

# **No. 1 of 2009**

**Tuesday, 3 February 2009**

**On the**

Assisted Reproductive Treatment  
Bill 2008

Associations Incorporation  
Amendment Bill 2008

Bus Safety Bill 2008

Criminal Procedure Bill 2008

Duties Amendment Bill 2008

Equal Opportunity Amendment  
(Governance) Bill 2008

Fair Trading and Other Acts  
Amendment Bill 2008

Liquor Control Reform Amendment  
(Enforcement) Bill 2008

Melbourne Cricket Ground Bill 2008

Occupational Health and Safety  
Amendment (Employee Protection)  
Bill 2008

Relationships Amendment (Caring  
Relationships) Bill 2008

Resources Industry Legislation  
Amendment Bill 2008

Salaries Legislation Amendment  
(Salary Sacrifice) Act 2008

Transport Legislation Amendment (Driver  
and Industry Standards) Act 2008

Transport Legislation General  
Amendments Bill 2008

Transport Legislation Miscellaneous  
Amendments Bill 2008

Workplace Rights Advocate  
(Repeal) Bill 2008

# Table of Contents

---

	<b>Page Nos.</b>
<b>Alert Digest No. 1 of 2009</b>	
Associations Incorporation Amendment Bill 2008	1
Bus Safety Bill 2008	4
Criminal Procedure Bill 2008	9
Duties Amendment Bill 2008	18
Equal Opportunity Amendment (Governance) Bill 2008	19
Fair Trading and Other Acts Amendment Bill 2008	21
Liquor Control Reform Amendment (Enforcement) Bill 2008	23
Melbourne Cricket Ground Bill 2008	25
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	26
Resources Industry Legislation Amendment Bill 2008	29
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	30
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	33
Transport Legislation General Amendments Bill 2008	36
Transport Legislation Miscellaneous Amendments Bill 2008	38
Workplace Rights Advocate (Repeal) Bill 2008	40
<b>Ministerial Correspondence</b>	
Assisted Reproductive Treatment Bill 2008	41
Relationships Amendment (Caring Relationships) Bill 2008	43
<b>Appendices</b>	
1 – Index of Bills in 2009	47
2 – Committee Comments classified by Terms of Reference	49
3 – Ministerial Correspondence	51

## Glossary



- ‘**Article**’ refers to an Article of the International Covenant on Civil and Political Rights;
- ‘**Assembly**’ refers to the Legislative Assembly of the Victorian Parliament;
- ‘**Charter**’ refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*;
- ‘**child**’ means a person under 18 years of age;
- ‘**Committee**’ refers to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament;
- ‘**Council**’ refers to the Legislative Council of the Victorian Parliament;
- ‘**court**’ refers to the Supreme Court, the County Court, the Magistrates’ Court or the Children’s Court as the circumstances require;
- ‘**Covenant**’ refers to the International Covenant on Civil and Political Rights;
- ‘**human rights**’ refers to the rights set out in Part 2 of the Charter;
- ‘**penalty units**’ refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (currently one penalty unit equals \$113.42).
- ‘**Statement of Compatibility**’ refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights.
- ‘**VCAT**’ refers to the Victorian Civil and Administrative Tribunal;

## Useful provisions

Section 7 of the **Charter** provides –

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

- (2) *A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—*
- (a) *the nature of the right; and*
  - (b) *the importance of the purpose of the limitation; and*
  - (c) *the nature and extent of the imitation; and*
  - (d) *the relationship between the limitation and its purpose; and*
  - (e) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

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

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



# Terms of Reference

## *Parliamentary Committees Act 2003*

### **17. Scrutiny of Acts and Regulations Committee**

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

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
  - (i) trespasses unduly upon rights or freedoms;
  - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
  - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
  - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
  - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
  - (vi) inappropriately delegates legislative power;
  - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
  - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
  - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
  - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
  - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –
  - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
  - (ii) within 10 sitting days after the Act receives Royal Assent —  
whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

## **The Committee has considered the following Bills –**

Associations Incorporation Amendment Bill 2008  
Bus Safety Bill 2008  
Criminal Procedure Bill 2008  
Duties Amendment Bill 2008  
Equal Opportunity Amendment (Governance) Bill 2008  
Fair Trading and Other Acts Amendment Bill 2008  
Liquor Control Reform Amendment (Enforcement) Bill 2008  
Melbourne Cricket Ground Bill 2008  
Occupational Health and Safety Amendment (Employee Protection) Bill 2008  
Resources Industry Legislation Amendment Bill 2008  
Salaries Legislation Amendment (Salary Sacrifice) Act 2008  
Transport Legislation Amendment (Driver and Industry Standards) Act 2008  
Transport Legislation General Amendments Bill 2008  
Transport Legislation Miscellaneous Amendments Bill 2008  
Workplace Rights Advocate (Repeal) Bill 2008

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

Assisted Reproductive Treatment Bill 2008  
Relationships Amendment (Caring Relationships) Bill 2008



### **Role of the Committee**

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

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

# Alert Digest No. 1 of 2009

---

## Associations Incorporation Amendment Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Tony Robinson MLA
<b>Portfolio responsibility</b>	Minister for Consumer Affairs

### Background

First enacted in 1981 the *Associations Incorporation Act 1981* (the 'Act') provides a simple and inexpensive means by which unincorporated non-profit associations could obtain corporate status. The Act regulates the creation, operation and dissolution of incorporated associations, and is the most popular vehicle for the incorporation of community and non-profit groups in Victoria. At 30 June 2008, there were 34,385 incorporated associations on the register of incorporated associations.

### Purpose

#### [Clauses]

The Bill amends the Act to –

1. Merge the role of public officer and secretary of an incorporated association so that the secretary will assume all roles currently undertaken by the public officer. **[31 to 34]**
2. Introduce measures to improve the rights of members to access information about their incorporated association and its operations by requiring the rules of an incorporated association to set out a clear statement of members' rights of access to accurate minutes of meetings and accessing or inspecting the association's financial accounts. **[35]**
3. Amend the Schedule to the Act to provide that the rules of an incorporated association must provide for the preparation and retention of accurate minutes of general meetings of the association and of meetings of the committee or other body of management of the incorporated association. **[35]**
4. Require that the rules of the association specify the rights and procedures for members to examine or obtain copies of minutes of meetings and of the accounting records and financial statements of the incorporated association. **[35]**
5. Provide that an auditor of an incorporated association can only be removed from office by resolution at a general meeting of the association and that appropriate notice of the proposed removal of an auditor will be required to be given to all members and to the auditor prior to the general meeting at which the matter is to be considered. **[11]**
6. Provide a defence of qualified privilege to statutory managers, administrators and auditors appointed in accordance with the Act. Qualified privilege provides a statutory defence in circumstances where a statement whether written or oral may otherwise be perceived as defamatory. **[27]**

**Note: Qualified privilege** A privilege offering protection in an action in defamation where the person who made the communication had an interest or a duty, 'legal, social, or moral', to

*make it to the person to whom it was made, and the person to whom it was made had a corresponding interest or duty to receive it: Adam v Ward [1917] AC 309; Mouwlds v Fergusson (1940) 64 CLR 206. It will not be available if the publication was motivated by malice or an improper purpose: Calwell v Ipec (1975) 135 CLR 321; 7 ALR 553.<sup>1</sup>*

7. Provide measures that when a member or committee member resigns or otherwise ceases to hold office, that member must return to the secretary of the incorporated association, any documents that they possessed by virtue of being a member or committee member. Where documents are not returned the bill provides that an incorporated association may apply to the Magistrate's Court for an order directing a person to return documents to the association. **[10]**
8. Provide for improved notice to be given to members of important proposals such as special resolutions that need to be considered by a general meeting of the association including adequate detail of the content of the resolution. **[9]**
9. Clarify that an incorporated association must not act outside of the powers provided by its rules and must not act outside the scope of its statement of purposes and provide that if an incorporated association acts outside its statement of purpose, a member of the association or the registrar may bring proceedings in the Magistrate's Court to restrain the incorporated association from doing so. **[5]**
10. Introduce new provisions that will enable a member or former member of an incorporated association to apply to the Magistrates Court to seek an order in circumstances where it is alleged that the association has engaged or proposes to engage in conduct that is oppressive. The Magistrates Court will be able to make a range of orders including an order restraining or requiring a person to do a specific thing or an order to reinstate a member or refer proceedings to the Supreme Court if the proceedings raise a complex question or matter of general importance, a question of law or if it appears that an incorporated association may need to be wound up. **[6], [27]**
11. Provides that the Registrar will be a body corporate with perpetual succession under the name of Registrar of Incorporated Associations and provide the Registrar with additional power to clarify the validity of lodged documents and allow the Registrar to refuse to accept documents lodged under the Act if the registrar is of the opinion that they may not be valid. The incorporated association will be entitled to provide the registrar with minutes of meetings and any other documents or information necessary to support the validity of documents that have been lodged. Where the Registrar declines to accept the documents, an incorporated association will be able to request that the Registrar refer the matter to the Magistrates Court for a declaration regarding their validity. **[22], [25]**
12. Allow the Registrar a discretion to accept some alterations made to the rules by a special resolution and reject others which are illegal or beyond power , even if the valid and invalid provisions have been the subject of the same special resolution. **[8]**
13. Enable the Registrar by application to the Magistrates' Court following an investigation into the affairs of the incorporated association to seek the appointment of a temporary statutory manager to manage the affairs of an incorporated association in circumstances where there is evidence of serious dysfunction in the operations of an association rather than seeking to have the incorporated association wound up. The expenses of the statutory management are to be paid from the funds of the incorporated association. **[12]**
14. Introduce new provisions that will enable small incorporated associations with surplus assets of less than \$10,000 to apply to the registrar for voluntary cancellation of their incorporation, thereby removing the need (and saving the cost) for these associations to appoint a liquidator. **[18]**

---

<sup>1</sup> Concise Australian Legal Dictionary, *Butterworths*, Second Edition, page 359

15. Introduce the ability for incorporated associations to apply for voluntary administration by applying the relevant provisions of the Commonwealth Corporations Act with appropriate modifications. [14].
16. Provide that generally, when an incorporated association is wound up, voluntarily or otherwise, the surplus assets of the association cannot be distributed to a member, a former member or to any person who would hold the assets on trust for a member or former member. The amendments also provide for a number of exceptions including incorporated associations that currently specify in their rules that assets may be distributed to members. A person aggrieved by the general prohibition may apply to the Supreme Court for an order permitting distribution in a way contrary to the incorporated association's rules. [15].
17. Provide that on winding up where an asset or part of an asset consists of property supplied by a government department or public authority (whether State, Commonwealth or Municipal) that property must be returned to the Department or authority that supplied it or to a body nominated by that Department or authority and this will include items such as the unexpended portion of a government grant. [15].

## Content and Committee comment

The provisions in the Bill (except Parts 3 and 4) will come into operation on the day after Royal Assent. Part 3 and Part 4 (clauses 31 to 35) are each to commence operation on a day to be proclaimed or if no date has then been proclaimed, on 1 December 2011. [2].

**Note:** From the explanatory memorandum – *Part 3 changes references in the Act from 'public officer' to 'secretary', and Part 4 specifies matters that the rules of an incorporated association must set out. A default date of 1 December 2011 has been specified in order to allow sufficient time for the Model Rules set out in the regulations to be revised to include the new matters and to recognise the change from "public officer" to "secretary". This will also enable incorporated associations sufficient lead-time to amend their own rules to comply with the new requirements.*

### **Delayed commencement – In appropriate delegation of legislative power – Implementation of new rules by no-profit associations – Whether sufficient justification for delay**

*The Committee notes the explanation for the delayed commencement of the provisions relating to the new model rules and the new title of 'secretary' replacing 'public officer'.*

*The Committee accepts that in the case of community and non-profit smaller incorporated associations a longer lead time may be desirable to allow these bodies to amend their rules to ensure compliance with the new legislative requirements.*

**The Committee makes no further comment.**

## Bus Safety Bill 2008

Introduced	2 December 2008
Second Reading Speech	4 December 2008
House	Legislative Assembly
Member introducing Bill	Hon. Lynne Kosky MLA
Portfolio responsibility	Minister for Transport

### Background

The Bill proposes a new principal Act to make provision for the safe operation of bus services.

**Notes:** From the Second Reading Speech –

- *More than 40 per cent of the bus fleet is currently unregulated for safety.*
- *Bus safety is currently regulated by an operator accreditation scheme in the Public Transport Competition Act 1995 and by miscellaneous prescriptive offences in the Transport (Passenger Vehicles) Regulations 2005.*
- *The current definition of 'bus' is a passenger vehicle with more than 12 seating positions, including the driver. This misses minibuses and is inconsistent, not only with the requirements in most Australian jurisdictions, but also with the relevant Australian design rules.*
- *This Bill now extends the definition of 'bus' in line with the Australian design rules, which define a bus as a passenger vehicle with 10 or more seating positions including the driver.*
- *[the] Bill imposes performance-based duties of care on all industry participants who are in a position to influence the safety of the operation what is called the 'chain of responsibility'.*
- *New probity standards will also be introduced, with the inclusion of disqualification offences – essentially past criminal convictions which, depending on their seriousness, may disqualify an applicant from obtaining accreditation.*
- *It is not proposed to compel bus operators to impose drug and alcohol testing on drivers or other relevant employees. Instead, the Bill requires the operator to develop a drug and alcohol policy in consultation with employees.*
- *These provisions give the safety director regulatory tools including improvement notices (which require a duty holder to remedy a safety breach) and, in more critical circumstances, prohibition notices (which enable the Safety Director to prohibit the duty holder from carrying out an unsafe activity until the situation is remedied). In each case, failure to comply with the notice is an offence.*
- *The Rail Safety Act and Road Safety Act give courts a wide range of sentencing options after a finding of guilt is made in relation to a safety offence. These, too, will now be available in relation to bus safety offences.*

### Content and Committee comment

#### [Clauses]

#### **Delayed commencement**

[2]. Clauses 1, 2 and 80 to come into operation on the day after Royal Assent the remaining provisions of the Bill come into operation on a day to be proclaimed but not later than by 31 December 2010.

