gazette), rather than a prescribed form.

I hope that this information is of assistance.

Section 12A Human Rights Certificate⁵¹

I, Daniel Andrews, Minister for Health, and Minister responsible for administering the Health Act 1958, certify that, in my opinion –

The proposed Health (Infectious Diseases) (Amendment) Regulations 2008 (the proposed Regulations) do limit a human right set out in the Charter of Human Rights and Responsibilities as follows:

⁵¹ Section 12A Human Rights Certificate, for SR No. 105 – Health (Infectious Diseases)(Amendment) Regulations 2008 prepared by the Hon. Daniel Andrews MP, Minister for Health, dated 30 August 2008.

Charter Section 8: recognition of equality before the law

The Charter provides that every person has the right to enjoy his or her human rights without discrimination to equal protection of the law and to equal and effective protection against discrimination. The attributes of discrimination prohibited are those specified in section 6 of the Equal Opportunity Act 1995.

The provision authorising the making of proposed regulation 8 is contained in the table in section 132A of the Health Act 1958. Row 2, column 2 provides that a statutory defence actions if the Red Cross Society or hospital by which the blood or blood product was supplied -

"before taking the blood from a donor obtained a statement from the donor in the prescribed form".

Section 146 of the Health Act 1958 permits the making of regulations and procedures to be taken to stop, limit or prevent the spread of any infectious disease, including the examination, testing and counselling of persons. Examination, for the purposes of infectious disease control, legitimately includes questions concerning sexual behaviour because some communicable diseases are sexually transmitted.

Regulations 5 and 6

Proposed Regulation 5 and 6 both concern the provision of information to the Secretary. Proposed Regulation 5 provides that the presence of specified infections or conditions must be provided to the Secretary. Infections or conditions are impairments, impairment is an attribute listed in section 6 of the Equal Opportunity Act 1995. Proposed Regulation 6 concerns the provision of information to the Secretary regarding the country of origin of a person. Race is an attribute listed in section 6 of the Equal Opportunity Act 1995.

The limitations imposed by proposed Regulation 5 and 6 on the right to freedom of discrimination is authorised by section 138 of the Health Act 1958 and are justified on the following grounds:

Reasonableness of the limitation

Nature of the right

The right protects persons from discrimination on the basis of attributes specified in section 6 of the Equal Opportunity Act 1995.

Importance and purpose of the limitation

The reporting of information concerning the prevalence of diseases in the community is important for ensuring public resources are efficiently applied and the State is able to respond to emerging public health risks.

Information regarding the country of origin of a person affected by a notifiable condition will assist the Department to plan appropriate, socially relevant interventions and programs where appropriate.

The nature and extent of the limitation

Information concerning impairment and country of origin will be provided to the Secretary.

The relationship between the limitation and its purpose

The provision of information concerning the impairment and country of origin will assist the Secretary to efficiently respond to public health risks.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive means available to achieve the purpose of quantifying the instances of notifiable diseases.

Information regarding the country of origin of persons affected by notifiable conditions is only available to practicing medical practitioners and is not comprehensively collected by other Government authorities (for example, immigration officials).

Conclusion

Given the importance of responding to threats to public health, information regarding disease prevalence and prevalence within particular groups can assist the State to lower the burden of disease and ensure public funds are efficiently allocated.

Regulation 7

Proposed Regulation 7 permits the Secretary, if necessary to exclude persons who have had contact with persons infected with influenza and influenza-like illnesses from attending at schools or children's services premises. Influenza and influenza-like illnesses are impairments, impairment is an attribute listed in section 6 of the Equal Opportunity Act 1995.

The limitation imposed by proposed Regulation 7 on the right to freedom of discrimination is authorised by section 138 of the Health Act 1958 and is justified on the following grounds:

Reasonableness of the limitation

Nature of the right

The right protects persons from discrimination on the basis of attributes specified in section 6 of the Equal Opportunity Act 1995.

Importance and purpose of the limitation

It may be necessary to safeguard children attending schools and children's services centres from influenza and influenza-like conditions to prevent infections, lost learning opportunities, illness and death. Influenza and related conditions can spread rapidly in schools and children's services centres as some children may be unable to take measures to minimise risks.

The nature and extent of the limitation

The Secretary may elect to exclude persons who have had contact with persons infected with influenza and influenza like illnesses from attending at schools or children's services in the case of serious disease outbreaks. This provision could be used to protect children during an outbreak of avian influenza or SARS.

The relationship between the limitation and its purpose

There is a direct and rational connection between excluding the contacts of persons infected with influenza and influenza like conditions and the purpose of minimising or preventing the spread of infectious disease by preventing or minimizing contact between those who are potentially infected and those who are not infected with the condition.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive means available to achieve the purpose of the limitation.

Conclusion

Given the importance of protecting children from influenza or related conditions such as the avian flu or SARS the manner in which the regulations limit the rights protected by section 8 of the Charter can be demonstrably justified in a free society that values public health and wellbeing.

Impairment and Regulation 8

Proposed Regulation 8 inserts a questionnaire asking a blood donor if they had ever had a test which showed they had hepatitis B, hepatitis C, HIV or HTLV. The questionnaire also asked if a person has in the last 12 months had an illness with swollen glands and a rash with or without a fever. Impairment is an attribute listed in section 6 of the Equal Opportunity Act 1995. The effect of the provision is to defer donations of blood for 12 months (or, in the case of some diseases until the disease is no longer expressed), or permanently.

The limitation imposed by proposed Regulation 8 on the right to freedom of discrimination is authorised by section 132A and 146 of the Health Act 1958 and is justified on the following grounds:

Reasonableness of the limitation

Nature of the right

The right protects persons from discrimination on the basis of attributes specified in section 6 of the Equal Opportunity Act 1995.

Importance and purpose of the limitation

The risk of transmitting infectious diseases from blood donors to blood recipients is high (morbidity is associated with hepatitis B, hepatitis C, HIV or HTLV). The purpose of deferring donations from persons with an infectious disease is to prevent disease transmission, lower the burden of infectious disease in the community and promote public health.

The nature and extent of the limitation

The permanent deferral of blood donations prevents persons with infectious diseases from participating in voluntary blood donation.

The relationship between the limitation and its purpose

There is a direct and rational connection between deferring the donations from persons with infectious diseases and preventing the transmission of infectious disease amongst blood product recipients.

Any less restrictive means reasonably available to achieve the purpose that the limitation seek to achieve

There is no less restrictive means available to achieve the purpose the limitation.

Conclusion

Given the importance of a supply of blood and blood products that will not increase the burden of infectious disease in the community, maintain community confidence in the blood donation scheme and prevent illness and mortality, the deferral of donations from those affected by blood borne infectious disease is justified in a free and democratic society that values public health and wellbeing.

Lawful sexual activity and Regulation 8

Proposed Regulation 8 inserts a questionnaire asking blood donors for information relating to male to male sex. Male to male sex is a lawful sexual activity, and proposed regulation 8 engages an attribute listed in section 6 of the Equal Opportunity Act 1995. The effect of the provision is to defer donations of blood for 12 months from persons who disclose male to male sexual activity in a 12 month period prior to making the declaration.

The proposed Regulations inquire if the person making the statement has had sexual activity with a male who they think might be bisexual? If indicated, the donation is deferred. Section 6 of the Equal Opportunity Act 1995 provides that a personal association with a person who is identified by reference to any of the other attributes listed in section 6 is prohibited.

The limitation imposed by proposed Regulation 8 on the right to freedom of discrimination is authorised by section 132A and 146 of the Health Act 1958 and is justified on the following grounds:

Reasonableness of the limitation

Nature of the right

The right protects persons from discrimination on the basis of attributes specified in section 6 of the Equal Opportunity Act 1995.

Importance and purpose of the limitation

It is necessary to safeguard the blood supply by making inquiries about sexual behaviour. Recipients of donated blood are exposed to the risk of infection with blood born viruses including HIV. The deferral of blood donations by persons who disclose male to male sexual activity aims to prevent contamination of the blood supply. Safe sex practices are vital to the prevention of HIV and other sexually transmitted infections. However, protected sex is not 100% reliable. Proposed Regulation 8 takes into account the prevalence of HIV infection in certain population groups. Donations from other persons at risk are also deferred for varying periods of time, for example, those persons who disclose intravenous drug use and persons who have travelled to particular destinations.

The exclusion of sexual contacts of men who have sex with men is important because this group is at risk of contracting HIV or other infectious diseases and donations of blood from this group of persons presents risks to the blood supply.

The nature and extent of the limitation

The imposition of a 12 month deferral period for persons disclosing incidents of male to male sex and their other sexual partners may distress potential donors who are unable to donate blood. The 12 month deferral does not exclude all men that have infrequent episodes of sexual activity with other men (or their sexual partners) if, during the preceding twelve months, no male to male sexual activity has occurred. The 12 month deferral period provides an opportunity for persons to prepare for and undertake testing and takes into account the variations in of detectable disease markers.

It is noted that donations from persons who disclose male to male sex are deferred for life in the US and Canada.

The relationship between the limitation and its purpose

There is a direct and rational connection between deferring blood donations and the purpose of minimising or preventing the spread of infectious disease because of the

prevalence of HIV infection amongst men who have sex with men, their other sexual partners and the incurable nature of the disease. The majority of new HIV infections in Victoria occur amongst men who have sex with men. Other sexual partners of men who have sex with men are similarly at risk of disease transmission.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive means available to achieve the purpose of the limitation. The period between infection with HIV and an episode of seroconversion illness likely to prompt testing and medical investigation may be around 10 days after initial infection, if the illness occurs at all. It is also possible that episodes of HIV seroconversion illness are misdiagnosed by either patients or general practitioners because HIV seroconversion may present influenza type symptoms. Further, not all persons infected with HIV will experience seroconversion illness or may not undertake regular HIV testing.

