58th Parliament
Alert Digest

No. 11 of 2018

Tuesday, 7 August 2018
on the following Bills

Children, Youth and Families Amendment (Youth Offender Compliance) Bill 2018

Corrections Amendment (Parole) Bill 2018

Disability Service Safeguards Bill 2018

Environment Protection Amendment Bill 2018

Environment Protection Amendment (Container Deposit Scheme) Bill 2018

Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018

Justice Legislation Miscellaneous Amendment Bill 2018

Justice Legislation (Police and Other Matters) Bill 2018

Owner Drivers and Forestry Contractors Amendment Bill 2018

Racing Amendment (Integrity and Disciplinary Structures) Bill 2018

Victims and Other Legislation Amendment Bill 2018

Scrutiny of Acts and Regulations Committee

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Terms of Reference - Scrutiny of Bills

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

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –

- (i) trespasses unduly upon rights or freedoms;
- (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
- (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
- (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Privacy and Data Protection Act 2014*;
- (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
- (vi) inappropriately delegates legislative power;
- (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
- (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –

- (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
- (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
- (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

***Parliamentary Committees Act 2003*, section 17**

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Scrutiny of Acts and Regulations Committee

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Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the *Charter* provides –

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

Glossary and Symbols

'Assembly' refers to the Legislative Assembly of the Victorian Parliament

'Charter' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*

'Council' refers to the Legislative Council of the Victorian Parliament

'DPP' refers to the Director of Public Prosecutions for the State of Victoria

'human rights' refers to the rights set out in Part 2 of the Charter

'IBAC' refers to the Independent Broad-based Anti-corruption Commission

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (as at 1 July 2018 one penalty unit equals $158.57)

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights

'VCAT' refers to the Victorian Civil and Administrative Tribunal

[ ] denotes clause numbers in a Bill

Alert Digest No. 11 of 2018

Children, Youth and Families Amendment (Youth Offender Compliance) Bill 2018

Bill Information

Minister	Hon Jenny Mikakos MP	**Introduction Date**	25 July 2018
Portfolio	Families and Children	**Second Reading Date**	26 July 2018

Bill Summary

The Bill would amend the *Children, Youth and Families Act 2005* to:

- clarify the power of the Youth Parole Board to impose special conditions on a parole order and validate past decisions of the Youth Parole Board to impose special conditions on parole orders and any decisions made in relation to those conditions
- establish a three-year trial of electronic monitoring as a condition on parole orders for young offenders aged 16 years or older who are on parole after being in youth justice detention for committing a Category A or Category B serious youth offence
- establish a three-year trial of an alcohol and other drug testing regime for youth parolees
- ensure that Youth Parole Board decisions to transfer a person from a youth justice custodial facility to prison will continue to apply to new custodial sentences imposed on appeal
- clarify that the family law jurisdiction of the Children's Court under the Commonwealth *Family Law Act 1975* would be exercised in the Family Division of the Court, and allow the Children's Court to make rules for exercising that jurisdiction
- make statute law revisions.

The bill would also:

- amend *the Children, Youth and Families Act 2005* and the *Bail Act 1977* in relation to amendments made by the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Part 4)
- make a consequential amendment to the *Surveillance Devices Act 1999* in relation to the electronic monitoring trial
- amend the *Children Legislation Amendment (Information Sharing) Act 2018* to exclude courts, tribunals and other persons and bodies specified in section 41T of the *Child Wellbeing and Safety Act 2005* from the definition of information holder in the *Children, Youth and Families Act 2005*.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☐ NONE
☐ Other:
☒ Inappropriately delegates legislative power
☒ Trespasses unduly on Rights or Freedoms

Details

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 provides that Part 7 of the Bill would commence on 30 June 2022, which is more than 12 months from the date of the Bill's introduction. The Committee notes that Part 7 sets out repeal provisions for the electronic monitoring and alcohol and drug testing provisions in the Bill.

The Explanatory Memorandum states:

> …the Bill commences the operation of Part 7 of the Bill on 30 June 2022, which is three years after the default commencement date of the provisions it repeals and means the trial of electronic monitoring and alcohol and drug testing will be conducted over a period of at least three years.

The Committee is satisfied that the delayed commencement of Part 7 is reasonable and justified in the circumstances.