**Note:** Extract from the Second Reading Speech –

*The new Act comes into operation on a date to be proclaimed, with 31 December 2010 targeted as the default commencement date. This will allow time for the industry and the regulator to adapt to the new requirements, and for certain operators and services using minibuses to transition from hire car and special purpose vehicle licensing schemes to the new bus scheme.*

*Subordinate instruments necessary for the operation of the new scheme will be developed during 2009 and 2010. These will include regulations, a code or codes of practice, and a compliance and enforcement policy. Each will involve further consultation with industry and other stakeholders.*

**Delayed commencement – Inappropriate delegation of legislative power – New regulatory scheme – Whether sufficient justification for delay**

*The Committee notes the reasons given for a delayed commencement of up to two years. The Committee observes that where new regulatory schemes are introduced requiring industry familiarization and new subordinate instruments to be developed, requiring regulatory impact assessments requiring public consultation, that these factors may justify an extended commencement provision.*

[8]. Empowers the Minister to declare, by notice in the Government Gazette, that a substance is a drug for the purposes of Part 5 (Drug management policy).

Part 2 sets out the key principles which underpin the regulatory scheme established by the Bus Safety Bill.

Part 3 of the Bill introduces the concept of 'ensuring safety', and a suite of duties for various persons and classes of persons involved in the provision of bus and bus related services.

Part 4 establishes a new accreditation scheme for operators of commercial and local bus services, and requires other providers of bus services to be registered.

[24]. Prohibits an operator from operating a commercial bus service or a local bus service unless the operator is accredited under Part 4.

[27]. Requires the Safety Director to refuse an application for accreditation if he or she believes on reasonable grounds that the applicant or responsible person has been found guilty of a tier 1 offence (defined in clause 3); or the applicant or responsible person is subject to a reporting obligation or an order referred to in section 12(1)(a) or (b) of the *Working with Children Act 2005*; or the applicant is disqualified from obtaining the accreditation, based on the cancellation of a previous accreditation; or the applicant is insolvent, or has been placed in administration under law; or a receiver, or receiver and manager, has been appointed; or a court has made an order for the winding up of the applicant.

[28]. Requires the Safety Director to refuse an application for accreditation if he or she believes on reasonable grounds that the applicant or responsible person has been found guilty of a tier 2 offence (clause 3), unless the applicant can demonstrate that accreditation is appropriate in the circumstances and empowers the Safety Director to refuse an application for accreditation if he or she believes on reasonable grounds that the applicant or responsible person has been found guilty of a tier 3 offence (defined in clause 3 – other criminal offences or their equivalent on other jurisdictions), or that the applicant has contravened a current or past condition of accreditation.

[29]. Empowers the Safety Director to postpone a decision on accreditation if the applicant or responsible person has been charged with a disqualifying offence, the charge has not been

finally disposed of and the Safety Director believes that a finding of guilt would be relevant to his or her decision.

[30]. Empowers the Safety Director to disqualify an applicant whose accreditation application has been refused from applying for accreditation for a period not exceeding 5 years.

[48]. Empowers the Safety Director to immediately suspend an accreditation, if he or she considers it necessary, without holding an inquiry under clause 50 of this Bill.

[50]. Empowers the Safety Director to hold an inquiry to determine whether proper cause exists for taking disciplinary action against an accredited bus operator.

Part 5 requires bus operators, to develop, maintain and implement an alcohol and drug management policy.

Part 6 provides certain persons affected by decisions of the Safety Director, to apply to the VCAT for review of a decision to refuse, suspend or cancel accreditation; impose a condition on accreditation; vary or not vary accreditation; or disqualify an operator from applying for accreditation.

Part 7 of the Bill contains provisions for the approval of codes of practice by the Minister. Codes of practice will contain operational guidelines and standards to give practical guidance to accredited bus operators and any other person on whom this Bill may place obligations.

[64]. Provides that a person does not incur any civil or criminal liability, only as a result of failing to observe any provision of an approved code of practice.

Part 8 deals with general matters, including offences for misleading and deceptive conduct, the setting of accreditation fees, offences by bodies corporate, disallowance of approved codes of practice, the effect of compliance with regulations or approved codes of practice, and the making of regulations.

[65]. Requires an accredited bus operator or registered bus operator to notify the Safety Director of prescribed incidents in accordance with the regulations. It is an offence not to comply with this clause, and a penalty of 50 penalty units applies.

[67]. Empowers the Safety Director to set accreditation fees by notice published in the Government Gazette. Clause 67(4) provides that a fee set by the Safety Director is not limited to an amount that is related to the cost of providing a service.

**Insufficiently subjects the exercise of legislative power to parliamentary scrutiny – Total absence of explanatory material**

*The Committee notes that the explanatory memorandum avoids any mention of this provision (clause 67(4)). The Committee refers to Practice Note No. 1 of 2005 concerning inadequate explanatory material provided with a Bill. The Committee considers that where Parliament is provided with insufficient advisory matter for it to exercise its legislative discretion this may be in breach of section 17(a)(vii) of the Parliamentary Committees Act 2003 (insufficiently subjects the exercise of legislative power to parliamentary scrutiny).*

**Inappropriate delegation of legislative power – Fees levied by Safety Director without relation to cost of providing service – Whether taxation (not fee for service) by means of subordinate instrument**

*The Committee considers that a fee making provision which is not related to recovering costs of providing a service may be characterised as a form of taxation and therefore the Committee considers that the proper authority for such a power should be found in primary*

*legislation not as a discretionary executive power. Such a taxation power may constitute an inappropriate delegation of legislative power within the meaning of section 17(a)(vi) of the Parliamentary Committees Act 2003.*

*The Committee will seek further information from the Minister concerning the purpose or intention of making a provision that allows accreditation fees to be set without regard to the cost of the service and drawing the Minister's attention to the inadequate explanatory material provided with the Bill.*

[71]. Provides for the tabling and disallowance of approved codes of practice in Parliament.

## Charter report

**Impairment discrimination – Barriers to accreditation for people found not guilty of certain offences on the basis of mental impairment – Whether discrimination – Whether reasonable limit**

***Summary: Clause 3(d) treats people in similar circumstances differently, by imposing barriers to accreditation on people who involuntarily commit crimes because of a mental impairment, but imposing no barriers on people who involuntarily commit the same crimes for other reasons that may affect public safety. It may therefore limit the Charter rights of people who have or had a mental impairment to equal protection of the law without discrimination. The Committee is concerned that there may be 'less restrictive means reasonably available to achieve the purpose' of protecting public safety.***

The Committee notes that clause 3(3)(d)(i) & (ii) provides that people found not guilty of an offence on the basis of 'mental impairment'<sup>2</sup> are to be treated as if they had been found guilty of the offence for the purposes of the Bill. Such people hence become subject to the various special barriers for certain offenders to accreditation (or continuing accreditation) as operators of bus services under clauses 27, 28, 49 and 50.<sup>3</sup> These clauses engage the Charter's right to equal protection of the law without discrimination on the basis of 'impairment'.<sup>4</sup>

The Statement of Compatibility remarks:

*In my view, the provisions do not amount to disability discrimination. This is because the accreditation decision or disciplinary action is not made on the basis of the person's mental impairment. Rather, the action is taken because of the fact of the person having committed the actus reus<sup>5</sup> of the offence, and in the interest of public care and safety.*

However, the Committee observes that a finding of not guilty on the basis of mental impairment can be made even when the person's actions are involuntary, if the

<sup>2</sup> s. 20, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. The category also includes people who were the subject of similar findings under non-Victorian laws, as well as Victorians acquitted under the common law defence of insanity and who fall within the terms of Schedule 3, clause 7(2) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

<sup>3</sup> For tier 1 offences, the Director must refuse applications and revoke accreditation: clauses 27(a)(i) & 49. For tier 2 offences, there is a presumption against accreditation and in favour of cancellation: clauses 28(1) & 50(4). For tier 3 offences, there is a discretion to refuse accreditation and automatic 'proper cause for taking disciplinary action': clauses 28(2)(a) & 50(2)

<sup>4</sup> Charter s. 8(3). Discrimination is defined in the *Equal Opportunity Act 1995* to include discrimination on the basis of 'impairment', including a 'mental or psychological disease or disorder.'

<sup>5</sup> 'Actus reus' means the physical side of the crime: the things the offender voluntarily did, the circumstances in which it occurred and the results that followed. That is distinct from the mental side of the crime: what the offender was thinking when he or she did those things,

involuntariness was due to a mental impairment.<sup>6</sup> By contrast, people who act involuntarily for other reasons, including intoxication, temporary psychosis or a disorder that does not qualify as a mental impairment (such as sleepwalking or automatism) will be acquitted. So, **clause 3(d) treats people in similar circumstances differently, by imposing barriers to accreditation on people who involuntarily commit crimes because of a mental impairment, but imposing no barriers on people who involuntarily commit the same crimes for other reasons that may also affect public safety. The Committee therefore considers that clause 3(3)(d) may limit the Charter rights of people who have or had a mental impairment to equal protection of the law without discrimination.**

The compatibility of clause 3(3)(d) with the Charter may depend on whether or not the barriers to accreditation for people found not guilty on the basis of mental impairment are reasonable limits on the right to equality according to the test in Charter s. 7(2).<sup>7</sup> The Statement of Compatibility remarks:

*[O]nly those found guilty of serious offences described in the bill as tier 1 offences, are excluded from accreditation or suspended on a mandatory basis. Tier 2 and 3 offences trigger discretion on the part of the Safety Director, which must be exercised compatibly with the Charter. Furthermore, a person may apply to VCAT for review of accreditation and certain disciplinary decisions by the Safety Director.*

While the Committee considers that these provisions reduce the limitation that clause 3(3)(d) may impose on the Charter's equality rights, **the Committee is concerned that there may be 'less restrictive means reasonably available to achieve the purpose' of protecting public safety.**<sup>8</sup> In particular, clauses 26, 48 and 50 empower the Director to reject any application or suspend or cancel any registration in a variety of circumstances relating to public safety, whether or not a crime was committed or why.

***The Committee will write to the Minister seeking further information as to whether or not the Director's general powers under clauses 26, 48 and 50 are a less restrictive means reasonably available to achieve the purpose of protecting bus passengers from people who are found not guilty of crimes on the basis of mental impairment. Pending the Minister's response the Committee draws attention to clause 3(3)(d)."***

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

---

<sup>6</sup> Section 21(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* c.f. *R v Falconer* (1990) 171 CLR 30.

<sup>7</sup> Charter s. 7(2) states: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom...'

<sup>8</sup> Charter s. 7(2)(e).

## Criminal Procedure Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Portfolio responsibility</b>	Attorney-General

### Purpose

The purposes of the Bill are to —

1. Clarify, simplify and consolidate the laws relating to criminal procedure in the Magistrates' Court, the County Court and the Supreme Court;
2. Introduce a new procedure permitting the service of a notice to appear in the Magistrates' Court;
3. Provide new pre-trial disclosure requirements for the prosecution;
4. Provide for a 6-month time limit for the filing of charges for summary offences in the Children's Court;
5. Provide for the transfer to the County Court or Supreme Court of summary offences related to an offence to be tried on indictment by that court;
6. Abolish the procedure of indictment by grand jury;
7. Provide for interlocutory appeals in criminal proceedings in the County Court and the Supreme Court;
8. Clarify the tests relating to determination by the Court of Appeal of appeals;
9. Provide for the stay of sentences on appeal;
10. Amend the *Sentencing Act 1991* to provide for a maximum fine that may be imposed for an indictable offence that is heard and determined summarily;
11. Amend the *Crimes Act 1958*, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, the *Magistrates' Court Act 1989*, the *Children, Youth and Families Act 2005* and the *Appeal Costs Act 1998*;
12. Repeal the *Crimes (Criminal Trials) Act 1999*;
13. Make consequential and other amendments.