The reporting of 'safe' or 'unsafe' sexual practices as a mechanism for screening blood is not adequate to protect the blood supply because of the potential for condom breakage, the window period between infection and seroconversion, the possibility that no identifiable seroconversion illness occurs, and the potential for misdiagnosis. The nature of seroconversion illness, when the HIV virus rapidly reproduces throughout the body, is also providing challenges to pathologists and current diagnostic tests are capable of returning false negative results.

Conclusion

Given the importance of protecting the blood supply and public confidence in the safety of the blood supply the manner in which the regulations limit the rights protected by section 8 of the Charter can be demonstrably justified in a free and democratic society. Proposed Regulation 8 inserts a questionnaire asking blood donors for information relating to sex with a male or female sex worker, (depending on the circumstances) a lawful sexual activity and an attribute listed in section 6 of the Equal Opportunity Act 1995. The effect of the provision is to defer donations of blood for 12 months from persons who have engaged in sexual activity with a male or female sex worker in the 12 month period prior to making the declaration.

The proposed Regulations make inquiries of persons who believe they have had sex with a person that engaged in sex with a male or female sex worker in the last twelve months. If indicated, the donation is deferred. Section 6 of the Equal Opportunity Act 1995 provides that discrimination can extend to a personal association with a person who is identified by reference to the discrimination attributes.

The limitation imposed by proposed Regulation 8 on the right to freedom of discrimination is authorised by section 132A and 146 of the Health Act 1958 and is justified on the following grounds:

Reasonableness of the limitation

Nature of the right

The right protects persons from discrimination on the basis of attributes specified in section 6 of the Equal Opportunity Act 1995.

Importance and purpose of the limitation

Recipients of donated blood are exposed to the risk of infection with blood born viruses including HIV. The deferral of blood donations by persons who have sex with sex workers aims to prevent contamination of the blood supply. Safe sex practices are vital to the

prevention of HIV and other sexually transmitted infections. However, 'protected sex' is not 100% effective. Proposed Regulation 8 takes into account the prevalence of HIV infection in certain population groups.

The exclusion of sexual contacts of persons who have sex with sex workers is important because donations of blood from this group of persons represent risks to the blood supply. Similar considerations concerning safe sex and disease prevalence outlined previously in this certificate are relevant to the important aim of protecting the blood supply and minimising disease transmission by persons in this category.

The nature and extent of the limitation

The imposition of a 12 month deferral period for persons disclosing sex with sex workers and their other sexual partners may distress potential donors who are unable to donate blood. The 12 month deferral period provides an opportunity for persons to prepare for and undertake testing and takes into account the variations in detectable disease markers.

The relationship between the limitation and its purpose

There is a direct and rational connection between deferring blood donations and the purpose of minimising or preventing the spread of infectious disease because of risks of HIV and other disease transmission to sex worker clients and their partners and the incurable nature of the disease.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive means available to achieve the purpose of the limitation. Discussion in this certificate regarding the HIV, safe sex and seroconversion also apply in regard to the options available for securing the safety of the blood supply.

Conclusion

Given the importance of protecting the blood supply and public confidence in the safety of the blood supply the manner in which the regulations limit the rights protected by section 8 of the Charter can be demonstrably justified in a free and democratic society.

Proposed Regulation 8 inserts a questionnaire asking blood donors for information relating to prostitution. Donations will be deferred from persons that indicate they have traded money for sex or gifts or drugs. In Victoria sex workers can enter into work related contracts and are able to, for example, bring unfair dismissal and compensation claims. Employment activity is an attribute listed in section 6 of the Equal Opportunity Act 1995.

The limitation imposed by proposed Regulation 8 on the right to freedom of discrimination is authorised by section 132A and 146 of the Health Act 1958 and is justified on the following grounds:

Reasonableness of the limitation

Nature of the right

The right protects persons from discrimination on the basis of attributes specified in section 6 of the Equal Opportunity Act 1995.

Importance and purpose of the limitation

The Prostitution Control Act 1994 and Health (Infectious Diseases) Regulations 2001 are the legal mechanisms for regulating the sex industry in Victoria and impose standards for the use of condoms and availability of safe sex information to sex workers and clients. For the

purposes of infectious disease control the donation statement recognises that prostitution can occur both within and outside the law and may include, for example, instances where gifts or drugs are exchanged for sexual services. Persons engaging in prostitution (both as clients and sex workers) present an infectious diseases risk to the blood supply because some infectious diseases are sexually transmitted and may contaminate the blood supply.

The nature and extent of the limitation

The imposition of a deferral period will prevent persons who have performed sex work from donating blood for 12 months.

The relationship between the limitation and its purpose

There is a direct and rational connection between deferring blood donations from persons who have engaged in sex work and the purpose of minimising or preventing the spread of infectious disease ensuring that those at risk of transmitting blood borne conditions do not contribute to the blood supply. Comments in this certificate regarding HIV, safe sex and seroconversion also broadly apply to the consideration of this issue.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive means available to achieve the purpose of the limitation.

Conclusion

Given the importance of supplying blood and blood products that do not increase the burden of infectious disease in the community, maintain community confidence in the blood donation scheme and prevent illness and mortality the deferral of donations from those affected by infectious disease is justified in a free and democratic society that values public health and wellbeing.

Religious or political beliefs and Regulation 8

Proposed Regulation 8 inserts a questionnaire asking blood donors for information relating to tattooing, body and ear piercing. Donations will be deferred for 12 months from persons that indicate they have undergone such procedures. Although tattooing, body or ear piercing is commonly practiced for cosmetic or aesthetic purposes it is possible that such procedures are an expression of personal religious or political beliefs, attributes listed in section 6 of the Equal Opportunity Act 1995.

The limitation imposed by proposed Regulation 8 on the right to freedom of discrimination is authorised by section 132A and 146 of the Health Act 1958 and is justified on the following grounds:

Reasonableness of the limitation

Nature of the right

The right protects persons from discrimination on the basis of attributes specified in section 6 of the Equal Opportunity Act 1995.

Importance and purpose of the limitation

Tattooing and body piercing involves the penetration of the skin service with needles or other devices and in some circumstances the procedure has the capacity to transmit infectious diseases. Although the commercial tattoo and body piercing industry is regulated and must comply with policies and procedures to minimise the spread of infectious

diseases, not all procedures are carried out in regulated premises and persons who undergo these procedures may present an infectious disease risk to the blood supply.

The nature and extent of the limitation

The imposition of a deferral period will prevent persons having had body piercing or tattoos from donating blood for 12 months.

The relationship between the limitation and its purpose

There is a direct and rational connection between deferring blood donations from persons who have undergone these procedures and the purpose of minimising or preventing the spread of infectious disease ensuring that those at risk of transmitting blood borne conditions do not contribute to the blood supply.

Any less restrictive means reasonable available to achieve the purpose that the limitation seeks to achieve

There is no less restrictive means available to achieve the purpose of the limitation:

Conclusion

Given the importance of supplying blood and blood products that do not increase the burden of infectious disease in the community, maintain community confidence in the blood donation scheme and prevent illness and mortality the deferral of donations from those people who have undergone tattooing or body piercing is justified in a free and democratic society that values public health and wellbeing.

Charter Section 12: Freedom of movement

Proposed Regulation 7 specifies that the Secretary may amend the minimum period of exclusion for persons who have experienced contact with persons who have influenza and influenza-like illnesses. Proposed Regulation 7 does not affect the right to move freely within Victoria because:

The right to freedom of movement does not extend to a right to freedom of movement within educational premises or children's services premises because of the private nature of the premises; and

The limitation imposed by proposed Regulation 6 does not affect the ability of persons to move freely or settle in Victoria.

Charter Section 13: right to privacy and reputation

The Charter protects a person's right not to have his or her privacy unlawfully or arbitrarily interfered with. The proposed Regulations engage this right because they allow for the use and disclosure of information identifying a person or sensitive information but the use is not arbitrary or unlawful.

The provision authorising the making of proposed Regulations 5 to 7 is section 138 of the Health Act 1958. This provision permits regulations to be made which prescribe diseases or bodily conditions which must be notified to the Secretary, the particulars to be furnished by registered medical practitioners and matters or things necessary or expedient to be prescribed with respect to the notification of prescribed diseases or conditions.

The use and disclosure of information identifying a person or sensitive information will conflict with the Charter if the use is arbitrary and unlawful.

The proposed Regulations specify that registered medical practitioners are to provide details of Herpes zoster and Varicella as well as the country of origin of a person (and if born outside Australia, the year of arrival in Australia) to the Secretary to the Department of Human Services. The information to be included in the notification includes information that may identify a person as well as sensitive information concerning a notifiable disease. (The term sensitive information is defined in the Commonwealth Privacy Act 1988 to include health information or information about the racial or ethnic origin of a person).

Information contained in the blood donation statement completed by persons electing to volunteer blood contains sensitive information. The Australian Red Cross Blood Service (the Service) is bound by the Commonwealth Privacy Act 1988. National Privacy Principles govern the collection of both personal and sensitive information and place additional restrictions on primary and secondary uses of sensitive personal information.

In addition, the Service is required to inform persons providing sensitive personal information of their rights, the reasons for collecting the information, with whom the information may be shared as well as methods for accessing information, storage and security and complaint matters.

The effects of notifications and the blood donation statement to the right to privacy is 'lawful' in the sense that the proposed Regulations and the Health Act 1958 specify the circumstances in which interferences with a person's right to privacy will be permissible.

The proposed Regulations specifying diseases for which notifications are to be made and the matters to be included in notifications are not arbitrary because the requirement applies to registered medical practitioners exercising powers under the Health Act 1958 and are designed to ensure epidemiological information is accurate and able to inform the Secretary of potential changes to community wellbeing.

The proposed Regulations affecting the blood donation statement are not arbitrary because the obligations and procedures established by the Privacy Act 1988 apply, including the requirement for consent and the procedures for complaints, review and storage of sensitive personal information. Furthermore the collection of this information is necessary to ensure safety and community confidence in the blood supply.