Power of entry without a warrant

New section 461AA would provide an officer, in certain circumstances, with the power to remove an electronic monitoring device worn by a person or any equipment used for electronic monitoring, and to enter the person's residence for that purpose.

The Statement of Compatibility states:

> Entry to a person's residence to effect removal also affects their privacy. However, any interference with privacy will, in my view, neither be unlawful nor arbitrary. The circumstances in which the device or equipment may be removed, and who may remove it, are clearly set out in the provisions. The removal will occur for a reason specified in section 461AA(1), such as the condition containing the monitoring requirement being varied or revoked.
>
> In most instances, devices and equipment will be removed or recovered with the offender's agreement. If practicable, an officer is required to seek a person's consent before using any force to remove a device or equipment from their person or premises (new section 461AA(8)(c)). Further, forcible removal or entry to premises is confined by the requirement to use only reasonable force.

The Committee is satisfied that the power of entry without a warrant in section 461AA is necessary and reasonable in the circumstances.

Recommendation

☐ **Refer to Parliament for consideration**	☐ **Write to Minister for clarification**	☒ **No further action required**

CHARTER ISSUES

☒ NONE
☐ Other:

☐ Compatibility with Human Rights
☐ Operation of the Charter

Details

The Children, Youth and Families Amendment (Youth Offender Compliance) Bill 2018 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

Recommendation

☐ **Refer to Parliament for consideration**	☐ **Write to Minister for clarification**	☒ **No further action required**

Corrections Amendment (Parole) Act 2018

Bill Information

Minister	Hon Gayle Tierney MP	**Introduction Date**	24 July 2018
Portfolio	Corrections	**Second Reading Date**	24 July 2018
		Royal Assent	31 July 2018[1]

Bill Summary

Note: The Committee reports on this Act pursuant to section 17(c)(ii) of the *Parliamentary Committees Act 2003*.

Background

In August 1988, the Supreme Court sentenced Craig Minogue to life imprisonment, with a non-parole period of 28 years, for murder following his involvement in the 1986 bombing of the Russell Street Police Headquarters. The bombing resulted in the death of Victoria Police Constable Angela Taylor and injury to 22 other people. Mr Justice Vincent described the offending as 'one of the most serious criminal actions ever to take place in this community…[and as]…behaviour recognised in so many other parts of the world as an act of war'.[2]

Craig Minogue's non-parole period expired in September 2016 and he subsequently applied for parole.

On 8 December 2016, the Victorian Parliament passed the *Justice Legislation Amendment (Parole Reform and Other Matters) Act* 2016, which commenced on 14 December 2016. The Act made a number of amendments to the *Corrections Act 1986*, including the insertion of section 74AAA which:

- introduced a presumption against parole for prisoners serving a prison sentence with a non-parole period for an offence of murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer
- applied retrospectively (i.e., apply regardless of whether the prisoner was sentenced for the murder before, on or after the commencement of the clause)
- prohibited the Adult Parole Board from making a parole order in respect of such a prisoner unless satisfied that, because the prisoner is in imminent danger of dying or is seriously incapacitated, they are no longer able to harm any person and do not pose a risk to the community.

Craig Minogue commenced proceedings before the High Court in January 2017, in which he sought declarations that section 74AAA did not apply to him or his parole application. On 20 June 2018, the High Court held that section 74AAA did not apply to Craig Minogue because he was not sentenced on the basis that he knew the person murdered was a police officer or that he was reckless as to that fact.

The Committee discussed the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* in its Alert Digest No. 1 of 2017. The Committee also discussed the *Corrections Amendment (Parole) Bill 2016*, a Private Member's Bill introduced by the Hon Edward O'Donohue MLC in November

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1 The Act came into operation on the day after Royal Assent.

2 *R v Taylor, Stanley Brian; Minogue, Craig William John; Reed, Peter Michael & Minogue, Rodney Joseph [Russell Street bombing]* [1988] VicSC 435 (24 August 1988). Available online at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VicSC/1988/435.html

2016, which proposed an amendment to the *Corrections Act 1986* to provide for additional conditions for the making of a parole order in relation to Craig Minogue.