### Content and Committee comment

#### [Clauses]

#### ***Rights and freedoms – Liberty of the person – Arrest and Bail of persons***

The Bill contains provisions that deal with Bail pending or during the course of proceedings or pending and after an appeal. [265], [310], [323], [359], [362]

A number of provisions give powers for a court to issue a warrant to arrest an accused to ensure his or her attendance at relevant proceedings. [80-81], [87], [268], [330]

***Right to a fair hearing – Special procedural provisions for vulnerable witnesses in sexual offences – Time for commencement of summary offences abridged where accused is a child***

There are special provisions in the Bill providing for the giving of evidence and cross-examination of child and cognitively impaired complainants in respect to sexual offences. Further there are shorter time limits for holding committal hearings, filing indictments and the holding of trials in respect to such complainants. [8], [17], [23], [24], [123], [163], [212]

There are shortened time limits of six months rather than twelve months within which a summary offence must be brought where the accused is a child. There is power to extend this to 12 months in appropriate cases. [376]

*The Committee notes the special provisions in the Bill for child and cognitively impaired complaints and considers that the question whether these special provisions are proportionate and rationally connected to protecting vulnerable witnesses with reduced capacity whilst preserving procedural fairness (found in other provisions of the Bill) for an accused is a matter for the consideration of Parliament.*

***Right to silence – Accused required to plead at conclusion of committal***

At the end of a committal hearing the court must ask the accused whether he or she wishes to plead guilty or not guilty to the charge(s) but not whether they wish to reserve their plea. [144]

*The Committee observes that it raised this issue in respect to the Criminal Procedure Legislation Amendment Bill 2007 and notes the Attorney-General's response to the Committee's concerns.*

*The Committee further observes the point made in the Statement that - in response to the Magistrate's question 'an accused may choose to answer or not answer. There is no mechanism to compel an answer'. A non-answer will be treated as a plea of not guilty.*

***Presumption of innocence – Prosecutorial responsibility to prove elements of offence – Whether defence disclosure compatible with that duty***

The Bill includes a number of clauses that require the defence to disclose certain matters prior to trial. The defence must disclose (give prior notice) alibi evidence [51], [190] and expert evidence [50], [189]. In addition the defence may be required to give information for case management purposes, such as any special requirements of witnesses and narrowing the disputed case against the accused by responding to the prosecutions outline of the case against the accused [55], [125], [179], [182], [183]

*The Committee notes these provisions and accepts that it is desirable in all the circumstances to strike a balance between an accused's rights and efficient case management. The Committee does not consider that any of the provisions limit or abrogate the common law right that the prosecution prove each element of the offence(s).*

***Fair trial – Right to legal representation – No common law right to legal representation***

The Committee observes that there is no common law right in Australia to be legally represented.<sup>9</sup>

---

<sup>9</sup> *McInnis v R* (1979)143 CLR 575; 27 ALR 449

The Bill proposes to re-enact section 360A of the *Crimes Act 1958* which prevents courts from staying or adjourning trials because an accused has been refused legal assistance. The section arose from the decision of the High Court in *R v Dietrich* (1992) 177 CLR 292. There it was held that a court has an inherent jurisdiction to stay (even permanently) a trial where the absence of legal representation, at least in trials for very serious offences, may result in injustice. The Bill empowers the court to order Victorian Legal Aid (VLA) to provide legal assistance. VLA may appeal such an order to the Court of Appeal. The burden of proof that an accused cannot afford legal assistance rests with the accused. Courts retain an inherent jurisdiction proceedings until representation is provided if a fair hearing cannot otherwise be assured. [197]

*The Committee notes the decision in R v Dietrich and the State's response to overcome any impasse that may arise from a stay of proceedings. The Committee further recognizes that there may be circumstances where an accused refuses legal assistance even when eligible for legal aid and cases where an accused, whilst able to engage counsel will seek to represent themselves.*

*The question whether the provisions achieve a fair and proportionate balance to ensure a fair trial is for Parliament to determine.*

***Right to be presumed innocent – Prosecution to prove the elements of the case against accused***

The Bill re-enacts section 130 of the *Magistrates' Court Act 1989*. The section deals with cases where an offence makes provision for a proviso, exception, exemption, excuse or qualification. These type of offences, often involving a breach of regulatory schemes, place a reverse evidentiary onus of proof on an accused to point to or establish, on the balance of probabilities, some evidentiary matter within the peculiar knowledge of the accused (such as a reasonable excuse, exception or exemption). The provision has application to summary offences and indictable offences triable summarily. [72]

*The Committee notes that reverse evidentiary onus provisions are frequently encountered in regulatory offences punishable by low to moderate levels of fine, loss of licence or permit but not ordinarily involving a term of imprisonment. The Committee accepts the desirability of including such a provision in the Bill to establish the procedure and law where such reverse evidential onus offences are provided.*

*The Committee will however seek to review each new or re-enacted offence where such a provision is included in the proposed legislation to ensure that in all the circumstances a reverse evidential onus is appropriate having regard to the particular regulatory scheme, the sanction provided for the breach, the public benefit ensuring effective prosecution of offences and other relevant matters.*

***Fair trial – Right to be informed of alleged offence in sufficient detail – Right to trial without unreasonable delay – Conviction on alternative less serious offence not contained in charge sheet or indictment – Right to an interpreter where custodial sentence a possible outcome – Prosecution refusal to disclose certain evidence – Right to be tried in person – Right to examine witnesses in person or by counsel***

*Notice of offence in sufficient detail* – The Bill provides that the accused must be notified in sufficient detail concerning the charge(s) against him or her for both summary and indictable offences. [6], [13-17], [21], [24], [32], [159], [171]

Courts retain an inherent jurisdiction to adjourn proceedings or extend procedural time limits to ensure adequate information and time for preparation by an accused for committal and trial. [19], [35-49], [247], [313], [331]

*Trial without unreasonable delay* – The Bill contains a number of provisions that set time limits, for example, ensuring a reasonably prompt re-trial where this is ordered by the Court of Appeal [211-212] and for speedy resolution of interlocutory appeals before trials, and if necessary during a trial to resolve legal issues, such as questions on the admissibility of evidence. [295-301]

*Alternative offence* – In indictable proceedings and on appeal an accused may be convicted of a charge other than that with which they are charged if it is an alternative or lesser offence. The alternative offence must be a true alternative in that the elements of the alternative offence must also be the elements of the charged offence. [239], [277]

In summary proceedings the power extends only to a finding of attempt to commit the offence. [76]

*Interpreter* – The Bill provides for mandatory assistance by an interpreter if necessary in all cases where imprisonment is a possible outcome. [335]

*Prosecution may seek to deny disclosure* – The prosecution may seek to refuse disclosure of information, for example that may unreasonably impact of a witnesses privacy, jeopardize law enforcement, provide details of irrelevant convictions (character of witnesses) or otherwise may not be in the public interest to make disclosure. The accused may apply for an order requiring disclosure. [45-46], [48], [363]

All prosecutorial applications to deny full disclosure are reviewable by the courts. [46], [125], [181]

The prosecution has a continuing obligation of disclosure. [42], [111], [185]

*Right to be tried in person* – In summary proceedings, where the Magistrate considers it justified, the court may hear and determine the charge(s) in the absence of the accused [80-81]. However in these circumstances a convicted accused may apply for a re-hearing and the court is limited in the sentencing dispositions that may be imposed on an absent accused. [87], [94]

Further, a committal proceedings may be continued where an accused applies to be absent, absconds or is removed for misbehaviour [135-136]. However, an absent accused may not be committed for trial [137-138]. The Statement observes that the courts have common law powers to regulate their proceedings and the Bill does not limit powers to hear a charge for a summary offence or a committal proceedings in the absence of an accused.

*Right to examine witnesses in person or by counsel* – The Bill prohibits cross-examination of children and cognitively impaired complainants in sexual offences [123]. These complainants may be cross-examined for the purposes of the trial as part of the special hearings process found in sections 41G and 41H of the *Evidence Act 1958*. In appropriate circumstances a witness may give evidence by audio or audiovisual recording. [232]

### ***Right not to be compelled to confess guilt – Sentence indication procedure***

The Bill provides for sentence indications where the accused person requests the court to make one an indication of a likely sentence for the offence(s). The Committee has previously raised the issue of sentencing indications and posed the question whether the procedure may induce a person to plead guilty. The sentence indication procedure was introduced by the *Criminal Procedure Legislation Amendment Bill 2007*. [60-61], [207-209]

*The Committee raised the question of sentencing indications in Alert Digest No. 16 of 2007 and wrote to the Attorney-General seeking further advice. The Attorney's response is published in Alert Digest No. 1 of 2008.*

**Right to appeal statutory or constitutional in nature**

The Committee notes that at common law there is no absolute right to an appeal and that appeal rights are statutory or constitutional in nature. The Committee observes that in international law there is recognition of a convicted person's right to appeal the conviction and sentence to a higher tribunal / court.

**Note:** Article 14.5 – *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

The Bill provides a comprehensive set of appeal and re-hearing rights.

The appeal rights are –

- An appeal by way of re-hearing de novo by the County Court from a decision of the Magistrates' Court either on conviction and sentence or sentence alone.
- An appeal to the Court of Appeal from a decision of the County Court that imposed a custodial sentence where the original decision of the Magistrates' Court was a non-custodial disposition. [283]
- An appeal by an accused from a decision of the Magistrates' Court to the Supreme Court on a question of law. [272]
- Appeals from the County Court and the Supreme Court (Trial Division) to the Court of Appeal against conviction and sentence. An accused must seek leave to appeal to the Court of Appeal. For appeal against conviction, applications for leave are to be determined on the merits of the appeal, such as the nature of the error of a ruling by the presiding judge or failure to instruct or improperly instructing the jury. For appeals against sentence a single judge hears the application for leave but the accused may seek the application for leave to be reviewed by the full court. [280], [315]

**Right not to be punished twice for the same offence – Double jeopardy – Crown appeal against sentence**

The Committee notes the discussion in the Statement concerning whether a Crown appeal against sentence could be characterized as a form of double jeopardy in the sense that a Crown appeal exposes the accused to a greater sentence than imposed at trial. The Committee notes that the Statement prefers the rule in *R v Morgentaler* [1988] SCR 30, a decision of the Canadian Supreme Court which held that the right not to be subject to double jeopardy applies only after appeal proceedings are concluded. The Statement notes that double jeopardy is not invoked because – *an increased sentence on appeal involves substituting one sentence for another, not imposing a second sentence on top of the first.*

For the avoidance of any legal doubt the provisions in the Bill expressly remove any consideration of 'double jeopardy' as a factor on Crown appeals against sentence. [290]

*The Committee accepts the argument in the Statement that re-sentencing as a consequence of a successful Crown appeal against sentence does not engage the right against double jeopardy in its ordinary meaning.*

**Presumption at common law that legislation applies prospectively – Presumption against retrospective application of laws without express or clear implied intent**

*The Committee notes that the Statement makes it clear that the transitional provisions that may apply to the provisions in this Bill will be provided in a future Bill providing for those matters, and including further consequential amendments. The Committee notes that any issue of retrospectivity will be considered by the Committee in that Bill.*

### **Commencement provisions**

Chapter 1 (sections 1 to 4) comes into operation on the day after Royal Assent.

Clause 384 providing for the repeal of sentence indication procedures in the County and Supreme Courts comes into operation on 1 July 2010. The clause repeals the sentencing indication pilot scheme in the County Court and Supreme Court.

The other provisions are to commence on proclamation but not later than by 1 January 2011. [2].

**Note:** From the explanatory memorandum – *It is intended that this Bill (with the possible exception of several clauses, such as clauses 145\* and 242\*) will be proclaimed to commence on the same day as the Evidence Act 2008 is proclaimed to commence. As a result, the Bill includes reference to sections in the Evidence Act 2008.\*\**

*\* Clauses 145 and 242 concern new processes respectively relating to the transfer of related summary offences to the County or Supreme Courts on committal of an accused for trial and jurisdiction for those Courts to hear and determine related summary offences.*

*\*\* The Evidence Act 2008 has a forced commencement provision of 1 January 2010.*

#### **Delayed commencement – Inappropriate delegation of legislative power**

*The Committee notes that the explanatory memorandum draws attention to the possible delayed commencement of several clauses such as clauses 145 and 242.*

*The Committee refers to its Practice Note No. 1 concerning delayed commencement provisions exceeding one year from introduction in the Parliament. In such circumstances the Committee will seek to ensure that Parliament has sufficient information to determine whether a delay in commencement is justified.*

*The Committee will seek further information from the Attorney-General concerning clauses 145 and 242 and others that may have delayed commencement of greater than one year from introduction in the Parliament.*

#### **Sentence indication may be given – Decision whether to give an indication is final and no appeal lies to Supreme Court**

##### *Magistrates' Court*

The Magistrates' Court may give an indication as to the type of sentence that will be imposed if the accused pleads guilty at that time.

If the accused does not plead guilty in response to the indication but instead chooses to go ahead with a contested hearing, the contested hearing will be conducted before a different magistrate, unless the parties otherwise agree.

The court has unfettered discretion to refuse to provide a sentence indication. Accordingly, if the material available is insufficient to provide an indication by which the court is prepared to be bound, it may decline to provide a sentence indication.

If a sentence indication is requested, a decision to give or not to give a sentence indication is final and conclusive and cannot be appealed. (Refer to section 85 Constitution Act 1975 report below). [60-61]

*The Committee observes that it raised human rights issues about appeals from sentence indications in respect of the Criminal Procedure Legislation Amendment Bill 2007 and notes the Attorney-General's response to those concerns published in its Alert Digest No. 1 of 2008.*

### *Supreme and County Courts*

A court may provide a sentence indication as to whether the accused would or would not be likely to receive an immediately servable term of imprisonment, if the accused pleads guilty to the offence charged or another specified offence.

A decision to give or not to give a sentence indication is final and conclusive [207-209]. (Refer to the section 85, Constitution Act 1975 report below).