Charter Section 15: freedom of expression

Proposed Regulation 6 specifies that registered medical practitioners are required to inform the Secretary of occurrences of certain diseases and bodily conditions. The clause also contains particulars to be provided to the Secretary. Regulation 8 provides that persons participating in the blood donation program inform the Red Cross Society of the details in the blood donation statement.

The Charter provides that every person has the right to express and impart information in writing or orally. The right to express information also includes the right not to provide information. The Charter provides that special duties and responsibilities are attached to the right of freedom of expression and authorises lawful restrictions reasonably necessary for the protection of public health.

The requirement that registered medical practitioners provide information is reasonably necessary to ensure epidemiological information concerning Herpes zoster and Varicella and related notification information is available to the Secretary. Information provided by blood donors is essential for protecting community safety and confidence in the blood supply. The information provided will be used to monitor the epidemiological effects of the national vaccination program, monitor the burden of disease in the community, inform public health programs and priorities and screen blood donors.

Proposed regulations 6 and 8 are lawful because the obligation to communicate the information is authorised by section 138 of the Health Act 1958.

The Subcommittee carefully examined matters relating specifically to the section 7(2) Charter test. Does the section 12A certificate address the test set out in section 7(2) of the Charter? The Subcommittee wrote to the Minister in these terms in relation to SR No.163 – *Charter of Human Rights and Responsibilities (Public Authorities)(Interim Regulations) 2008*.

Example 4:

SR No. 163 – Charter of Human Rights and Responsibilities (Public Authorities) (Interim Regulations) 2008

Subcommittee's Letter⁵²

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at a meeting on 18 March 2009.

The Subcommittee notes that original 2007 Regulations were accompanied by a section 9(3) Premier's certificate. The Subcommittee further notes that this additional set of interim Regulations is accompanied by a second section 9(3) Premier's certificate. The Subcommittee notes that the reason for the exemption of the boards from the obligations on public authorities is to allow the review of the impact of the Charter on work and resources to be completed. The 2008 Regulations expire on 29 December 2009. A further extension should not be required.

The Subcommittee also carefully examined the matters raised in the section 12A Human Rights certificate. The Subcommittee specifically seeks your advice as to how section 7(2) of the Charter of Human Rights and Responsibilities Act 2006 (the Charter) in relation to the current Regulations is satisfied? The section 12A certificate does not address the test set out in section 7(2) of the Charter.

The Subcommittee is in the process of preparing its Annual Report. The Subcommittee would be pleased to receive your response as soon as possible so that it may be incorporated into the Annual Report.

Minister's Response⁵³

I refer to your letter dated 18 March 2009.

The above Regulations were made on 16 December 2008. The Regulations were accompanied by a Human Rights Certificate, as required under section 12A of the Subordinate Legislation Act 1994 ('certificate').

As stated in the certificate, the Regulations limit all of the rights in the Charter by exempting the Adult Parole Board, the Youth Parole Board and the Youth Residential Board (Boards) from the obligation in section 38(1), which provides that it is unlawful for a public authority either to 'act in a way that is incompatible with a human right' or, in making a decision, to 'fail to give proper consideration to a relevant human right'. The Regulations are empowered by section 46(2)(c) of the Charter which provides that regulations may be made under the Charter to prescribe entities not to be public authorities for the purposes of the Charter. The certificate provides that the Regulations are therefore contemplated by and compatible with

⁵² Letter dated 18 March 2009 to the Attorney General, Rob Hulls, MP, from the Regulation Review Subcommittee.

⁵³ Letter dated 27 April 2009 to the Regulation Review Subcommittee from the Hon. Rob Hulls MP, Attorney General.

the provisions of the Charter. The extent of the limitation is confined because the regulations will be in force for a 12 month period only, in order to allow the review of the impact of the Charter on the work and resources of the Boards to be completed and any resultant actions taken.

In your letter you seek my advice as to how section 7(2) of the Charter is satisfied in relation to the Regulations. Having regard to the information provided in the certificate, I advise that:

(a) Nature of the human rights limited: the Regulations limit all of the human rights set out in the Charter that may impact on the Board's activities. The work currently being undertaken is directed at identifying more precisely the relevant rights and their impacts.

(b) The importance of the purpose of the limitation: the limitation is for an important purpose, in order to allow the review of the impact of the Charter on the work and resources of the Boards to be completed and any resulting actions taken.

(c) The nature and extent of the limitation: The nature and extent of the limitation is confined because the regulations will be in force for a 12 month period only.

(d) The relationship between the limitation and its purpose: The Regulations are empowered by section 46(2)(c) of the Charter which provides that regulations may be made under the Charter to prescribe entities not to be public authorities for the purposes of the Charter. The Regulations are therefore contemplated by and compatible with the provisions of the Charter. There is a direct relationship between the limitation and its purpose.

(e) Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve: there are no less restrictive means reasonably available to achieve the purpose of the limitation.

I trust that this letter answers the Committee's queries.

Thank you for your correspondence.

The Committee wrote a further letter to the Minister on 1 June 2009.

Subcommittee's Letter⁵⁴

The Regulation Review Subcommittee (the Subcommittee) has carefully considered your letter dated 27 April 2009.

The Subcommittee notes that the Regulations are contemplated by ss 4(1)(k) and 46(2)(c) of the Charter of Human Rights and Responsibilities Act 2006 (the Charter). However, it observes that all limitations on human rights (including limitations in regulations validly made under the Charter) must be 'demonstrably justified' under Charter s7(2). The Subcommittee seeks further advice as to that demonstrable justification.

In particular, your letter states that the purpose of the Regulations is "to allow the review of the impact of the Charter on the work and resources of the Boards to be completed and any resulting actions taken." The Subcommittee is interested to know why it is necessary to suspend Charter rights while the review takes place. For example, what adverse consequences will the Regulations avoid? Also, in light of ss46(3)(a), the Subcommittee is curious as to whether limiting the Regulations to particular acts of the Boards and particular rights is a reasonably available alternative?

⁵⁴ Letter dated 1 June 2009 to the Attorney General, Rob Hulls, MP, from the Regulation Review Subcommittee.

The Subcommittee will consider the final form of the regulations most carefully. The Subcommittee will continue to monitor these regulations.

Section 12A Human Rights Certificate⁵⁵

I, Rob Hulls MP, Attorney-General, certify under section 12A(2) of the Subordinate Legislation Act 1994 that, in my opinion the proposed Charter of Human Rights and Responsibilities (Public Authorities) Interim Regulations 2008 do limit the human rights set out in the Charter of Human Rights and Responsibilities (Charter). The proposed regulations limit all of the rights in the Charter by exempting the Adult Parole Board, the Youth Parole Board and the Youth Residential Board (Boards) from the obligation in section 38(1), which provides that it is unlawful for a public authority either to 'act in a way that is incompatible with a human right' or, in making a decision, to 'fail to give proper consideration to a relevant human right'. The proposed regulations are empowered by section 46(2)(c) of the Charter which provides that regulations may be made under the Charter to prescribe entities not to be public authorities for the purposes of the Charter. The extent of the limitation is confined because the proposed regulations will be in force for a 12 month period only, in order to allow the review of the impact of the Charter on the work and resources of the Boards to be completed and any resulted actions taken. The proposed regulations are therefore contemplated by and compatible with the provisions of the Charter.

The Subcommittee was also required to consider the section 7(2) Charter test in relation to SR No.82 – *Professional Boxing and Combat Sports Regulations 2008*. The issue of mixed professional boxing, kickboxing and combat sports was examined.

Example 5:

SR No. 82 – Professional Boxing and Combat Sports Regulations 2008

Subcommittee's Letter⁵⁶

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 23 October 2008.

Section 7(3) of the Professional Boxing and Combat Sports Act 1985 (the Act) bans conducting a 'promotion' including all non-amateur boxing, kickboxing and combat sports without a permit. Section 7(2) provides that the Minister may only issue a permit if satisfied as to a number of preconditions. Regulation 6(2)(g) provides that one such precondition is 'that female contestants have not been matched against male contestants.'

Regulation 6(2)(g) effectively bans all mixed professional boxing, kickboxing and combat sports in Victoria. Regulation 6(2)(g) therefore limits the Charter of Human Rights and Responsibilities Act 2006 (the Charter) equality rights with respect to sex.

The relevant extract of the Human Rights Certificate is as follows:-

Females are prohibited from being matched against males in professional contests because there is generally a wide discrepancy between the genders in size, strength

⁵⁵ Section 12A Human Rights Certificate, for SR No. 163 – Charter of Human Rights and Responsibilities (Public Authorities) (Interim Regulations) 2008 prepared by the Hon. Rob Hulls MP, Attorney General, dated 9 December 2008.

⁵⁶ Letter dated 27 October 2008 to Mr. James Merlino, MP, Minister for Sport and Recreation, from the Regulation Review Subcommittee.

and speed... In most matchings of this nature there would be an unacceptable level of risk of physical harm to the female participant.

The Human Rights Certificate points out that sex discrimination is permitted under Australian anti-discrimination legislation in sports where competitiveness depends on strength, stamina and physique. It states there is little or no demand for mixed professional combat sports. While these remarks are undoubtedly accurate, the issue is whether a completely inflexible ban is justified.

An alternative is to provide for specifically for the Minister to permit such contests subject to a 'public interest' test. Section 14 of the Boxing Control Act 1993 (ACT), contains a special provision for any female involvement in a professional boxing contest. The Human Rights Certificate states that 'Any alternative measure would expose female competitors to an intolerable risk of harm.' However, it does not state why this risk could not be managed by the existing licensing process in section 7(2) of the Act.

The inflexible ban on mixed professional contests set out in Regulation 6(2)(g) may not satisfy the section 7(2)(e) test for limits on rights in the Charter. Is there any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve? The Subcommittee seeks your further advice as to why the existing licensing scheme in section 7(2) of the Act cannot adequately manage the risk of harm to female competitors.

