SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

56th Parliament
Annual Review 2009
Regulations 2009

Ordered to be Printed
N° 328 Session 2006-10
Scrutiny of Acts and Regulations Committee

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

17. Scrutiny of Acts and Regulations Committee

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

(a) To consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
   (i) trespasses unduly on rights or freedoms;
   (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
   (iii) makes rights, freedoms or obligations dependent on non-reviewable administrative decisions;
   (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000;
   (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2001;
   (vi) inappropriately delegates legislative power;
   (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
   (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities Act 2006;

(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 Act 2006*;

(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.
PRINCIPLES OF REGULATION REVIEW

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

21. Review of statutory rules by the Scrutiny Committee

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

(a) does not appear to be within the powers conferred by the authorising Act;

(b) without clear and express authority being conferred by the authorising Act –

(i) has a retrospective effect; or

(ii) imposes any tax, fee, fine, imprisonment or other penalty; or

(iii) purports to shift the onus of proof to a person accused of an offence; or

(iv) provides for the sub-delegation of powers delegated by the authorising Act;

(c) appears to be inconsistent with the general objectives of the authorising Act;

(d) makes unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of that Act;

(e) contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation;

(f) unduly trespasses on rights and liberties of the person previously established by law;

(g) makes rights and liberties of the person unduly dependent upon administrative and not upon judicial decisions;

(ga) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000;

(gb) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2001;

(h) is inconsistent with principles of justice and fairness;

(ha) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities Act 2006;

(i) requires explanation as to its form or intention;

(j) has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature;

(k) is likely to result in administration and compliance costs which outweigh the likely benefits sought to be achieved by the statutory rule.
(2) A report of the Scrutiny Committee under this section may contain any recommendations that the Scrutiny Committee considers appropriate, including a recommendation that a statutory rule should be –

(a) disallowed in whole or in part; or

(b) amended as suggested in the report.
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CHAIRPERSONS’ FOREWORD

We are proud to present the Annual Review of the operations of the Regulation Review Subcommittee to the Parliament of Victoria. The Subcommittee has reviewed the 2009 statutory rule series. This is the last Annual Review of Regulations for the fifty sixth Parliament. We have been the respective Chairs of the Regulation Review Subcommittee and the Scrutiny of Acts and Regulations Committee for this Parliamentary term.

The Charter of Human Rights and Responsibilities 2006 (the Charter) commenced operation on 1 January 2006. Pursuant to the Charter the Subcommittee is required to consider every statutory rule in the context of human rights. During the course of this Parliament the Subcommittee has navigated its way through the unknown waters of human rights. The Subcommittee has found this interesting and challenging.

The Subcommittee has worked assiduously and carefully through the 2009 statutory series. The series was comprised of 189 regulations. Thirty-one regulations were accompanied by Regulatory Impact Statements. Often those regulations accompanied by Regulatory Impact Statements have large numbers of submissions. Each submission is considered in the context of the regulation and its objectives. This can be time consuming. The Subcommittee endeavours to take a common sense and pragmatic approach. The atmosphere at Subcommittee meetings is friendly, bipartisan and co-operative. In one sense the largely unseen achievement of the Subcommittee is an example of Parliament working at its very best.

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

The area of regulation review continues to evolve. We wish the new Subcommittee in the next Parliament well in its endeavours.

Mr Ken Jasper MP
Chairperson
Regulation Review Subcommittee

Mr Carlo Carli MP
Chairperson
Scrutiny of Acts and Regulations Committee

August 2010
Mr Jasper and Mr Carli have both been involved with the review of regulations and bills for a number of years. Both members are retiring at the end of this Parliament. During this Parliament the Subcommittee has had to scrutinise regulations in the new context of human rights. The experience and contribution from both Mr Jasper and Mr Carli has been invaluable. The Subcommittee thanks the members for their work and commitment to the scrutiny process. They will be greatly missed.
CHAPTER 1 – INTRODUCTION

This Annual Review examines the major issues arising out of the scrutiny of regulations made in Victoria in 2009 by the Regulation Review Subcommittee (the Subcommittee).

WHAT IS THE REGULATION REVIEW SUBCOMMITTEE?

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

WHAT ARE ‘REGULATIONS’?

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

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

PARLIAMENTARY OVERSIGHT

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

While regulations are sometimes perceived to be of lesser importance than Acts of Parliament, regulations do control and prohibit the conduct of citizens and may adversely affect the rights and liberties of citizens in much the same way as Acts of Parliament. The potential for abuse of the regulation-making power and erosion of citizens’ rights always exists. As Mr Justice Stephen commented in Watson v. Lee2 the history of delegated legislation:–

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1 Prior to 1 May 2000 the Regulation Review Subcommittee was known as the Subordinate Legislation Subcommittee.
2 (1979) 155 CLR 374 at 394
“reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed “requires an adequate measure of control if it is not to degenerate into arbitrary government”.”

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

Victoria has scrutinised regulations since 1956. From 1982 to 1992 the Legal and Constitutional Committee was responsible for scrutinising regulations. In 1992, the Committee was created by the Parliamentary Committees (Amendment) Act 1992 (Vic). It scrutinises regulations and bills.

**SCOPE OF THE SUBORDINATE LEGISLATION ACT 1994**

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

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

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

- The procedures of the Act. However they remain subject to any requirements contained in legislation under which they are made;
- Scrutiny by the Subcommittee and generally not subject to Parliamentary review. However it should be noted that some regulations which fall outside the definition of ‘statutory rule’ are

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

4 Subordinate Legislation Act 1956 (Vic)

5 Ibid, s. 3
subject to specific Parliamentary review requirements. For example, planning schemes (and amendments) must be tabled in Parliament within 10 sitting days after being approved.6

The Committee remains concerned about regulations which fall outside the definition of ‘statutory rule’ because it means that they are not subject to consistent regulation-making procedures nor generally to Parliamentary review, allowing the potential for powers to be used improperly and for rights to be adversely affected. This issue is discussed in detail in the Committee’s Report on the Subordinate Legislation Act 1994.7

ROLE OF THE SUBCOMMITTEE

The Subcommittee examines and reviews:–

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

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

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

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

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6 Planning and Environment Act 1987 (Vic)
8 The Regulation Review Subcommittee has all the powers and privileges of the full Committee. However it cannot report directly to Parliament.
9 Parliamentary Committees Act 1968 (Vic), s. 4L(5)
10 Subordinate Legislation Act 1994 (Vic), s. 22(1)
11 Ibid, s. 22(5)
DISALLOWANCE

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

SCRUTINY OF REGULATIONS

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

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

12 Subordinate Legislation Act 1956 (Vic), s. 21
13 Department of Premier and Cabinet, *Premier’s Guidelines*, December 2004
The Subcommittee also ensures compliance with the procedural requirements of the Act. Where a Regulatory Impact Statement (RIS) has been prepared, some of the procedural issues the Subcommittee examines include whether:–

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

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

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

The Subcommittee also ensures that:–

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

**SCRUTINY OF ENVIRONMENT PROTECTION AND WASTE MANAGEMENT POLICIES**

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

More specifically State Environment Protection Policies include:–

- policies concerning the environment generally;\(^{14}\)
- policies concerning the removal, disposal or reduction of litter in the environment;\(^ {15}\)
- policies concerning the re-use and recycling of substances.\(^ {16}\)

Until recently waste management policies made under the Environment Protection Act 1970 (Vic) applied only to industrial waste. With changes brought about by the Environment Protection

\(^{14}\) Environment Protection Act 1970 (Vic), s. 16(1)
\(^ {15}\) Ibid, s. 16(1B)
\(^ {16}\) Ibid, s. 16(1C)
(Resource Efficiency) Act 2002 (Vic) waste management policies now apply to waste generally.\(^{17}\) Waste management policies are now enacted under s. 16A of the Environment Protection Act 1970 (Vic).\(^{18}\)

Waste Management Policies include policies dealing with:—\(^{19}\)

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

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

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

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

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\(^{17}\) See definition of ‘waste’ in the Environment Protection Act 1970 (Vic), s. 4  
\(^{18}\) Previously Industrial Waste Management Policies were made under section 16(1A) of the Environment Protection Act 1970 (Vic)  
\(^{19}\) Environment Protection Act 1970 (Vic), s. 16A  
\(^{20}\) Ibid, s. 16(1)  
\(^{21}\) Ibid, s. 18D(1)
• the EPA must consider all submissions; and
• the EPA must write a separate letter to each person who has lodged a submission.

Section 18C of the Environment Protection Act 1970 (Vic) sets out the matters which a policy impact assessment must discuss:—
• the purposes of the policy;
• the alternatives for achieving the objectives, including consideration of not declaring the policy or varying the existing policy; and
• an assessment of the possible financial, social and environmental impacts of each alternative in qualitative and, where practicable, in quantitative terms.

A copy of the following documents must be forwarded to the Committee:—
• the final policy impact assessment;
• a summary of submissions;
• a statement of the EPA’s evaluation of the submissions and any changes made to the draft policy;
• a copy of the review panel’s advice if there was a review panel.

The Committee may report to Parliament where these policies are beyond power or do not comply with the provisions of the Environment Protection Act 1970 (Vic). Section 18D(3) provides that the Committee may report to Parliament where a policy:—
• does not appear to be within the powers conferred by the Environment Protection Act 1970 (Vic);
• has been prepared in contravention of the Environment Protection Act 1970 (Vic); or

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

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

THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

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

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22 Environment Protection Act 1970 (Vic), s. 18D(4)
23 Ibid, s. 18D(6)
HISTORY – AMENDMENT OF THE SUBORDINATE LEGISLATION ACT 1994

In 1985, Victoria introduced a range of regulatory reforms including a regulatory impact statement (RIS) process for the making of statutory rules and the automatic sunsetting of regulations after 10 years of operation. In 1995 changes were made to the Act which imposed stronger RIS requirements on the regulation making process, specifically targeting regulation likely to impose an appreciable economic or social burden.

The Committee tabled a report in September 2002 ‘Inquiry into the Subordinate Legislation Act 1994’. In that Report the Committee examined the effectiveness of the regulation making system in Victoria. It made a number of recommendations to improve the system to enable Victoria to achieve best practice standards set by the Organisation for Economic Co-operation and Development (OECD). The Government’s response to the Committee’s Report was tabled in the Legislative Assembly in 2003. In 2004 the Victorian Competition and Efficiency Commission (VCEC) was created to act as an independent regulatory review body. VCEC’s role includes reviewing regulatory impact statements and advising on the economic impact of significant new legislation.

In December 2009 the Subordinate Legislation Amendment Bill Discussion Paper was released seeking submissions. The Committee carefully considered many issues raised by the Discussion Paper. The Committee considered the implications of Appendix B of the Discussion Paper which are being considered for prescription as legislative instruments exempt from the operation of the draft Bill. The Committee also considered the proposed changes in respect of the definition of ‘legislative instrument’ and its implications in terms of resources. Of interest to the Committee is the impact of the Charter on its scrutiny of regulations. The Committee sent a written submission to the Department of Premier & Cabinet. In addition, the Committee had several productive and informative meetings with representatives of the Department of Premier & Cabinet to discuss various matters. The Committee has appreciated the opportunity to be involved in this matter and happy to provide further input when required.

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27 Ibid, p. 7
28 Department of Premier and Cabinet, Subordinate Legislation Amendment Bill Discussion Paper, December 2009
CHAPTER 2 – SIGNIFICANT ISSUES

In 2009, the Subcommittee held nine meetings. During those meetings it considered 189 statutory rules made during 2009. Of those rules thirty-three were accompanied by Regulatory Impact Statements. Of the total regulations made sixty-one were actually considered by the Subcommittee in early 2010.

The Subcommittee did not make any reports to Parliament during 2009. However, the Subcommittee sought further clarification or made comments in relation to seventeen statutory rules. In each instance, it wrote to the responsible Minister. Generally, the Subcommittee received satisfactory responses to the issues raised. The Subcommittee thanks the Ministers for their responses.

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

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

(A) The statutory rule has been prepared in contravention of any of the provisions of the act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature 11

(B) Consultation 11

(C) Consideration of submissions – General expectation – Response required 12

SR No. 136 – Alpine Resorts (Management) Regulations 2009 13
SR No. 134 – Liquor Control Reform Regulations 2009 14
SR No. 53 – Children’s Services Regulations 2009 18


SR No. 32 – Electricity Safety (Stray Current Corrosion) Regulations 2009 27


(F) Sighting of material incorporated by reference 29

(G) Section 9(1)(A) – Section 21(1)(i) – Requires explanation as to its form or intention 30

SR No. 105 – Building Amendment (Bushfire Construction) Further Interim Regulations 2009 30
SR No. 52 – Retirement Villages (Contractual Arrangements) Amendment (Formula) Regulations 2009 33
(H) Other Matters – The ‘Balanced Scorecard Approach’ – What is it?  

(I) Section 9(1)(A) – Is there any appreciable economic or social burden on any sector of the public?  

(J) Commendation  

(K) Human rights  

SR No. 1 – Crimes (DNA Database) Amendment Regulations 2009  
SR No. 6 – Education and Training Reform Amendment (Age Requirements) Regulations 2009  
SR No. 24 – Road Safety (Drivers)(Peers Passenger Restrictions) Interim Amendment Regulations 2009  
SR No. 40 – Corrections Regulations 2009  
SR No. 41 – Valuation of Land (General and Supplementary Valuation) Amendment Regulations 2009  
SR No. 45 – Police Integrity Regulations 2009  
SR No. 47 – Alpine Resorts (Management) Interim Regulations 2009  
SR No. 94 – Road Safety Road Rules Regulations 2009  
SR No. 180 – Marine Regulations 2009  
SR No. 118 – Road Safety (Vehicles) Regulations 2009
Under section 21(1)(j) of the Act the Subcommittee examines regulations to ensure that they have been properly prepared. It examines them to see whether they have been prepared in contravention of any of the provisions of the Act or of the Premier’s Guidelines with respect to the statutory rule. It examines the regulations to see whether the contravention is of a substantial or material nature.

This year no statutory rules came within this category.

**B) Consultation**

Section 6 of the Act sets out the requirements for consultation. These requirements apply to regulations made with or without RISs. Responsible Ministers must ensure that there is consultation “where the guidelines require consultation”29 with “any sector of the public on which an appreciable economic or social burden may be imposed.”30

The Premier’s Guidelines31 provide as follows:–

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

The Premier’s Guidelines indicate that the “nature and degree of consultation that is appropriate for any particular rule will vary with the nature of that rule.”32 This places the final responsibility on Ministers to ensure that appropriate consultation takes place and includes all those affected by a proposed regulation.

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

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

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29 Subordinate Legislation Act 1994, s. 6
30 Ibid, section 6(b).
31 Department of Premier and Cabinet, Premier’s Guidelines, December 2004, paragraph 5.19
32 Ibid, Paragraph 5.13


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

General Expectations

Section 11(3) of the Act imposes a duty on Ministers “to consider all submissions and comments received on a draft statutory rule where a RIS has been prepared”.\(^33\) The Premier’s Guidelines also emphasise the need for proper consultation\(^34\) before a regulation is made.

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

Submissions received by the Subcommittee

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

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

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

Email

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

\(^33\) Subordinate Legislation Act 1994, s. 11(3)
\(^34\) Department of Premier and Cabinet, *Premier’s Guidelines*, December 2004, paragraphs 5.12 - 5.17
the particular issues at hand. For an example, an email to many recipients attaching a formal letter from the Department is appropriate provided the letter itself is sufficient. Posting letters to those who do not have an email address of course remains an appropriate manner with which to deal with submissions.

The Subcommittee considered the matter of responses to the submission in relation to SR No. 136 – Alpine Resorts (Management) Regulations 2009. The Subcommittee advised the Minister of its expectations.

Example 1:

SR No. 136 – Alpine Resorts (Management) Regulations 2009

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 22 July 2009.

The Subcommittee made the following comments in its Annual Review 2007, August 2008 at page 11: -

“General Expectations

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

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

The closing date for the submissions was 14 September 2008. The Department did not provide written responses. There were only eleven submissions. The Regulations were not made until 4 November 2009. The Subcommittee was advised that the Department sent a brief email in the following terms: -

‘Following the closing date of Monday 14th, submissions will be collated and any necessary amendments will be made to the draft Regulations before the new Regulations are set in place in early November.

Unfortunately we are not able to provide feedback on individual submissions. However, I sincerely thank you for submitting your response and assure you that it will be considered and analysed as part of the review process’.

The Subcommittee notes that several submissions raised issues in relation to the definition of wheel chains, winter tyres and ‘autosocks’. The Subcommittee is appreciative of the information sent to it by the relevant officers in relation to the consultation process. However, the Subcommittee’s clear expectation is that a written response ought to be sent to those who send in submissions. The Subcommittee is of the view that there was ample time in this instance to provide written responses.

Letter dated 21 April 2010 to the Hon. Gavin Jennings MLC, Minister for Environment and Climate Change, from the Regulation Review Subcommittee
Minister’s Response


I acknowledge that the expectation of the Regulations Review Subcommittee is that a written response should have been sent to those who made submissions through the Alpine Resorts (Management) Regulations 2009 consultation process.

I have made a broad undertaking that officers of the Department of Sustainability and Environment provide written responses to submissions in the future, in accordance with the Victorian Guide to Regulation.

Thank you again for raising this matter with me.

The Subcommittee formed the view that there was a contravention of section 6(b) of the Act in respect of SR No. 134 – Liquor Control Reform Regulations 2009.

Example 2:

SR No. 134 – Liquor Control Reform Regulations 2009

Submission from Mr William Albon

Application to Disallow Liquor Control Reform Regulations 2009

I write on behalf of a large group of business people who hold liquor licenses for their venues to which are attached conditions permitting their venues to provide sexual explicit entertainment (striptease). These persons are massively impacted by Minister Tony Robinson’s Liquor Control Reform Regulations 2009 in two specific areas and for two fundamental reasons. On these basis's [sic] your Scrutiny of Acts and Regulations Committee is asked to disallow the Regulations. I seek to set out the facts.

1. The majority of the more than 50 businesses that have liquor licenses with the sexually explicit entertainment conditions were not regarded as being stakeholders and were not provided with notice or detail of the Regulatory Impact Statement. Their comment was never sought; they had no opportunity to contribute to the debate.

2. The RIS made no reference to the specific of a separate fee structure for sexually explicit entertainment venues and yet a fee for 2010 has been set by Minister Robinson at $30,000 p.a. There is also a demerit feature to the licensing fee that would see massive increase in license fees for an indiscretion, a feature that was never flagged in the RIS.

I contend that the RIS process was seriously flawed and subsequently seriously abused.

It follows that your Committee should move to disallow the proposed Regulation.

It follows that I along with my clients are prepared to appear before your committee to give evidence, or to elaborate in any form you seek.

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36 Letter dated 24 May 2010 to the Regulation Review Subcommittee from the Hon. Gavin Jennings MLC, Minister for Environment and Climate Change
37 Letter dated 1 December 2009 to Mr Carlo Carli Chairperson, Scrutiny of Acts and Regulations Committee, from Mr William Albon
Thank you for your letter dated 1 December 2009.

The Regulation Review Subcommittee (the Subcommittee) held a meeting on 2 December 2009.

The Subcommittee considered your letter. The Subcommittee has not yet considered the above Regulations. Section 21 of Subordinate Legislation Act 1994 provides that the period for a notice of motion of disallowance expires 18 sitting days after the Regulations have been tabled. In this instance the Regulations were tabled in both the Legislative Assembly and Legislative Council on 24 November 2009. The period for a notice of motion of disallowance will not expire until 13 April 2010.

Accordingly, the Subcommittee will scrutinise the Regulations and any correspondence in 2010.