Purpose

The Act amended the *Corrections Act 1986* ('the Principal Act'), with effect from 1 August 2018, by: substituting a new section 74AAA of the Principal Act:

- which applies:
    - to a prisoner who has been convicted of murder and sentenced to a term of imprisonment with a non-parole period (set at or after the time of sentencing), and
    - where the victim of the murder was a police officer, and
    - where the Adult Parole Board is satisfied that at the time of the conduct that resulted in the police officer's death, the prisoner either:
        - intended to cause the death of, or really serious injury to, a police officer, or
        - knew that the person whose death was caused by the conduct was a police officer, or
        - knew that it was probable that the death of, or really serious injury to, a police officer would be caused by the conduct
- which provides that the Adult Parole Board must not make a parole order in respect of the prisoner unless it is satisfied that they are:
    - in imminent danger of dying, or seriously incapacitated and, as a result, no longer have the physical ability to do harm to any person, and
    - has demonstrated that they do not pose a risk to the community.

The Act also inserted new section 74AB which provides that the Adult Parole Board must not make a parole order under section 74 or 78 in respect of the prisoner Craig Minogue unless it is satisfied that he is:

- in imminent danger of dying, or seriously incapacitated and, as a result, no longer has the physical ability to do harm to any person
- has demonstrated that he does not pose a risk to the community.

Both section 74AAA and section 74AB contain override declarations in relation to the *Charter of Human Rights and Responsibilities Act 2006*.

The Committee notes that section 31(4) of the Charter declares that it is the intention of parliament that an override declaration will only be made in exceptional circumstances.

The Committee notes that the Minister has made an override statement supporting the override declarations in the course of the Second Reading Speech.

The override statement in the Second Reading Speech provides:

> In the Bill, new sections 74AAA and 74AB also include subsections which provide that the Charter of Human Rights and Responsibilities Act 2006 does not apply to either provision, and that those override declarations do not need to be re-enacted every five years (as is ordinarily required under section 31(7) of the Charter). The Government accepts that these provisions are incompatible with the Charter. Therefore, in this exceptional case, the Charter is being overridden and its application is entirely excluded from the operation of these new provisions to ensure that the sentences imposed on persons who murder police officers, and Dr Minogue

specifically, are fully served. To provide legal certainty and to avoid a court giving the Bill an interpretation based on Charter rights which do not achieve the Government's intention, new sections 74AAA and 74AB provide that the Charter does not apply to each new section respectively. These provisions are intended to serve as the override declaration envisaged by s 31(1) of the Charter, but go further to make clear that the Charter does not apply to these new sections at all and that the override and non-application of the Charter do not expire after five years under section 31(7) of the Charter.

Whether the amendments sought to be made by the Bill constitute grounds for an 'exceptional circumstance' is a matter for parliament to consider.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☐ NONE ☐ Inappropriately delegates legislative power

☐ Other: ☒ Trespasses unduly on Rights or Freedoms

Details

Retrospective application – Future application based on past events — Adverse impact on offenders

Clause 6 of the Bill would substitute section 127A of the Principal Act, which would provide that:

- section 74AAA would apply regardless of whether the prisoner had already become eligible for parole, or had taken any steps to ask the Board to grant parole, or the Board had begun any consideration of whether the prisoner should be granted parole
- section 74AB would apply regardless of whether the prisoner had already become eligible for parole, or had taken any steps to ask the Board to grant parole, or the Board had begun any consideration of whether the prisoner Craig Minogue should be granted parole.

The Statement of Compatibility states:

> I also accept that the limitation is aggravated by the retrospective effect of the provisions, because offenders, including Craig Minogue, would have had an expectation, up until the time the [Justice Legislation Amendment (Parole Reform and Other Matters)] Bill was announced, that they may have had some possibility for release in the future and the capacity to live a useful life post-release.

The Committee refers to Parliament the question whether the retrospective application of section 127A is justified in the circumstances.