Minister's Response⁵⁷

I refer to your correspondence of 27 October 2008 regarding the Professional Boxing and Combat Sports Regulations 2008 ("the Regulations") and your enquiries in relation to the prohibition on matching female and male professional contestants in professional contests.

The existing licensing scheme provided in section 7(2) of the Professional Boxing and Combat Sports Act 1985 ("the Act"), taken in isolation, is inadequate to protect female professional contestants from the heightened risks of harm inherent in mixed gender professional contests. It provides only that the Board may issue a permit to conduct a promotion where certain requirements have been satisfied. For this reason the prohibition on matching female against male contestants was remade as a pre-requisite for a promotion permit in the new regulations.

The pre-requisites specified in the Regulations have the effect of providing quality control for the licensing scheme provided under the Act, in particular by requiring that professional contestants are adequately matched having regard to experience, competence and weight (Regulation 6(2)(c)). This regulation is reinforced by rules based on standard practice overseas that require contestants to be of similar weight. Competence in this context, as in boxing and combat sports parlance generally, refers primarily to technical skills rather than to physical qualities such as power, speed, stamina and strength.

Removal of the pre-requisite prohibiting the matching of females against males (6(2)(g)) would mean that regulation 6(2)(c) would be the only provision regulating the matching of contestants. This could mean that female contestants who are similar to male contestants having regard to experience, competence and weight may be matched against men. However, regulation 6(2)(c) assumes contestants are of the same gender and would be inadequate to protect female contestants from an unreasonable risk of injury.

⁵⁷ Letter dated 26 March 2009 to the Regulation Review Subcommittee from Mr James Merlino, MP, Minister for Sport and Recreation.

The problem with relying on 6(2)(c) in isolation is that it does not provide for consideration of the innate difference in the power to weight ratio between men and women. An elite 65 kilogram female, contestant may be in significant danger if matched against an elite 65 kilogram male contestant or even a much lighter male who was much faster and more powerful. It is this innate difference between the genders that underpins legalised discrimination in sport in the Equal Opportunity Act 1995, where the difference in strength, stamina and physique is a reasonable basis for non-competition between the sexes. Innate differences between the sexes are significantly pronounced in elite sport where athletes are in peak condition.

Further, the existing regime under s 7(2) of the Act would be inadequate to protect female contestants from unreasonable risk of harm without regulation 6(2)(g) because the regime provides that the Board may issue the permit provided the pre-requisites are satisfied. While the word 'may' suggests some discretion, it would be unduly capricious of the Board to withhold a permit on the basis of unreasonable risk of injury to female contestants where this is not expressed as a pre-requisite.

There is no less restrictive means known at this time that would reliably enable the Board to approve contests between professional male contestants and professional female contestants with a sufficient degree of a certainty that such a contest would be safe for the female contestant.

Your letter suggests an alternative to this regime could be insertion of a provision similar to one contained in the Boxing Control Act 1993 (ACT) whereby the Minister may permit such contests subject to a 'public interest' test.

The insertion of such a provision in the Act would be inappropriate as the permit regime has been specifically amended to transfer all operational matters, such as the assessment of and issuing of permits, to an expert Board. It would likewise be inappropriate and undesirable for the Board to make assessments in the public interest.

Additionally, the context of the ACT legislation is significantly different to the professional boxing and combat sports industry in Victoria. The ACT operates within the NSW Boxing regime which prohibits any female participation in professional contests whatsoever; consequentially the ACT legislation allows female contestants to engage in professional contests where they could not otherwise do so, regardless of the gender of their opponent.

The public interest test, therefore, appears to relate to the public morality of allowing a professional female contestant into the ring. It has not been developed to assess the risks to the health and safety of female participants in potential matchings against male competitors, which may more rightly be considered a 'private interest' test.

A Ministerial public interest test of this nature would be incoherent within the Victorian regulatory regime for this industry.

Section 12A Human Rights Certificate⁵⁸

I, James Merlino, Minister for Sport, Recreation and Youth Affairs, certify under section 12A of the Subordinate Legislation Act 1994 that, in my opinion-

the proposed Professional Boxing and Combat Sports Regulations 2008 reasonably limit a human right set out in the Charter of Human Rights and Responsibilities as follows –

⁵⁸ Section 12A Human Rights Certificate, for SR No. 82 – Professional Boxing and Combat Sports Regulations 2008, prepared by Mr James Merlino, MP, Minister for Sports and Recreation, dated 13 June 2008.

Recognition and Equality before the law

Section 8(3) of the Charter states that 'every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.'

The proposed Professional Boxing and Combat Sports Regulations ("the Regulations") create a prima facie discrimination on the basis of sex, as regulation 6(2)(g) provides that it is a prerequisite of a promotion permit that females are not matched against males. While both genders are equally restricted on the face of the provision, the prohibition has the operational outcome of limiting opportunities for female contestants. There are significantly fewer female contestants in the professional boxing and combat sports industry and this provision limits potential contests available to female contestants in comparison to their male counterparts. This equates to less favourable treatment of female contestants on the basis of their sex.

1. The nature of the human right limited

The right to recognition and equality before the law and to equal protection of the law without discrimination prohibits discrimination on the basis of prescribed attributes in section 6 of the Equal Opportunity Act 1995. These attributes include a prohibition on discrimination on the basis of sex. Discrimination under the Charter incorporates both less favourable indirect and direct treatment of a particular person or group on the basis of a specified attribute.

2. The importance of the purpose of the limitation

Females are prohibited from being matched against males in professional contests because there is generally a wide discrepancy between the genders in size, strength and speed. The professional boxing and combat sports context is significantly different from mixed participation in other sports because of the full body contact nature of these activities. In most matchings of this nature there would be an unacceptable level of risk of physical harm to the female participant.

3. The nature and extent of the limitation

The limitation is absolute, as males and females may not be matched in professional contests. There is, however, little or no demand for professional contests of this nature and the limitation will impact upon a minimal or non-existent section of society.

4. The relationship between the limitation and its purpose

The prohibition on these matchings is strongly connected to the purpose of protecting professional contestants from an unacceptable risk of physical harm. Section 42 of the Sex Discrimination Act 1984 (Cth) provides that it is not unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant. Section 66 of the Equal Opportunity Act 1995 reflects this provision. Although these exceptions are not provided for in section 8 of the Charter, the reasoning informing these provisions demonstrates that there is a rational basis for restricting mixed gender participation in elite sporting activities where the physical capabilities of respective genders make such activities dangerous or so one-sided as not to be competitive.

5. Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

There are no less restrictive means reasonably available as an alternative to the non-matching of males against females in professional contests that could achieve the purpose

of the limitation. Any alternative measure would expose female contestants to an intolerable risk of physical harm.

APPENDIX 1 – REGULATIONS 2008⁵⁹

ALPHABETICAL LISTING

SR No. 169	Accident Towing Services Regulations 2008
SR No. 10	Adoption Regulations 2008
SR No. 114	Births, Deaths And Marriages Registration Regulations 2008
SR No. 126	Building Amendment Regulations 2008
SR No. 91	Catchment and Land Protection Amendment Regulations 2008
SR No. 145	Cemeteries and Crematoria Amendment Regulations 2008
SR No. 163	Charter of Human Rights and Responsibilities (Public Authorities) Interim Regulations 2008
SR No. 109	Chattel Securities (Purchase Price) Regulations 2008
SR No. 112	Chattel Securities (Registration) Regulations 2008
SR No. 11	Children’s Court (Evidence – Audio Visual and Audio Linking) Rules 2008
SR No. 156	Children’s Court (Family Violence Protection) Rules 2008
SR No. 120	Children’s Services Further Amendment Regulations 2008
SR No. 70	City of Melbourne (Elections) Amendment Regulations 2008
SR No. 57	Confiscation Regulations 2008
SR No. 49	Conveyancers (Professional Conduct and Trust Account and General) Regulations 2008
SR No. 48	Conveyancers (Qualifications, Experience and Fees) Regulations 2008
SR No. 133	Co-Operatives Regulations 2008
SR No. 30	Corrections (Amendment) Regulations 2008
SR No. 89	Country Fire Authority (Charges) Amendment Regulations 2008
SR No. 106	Country Fire Authority Amendment Regulations 2008
SR No. 33	County Court (Chapter 1 Amendment No.23) Rules 2008
SR No. 119	County Court (Chapter 1 Amendment No.24) Rules 2008
SR No. 147	County Court (Chapter 1 Amendment No.25) Rules 2008
SR No. 148	County Court Civil Procedure Rules 2008

⁵⁹ This Appendix lists all regulations made during 2008. The Appendix categorises regulations according to whether they were made with a Regulation Impact Statement or whether they were exempted or excepted from those requirements. The Committee did not move for disallowance of any of the regulations made in 2008. However the Regulation Review Subcommittee did correspond with responsible Ministers concerning some regulations.