### ***Discretion to allow evidence at trial not previously disclosed by prosecutor or accused***

The trial judge may give leave to either party to introduce at the trial evidence not disclosed in accordance with the pre-trial procedures prescribed by the Act. Further, the trial judge may permit the prosecutor rebut evidence given by the accused that could not have been foreseen by the prosecution. [233]

### **Repeal, alteration or variation of s. 85 of the Constitution Act 1975**

[365]. Declares that it is the intention of clauses 61(4) and 209(4) to alter or vary section 85 of the *Constitution Act 1975*.

**Note:** *These clauses both state that a decision to give or not to give a sentence indication is final and conclusive.*

The Committee notes the section 85 of the *Constitution Act 1975* statement in the Minister's Second Reading Speech –

*Clauses 61 and 209 of the Bill provide the Magistrates, Children's, County and Supreme courts with the capacity to provide a sentencing indication to an accused who is considering pleading guilty. In accordance with a recommendation from the Sentencing Advisory Council in its report, Sentence Indication and Specified Sentence Discounts, these sections provide that a decision to give or not to give a sentence indication is final and conclusive.*

*A sentence indication should only be given where it is likely to be of benefit in concluding proceedings.*

*The reason for restricting review and appeal rights against a decision to give or not to give a sentence indication is to ensure that this decision is final and the substantive proceedings, whether a trial or a plea hearing, can proceed without delay. If review and appeal rights were not restricted, they could defeat the purpose for the introduction of this scheme. Importantly, when a sentence is imposed, each party has rights of appeal against the sentence imposed.*

### **Constitution Act 1975, section 85 – Repeal, alteration or variation of the unlimited jurisdiction of the Supreme Court<sup>10</sup>**

*The Committee notes that clauses 61(4) and 209(4) prevent decisions made in the course of criminal proceedings from being appealed to the Supreme Court.*

<sup>10</sup> Section 85(1) of the *Constitution Act 1975* provides that "Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

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

### **Repeals, consequential and other amendments**

Repeals certain provisions concerning sentence indications in the Supreme Court and County Court on 1 July 2010. [384]

**Note:** *The provision effectively sunsets the sentence indication provisions in the Supreme and County Courts.*

## **Charter Report**

### **Rights in criminal proceedings – Provisions that permit or fail to prohibit potential rights limitations – Compatibility depends on maintenance of existing common law rules and practices**

The Committee notes that several provisions of the Bill engage various Charter rights in criminal proceedings, by permitting or failing to prohibit potential breaches of those rights:

- Clause 76 gives the Magistrates Court a power to convict a person charged with a summary offence of the offence of attempting to commit that offence, whether or not the offender was promptly told of that possibility (as required by Charter s. 25(2)(a).)
- Clause 247 gives courts the power to extend time limits for trials 'if it is in the interests of justice to do so', without any guarantee that the trial will not be unreasonably delayed (as required by Charter s. 25(2)(c).)
- Clauses 274 and 278 provide for appeals against conviction and sentence only on the granting of leave to appeal by the Court of Appeal, rather than as of right (as required by Charter s. 25(4).)

The Statement of Compatibility argues that, in light of existing court practices, these Charter rights will not be limited (or will only be reasonably limited) by courts applying these provisions.

While the Committee accepts that existing practices will protect defendants' Charter rights in this way, the Committee is concerned that such protection is not guaranteed against future changes in those practices, for example because of a change in the common law or Australian court practice mandated in a future High Court judgment. In particular, Charter s. 38(1), which obliges public authorities to act compatibly with rights, does not apply to courts in these circumstances, because their non-administrative functions are exempted from the definition of public authority by Charter s. 4(1)(j).

***The Committee therefore draws Parliament's attention to clauses 76, 247, 274 & 278.***

---

### **Rights to an interpreter and to communication assistance – Provision barring uninterpreted hearings in circumstances that are narrower than the Charter's minimum guarantees – Whether restricted circumstances demonstrably justified**

**Summary:** *Clause 335 bars a court from hearing a criminal proceeding in the absence of a competent interpreter, but provides no protection for people who know but cannot speak English, or who can speak English but require assistance to communicate, or who are charged with offences that are not punishable by imprisonment. The Committee will write to*

*the Minister seeking further information as to whether there is a demonstrable justification for the conditions in clause 335(a) & (b).*

The Committee notes that **clause 335 bars a court from hearing a criminal proceeding in the absence of a competent interpreter** if two conditions are satisfied:

- s. 335(a): a person is charged with an offence punishable by imprisonment; and
- s. 335(b): that person does not have sufficient 'knowledge of the English language'

These conditions are more restrictive than the Charter s. 25's 'minimum guarantees' for all criminal defendants:

- Charter s. 25(2)(i): 'to have the free assistance of an interpreter if he or she cannot understand or speak English'.<sup>11</sup>
- Charter s. 25(2)(j): 'to have the free assistance of assistants and specialised communications tools and technology if he or she has communication or speech difficulties that require such assistance'.

**The Committee is concerned that clause 335 provides no protection for people who know but cannot speak English, or who can speak English but require assistance to communicate. Also, it doesn't protect people charged with offences that are not punishable by imprisonment.** The Canadian Supreme Court, interpreting a similar right, has noted that it applies to 'all accused, irrespective of the gravity of the offence charged and its classification'.<sup>12</sup>

The Statement of Compatibility observes that the bill does not 'limit' the right to an interpreter and, more generally, that the bill operates in tandem with common law and other statutory rights, including the right to a fair hearing. However, the Committee is concerned that an express statutory protection protecting one of Charter s. 25's 'minimum guarantees' only in some circumstances may be incompatible with the Charter unless that limited protection is demonstrably justified according to the test in Charter s. 7(2).<sup>13</sup> Also, a ban on uninterpreted proceedings only when people lack 'knowledge' (as opposed to other communication difficulties) may limit the Charter's right to equal protection of the law without discrimination on the basis of impairment.<sup>14</sup>

***The Committee will write to the Minister seeking further information as to whether there is a demonstrable justification for the conditions in clause 335(a) & (b). Pending the Minister's response, the Committee draws attention to clause 335.***

---

### ***Statement of compatibility – Large and complex Bill – Clear, helpful and detailed analysis***

The Committee notes that the Bill is a large and complex one that engages numerous Charter rights. The Statement of Compatibility provides a clear, helpful and detailed analysis of the many human rights issues that the Bill raises.

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

---

<sup>11</sup> Charter s. 3 defines 'interpreter' to include either an accredited interpreter or, if none are 'readily available', a competent interpreter. The term relates to communication from one language to another and from one 'form of communication' to another.

<sup>12</sup> *R v Tran* [1994] 2 SCR 951, [Part IV. Analysis]

<sup>13</sup> Charter s. 7(2) provides that a 'human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.

<sup>14</sup> Charter s. 8(3)

## Duties Amendment Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Tim Holding MLA
<b>Minister responsible</b>	Hon. John Lenders MLC
<b>Portfolio responsibility</b>	Treasurer

### Purpose

The Bill amends the *Duties Act 2000* (the 'Act') to ensure that leases are not used as a mechanism for avoiding duty; clarify when duty is payable in relation to changes in beneficial ownership; and reduce the time period for the payment of duty.

### Background

As an anti-avoidance measure the Bill amends the Act to ensure that duty is payable where effective control or ownership of real property is obtained, irrespective of the form of transaction. In particular, the Bill will ensure that duty is payable on certain long term lease arrangements used to avoid stamp-duty. The Bill clarifies when duty is payable in relation to changes in beneficial ownership. [3 to 8]

The Bill will reduce the period for the payment of duty to 14 days after the settlement of a dutiable transaction. Currently the Act allows three months for payment of duty after the dutiable transaction has taken place. [9 to 13]

### Content and Committee content

[2]. Other than Part 2 (certain leases and beneficial ownership) the provisions commence on Royal Assent. Part 2 is deemed to have commenced on 21 November 2008.

**Note:** In respect to Part 2 the Second Reading Speech states – *These anti-avoidance measures are to apply from the date of public announcement – 21 November 2008 ... The anti-avoidance measures will not bring any transaction to duty where there is no clear policy intent that duty should be payable. The transactions that may be affected do transfer effective economic ownership and should be dutiable. Applying the measures from the day of announcement is reasonable given the risk to the revenue base.*

#### **Rights and freedoms – Retrospective application of public revenue measures to the time of public announcement in the media – Whether justified**

*The Committee notes that the anti-avoidance measures in Part 2 are deemed by the Bill to commence a few days prior to the introduction of the measure in the Parliament being the date of the ministerial announcement in the media. The Committee also notes the comments in the Minister's Second Reading Speech.*

*The Committee recognises that retrospective application in respect to taxation and revenue legislation may be justified by government in certain circumstances to avoid the potential of persons and corporations achieving windfall profits between the time of a public announcement and the time of the implementing enactment*

*The Committee refers the question whether retrospective application is appropriate in the circumstances for the consideration of the Parliament.*

**The Committee makes no further comment.**

## Equal Opportunity Amendment (Governance) Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Portfolio responsibility</b>	Minister for Industrial Relations

### Background

The first Equal Opportunity Act was enacted in Victoria in 1977 creating the Equal Opportunity Board and the Office of Equal Opportunity Commissioner. The Act was amended in 1993 to make structural and operational changes including the replacement of the Commissioner with a five member Equal Opportunity Commission.

### Purpose

The Bill amends the *Equal Opportunity Act 1995* (the 'Act') to alter the governance and complaint-handling arrangements for the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) under the Act.

In summary the Bill will –

1. Create a new full-time position of Commissioner of the VEOHRC Commission appointed by the Governor in Council for a renewable term of five years. **[5]**
2. Provide that the Commissioner will have control of the day to day administration of the affairs of the Commission in accordance with the policies, priorities and strategies determined by the Board. **[5]**
3. Provide that the Commissioner will chair a Board with between five and seven members. **[5]**
4. Provide that Board members will be appointed on a part-time basis by the Governor in Council on recommendation of the Minister with a renewable term of five years. **[5]**
5. Give the Board a clear strategic oversight function and the power to make strategic decisions and to set the organisation's strategic direction. **[5]**
6. Consistent with the Board's new strategic functions, remove the Board members' complaint-handling functions and powers completely, and allocate complaint-handling powers and functions to the Commissioner who can then delegate to appropriately skilled staff. **[5]**
7. Abolish the current Chief Conciliator/Chief Executive Officer position. **[5]**
8. Limit the unlimited jurisdiction of the Supreme Court of Victoria. **[14]**
9. Make consequential amendments to the Act, other Acts and transitional arrangements as a result of the new Commission governance amendments. **[6 and 7], [9 to 13], [15 to 18]**

### Content and Committee comment

#### Repeal, alteration or variation of s.85 of the Constitution Act 1975

**[14]**. Declares it is the intention of section 211 to alter or vary section 85 of the *Constitution Act 1975*.

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

*Section 211 of the Equal Opportunity Act 1995 alters or varies section 85 of the Constitution Act 1975 to the extent necessary to prevent the bringing before the Supreme Court of any action in relation to a complaint dismissed by the commission under sections 108, 110, 113, 117 or 123 of the Equal Opportunity Act 1995.*

*The effect of section 211 is to limit a complainant's right to pursue further legal action once the Commission has dismissed a complaint where the complainant has failed to request a referral to VCAT within 60 days of being advised by the Commission of his or her rights of referral. The 60-day time limit provides a complainant with sufficient time to consider his or her options and to seek legal advice if necessary. It would create uncertainty and place an unfair burden on respondents if matters that have been dismissed by the Commission could be re-litigated.*

*The Bill inserts new section 211(2) into the Equal Opportunity Act 1995 so that decisions of the Commissioner pursuant to sections 108, 110, 113, 117 or 123 of the Equal Opportunity Act 1995 may not be brought before the Supreme Court. This is required because complaints will no longer be dismissed by the 'Commission' under the Equal Opportunity Act 1995; all complaint handling functions will rest with the Commissioner.*

*Section 211(c) of the Equal Opportunity Act 1995 alters or varies section 85 of the Constitution Act 1975 to the extent necessary to prevent the bringing before the Supreme Court of any action in relation to a complaint where a person has chosen another avenue under section 103 of the Public Sector Management Act 1992 in relation to the same subject matter. It is appropriate that this Bill repeals section 211(c) because the reference to the Public Sector Management Act 1992 and section 103 of that Act is obsolete; the Public Sector Management Act 1992 has been repealed.*

**Constitution Act 1975, section 85 – Repeal, alteration or variation of the unlimited jurisdiction of the Supreme Court<sup>15</sup>**

*The Committee notes that clause 14 prevents the bringing of any action before the Supreme Court in relation to a complaint dismissed by the Commissioner under sections 108, 110, 113, 117 or 123.*

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

**The Committee makes no further comment.**

---

<sup>15</sup> Section 85(1) of the *Constitution Act 1975* provides that “Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

## Fair Trading and Other Acts Amendment Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Tony Robinson MLA
<b>Portfolio responsibility</b>	Minister for Consumer Affairs

### Purpose

This Bill amends the *Fair Trading Act 1999*; the *Residential Tenancies Act 1997* and the *Consumer Credit (Victoria) and Other Acts Amendment Act 2008*.