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 10 February 2010. The Subcommittee has not yet approved the Regulations.

a) Background – Preliminary inquiries

As part of the process of considering the Regulations, the Subcommittee made written enquiries in January 2010. The relevant Departmental officer responded in an extremely prompt and thorough manner. The Subcommittee thanks the Departmental officer. As a result of those inquiries, the Subcommittee ascertained the following facts: -

1. The Regulatory Impact Statement (RIS) made no reference to the separate fee structure for sexually explicit entertainment venues;
2. The draft Regulations accompanying the RIS made no specific provision for a separate fee for sexually explicit entertainment venues;
3. The first public reference to a separate fee structure appears to have been in a media release from the Minister for Consumer Affairs dated 15 October 2009;
4. The Notice of Decision was published in the Herald Sun newspaper and the Government Gazette on 30 October 2009;
5. The first publication of a $30,000 annual renewal fee in relation to sexually explicit entertainment venues was when the Regulations were made by the Governor in Council on 4 November 2009;
6. There are approximately 19,500 licence holders in total affected by the new Regulations;
7. In relation to sexually explicit entertainment venues there are approximately 28 stakeholders who may be affected;
8. Under the old licence fee structure, the approximate maximum fee for a sexually explicit entertainment venue operating for 24 hours per day was $5,800.
b) The requirements of the Subordinate Legislation Act 1994 (the Act)

Section 6 of the Act sets out the requirements for consultation. It provides:-

6. Consultation

The responsible Minister must ensure that where the guidelines require consultation:-

(a)…

(b) There is consultation in accordance with the guidelines with any sector of the public on which an appreciable economic or social burden may be imposed by a proposed statutory rule so that the need for, and the scope of, the proposed statutory rule is considered.

c) The requirements of the Premier’s Guidelines (the Guidelines)

The relevant extract is set out at paragraph 4.3.2:-

In considering whether a proposed rule imposes an appreciable cost or burden on a sector of the public, consideration must be given as to:

• whether the proposed statutory rule has the requisite impact on a ‘sector of the public’. The rule must have an impact on the whole community or on groups of people, although the question of how many people constitute a ‘sector’ of the public is a matter of judgment; and

• whether the proposed rule imposes ‘an appreciable cost or burden’ on that sector of the public.

The burden needs to be something real and more than just theoretical. There must be an actual impact. In considering whether a particular proposed statutory rule imposes an appreciable burden, the following questions should be considered:

• Does it impose significant penalties for non-compliance?;

• Does it impact on individual rights and liberties?;

• Will business, community groups or individuals have to spend funds or devote time to compliance activities, change current practices or seek external advice?

If the answer to one or more of the questions above is ‘yes’, then the size of the burden should be considered.

The Subcommittee also notes the comments at paragraph at 4.3.4:-

If the proposed statutory rule is likely to impose an appreciable burden, cost or disadvantage on a sector of the public, consultation should take place with that sector (eg. Business groups, community groups, special interest groups). This consultation should include discussion of the need for and method of the proposed regulation…

d) Scrutiny of Acts & Regulations Committee – Annual Review 2008

The Subcommittee notes comments made in the Annual Review at page 11: -

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

e) Submission to the Subcommittee – Mr William Albon

The Subcommittee received a submission from Mr William Albon dated 1 December 2009. A copy is attached for your information.
f) **Scrubtity of the RIS process – Section 21(j) Power to review – Section 22 – Suspension of statutory rule or part of a statutory rule**

Section 21(j) of the Act provides that the Committee may consider any statutory rule that:

Has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature.

Section 22 of the Act provides as follows:

22. Suspension of statutory rule or part of a statutory rule

(1) If the Scrutiny Committee–

(a) proposes under section 21 to recommend that a statutory rule should be–

(i) disallowed in whole or in part; -

(ii) amended: and

(b) is of the opinion that considerations of justice and fairness require that the operation of the statutory rule or any part of the statutory rule should be suspended pending the consideration by the Parliament of the statutory rule–

the Scrutiny Committee may propose in the report under section 21 that the operation of a statutory rule or part of a statutory rule be suspended;

g) **The Subcommittee’s view**

Section 6 of the Act states that the Minister **must** ensure there is consultation where it is required by the Guidelines. The Guidelines provide there should be consultation where the proposed statutory rule imposes an appreciable burden on a sector of the community.

In this case there are approximately 28 stakeholders out of approximately 19,500 affected by the introduction of an annual renewal fee of $30,000. The original fee was in the vicinity of $5,800. The stakeholders were not given any notice of the introduction of the $30,000 fee nor were they given any opportunity to have input or make any submissions.

The fee of $30,000 may well be considered an appreciable burden on a sector of the public. The sector of the public specifically affected in this instance is the group of owners of sexually explicit entertainment venues.

**The Subcommittee is of the firm view that there has been a contravention of section 6(b) of the Act and of the Guidelines.**

**Minister’s Response**

I refer to your letter of 10 February 2010 regarding the review of the Liquor Control Reform Regulations 2009 (the Regulations) by the Scrutiny of Acts and Regulations Committee, Parliament of Victoria.

Under section 6(b) of the Subordinate Legislation Act 1994 (the Act), the responsible Minister must ensure that, where required by the Premier’s Guidelines, there is consultation with any sector of the public on which an appreciable economic or social burden may be imposed by proposed regulations. If proposed regulations are likely to impose an appreciable burden, cost or disadvantage on any sector of the public, the Premier’s Guidelines require consultation to take place with that sector (e.g. business, community or special interest groups).

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41 Letter dated 15 March 2010 to the Regulation Review Subcommittee from the Hon. Tony Robinson MP Minister for Consumer Affairs
A Regulatory Impact Statement (RIS) for the proposed Regulations was released for public consultation on 12 August 2009. Submissions closed on 18 September 2009. In response to the submissions received and direct representations, the Government made several changes to the proposed licence fee structure prior to the making of the Regulations. These changes included establishing a separate licence renewal fee structure for venues with sexually explicit entertainment (SEE) conditions on their licence.

During the development of the separate fee structure for SEE venues the Government met and consulted with the main peak bodies in the liquor industry, including the Australian Hotels & Hospitality Association (Vic) and Restaurant & Catering Victoria, about their concerns regarding the proposed fee model following publication of the RIS. The discussions included changes to the fee model to address concerns about the impact of the fees on country pubs, and included consideration of a higher renewal fee for SEE venues.

Of the 28 SEE venues at the time of making the Regulations, 15 are members of the Australian Hotels & Hospitality Association (Vic). Further, there is no separate recognised peak body for SEE venues in Victoria. I note the Premier's Guidelines provide that a factor to be taken into account when determining the appropriate level of consultation is the nature of the industry the regulations will affect, such as whether it has peak bodies that can or should be consulted.

Accordingly, I consider that the Government has undertaken an appropriate level of consultation in relation to the separate fee structure for SEE venues and there has been no contravention of either section 6(b) of the Act or the Premier's Guidelines.

By way of contrast, in respect of SR No. 53 – Children's Services Regulations 2009, the Subcommittee found the consultation process was robust. The Subcommittee received two submissions. One submission was from Mr Max Pyle and the other from Mr Frank Cusmano.

Example 3:

SR No. 53 – Children's Services Regulations 2009

Submission received from Mr Max Pyle

I would like to take the opportunity to illustrate to you what I see happening should the Children's Services Regulation Review be adopted – a 30% - 40% increase in child care fees.

Child Care Centre rooms are designed under Human Services Regulations of 3.3m² per child internally.

Currently under 3 years of age group rooms are designed to cater for the following children numbers:

- 0-1 years  Infant Room  10 children
- 1-2 years  Babies Room  10 children
- 2-3 years  Toddlers Room  15 children

Current regulation staff ratios are 1 staff member to 5 children:

- 0-1 years  2 staff members comprising 1 Qualified (diploma) & 1 Assistant
- 1-2 years  2 staff members comprising 1 Qualified (diploma) & 1 Assistant
- 2-3 years  3 staff members comprising 1 Qualified (diploma) & 2 Assistants

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42 Letter dated 12 March 2009 to Mr Ken Jasper MLA, Member for Murray Valley, from Mr Max Pyle.
Should the new Regulation suggested ratio of 1 staff member to 4 children and 1 Diploma to 12 children be adopted then the following would need to occur:

Scenario 1:

- **0-1 years**: 3 staff members comprising 1 Qualified (diploma) & 2 Assistants  
  Room capacity remains as is: 10 children  
  33 1/3% Staffing Cost Increase

- **1-2 years**: 3 staff members comprising 1 Qualified (diploma) & 2 Assistants  
  Room capacity remains as is: 10 children  
  33 1/3% Staffing Cost Increase

- **2-3 years**: 4 staff members comprising 2 Qualified (diploma) & 2 Assistants  
  Room capacity remains as is: 15 children  
  1 to 12 ratio applicable hence a second qualified required.  
  35% Staffing Cost Increase

As you can see the Labour Cost increases are enormous leaving no choice but to increase fees – how will the families cope?

Alternatively the following could occur:

Scenario 2:

- **0-1 years**: 2 staff members comprising 1 Qualified (diploma) & 1 Assistant  
  Room capacity reduces: 8 children  
  Loss of 2 child care places  
  Increase of 20% fees to compensate for loss of 2 places.

- **1-2 years**: 2 staff members comprising 1 Qualified (diploma) & 1 Assistant  
  Room capacity reduces: 8 children  
  Loss of 2 child care places  
  Increase of 20% fees to compensate for loss of 2 places.

- **2-3 years**: 3 staff members comprising 1 Qualified (diploma) & 2 Assistants  
  Room capacity reduces: 12 children  
  Loss of 3 child care places  
  Increase of 20% fees to compensate for loss of 3 places.

Loss of Child Care Places would be disastrous.

It does not matter which scenario you go with families will be impacted by a fee increase due to either the 33 1/3% labour increase or the 20% increase to cover the loss of places for care.

In conclusion should the new ratios along with other suggested staffing requirements be passed then the overall financial affects to families and Child Care Operators will be horrific - 30% to 40% increase.

It is difficult to comprehend in the current climate that such changes could be looked upon favourably.

**Subcommittee’s Letter**

Thank you for your submission dated 23 February 2009.

I refer to previous correspondence and in particular to my letter to you of 12 March 2009.

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at a meeting on 26 August 2009.
The Subcommittee notes that the consultation process commenced in March 2007 when the Children’s Services Review Discussion Paper was released for public comment. Twenty four consultation sessions were conducted including sixteen public sessions at various locations throughout metropolitan and regional Victoria. The review has been supported with regular input from the Victorian Children’s Council. It has been overseen by a Project Control Group comprising key departmental stakeholders as well as external early childhood experts.

The Regulatory Impact Statement (RIS) was released for public comment in January 2009. A total of 12,390 copies of the RIS and draft Regulations were distributed through a range of means including a mail out to the sector and responses to individual requests. Around 1500 additional copies were distributed at public consultations.

Following the release of the RIS a further statewide public consultation process was undertaken in which there was broad community participation. This included the attendance of over 1600 people attending public or sector-specific information sessions. The Department of Education and Early Childhood Development prepared an extremely comprehensive ‘Feedback Report’. In addition, the Minister released a ‘Statement of Reasons’. The ‘Statement of Reasons’ outlined a substantive number of amendments which were made to the Regulations as a result of the consultation process.

The Minister also prepared a ‘Statement – Comparison of Fees’. The Subcommittee is of the view that the consultation process has been robust.

I enclose for your information, copies of the following documents: -

- Feedback Report released in May 2009;
- Minister’s ‘Statement of Reasons’;
- Minister’s ‘Statement – Comparison of Fees’.

I trust these will be of assistance to you. In particular, the Minister’s ‘Statement – Comparison of Fees’ may be useful in assessing any cost implications of the Regulations.

Submission received from Mr Frank J. Cusmano

Highly-regulated, good-quality childcare centres are already at the limits of affordability for too many Victorian families.

The need to protect affordability is why trying to improve ‘quality’ - by changing the law to force centres to employ more staff and more highly credentialed staff - is a delicate balancing act.

Such "reforms need to balance the benefits of improved quality for children and families with the associated costs," says the Council of Australian Governments regulation review, underway since July 2009.

This duplication between state and national regulatory review may be useful, because economic analysis done for COAG demonstrates that the Victorian review has seriously underestimated cost impacts, and has either ignored or misapplied research evidence about how to improve quality.

There is worrying evidence that Victoria's analysis is wrong on both costs and quality.

Child Care Centres Association Victoria seeks Parliament's involvement to prevent unintended consequences for children, families, staff, operators and governments. CCCAV believes contradictions between COAG and Victorian analysis should be investigated before the time

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44 Letter dated 14 September 2009 to the Regulation Review Subcommittee, from Mr Frank J. Cusmano.
expires for Parliament to enforce its own regulation-making requirements. To enable enough
time for the conflicts to be understood (and for Parliament to maintain its oversight of proper
subordinate legislation) we ask that the time for disallowance be ‘extended’ - using s. 23 of the
Subordinate Legislation Act.

Background

COAG is investigating basically the same regulatory changes as the Victorian Review.

COAG’s Regulation Impact Statement is based on a July 2009 Access Economics analysis,
commissioned by the Commonwealth Department of Education, Employment and Workplace
Relations:-“An economic analysis of the proposed Early Childhood Education and Care National
Quality Agenda ”.

The COAG analysis differs from the Victorian analysis in fundamental ways. COAG arrives at
starkly different cost estimates and has totally different findings based on its assessment of
research evidence on qualifications and staff-child ratios.

CCCAV believes that the relevant provisions of the new regulations should be delayed for long
enough to enable the discrepancies to be analysed and resolved.

CCCAV does not want Victorian reforms stopped. But we do want the attempt to attract higher
levels of investment to early childhood development to be supported by departments of Finance
and Treasury, and by taxpayers. Without that support, the reforms will come to nothing or, even
worse, will make existing good-quality worse for many thousands of children and families who
will be excluded because of affordability problems.

CCCAV fears that such funding support will not happen because the Victorian proposals are
inconsistent with the research evidence canvassed in the COAG analysis. The net result is that
the Victorian staffing and qualification proposals will not get the balance right between cost and
quality. The Victoria proposals are at risk of seriously upsetting that balance.

Research evidence does, we agree, say that Australia will benefit from higher levels of
investment in early-child development and parenting support services. But such increases in
investment have to be well-targeted if they are to deliver net community benefits. We support
and understand the reasons for more spending, but it must be wise, well-targeted and efficient
spending if Treasuries and taxpayers are to support it.

Based on the COAG analysis, however, there is a clear risk that the Commonwealth Treasury
will not support the Victorian qualification and staffing proposals, with horrendous
consequences for parent affordability and access. That COAG evidence makes it clear that the
Victorian proposals are not well-targeted, at least not if the whole of the research evidence is
taken into account – something which the Victorian RIS chose not to tackle.

All of us have got to take enough time to get this law-making right. Getting it right means having
proper understanding of parental cost impacts, and of what the research evidence says actually
drives child-development quality.

Key Concerns

Balancing Quality and Affordability

Each Parliament obviously wants changes to regulation to balance (hoped-for) benefits of
improved quality with (inevitable) parent cost increases. Only the COAG decision-making is
analysing the right evidence in the right way.

COAG cost estimates are roughly double the Victorian estimates.
They can't both be right.

The COAG estimate for Victoria is $503.8 million (RIS p. IV). The Victorian estimate is $278.3 million (RIS p. 9).

That already huge difference is likely to get even bigger. COAG consultations have said that current COAG estimates reflect aggregated, national, average data and therefore do not yet estimate likely impact at a centre level. In other words, COAG parent cost estimates must rise significantly as part of the consultation process.

The Victorian Department ignored the advice of the Victorian Competition & Efficiency Commission to follow a similar approach. We explore this matter further below.

The Department rejected CCCAV’s attempts to assist in the costing exercise, and then dismissed our explanations for why their costing were incomplete and based on incorrect assumptions about operational matters.

CCCAV submission to the Victorian RIS identified several reasons why the Victorian costs were inaccurate. A copy of our submission is attached.

CCCAV also raised our concerns directly with the Minister, by letters of 1 May and 28 May (copies attached).

The Minister directed the Department to reply. See attached copy of letter received 19th June.

The Department did not address our particular concerns, simply claiming that it is satisfied that the costing provides a reasonably indicative picture.

The Department also relied on the assessment of the RIS by the Victorian Competition & Efficiency Commission. A closer assessment of that VCEC assessment, however, reveals two important qualifications.

First, the VCEC assessment makes it clear that it is based on the evidence that was presented in the RIS. If that evidence was inadequate, then analysis can't overcome that defect. If it is 'error-in', it must be 'error-out'.

The COAG evidence demonstrates that the Victorian evidence on cost impact is inadequate. It was 'error-in'.

Second, and more importantly, the VCEC advised the Department:

"Further evidence on the nature and size of the costs and benefits may emerge during the consultation stage and consequently change the conclusions reached."

Further evidence is exactly what happened. That COAG evidence speaks for itself and its effect should now be determined.

That is why the extra time is required.

New conclusions should in our view address two questions:

1. Why are (incomplete) COAG cost assessments already approximately double the Victorian assessment?

2. Would it be safe for Parliament to rely on Victorian estimates without requiring the Department to do the further consideration which the VCEC suggested?

There are two other disturbing conflicts between the COAG analysis and the Victorian analysis.
The Victorian RIS did not canvass or apply all the research evidence on 'qualifications' or on 'staff-child ratios.' The research on each of these was comprehensively analysed in the COAG analysis.

A brief comparison is enough to illustrate the contradictions between the Victorian position and the COAG evidence.

**Qualifications**

It is true that the Victorian RIS refers to evidence which supports the general proposition that it makes sense for Australia to invest more in early childhood development and parenting support.

This Victorian analysis, however, rests on broad-brush statements. For example, at p 62:

“In general terms, there is a body of evidence that strongly suggests that attending a quality children's service has important developmental benefits for children.”

It is impossible to disagree with that form of statement.

But a genuine attempt to balance cost against quality would try to explain what a "quality children's service" looks like.

Rather than attempt that, the Victorian RIS (p 27) simply relies on assertions such as the one at p.27:

"While community expectations ... are varied, there is an overwhelming view throughout the children's services community that standards, particularly in the critical areas of ratios and qualifications, need to be improved."

"This advocacy [by a majority of peak agencies] of improved standards reflects the conclusions of substantial literature in child development research, which demonstrates a clear link between the use of more and better qualified childcare staff and improved developmental outcomes."

This assertion rests on the vague terms "more" staff and "better" qualified staff without explaining what 'more' or 'better' might mean.

Even if we ignore those defects, the Victorian assertion is still based on "advocacy", not on an assessment of all the research.

Importantly, the Victorian RIS is either unaware of or ignores evidence which does not suit its pre-existing purposes.

COAG analysis did canvass the whole of the research evidence.

It is instructive to compare their findings with the Victorian assertions.

At p 20:

"The structural quality of an ECEC program is important, and the balance of the literature suggests that improvements in teacher qualifications and staff to child ratios enhance outcomes ..... However, apart from discussions in ... rather general terms, there is little in the literature to suggest exactly what is meant by high-quality ECEC, which variables increase the quality of programmes, or what a sufficient or optimal level of quality might be.

At p 21:

"The general conclusion surrounding the provision of quality ECEC is also somewhat equivocal and suggests that what is most important is the quality of the interaction between the staff and the children ... that is, it is the quality of teachers that matter ..."
At p.21:
"The literature generally finds a positive association between teacher qualifications and cognitive and educational outcomes of children. However, there remains a question mark over whether the link is causal or merely marking a correlation. The complicating factors are raised in many of the reviews of the literature on structural quality ... (further) it is generally found that the defining link between teachers and child outcomes is through the way in which teachers interact with children.

At page 22:
"Early et al (2007) ... [conclude] in regard to the literature on teacher qualifications that:

‘The findings indicate largely null or contradictory associations, indicating that policies focused solely on increasing teachers education will not suffice for improving classroom quality or maximising children's academic gains, instead, raising the effectiveness of early childhood education likely will require a broad range of professional development activities and supports targeted toward teachers interactions with children’.