SR No. 127	Crimes (Controlled Operations) Regulations 2008
SR No. 24	Dangerous Goods (Explosives) Amendment Regulations 2008
SR No. 166	Dangerous Goods (Transport by Road or Rail) Regulations 2008
SR No. 67	Domestic (Feral and Nuisance) Animals (Infringement Amendment) Regulations 2008
SR No. 98	Drugs, Poisons and Controlled Substances (Industrial Hemp) Regulations 2008
SR No. 71	Drugs, Poisons and Controlled Substances (Volatile Substances) (Amendment) Regulations 2008
SR No. 81	Eastlink Project Regulations 2008
SR No. 121	Environment Protection (Residential Noise) Regulations 2008
SR No. 97	Estate Agents (Contracts) Regulations 2008
SR No. 128	Estate Agents (Education) Regulations 2008
SR No. 39	Estate Agents (General, Accounts and Audit) Regulations 2008
SR No. 46	Estate Agents (Professional Conduct) Regulations 2008
SR No. 58	Evidence (Affidavits and Statutory Declarations) Regulations 2008
SR No. 88	Fair Trading (Amendment) Regulations 2008
SR No. 99	Fair Trading (Safety Standard)(Children's Portable Folding Cots) Regulations 2008
SR No. 45	Fair Trading (Safety Standard)(Hot Water Bottles) Regulations 2008
SR No. 86	Fair Trading (Safety Standard)(Prams and Strollers) Regulations 2008
SR No. 153	Family Violence Protection Regulations 2008
SR No. 22	Firearms Regulations 2008
SR No. 92	Fisheries (Fees, Royalties and Levies) Amendment Regulations 2008
SR No. 4	Fisheries (Fees, Royalties and Levies) Regulations 2008
SR No.103	Gambling Regulation (Race Fields) Regulations 2008
SR No. 165	Gas Safety (Gas Installation) Regulations 2008
SR No. 164	Gas Safety (Safety Case) Regulations 2008
SR No. 132	Guardianship and Administration (Fees) Regulations 2008
SR No. 159	Health (Consultative Council on Obstetric and Paediatric Mortality and Morbidity) Amendment Regulations 2008
SR No. 105	Health (Infectious Diseases)(Amendment) Regulations 2008
SR No. 160	Health (Prescribed Accommodation) Amendment Regulations 2008
SR No. 66	Impounding of Livestock Regulations 2008
SR No. 107	Infringements (General) Further Amendment Regulations 2008
SR No. 85	Infringements (General)(Amendment) Regulations 2008
SR No. 108	Infringements (Reporting and Prescribed Details and Forms) Amendment Regulations 2008

SR No. 54	Introduction Agents Regulations 2008
SR No. 15	Legal Profession (Admission) Rules 2008
SR No. 13	Liquor Control Reform (Prescribed Class of Premises) Regulations 2008
SR No. 20	Liquor Control Reform (Prohibited Supply) Amendment Regulations 2008
SR No. 143	Liquor Control Reform Amendment (Fees) Regulations 2008
SR No. 102	Liquor Control Reform Amendment Regulations 2008
SR No. 96	Local Government (General) Amendment Regulations 2008
SR No. 83	Magistrates' Court (Committals) Amendment Rules 2008
SR No. 138	Magistrates' Court (Committals) Further Amendment Rules 2008
SR No. 84	Magistrates' Court (Criminal Procedure) Amendment Rules 2008
SR No. 157	Magistrates' Court (Family Violence Protection) Rules 2008
SR No. 5	Magistrates' Court (Fees, Costs and Charges) Amendment Regulations 2008
SR No. 43	Magistrates' Court Civil Procedure (Amendment No. 22) Rules 2008
SR No. 64	Magistrates' Court Civil Procedure (Amendment No.23) Rules 2008
SR No. 139	Magistrates' Court Civil Procedure (Amendment No.24) Rules 2008
SR No. 6	Magistrates' Court Criminal Procedures (Evidence – Audio Visual and Audio Linking) Rules 2008
SR No. 113	Marine (Infringements Amendments) Regulations 2008
SR No. 111	Mental Health Regulations 2008
SR No. 155	Metropolitan Fire Brigades (General)(Charges Amendment) Regulations 2008
SR No. 144	Motor Car Traders Regulations 2008
SR No. 93	National Parks (Fees and Charges) Amendment Regulations 2008
SR No. 36	Parliamentary Allowances Amendment Regulations 2008
SR No. 122	Planning and Environment (Fees) Amendment Regulations 2008
SR No. 136	Plumbing Regulations 2008
SR No. 25	Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008
SR No. 146	Police Integrity (Legal Assistance for Witnesses) Regulations 2008
SR No. 68	Prevention of Cruelty to Animals (Amendment) Regulations 2008
SR No. 16	Prevention of Cruelty to Animals (Prohibited Procedures) Regulations 2008
SR No. 162	Prevention of Cruelty to Animals Regulations 2008
SR No. 82	Professional Boxing and Combat Sports Regulations 2008
SR No. 14	Public Administration (Review of Actions)(Amendment) Regulations 2008
SR No. 42	Public Transport Competition (Amendment) Regulations 2008
SR No. 167	Radiation Amendment (Tanning Units and Fees) Regulations 2008

SR No. 9	Rail Safety (Amendment) Regulations 2008
SR No. 55	Residential Tenancies Regulations 2008
SR No. 116	Road Safety (Drivers) Amendment (Fatigue Management) Regulations 2008
SR No. 168	Road Safety (Drivers) and Road Safety (General) Amendment (Fatigue Management and Other Matters) Regulations 2008
SR No. 63	Road Safety (Drivers)(Fees Amendment) Regulations 2008
SR No. 61	Road Safety (Drivers)(Learner Approved Motor Scheme and Other Amendments) Regulations 2008
SR No. 27	Road Safety (Drivers)(Miscellaneous Amendments) Regulations 2008
SR No. 80	Road Safety (Drivers)(Peer Passenger Restriction) Interim Regulations 2008
SR No. 115	Road Safety (General) Amendment (Fatigue Management) Regulations 2008
SR No. 104	Road Safety (General) Amendment Regulations 2008
SR No. 137	Road Safety (General) Further Amendment (Fatigue Management) Regulations 2008
SR No. 77	Road Safety (General)(Infringement Trial Amendments) Regulations 2008
SR No. 59	Road Safety (General)(Learner Approved Motor Cycle Scheme Amendment) Regulations 2008
SR No. 26	Road Safety (General)(Miscellaneous Amendments) Regulations 2008
SR No. 79	Road Safety (General)(Peer Passenger Restrictions) Regulations 2008
SR No. 2	Road Safety (General)(Prescribed Devices Amendment) Regulations 2008
SR No. 170	Road Safety (Road Rules) Amendment (Traffic Control Items) Regulations 2008
SR No. 78	Road Safety (Road Rules)(Amendment) Regulations 2008
SR No. 28	Road Safety (Road Rules)(Miscellaneous Amendments) Regulations 2008
SR No. 161	Road Safety (Road Rules)(Seatbelts) Amendment Regulations 2008
SR No. 131	Road Safety (Vehicles) Amendment (Assignment Fees) Regulations 2008
SR No. 62	Road Safety (Vehicles)(Fees Amendment) Regulations 2008
SR No. 37	Road Safety (Vehicles)(Heavy Vehicles Fees) Amendment Regulations 2008
SR No. 60	Road Safety (Vehicles)(Learner Approved Motor Cycle Scheme Amendment) Regulations 2008
SR No. 52	Rural Finance Corporation of Victoria Regulations 2008
SR No. 47	Sale of Land Amendment Regulations 2008
SR No. 141	Second-Hand Dealers and Pawnbrokers (Exemption) Regulations 2008
SR No. 140	Second-Hand Dealers and Pawnbrokers Regulations 2008
SR No. 51	Serious Sex Offenders Monitoring (Amendment) Regulations 2008
SR No. 152	Stalking Intervention Orders Regulations 2008

SR No. 69	State Superannuation Regulations 2008
SR No. 8	Subdivision (Registrar's Fees)(Amendment) Regulations 2008
SR No. 31	Subordinate Legislation (Alpine Resorts (Management) Regulations 1998 – Extension Of Operation) Regulations 2008
SR No. 90	Subordinate Legislation (Associations Incorporation Regulations 1998 - Extension of Operation) Regulations 2008
SR No. 1	Subordinate Legislation (Children's Services Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 135	Subordinate Legislation (Dangerous Goods (Transport By Rail) Regulations 1998 – Extension Of Operation) Regulations 2008
SR No. 21	Subordinate Legislation (Environment Protection (Prescribed Waste) Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 3	Subordinate Legislation (Fisheries Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 18	Subordinate Legislation (Freedom of Information Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 101	Subordinate Legislation (Land Acquisition and Compensation Regulations 1998 – Extension Of Operation) Regulations 2008
SR No. 35	Subordinate Legislation (Motor Car Traders Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 34	Subordinate Legislation (Retirement Villages Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 17	Subordinate Legislation (Road Transport (Dangerous Goods)(Licence Fees) Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 124	Subordinate Legislation (Wildlife (Whales) Regulations 1998 – Extension Of Operation) Regulations 2008
SR No. 100	Supreme Court (Associate Judges Amendment) Rules 2008
SR No. 32	Supreme Court (Chapter 1 Amendment No.11) Rules 2008
SR No. 149	Supreme Court (Chapter 1 Amendment No.12) Rules 2008
SR No. 151	Supreme Court (Chapter 1 Amendment No.13) Rules 2008
SR No. 117	Supreme Court (Chapter V Amendment No.5) Rules 2008
SR No. 118	Supreme Court (Chapter VI Amendment No.1) Rules 2008
SR No. 150	Supreme Court (Chapter VI Amendment No.2) Rules 2008
SR No. 12	Supreme Court (Criminal Procedure) Rules 2008
SR No. 94	Supreme Court (Miscellaneous Civil Proceedings) Rules 2008
SR No. 95	Supreme Court Library Fund (Investment) (Amendment No.1) Rules 2008
SR No. 129	Tobacco (Victorian Health Promotion Foundation) Regulations 2008
SR No. 142	Trade Measurement Amendment (Standard Wine Package Marking) Regulations 2008
SR No. 38	Trade Measurement Amendment Regulations 2008