Constitutional validity

Parliamentary Committees Act 2003 – Section 17(a)(i) – Undue trespass to rights or freedoms – Judicial power – Sentencing – Life sentence – Parole eligibility after minimum term – Whether legislation sets aside, varies, alters or otherwise nullifies a judgement, decree, order or sentence of the Supreme Court – Whether interference with exercise of judicial power – Doctrine in Kable v DPP

(NSW) – Ad hominem (directed to the individual) legislation – Whether Bill is tantamount to a prohibition on parole for one individual – Whether legislation is a valid law

Changes to Parole eligibility

The Committee refers to its discussion in *Alert Digest No. 1 of 2017* of the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* and the Corrections Amendment (Parole) Bill 2016 (under the 'Constitutional validity' heading). The Committee considers that the same conclusion applies regarding the changes to parole eligibility in the current Act. That is, the decision of the High Court in *Crump* may indicate that the current Act is constitutionally valid as not infringing Chapter III of the Federal Constitution because the sections 74AAA and 74AB do not set aside, vary or nullify the original sentence of a court.

One person laws – Ad hominem legislation (directed to the person)

As discussed in *Alert Digest No. 1 of 2017*, ad hominem laws (laws which are directed to an individual) raise questions of constitutional law that until recently had not been decided by the High Court. Those constitutional questions arise in relation to the current Act because new section 74AB is directed at an individual.

In August 2017, the High Court unanimously held in *Julian Knight v the State of Victoria & Anor* [2017] HCA 29, that a law targeted solely and directly at an individual, the prisoner Julian Knight, was constitutionally valid. The decision may indicate that section 74AB is constitutionally valid.

Recommendation

☒ **Refer to Parliament for consideration**	☐ **Write to Minister for clarification**	☐ **No further action required**

CHARTER ISSUES

☐ NONE	☒ Compatibility with Human Rights
☐ Other:	☒ Operation of the Charter

Details

Statement of incompatibility – Humane treatment – Children – Adult parole board barred from making a parole order for murderers of police officers if satisfied of particular matters – Adult parole board barred from making a parole order for Craig Minogue

Summary: *The effect of new section 74AAA(2) may be to bar the Adult Parole Board from considering other evidence that casts doubt on whether the prisoner is barred from being paroled. The Committee will write to the Minister for further information and refers to Parliament for its consideration whether or not the Serious Offenders Act 2018 (Vic) is a less restrictive alternative reasonably available to achieve the purposes of ss. 4 and 5 and whether s. 4, to the extent that it bars parole for a prisoner who*

murdered a police officer as a child, is compatible with the Charter rights of child offenders to protection by the state and to humane treatment in detention.

Relevant provision

The Committee notes that section 4, substituting existing s. 74AAA, generally bars the Adult Parole Board from making a parole order for a prisoner convicted and sentenced for murder of a police officer until near the end of his or her life if:

> the Board is satisfied that the prisoner, at the time of carrying out the conduct that resulted in the police officer's death—
>
> (i) intended to cause the death of, or really serious injury to, a police officer (whether or not the prisoner intended to cause the death of, or really serious injury to, any particular police officer); or
>
> (ii) knew that the person whose death was caused by the conduct was a police officer; or
>
> (iii) knew that it was probable that the death of, or really serious injury to, a police officer would be caused by the conduct (whether or not the prisoner knew that it was probable that the death of, or really serious injury to, any particular police officer would be caused by the conduct).

New section 74AAA(2) provides that:

> In considering whether it is satisfied under paragraph (1)(c), the Board must have regard only to the following—
>
> (a) the evidence led at trial;
>
> (b) the judgment;
>
> (c) the reasons for sentence;
>
> (d) any reasons in connection with the fixing of a non-parole period, whether the non-parole period is set at or after the time of sentencing;
>
> (e) any judgment on appeal.

The Explanatory Memorandum remarks:

> The Adult Parole Board is only allowed to consider the materials listed above when determining whether it is satisfied that the prisoner had a requisite state of mind. Any other information, for example admissions made by a prisoner while in custody, cannot be considered by the Adult Parole Board at this stage.

However, the Committee observes that the effect of new section 74AAA(2) may also be to bar the Adult Parole Board from considering other evidence that casts doubt on whether the prisoner had one of the three states of mind set out in new section 74AAA(1)(c), for example, evidence that the offender, although a murderer, was mistaken as to the identity of the victim at the time of the killing.

The Committee also notes that new section 5, inserting a new section 74AAB, generally bars the Adult Parole board from making a parole order for the prisoner Craig Minogue until near the end of his life.

Charter analysis

The Statement of Compatibility remarked:

> In my opinion, the Bill, as introduced to the Legislative Assembly, is incompatible with human rights in the Charter….