This is precisely the research evidence which the Victorian RIS should have but did not address.

When it comes to the best targets for increased spending to secure improved quality, the COAG analysis suggests the direct opposite of the Victorian assertions.

They cannot both be right.

CCCAV says the unsound Victorian proposals will result in misdirected, inefficient, unwise spending - spending that may not increase quality but must increase parent costs.

This increase in parent costs is likely to result in the unintended outcome of thousands of already struggling Victorian families being denied access to already-good-quality services. The perverse outcome will be reduced quality for those families.

Avoiding that perverse outcome and directing the spending to where it will get the best value for money is why we ask Parliament to use its powers to enforce democratic principles to compel the decision-makers to take the time to get it right.

CCCAV agrees it is understandable that policy should seek to raise quality. However, a more sophisticated and targeted approach is required.

Unless Parliament directs the parties to take the required amount of time to work through these delicate balancing acts carefully, Victorian regulation will not get the balance between quality and costs right.

**Staff-Child Ratios**

The Victorian RIS talks about a rationale for changing staff-child ratios. However, no rationale is offered in the RIS. All that is offered is the above-described assertion that there is a view in the children's services community that such ratios should be changed.

CCCAV understands the underlying sentiment. Nevertheless, we fear that Treasury and taxpayers will not support increased investment unless there is some demonstrable connection between increased costs and improved quality, supported by research evidence, not by mere assertions, or good intentions.

Research evidence on staff-child ratios was canvassed in the COAG analysis but not in the Victorian analysis.
At p 23:

"... Huntsman (2008) concludes that the literature generally points to higher staff to child ratios increasing the quality of ECEC, stating:

'While there have been some studies with contradictory results ... the weight of evidence favours a conclusion that child-adult ratio in a child care setting is significantly associated with quality.' However Huntsman reiterates the common concerns surrounding the inadequacy of some of the research methods employed in the literature, particularly poor experimental design. In identifying effects and drawing conclusions, the studies rely on correlation and do not demonstrate causation. Where effects are found generally it is not possible to isolate the contributing elements or demonstrate their relative contribution to effects. She finds only two experimental studies, only one of which reports a significant relationship between ratios and outcomes, with only relatively small effect sizes found.'

As with much of the research on structural parameters, there is little emphasis on the existence of threshold effects, or the general non-linearity of changes in variables. That is, it is unclear whether minimum ratios must be met before gains are achieved, or whether increasing ratios past a certain point achieves no further gains. Philipsen (1997) provides some evidence here, finding that the incremental gains from increasing staff to child ratios decrease (i.e. in this sense, there are diminishing returns to quality).

The Victorian RIS should have, but did not, assess the research evidence. The COAG analysis does assess that evidence, demonstrating that increase costs may not result in increased quality.

Any genuine attempt to balance cost and quality must understand where improved quality may come from. In the light of the COAG evidence, and the VCEC suggestions as to how to deal with evidence that emerges during the consultation, we suggest that the following questions must be addressed in Victoria:

1. Is it prudent for Parliament to press on with changes to staffing and qualification requirements given the conflict between the COAG evidence and the Victorian position, and given that the Victorian position relies on assertion rather than analysis of the research?

2. The Victorian Competition & Efficiency Commission predicted that evidence on the nature of benefits might emerge during the consultation and, consequently, change the Victorian conclusions. COAG analysis of the research is such evidence. Should Parliament therefore require consideration be given to what effect that evidence may have on the conclusions?

Economic circumstances are very different now compared to when the Department began its regulation review. The Global Financial Crisis, and its consequences need to be taken into account. Present economic circumstances, together with the COAG analysis of the research evidence, must raise doubts about one of the main assumptions underpinning the Victorian analysis.

The Victorian RIS, at p 9, says:

"[I]t is expected that the majority of the additional costs identified will ultimately be borne by government."

CCCAV believes that assumption now needs to be carefully tested, including by considering the following question:

Is it prudent for Parliament to assume that the Commonwealth government will ignore the COAG analysis of research evidence which demonstrates that increased spending on more staff and more highly credentialed staff may not increase quality?
Concluding Remarks

CCCAV appreciates that there is little time left to use s.23.

As a small, self-funded body, our limited resources were necessarily devoted to the COAG process. As a result of our involvement in that COAG process, however, we can now not ignore the important differences between the Victorian analysis and the COAG analysis.

CCCAV believes that the Victorian proposals are largely on the right track. We strongly support the idea of attracting higher public and private investment in the early child development and parenting sector.

Increased investment should be based on more than good intentions. There must be good evidence that the greater investment will be wisely spent on what the research evidence shows are most likely to produce the important balance between cost and quality. Conversely, poorly targeted investment may actually reduce quality for thousands of Victorian children and families.

These matters are too important for the Department to expect Parliament to rubber-stamp regulations just because they are well intentioned.

Please do not hesitate to call if you wish to have any of the above points amplified.

Subcommittee’s Letter

Thank you for your letter dated 14 September 2009.

The Regulation Review Subcommittee (the Subcommittee) carefully considered and approved the above Regulations at a meeting on 26 August 2009. The Subcommittee considered your letter at a meeting on 7 October 2009.

The Subcommittee notes that the consultation process commenced in March 2007 when the Children’s Services Review Discussion Paper was released for public comment. Twenty four consultation sessions were conducted including sixteen public sessions at various locations throughout metropolitan and regional Victoria. The review has been supported with regular input from the Victorian Children’s Council. It has been overseen by a Project Control Group comprising key departmental stakeholders as well as external early childhood experts.

The Regulatory Impact Statement (RIS) was released for public comment in January 2009. A total of 12,390 copies of the RIS and draft Regulations were distributed through a range of means including a mail out to the sector and responses to individual requests. Around 1500 additional copies were distributed at public consultations.

Following the release of the RIS a further statewide public consultation process was undertaken in which there was broad community participation. This included the attendance of over 1600 people attending public or sector-specific information sessions. The Department of Education and Early Childhood Development prepared an extremely comprehensive ‘Feedback Report’. In addition, the Minister released a ‘Statement of Reasons’. The ‘Statement of Reasons’ outlined a substantive number of amendments which were made to the Regulations as a result of the consultation process.

The Subcommittee notes that Child Care Centres Association of Victoria made a submission to the Department of Education and Early Childhood Development on 23 March 2009 as part of the RIS process. A detailed letter of response from the Department of Education and Early Childhood Development addressing your concerns was sent on 19 June 2009.

45 Letter dated 12 October 2009 to Mr Frank J. Cusmano, from the Regulation Review Subcommittee
The Minister also prepared a ‘Statement – Comparison of Fees’. The Subcommittee is of the view that the consultation process has been robust.

I enclose for your information, copies of the following documents: -

- Feedback Report released in May 2009;
- Minister’s ‘Statement of Reasons’;
- Minister’s ‘Statement – Comparison of Fees’.

I trust these will be of assistance to you. In particular, the Minister’s ‘Statement – Comparison of Fees’ may be useful in assessing any cost implications of the Regulations.

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

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

The Subcommittee made comments in respect of SR No. 32 – Electricity Safety (Stray Current Corrosion) Regulations 2009.

Example 1:

SR No. 32 – Electricity Safety (Stray Current Corrosion) Regulations 2009

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) considered and approved the above Regulations at a meeting on 22 July 2009.

The Subcommittee notes that the Minister’s decision to proceed with the making of the Regulations was obtained on 20 March 2009. However the section 12(3) notice was not published before the Regulations were made on 31 March 2009. The Subcommittee notes that this was an accidental Departmental oversight.

The Subcommittee notes the advice from the Department that the Regulations are being remade as soon as possible to address any uncertainty in relation to their validity.

The Subcommittee thanks the Departmental officers involved for their assistance with its queries.

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46 Letter dated 27 July 2009, to the Hon. Peter Batchelor, Minister for Energy and Resources, from the Regulation Review Subcommittee
(E) SETTING A PACKAGE OF FEES – ‘THE BASKET APPROACH’ – THE PREMIER’S GUIDELINES

The Premier’s Guidelines\(^{47}\) provide as follows: -

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

By way of example in SR No. 57 – Plumbing (Fees Amendment) Regulations 2005\(^{48}\) increased a number of fees. This was done using the ‘basket’ approach. In this instance, four of the seventeen fee increases exceeded the Treasurer’s approved rate of 2.25% although the actual monetary increases were extremely small. In addition, the package as a whole fell within the Treasurer’s approved rate. The increases were 0.03% above the approved rate. The table set out below illustrates the dollar value of the four fee increases which were marginally above the approved rate. In real terms, the largest monetary amount above an increase of 2.5% was eight cents. The smallest monetary amount above an increase of 2.5% was three cents.

<table>
<thead>
<tr>
<th>Item</th>
<th>Current Fee</th>
<th>Proposed Fee</th>
<th>Dollar Increase Based on 2.5%</th>
<th>% Increase</th>
<th>Actual Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>For registration under section 221O or a renewal of registration under section 2221ZB</td>
<td>$237.00</td>
<td>$243.00</td>
<td>$5.92</td>
<td>2.53%</td>
<td>$6.00</td>
</tr>
<tr>
<td>For provisional registration or renewal of provisional registration</td>
<td>$79.00</td>
<td>$81.00</td>
<td>$1.97</td>
<td>2.53%</td>
<td>$2.00</td>
</tr>
<tr>
<td>For restricted registration or a renewal of restricted registration</td>
<td>$237.00</td>
<td>$243.00</td>
<td>$5.92</td>
<td>2.53%</td>
<td>$6.00</td>
</tr>
<tr>
<td>For an application to modify the plumbing regulations under section 221ZZO</td>
<td>$79.00</td>
<td>$81.00</td>
<td>$1.97</td>
<td>2.53%</td>
<td>$2.00</td>
</tr>
</tbody>
</table>

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

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

During the year when necessary there have been informal discussions with officers from the various Departments and the Legal Adviser. The discussions suggest that a strict interpretation of

\(^{47}\) Department of Premier and Cabinet, *Premier's Guidelines*, December 2004, paragraphs 5.12 - 5.17

the Premier’s Guidelines occasionally may make it difficult for Departments in practical terms in setting a package of routine fee increases. Ultimately, regulations are the practical arm of the legislation. They need to function and be made in a commonsense and practical manner where possible. The Subcommittee welcomes input from Departments.

(F) SIGHTING OF MATERIAL INCORPORATED BY REFERENCE

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

The Premier’s Guidelines provide some assistance:—49.

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

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

- that the provisions of the rule will only refer to the incorporated material and members of the public affected by the rule must see the incorporated document before they can understand the contents and effect of the rule;
- that the incorporated material may not be readily available at a reasonable cost;
- that the procedures set out in section 32 are designed to facilitate Parliamentary oversight of incorporation of material and to ensure that such material is publicly available so that members of the public affected by the rule can have access to the rules with which they must comply.

7.05 It needs to be remembered that the incorporated material may not be a single document. The problem is exacerbated by the drafting style adopted by the Standards Association of Australia as these standards are frequently not self contained but adopt the provisions of other standards. This can create a chain of material incorporated by reference leading to the possibility that the need to table a particular document will be overlooked.

7.06 Consideration should also be given in drafting statutory rules as to whether the reference to an Australian Standard should be to a specific standard (eg AS 1234) or to a specific version of a standard by reference to its date (eg AS 1234, 1997). The latter approach means that if a later amended version of a standard is to be adopted it will require the amendment of the statutory rule and the undertaking of the RIS process. The former approach may result in significant changes to the effect of the statutory rule with no automatic mechanism to review the changes to the costs and benefits of the statutory rule.

7.07 The aim of the procedures set out in section 32 of the Interpretation of Legislation Act 1984 is to guarantee the availability of any material which is incorporated into a statutory rule by reference, to ensure that citizens may have access to the laws with which they must comply.

49 Department of Premier and Cabinet, Premier’s Guidelines, December 2004, paragraphs 7.03 – 7.08
7.08 In deciding whether to incorporate material by reference, agencies need to take care
to balance the drafting convenience with ease of access to the incorporated material and
understanding of it by those affected by it or required to comply with it. Agencies should
reserve the use of incorporated detailed and extensive technical material to regulations
concerning industries familiar with and using the material. The use of the material then has
the benefit of removing duplication. In such cases agencies should also consider whether
performance standards are the more appropriate means of regulations.

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

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

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

This year the Subcommittee sought further explanation in relation to two statutory rule, SR No. 105
– Building Amendment (Bushfire Construction) Further Interim Regulations 2009 and SR No. 52 –
Retirement Villages (Contractual Arrangements) Amendment (Formula) Regulations 2009.

Example 1:

SR No. 105 – Building Amendment (Bushfire Construction) Further
Interim Regulations 2009

Subcommittee’s Letter\textsuperscript{50}

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations
at a meeting on 7 October 2009. The Subcommittee has not yet approved the Regulations. The
Subcommittee notes that the Regulations were made with a section 9(3) Premier’s certificate.

The Subcommittee seeks further clarification in relation to the operation of the Regulations. The
Subcommittee notes the advice in the Explanatory Memorandum: -

“To that end, it is intended to remove the requirement for people rebuilding their homes in the bushfire
affected areas to provide for access to emergency vehicles and dedicated water supply for fire fighting
purposes where that rebuilding is to be done in the same location as the destroyed home…It is
proposed to transfer the requirement to the building regulatory system. This is because all building
work, except for some exemptions, requires the obtaining of a building permit and because of the
issues of life, safety and amenity, this is unlikely to change.”

1. Is there an existing requirement in relation to the provision of access to emergency
vehicles and dedicated water supply for fire fighting purposes?

2. If so, under what circumstances is a person building a single dwelling obliged to comply
with these requirements?

3. How does this work in relation to the Wildfire Management Overlay under a planning
scheme?

\textsuperscript{50} Letter dated 12 October 2009, to the Hon. Justin Madden MLC, Minister for Planning, from the Regulation Review
Subcommittee
4. Is the effect of the Regulations simply to transfer those existing requirements where people are building single dwellings in the same location as the one destroyed by the Victorian bushfires from planning to building regulatory systems?

Is the effect of the Regulation to ensure that those people affected by existing requirements apply for building rather than planning permits?

Minister’s Response

Thank you for your letter of 12 October 2009 on behalf of the Regulation Review Subcommittee of the Scrutiny of Acts and Regulations Committee of Parliament requesting clarification in relation to the operation of the above Regulations.

Prior to responding to the specific questions raised by the Subcommittee, I would like to state that as part of the approach to fast-track the rebuilding process following the February 2009 bushfires, the Government removed the requirement to obtain a planning permit where people were rebuilding in the same area that was destroyed by the bushfires.

In order to streamline the approval process for people affected by the bushfires, the intent was to transfer, where relevant, the requirements into the building permit system. This also replicates the process that currently exists in a number of metropolitan councils where planning permits are not always required.

This new provision will make it easier for people to rebuild their homes and farms and save councils time and money in processing planning permit applications for replacement dwellings and other buildings.

The exemption from the requirement to obtain a planning permit resulted in the need to transfer some of the specific requirements in a Wildfire Management Overlay (WMO) under planning schemes into the building system. In particular there is a need to ensure that the important bushfire safety requirements of the WMO are maintained and that rebuilding provides greater safety in the future.

Is there an existing requirement in relation to the provision of access to emergency vehicles and dedicated water supply for fire fighting purposes?

A WMO as contained in a planning scheme made under the Planning and Environment Act 1987 applies various requirements to achieve minimum fire protection outcomes to assist in protecting life and property from the threat of wildfire. These include the provision of safe access for emergency and other vehicles at all times and the installation of a static dedicated fire fighting water supply.

As noted above, in May 2009 a new planning scheme provision was introduced that enabled landowners to rebuild houses and other types of buildings that were damaged or destroyed in the 2009 Victorian Bushfires without having to satisfy the normal planning scheme requirements. This meant that these landowners, if in a WMO, would also have been exempt from having to comply with the existing requirements of the WMO.

The requirements that would have been part of the planning permit assessment and that were relevant to a building consideration were transferred to the building system through the Building Amendment (Bushfire Construction) Further Interim Regulations 2009. These requirements are the need to provide a dedicated water supply and access for emergency vehicles.

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51 Letter dated 12 November 2009 to the Regulation Review Subcommittee from Hon. Justin Madden MLC, Minister for Planning
If so, under what circumstances is a person building a single dwelling obliged to comply with these requirements?

Under normal circumstances a planning permit is needed to construct a building, including a dwelling on land covered by a WMO and the application must be referred to the Country Fire Authority. As part of this process they would need to demonstrate compliance with the WMO requirements of access and water supply.

However as people rebuilding following the February bushfires are now exempt from these provisions (including those rebuilding in WMOs), the Regulations will require the provision of access to emergency vehicles and dedicated water supply for fire fighting purposes where a person is rebuilding a single dwelling in the same location as the one destroyed by the Victorian bushfires of 1 January to 31 March 2009.

The requirement will only apply to WMOs that were current at the time of the bushfires and not to any WMOs subsequently applied under the Planning and Environment Act.

How does this work in relation to the Wildfire Management Overlay under a planning scheme?

As noted above, generally a person seeking to build in a WMO would need to obtain a planning permit. As part of this process they would need to demonstrate compliance with the WMO requirements of access and water supply.

The provisions of WMOs made under a planning scheme were amended to provide that a planning permit was not required for building or works associated with a single dwelling that is sited in the same location as a dwelling that was damaged or destroyed by bushfire that occurred after 1 January 2009. This exemption applies to the building or the construction or carrying out of works commenced prior to March 2011.

Is the effect of the Regulations simply to transfer those existing requirements where people are building single dwellings in the same location as the one destroyed by the Victorian bushfires from planning to building regulatory systems?

The Regulations apply only to the rebuilding of a dwelling that was damaged or destroyed in the 2009 Victorian Bushfires and where the rebuilding is occurring on land where a Wildlife Management Overlay applied at the time of the Bushfires. They replicate the requirements of the WMO in regards to access and a water supply for fire fighting.

In effect this means that the existing requirements of a WMO where people are building single dwellings to be sited in the same location as the one destroyed by the bushfires is transferred from the planning to the building regulatory system.

Is the effect of the Regulation to ensure that those people affected by existing requirements apply for building rather than a planning permit?

The requirement for a building permit has not been removed. Under section 16 of the Building Act 1993 a person must not carry out building work unless a building permit in respect of the work has been issued. This is an over-riding requirement of the building regulatory system.

The planning scheme amendment that removed the need for a planning permit in the circumstance outlined above and the making of the Building Amendment (Bushfire Construction) Further Interim Regulations 2009 was in line with the Government’s commitment to reduce the number of permits required to fast-track the rebuilding process. The intent of the Regulations was also to ensure that the removal of the planning permit requirement did not
impact on the need to provide minimum fire protection outcomes that were being provided by the Wildlife Management Overlay requirements.

In relation to SR No 52 – Retirement Villages (Contractual Arrangements) Amendment (Formula) Regulations 2009, the Subcommittee was particularly critical of the RIS. It found it confusing, lacking in clear structure and difficult to understand.

Example 2:

SR No. 52 – Retirement Villages (Contractual Arrangements) Amendment (Formula) Regulations 2009

Submission received from Mr Howard Campey

1. About Residents of Retirement Villages Victoria Inc.

1.1. The Residents of Retirement Villages Victoria Inc (Reg No A0048146R) (“RRVV”) is a not for profit incorporated association created to facilitate a collective voice for all Victoria retirement village residents. The constitution of the RRVV requires it to carry out a range of functions including:

- Providing information and education to its members;
- Providing legal referral and support services to its members;
- Contributing to policy debate and development;
- Raising with the Department of Justice (“DoJ”), Consumer Affairs Victoria (“CAV”), relevant Government Departments, Local Councils and relevant peak organisations the needs, problems and emerging issues of its members.