SR No. 56	Transfer of Land (Fees) Amendment Regulations 2008
SR No. 123	Transport (Conduct and Infringements) Amendment Regulations 2008
SR No. 73	Transport (Conduct)(Amendment) Regulations 2008
SR No. 134	Transport (Infringements) Amendment (Obsolete Offences) Regulations 2008
SR No. 72	Transport (Infringements)(Amendment) Regulations 2008
SR No. 40	Transport (Passenger Vehicles)(Amendment) Regulations 2008
SR No. 75	Transport (Passenger Vehicles)(Miscellaneous Amendment) Regulations 2008
SR No. 41	Transport (Taxi-Cab Licences – Market and Trading)(Amendment) Regulations 2008
SR No. 76	Transport (Taxi-Cab Network Service Provider Accreditation Exemptions)(Amendment) Regulations 2008
SR No. 74	Transport (Taxi-Cabs)(Amendment) Regulations 2008
SR No. 130	Transport (Tow Truck) Amendment Regulations 2008
SR No. 110	Transport Superannuation Regulations 2008
SR No. 44	Travel Agents (Infringement Penalties) Regulations 2008
SR No. 19	Veterans (Patriotic Funds) Regulations 2008
SR No. 7	Veterinary Practice Regulations 2008
SR No. 23	Victims of Crime Assistance (Delegation) Amendment Regulations 2008
SR No. 65	Victorian Civil and Administrative Tribunal Rules 2008
SR No. 158	Victorian Energy Efficiency Target Regulations 2008
SR No. 125	Victorian Plantations Corporation (Register of Plantation Licences) Regulations 2008
SR No. 154	Victorian Workers' Wages Protection (Exceptions) Regulations 2008
SR No. 29	Water (Lake Eildon Recreational Area)(Houseboats) Amendment Regulations 2008
SR No. 50	Wildlife (Game)(Hunting of Fallow Deer)(Amendment) Regulations 2008
SR No. 53	Working With Children Amendment Regulations 2008
SR No. 87	Zoological Parks and Gardens (Fees) Amendment Regulations 2008

Code of Practice

Management of Infrastructure in Road Reserves – Made under the *Road Management Act 2004*

Compliance Codes

Under Section 149 *Occupational Health and Safety Act 2004*

Ministerial Determination

Under *Retail Leases Act 2003*

APPENDIX 2 — REGULATIONS 2008

REGULATION IMPACT STATEMENTS

SR No. 4	Fisheries (Fees, Royalties and Levies) Regulations 2008
SR No. 10	Adoption Regulations 2008
SR No. 13	Liquor Control Reform (Prescribed Class of Premises) Regulations 2008
SR No. 15	Legal Profession (Admission) Rules 2008
SR No. 22	Firearms Regulations 2008
SR No. 48	Conveyancers (Qualifications, Experience and Fees) Regulations 2008
SR No. 73	Transport (Conduct)(Amendment) Regulations 2008
SR No. 74	Transport (Taxi-Cabs)(Amendment) Regulations 2008
SR No. 75	Transport (Passenger Vehicles)(Miscellaneous Amendment) Regulations 2008
SR No. 82	Professional Boxing and Combat Sports Regulations 2008
SR No. 102	Liquor Control Reform Amendment Regulations 2008
SR No. 112	Chattel Securities (Registration) Regulations 2008
SR No. 114	Births, Deaths And Marriages Registration Regulations 2008
SR No. 120	Children's Services Further Amendment Regulations 2008
SR No. 121	Environment Protection (Residential Noise) Regulations 2008
SR No. 132	Guardianship and Administration (Fees) Regulations 2008
SR No. 133	Co-Operatives Regulations 2008
SR No. 136	Plumbing Regulations 2008
SR No. 140	Second-Hand Dealers and Pawnbrokers Regulations 2008
SR No. 143	Liquor Control Reform Amendment (Fees) Regulations 2008
SR No. 144	Motor Car Traders Regulations 2008
SR No. 158	Victorian Energy Efficiency Target Regulations 2008
SR No. 160	Health (Prescribed Accommodation) Amendment Regulations 2008
SR No. 162	Prevention of Cruelty to Animals Regulations 2008
SR No. 164	Gas Safety (Safety Case) Regulations 2008
SR No. 165	Gas Safety (Gas Installation) Regulations 2008
SR No. 167	Radiation Amendment (Tanning Units and Fees) Regulations 2008
SR No. 169	Accident Towing Services Regulations 2008

EXCEPTIONS UNDER SECTION 8

S. 8(1)(a) — Fee Increases

SR No. 29	Water (Lake Eildon Recreational Area)(Houseboats) Amendment Regulations 2008
SR No. 56	Transfer of Land (Fees) Amendment Regulations 2008
SR No. 62	Road Safety (Vehicles)(Fees Amendment) Regulations 2008
SR No. 63	Road Safety (Drivers)(Fees Amendment) Regulations 2008
SR No. 87	Zoological Parks and Gardens (Fees) Amendment Regulations 2008
SR No. 89	Country Fire Authority (Charges) Amendment Regulations 2008
SR No. 93	National Parks (Fees and Charges) Amendment Regulations 2008
SR No. 122	Planning and Environment (Fees) Amendment Regulations 2008
SR No. 126	Building Amendment Regulations 2008
SR No. 155	Metropolitan Fire Brigades (General)(Charges Amendment) Regulations 2008

S. 8(1)(b) — Court Rules

SR No. 6	Magistrates' Court Criminal Procedures (Evidence – Audio Visual and Audio Linking) Rules 2008
SR No. 11	Children's Court (Evidence – Audio Visual and Audio Linking) Rules 2008
SR No. 12	Supreme Court (Criminal Procedure) Rules 2008
SR No. 23	Victims of Crime Assistance (Delegation) Amendment Regulations 2008
SR No. 32	Supreme Court (Chapter 1 Amendment No.11) Rules 2008
SR No. 33	County Court (Chapter 1 Amendment No.23) Rules 2008
SR No. 43	Magistrates' Court Civil Procedure (Amendment No. 22) Rules 2008
SR No. 65	Victorian Civil and Administrative Tribunal Rules 2008
SR No. 64	Magistrates' Court Civil Procedure (Amendment No.23) Rules 2008
SR No. 83	Magistrates' Court (Committals) Amendment Rules 2008
SR No. 84	Magistrates' Court (Criminal Procedure) Amendment Rules 2008
SR No. 94	Supreme Court (Miscellaneous Civil Proceedings) Rules 2008
SR No. 95	Supreme Court Library Fund (Investment) (Amendment No.1) Rules 2008
SR No. 100	Supreme Court (Associate Judges Amendment) Rules 2008
SR No. 117	Supreme Court (Chapter V Amendment No.5) Rules 2008
SR No. 118	Supreme Court (Chapter VI Amendment No.1) Rules 2008
SR No. 119	County Court (Chapter 1 Amendment No.24) Rules 2008
SR No. 138	Magistrates' Court (Committals) Further Amendment Rules 2008
SR No. 139	Magistrates' Court Civil Procedure (Amendment No.24) Rules 2008

S. 8(1)(b) — Court Rules (cont.)

SR No. 147	County Court (Chapter 1 Amendment No.25) Rules 2008
SR No. 148	County Court Civil Procedure Rules 2008
SR No. 149	Supreme Court (Chapter 1 Amendment No.12) Rules 2008
SR No. 150	Supreme Court (Chapter VI Amendment No.2) Rules 2008
SR No. 151	Supreme Court (Chapter 1 Amendment No.13) Rules 2008
SR No. 156	Children's Court (Family Violence Protection) Rules 2008
SR No. 157	Magistrates' Court (Family Violence Protection) Rules 2008

S. 8(1)(d)(iii) — Extension by 12 Months

SR No. 1	Subordinate Legislation (Children's Services Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 3	Subordinate Legislation (Fisheries Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 17	Subordinate Legislation (Road Transport (Dangerous Goods)(Licence Fees) Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 18	Subordinate Legislation (Freedom of Information Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 21	Subordinate Legislation (Environment Protection (Prescribed Waste) Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 31	Subordinate Legislation (Alpine Resorts (Management) Regulations 1998 – Extension Of Operation) Regulations 2008
SR No. 34	Subordinate Legislation (Retirement Villages Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 35	Subordinate Legislation (Motor Car Traders Regulations 1998 – Extension of Operation) Regulations 2008
SR No. 90	Subordinate Legislation (Associations Incorporation Regulations 1998 - Extension of Operation) Regulations 2008
SR No. 101	Subordinate Legislation (Land Acquisition and Compensation Regulations 1998 – Extension Of Operation) Regulations 2008
SR No. 124	Subordinate Legislation (Wildlife (Whales) Regulations 1998 – Extension Of Operation) Regulations 2008
SR No. 135	Subordinate Legislation (Dangerous Goods (Transport By Rail) Regulations 1998 – Extension Of Operation) Regulations 2008

EXEMPTIONS UNDER SECTION 9

S. 9(1)(a) — No Economic Burden

SR No. 5	Magistrates' Court (Fees, Costs and Charges) Amendment Regulations 2008
SR No. 7	Veterinary Practice Regulations 2008
SR No. 8	Subdivision (Registrar's Fees)(Amendment) Regulations 2008
SR No. 9	Rail Safety (Amendment) Regulations 2008
SR No. 20	Liquor Control Reform (Prohibited Supply) Amendment Regulations 2008
SR No. 24	Dangerous Goods (Explosives) Amendment Regulations 2008
SR No. 26	Road Safety (General)(Miscellaneous Amendments) Regulations 2008
SR No. 27	Road Safety (Drivers)(Miscellaneous Amendments) Regulations 2008
SR No. 28	Road Safety (Road Rules)(Miscellaneous Amendments) Regulations 2008
SR No. 36	Parliamentary Allowances Amendment Regulations 2008
SR No. 46	Estate Agents (Professional Conduct) Regulations 2008
SR No. 47	Sale of Land Amendment Regulations 2008
SR No. 50	Wildlife (Game)(Hunting of Fallow Deer)(Amendment) Regulations 2008
SR No. 53	Working With Children Amendment Regulations 2008
SR No. 54	Introduction Agents Regulations 2008
SR No. 55	Residential Tenancies Regulations 2008
SR No. 59	Road Safety (General)(Learner Approved Motor Cycle Scheme Amendment) Regulations 2008
SR No. 60	Road Safety (Vehicles)(Learner Approved Motor Cycle Scheme Amendment) Regulations 2008
SR No. 61	Road Safety (Drivers)(Learner Approved Motor Scheme and Other Amendments) Regulations 2008
SR No. 68	Prevention of Cruelty to Animals (Amendment) Regulations 2008
SR No. 70	City of Melbourne (Elections) Amendment Regulations 2008
SR No. 76	Transport (Taxi-Cab Network Service Provider Accreditation Exemptions)(Amendment) Regulations 2008
SR No. 77	Road Safety (General)(Infringement Trial Amendments) Regulations 2008
SR No. 78	Road Safety (Road Rules)(Amendment) Regulations 2008
SR No. 79	Road Safety (General)(Peer Passenger Restrictions) Regulations 2008
SR No. 81	Eastlink Project Regulations 2008
SR No. 85	Infringements (General)(Amendment) Regulations 2008
SR No. 88	Fair Trading (Amendment) Regulations 2008
SR No. 92	Fisheries (Fees, Royalties and Levies) Amendment Regulations 2008
SR No. 97	Estate Agents (Contracts) Regulations 2008