> Despite the finding by the High Court in Minogue v Victoria, this Government remains determined to avoid the risk posed to society by the release from prison of Craig Minogue and other prisoners convicted of the murder of police officers. The murder of a police officer, someone who serves and protects the community and risks their life to do so, is the most serious example of the most serious crime. These amendments reflect the seriousness of such a crime and serve the important purpose protecting society. There is no less restrictive means of achieving this objective.
>
> As I noted in the previous statement of compatibility, the extent of the limitation on the relevant Charter rights is confined, as the reform will only currently affect the parole applications of three prisoners currently serving life sentences with non-parole periods for the murders of police officers. The reform will also apply to deter any future relevant offending, as prospective offenders will be fully aware of the consequences that flow from such actions.
>
> As I stated in the previous statement of compatibility, I accept that the nature of the limitation is severe for the prisoners affected, because in certain cases (where the individual is serving a life sentence) it will prevent that offender from being released on parole except in very limited circumstances, and those circumstances are not conducive to leading any useful life post-release. I also accept that the limitation is aggravated by the retrospective effect of the provisions, because offenders, including Craig Minogue, would have had an expectation, up until the time the JLA Bill was announced, that they may have had some possibility for release in the future and the capacity to live a useful life post-release.
>
> For these reasons, I conclude that the limitation to the rights ss 10(b) and 22(1) of the Charter are unable to be justified in accordance with section 7(2) of the Charter. Accordingly, I conclude that clauses 4 and 5 are incompatible with human rights.

However, the Committee notes that the *Serious Offenders Act 2018*, which will operate from 2 September 2018, empowers the Director of Public Prosecutions to ask the Supreme Court to order the detention of any person serving a sentence for murder, including someone who is on parole, if the Court determines (giving paramount consideration to the safety and protection of the community) that there is an unacceptable risk of the offender committing a serious sex or violence offence if the offender is in the community.[3]

The Statement of Compatibility also remarks:

> In my view, the parole reforms in clause 4 will have a limited effect on child offenders. The parole reforms do not apply to the Youth Parole Board, which hears parole applications involving children under the Children, Youth and Families Act 2005.
>
> Further, there are many protections built into the sentencing system to ensure sentences for children or young offenders take into account their age and prospect for rehabilitation, and allow for alternative sentences such as a youth justice centre order or a youth residential centre order.
>
> I note that in relation to existing offenders currently serving a sentence, these reforms will not capture any existing offender who was sentenced as a child.

However, the Committee notes that the Minister advised the Committee in relation to the previous s. 74AAA (which was in similar terms):

> The police murderer parole reforms may capture a person who committed the offending when he or she was a child. One co-offender in a police murder, to whom new section 74AAA applies, was 17 years of age and about to turn 18 years of age when he committed the murder of a

[3] See *Serious Offenders Act 2018*, ss. 4, 5, 63 & 64.

police officer. This prisoner, when he was an adult, received a life sentence of imprisonment from the court.[4]

The Committee observes that the United Nations Human Rights Committee and the Supreme Court of the United States have held that imprisoning a person for life without parole for crimes committed as a child may be incompatible with human rights in some circumstances.[5]

Relevant comparisons

The Committee notes that no other Australian jurisdiction bars parole for all murderers of police or for named offenders, but that New South Wales bars parole for certain past offenders who the sentencing judge declared should never be released.[6]

The Committee also notes that existing s. 74AABA, which bars parole for some homicide prisoners unless the Adult Parole Board is satisfied that the prisoner cooperated satisfactorily to identity the location of the remains of the homicide victim, provides:

> For the purposes of subsection (1), the Board must have regard to the following—
>
> (a) a report by the Chief Commissioner of Police evaluating the prisoner's cooperation in the investigation of the offence;
>
> (b) a report from the Secretary to the Department in respect of whether the prisoner is suitable for release on parole;
>
> (c) the capacity of the prisoner to cooperate in the investigation of the offence, which may include information provided in a report under paragraph (a) or (b);
>
> (d) the record of the court in relation to the offending, including the judgment and the reasons for sentence;
>
> (e) any other information regarding whether the body or remains of a deceased victim was or were recovered as a result of the prisoner's cooperation in the investigation of the offence;
>
> (f) any submission to the Board by a victim under section 74A.