2. Background

1. The ageing of Australia’s population has been well-documented. According to the Australian Bureau of Statistics (“ABS’) and the Victorian Government projections, 13.3% of the Victorian population was aged 65 years, and in 2031, approximately 25% of Victorians will be over 65 years of age.

3. Age and Sex Distribution, Victoria - 30 June 2007


52 Letter dated 15 January 2009 to Scrutiny of Acts and Regulations Committee, from Mr Howard Campey
3.1. This demographic shift has far-reaching implications for Government in the supply of housing for senior Victorians, but also in terms of a sustainable retirement village model that responds to the demands of aging. The demands of aging require retirement village models that enable a seamless transition between independent living and nursing care for those on limited incomes.

3.2. The introduction above is to provide the Committee with an overview of our organisation and its purpose, membership and demography.

3.3. 23rd December 2008, I received a letter from Dr Elizabeth Lanyon alerting me and our organisation that a regulatory impact statement for the proposed Retirement Villages Regulations 2008 had been published and that they were enclosed for RRVV's comment.

3.4. Many of our members, after the Christmas New Year break were advised that this matter had been published in the Herald Sun Wednesday, December 24, 2008 requesting comments, expressed their concern that it is disturbing that CAV only gives the required 4 weeks consultation on the proposed regulations over the Christmas and New Year holiday period. Many of them had not seen the notice as they were:

- Either on a vacation break
- Had not read the paper due to it being hectic and busy "getting ready for Christmas'.

3.5. As one of the major stakeholders in the Retirement Village Industry, our residents should be shown greater consideration by Consumer Affairs when any changes proposed in the regulations may have a major effect on their financial contribution to living in a retirement village and their village living lifestyle.

3.6. In the future if any matter involving a change to legislation the RRVV requests the assistance of the Scrutiny of Acts and Regulations Committee to ensure that any regulatory change are not published, "just prior to a major vacation break" limiting the possibility for consumers to respond meaningfully to the CAV set deadline.

3.7. The consumers or RRVV have been disadvantaged by the timing of the draft regulations being published in such a manner. RRVV is asking that CAV demonstrate their commitment to better serve consumers by agreeing to our request through you as our mediator.

I on behalf of RRVV thank the Scrutiny of Acts and Regulations Committee in anticipation for your assistance.

Subcommittee’s Letter

Thank you for your letter.

I refer to correspondence to you dated 11 February 2009.

The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 26 August 2009.

The Subcommittee carefully considered your submission and in particular the issues you raised in relation to the timing of the advertising of the Regulatory Impact Statement (RIS). Although there has been compliance with the requirements of the Subordinate Legislation Act 1994, the Subcommittee’s view is that the release of the RIS on Christmas Eve was not ideal. The Subcommittee has written to the Minister commenting on these matters.

Thank you for bringing these matters to the attention of the Subcommittee.

53 Letter dated 31 August 2009, to Mr Howard Campey, from the Regulation Review Subcommittee
The Regulation Review Subcommittee (the Subcommittee) considered the above Regulations at a meeting on 26 August 2009.

**General comment – section 21(1)(i) – requires explanation as to its form or intention**

Section 21(1)(i) of the Subordinate Legislation Act 1994 provides as follows:

21 Review of statutory rules by the Scrutiny Committee

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

(i) requires explanation as to its form or intention.

The Subcommittee makes the general comment that it found the Regulatory Impact Statement (RIS) confusing, lacking in clear structure and difficult to understand. In particular, the lack of consistent terminology makes it difficult to assess just what is being discussed.

The terminology vacillates between ‘options’ and ‘alternatives’. There are no clear headings which identify the ‘options’ originally identified on pages 2 and 3. Instead there are headings such as ‘4.2 Annual vs quarterly adjustments’, ‘Alternative 1: Base for CPI adjustment to incorporate new charges agreed by residents’, 5.2 Variation of charges by notification and consent’. The reader is repeatedly left to try and ascertain just precisely what discussion relates to the original options identified at pages 2 and 3. There seem to be three alternatives in reality, not five.

By the end of the RIS in the consultation section when assessing what support was available from each option there are completely irreconcilable statements. For example at pages 20-21 of the RIS:

“5.1 Alternative 1: Base for CPI adjustment to incorporate new charges by residents...5.1.2... Consultation on the basis of this alternative was conducted during the development of the regulations. However, this alternative was universally opposed by the stakeholders consulted. Opposition came from both groups representing the interests of residents and from those representing retirement village operators.”

However at page 38 of the RIS:

“May-July 2008 – Submissions received by CAV from COTA, RRVV Inc, HAAG and RVA indicated unanimous support for Option 1.”

The Subcommittee wrote to the Department requesting clarification. The Department responded promptly and was most helpful. Indeed the Subcommittee was advised that the references to Option 1 on page 37 should actually be read as a reference to Alternative 1 (as referred to on pages 20-21) or Option 4.

In the Subcommittee’s view the RIS is a poorly drafted document. Distinctions between ‘alternatives’ and ‘options’ are confused. This is particularly evident at pages 37-38. There, the advice from the Department says that the where reader sees the words ‘Option 1’ he or she should instead insert ‘Alternative 1’ or ‘Option 4’ to make any sense of it.

The development of these Regulations as identified at page 37 of the RIS, commenced in February 2007. In the Subcommittee’s view this makes it all the more unsatisfactory that the RIS is such an inadequate document in terms of clarity and structure. For user-friendly purposes it would be better to clearly identify options and number them accordingly. It is not

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54 Letter dated 31 August 2009, to the Hon. Tony Robinson MP, Minister for Consumer Affairs, from the Regulation Review Subcommittee
unreasonable in a document released for public discussion to expect the consistent use of a single term (eg: ‘option’ or ‘alternative’) so that it may be easily understood. The reader of such a document is entitled to at least minimal standards of drafting and language.

The Subcommittee wishes to draw its expectations to your attention.

Release of RIS – timing

The Subcommittee notes that RIS was advertised in the Government Gazette on 23 December 2008. Written submissions were required by 30 January 2009. The Subcommittee has received a submission from the Residents of Retirement Villages Victoria Inc (RRVV). A copy is attached for your information. The essence of the complaint is that the RRVV has been disadvantaged by the timing of the advertising of the RIS on Christmas Eve.

Whilst there has been compliance with the requirements of the Subordinate Legislation Act 1994, the Subcommittee makes the general comment that the release of the RIS on Christmas Eve was not ideal.

The Subcommittee wishes to draw your attention to its comments.

Minister’s Response

Thank you for your letter dated 31 August 2009.

As the regulatory impact statement (‘RIS’) for the Retirement Villages (Contractual Arrangement) Amendment (Formula) Regulations 2009 (‘the regulations’) records, consultation on the making of the regulations with parties representing residents of retirement villages, and parties representing operators/owners of retirement villages, commenced in February 2007 and continued until the end of January 2009.

The consultation included face-to-face meetings and communication via correspondence, and culminated in the release of the RIS (with the then proposed regulations) for public comment in December 2008 and January 2009.

Early consultation revealed that the interests of retirement village residents, and the interests of owners/operators of these villages, were divergent. Although both sets of stakeholders generally agreed annual adjustments of the maintenance charge to be preferable to quarterly adjustments (as under the previous Retirement Villages Regulations 1998), there was strong disagreement regarding the formula to be used to adjust the charge. Representatives of owners/operators generally advocated for a shift away from the previous formula, suggesting that the cost of new services be incorporated in the adjusted maintenance charge. This approach was strongly opposed by retirement village residents, who preferred a formula similar to that prescribed by the previous regulations.

The RIS took both of these positions into consideration, and put forward five feasible options, as outlined on page three of the RIS:

1. remaking the previous regulations without amendment (that is, quarterly CPI adjustments to the maintenance charge, using the All Groups CPI);
2. adopting annual CPI based adjustments to the maintenance charge, using the All Groups CPI (this was the option adopted in the then proposed regulations);
3. adopting annual CPI based adjustments to the maintenance charge, using the House Repairs and Maintenance CPI in preference to the All Groups CPI;

Letter dated 23 October 2009 to the Regulation Review Subcommittee from the Hon. Tony Robinson MP, Minister for Consumer Affairs
4. adopting an annual maintenance charge adjustment which would include the cost of new services within the adjusted maintenance charge; and

5. adopting a requirement to notify, and seek approval from, residents regarding all increases to maintenance charges.

The vast majority of submissions received from retirement village residents in response to the RIS unambiguously supported the regulations (as proposed). Stakeholders representing the interests of owners and operators of retirement villages recommended that the formula be amended to include the cost of new services within the adjusted maintenance charge.

**General comment - section 21 (1) (i) – requires explanation as to its form or intention**

In light of the extensive early consultation with stakeholders, and considering the quality of the submissions received on the RIS, I do not consider that stakeholders were confused as to the effect of the proposed regulations.

However, I note your comments on the need for consistency of terminology in, and clear structuring of, regulatory impact statements, and am advised by the department that every effort will be made to ensure that this is addressed in the future.

**Release of RIS – timing**

Finally, I note your comments about correspondence from Residents of Retirement Villages Victoria Inc. (RRVV) concerning the date of release of the RIS. As set out above, the RIS was the culmination of extensive consultation with residents, throughout which they were afforded every opportunity to put forward their preferred outcome, and to continue to support it. Further, unless there are unusual or exceptional circumstances, there is an equal probability that a person will view an advertisement for an RIS on any business day of the year.

In this context, the RIS was released in December to ensure not only that stakeholders enjoyed a reasonable period in which to consider and respond to the RIS, but also to ensure that there was sufficient time for responses to be considered and any necessary changes to be made to the proposed regulations.

It should also be noted that a copy of the RIS was forwarded directly to the President of the RRVV as soon as it was published, as well as to all of the other major stakeholders, and it was published on the Consumer Affairs Victoria website. A number of requests for further copies of the RIS were received in January from residents of retirement villages, and these were supplied in a timely fashion. No requests for an extension of time were received. This demonstrates that it was not inappropriate to rely upon the network of the residents and the RRVV to ensure the dissemination of the RIS as a support for the advertisement.

Additionally, as the extensive process of consultation did not reveal that residents had concerns that the agencies representing their interests had not sufficiently advocated their position, it was appropriate to rely upon their response to the RIS as authoritative.

However, as a result of your comments, I have requested that departmental officers avoid advertising an RIS immediately before a significant holiday period in future.
(H) OTHER MATTERS – THE ‘BALANCED SCORECARD APPROACH’ – WHAT IS IT?

The ‘Balanced Scorecard Approach’ – What is it?

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

The Subcommittee does not always find that the use of such a Table provides great illumination in the context of an assessment of alternatives. On one view, the inclusion of such a Table to the average reader of the RIS adds little in terms of understanding and clarity. If such a Table is to be used, then there ought to be appropriate commentary which explains it.

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

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

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

Paragraph 5.33 of the Premier’s Guidelines⁵⁶ set out the particular requirements in respect of the exemption certificates.

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

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

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

(J) COMMENDATION

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

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⁵⁶ Department of Premier and Cabinet, *Premier’s Guidelines*, December 2004, paragraph 5.33
(K) HUMAN RIGHTS

History

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

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

Rights

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

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

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

Legislative Scheme and Requirements

The Charter of Human Rights and Responsibilities Act 2006


30. Scrutiny of Acts and Regulations Committee

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

57 Scrutiny of Acts and Regulations Committee, First Annual Report, April 1994, p. vii
59 Ibid
60 Ibid
61 Legal and Constitutional Committee, Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights, April 1987, Chapter 2, pp. 8-18
Note: The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the Subordinate Legislation Act 1994.

The Subordinate Legislation Act 1994 – section 21(aha)

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

Section 21. Review of statutory rules by the Scrutiny Committee

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

…….

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

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

12A. Human Rights Certificate

(1) The responsible Minister must ensure that a human rights certificate is prepared in respect of a proposed statutory rule, unless the proposed statutory rules is exempted under sub-section (3)

(2) A human rights certificate must—

(a) certify whether, in the opinion of the responsible Minister, the proposed statutory rule does or does not limit any human right set out in the Charter of Human Rights and Responsibilities; and

(b) if it certifies that, in the opinion of the rule does limit a human right set out in the Charter of Human Rights and Responsibilities, set out - (i) the nature of the human right limited; and

(ii) the importance of the purpose of the limitation; and

(iii) the nature and extent of the limitation; and

(iv) the relationship between the limitations and its purpose; and

(v) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Sub-section (1) does not apply if the responsible Minister certifies in writing that in his or her opinion –

(a) The proposed statutory rule is a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or

(b) The proposed statutory rule only—

(i) prescribes under section 4(1)(a) an instrument or class of instrument to be a statutory rule: or

(ii) exempts under section 4(1)(b) an instrument or class of instrument from the operation of this Act; or

(iii) extends under section 5(4) the operation of a statutory rule that would otherwise be revoked by virtue of section 5.
**Subcommittee’s obligations – What are human rights?**

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

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

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

- Recognition and equality before the law.
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom from forced work
- Freedom of movement
- Privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Protection of families and children
- Taking part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Children in the criminal process
- Fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Retrospective criminal laws

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

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

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

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

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

**The Operation of the Charter in Relation to Statutory Rule Series 2009**

The Subcommittee has considered the Charter in relation to a number of statutory rules this year. Where necessary, the relevant section 12A Human Rights certificate accompanies a regulation. The Subcommittee then considers the regulation, the section 12A certificate and any issues raised. The Subcommittee has considered a number of issues in respect of human rights. The exchange of correspondence with various Ministers set out below demonstrates concerns in respect of a number of statutory rules.

**Example 1:**

**SR No. 1 – Crimes (DNA Database) Amendment Regulations 2009**

**Subcommittee’s Letter**

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 27 May 2009.

The Subcommittee notes that the Regulations permit the transfer of Victorian DNA database information to jurisdictions with laws that provide for significantly less protections in relation to the right to privacy. The Subcommittee also notes that the Ministerial arrangements require CrimTrac and the receiving jurisdictions to obey Victorian rules on matching and destruction (where those rules are more protective than other jurisdictions’ rules.)

The Subcommittee seeks your advice as to whether the consequences provided for by s464ZE of the Crimes Act 1958 for breaches of the Victorian rules will apply if CrimTrac or the South Australian or Northern Territorian authorities breach those rules. If not, what remedies will apply for breaches of the Ministerial arrangement?

**Minister’s Response**

Thank you for your letter in relation to the Crimes (DNA Database) Amendment Regulations 2009 (the Regulations) dated 1 June 2009. I apologise for the delay in my response.

Your letter raises a question in relation to the remedies that apply to any breaches of the Victorian rules in relation to the matching and destruction of DNA samples.

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62 Letter dated 1 June 2009 to the Hon. Rob Hulls, Attorney General, from the Regulation Review Subcommittee
63 Letter dated 26 August 2009 to the Regulation Review Subcommittee from the Hon. Rob Hulls MP, Attorney General
The Ministerial Arrangement for the Sharing of DNA Profiles and Related Information (the Ministerial Arrangement) places a number of obligations on CrimTrac and each jurisdiction a party to this Arrangement in relation to the matching of DNA information.

Clause 4 of the Ministerial Arrangement relates to the provision of information to and management of information by CrimTrac. In particular, clause 4(2) stipulates that where a party to the Ministerial Arrangement enters DNA information onto the National Crime Investigation DNA Database (NCIDD), the party must give instructions to CrimTrac regarding any requirements for the destruction or removal from NCIDD of its DNA information. Clause 4(4) requires CrimTrac to comply with any instructions received under clause 4(2) as soon as practicable.

Clause 5 of the Ministerial Arrangement provides for the exchange of identifying information between the parties. Under clause 5(1) a party to the Ministerial Arrangement may make a request for the provision of identifying information and other information from a DNA database of another party to the Ministerial Arrangement. Clause 5(5)(a) provides that a party to the Ministerial Arrangement complying with a request under clause 5(1) is to notify the requesting party in writing at the time of providing the information, of any requirements in relation to the destruction of the information including the date by which the information must be destroyed and any restrictions which apply to the Arrangement to whom the information is provided to comply with any such restrictions or requirements of which it receives notice under clause 5(5).

Clause 6(3) also provides that each party to the Ministerial Arrangement will work with other parties to the Ministerial Arrangement to facilitate compliance with the accountability requirements of those other parties, subject to the restrictions imposed by their own laws. However, the Ministerial Arrangement does not provide a mechanism for the management of breaches of its provisions.

Your letter refers in particular to section 464ZE of the Crimes Act 1958. These provisions relate to circumstances where evidence relating to forensic material either is or may be inadmissible in Victorian proceedings where certain requirements have not been complied with. While inadmissibility is an effective sanction for the misuse of forensic evidence, as you would appreciate, Victoria is not able to prescribe laws of evidence for criminal proceedings in other jurisdictions. Further, in order for the national DNA information matching scheme to be feasible, each jurisdiction, including Victoria, needs to be able to use DNA information collected in other jurisdictions despite the existence of different legislative regimes for forensic material. Accordingly, section 464ZGO authorises the retention and use in Victoria of forensic material taken, or information obtained from it, in accordance with the corresponding law of the Commonwealth, another State or Territory even if its retention or use would otherwise constitute a contravention of Victoria’s DNA laws.

However, in addition to the above-mentioned obligations imposed in the Ministerial Arrangement, there are provisions in the Crimes Act 1958 which impose criminal penalties for the misuse of DNA information.

Under section 464 of the Crimes Act 1958, DNA database means-

a. in relation to Victoria, the DNA database referred to in section 464ZFD or the DNA database system; and

b. in relation to a participating jurisdiction, means a DNA database system that is kept under a corresponding law of the participating jurisdiction.

Further, under the same section, a DNA database system is defined as a database system (whether in computerised or other form and however described) containing:
a. one or more of the following indexes of DNA profiles.
   i. a crime scene index;
   ii. a missing persons index;
   iii. an unknown deceased persons index;
   iv. a serious offenders index;
   v. a volunteers (unlimited purposes) index;
   vi. a volunteers (limited purposes) index;
   vii. a suspects index –
       and information that may be used to identify the person from whose forensic material each DNA
       profile was derived; and
b. a statistical index; and

c. any other prescribed index.

Section 464ZGJ(2) provides that a person who intentionally or recklessly causes any identifying
information obtained from forensic material to be recorded or retained in a DNA database
system at any time after that legislation requires the forensic material to be destroyed, is guilty
of a summary offence and liable to level 8 imprisonment (1 year maximum) or a level 8 fine (120
penalty units maximum). In addition, section 464ZGK provides that a person who has access to
information from the Victorian DNA database must not disclose the information other than in
limited, specified circumstances.

I trust this information is of assistance to you.

Example 2:

SR No. 6 – Education and Training Reform Amendment
(Age Requirements) Regulations 2009

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above
Regulations at its meeting on 27 May 2009.

The Subcommittee considers that the compatibility of the regulations with the Charter’s equality
rights depends on the capacity of the exemptions in ss 12E-12G to accommodate cases that fall
outside of the minimum and maximum ages. The Subcommittee is concerned that a system of
Ministerial exemptions may be more onerous and less individual than the previous system
where school principals exercised a discretion. The Subcommittee seeks your advice as to
whether or not the previous system is a less restrictive means reasonable available (under
Charter s7(2)(e)) to achieve the purpose of the regulations.

Minister’s Response

Thank you for your letter of 1 June 2009 concerning the Education and Training Reform
Amendment (Age Requirements) Regulations 2009 and whether the previous system (under
which school principals exercised a discretion) is a less restrictive means reasonably available
(under section 7(2)(e) of the Charter) to achieve the purpose of regulations.