S. 9(1)(a) — No Economic Burden (cont.)

SR No. 98	Drugs, Poisons and Controlled Substances (Industrial Hemp) Regulations 2008
SR No. 103	Gambling Regulation (Race Fields) Regulations 2008
SR No. 106	Country Fire Authority Amendment Regulations 2008
SR No. 107	Infringements (General) Further Amendment Regulations 2008
SR No. 109	Chattel Securities (Purchase Price) Regulations 2008
SR No. 111	Mental Health Regulations 2008
SR No. 127	Crimes (Controlled Operations) Regulations 2008
SR No. 130	Transport (Tow Truck) Amendment Regulations 2008
SR No. 131	Road Safety (Vehicles) Amendment (Assignment Fees) Regulations 2008
SR No. 137	Road Safety (General) Further Amendment (Fatigue Management) Regulations 2008
SR No. 141	Second-Hand Dealers and Pawnbrokers (Exemption) Regulations 2008
SR No. 146	Police Integrity (Legal Assistance for Witnesses) Regulations 2008
SR No. 154	Victorian Workers' Wages Protection (Exceptions) Regulations 2008
SR No. 170	Road Safety (Road Rules) Amendment (Traffic Control Items) Regulations 2008

S. 9(1)(b) — National Uniform Legislation

SR No. 37	Road Safety (Vehicles)(Heavy Vehicles Fees) Amendment Regulations 2008
SR No. 45	Fair Trading (Safety Standard)(Hot Water Bottles) Regulations 2008
SR No. 86	Fair Trading (Safety Standard)(Prams and Strollers) Regulations 2008
SR No. 99	Fair Trading (Safety Standard)(Children's Portable Folding Cots) Regulations 2008
SR No. 142	Trade Measurement Amendment (Standard Wine Package Marking) Regulations 2008
SR No. 161	Road Safety (Road Rules)(Seatbelts) Amendment Regulations 2008
SR No. 166	Dangerous Goods (Transport by Road or Rail) Regulations 2008

S. 9(1)(c) — Fundamentally Declaratory

SR No. 2	Road Safety (General)(Prescribed Devices Amendment) Regulations 2008
SR No. 16	Prevention of Cruelty to Animals (Prohibited Procedures) Regulations 2008
SR No. 38	Trade Measurement Amendment Regulations 2008
SR No. 40	Transport (Passenger Vehicles)(Amendment) Regulations 2008
SR No. 41	Transport (Taxi-Cab Licences – Market and Trading)(Amendment) Regulations 2008
SR No. 44	Travel Agents (Infringement Penalties) Regulations 2008

S. 9(1)(c) — Fundamentally Declaratory (cont.)

SR No. 51	Serious Sex Offenders Monitoring (Amendment) Regulations 2008
SR No. 57	Confiscation Regulations 2008
SR No. 66	Impounding of Livestock Regulations 2008
SR No. 67	Domestic (Feral and Nuisance) Animals (Infringement Amendment) Regulations 2008
SR No. 69	State Superannuation Regulations 2008
SR No. 72	Transport (Infringements)(Amendment) Regulations 2008
SR No. 91	Catchment and Land Protection Amendment Regulations 2008
SR No. 96	Local Government (General) Amendment Regulations 2008
SR No. 104	Road Safety (General) Amendment Regulations 2008
SR No. 108	Infringements (Reporting and Prescribed Details and Forms) Amendment Regulations 2008
SR No. 110	Transport Superannuation Regulations 2008
SR No. 113	Marine (Infringements Amendments) Regulations 2008
SR No. 123	Transport (Conduct and Infringements) Amendment Regulations 2008
SR No. 125	Victorian Plantations Corporation (Register of Plantation Licences) Regulations 2008
SR No. 128	Estate Agents (Education) Regulations 2008
SR No. 129	Tobacco (Victorian Health Promotion Foundation) Regulations 2008
SR No. 134	Transport (Infringements) Amendment (Obsolete Offences) Regulations 2008
SR No. 152	Stalking Intervention Orders Regulations 2008
SR No. 153	Family Violence Protection Regulations 2008
SR No. 159	Health (Consultative Council on Obstetric and Paediatric Mortality and Morbidity) Amendment Regulations 2008

S. 9(1)(d) – Administration Between Departments

SR No. 14	Public Administration (Review of Actions)(Amendment) Regulations 2008
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S. 9(3) — Premier’s Certificate

SR No. 80	Road Safety (Drivers)(Peer Passenger Restriction) Interim Regulations 2008
SR No. 163	Charter of Human Rights and Responsibilities (Public Authorities) Interim Regulations 2008

EXCEPTIONS AND EXEMPTIONS UNDER COMBINED SECTIONS

S. 9(1)(a) — No Economic Burden and S. 9(1)(c) — Fundamentally Declaratory

SR No. 19	Veterans (Patriotic Funds) Regulations 2008
SR No. 25	Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008
SR No. 30	Corrections (Amendment) Regulations 2008
SR No. 39	Estate Agents (General, Accounts and Audit) Regulations 2008
SR No. 42	Public Transport Competition (Amendment) Regulations 2008
SR No. 49	Conveyancers (Professional Conduct and Trust Account and General) Regulations 2008
SR No. 52	Rural Finance Corporation of Victoria Regulations 2008
SR No. 58	Evidence (Affidavits and Statutory Declarations) Regulations 2008
SR No. 71	Drugs, Poisons and Controlled Substances (Volatile Substances) (Amendment) Regulations 2008
SR No. 105	Health (Infectious Diseases)(Amendment) Regulations 2008
SR No. 145	Cemeteries and Crematoria Amendment Regulations 2008

S. 9(1)(a) — No Economic Burden and S. 9(1)(b) — Part of a National Uniform Legislation Scheme

SR No. 115	Road Safety (General) Amendment (Fatigue Management) Regulations 2008
SR No. 116	Road Safety (Drivers) Amendment (Fatigue Management) Regulations 2008

S. 9(1)(b) — National Uniform Legislation and S. 9(1)(c) – Fundamentally Declaratory

SR No. 168	Road Safety (Drivers) and Road Safety (General) Amendment (Fatigue Management and Other Matters) Regulations 2008
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ADDITIONAL INSTRUMENTS

Code of Practice

Management of Infrastructure in Road Reserves – Made under the <i>Road Management Act 2004</i>

Compliance Codes

Under Section 149 <i>Occupational Health and Safety Act 2004</i>

Ministerial Determination

Under <i>Retail Leases Act 2003</i>

APPENDIX 3

MINISTERIAL CORRESPONDENCE

This Appendix contains a list of correspondence sent to responsible Ministers by the Subcommittee regarding regulations made in 2008. The Appendix categorises correspondence in accordance with the nature of the issue raised by the Subcommittee

Regulation	Minister	Issue
SR No. 25 – Police (Testing for Alcohol or Drugs of Dependence) Amendment Regulations 2008	Minister for Police and Emergency Services	Sought further advice in respect of the right to privacy and confidentiality.
SR No. 85 – Professional Boxing and Combat Sports Regulations 2008	Minister for Sport, Recreation and Youth Affairs	Sought further advice regarding imposed bans on all mixed professional boxing, kickboxing and combat sports, in view of Charter equality rights with respect to sex.
SR No. 73 – Transport (Conduct) Amendment Regulations 2008	Minister for Public Transport	Emphasised that the Human Rights certificate should address any provisions of the principal regulation which may limit human rights.
SR No. 75 – Transport (Passenger Vehicles)(Miscellaneous Amendment) Regulations 2008	Minister for Public Transport	Emphasised that the Human Rights certificate should address any provisions of the principal regulation which may limit human rights.
SR No. 105 – Health (Infectious Diseases) (Amendment) Regulations 2008	Minister for Health	Sought further information regarding a questionnaire given to every prospective blood donor and the question (8) of male-to-male sex. Why does this question not distinguish between monogamous and non-monogamous sexual activity? Is this question incompatible with the right to equal enjoyment of the right to privacy without discrimination on the basis of sexual orientation?

Regulation	Minister	Issue
SR No. 132 – Guardianship and Administration (Fees) Regulations 2008	Attorney-General	Noted that the threshold at which fees are to be imposed should remain above the Disability Support Pension. Also noted that this will be monitored regularly.
SR No. 136 – Plumbing Regulations 2008	Minster for Planning	Commended the Department of Planning and Community Development on the detail of responses given to those who made submissions to the RIS process.
SR No. 163 – Charter of Human Rights and Responsibilities (Public Authorities) (Interim Regulations) 2008	Attorney-General	Sought further advice as to how section 7(2) of the Charter is satisfied in relation to the current Regulations.