The Committee observes that para (e) appears to permit the Board to consider any information that supports a finding that the prisoner is eligible for parole.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not new section 74AAA(2) bars the Adult Parole Board from considering any evidence that supports a finding that the prisoner did not have one of the states of mind set out in new section 74AAA(1)(c).

The Committee refers to Parliament for its consideration whether or not:

- **the *Serious Offenders Act 2018* (Vic) is a less restrictive alternative reasonably available to achieve the purposes of ss. 4 and 5; and**

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4 Scrutiny of Acts and Regulations Committee, *Alert Digest No. 2 of 2017*, p. 15.

5 *Bronson Blessington and Matthew Elliot v. Australia*, Human Rights Committee, Communication No. 1968/2010, U.N. Doc. CCPR/C/112/D/1968/2010 (2014); *Miller v Alabama*, 567 US 460 (2012).

6 *Crimes (Administration of Sentences) Act 1999* (NSW), s. 154A.

- **whether or not s. 4, to the extent that it bars parole for prisoners (including an existing prisoner) who murdered a police officer as a child, is compatible with the Charter rights of child offenders to protection by the state and to humane treatment in detention.**

Recommendation

☒ **Refer to Parliament for consideration**	☒ **Write to Minister for clarification**	☐ **No further action required**

Override declaration – SARC reports – Declarations of inconsistent interpretation – VEOHRC reports

Summary: *The effect of the two override declarations may be to disapply four mechanisms for Parliament to be informed about the human rights compatibility or effect of new sections 74AAA and 74AB. The Committee will write to the Minister seeking further information.*

Relevant provision

The Committee notes that sections 4, which inserted new sub-section 74AAA(9), and 5, which inserted new sub-section 74AB(4), provide that the *Charter of Human Rights and Responsibilities Act 2006* do not apply to new sections 74AAA and 74AB.

The Second Reading Speech remarked:

> In the Bill, new sections 74AAA and 74AB also include subsections which provide that the Charter of Human Rights and Responsibilities Act 2006 does not apply to either provision, and that those override declarations do not need to be re-enacted every five years (as is ordinarily required under section 31(7) of the Charter). The Government accepts that these provisions are incompatible with the Charter. Therefore, in this exceptional case, the Charter is being overridden and its application is entirely excluded from the operation of these new provisions to ensure that the sentences imposed on persons who murder police officers, and Dr Minogue specifically, are fully served. To provide legal certainty and to avoid a court giving the Bill an interpretation based on Charter rights which do not achieve the Government's intention, new sections 74AAA and 74AB provide that the Charter does not apply to each new section respectively. These provisions are intended to serve as the override declaration envisaged by s 31(1) of the Charter, but go further to make clear that the Charter does not apply to these new sections at all and that the override and non-application of the Charter do not expire after five years under section 31(7) of the Charter.

The Committee notes that new section 74AAA(9) and 74AB(4) go beyond excluding the Charter's provision on interpretation (which could change the legal effect of those sections) and, in particular, exclude the application of the following provisions for advising Parliament on the human rights compatibility of its laws:

- Charter s. 30, which requires this Committee to consider and report to Parliament on whether the Bill that introduced new sections 74AAA and 74AB is incompatible with human rights.
- Charter s. 36, which allows the Supreme Court to declare that new sections 74AAA or 74AB cannot be interpreted consistently with a human right, in turn requiring the Attorney-General to table a written statement in response in Parliament.
- Charter s. 41(a)(iii), which gives the Victorian Equal Opportunity and Human Rights Commission the function of reporting on all override declarations made in a particular year

to the Attorney-General, who is in turn required by Charter s. 43 to lay the report before each house of Parliament.

- Charter s. 41(b), which allows Attorney-General to ask the Victorian Equal Opportunity and Human Rights Commission to review the effect of new sections 74AAA(9) and 74AB(4) on human rights, a review that the Attorney-General must lay before each house of Parliament under Charter s. 43.

Accordingly, the effect of new sections 74AAA(9) and 74AB(4) may be to disapply these four mechanisms for Parliament to be informed about the human rights compatibility or effect of new sections 74AAA and74AB.