64 Letter dated 1 June 2009 to the Hon. Bronwyn Pike MP, Minister for Education, from the Regulation Review
Subcommittee

65 Letter dated 14 July 2009 to the Regulation Review Subcommittee from the Hon. Bronwyn Pike MP, Minister for
Education.
Your letter also noted that the Subcommittee is concerned that a system of Ministerial exemptions under the current regulations may be more onerous and less individual than the principal’s discretion under the previous system.

In reply, I advise as follows:

1. The purpose of the Age Requirements Regulations 2009 is to set the minimum and maximum ages for enrolment in Government schools.

2. The Commonwealth’s Age Discrimination Act was passed in 2004 and did not exist when the previous regulations were made in 1999.

3. At the time of making the current regulations, legal advice confirmed that section 26 of the Age Discrimination Act 2004 prohibits age discrimination in education, and that the Act binds the State of Victoria in conducting education institutions. It is not age discrimination if a person does something in ‘direct compliance’ with a regulation made under a State Act [s39(4)]. The words ‘direct compliance’ were interpreted by the High Court in Waters v Public Transport Corporation (1992) 173 CLR 349 as requiring the act to be in compliance with an obligation, rather than pursuant to a discretion.

4. The previous regulations did not comply with the Age Discrimination Act 2004 because of the amount of discretion placed on principals and the Minister. The regulations stated that a person was 'not entitled' to be enrolled unless they met the age requirements and that the Minister 'may' grant exemptions from the regulations. The words 'not entitled' did not impose an obligation on principals to exclude a person, as they merely established that a person did not have a right to enrolment.

5. In order to comply with the Commonwealth's Age Discrimination Act 2004, there does not appear to be any other means reasonably available to achieve the purpose of the regulations.

6. To ensure that the Age Requirements Regulations 2009 do not increase the burden on Government schools and families, the Department of Education and Early Childhood is working with key stakeholders to identify and develop appropriate processes for exempting students from the minimum and maximum age requirements. This will include automatic exemptions (which principals will be able to implement without any further authority) for:

   - persons who have had their schooling temporarily interrupted due to illness, an accident or some other event, and require an extra year to complete an accredited senior secondary course;
   - persons seeking to enrol in:
     i. the Distance Education Centre Victoria;
     ii. programs designed to re-engage people in the education process, such as initiatives targeting young mothers;
     iii. courses specifically designed for students aged 18 years or over;
     iv. mainstream school programs designed for refugees or those who have recently arrived in Australia;
     v. specific courses such as the "senior extension Victorian Certificate of Applied Learning"
     vi. any other mainstream school program offered or designed to assist disadvantaged groups or students at risk.

7. As was the practise under the previous regulations, it is envisaged that exemptions from the minimum school starting age will continue to be approved by the relevant Regional Director. The Student Wellbeing and Health Support Division of the Department will continue to handle applications in respect of students supported by the Program for Students with Disabilities.

8. Once the exemption processes have been finalised, the Department will distribute guidelines to Government schools detailing arrangements for 2010 and subsequent years.
Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 27 May 2009.

The Subcommittee notes that the regulations are doubly discriminatory, as both the driver (via the definition of P1 probation) and the passengers are singled out on the basis of age. The Subcommittee is concerned about the impact of the regulations on the rights of such people to movement and association, especially in rural areas. The Subcommittee also notes that other jurisdictions (for example, Queensland and NSW) impose more limited restrictions that only apply between 11pm and 5am.

The Subcommittee notes that the Human Rights Certificate states:

The restriction on carriage of peer passengers is based on wide research and statistics about the likelihood of road accidents, recognising that drivers and passengers aged under 25 years are over-represented in car accidents....

While there are less restrictive means that could be chosen, Victoria has made a deliberate policy choice aimed at addressing the over-representation of young people in road accidents and increasing overall road safety.

The Subcommittee seeks further information as to whether or not the Regulations are ‘demonstrably justified’ according to the test in Charter s. 7(2). In particular, it requests further information in relation to the following matters:

• the research and statistics referred to in the Human Rights Certificate;
• why the alternative approaches adopted in Queensland and NSW have not been adopted in Victoria.

Minister’s Response

Thank you for your letter dated 1 June 2009 regarding the above Regulations. The Regulations Review Subcommittee has expressed concern as to whether the aged based restrictions in the Regulations can be ‘demonstrably justified’ under section (2) of the Charter of Human Rights and Responsibilities.

Summary of the restriction and its purpose

From 1 July 2008 all P1 probationary drivers (newly licensed aged under 21 years at the time of licensing) have been restricted to carrying no more than one peer passenger. Peer passengers are defined as people who are at least 16 years of age but no more than 21 years of age, but do not include spouses, domestic partners, siblings or step-siblings of the P1 driver. The peer passenger limit also does not apply when the P1 driver is accompanied by a fully licensed driver, or when the P1 driver is driving a police or emergency vehicle in the course of his or her duties.
The restriction was originally introduced by the Road Safety (Drivers) (Peer Passenger Restrictions) Interim Regulations 2008, which were subsequently extended until 1 December 2009 by the Road Safety (Drivers) (Peer Passenger Restrictions) Interim Amendment Regulations 2009.

The restriction forms part of the proposed Road Safety (Drivers) Regulations 2009 which are intended to be made on or before 1 December 2009. Those Regulations were published as an exposure draft together with a regulatory impact statement on 29 May 2009, and can be accessed via VicRoads' website. That regulatory impact statement contains the estimated benefits of the Graduated Licensing System including the peer passenger restriction.

The peer passenger restriction on P1 probationary drivers aims to reduce the crash risk to both the P1 driver and to any peer passengers that they carry.

**Research and statistics supporting the peer passenger restriction for P1 drivers**

The Regulation Review Subcommittee sought advice as to the research and statistics which are referred to in the Human Rights Certificate provided to the Executive Council in support of these Regulations.

Those statistics show that crashes most commonly occur in the first 12 months of driving when the new driver is least experienced. The risk of crashing in the first year of driving is three times higher than for an experienced driver. Passengers travelling with a newly licensed driver are most at risk during this first twelve months due to the increased likelihood of a crash.

Each year, on average, 27 first year probationary drivers are involved in fatal crashes resulting in 30 deaths.

Research shows that carrying multiple passengers is a significant contributor to crashes involving inexperienced drivers, as detailed below:

- Fatal crash risk for probationary drivers increases four fold with two or more passengers.
- Twenty-six per cent of first year probationary drivers involved in fatal crashes are carrying multiple passengers. In contrast, survey data suggest the peer passenger regulation affects only an estimated nine percent of total driving and seven percent of trips by P1 drivers who would otherwise potentially carry multiple passengers.
- Eighteen percent of probationary driver fatal crashes with multiple passengers in Victoria occur during the day or evening, while only eight percent occur late at night.
- Multiple passengers, in particular, a group of alcohol affected peer passengers, pose a dangerous distraction for an inexperienced driver. Multiple peer passengers can also directly and indirectly encourage more risk taking behaviour.
- It is estimated that the benefit of the peer passenger restriction in Victoria is 2 fewer deaths, 49 fewer serious injuries and 61 fewer minor injuries each year.

This is supported by international research on graduated licensing models. In 2008, a comprehensive study conducted in the United States by The Children's Hospital of Philadelphia on young drivers found:

- Adolescent and teen passengers are more likely to die if a teen driver is behind the wheel.
- Just one teen passenger doubles the risk that a teen driver will get into a fatal crash.
- Three or more passengers quadruples that risk.

A review of graduated licensing models in 2003 found that 25 US states and New Zealand had implemented passenger restrictions on newly licensed drivers with evaluations reporting positive road safety benefits (McKnight and Peck 2002, McKnight and Peck 2003).
In 2003, the Monash University Accident Research Centre completed a comprehensive review of graduated licensing models, their effectiveness and their individual components. The review concluded that there is overwhelming evidence to support the implementation of graduated licensing internationally, and that peer passenger restrictions are an effective measure to be included.

**Queensland and New South Wales approach to peer passenger restrictions**

The Regulation Review Subcommittee also noted that Queensland and New South Wales impose restrictions that only apply between 11 pm and 5am, and has sought advice as to why this approach was not adopted.

Having this sort of time-based restriction was considered inadequate in Victoria as it would address only eight percent of all first year probationary driver fatal crashes, whereas having no time-based restriction has the potential to prevent 26 per cent of all first year probationary driver fatal crashes.

The Queensland and New South Wales approach also extends the current Victorian restriction for P1 drivers aged under 21 years to P1 drivers aged under 25 years. P1 drivers in Queensland and New South Wales aged under 25 years may only carry one passenger under the age of 21 between 11 pm and 5am and at all other times there are no restrictions on the number of passengers. This system would place restrictions on a larger number of drivers and given the risk profile of drivers aged 22 to 25 years, this cannot be justified at this time.

**Peer passenger restriction exemptions**

In Victoria, exemptions from the peer passenger restriction are available to reduce the negative impacts on individuals and the community. Apart from the automatic exemption for emergency services activity already referred to, VicRoads may exempt a person from the peer passenger restriction if the person’s employment, essential activities or family circumstances is such that compliance with the regulation would impose undue hardship on the person or their family having regard to the exemptions impact on safe, efficient and equitable road use in Victoria.

Since 1 July 2008, Vic Roads has processed 27 peer passenger restriction exemption applications on the grounds of undue hardship, representing 0.03% of all P1 probationary drivers in Victoria. This small number of exemptions suggests that the restriction is not placing undue hardship on the vast majority of P1 drivers.

**Conclusion**

It is submitted that the Road Safety (Drivers) (Peer Passenger Restrictions) Interim Amendment Regulations 2009 are demonstrably justified within the meaning of section 7(2) of the Charter of Human Rights and Responsibilities, given:

- the high level of risk posed by P1 drivers carrying peer passengers, as demonstrated by Australian and international research and experience;
- the inability of a time based restriction to substantially address that safety risk;
- the relatively low level of trips impacted by the one year restriction;
- the availability of an exemption for the restriction in the case of hardship; and
- the fact that very few applications have been made under that exemption provision.
Example 4:

**SR No. 33 – Freedom of Information Regulations 2009**

**Subcommittee’s Letter**

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 22 July 2009. The Regulations have not yet been approved.

The Subcommittee notes that Regulations 6(a) and 6(c) exempt the Director of Public Prosecutions (DPP) and the Solicitor-General (S-G) from aspects of the Freedom of Information Act 1982, Health Records Act 2001 and Information Privacy Act 2000. The Human Rights Certificate remarks that the exemptions are ‘reasonable and proportionate’, as ‘it is considered to be in the public interest’. It states:

- ‘for the DPP to make decisions about prosecutions without interference or any perception of interference, based on the evidence before him or her and to retain a strong level of independence around the exercise of his or her discretion…’
- ‘that the Solicitor-General is free to provide advice to Government about often highly sensitive and contentious issues and to preserve the strict level of confidentiality as is required by the office’.

The Subcommittee seeks further information as to how, being subject to rules on freedom of information or privacy would interfere with the DPP’s and S-G’s ability to make decisions or provide advice or interfere with their independence or confidentiality obligations.

In particular, the Subcommittee seeks advice as to:-

1. Whether the exemption of the DPP and S-G might operate in an arbitrary manner, given that the OPP, VGSO and Department of Justice are not exempt? For example, would a person’s ability to obtain and correct documents vary according to the happenstance of who happens to possess a document on the day an application is made or processed?
2. Is the complete exemption reasonable and proportionate in circumstances where a tribunal or court rules under s50(4) that the public interest in releasing the documents outweighs the public interest in not releasing the documents? Where the documents involve a death investigation is the complete exemption compatible with the Charter of Human Rights and Responsibilities Act 2006 right to life, including the right to a transparent investigation of all deaths that implicate the state?

**Minister’s Response**


The Regulation Review Subcommittee (the Subcommittee) has requested further information as to how being subject to rules on freedom of information and privacy would interfere with the ability of the Solicitor-General and the Director of Public Prosecutions (DPP) to make decisions or provide advice or interfere with their independence or confidentiality obligations.

As set out in the Regulatory Impact Statement (RIS) and the Human Rights Certificate which accompany the Regulations, the Solicitor-General and the DPP hold unique positions in the Victorian Government.

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68 Letter dated 27 July 2009 to the Hon. Rob Hulls MP, Attorney General, from the Regulation Review Subcommittee
69 Letter dated 7 September 2009 to the Regulation Review Subcommittee from the Hon. Rob Hulls MP, Attorney-General
The Solicitor-General plays a unique role as the principal legal adviser to the Government. Virtually all of the Solicitor-General’s work (except for minimal administrative duties) is either:

- for the purposes of providing legal advice to the government, or preparing for litigation representing the government, and therefore subject to legal professional privilege
- prepared for the consideration of Cabinet, such that disclosure of documents would undermine the confidentiality of Cabinet deliberations, and are therefore subject to Executive privilege.

The Solicitor-General could not ordinarily disclose the documents going in and out of his or her office because of an obligation to maintain the privileges and confidences of the client.

The DPP conducts proceedings on behalf of the Crown and his or her primary role is to decide whether or not to prosecute an individual who is accused of serious crimes in Victoria. The DPP makes prosecution decisions following nationally agreed guidelines, considering the interests of victims, the suspected offender and the wider community, together with considerations of fairness and justice.

The functions of both the Solicitor-General and the DPP generally involve highly contentious and sensitive issues. Access would not need to be provided to most of the documents which they possess as those documents would be exempt under one or more of the following exemptions: s 32 (documents affecting legal proceedings), s 28 (Cabinet documents), s 29A (documents affecting national security, defence or international relations), s 29 (documents containing matter communicated by any other State), s 33 (documents affecting personal privacy), and s 35 (documents containing material obtained in confidence).

The public interest would not be best served by requiring those officeholders to spend time going through their documents for the purpose of processing FOI applications when most of the documents in their possession would be exempt in any case. The uniquely sensitive, confidential and individual nature of these offices differentiates them from other legal entities such as the Victorian Government Solicitor’s Office and the Office of Public Prosecutions. These bodies have a more general suite of functions that are appropriately covered by the FOI Act.

In addition, the DPP may meet with family members or interested parties of a victim of crime (predominantly in homicide and sexual offence matters). Even though existing exemptions in the FOI Act may protect much of the information from disclosure, the mere fact of making the DPP subject to FOI may impair the DPP from obtaining information from these persons, who may be concerned about the confidentiality of their information. This would inhibit the DPP in the performance of his or her functions.

The Subcommittee has also sought advice on several specific matters, the responses to which are set out below.

1. Would the exemption of the DPP and Solicitor-General operate in an arbitrary manner, given that the Office of Public Prosecution (OPP), Victorian Government Solicitor’s Office (VGSO) and the Department of Justice are not exempt? For example, would a person’s ability to obtain and correct documents vary according to the happenstance of who happens to possess a document on the day the application is made or processed?

As mentioned above, almost all of the documents that the Solicitor-General and the DPP create and hold are exempt documents. If a request under the FOI Act happened to be made on a day when such an exempt document was not in the Solicitor-General’s or DPP’s possession, it would still be exempt pursuant to one of the exemptions listed above, regardless of where it was located. If the request was made on a day when the document happened to be in the Solicitor-General’s or DPP’s possession, then it would be exempt, pursuant to the Solicitor-General’s or DPP’s exemption respectively. In either circumstance, the document would still be exempt and a
person's ability to obtain and correct documents would not vary according to the happenstance of who possessed the document on the day a request was made.

In addition, many documents which come into the possession of the Solicitor-General or the DPP are copies of documents generated by other agencies for the purposes of providing advice or making decisions. Therefore those documents would be accessible from other agencies. For example, in the case of the DPP:

- Any documents which the DPP may consult to form an opinion or provide advice come into the DPP's possession through the OPP. It would therefore be more appropriate for a person to seek access to such documents from the OPP.
- In situations where the OPP briefs and provides legal opinion and recommendations to the DPP, such documents are as a matter of practice returned to the OPP workfile and are assessed accordingly if an FOI application is received. Removing the DPP's exemption would not provide greater access to documents; rather it would create confusion by replicating the administrative process.
- The OPP considers the Attorney-General's FOI Guidelines in applying the objects of the FOI Act in order to assist an applicant, especially where the applicant is a victim of crime. For example, when a request is erroneously addressed to the 'Department of Public Prosecutions', the 'DPP', or the 'Director of the OPP', then the OPP assists the applicant by processing the request as though it were originally made to the OPP.

The Solicitor-General possesses a very small number of documents relating to the general administration of his or her office. The Department of Justice holds copies of these documents, and a request could be made through the Department (as noted at 6.2.2(a) of the Regulatory Impact Statement on the FOI Regulations).

The exemption for the Solicitor-General and the DPP would therefore not operate in an arbitrary manner.

2. Is the complete exemption reasonable and proportionate where there has been a ruling that the public interest in release of a document on balance outweighs the public interest in not releasing it under s 50(4)?

A complete exemption for the Solicitor-General and the DPP is reasonable and proportionate for the following reasons.

Section 50(4) of the FOI Act creates a public interest override in respect of some exempt documents. Cabinet documents within the meaning of s 28 are not subject to the override power under s 50(4), nor are documents under s 29A (documents the disclosure of which may affect the security of the State) or documents under s 33 (documents affecting personal privacy).

The nature of the Solicitor-General's role in advising on important and sensitive legal issues of concern to the Attorney-General and the Cabinet means that many of the documents which the Solicitor-General holds are Cabinet documents within the meaning of s 28. As mentioned above, the Solicitor-General is also provided with documents which fall within the national security exception to the public interest override under s 29A. Therefore, many of the documents that the Solicitor-General holds are not accessible under s 50(4).

Both the Solicitor-General and the DPP hold documents for the purpose of providing legal advice or litigation. Legal professional privilege is directly linked with the duty of confidentiality owed by a legal adviser to the client. As the term suggests, the privilege belongs to the client and can only be waived by or with the consent of the client.

In the case of the Solicitor-General, the confidence and privilege which attach to those documents belong to the Government. An order under s 50(4) would require the Solicitor-General effectively to produce his or her client's documents. For most of these documents
access could be sought from the Government agency that has briefed the Solicitor-General to advise. The proper course would be to pursue a request under the FOI Act from those agencies. If an application requesting access to such documents were to be received by the DPP, he or she would be permitted by the FOI Act to claim the documents as exempt and deny access accordingly.

While section 50(4) of the FOI Act permits the review Tribunal to order the release of such privileged documents where it is in the public interest to do so, the recent decision of the High Court in Osland v Secretary to the Department of Justice [2008] HCA 37 suggests that there will be a reluctance to do so.

3. Where documents involve the investigation into a death, is the complete exemption, compatible with the Charter of Human Rights and Responsibilities Act 2006, including the right to a transparent investigation of all deaths that implicate the State?

The complete exemption of the Solicitor-General and the DPP from the FOI Act does not raise compatibility issues with the right to life or with the right to a transparent investigation of a death under s 9 of the Charter.

The Solicitor-General's functions do not include investigating deaths. The nearest aspect of the Solicitor-General's role which may concern an investigation of a death is advice in regard to the powers of the Coroner, who is empowered to investigate deaths pursuant to the Coroners Act 1985.

The Coroner must report to the DPP if the Coroner believes that an indictable offence has been committed in connection with a death that the Coroner has investigated. While some jurisdictions may regard the prosecutorial component of the criminal justice process as part of the investigation for purposes related to human rights issues concerning access to reasons for decisions, in Victoria there is currently a clear delineation between the investigative and prosecutorial stages of this process.

Any analysis of the impact of retaining or removing the DPP’s exemption from general FOI obligations must be assessed in the context of the probable existence of a small number of documents, relating to the DPP’s consideration of matters involving fatalities. Examples of such documents might include the DPP’s own notes of confidential discussions and conferences with the families of homicide victims, notes of discussions with prosecutors as to the viability of cases (which might include candid assessments of witnesses' credibility, and similar issues), notes of discussions with Coroners and police investigators and other similar documents.