APPENDIX 4

COMMITTEE PRACTICE NOTES

EXEMPTIONS AND EXCEPTIONS

- **Dating Certificates.** The Subcommittee has occasionally been presented with undated exemption and exception certificates. The Subcommittee expects all certificates to be dated.
- **Reasons for Exemption.** The Subcommittee has occasionally received regulations exempted under section 9 with certificates of exemption which fail to adequately explain the reasons for granting the exemption or with reasons for granting the exemption contained in the Explanatory Memorandum. It should be noted that it is a requirement of section 9(2) of the *Subordinate Legislation Act 1994* (Vic) that certificates of exemption 'specify the reasons for the exemption'. The Subcommittee expects all exemption certificates to contain adequate explanations of the reasons for granting the exemptions.
- **Extension of Regulations for Periods up to 12 months.** Regulations expire 10 years after they have been made. The Subcommittee has been presented with a number of regulations made under sections 8(1)(d)(iii) and 5(3) extending regulations due to expire for periods up to 12 months. Before an extension of time can be granted, the Minister must certify that due to 'special circumstances' there is insufficient time available to comply with the formal regulation-making requirements of the *Subordinate Legislation Act 1994*. The Subcommittee expects details of the 'special circumstances' to be contained in the section 5(3) certificate itself as required by the *Subordinate Legislation Act 1994*. Please see additional general comments below.
- **Using Appropriate Exemption and Exception Categories.** Department and agency officers need to be careful when determining which category to use when exempting and excepting regulations from the Regulation Impact Statement process. The Subcommittee has occasionally received regulations which are incorrectly exempted and excepted.
- **Typographical Errors.** Department and agency officers need to be careful when preparing certificates to ensure that they do not contain typographical errors.

EXTENSION OF TIME

The Subcommittee is often presented with regulations which require an extension of time for a period of twelve months. Such regulations are accompanied by a section 5(3) certificate of special circumstances which outlines the particular reasons for the extension. It is difficult for the Subcommittee to know whether any particular regulation has been accompanied by a previous extension of time certificate. Ongoing extensions of time in respect of a particular regulation are clearly matters upon which the Subcommittee would make adverse comment.

The Subcommittee expects that in the event a second or subsequent extension of time is sought for a regulation (in addition to an initial request), the Minister informs it that this is the case.

EXPLANATORY MEMORANDA

The Subcommittee expects Explanatory Memoranda to comply with the requirements contained in Paragraph 8.10 Premier's Guidelines. An Explanatory Memorandum must contain: –

- A brief outline of each provision;
- An explanation of the changes effected by each provision;
- A statement of the reasons for making the rule;
- Where applicable, the reasons why no regulatory impact statement was prepared;
- A statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult.

FEE INCREASES: 8(1)(A) AND 8(2)

Regulations increasing fees made under section 8(1)(a) of the Subordinate Legislation Act 1994 (Vic) must not increase fees by more than the percentage set by the Treasurer. For each financial year a percentage increase is set by the Treasurer. The Treasurer notifies the Subcommittee in writing of the relevant percentage increase.

A regulation may increase a number of fees, with some individual fee increases falling outside the rate set by the Treasurer. However when the total average of fee increases for that regulation is calculated, it falls within the rate fixed by the Treasurer. This practice is referred to as the 'basket approach'. Paragraph 5.25 of the Premier's Guidelines provides that:-

It is acceptable to make a statutory rule setting a package of fees. This is known as the 'basket approach'. However, the exception available in section 8(1)(a) does not apply if any individual fee component in the package exceeds the Treasurer's annual rate. It does not matter if the average fee increase across the package is less than the annual rate. If any individual fee is increased above the annual rate, a RIS process needs to be undertaken as the fee increase may have a significant and adverse impact on the community and business.

Section 8(2) of the Subordinate Legislation Act 1994 (Vic) validates the rounding up of fee increases to the nearest whole dollar. Sometimes the total average increase may be greater than that set by the Treasurer but may be validated on the basis that there has been rounding up to the nearest whole dollar. The Subcommittee may only approve such increases where the extra amount can be considered trifling when compared to the whole fee. Where the amount is significant in proportion to the whole fee, the Subcommittee may request the Minister to reconsider the increase.

The Subcommittee is bound by the Premier's Guidelines. A strict interpretation of the Premier's Guidelines leads to the view that as a matter of principle individual fees in a 'basket' package should not exceed the Treasurer's annual rate. However, the Subcommittee is of the view that fee increases and the Premier's Guidelines need to be read in a commonsense manner. Clearly, it is often sensible to introduce a 'basket' package of fees. It is a more efficient and streamlined manner of introducing a large number of routine fee increases. In this instance monetary increases were extremely small.

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee's view is that it is a matter of balance. The 'basket' of fees in its entirety must not exceed the Treasurer's approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer's annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine

each fee increase, the monetary amount and what the fee is for. Each regulation will be examined on its merits and in context.

The Subcommittee will continue to carefully scrutinise the regulations and the Premier's Guidelines.

The preparation of a table showing new and old fees and including an indication of the percentage increase or decrease is of great assistance to the Subcommittee. The Subcommittee provides the following as an example:

Description	Current Fee	Proposed Fee	% Increase
Application for	\$100.00	\$105.00	5.0
Application for ...	\$320.00	\$325.00	1.6

INDEPENDENT ADVICE CERTIFICATES: 10(3)

Under section 10(3) of the Subordinate Legislation Act 1994 (Vic) a Minister must ensure that independent advice as to the adequacy of a Regulation Impact Statement is obtained. The provision of that independent advice assists the Subcommittee in its review of the regulations.

LEGISLATIVE INSTRUMENTS OUTSIDE THE SUBORDINATE LEGISLATION ACT 1994

The Subcommittee plays a vital role in ensuring that rights are adequately protected. It cannot do this if provisions are incorporated in legislative instruments outside its scrutiny. The Subcommittee prefers department and agency officers not to use Guidelines and Codes of Practice. Where Guidelines and Codes of Practice are used the Subcommittee would like those Guidelines and Codes of Practice to be published and available to the public at the same time as the regulation commences operation.

PROVISION OF DOCUMENTATION TO REGULATION REVIEW SUBCOMMITTEE

The Subcommittee needs to receive Explanatory Memoranda, all certificates, Regulation Impact Statements and comments and submissions made in relation to Regulation Impact Statements within 7 days after a regulation has been made. The Subcommittee has a limited time within which to review regulations. If the Committee wants to move for disallowance of a regulation it must do so within 18 sitting days of that regulation being tabled in Parliament. Prior to the Committee moving a motion for disallowance, the Subcommittee corresponds and negotiates with the particular Minister. The Subcommittee needs sufficient time for this process to take place.

Paragraph 5.51 of the Premier's Guidelines provides that: -

All certificates required under the Act are to be signed and dated with the date of the day of signing. Copies of all certificates prepared in the course of making statutory rules are to be forwarded to SARC within 7 days of the making of the statutory rule, or within 7 days of the establishment of SARC (whichever is the longer period of time).

RECOMMENDATIONS

The Subcommittee notes that some regulations are made on the recommendation of a Minister or some other authorised body. If the Subcommittee is provided with a copy of the recommendation, it can certify that the regulations have been validly made in accordance with that recommendation. The Subcommittee would appreciate receiving copies of all recommendations.

APPENDIX 5
SARC REGULATIONS CHECKLISTS

EXCEPTIONS AND EXEMPTIONS

CHECKLIST:

**Exception Certificate –
Section 8**

- Recommendation to make Regulations (Letter signed by Minister) *(Optional)*
- Explanatory Memorandum
- Section 8 (Exception Certificate)
- Section 12A Human Rights Certificate
- Section 13 Certificate (Parliamentary Counsel) ****
- Copy of draft regulations *(Optional)*

**Court Rules –
Section 8(1)(b)**

- Explanatory Memorandum
- Section 8 (Exception Certificate)
- Section 12A(3)(a) Human Rights Exemption Certificate

**Extension of
Time –
Section 8(1)(d)(iii)**

- Recommendation to make Regulations (Letter signed by Minister) *(Optional)*
- Explanatory Memorandum
- Section 8(1)(d)(iii) Exception Certificate
- Section 5(3) Certificate (Minister certifies insufficient time to make new regulations)
- Section 12A(3)(b) Human Rights Exemption Certificate
- Section 13 Certificate (Parliamentary Counsel) ****
- Copy of draft regulations *(Optional)*

**Exemption Certificate –
Section 9**

- Recommendation to make Regulations (Letter signed by Minister) *(Optional)*
- Explanatory Memorandum
- Section 6 Certificate (Consultation) *(Optional)*
- Section 9 Exemption Certificate
- Section 12A Human Rights Certificate
- Section 13 Certificate (Parliamentary Counsel) ****
- Copy of draft regulations *(Optional)*

****Note Section 13 certificates are not required for court rules or for regulations which are not made by Governor-in-Council. For example the Regulations may be exempt under section 9(1)(a) and made by the Council of Legal Education. No s. 13 certificate is required in these circumstances.

Please forward all relevant documents to:
Executive Officer,
Scrutiny of Acts and Regulations Committee,
Parliament House, Spring Street
MELBOURNE VIC 3000

Updated
20.01.2009

REGULATION IMPACT STATEMENTS

CHECKLIST:

- Explanatory Memorandum
- Section 6 Certificate (Consultation)
- Section 10(4) Certificate (Compliance with requirements of SLA)
- Section 10(3) Certificate (Letter of Independent Assessment) (*Optional*)
- Section 12A Human Rights Certificate
- Section 13 Certificate (Parliamentary Counsel)
- Recommendation to make Regulations (Letter signed by Minister) (*Optional*)
- Regulation Impact Statement
- Copy of all submissions
- Summary of all submissions
- Copy of letters sent to those who made submissions
- Copy of draft regulations (usually part of RIS)

Please forward all relevant documents to:
Executive Officer,
Scrutiny of Acts and Regulations Committee,
Parliament House, Spring Street
MELBOURNE VIC 3000

Updated
20.01.2009