The Bill amends the –

#### ***Fair Trading Act 1999***

1. Clarify that courts can make "non-punitive" corrective advertising orders and "punitive" adverse publicity orders. **[11 and 12]**
2. Ensure that courts can make orders prohibiting a person who is subject to litigation from divesting his or her assets or property. **[13]**
3. Increase the amount of compensation able to be awarded by a court or the VCAT for humiliation or distress arising from conduct which is an offence under the Act from \$1,000 to \$10,000. **[15]**
4. Amend Part 2B of the Act (unfair terms in contracts) to enable the Director of Consumer Affairs Victoria (Director) to apply to the County or Supreme Court as well as to the VCAT for an injunction or declaration under Part 2B. **[7 to 9]**
5. Provide a Court or the Tribunal with the capacity to make remedial orders such as an order that a refund be made or that property be transferred after having declared a term in a consumer contract to be an unfair term or a term in a standard form contract to be a prescribed unfair term. **[9]**
6. Provide a new presumptive provision that if it is alleged in any proceeding under Part 2B that a contract is a consumer contract or standard form contract to which Part 2B applies, it is to be presumed (unless the contrary is established) that Part 2B applies to the contract. **[10]**
7. Extend the operation of Part 2B of the Act to credit contracts by ensuring that parties to credit contracts entered into after the commencement of the Bill will enjoy protection from unfair contract terms. The extension of operation will also apply to a term of a credit contract if that term is varied after the date of commencement. **[4]**
8. Make two statute law revision amendments being, an incorrect cross-reference and an incorrect alphabetical listing in Schedule 1. **[17]**

#### ***Residential Tenancies Act 1997***

9. The Bill amends the Act in relation to residential premises that may or may not be formally affiliated with a school or institution which provides education and training by introducing new requirements that prescribed criteria be considered by a school or educational institution prior to entering into an agreement to formally affiliate a residential premises, and that where a residential premises is exempt from the operation of the Act by virtue of formal affiliation, notice of that exemption be prominently displayed in a public or common area. Offences relating to misrepresentation or engaging in misleading conduct in relation to formal residential affiliation are included. **[18 to 21]**

### **Consumer Credit (Victoria) and Other Acts Amendment Act 2008**

10. The Bill amends the Act in respect to several unproclaimed provisions which are no longer necessary to bring into force. The provisions related to the introduction of an enhanced credit provider registration scheme and a default commencement of 1 July 2009 was originally provided. As a contingency measure the relevant provisions (sections 7 to 19, 21, 22 and 24) are not being repealed by the Bill. In the event the transfer of regulation of credit provider registration to the Commonwealth does not proceed the provisions may need to be proclaimed. Therefore the provisions will have no default commencement date. [22]

**Note:** From the Second Reading Speech – *The commencement of these provisions is no longer necessary, as a comprehensive national credit provider and finance broker licensing scheme announced earlier this year by the Council of Australian Governments is being developed by the Commonwealth government for introduction in mid 2009. The Bill also makes technical amendments to ensure that related provisions introducing external dispute resolution requirements can come into operation on 1 July 2009, if not proclaimed to come into operation earlier.*

11. The Bill makes consequential amendments to the *Consumer Credit (Victoria) Act 1995*, the *Retirement Villages Act 1986*, the *Relationships Act 2008* and the *Veteran's Act 2005*.

### **Content and Committee comment**

With the exception of clauses 18, 20 and 21 the provisions in the Bill come into operation on the day after the day on which it receives the Royal Assent. Clauses 18, 20 and 21 (*Residential Tenancies Act 1997*) of the Bill commence on proclamation but not later than by 1 March 2010. [2]

**Note:** From the explanatory memorandum – *Clauses 18, 20 and 21 will come into operation on a day or days to be proclaimed. Their commencement is deferred in order for consultation to be undertaken and regulations to be made prescribing criteria a school or institution must consider prior to entering an agreement referred to in section 21 of the Residential Tenancies Act 1997, the form of the notice required to be displayed under new section 505B of that Act and the endorsement of such notices.*

#### **Delayed commencement – Inappropriate delegation of legislative power – Need for consultation and new regulations – Whether sufficient reason to delay commencement**

*The Committee notes that the explanatory memorandum draws attention to the delayed commencement of several clauses in the Consumer Credit (Victoria) and Other Acts Amendment Act 2008 and the Residential Tenancies Act 1997.*

*The Committee refers to its Practice Note No. 1 concerning delayed commencement provisions exceeding one year from introduction in the Parliament. In such circumstances the Committee will seek to ensure that Parliament has sufficient information to determine whether a delay in commencement is justified.*

*The Committees notes the explanatory material provided in clauses 2 and 22 of the Bill.*

*The Committee draws attention to the provisions.*

**The Committee makes no further comment.**

## Liquor Control Reform Amendment (Enforcement) Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Tony Robinson MLA
<b>Portfolio responsibility</b>	Minister for Consumer Affairs

### Purpose

The Bill amends the *Liquor Control Reform Act 1998* (the 'Act') to make provision for the appointment of compliance inspectors; clarify the Director's powers in relation to security cameras; require associates of licensees to be declared and for other purposes.

### Background

The provisions in the Bill –

1. Establish a new civilian compliance Directorate within the Department of Justice to complement those existing enforcement bodies (the Director and Victoria Police) under the Act. Compliance inspectors will be empowered with entry, search and seizure powers, power to require a person to state name and address or to demand proof of age, seize evidence of age, seize liquor from a minor and to serve infringement notices for most offences. However unlike police, inspectors will not be empowered to arrest under-age persons. **[21], [26]**
2. Provide a new power for the Director to suspend a licensee's licence for up to five days if the Director believes on reasonable grounds that the licensee has engaged in conduct that would constitute grounds for a VCAT inquiry and there is a danger that, unless the licence is suspended, a person may suffer substantial harm, loss or damage as a result of that conduct. The Director must give notice of an intention to suspend and state the reasons for doing so under this new power and allow the licensee to respond to the proposed course of action. **[12 and 13]**
3. Improve the operation of the Director's breach notice power by removing the requirement that the director must believe that the licensee will continue to engage in conduct that would constitute grounds for a VCAT inquiry before issuing a breach notice. It will be sufficient for the director to believe that licensee has engaged in such conduct. **[11]**
4. Enable the Director to undertake a broadbased inquiry into any matter relevant to the operation of the Act, including an inquiry into activities regulated by the Act in any area or locality of the State. **[22]**
5. Clarify that the Director may impose licence conditions requiring security cameras to be affixed to authorised premises, other premises, land (such as car parks), fixtures or other objects that are under the control of the licensee and not just to the licensed premise itself. **[8]**
6. Narrow the defence that is available for licensees or permittees who are charged with the offence of permitting drunken or disorderly persons to be on licensed or authorised premises to require a licensee or permittee to demonstrate that he or she did not know that drunken or disorderly persons were on the premises and that they had taken reasonable steps to ensure that such persons were not on the premises. The current provisions are satisfied if one of the limbs of the test is established. **[16]**

## **Content and Committee comment**

Substitutes new provisions in respect to powers of authorised officers (new sections 129, 130 and 130A to 130F). The sections deal with right of entry, search warrants and like matters.

### ***Protection against self incrimination – Protection in criminal proceedings but requires documents to be produced***

New section 130F provides for protection against self incrimination in relation to the requirement to answer questions or provide information but does not protect a person from refusing or failing to produce any document, equipment or other thing that they are required to produce by or under the Act.

Where a person claims, before they produce the document, equipment or other thing that the production would tend to incriminate them, the document, equipment or other thing is not admissible in evidence against that person in criminal proceedings. **[19]**

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

## Melbourne Cricket Ground Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. James Merlino MLA
<b>Portfolio responsibility</b>	Minister for Sport and Recreation

### Purpose

The Bill re-enacts and further provides for the law relating to the Melbourne Cricket Ground (MCG) in order to create a simpler legislative framework for the MCG and repeals the existing Acts relating to the MCG.

### Background

The Bill includes a preamble that summarises the background to the Bill including key Orders in Council, Crown grants, reservations and legislation made and enacted in relation to the MCG since 1861.

The Bill establishes the Melbourne Cricket Ground Trust (the 'Trust') and provides that the Trust is a body corporate with perpetual succession; has a common seal; may sue or be sued in its corporate name; is capable of acquiring, holding and disposing of real and personal property; and is capable of doing or suffering anything which by law bodies corporate may do or suffer.

The Acts to be repealed are the *Melbourne Cricket Ground Act 1933* the *Melbourne Cricket Ground Act 1951* the *Melbourne Cricket Ground (Trustees) Act 1957* the *Melbourne Cricket Ground Act 1983* the *Melbourne Cricket Ground Act 1984* the *Melbourne Cricket Ground (Guarantees) Act 1984*; and the *Melbourne Cricket Ground Trust Act 1989*.

### [Clauses]

*Unauthorised commercial exploitation of name* – A person, in the course of a trade or business, must not use the name "Melbourne Cricket Ground" or the initials "MCG" as the name or part of the name of another place, unless authorized by the Trust. The provision differs from section 8A of the *Melbourne Cricket Ground Act 1933* in that a penalty for breach of the provision is now provided. **[26]**

*Regulations* – The Trust may make regulations concerning admission to the Ground, collection of fees and charges and the preservation of good order and behaviour. **[32]**

*Existing rights preserved* – Existing leases and licences made under the *Melbourne Cricket Ground Act 1933* (to be repealed) are preserved. **[33]**

*Pre-existing Trust continues* – The Bill provides that the current Trust is deemed to continue in existence and its members continue to hold office for the remainder of their appointment. **[33(2)]**

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

# Occupational Health and Safety Amendment (Employee Protection) Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Portfolio responsibility</b>	Minister for Industrial Relations

## Purpose

The Bill amends the *Occupational Health and Safety Act 2004* (the 'Act') to create a civil cause of action for employees or prospective employees who are discriminated against by an employer or prospective employer on grounds that relate to occupational health and safety (discrimination on the basis of OHS activity as defined in section 76(2) and new section 78B).

## Background

The Bill amends the Act to –

1. Enable an employee or prospective employee to bring a civil action where the employer or prospective employer engages in discriminatory conduct (new sections 78A-78E). [6]

### Notes:

1. *Section 76 of the Act currently establishes such discrimination as a criminal offence with penalties, and section 78 enables a court to make orders for damages or other redress if the employer or prospective employer is convicted. However, the current provisions do not enable the employee or prospective employee who is discriminated against to commence their own action to recover damages or seek other forms of redress in the event that the employer or prospective employer is not convicted of the criminal offence, or the court does not order the type or extent of redress the employee or prospective employee is seeking.*
  2. *A successful civil action under new Subdivision 2 does not prevent a prosecution for the existing criminal offence (as modified by this Bill in Subdivision 1).*
  3. *An employee or prospective employee may only obtain damages or other redress once, either as a result of the criminal prosecution or from the civil action where the damages or redress are based on the same conduct.*
  4. *The new civil action exists regardless of any criminal prosecution in respect to the same conduct.*
  5. *In proceedings for a criminal offence under section 76 the defendant bears the onus of proving that that reason alleged in the charge was not the 'dominant reason' for engaging in the conduct. In the civil form of action the employer, prospective employer or third party bears the onus of proving that the reason alleged in the complaint was not the 'substantial reason' for the conduct.*
2. Provide protection for employees or prospective employees against discriminatory conduct instigated by third parties (new section 78C). [6]
  3. Provide that the court may order the payment of damages or other redress to an employee or prospective employee whose civil action is successful. [6]
  4. Remove the penalty of imprisonment from the existing criminal offence provisions of the Act in relation to discriminatory conduct. [4]
  5. Amend the existing provisions of the Act in relation to discriminatory conduct to include authorised representatives of registered employee organisations among those with

whom an employee or prospective employee may engage in activity related to occupational health and safety that is protected by the Act. [4]

## Content and Committee comment

The Bill amends the existing criminal offence provisions in section 76 of the Act to extend the categories of people whom an employee or prospective employee may assist, provide with information or raise an occupational health and safety issue while being protected against discrimination by an employer to include an authorised representative of a registered employee organisation. The clause also removes the penalty of imprisonment of up to six months [4]. (Refer to the Charter Report below).

**Note:** Section 77 of the Act provides that for an offence against section 76 the defendant bears the onus of proving that the reason alleged in the charge was not the dominant reason why the defendant engaged in the conduct.

### Presumption of innocence – Reverse onus to prove prohibited discrimination not the dominant reason to engage in the conduct

#### 1. Rights and freedoms – Presumption of innocence – Criminal offence expanded

*The Committee notes that the amendments made widen the application of the criminal offence provision in section 76 of the Act and that by virtue of section 77 of the Act the defendant in such proceedings bears the burden of proving that the prohibited conduct was not the dominant reason for engaging in the conduct.*

*The Committee observes that the explanatory memorandum does not refer to the expansion of the reverse onus offence in respect to the criminal offence under Subdivision 1, of Division 9 of Part 7.*

*The Committee refers to the Charter Report below.*

#### 2. Rights and Freedoms – Fair civil proceedings

*The Committee notes the reverse onus provision (new section 78E(2)) applies in proceedings under section 78A and 78V which respectively provides for a civil form of action against prohibited discriminatory conduct by an employer or prospective employer or by a third party.*

*The reverse onus provision requires the defendant to prove that the prohibited reason for the conduct alleged in the complaint was not the ‘substantial reason’ for the conduct.*

*The Committee has previously noted circumstances where a reverse onus may be justified in circumstances where alleged facts may be more conveniently disproved by one party or be in the exclusive or peculiar knowledge of that party than the party alleging, and therefore bearing the ordinary burden of proof of that fact.*

*The Committee refers the question of the appropriateness of the reverse onus provision for the consideration of the Parliament.*

## Charter report

### Presumption of innocence – Extension of existing criminal offence that places an onus of proof on defendants – Not addressed in statement of compatibility

Summary: Clauses 4(1) & (2) engage the Charter’s presumption of innocence. The statement of compatibility does not address these clauses. The Committee will write to the

*Minister seeking further information as to whether and how the clauses are compatible with the Charter.*

The Committee notes that clauses 4(1) & (2) extend the scope of an existing criminal offence in s.76 of the *Occupational Health and Safety Act 2004*. Section 76 makes it an offence for an employer to take various actions against employees or prospective employees because of their role in relation to health and safety. Clauses 4(1) & (2) extend the offence to cover employees who assist, give information to or raise issues or concerns with an authorised representative of a registered employee organisation.