One of the DPP’s publicly available Policies (Policy 24) prescribes a clear and transparent mechanism for persons who have a legitimate interest in a matter to seek and be provided with reasons for the making of a particular prosecutorial decision, whether relating to a case involving a fatality or not.

The current exemption for the DPP under the FOI Act, in combination with the discretionary procedure for disclosure as embodied in the DPP’s Policy, provides the correct balance between the requirements of transparency (whether within the framework within the Human Rights Charter or otherwise), and factors such as public interest immunity and the rights of privacy and confidentiality of individual parties with whom the DPP might have discussions.

Any removal of the present exemption for the DPP would not enhance the legitimate rights of access to information by any legitimately interested parties.
Conclusion

The offices of the Solicitor-General and DPP are at the highest levels of government and the legal system. They are occupied by individuals who are called on to exercise their skill and judgement on matters of great complexity and sensitivity.

It would be undesirable and unnecessary in principle and practice to include the two offices within the scope of the FOI Act. The Government's view is that such a change would interfere with the officeholders' ability to perform their duties to their fullest capacity, knowing that they may be required to undertake the process of identifying documents relevant to an FOI request and assessing their content against the Act's categories and criteria.

Any perceived improvements in transparency would be outweighed by the greater detriment of the chilling effect on the performance of the office holders' roles. The greater public interest is in the ability of the Solicitor-General and the DPP to discharge their difficult and sensitive roles to the fullest extent, safe in the knowledge that the necessary confidentiality of their work is adequately protected.

Example 5:

SR No. 40 – Corrections Regulations 2009

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 22 July 2009. The Subcommittee has not yet approved the Regulations.

The Subcommittee notes that the ACT’s corrections regime (including its Corrections Management Act 2007 and various regulations and policies promulgated under that Act) was developed after an extensive human rights consultation in light of that jurisdiction’s Human Rights Act 2004 (ACT). While the Subcommittee appreciates that the Corrections Regulations 2009 were developed with the Victorian Charter in mind, it seeks further information as to whether and how the model developed in the ACT was considered in formulating the Victorian regulations.

The Subcommittee also has a number of specific queries.

Regulations 22 and 25

In relation to Regulations 22 and 25 which provide for decisions about a prisoner’s security rating, the Subcommittee notes that the factors set out include ‘any risk that a prisoner poses to the welfare of himself or herself’ (amongst others.) While the Subcommittee appreciates that a risk of self-harm poses significant management issues, it is concerned that a prisoner may be given a ‘high’ or ‘maximum’ security rating simply because of the risk of self-harm. This may expose the prisoner to rules which are more properly aimed at prisoners who pose a risk to others. For example it may involve those regulations which govern the circumstances when escort officers can carry firearms. The Subcommittee seeks your advice as to whether the risk of self-harm could be managed in a separate manner.

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70 Letter dated 27 July 2009 to the Hon. Bob Cameron MP, Minister for Corrections, from the Regulation Review Subcommittee
**Regulation 27**

In relation to Regulation 27 (‘separation of a prisoner from other prisoners’), the Subcommittee notes that Part 9.2 of the Corrections Management Act 2007 (ACT) imposes tighter restrictions on the use of separation. This includes a bar on separation for punishment of disciplinary purposes (s89); a set time period for separation orders unless they are renewed, a requirement to consider cultural considerations, and a set time-line for review and reviews at the prisoner’s request (ss90-92); accelerated reviews at the request of a doctor (Corrections Management (Segregation) Policy 2009); and review by an external adjudicator (ss 96-97.) The Subcommittee seeks advice as to whether the restrictions in Part 9.2 of the ACT Act are a less restrictive alternative reasonably available to achieve the purpose of Regulation 27.

**Regulations 69 and 71**

Regulations 69 and 71 provide for ‘strip searches’. The Subcommittee notes that the definition in Regulation 4 does not expressly state whether or not a strip search includes an examination of a person’s genitals and anus. In Wainwright v UK [2006] ECHR 808, the European Court of Human Rights held that the performance of such intimate searches without explicit authorisation and clear warning to those being searched was incompatible with the right to privacy. The Subcommittee seeks further advice as to whether or not Regulations 69 and 71 permit an examination of the genitals and anus. In particular do they permit prisoners and visitors to be asked to bend over, spread their legs or move their genitals to permit observation?

The Subcommittee notes that Division 4.4.4 of the Corrections Management Act 2007 (ACT) provides separately for such searches. Is this a less restrictive alternative reasonably available to achieve the purposes of Regulations 69 and 71? The Subcommittee also seeks your advice as to whether people searched under Regulations 69 and 71 are expressly warned in advance that the search may involve an examination of their genitals or anus.

**Minister’s Response**71

Thank you for your letter dated 27 July 2009.

I value the Regulation Review Subcommittee’s careful consideration of the Corrections Regulations 2009 (the Victorian Regulations), made under sections 112 and 112A of the Corrections Act 1986 (the Victorian Corrections Act), and I respond to the Subcommittee’s questions below.

1. **The corrections regime in the Australian Capital Territory**

The Subcommittee seeks information on whether the Victorian Regulations were informed by the Corrections Management Act 2007 in the Australian Capital Territory (the ACT Corrections Act) and that jurisdiction’s Human Rights Act 2004 (ACT).

In developing the Victorian Regulations, and its compatibility with the Charter of Human Rights and Responsibilities Act 2006 (the Victorian Charter), the Human Rights Act 2004 (ACT) and a range of other international human rights regimes were considered. While the ACT’s corrections regime was considered, it is noted that this regime is less than two years old and provides the legislative framework for one prison (which opened in 11 September 2008), one periodic detention centre that operates on weekends only, and an average daily prisoner population of 82 in 2007/08. In contrast, the power to make the 96 regulations in the Victorian Regulations was conferred under the Victorian Corrections Act. While that Act came into operation over two decades ago, it has been amended over time to keep abreast of complex operational needs in

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71 Letter dated 24 August 2009 to the Regulation Review Subcommittee from the Hon. Bob Cameron MP, Minister for Corrections
eleven public prisons and two privately operated prisons that manage different prisoner security ratings, and an average daily prisoner population of 4,177 in 2007/08.

Consideration of human rights was a very important aspect of the Victorian Regulations' underlying policy analysis, alongside an awareness of Victoria's corrections operational environment and the authorisation conferred under the Victorian Corrections Act. To this end, I am confident that human rights protected under Victoria's corrections legislative regime strike an appropriate balance between the management and security of prisons and the welfare of prisoners.

2. Prisoner security ratings and regulations 22 and 25 of the Corrections Regulations 2009 (Vic)

The Subcommittee distinguishes between prisoners who are at risk of self-harm and prisoners who pose a risk to others, and queries whether risk of self-harm should be managed in a separate manner that is not provided under regulations 22 and 25 of the Victorian Regulations. Your letter also states that:

[Regulations 22 and 25] may expose the prisoner [who presents a risk of self-harm] to rules which are more properly aimed at prisoners who pose a risk to others. For example it may involve those regulations which govern the circumstances when escort officers can carry firearms. The Subcommittee seeks your advice as to whether the risk of self-harm could be managed in a separate manner.

At the outset, it is important to note that each prisoner is assigned a security rating based on their individual needs and circumstances, with the objective of placing and managing them appropriately. In addition, as discussed at section 3 of the Corrections Victoria Sentence Management Manual (which is publicly available from the Department of Justice website at <http://www.justice.vic.gov.au/>), one of the important objectives or considerations in assigning classifications is to place prisoners at the lowest appropriate level of security. The Manual also provides that a cornerstone of Sentence Management philosophy and policy is that prisoners are held in the least restrictive environment possible.

As the Subcommittee has identified, a risk of self-harm does pose a significant management issue for Corrections Victoria. Accordingly, the Director's Instruction No: 1.2 entitled 'At Risk Procedures' (available in all Victorian public prisons and available to the public upon request) sets out instructions for managing any prisoner considered to be at risk of suicide or self-harm. Victoria's two privately operated prisons also have corresponding Operating Instructions.

These Instructions state the following:

Corrections Victoria prisons will maximise the safety of 'at risk' prisoners principally through:

- the reception process, the aims of which include the identification and addressing of 'at risk' issues in the critical first few days of each prisoner's term of imprisonment;
- the prompt identification and effective management of 'at risk' issues that arise after transfer from another location, return from Court (including Tele-court) or at any other time during a prisoner's term of imprisonment.

These Instructions also include the following two general principles: first, that the prisoner is to be placed in the least restrictive accommodation that maximises the prisoner's safety; and secondly, in determining the intervention with an 'at risk' prisoner, consideration should be given to minimising the isolation of the prisoner and maximising their interaction with others, whilst maintaining the safety of all parties.

Therefore, a prisoner who poses a risk of suicide or self-harm will be placed in a prison where that risk can be contained, managed and addressed. Depending on the other relevant factors, this might result in that prisoner being assigned a 'high' or 'maximum' security rating. The other
relevant factors are set out under regulation 25 of the Victorian Regulations (including any risk to the safe custody of all prisoners, safety of staff and the integrity of facilities, as well as the protection of the community by minimising opportunity for and the risk of escape). Should that prisoner need to be escorted to or from a prison, as provided in regulation 8 of the Victorian Regulations, an escort officer accompanying that prisoner might carry fire arms.

3. Separation and regulation 27 of the Corrections Regulations 2009 (Vic)

The Subcommittee notes the separation scheme provided under regulation 27 of the Victorian Regulations and seeks advice on whether the restrictions on the use of separation in the ACT is 'a less restrictive alternative reasonably available to achieve the purpose of regulation 27'. Your letter also states that the ACT Corrections Act 'imposes tighter restrictions on the use of separation', and describes five restrictions that the Subcommittee believes are not provided in the Victorian Regulations.

In my view, the restrictions on the use of separation in Victorian prisons are robust and comparable with the restrictions in the ACT Corrections Act for the reasons outlined below.

First, the Subcommittee notes that section 89 of the ACT Corrections Act states that separation cannot be used for punishment or disciplinary purposes. However, I note that section 90 of the ACT Corrections Act states that separation can be used to protect 'the safety of anyone at a correctional centre, or [the] security or good order at a correctional centre'. Similarly, regulation 27 of the Victorian Regulations only authorises separation for the purposes of 'safety or protection of a prisoner or other persons, or the security, good order or management of a prison'.

However, I also note that section 89 of the ACT Corrections Act must be read in the context of Chapter 10 of that Act. Chapter 10 permits the use of 'separate confinement' as a penalty arising from a proven disciplinary breach or where a prisoner admits the disciplinary breach charged. The expression 'separate confinement' is also defined in the ACT Corrections Act as 'confinement of a prisoner in a cell, away from other prisoners'. Further, separate confinement can be imposed for a period of 3 days, 7 days, or 28 days.

Victorian prisons also use separation for disciplinary purposes. Under section 53(4) of the Victorian Corrections Act, one or more of a prisoner's privileges might be withdrawn if a prisoner is guilty of a prison offence or the prisoner admits the truth of a charge. Section 5 of the Sentence Management Manual also set out a range of separation regimes including the 'full loss of privileges' regime that might be imposed as the outcome of disciplinary proceedings. This results in a prisoner being separated into a management unit or high security unit, and by reference to section 53(4) of the Victorian Corrections Act, the length of separation as a result of a disciplinary hearing cannot be for a period that exceeds 30 days. Finally, the Sentence Management Manual expressly states that 'placement in a restricted regime is not available as a punishment except where that placement occurs as an outcome of a disciplinary hearing'.

Second, the Subcommittee notes that sections 90-92 of the ACT Corrections Act include a set time period for separation orders unless they are renewed, a requirement to consider cultural considerations, and a set time-line for review and reviews at the prisoner's request.

The Victorian separation scheme under regulation 27 does not include a set time period for separation, or allow for reviews of separation orders at the prisoner's requests. However, section 5 of the Sentence Management Manual provides that the initial period of separation cannot be for a period that exceeds seven days, and a review for further separation must occur on a weekly basis. Further, other than the 'full loss of privileges' regime that might be imposed as the outcome of disciplinary proceedings, a prisoner cannot be separated under other separation regimes for a period in excess of 30 days without the approval of the Commissioner for Corrections or the Assistant Commissioner, Offender Management Services. In my view, the
fact that a review of a separation order in Victoria occurs at least once every seven days is a less restrictive process than the 21 day time period allowed in the ACT, and also precludes the need for a separate right of review by a prisoner.

Also, while regulation 27 of the Victorian Regulations does not include an express requirement to consider cultural considerations, section 2 of the Sentence Management Manual sets out sentence management guiding principles. One of the guiding principles is that:

A prisoner’s cultural background should be taken into account in the sentence management process. This includes consideration of placement at a location at which a prisoner may maintain cultural links and access to appropriate supports.

In addition, the Director’s Instruction No: 2.9 entitled ‘Prisoners from Culturally and Linguistically Diverse Backgrounds’ provides that prison officers are required to receive cultural awareness information during recruit training and during periodic staff refresher training. Victoria’s two privately operated prisons also have corresponding Operating Instructions, and I therefore believe that cultural considerations are taken into account throughout all aspects of corrections management, including separation.

Third, the Subcommittee notes that the Corrections Management (Segregation) Policy 2009 (ACT) provides for accelerated reviews at the request of a doctor. In Victoria, section 5 of the Sentence Management Manual includes a separation regime entitled the ‘medical/psychiatric observation’ regime. Under this regime, a Prison General Manager may separate a prisoner pending medical examination where such action is considered necessary. This regime also requires that a prisoner separated for medical supervision is seen by a Medical Officer as soon as possible and within 24 hours, and that continuation of the separation is then dependent on medical advice.

Finally, the Subcommittee notes that sections 96-97 of the ACT Corrections Act includes review of a separation order by an external adjudicator. The Victorian Regulations does not include an express right to seek a review of a separation order by an external adjudicator. Instead, under section 47(1)(j) of the Victorian Corrections Act, all prisoners have the statutory right to make complaints concerning prison management (which includes the making of a separation order) to the Minister for Corrections, the Secretary to the Department of Justice, the Commissioner for Corrections, a Prison General Manager, the Ombudsman, the Health Services Commissioner, and the Human Rights Commissioner. It also allows complaints to be made to ‘official visitors’, and they are volunteers appointed by myself under section 35 of the Victorian Corrections Act. These volunteers fall under the ‘Independent Prisoner Visitors Scheme’ administered by the Office of Correctional Services Review, and this Office is independent of Corrections Victoria. In addition, the role of official visitors is to provide independent and objective advice to me regarding the operations of the prison they visit. (Information on the Office of Correctional Services Review and the Independent Prisoner Visitors Scheme is publicly available from the Department of Justice website).

The Victorian Corrections Act therefore allows a prisoner to seek a review of a separation order by a person internal as well as external to Corrections Victoria, and I note that prisoners do currently avail themselves of this statutory right.

Accordingly, I believe Victoria’s separation scheme is within the range of reasonable alternatives available in Victoria to address issues relating to the safety and protection of prisoners and others, and for the good order and management of the prison.

4. Strip searches and regulations 69 and 71 of the Corrections Regulations 2009 (Vic)

In your letter, the Subcommittee seeks advice on the following:
Whether or not regulations 69 and 71 [of the Victorian Regulations] permit an examination of the genitals and anus? In particular, do they permit prisoners and visitors to be asked to bend over, spread their legs or move their genitals to permit observation?

[and]

Whether people searched under Regulations 69 and 71 are expressly warned in advance that the search may involve an examination of their genitals or anus?

The definition of 'strip search' at regulation 5 of the Victorian Regulations prohibits any touching of a person's body and is defined as follows:

**strip search** means a search of a person that requires-

1. the person to remove any or all of the person's clothing; and

2. an examination of the person's body and of that clothing but does not require the person to be touched by the person or persons conducting the search.

While the expression 'an examination of the person's body' is not defined, this expression in the context of strip searches creates a clear expectation that a strip search might include an examination of all parts of a person's body. Further, as described in the Director's Instruction No: 1.5 entitled 'Searches and Patrols' (as well as in corresponding Operating Instructions in the two privately operated prisons in Victoria), both prisoners and visitors are required to be informed of the process involved in a strip search.

In respect of prisoners being strip searched, the precise process is set out in the Director's Instruction and includes the following directions:

Direct the prisoner to bend over until the hands are about 30 cms from the ground, and to part the cheeks of the buttocks with the hands enabling the Prison Officer to ensure that no contraband or unauthorised articles are concealed in this area.

Where necessary to enable an adequate visual inspection of areas that may conceal contraband, direct male prisoners to lift the testicles or female prisoners to lift the breasts.

These directions are the same for visitors being strip searched. Prior to a visitor being strip searched under regulation 71, there must be reasonable grounds to suspect that a visitor is concealing an unauthorised substance or article. In addition, a visitor's written consent is required prior to a strip search commencing. As the strip search does not include touching a visitor's body the searching officer must explain each step of the process, and at any point where there is confusion or distress, the visitor can withdraw his or her consent. This is clearly explained in the Director's Instruction as follows:

In the event of a visitor expressly or implicitly withdrawing consent, or where the visitor complains, becomes distressed so that it is not clear that consent continues, or where there is any doubt in the mind of the searching officer that consent is not present, the search will not be commenced or continued.

Finally, the Subcommittee has also asked whether the strip search process described at Division 9.4.4 (incorrectly identified in your letter as Division 4.4.4) of the ACT Corrections Act provides a less restrictive alternative reasonably available to achieve the purposes of regulations 69 and 71. This Division describes the involvement of doctors and nurses with the assistance of corrections officers, if required, to conduct a 'body search'. In the ACT Corrections Act, 'body search' is defined as 'a search of the detainee's body, including an examination of any orifice or cavity of the detainee's body', and such an examination will be conducted by a doctor or nurse. This search is therefore very different from a 'strip search' defined in the Victorian Regulations, which prohibits the touching of a person who is submitting to a strip search, and would therefore not include touching any part of the body.

Also, as mentioned above, one of the available separation regimes described in the Sentence Management Manual is the 'medical/psychiatric observation' regime, and separation of a
prisoner under this regime is reviewed weekly. In the situation where a strip search reveals items concealed about a prisoner's body, and that prisoner is unwilling to remove that item, the prisoner will be subject to the 'medical/psychiatric observation' separation regime. This observation regime also includes no touching of a prisoner's body, and the purpose of this separation is for the protection of the prisoner as well as for the security and good order of the prison.

In light of the differences between the ACT body search process and Victoria's strip search process, I do not believe that Division 9.4.4 is a less restrictive alternative reasonably available to achieve the purposes of regulations 69 and 71.

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) considered and approved the above Regulations at a meeting on 26 August 2009.

The Subcommittee thanks you for your response dated 24 August 2009. The Subcommittee appreciated the detailed, careful analysis of the comparative regime in the ACT. The Subcommittee also found the explanation of the various documents regulating corrections in Victoria particularly helpful.

Regulations 69 and 71 – ‘Strip searches’

The Subcommittee appreciates the protections contained in Directors Instruction No: 1.5 (the Instructions). However, the Subcommittee has two concerns and makes the following comments.

Searches of visitors

The Subcommittee notes your advice that all visitors have the opportunity to withdraw their consent to a strip search as soon as they are asked to remove their underwear, bend over, spread their buttocks or lift their breasts or genitals. Searching officers are instructed to look for implicit withdrawals of consent.

The Subcommittee acknowledges the protective nature of the Instructions. However it is concerned that unless visitors are aware from the outset, of the aspects of a proposed search, they may feel obliged (due to embarrassment, stress or confusion) to comply with a searching officer’s requests once the search has commenced. Visitors may therefore not adequately reveal their distress or reluctance to perform a specific requested act.

The Subcommittee is of the view that where it is proposed to perform such an intimate search on a visitor, all of the particular actions to be performed by the visitor should be explained before any clothes are removed.

Searches of prisoners

The Subcommittee notes that prisoners can be strip searched without their consent on the ground ‘that it is necessary for the security or good order of the prison or the prisoners’ (regulation 69(3)). Whilst a loss of privacy is a routine consequence of imprisonment, the Subcommittee observes that regulations 69(6) and 70(2) contain significant restrictions on the conduct of strip searches.

Letter dated 31 August 2009 to the Hon. Bob Cameron MP, Minister for Corrections, from the Regulation Review Subcommittee
It is concerned that for the intimate searches of the anus or genitals, the phrase ‘good order’ may be too broad and ambiguous to be compatible with prisoners’ right not to have their ‘privacy… unlawfully or arbitrarily interfered with’ (see Section 12 of the Charter of Human Rights and Responsibilities Act 2006).

The Subcommittee is of the view that consideration be given to more precise delineation of the circumstances when prisoners may be subjected to searches of their anus or genitals for the ‘good order’ of the prison or prisoners. Such delineation could be by way of further regulation or Instructions.

Minister’s Response

I refer to your letter dated 31 August 2009. I note with thanks that the Regulations Review Subcommittee (the Subcommittee) has now approved the Corrections Regulations 2009.

Your letter raises two further concerns of the Subcommittee relating to strip search procedures.

**Strip searches of visitors**

In my letter to the Subcommittee dated 24 August 2009, I advised that there is a specific Director’s Instruction on searches in Victoria's public prisons, and there are corresponding Operating Instructions in Victoria’s two privately-operated prisons. These Instructions require the written consent of a visitor before a strip search of that visitor commences. I am advised that the strip search process is limited to a visual examination and does not include touching a visitor’s body. Therefore, in practice, the searching officer must explain each step of the strip search process, and at any point of the search where there is confusion or distress, the visitor can withdraw his or her consent.

The Subcommittee has raised the concern that unless visitors are aware from the outset of the steps involved in a proposed strip search, they might feel obliged to comply with a searching officer’s requests once the search has commenced. I agree with this concern and the Instructions will be amended to expressly require that before seeking a visitor’s written consent, a searching officer must advise that visitor of the steps involved in a strip search prior to the search commencing.

**Strip searches of prisoners**

Regulation 69 states that a prisoner might be strip searched if there are ‘reasonable grounds that it is necessary for the security or good order of the prison’ when a prisoner leaves or enters a prison, before or after contact visits, and prior to the testing of drugs. In addition, this regulation states that a prisoner might be strip searched at any other time if there are ‘reasonable grounds that it is necessary for the security or good order of the prison or prisoner’.

The Subcommittee is of the view that consideration be given to more precise delineation of the circumstances when prisoners may be subjected to a search of their genital region for the good order (as opposed to the security) of the prison or prisoners, and such delineation could be by way of further regulation or Instructions.

I reiterate that under the Regulations, a strip search is limited to a visual examination and does not involve touching a person’s body. I consider that requiring ‘reasonable grounds that it is necessary for the security or good order of the prison or the prisoners’ is an appropriate limitation on when a strip search can occur. In my view, it is difficult to attempt prescribing the full range of circumstances that necessitate the need for the visual examination of a prisoner’s
genital region. Not only are these circumstances difficult to foresee, but to then prescribe such circumstances would create the risk that strip searches cannot occur in circumstances that have not been prescribed. This would clearly impact on the safety of prisoners and prison staff, and the safe and secure environment of the prison.

Furthermore, in relation to the security or the good order of the prisoner or prisoners, these two grounds in which a strip search can occur are not mutually exclusive. If good order is not maintained in a prison, risks to the security of the prison or prisoners might arise. Similarly, if security is not maintained in prison, the good order of the prison or prisoner would be diminished.

Strip searches of prisoners are an important part of maintaining both the good order and security of a prison and, despite prisoners knowing they will be strip searched when they have been in contact with people from outside the prison, or uncontrolled areas outside the prison, prisoners have still been found with items concealed about their bodies.

It is my view that the grounds of both good order and security are necessary in relation to strip searches and are compatible with the Charter.

Example 6:

SR No. 41 – Valuation of Land (General and Supplementary Valuation) Amendment Regulations 2009

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting of 22 July 2009. The Regulations have not yet been approved.

The Subcommittee notes that Schedule 3’s oath of fidelity and secrecy is unchanged from earlier versions developed prior to the enactment of the Charter of Human Rights and Responsibilities Act 2006 (the Charter). In particular, the present oath extends to a promise not to ‘divulge or communicate any… matter coming to my knowledge in the performance of my duties to any person except for the purposes of carrying into effect the provisions of the’ Valuation of Land Act 1960. This aspect of the oath is not limited to information about a valuation, confidential information, sensitive information or information which disclosure could prejudicially affect either the government’s or a particular person’s interests. There are also no exceptions for disclosure pursuant to other laws or with appropriate authority.

The Subcommittee is concerned that the oath may be incompatible with the Charter’s right to freedom of expression, especially as a breach of the ‘true effect’ of the oath would expose a valuer to a penalty of up to twelve months in prison. While the Subcommittee appreciates that it is important to ensure the confidentiality of information obtained by a valuer, it seeks further information as to whether a narrower oath would be a less restrictive alternative that is reasonably available to achieve this purpose. In particular, the Subcommittee seeks your advice whether the oath could be limited to information from valuation documents or to confidential information.

In this regard the Subcommittee notes the contemporary approach taken to secrecy obligations in the Federal public service. The Subcommittee notes that Regulation 2.1 of the Public Service Regulations 1999 (Cth) was drafted in response to constitutional, free speech concerns. Is this an approach which is a less restrictive alternative that is reasonably available in this context?

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74 Letter dated 27 July 2009 to the Hon. Gavin Jennings MLC, Minister for Environment and Climate Change, from the Regulation Review Subcommittee
Thank you for your letter of 27 July 2009 regarding the compatibility of the oath of fidelity and secrecy contained in the Valuation of Land (General and Supplementary Valuation) Amendment Regulations 2009 (the Regulations) with the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

I am advised that the Department of Sustainability and Environment (DSE) gave considerable attention to the Charter when preparing the Regulations. Consultation was undertaken with the Human Rights Unit in the Department of Justice which approved both the Regulations and their accompanying Human Rights Certificate which was submitted to the Governor-in-Council.

While the oath of secrecy and fidelity contained in the Regulations may limit a person's right to freedom of expression on specific valuation matters, there is no intention to restrict a person's broader right to freedom of expression. Rather, the purpose of requiring a small number of staff to take the oath is to assist in maintaining the secrecy of all matters related to any information obtained or documents created by the Valuer-General for the purpose of providing valuation advice. The limitation on the right to free expression is considered reasonable because there is a need to maintain confidentiality so that the government's interests are protected and the privacy of persons affected by any communication of sensitive information is protected. Limitations on the ability of the Valuer-General's staff to impart knowledge obtained during the course of their employment will ensure responsible use of such information for official purposes only and disclosure only in the legitimate course of duty or when proper authority has been given.

The oath does not limit the rights of staff to seek, receive and impart information and ideas that are unrelated to the performance of their duties under the Valuation of Land Act 1960. Only a small number of DSE staff take and are subject to the oath. Staff subject to the oath can make disclosures of information covered by the oath when permitted by law (for example, when disclosing information covered under the Whistleblowers Protection Act 2001). On these bases, the Regulations are considered to be compatible with the Charter.

Revising the text of the oath so that it covered, for example, only information from valuation documents and confidential information would mean that the oath would not cover all the documents that the Valuation of Land Act 1960 makes subject to secrecy provisions. The Act requires staff involved in the valuation process to take an oath (the text of the oath to be prescribed by regulations) to guard the secrecy of all information and documents obtained or generated in the course of the valuation process.

Amending the Valuation of Land Act 1960 to only require secrecy in relation to valuation documents or confidential information is not considered appropriate. The sensitivity of the valuation process requires that secrecy provisions apply to all documentation and information obtained or generated in the course of valuation work. Restricting secrecy provisions to confidential documents may not be workable in practice as it may not be evident to staff which documents and pieces of information are confidential and which are not as the status of a particular document or piece of information may vary depending on the context. Furthermore, public confidence in (and cooperation with) the valuation process is aided by the fact that all information obtained and used in the process is subject to secrecy provisions. An effective valuation process requires that the wider community maintain considerable trust in the processes used. Therefore, these less restrictive means do not adequately address the purpose of the limitation on the right to freedom of expression.

I trust this information is helpful to your subcommittee. Thank you again for raising this matter with me.

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75 Letter dated 17 August 2009 to the Regulation Review Subcommittee from the Hon. Gavin Jennings MLC, Minister for Environment and Climate
**Subcommittee’s Letter**

The Regulation Review Subcommittee (the Subcommittee) considered and approved the above Regulations at a meeting on 26 August.

The Subcommittee thanks you for your prompt, detailed response dated 17 August 2009.

The Subcommittee notes your advice that the present terms of the oath are required to ‘cover all the documents that the Valuation of Land Act 1960 (the Act) makes subject to secrecy provisions.’ However, the Subcommittee observes that the s3A(3)(a) of the Act:

- is limited to ‘information obtained or documents created by the valuer-general for the purpose of providing valuation advice’, while the oath has broader terms covering ‘any matter coming to my knowledge in the performance of my duties’; and
- requires only that the valuer ‘maintain and aid in maintaining the secrecy’ of such matters, terms that appear only applicable to confidential information.

The Subcommittee notes your advice that the boundaries of a narrower oath would not be as clear to valuers or the public. However it is concerned that an overly broad secrecy provision will lead to valuers feeling obliged to refrain from any communication whatsoever about their work.

This may be detrimental to the expressive rights of both the valuers and the public. A similarly broad and long-standing secrecy provision for federal public servants was held to be an unconstitutional bar on freedom of expression in Bennett v President, HREOC [2003] FCA 1433.

The Subcommittee is of the view that consideration be given to adopting the narrower approach to secrecy presently used in the federal public service (see Reg 2.1 of the Public Service Regulations 1999 (Cth)) as an alternative to the present regime for valuers.

**Example 7:**

**SR No. 45 – Police Integrity Regulations 2009**

**Subcommittee’s Letter**

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 22 July 2009. The Regulations have not yet been approved.

The Subcommittee notes that Regulation 7(c) requires Office of Police Integrity (OPI) personnel ordered to provide a sample to ‘advise the person taking the sample of… any prescription medicine taken by the member of the OPI personnel.’ No time period is specified for this proposal, e.g. ‘within the past 24 hours’ or ‘within the past week’.

While the Subcommittee appreciates the purpose of Regulation 7(c) is to ensure that the prescription medicine can be taken into account during the analysis of the sample, it seeks further information as to whether it would be appropriate to specify a time period for the disclosure. This would avoid OPI personnel being confused about the obligation or unnecessarily disclosing irrelevant but highly sensitive, personal information.

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76 Letter dated 31 August 2009 to the Hon. Gavin Jennings MLC, Minister for Environment and Climate Change, from the Regulation Review Subcommittee

77 Letter dated 27 July 2009 to the Hon. Bob Cameron, MP, Minister for Police and Emergency Services, from the Regulation Review Subcommittee
Minister’s Response

Thank you for your letter dated 27 July 2009 in relation to the Police Integrity Regulations 2009.

I note your concern that regulation 7(c) does not indicate a relevant time frame within which a member of Office of Police Integrity personnel who has taken prescription medication should advise the ‘sample taker’, when complying with a direction to submit to drug or alcohol testing.

There are various public policy considerations to take into account in preparing the proposed regulations. On the one hand, I recognise that OPI personnel may be confused as to the extent of their obligation if no time-frame is included. Equally, I note that inclusion of too short a time-frame may be counter-productive, given that some drugs can remain in a person’s system for longer periods than others and that a person may not be aware that a drug is still in his or her system at the time of testing.

As you correctly identify, the purpose of the regulation is exculpatory in that it is intended to provide a lawful reason for the presence of a drug in that person’s system at the time of testing. In the absence of regulation 7(c), if a drug of dependence was detected in the system of a member of Office of Police Integrity personnel, that member would be asked to explain why that drug was present and would have the later opportunity to offer a valid reason. Inclusion of the requirement to advise the ‘sample taker’ at the time of submitting to a test should reduce any embarrassment or criticism that may be associated with responding to an inquiry at a later time about how a drug of dependence came to be present in that person.

The equivalent provisions of the Police Regulations 2003 do not contain a similar requirement as such a requirement is unnecessary. The Police Regulation Act 1958 includes a broad power for the Chief Commissioner to issue directions to police members. The employment/appointment power of the Director, Police Integrity over Office of Police Integrity personnel differs from that applicable to police and so regulation 7 is required.

Following receipt of your letter, the Department of Justice is seeking advice on my behalf from the Victorian Institute of Forensic Medicine, which should assist in determining whether or not an amendment to the Regulation is desirable.

I will notify you as soon as that information is to hand.

Minister’s Response

Thank you for your letter dated 27 July 2009 regarding regulation 7(c) of the Police Integrity Regulations 2009.

Following receipt of your letter, the Department of Justice consulted with the Victorian Institute of Forensic Medicine, the contracted service provider to the Office of Police Integrity for the purposes of conducting alcohol and other drug screening, and the Director, Police Integrity regarding the issues you have raised.

Following that consultation I am pleased to advise that I will shortly move to have the Regulations amended to limit the application of regulation 7(c) to the seven days preceding the date on which the direction under the Act is given.

I believe that this amendment addresses the concerns raised in your letter.

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78 Letter dated 12 August 2009 to the Regulation Review Subcommittee from the Hon. Bob Cameron, MP, Minister for Police and Emergency Services
79 Letter dated 28 August 2009 to the Regulation Review Subcommittee from the Hon. Bob Cameron, MP, Minister for Police and Emergency Services
Example 8:

SR No. 47 – Alpine Resorts (Management) Interim Regulations 2009

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 22 July 2009. The Subcommittee has not yet approved the Regulations.

The Subcommittee notes that Regulation 36 makes it a criminal offence to behave in an ‘insulting manner’ at an alpine resort. This aspect of the offence may engage the Charter of Human Rights and Responsibilities Act 2006 (the Charter). In particular it may engage the Charter’s right to freedom of expression. For example, some political protests at alpine resorts may be regarded as insulting to some people. Recent bills before the Parliament have opted to omit the word ‘insulting’ from similar offences. In particular see new Section 73A of the Road Safety Act 1986, inserted by the Road Legislation Amendment Bill 2009. Please also note the new Section 202 of the Equal Opportunity Act 1995 inserted by the Equal Opportunity Amendment (Governance) Bill 2009.

The Subcommittee seeks further information as to whether criminalising ‘insulting’ behaviour at alpine resorts is a reasonable limitation necessary to achieve the purpose of protecting visitors and workers at resorts, given that Regulation 36 already bars riotous, indecent, offensive, threatening and abusive behaviour.

Minister’s Response

Thank you for your letter of 27 July seeking further information regarding the compatibility of regulation 36 of the Alpine Resorts (Management) Interim Regulations 2009 with section 15 (Freedom of expression) of the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

The Alpine Resorts (Management) Interim Regulations 2009 will sunset on 4 November 2009 and will be replaced by the Alpine Resorts (Management) Regulations 2009, of which the exposure draft will soon be released for public consultation.

I am advised that the Department of Sustainability and Environment (DSE) gave considerable attention to the Charter when preparing the Interim Regulations. Consultation was undertaken with the Human Rights Unit in the Department of Justice, which considered both the Regulations and their accompanying Human Rights Certificate, as submitted to the Governor-in-Council.

Section 15(2) of the Charter states that ‘Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds’, including imparting that information orally. However, special duties and responsibilities are attached to the right of freedom of expression and the right is subject to lawful restrictions reasonably necessary to respect the rights and reputations of other persons and for the protection of public order.

Regulation 36 of the Alpine Resorts (Management) Interim Regulations 2009 makes it an offence, in an alpine resort, to behave in a riotous, indecent, offensive, threatening, abusive or

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80 Letter dated 27 July 2009 to the Hon. Gavin Jennings MLC, Minister for Environment and Climate Change, from the Regulation Review Subcommittee

81 Letter dated 24 August 2009 to the Regulation Review Subcommittee from the Hon. Gavin Jennings MLC, Minister for Environment and Climate Change
insulting manner or in a manner that is likely to cause danger or unreasonable disturbance to other persons.

In penalising this behaviour, the proposed regulation engages the right to freedom of expression under section 15(2) of the Charter. However, limitations on the right are permissible as they satisfy the requirements of section 15(3) of the Charter or section 7(2). Section 15(3) provides that the right to freedom of expression 'may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons', or for the protection of matters such as public order.

Upon consultation with the Department of Justice between 2007 and 2008, the Human Rights Unit initially expressed concern that this regulation may overlap with the Summary Offences Act 1966. However, this Act can only be enforced by police officers who are not always stationed at alpine resorts. Therefore, one of the purposes of regulation 36 is to provide authorised officers with increased protection from potential insulting behaviour and to protect public order.

At the time of preparing the Interim Regulations, it was considered that behaving in an insulting manner may affect an authorised officer's right to carry out his or her job freely and safely and therefore may impact on public order within alpine resorts. It was also considered that such behaviour may affect the rights of users of alpine resorts to enjoy their leisure time without being exposed to insulting behaviour of others. In this way, the regulation also seeks to promote the objective of providing for the public's enjoyment of alpine resorts.

Upon consideration during the remaking of the Alpine Resorts (Management) Regulations 2009, it was decided that the term 'insulting' should be removed from regulation 36, which already covers the terms 'riotous, indecent, offensive, threatening and abusive'. The term 'insulting' has been removed from the exposure draft of the proposed regulations which will soon be released for public consultation.

Thank you again for raising this matter with me. I trust this information is helpful to your Committee.

Example 9:

**SR No. 94 – Road Safety Road Rules Regulations 2009**

**Subcommittee’s Letter**

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

The Subcommittee considered the Regulations in the context of section 12A(2)(b)(v) of the Subordinate Legislation Act 1994 (the Act). The Subcommittee notes that the Regulations do not provide for a defence of honest and reasonable mistake of fact for offences under the Road Rules. The Victorian Supreme Court has held such offences are 'absolute liability' offences; Kearon v Grant [1991] 1 VR 321. Regulation 10-1 of the Road Rules 2008 (NSW) provides that such offences are strict liability offences. These offences attract the defence of honest and reasonable mistake of fact. The Subcommittee seeks your view as to whether the provision of a defence of honest and reasonable mistake of fact may be a less restrictive reasonably available alternative to achieve the purpose of the Victorian Road Rules.

Second, in relation to Regulations 315(2) and 319(2), the Subcommittee notes the present approach of placing a legal burden on the defendant to prove lack of substantial compliance.
The Subcommittee seeks your advice as to whether placing an evidential burden on the defendant in relation to the issue of substantial compliance is a less restrictive reasonably available alternative in respect of the Regulations.

Minister’s Response

Thank you for your letter dated 24 November 2009 advising that the Regulation Review Subcommittee had approved the Road Safety Road Rules 2009 (‘the Road Rules’) at its meeting on 18 November 2009. Your letter asks, in relation to the Human Rights Certificate prepared for the Road Rules, whether under section 12A(2)(b)(v) of the Subordinate Legislation Act 1994, there were any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve in respect of the following two issues:

1. Whether the provision of a defence of honest and reasonable mistake of fact should be included in the Road Rules, along the lines of Rule 10-1 of the Road Rules 2008 (NSW).
2. In relation to rules 315(2) and 319(2), whether placing an evidential burden on the defendant in relation to substantial compliance would be preferable to placing a legal burden.