Section 77 provides that, in proceedings under s.76, defendants bear the onus of proof on the issue of the reasons for their conduct. **The Committee therefore considers that clauses 4(1) & (2) may limit the Charter right of defendant's charged with an offence to be presumed innocent of that offence until proved guilty.**<sup>16</sup>

Although the Statement of Compatibility addresses other clauses of the Bill that impose a similar reverse onus on civil defendants (who do not have a right to be presumed innocent), **the Statement does not address whether and how clauses 4(1) & (2) (which apply to criminal defendants) are compatible with the Charter.**<sup>17</sup> The Committee observes that, given the introduction of parallel civil proceedings for discrimination against employees on health and safety grounds, the usual justification for reverse onuses in regulatory offences – that they are necessary to ensure compliance with the regulations – may no longer apply. An evidential burden on the defendant may therefore be a 'less restrictive means reasonably available to achieve the purpose of' the existing offence.<sup>18</sup>

***The Committee will write to the Minister seeking further information about whether and how the reverse onus in s. 77 is compatible with the Charter. Pending the Minister's response, the Committee draws attention to clauses 4(1) & (2).***

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

---

<sup>16</sup> Charter s. 25(1)

<sup>17</sup> Charter s. 28(3)(a) requires that the Statement state 'whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible'.

<sup>18</sup> Charter s. 7(2)(e).

## Resources Industry Legislation Amendment Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Peter Batchelor MLA
<b>Portfolio responsibility</b>	Minister for Energy and Recreation

### Purpose

The Bill amends the *Mineral Resources (Sustainable Development) Act 1990* (the 'Act') to provide for the regulation of extractive industries under the Act and repeal the *Extractive Industries Development Act 1995* which currently governs extractive industry activity. The Bill also makes necessary consequential amendments and removes redundant provisions.

### Background

The Bill amends the Act to –

1. Repeal the *Extractive Industries Development Act 1995* and provide instead for the regulation of extractive industries through an amended *Mineral Resources (Sustainable Development) Act 1990*. **[4 to 20], [41]**
2. Extend the ability to make codes of conduct currently found in the Act to extractive industries. **[32]**
3. Partially deregulate work plan requirements for small quarries by exempting operators of sites up to five hectares in area and five metres in depth (where no clearing of native vegetation or use of explosives is required) from current work plan requirements and instead be required to comply with a code of practice that contains a set of standard work conditions. **[20 and 40]**
4. Establish a duty to consult with the community on matters that may effect the community throughout the period of any extractive industry work authority. **[20]**
5. Remove the requirement to apply for a planning permit where an Environment Effects Statement is required. **[20]**

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

## Salaries Legislation Amendment (Salary Sacrifice) Act 2008

Introduced	2 December 2008
Second Reading Speech	2 December 2008
Royal Assent	11 December 2008*
House	Legislative Assembly
Member introducing Bill	Hon. Tim Holding MLA
Portfolio responsibility	Minister for Finance, WorkCover and TAC

### Purpose

The Act amended the *Constitution Act 1975*, the *County Court Act 1958*, the *Magistrates' Court Act 1989*, the *Victorian Civil and Administrative Tribunal Act 1998*, the *Parliamentary Salaries and Superannuation Act 1968*, the *Attorney-General and Solicitor-General Act 1972*, the *Public Administration Act 2004* and the *Public Prosecutions Act 1994* to permit salary sacrificing arrangements by various judicial officers, office holders and Members of Parliament and validated previous salary sacrifice arrangements entered into.

**\*Note:** *The Act received Royal Assent on 11 December 2008 and the Committee provides this report pursuant to section 17(c) of the Parliamentary Committees Act 2003.*

### Background

The Act concerned the ability of the holders of certain offices and Members of Parliament to enter into effective salary sacrifice arrangements as defined by Australian Taxation Office (ATO) Ruling 2001/10.

The Act sought to ensure that arrangements already entered into, and similar arrangements if they are entered into in the future, meet the requirements of the ATO ruling.

The relevant office holders within the scope of this Bill are –

- office holders – people appointed to public offices whose remuneration is fixed or determined by the Act creating the office, by the statutory instrument appointing them or by the Governor in Council;
- judicial officers, some of whom are covered by the *Constitution Act 1975* and some under other Acts;
- Members of Parliament.

None of these categories of offices are employees. Parliament has established certain specific offices, and provided for a mechanism by which people can be appointed to those offices, and remunerated while holding the office. The remuneration arises from holding the office, not from performing any specific work.

### Content and Committee comment

#### **Rights and freedoms – Judicial independence – Separation of powers – Whether an executive discretion relating to remuneration limits judicial independence – Reality of and perception of judicial independence**

*The Committee notes that salary sacrifice arrangements as defined by the ATO are at the discretion of the employer or paying authority (the executive branch). The Committee observes that a hallmark of judicial independence is the inability of the executive to diminish remuneration during judicial tenure. To the extent that the executive retains any discretion to allow salary sacrifice or the extent of that arrangement under the ATO guidelines may be*

*perceived as the exercise of a discretion or negotiation concerning judicial remuneration during tenure.*

*The Committee raises this matter more fully under the Charter Report below.*

### **Rights and Freedoms - Retrospectivity – Deeming past arrangements to be valid**

*The Committee notes that throughout the Bill there are deeming provisions validating past arrangements entered into by the relevant office holder or Member. The Bill also deems that such arrangements are to be regarded as never constituting a reduction in salary of the relevant office holder or Member. For example see [3(2) and (4)], [7(2) and (4)] and [14].*

*Subject to issues relating to judicial independence, the separation of powers and the Committee's comments in the Charter Report the Committee accepts that the provisions may be beneficial to statutory office holders, the judiciary and members of Parliament and that therefore a retrospective deeming provision may be appropriate.*

## **Charter Report**

### **Independent court or tribunal – Authorisation for judicial officers and tribunal members to enter into a salary sacrifice arrangement – Whether a negotiation over remuneration**

*Summary: Sections 3-5, 7-9 & 11-13 authorised various judicial officers and tribunal members to 'enter into an arrangement' to engage in salary sacrificing. The Committee is concerned that individual officers and members may now be required or permitted to negotiate with the executive about their remuneration. Such negotiations may limit the Charter right of litigants to a hearing before an 'independent' court or tribunal. The Committee will write to the Minister seeking further information about how salary sacrificing is arranged.*

**The Committee notes that ss. 3-5, 7-9 & 11-13, by amending other statutes, authorised various judicial officers and tribunal members to 'enter into an arrangement' to engage in salary sacrificing.** The amendments provide that such arrangements cannot be initiated, varied or revoked without a notice by the officer or member. However, the amendments do not identify whether or not any other conditions, including discretionary considerations, must be satisfied or whether processes must be followed before a salary sacrificing arrangement can commence. **The Committee is concerned that, if the consent of a member of the executive is necessary before officers and members can obtain the financial benefits of salary sacrificing, then individual officers and members may now be permitted or required to negotiate with the executive about their remuneration. Such negotiations may limit the Charter right of litigants to a hearing before an 'independent' court or tribunal.**<sup>19</sup>

In relation to an equivalent right in Canada's Charter, that nation's Supreme Court has held<sup>20</sup>:

*[U]nder no circumstances is it permissible for the judiciary — not only collectively through representative organizations, but also as individuals — to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence.*

The Court stated that its reasoning applies, not only to salaries, but to all 'benefits'.<sup>21</sup>

<sup>19</sup> Charter s. 24(1)

<sup>20</sup> Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3, [134]

Salary sacrificing is obviously beneficial to judicial officers and tribunal members; however, the Charter right to an independent court or tribunal is for the benefit of litigants, not officers or members. As the Supreme Court of Canada explained<sup>22</sup>:

*The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.*

To avoid the risk of negotiation, the Canadian Court requires that all aspects of judicial remuneration be fixed by objective legal standards and that all alterations to those standards be preceded by a ruling from an independent commission.

***The Committee will write to the Minister seeking further information as to whether or not the entry into an arrangement to engage in salary sacrificing requires the consent of a member of the executive, the exercise of a discretion or the application of uncertain legal rules.***

***Pending the Minister's response, the Committee draws attention to ss. 3-5, 7-9 and 11-13.***

---

### **Charter requires that the Committee report on every bill – Consequences of non-compliance**

The Committee notes that it did not report on the compatibility of the Salaries Legislation Amendment (Salary Sacrifice) Bill 2008 while it was a bill, although it is now exercising its power to report on the bill now that it has become an Act.<sup>23</sup>

The Committee observes that Charter s. 30 provides that the Committee 'must consider any bill' and 'must report... as to whether the bill is incompatible with human rights.' The Committee is concerned that it is mandatory for the Committee to report on a bill while it is a bill. In contrast to other procedural provisions of the Charter,<sup>24</sup> there is no savings provision for the validity of a law that was passed without compliance with Charter s. 30.

***The Committee will write to the Attorney-General seeking further information as follows:***

- 1. Has Charter s. 30 been complied with in relation to the Salaries Legislation (Salary Sacrifice) Bill 2008?***
- 2. If not, what are the consequences of non-compliance?***
- 3. Should Charter s. 30 be amended to clarify its operation in light of the Committee's power to report on an Act under s. 17(c)(i) of the Parliamentary Committees Act 2003?***
- 4. Should the Charter be amended to clarify the consequences of any non-compliance with Charter s. 30?***

***Pending the Attorney-General's response, the Committee draws attention to Charter s. 30.***

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

---

<sup>21</sup> Ibid at [136]

<sup>22</sup> Ibid at [190]

<sup>23</sup> Parliamentary Committees Act 2003, s. 17(c)(ii)

<sup>24</sup> E.g. Charter ss. 29, 31(9) & 36(5).

## Transport Legislation Amendment (Driver and Industry Standards) Act 2008

Introduced	3 December 2008
Second Reading Speech	3 December 2008
Royal Assent	11 December 2008*
House	Legislative Assembly
Member introducing Bill	Hon. Lynne Kosky MLA
Portfolio responsibility	Minister for Public Transport

### Purpose

The Act amended the *Transport Act 1983* (the 'Act') in relation to taxi industry and commercial passenger driver accreditations; and eliminated regulatory overlap by amending the *Working with Children Act 2004* to provide for exemptions from also holding a working with children check for certain commercial passenger vehicle drivers who are accredited under the Act.

**\*Note:** *The Bill received Royal Assent on 11 December 2008 and the Committee provides this report pursuant to section 17(c) of the Parliamentary Committees Act 2003.*

### Content and Committee comment

[4]. Subclause (3) amended section 130A(2) of the Act with the effect that a finding under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* of not guilty by reason of mental impairment is brought within the taxi industry accreditation scheme to deem such a finding as a finding of guilt. The effect of the amendment is to make it mandatory for the Director of Public Transport (the 'Director') to refuse accreditation if the applicant has been found guilty of murder on the ground of insanity or mental impairment.

The Committee notes this extract from the Statement of Compatibility –

*Previously the procedure for people falling within this class was that the Director could consider whether the person was not 'technically competent and sufficiently fit and healthy to provide the service' or did not satisfy the public care objective under s 164 of the Transport Act.*

**Note:** *A person may appeal a relevant finding of the Director, whether discretionary or mandatory, to VCAT pursuant to section 160O of the Transport Act 1983.*

[5]. Amended section 132D of the *Transport Act 1983* relating to the accreditation of taxi industry participants.

Subclauses (1) and (2) contained provisions consequential to the amendments in clause 4. Subclause (1) omits providers of taxi-cab network services from the application of the mandatory refusal provision that relates to persons being found guilty of all tier 1 offences.

Subclause (2) inserted a new subsection to provide for the mandatory refusal of applications for accreditation for providers of taxi-cab network services if the person has been found guilty of a tier 1 offence other than an offence under section 318 of the *Crimes Act 1958*.

Subsection (3) inserted a new subsection in section 132D of the *Transport Act 1983* to provide that the licensing authority must not refuse to issue an accreditation on a ground that has previously been found by VCAT not to be a bar to accreditation. The amendment overrides the mandatory refusal provisions in the Act that would otherwise apply.

[9]. Amended section 163(1) of the Act to provide that a finding under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* of "not guilty" because of mental impairment is deemed to be a finding of guilt for the purposes of the commercial passenger vehicle driver accreditation scheme.

[15]. Inserted additional factors that VCAT must be satisfied of if it is to make an order to issue, reinstate or re-new accreditation.

VCAT must only make an order if it is satisfied that it is in the public interest to make an order and making the order would not pose an unjustifiable risk to the safety of persons using services. The specific range of factors that VCAT must have regard to are set out in section 168 of the Act.

## Charter report

The Committee notes that this Act raises the same concerns in relation to compliance with Charter s. 30 as those raised by the Committee in relation to the *Salaries Legislation (Salary Sacrifice) Act 2008*.

***The Committee will therefore also write to the Attorney-General seeking the same information in relation to the Transport Legislation Amendment (Driver and Industry Standards) Bill 2008.***

---

## Impairment discrimination – Barriers to accreditation for people found not guilty of certain offences on the basis of mental impairment – Whether discrimination – Whether reasonable limit

Summary: *Section 9 raises the same human rights concerns that the Committee raises in its report on clause 3(3)(d) concerning the Bus Safety Bill.*

The Committee notes that s. 9, amending s. 163(1)(d) of the *Transport Act 1983*, extended an existing rule that equates people found not guilty on the basis of 'mental impairment' are to be treated as if they were found guilty for the purposes of the 'driver accreditation' provision of the Act.<sup>25</sup> Such people hence became subject to the various special barriers for certain offenders to accreditation (or continuing accreditation) as operators of commercial passenger vehicles under ss. 169, 169E & 169F of the *Transport Act 1983*.<sup>26</sup> **Section 9 raises the same human rights concerns that the Committee raises in its report in this Alert Digest on clause 3(3)(d) concerning the Bus Safety Bill.**

***The Committee will write to the Minister seeking further information as to whether or not the Director's general powers to refuse or cancel registration are a less restrictive means reasonably available to achieve the purpose of protecting taxi passengers from people who are found not guilty of crimes on the basis of mental impairment. Pending the Minister's response the Committee draws attention to s. 9.***

---

## Presumption of innocence – People charged with certain offences cannot be accredited unless they demonstrate that the accreditation is appropriate having regard to public care – Not addressed in statement of compatibility

---

<sup>25</sup> The amendments extended s. 163(1)(d) to cover findings in relation to alternative offences and findings at a special hearing of someone who is not fit to be tried.

<sup>26</sup> For tier 1 offences, the Director now must refuse or cancel accreditation: ss. 169(2) & 169E. For tier 2 and 3 offences there is now, respectively, a presumption against and a discretion to refuse accreditation, and a discretion to cancel accreditation: ss. 169(3) & (4) & 169F.

---

*Summary: The Committee considers that s. 11(2) engaged the Charter's right to be presumed innocent. The Statement of Compatibility did not address this section. The Committee will write to the Minister seeking further information as to whether and how s. 11(2) was compatible with the Charter.*

The Committee notes s.11(2), which amended s. 169 of the *Transport Act 1983*, extended barriers to accreditation for people convicted of 'tier 2' offences to people charged (but not convicted) of 'tier 1' offences. The Director is now barred from accrediting such people unless they demonstrate that accreditation 'is appropriate having regard to the public care objective' (which is that commercial vehicle services be provided with safety, comfort, amenity and convenience; and be carried out without fraud or dishonesty.) **The Committee considers that s. 11(2) engaged the Charter right of such persons to be presumed innocent of their charges until proved guilty.**<sup>27</sup>

While the statement of compatibility addressed sections of the *Act* that applied to people found not guilty on the basis of mental impairment (who do not have the right to be presumed innocent), **the statement did not address whether and how s. 11(2) (which covers people who are currently criminal defendants) is compatible with the Charter.**

The Committee reiterates its view that, while treating a charged person differently because of the events or evidence that led to their charge is compatible with the Charter, disadvantaging a person because of the mere fact that they are charged may limit their Charter right to be presumed innocent. Even if this principle is limited to public pronouncements that suggest that a person is guilty, the Committee is concerned that s. 11(2) amounts to a public pronouncement by the legislature that people are presumed to be a threat to public safety or amenity merely because they have been charged with tier 2 offences. The Committee observes that the accreditation provisions of the *Bus Safety Bill 2008* do not contain an equivalent presumption and instead merely permit the Director to postpone an accreditation decision where the outcome of a charge may be relevant to that decision.<sup>28</sup>

***The Committee will write to the Minister seeking further information about whether and how s. 11(2) was compatible with the Charter. Pending the Minister's response, the Committee draws attention to this section.***

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

---

<sup>27</sup> Charter s. 25(1).

<sup>28</sup> Clause 29

## Transport Legislation General Amendments Bill 2008

<b>Introduced</b>	4 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Peter Batchelor MLA
<b>Responsible Minister</b>	Hon. Lynne Kosky MLA
<b>Portfolio responsibility</b>	Minister for Public Transport

### Purpose

The Bill amends the –

#### ***Transport Act 1983***

To improve the administrative process of renewing the authorisation of enforcement officers in the rail, tram and bus sectors. The amendment will require the Director of Public Transport to consider the probity criteria which apply to initial authorisations when considering whether to renew an authorisation or to carry out an inquiry into an authorisation. The criteria cover issues of competence and character. [5]

#### ***Children, Youth and Families Act 2005***

To provide the Registrar of the Children's Court the same powers as a magistrate to refer a young person to attend an approved program so that attendance at such a program can be used as an alternative sentencing arrangement for child offenders if the court considers it appropriate. [12]

**Note:** *Children who commit transport offences are generally dealt with under a special infringement penalty process called CAYPINS (children and young persons' infringement notice system).*

#### ***Rail Safety Act 2006***

To enable the Director, Public Transport Safety to intervene and assess the safety environment in situations where a Rail operator has refused access to rail land for works (such as preventative maintenance to overhead bridges by VicRoads) or require works to cease where the Rail operator considers the works present safety issues. The Director may issue directions on safe arrangements. The Director will essentially be undertaking a deadlock resolution role. [11]

#### ***Rail Corporations Act 1996***

- to enable State parties to include in contracts with third parties, such as property developers, provisions requiring the third party to pay penalties if their works disrupt rail operations. [10]
- to provide for the abolition of the Southern Cross Station Authority, which was established to manage the now completed redevelopment of the former Spencer Street station. The Secretary of the Department of Transport, on behalf of the Crown, will carry out the authority's remaining functions and succeed to all its property, rights and liabilities. The Bill provides for the initial transfer of staff to the Department of Transport. [6 to 8]

***Borrowing and Investment Powers Act 1987***

To make amendments consequential upon the amendments made by the Bill to the *Rail Corporations Act 1996* abolishing the Southern Cross Station Authority. **[13]**

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

## Transport Legislation Miscellaneous Amendments Bill 2008

Introduced	2 December 2008
Second Reading Speech	3 December 2008
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Minister for Roads and Ports

### Background

The Bill amends the following Acts.

#### **Marine Act 1988**

1. Extend the range of sanctions available to the Director of Marine Safety in the event of an actual or anticipated safety breach, primarily in the commercial boating and shipping area by making provision for inspectors to issue improvement notices and prohibition notices. It is an offence to contravene such notices and VCAT is given a supervisory role in reviewing decisions concerning such notices. **[4]**

**Note:** *Improvement notices require a person to remedy a contravention or likely contravention of a marine safety law within a specified period. Prohibition notices require a person to cease an activity which is considered to pose an immediate risk to the safety of a person until a clearance certificate is given.*

2. Expand the range of sanctions available to courts in relation to convictions for breaches of marine safety laws. A court will be entitled to make three new categories of order:
  - a commercial benefits penalty order, requiring a person to pay a fine where they have benefited financially from their commission of a marine safety offence;
  - a supervisory intervention order, imposing conditions on a person's ongoing activities, in order to improve their safety compliance; and
  - an exclusion order, banning persons for a certain period from carrying out marine operations. **[4]**
3. Give Marine Safety Victoria power to collect and disclose information for the purpose of assisting Consumer Affairs Victoria with the enforcement of a national marine safety standard developed by the National Marine Safety Committee. The standard is known as the Australian builders plate standard and will require an 'Australian builders plate' to be affixed to most recreational vessels bearing information about the vessel. **[3]**

#### **Port Services Act 1995**

4. Ensure that when carrying out their functions, port corporations are required to have appropriate regard to the benefits of competition among port service providers and that relevant long-term port development strategies are prepared and maintained for each commercial trading port. **[6-8]**

#### **Transport Act 1983**

5. Give the Chief Investigator a power to require persons to attend and answer questions during the investigation of a public transport or marine safety matter to facilitate the speedy investigation of a public transport or marine incident. Failure to attend before the Chief Investigator or a refusal to take an oath or make an affirmation or a refusal or failure to answer a question is an offence.

The answers to questions posed by the Chief Investigator are not admissible in evidence against the person in a criminal proceeding. The Bill provides that the exemption does not apply in the case of a coronial inquiry or if the court considers that failure to admit a report into evidence in a criminal proceeding could prejudice the fair trial of the accused. **[28-29]**

### ***Southern and Eastern Integrated Transport Authority Act 2003***

6. Expand the role of the Southern and Eastern Integrated Transport Authority (established to deliver the Eastlink project) to enable it to undertake other road transport related projects. **[25 to 27]**

### ***Road Management Act 2004***

7. To give the Secretary of the Department of Transport the power to install, remove and relocate bus stops and bus stop infrastructure and empower the Secretary to prevent others from removing infrastructure installed by the Department, and prevents people from moving the location of bus stops without the secretary's consent.

The Secretary is given the power to develop guidelines for bus stops in consultation with VicRoads, municipal councils and other interested parties such as bus operators.

The amendments also allow better monitoring of bus stop infrastructure across the network by obliging councils to notify the secretary when a significant item such as a shelter or seat is installed, removed or relocated. **[23]**

8. Give in principle priority to designated modes of transport on specified parts of the road network with the objective of the road network being managed in a way that makes specified routes more attractive for certain modes of transport, increasing efficiencies in the road network. Relevant Ministers will have the power to specify that certain roads or parts of roads to be priority roads for trams, buses, bicycles, pedestrians and freight. **[14-15]**
9. Expand the membership of the Utilities Reference Panel to include a member representing the interests of bus operators. **[11]**
10. Clarify and strengthen rail safety requirements by addressing key safety issues at points of road-rail interface such as level crossings. The Bill expands the coverage of safety duties to ensure that all appropriate parties are subject to the duties and to ensure there are no 'gaps' in the legislation; replicates safety duties presently applying to road authorities to rail operators working near road infrastructure; sets benchmarks as to what it actually means to ensure safety 'so far as is reasonably practicable' equivalent to provisions prescribed in the *Rail Safety Act* and the *Occupational Health and Safety Act*.  
Establishes parameters on how notification of works must be given to appropriate persons, specifically what form notification must take and how far in advance it must be given. **[18-21]**

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

## Workplace Rights Advocate (Repeal) Bill 2008

<b>Introduced</b>	2 December 2008
<b>Second Reading Speech</b>	4 December 2008
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Rob Hulls MLA
<b>Portfolio responsibility</b>	Minister for Industrial Relations

### Purpose

The Bill repeals the *Workplace Rights Advocate Act 2005* (the 'Act') and makes consequential amendments to the *Victorian Civil and Administrative Tribunal Act 1998* and the *Public Sector Employment (Award Entitlements) Act 2006*.

### Background

The Act created the Office of the Workplace Rights Advocate (the Advocate) to provide information about, and promote and monitor the development of fair industrial relations practices in Victoria. The Act also provided for the Governor in Council to appoint a person to be the Advocate.

Amendments to Commonwealth industrial relations laws, including the abolition of Australian Workplace Agreements and the introduction of a new No Disadvantage Test for certified agreements has changed the role of the Advocate and as a consequence the Advocate is no longer required to apply a fairness test to public sector agreements.

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

# Ministerial Correspondence

---

## Assisted Reproductive Treatment Bill 2008

The Bill was introduced into the Legislative Assembly on 9 September 2008 by the Hon. Rob Hulls MLA.

The Committee considered the Bill on 6 October 2008 and wrote to the Minister on 7 October 2008. The Committee wrote to the Minister again on 6 November 2008 in relation to a further matter reported in Alert Digest No. 12 of 2008.