1. Honest and Reasonable Mistake of Fact

It is a principle of common law that for statutory offences which allow for criminal responsibility to be established upon proof of a particular act, an honest and reasonable mistake as to a relevant fact may afford an excuse. This "defence" is often referred to as the "Proudman v Dayman defence" after the name of the High Court case which first developed it. In the words of Chief Justice Dixon it states that "as a general rule an honest and reasonable belief in a state of facts which, if they existed, could make the defendant's act innocent affords an excuse for doing what would otherwise be an offence". This "defence" may be excluded expressly or by implication. If it is excluded, then the offence is said to be one of "absolute liability". If it still operates, the offence is said to be one of "strict liability".

The "defence" has a number of components:

- there must be a mistake and not mere ignorance;
- the mistake must be one of fact and not law;
- the mistake must be honest and reasonable; and
- the mistake must render the defendant's act innocent.

Therefore, under Victorian common law the defence is available to a defendant who seeks to challenge their alleged infringement under the Road Rules in court, unless the availability of the defence is excluded expressly or impliedly. In the case of Kearon v Grant that you mention in your letter, the Victorian Supreme Court held that for the charge of exceeding the speed-limit under road rule 20, the defence was not available. In that case Justice Brooking felt that "the subject matter and character of this regulation are such as to make it likely that the exclusion of this defence was intended". He also stated that: "If ever one might expect an intention to impose strict responsibility, it would be in relation to this offence of driving a motor vehicle at an excessive speed".

The effect of road rule 10-1 of the New South Wales Road Rules is to provide that all offences under the Road Rules in New South Wales, including road rule 20, are strict liability offences. The relevant test for honest and reasonable mistake of fact is governed here by the Commonwealth Criminal Code 1995, not the common law test of Proudman v Dayman.
although it seems to be accepted that the Code test is a statutory form of the test at common law (Roads and Traffic Authority (NSW) v O’Reilly [2009] NSWSC 134).

As Victoria is not a criminal code jurisdiction, unlike New South Wales, it was considered appropriate to follow the established Victorian common law approach of allowing a defendant to seek to establish on the facts a Proudman v Dayman defence in court if they wish to challenge the validity of a charge under the Road Rules. It would then be for the court to consider, for the individual rule in question, whether the defence has been excluded either expressly or by implication. I note that this position is also consistent with the model Australian Road Rules.

2. The burden of proof that the defendant should bear

Road rules 315(2) and 319(2) state that a traffic control device or a traffic-related item is taken to comply substantially with the Road Rules unless the contrary is proved. The effects of rules 315(2) and 319(2) are, as you state in your letter, to put the “burden” onto the defendant who seeks to challenge a charge on the grounds that the traffic control device or traffic-related item did not comply with the Road Rules. As you point out, this is a shift of the legal burden of proof to the defendant.

Your suggestion that this might be changed so that the defendant only has to satisfy the evidential burden would mean that the defendant would only have to present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish an excuse. If that burden was met by the defendant, then the Crown would be required to meet the defence and to satisfy the Court beyond reasonable doubt that the defence should be rejected. This position is established by section 130 of the Magistrates Court Act 1989.

The reason for not adopting this approach is that it would render the Road Rules extremely difficult and impractical to enforce. It would allow a defendant to simply point to a defence that the traffic control device was not in legal effect. It would therefore mean that enforcement officers will need to take a photograph of the traffic control devices relevant to every infringement notice. Otherwise, the prosecution would have no chance of disproving a claim by the defendant that the device did not substantially comply with the Road Rules, for example because it was too dirty or faded to be read.

As was stated in the Human Rights Certificate provided in accordance with section 12A of the Subordinate Legislation Act 1994, the Road Rules preserve the effectiveness of traffic control devices and traffic-related items where they may have suffered some damage or wear and tear but are still substantially visible and clear. The purpose of the rules as drafted is to ensure compliance with those devices and items, and to prevent road users from relying on technical defences where they have been found to have breached the Road Rules. The overall purpose of the Road Rules is to maximise road safety, reduce road trauma, and ensure a balance of convenience for all road users. The Courts have repeatedly recognized, particularly in the context of regulatory offences, that in considering the reasonableness of a reversal of the burden of proof, it is appropriate to consider the difficulties a prosecutor may face in the absence of a legal burden on the defendant. In particular, I refer you to the comments of the House of Lords in Sheldrake v DPP [2004] 3 WLR 976 (in the context of the Human Rights Act 1998 (UK)) where Lord Bingham made clear that it is a balancing exercise:

"The extent and nature of the factual matters required to be proved by the defendant, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the defendant relates to facts which, if they are readily provable by him as matters within his own knowledge or to which he has ready access."

The serious threat to public safety posed by disobedience of traffic signals is well-established. Courts in countries with similar human rights legislation have held that reverse onus provisions applying in the area of public regulatory offences, such as road safety, generally constitute a
justified limitation on the presumption of innocence. For example in R v Whyte [1988] 2 SCR 3, the Supreme Court of Canada held that a reverse onus provision in relation to drink driving traffic offences was valid. The Court noted that the provision represented “a restrained parliamentary response to a pressing social problem” and that the provision constituted a minimal interference with the presumption of innocence. Rules 315(2) and 319(2) already represent a less restrictive choice by the State. In R v Whyte the Court noted that in the area of road safety the Parliament would be justified in creating absolute liability offences because of the serious risk to the public, but instead these Road Rules allow road users the opportunity to establish a defence by showing that the traffic control device or traffic related item was not substantially compliant with the Road Rules.

Once again, I thank you for your enquiries, and trust that the above explanations satisfy the Regulation Review Subcommittee’s concerns.

Example 10:


Subcommittee’s Letter\(^{84}\)

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at a meeting on 21 April 2010. The Subcommittee has not yet approved the Regulations.

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

In that regard at least one pertinent alternative was not considered in the Regulatory Impact Statement (RIS). A shorter exemption period of two years is a reasonably available alternative to the proposed Regulations. In particular, the Subcommittee seeks your advice as to why the Regulations do not expire until the end of 2013. The Charter has now been in operation for some years. A significant period has already passed to allow a review of the Charter on the work and resources of the Boards. A review of the Charter is required to be tabled in Parliament on 1 October 2011. The Subcommittee’s view is that the shorter exemption period of two years to coincide with the review of the Charter is more appropriate.

Minister’s Response\(^{85}\)

Thank you for your letter, dated 21 April 2010, that seeks further advice on the reasons behind the four year exemption granted to the Adult Parole Board, Youth Parole Board and Youth Residential Board (the ‘Boards’) in relation to their obligations under the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

The Boards play a unique role in managing the appropriate release of offenders on parole and home detention orders. The applicability of the Charter to the Boards raises unique challenges. The principal argument for the Boards’ exemption from the operation of the Charter is that requiring them to comply with the Charter’s obligations may undermine the effective operation of the Boards by interfering with the current case management model and may create a more
restrictive and formal atmosphere at Board meetings. This would impact on rehabilitation outcomes.

The four year period is considered necessary to enable the Boards to consider and trial options to enhance Charter compatibility. The Boards will have the time to comprehensively review their operations and processes in relation to the Charter, undertake research on comparable Boards in other jurisdictions, conduct trials of any new practices and procedures, assessing whether they are workable, and, if required, draft any resulting legislative amendments. The Department of Justice (DOJ) is currently in the process of recruiting a senior project manager to oversee this substantial project. The project manager will be supported by a senior steering committee, with representatives from DOJ, Corrections Victoria, Department of Human Services, Board members and senior staff of the Boards.

Any period of exemption of less than four years will not allow sufficient time to allow this work to occur in a careful and comprehensive manner. It may, for example, be necessary to implement changes incrementally to ensure that the effective operation of the Boards is not undermined.

Importantly, the four year exemption will also allow the findings and recommendations of this comprehensive Parole Boards review to be informed by the broader review of the Charter, scheduled for completion in 2011.

When the regulations expire on 27 December 2013, the Boards will be in a position to provide advice on issues regarding compatibility with the Charter.

I trust this information is useful.

Example 11:

SR No. 180 – Marine Regulations 2009

Subcommittee’s Letter

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above Regulations at its meeting on 19 May 2010.

Regulation 204 provides that the master of a vessel operation in state waters ‘must observe the Prevention of Collisions Convention’. This is a reference to the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (generally referred to as the COLREGS). Under section 58 of the Act contravening this regulation is a summary offence which carries (in the case of a natural person) a maximum penalty of two years imprisonment.

The Subcommittee seeks your advice as to whether it would be more appropriate to draft specific criminal offences to give effect to the COLREGS and whether a two year imprisonment penalty is appropriate for a breach of any of the COLREGS.

Minister’s Response

I refer to your letter of 24 May 2010 requesting advice on whether it would be more appropriate to draft specific criminal offences to give effect to the Convention on the International Regulations for Preventing Collisions at Sea (‘COLREGS’) and whether a two year imprisonment penalty is appropriate for a breach of any of the COLREGS.

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86 Letter dated 24 May 2010 to the Hon. Tim Pallas, MP, Minister for Roads and Ports, from the Regulation Review Subcommittee
87 Letter dated 15 June 2010 to the Regulation Review Subcommittee from the Hon. Tim Pallas MP, Minister for Roads and Ports
As you would be aware the Government has undertaken a major review of Victoria’s marine safety laws. The outcome of the review was a decision to replace the current Marine Act 1988 and Marine Regulations with a new Marine Safety Act and regulations. The Marine Regulations 2009 were made to bridge the gap between the expiry of the Marine Regulations 1999 and the new regulations that will be prepared and made, subject to the passage of the Marine Safety Bill 2010.

I can confirm that the intent is to impose only financial penalties in the future. The potential to impose a penalty of up to two years’ imprisonment will not be ‘carried over’ as part of the Marine Safety Bill. I can also confirm that it is intended to use the marine safety regulations to prescribe specific penalties for specific COLREG requirements. It is also intended to enable these requirements to be enforced through the issue of infringement notices.

Example 12:

SR No. 118 – Road Safety (Vehicles) Regulations 2009

Subcommittee’s Letter

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

The Subcommittee considered the Regulations in the context of section 15 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter) and associated ‘lawful restrictions’. The Subcommittee seeks further information in relation to regulations 58(c)(iv) and 60(a)(iv). These provisions relate to the refusal to sell or cancel rights in a particular registration number if it is ‘otherwise inappropriate for public display.’ The Subcommittee seeks your advice whether there are publicly available guidelines in relation to the determination of these grounds. The Subcommittee also seeks your advice as to whether these grounds may be used in relation to licence plates which display political content.

Minister’s Response

Thank you for your letter dated 24 November 2009, advising that the Regulation Review Subcommittee has approved the new Road Safety (Vehicles) Regulations 2009.

Your letter advises that the Subcommittee seeks further information in relation to regulations 58(c)(iv) and 60(a)(iv). These provisions enable VicRoads to refuse to sell, or to cancel, registration number plate rights. In particular, the Subcommittee has enquired if there are publicly available guidelines for determining the grounds that a particular registration number is "otherwise inappropriate for public display" and whether these grounds may be used in relation to licence plates which display political content.


The VicRoads website sets out general information relating to the grounds for determining whether a proposed registration number is "inappropriate for public display". The website explains that Vic Roads may recall or not issue plates which:

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88 Letter dated 24 November 2009 to the Hon. Tim Pallas, MP, Minister for Roads and Ports, from the Regulation Review Subcommittee

89 Letter dated 30 December 2009 to the Regulation Review Subcommittee from the Hon. Tim Pallas MP, Minister for Roads and Ports
• are likely to cause offense to any person or group of people;
• contain a known profanity (in any language);
• have a sexual reference or contravene public decency; or
• send a negative message about safe driving or road safety.

The refusal to sell or cancel rights to display a registration number because it is offensive is covered under regulations 58(c)(iii) and 60(a)(iii). The grounds that the registration number is “otherwise inappropriate for public display”, as contemplated by regulations 58(c)(iv) and 60(a)(iv), are covered by the last three dot points above, and published on the VicRoads website (see: <http://www.vplates.com.au/fag#faqs1.4>). However, there may be some overlap between the various grounds. For example, a known profanity may be inappropriate for public display and may also be offensive.

The grounds set out above would not trigger a refusal to sell or recall a registration number which seeks to display political content unless such content is also mixed with an expression that is “otherwise inappropriate”.

The criminal and civil illegality of certain inappropriate expression, such as racial and religious vilification is prohibited under Acts of the State and Federal Parliaments such as the Racial and Religious Tolerance Act 2001 (Vic) and the Racial Hatred Act 1995 (Cth). VicRoads works carefully to ensure that such illegal expression does not reach the public through its registration number system.

As part of the application process for registration number rights, VicRoads may contact a customer to seek clarification of the meaning and/or purpose for which the plate combination is sought.

VicRoads is further assisted in the decision process by internal business rules governing the assessment of inappropriate plate content. This ensures that there is a proper and consistent process for assessment of plates that may be “inappropriate for public display”.

I trust that this information addresses the Subcommittee’s concerns.
This Appendix lists all regulations made during 2009. Appendix 2 categorises regulations according to whether they were made with a Regulation Impact Statement or whether they were exempted or excepted from those requirements. The Committee did not move for disallowance of any of the regulations made in 2009, however the Regulation Review Subcommittee did correspond with responsible Ministers concerning some regulations.
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APPENDIX 3  
MINISTERIAL CORRESPONDENCE

This Appendix contains a list of correspondence sent to responsible Ministers by the Subcommittee regarding regulations made in 2009. The Appendix categorises correspondence in accordance with the nature of the issue raised by the Subcommittee.

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<td>Minister for Roads and Ports</td>
<td>Charter question regarding whether the Regents are ‘demonstrably justifiable’ according to the test in Charter s7(2).</td>
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<td>SR No. 32 – Electricity Safety (Stray Current Corrosion) Regulations 2009</td>
<td>Minister for Energy and Resources</td>
<td>Noted the department oversight of publication of the section 12(3) notice before the Regulations were made.</td>
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<td>Minister for Corrections</td>
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<td>SR No. 47 – Alpine Resorts (Management) Interim Regulations 2009</td>
<td>Minister for Environment and Climate Change</td>
<td>Charter question relating to behaving in an ‘insulting manner’ at an alpine resort.</td>
</tr>
<tr>
<td>Regulation</td>
<td>Minister</td>
<td>Issue</td>
</tr>
<tr>
<td>------------</td>
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</tr>
<tr>
<td>SR No. 52 – Retirement Villages (Contractual Arrangements) Amendment (Formula) Regulations 2009</td>
<td>Minister for Consumer Affairs</td>
<td>General issues relating to the drafting of the RIS and timing of the release of the advertisement for submissions.</td>
</tr>
<tr>
<td>SR No. 94 – Road Safety Road Rules 2009</td>
<td>Minister for Roads and Ports</td>
<td>Issue relating to RIS. Are there less restrictive reasonably available alternatives?</td>
</tr>
<tr>
<td>SR No. 105 – Bushfire Amendment (Bushfire Construction) Further Interim Regulations 2009</td>
<td>Minister for Planning</td>
<td>Sought further clarification in relation to the general operation of the Regulations.</td>
</tr>
<tr>
<td>SR No. 118 – Road Safety (Vehicles) Regulations 2009</td>
<td>Minister for Roads and Ports</td>
<td>Charter question relating to the refusal to sell or cancel rights in a particular registration number.</td>
</tr>
<tr>
<td>SR No. 134 – Liquor Control Reform Regulations 2009</td>
<td>Minister for Consumer Affairs</td>
<td>Issue relating to RIS and consultation process. There has been a contravention of section 6(b) of the Act and of the Guidelines.</td>
</tr>
<tr>
<td>SR No. 136 – Alpine Resorts (Management) Regulations 2009</td>
<td>Minister for Environment and Climate Change</td>
<td>Issue relating to RIS and consideration of responses. Detailed responses be given to persons / organizations who made a submission in the RIS process.</td>
</tr>
<tr>
<td>SR No. 174 – Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009</td>
<td>Attorney-General</td>
<td>Charter question. Why was the alternative of a shorter exemption period of two years not considered in the RIS?</td>
</tr>
<tr>
<td>SR No. 180 – Marine Regulations 2009</td>
<td>Minister for Roads and Ports</td>
<td>Charter question. Issue relating to the drafting of the COLREGS. Is a two year imprisonment penalty appropriate for any breach of any of the COLREGS?</td>
</tr>
</tbody>
</table>
EXEMPTIONS AND EXCEPTIONS

- **Dating Certificates.** The Subcommittee has occasionally been presented with undated exemption and exception certificates. The Subcommittee expects all certificates to be dated.

- **Reasons for Exemption.** The Subcommittee has occasionally received regulations exempted under section 9 with certificates of exemption which fail to adequately explain the reasons for granting the exemption or with reasons for granting the exemption contained in the Explanatory Memorandum. It should be noted that it is a requirement of section 9(2) of the *Subordinate Legislation Act 1994* (Vic) that certificates of exemption 'specify the reasons for the exemption'. The Subcommittee expects all exemption certificates to contain adequate explanations of the reasons for granting the exemptions.

- **Extension of Regulations for Periods up to 12 months.** Regulations expire 10 years after they have been made. The Subcommittee has been presented with a number of regulations made under sections 8(1)(d)(iii) and 5(3) extending regulations due to expire for periods up to 12 months. Before an extension of time can be granted, the Minister must certify that due to ‘special circumstances’ there is insufficient time available to comply with the formal regulation-making requirements of the *Subordinate Legislation Act 1994*. The Subcommittee expects details of the ‘special circumstances’ to be contained in the section 5(3) certificate itself as required by the *Subordinate Legislation Act 1994*. Please see additional general comments below.

- **Using Appropriate Exemption and Exception Categories.** Department and agency officers need to be careful when determining which category to use when exempting and excepting regulations from the Regulation Impact Statement process. The Subcommittee has occasionally received regulations which are incorrectly exempted and excepted.

- **Typographical Errors.** Department and agency officers need to be careful when preparing certificates to ensure that they do not contain typographical errors.

EXTENSION OF TIME

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

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

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

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

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

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

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

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

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

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

The Subcommittee will examine each regulation carefully. The Subcommittee is conscious of its statutory obligations. The Subcommittee’s view is that it is a matter of balance. The ‘basket’ of fees in its entirety must not exceed the Treasurer’s approved annual rate. However if, in a package of a number of fees, three or four slightly exceed the Treasurer’s annual rate then that may not necessarily be an immediate cause for concern. Rather, the Subcommittee will examine each fee increase, the monetary amount and what the fee is for. Each Regulation will be examined on its merits and in context.
At this stage, the Guidelines have only been in operation for over a year. The Subcommittee will continue to carefully scrutinise the Regulations and the Guidelines.

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

<table>
<thead>
<tr>
<th>Description</th>
<th>Current Fee</th>
<th>Proposed Fee</th>
<th>% Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application for ..</td>
<td>$100.00</td>
<td>$105.00</td>
<td>5.0</td>
</tr>
<tr>
<td>Application for ..</td>
<td>$320.00</td>
<td>$325.00</td>
<td>1.6</td>
</tr>
</tbody>
</table>

**INDEPENDENT ADVICE CERTIFICATES: 10(3)**

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

**LEGISLATIVE INSTRUMENTS OUTSIDE THE SUBORDINATE LEGISLATION ACT 1994**

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

**PROVISION OF DOCUMENTATION TO REGULATION REVIEW SUBCOMMITTEE**

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

Paragraph 5.51 of the Guidelines provides that:

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

**RECOMMENDATIONS**

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

### EXCEPTIONS AND EXEMPTIONS

**CHECKLIST:**

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

| Court Rules – Section 8(1)(b) | Explanatory Memorandum  
| | Section 8 (Exception Certificate)  
| | Section 12A(3)(a) Human Rights Exemption Certificate |

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

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

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

Please forward all relevant documents to: Executive Officer, Scrutiny of Acts and Regulations Committee, Parliament House, Spring Street, MELBOURNE VIC 3000.
SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

REGULATION IMPACT STATEMENTS

CHECKLIST:

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

*see paragraph 10.03 of Premier’s Guidelines