### Committee's Comments

#### Charter report

#### ***Freedom of expression – Offence to make certain statements about surrogacy – Altruistic surrogacy – Public expressions of personal views***

*The Committee notes that clause 45 makes it an offence to publish various statements about surrogacy. The Committee considers that clause 45 engages the Charter right to freedom of expression.*

*The Explanatory Memorandum states that clause 45 is:*

*...[i]n keeping with the need to ensure that surrogacy arrangements are not commercialised and are altruistic...*

*While the Committee accepts that preventing the advertising of commercial surrogacy (which is banned by the Bill) is compatible with the Charter's right to freedom of expression, the Committee is concerned that clause 45 may go further than this purpose in two respects:*

*First, clause 45 also applies to publications about non-commercial surrogacy, which is permitted under Part 4 of the Bill. Other jurisdictions that permit altruistic surrogacy either restrict their ban to commercial surrogacy or advertisements, or distinguish between commercial and non-commercial surrogacy.*

*Second, the ban on publications is not limited to advertisements or publications intended to procure or facilitate a surrogacy arrangement. Rather, it includes 'statements' or 'documents' (including in the media or online) to 'the effect that' a person 'may be willing' to be involved in a surrogacy arrangement either as a prospective parent (clause 45(1)(a)) or as a surrogate mother (clause 45(1)(f)). Clause 45 may therefore criminalise public expressions of a person's personal views, e.g. a media column where a person criticises the existing law for impeding their desire to have a baby via a surrogate; or a blog post discussing the ethics of surrogacy where the author remarks that she'd be willing to be a surrogate if a close relative was infertile. The Committee observes that criminalising such statements may chill public discussions about an important social issue.*

***The Committee will seek further information from the Minister as to whether clause 45 will apply to people who publicly mention their own willingness to enter into a surrogacy arrangement as part of public discussions on the issues associated with surrogacy. Pending the Minister's response, the Committee draws attention to clause 45.***

## Minister's Response

*I refer to your letter dated 6 November 2008 in relation to clause 45 of the Assisted Reproductive Treatment Bill 2008 (ART Bill) which provides that it is an offence to publish certain statements about surrogacy.*

*You have asked me to provide further information as to whether clause 45 will apply to people who publicly mention their own Willingness to enter into a surrogacy arrangement as part of public discussions on the issues associated with surrogacy.*

*The Report by the Scrutiny of Acts and Regulations Committee (Committee) in relation to the ART Bill contained in Alert Digest No 12 notes that the ban on publications is not limited to advertisements or publications intended to procure or facilitate a surrogacy arrangement. Rather, it includes 'statements' or 'documents' (including in the media or online) to 'the effect that' a person 'may be Willing' to be involved in a surrogacy arrangement either as a prospective parent or as a surrogate mother.*

*The Committee notes that clause 45 may criminalise public expression of a person's personal views, for example, a media column where a person criticises the existing law for impeding their desire to have a baby via a surrogate or a blog post discussing the ethics of surrogacy where the author remarks that she would be willing to be a surrogate if a close relative was infertile.*

*Clause 45 is not intended to prohibit conduct such as the examples that the Committee provided in its Report. I am advised that in interpreting the section, the general words highlighted by the Committee will be limited by the more specific words around them, such as:*

- the scope of the words 'statement' and 'document' will be necessarily narrowed by their appearing in context with 'advertisement' and 'notice';*
- paragraphs 45(1)(a) and 45(1)(f) will be read in conjunction with paragraphs 45 (1)(b)-(e) which clearly refer to someone trying to arrange a surrogacy arrangement; and*
- all of clause 45 should be read in conjunction with the very specific requirements of the definition of "surrogacy agreement" in clause 4. I am advised that merely expressing an opinion in relation to surrogacy agreements or a desire to be a party to a hypothetical surrogacy agreement in hypothetical circumstances would not satisfy this definition or clause 45.*

*I also note that the offence in clause 45(1) is substantially a re-enactment of the offence in s. 60 Infertility Treatment Act 1995. The conduct you have outlined as potentially infringing clause 45 has taken place while section 60 has been in operation, and I am informed that there have been no prosecutions for such conduct to date.*

*I trust that this satisfies your concerns,*

**HON. DANIEL ANDREWS MP  
MINISTER FOR HEALTH**

*8 December 2008*

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

## Relationships Amendment (Caring Relationships) Bill 2008

The Bill was introduced into the Legislative Assembly on 7 October 2008 by the Hon. Tony Robinson MLA. The Committee considered the Bill on 27 October 2008 and made the following comments in Alert Digest No. 13 of 2008 tabled in the Parliament on 28 October 2008.

### Committee's Comments

#### Charter report

#### **Marital status discrimination – Married or partnered people caring for a third party cannot register that caring relationship – Whether less favourable treatment – Whether reasonable**

*Summary: Under clause 9(2), only single people may register a caring relationship. The clause may treat married and partnered people less favourably than single people. This possible limitation of the Charter's equality rights does not appear to have been demonstrably justified. The Committee will write to the Attorney-General about the statement of compatibility. The question of possible Charter incompatibility is referred to Parliament.*

*The Committee notes that clause 9(2), amending s. 6, provides that caring relationships can only be registered if they satisfy the existing registration requirements, including that each person is:*

- *'not married or in a registered relationship'; and*
- *'not in another relationship that could be registered', e.g. in a domestic relationship with someone else (other than someone who is married, in a registered relationship or domiciled outside of Victoria)*

*In short, **only single people can register a caring relationship**. The Committee therefore considers that clause 9(2) engages the Charter's equality rights, by denying legal benefits on the basis of 'marital status'.*

*The Statement of Compatibility remarks:*

*Preventing married people and people in domestic relationships from registering a caring relationship... does not amount to less favourable treatment when compared to a person who is not married or in a domestic relationship being able to register a caring relationship. Marriage itself confers benefits, as does recognition as a domestic partner and, in most cases, spouses and domestic partners are treated equally across the statute book. The bill otherwise allows for the recognition of registered caring relationships in Victorian legislation where there has previously been on recognition.*

*Whilst the Committee recognises that the bill is beneficial, it is nevertheless concerned that **clause 9(2) may treat married or partnered people less favourably than single people**. For example, a middle-aged person may provide significant care for a disabled friend. If both are single, they will be able to register that relationship, allowing easy proof of that relationship and access to the property adjustment regime in Part 3 of the Relationships Act 2008. However, if the one happens to be married (e.g. to a long-term spouse with dementia who is living in a nursing home) or has an intimate relationship with a neighbour, then they will both be denied these legal benefits in respect of their caring relationship.*

*The Committee therefore considers that clause 9(2) may limit the Charter's right to 'equal enjoyment of human rights' and to 'equal protection of the law without discrimination' on the basis of marital status.*

*The Statement of Compatibility also remarks:*

*The requirements are reasonable given the purpose of the registration scheme is to allow people to register their primary relationship, which will be recognised as such for the purposes of Victorian laws. The registration scheme provides certainty about who the law applies to and it would become unworkable if someone could register numerous relationships.*

*The Committee observes that the purpose of allowing only allowing the registration of a 'primary' relationship appears merely to re-state the scheme's exclusion of married and partnered people. The statement that a broader scheme would be unworkable is not explained. The Committee therefore considers **that the statement of compatibility does not appear to provide a demonstrable justification for any limitation on the Charter's equality rights**, according to the test in Charter s. 7(2).*

*In its Practice Note No. 2, the Committee wrote that it 'will write to Ministers where, in the Committee's opinion, a Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right.' **The Committee will write to the Attorney-General expressing its concern about the Statement of Compatibility.***

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

- 1. Whether or not clause 9(2), by preventing the registration of caring relationships when either caring partner is married or in a domestic relationship, limits the right of both partners to equal protection of the law without discrimination on the basis of marital status.**
- 2. If so, whether or not clause 9(2) is a demonstrably justified limit on the Charter's equality rights according to the test set out in Charter s. 7(2).**

## **Minister's response**

*Thank you for your letter of 2 December 2008 enclosing a copy of the report of the Scrutiny of Acts and Regulations Committee (the Committee) in Alert Digest No. 15 of 2008 regarding the Relationships Amendment (Caring Relationships) Bill 2008 (the Bill).*

*The Bill amends the Relationships Act 2008 to allow for the registration of caring relationships on the Relationships Register. The Bill also provides for the recognition, where appropriate, of registered caring relationships across the Statute Book.*

*The Committee's report considers whether clause 9(2) of the Bill is incompatible with the Charter of Human Rights and Responsibilities (the Charter). Clause 9 amends the Relationships Act to allow people in a registrable caring relationship to apply for registration of their relationship. As is the case for applications to register a registrable domestic relationship, the applicants to register a registrable caring relationship cannot be married or be in a relationship already registered in Victoria, or be in another relationship that could be registered in Victoria.*

*As a result, the Committee states that only single people can register a caring relationship, denying married or partnered people legal benefits on the basis of their "marital status". The Committee is concerned that the clause may therefore limit the Charter right to equal enjoyment of human rights and equal protection of the law without discrimination on the basis of marital status.*

*The Committee has referred the question of possible Charter incompatibility to Parliament and written to request further advice about whether the Statement of Compatibility for the Bill (the Statement) provides a demonstrable justification for any Charter limitation. I am happy to provide the Committee with this further advice.*

*The Statement notes that clause 9 raises the Charter right to equality but concludes that the clause does not amount to a limitation on this right. I consider that the Statement adequately describes the purpose and effect of the clause in relation to the Charter right.*

*Under the Charter, every person is entitled to the equal protection of the law without discrimination. Discrimination means discrimination within the meaning of the Equal Opportunity Act 1995 on the basis of an attribute set out in section 6 of that Act. The attributes include a person's marital status, which includes being single, married or being a domestic partner. Direct discrimination occurs if a person treats someone with an attribute less favourably than the person treats someone without that attribute, or with a different attribute, in the same or similar circumstances.*

*While preventing married people and people in domestic relationships from registering a caring relationship raises an argument of differential treatment on the basis of a person's marital status, it does not amount to less favourable treatment in the same or similar circumstances. Marriage confers benefits on the partners in that marriage, as does recognition of a domestic relationship on the partners to that relationship, and in most cases, spouses and domestic partners are treated equally across the Statute Book. No detriment would therefore be suffered by one of those partners not being able to register a different, non-couple relationship.*

*The Statement also provides further context for clause 9 by explaining that the purpose of the registration scheme is to allow people to register their primary relationship, which will be recognised as such for the purposes of Victorian laws. The registration scheme therefore provides certainty about who Victorian laws apply to and demonstrates proof of the relationship where these laws apply. Registration allows recognition in an immediate way across a number of laws rather than leaving this up to a consideration of the nature of the relationship in each case.*

*This purpose would be undermined if a person could be married and also register a relationship, or if a person could register more than one relationship, as each Act would need to specify which relationship takes precedence in the particular circumstances. For example, the Guardianship and Administration Act 1986 sets out a hierarchy of people who may be the "person responsible" for a patient in relation to a proposed medical research procedure or proposed medical or dental treatment. The patient's spouse or domestic partner currently forms part of this list. It is intended that a registered caring partner be in the same position as a spouse or domestic partner in relation to this issue. If a patient has both a spouse and a registered caring partner, there would be uncertainty about whether the spouse or the registered caring partner is the person responsible for the patient and would require consideration of the numerous and complex factors that surround each of those relationships to determine this question.*

*The Statement also makes the important point that the registration scheme is voluntary and a person may choose not to register a caring relationship, instead making arrangements to benefit others in particular circumstances, such as by making a will or appointing a power of attorney.*

*Lastly, as set out in the Statement, I restate the beneficial nature of the Bill, which acknowledges that people form a diverse range of relationships and allows them to define which of their personal relationships is most important. The Bill recognises registered caring relationships in Victorian legislation where there has previously been no such recognition and by according them with a range of legal rights and obligations.*

*Given this, it is my opinion that the Statement adequately demonstrates that clause 9 does not amount to a limitation on the Charter right to equality.*

*Thank you for the opportunity to respond to the issues raised by the Committee in relation to this Bill. If you would be assisted by a further briefing from officers from my Department, please contact Dallas Henderson, Departmental Liaison Officer in my office (9651 1131) to arrange a suitable time.*

*ROB HULLS MP  
Attorney-General*

*19 December 2008*

**The Committee thanks the Attorney-General for this response**

**Committee Room  
2 February 2009**

# Appendix 1

## Index of Bills in 2009

---

### Alert Digest Nos.

Associations Incorporation Amendment Bill 2008	1
Assisted Reproductive Treatment Bill 2008	1
Bus Safety Bill 2008	1
Criminal Procedure Bill 2008	1
Duties Amendment Bill 2008	1
Equal Opportunity Amendment (Governance) Bill 2008	1
Fair Trading and Other Acts Amendment Bill 2008	1
Liquor Control Reform Amendment (Enforcement) Bill 2008	1
Melbourne Cricket Ground Bill 2008	1
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1
Relationships Amendment (Caring Relationships) Bill 2008	1
Resources Industry Legislation Amendment Bill 2008	1
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1
Transport Legislation General Amendments Bill 2008	1
Transport Legislation Miscellaneous Amendments Bill 2008	1
Workplace Rights Advocate (Repeal) Bill 2008	1



## Appendix 2

# Committee Comments classified by Terms of Reference

---

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

### Alert Digest Nos.

#### Section 17(a)

##### (vi) inappropriately delegates legislative power

Bus Safety Bill 2008	1
Criminal Procedure Bill 2008	1

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

Bus Safety Bill 2008	1
Occupational Health and Safety Amendment (Employee Protection) Bill 2008	1
Salaries Legislation Amendment (Salary Sacrifice) Act 2008	1
Transport Legislation Amendment (Driver and Industry Standards) Act 2008	1

#### Section 17(b)

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

Criminal Procedure Bill 2008	1
Equal Opportunity Amendment (Governance) Bill 2008	1



## Appendix 3

# Ministerial Correspondence

---

**Table of correspondence between the Committee and Ministers during 2008-09**

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Port Services Amendment (Public Disclosure) Bill 2008	Hon. David Davis MLC	28.02.08	2 of 2008
Assisted Reproductive Treatment Bill 2008	Health	06.11.08 08.12.08	12 of 2008 1 of 2009
Major Crime Legislation Amendment Bill 2008	Attorney-General	02.12.08	15 of 2008
Primary Industries Legislation Amendment Bill 2008	Agriculture	02.12.08	15 of 2008
Relationships Amendment (Caring Relationships) Bill 2008	Attorney-General	02.12.08 19.12.08	15 of 2008 1 of 2009