Charter analysis

Charter s. 31(6) provides:

> If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.
>
> Note
>
> As the Charter has no application to a statutory provision for which an override declaration has been made, the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision. Also, the requirement under section 32 to interpret that provision in a way that is compatible with human rights does not apply.

The Committee observes that overrides of the Charter may not need to exclude the application of the entire Charter but instead can be expressed to be of a particular 'extent'.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not narrowing the extent of the override declarations so that they preserve the Charter's mechanisms for parliamentary scrutiny would be a less restrictive alternative reasonably available to achieve the purpose of new sub-sections 74AAA(9) and 74AB(4).

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Minister for clarification**	☐ **No further action required**

Disability Service Safeguards Bill 2018

Bill Information

Minister	Hon Martin Foley MP	**Introduction Date**	24 July 2018
Portfolio	Housing, Disability and Ageing	**Second Reading Date**	25 July 2018

Bill Summary

The Bill would:

- establish a registration scheme for disability workers and disability students
- establish the Victorian Disability Worker Registration Board of Victoria
- establish the Victorian Disability Worker Commission and provide for the appointment of the Victorian Disability Worker Commissioner
- establish a complaints and notification mechanism in relation to disability workers and disability students
- amend the *Residential Tenancies Act 1997* to provide for the rights and duties of Specialist Disability Accommodation (SDA) residents and SDA providers, consistent with the National Disability Insurance Scheme (NDIS)
- provide access by SDA residents and SDA providers to general tenancy arrangements under Part 2 of that Act
- enable SDA residents to exercise choice and control in respect to their accommodation arrangements.

The Bill would also make consequential amendments to:

- the *Health Complaints Act 2016*, the *Ombudsman Act 1973* and the *Public Administration Act 2004* in relation to the regulation of disability workers
- the *Disability Act 2006* and other Acts to enable the *Residential Tenancies Act 1997* to provide for SDA residents and SDA providers.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☐ NONE ☐ Inappropriately delegates legislative power

☐ Other: ☒ Trespasses unduly on Rights or Freedoms

Details

The privilege against self-incrimination

Clause 273 of the Bill provides that a person is not excused from producing a document that they are required to produce under the Bill or regulations, or from giving their name or address, on the grounds that it might incriminate them.

The Statement of Compatibility states:

> This is therefore a limited abrogation of the privilege against self-incrimination because a document required to be produced may contain evidence that would tend to incriminate the person with respect to certain offences under the Bill.
>
> The privilege against self-incrimination generally covers the compulsion of any information or documents which might incriminate a person. However, the application of the privilege to pre-existing documents is considerably weaker than that accorded to oral testimony or documents that are required to be brought into existence to comply with a request for information. I note that some jurisdictions have regarded an order to hand over existing documents as not engaging the privilege against self-incrimination.
>
> The primary purpose of this limited abrogation is to enable the Board and Commissioner to monitor compliance with the scheme, investigate potential contraventions and proactively respond to potential risks posed by disability workers and students. Taking into account the protective purpose of the Bill, there is significant public interest in ensuring that authorised persons are able to access information and evidence that may be difficult or impossible to ascertain by alternative evidentiary means, and to use such evidence to bring enforcement action where appropriate.
>
> Any limitation on the right in section 25(2)(k) that is occasioned by the limited abrogation is directly related to its purpose. The documents that an authorised person can require to be produced are those necessary for the purpose of monitoring compliance with the Bill. Importantly, the requirement to produce a document does not extend to having to explain or account for the information contained in that document. If such an explanation would tend to incriminate, the privilege would still be available.
>
> There are no less restrictive means available to achieve the purpose of enabling authorised persons to have access to relevant documents, and access to such documents is necessary to ensure the safety of people accessing disability services. To provide for a 'use immunity' that restricts the use of produced documents to particular proceedings would unreasonably obstruct the role of authorised persons and the aims of the scheme, as well as giving the holders of such documents an unfair forensic advantage in relation to criminal and civil penalty investigations. Any limitation on the right to protection against self-incrimination is therefore appropriately tailored and the least restrictive means to achieve the regulatory purpose.

The Committee is satisfied that the limitation of the privilege against self-incrimination by clause 273 is reasonable and justified in the circumstances.

Strict liability offences

The Bill contains a number of strict liability offences, which are identified as such in the Explanatory Memorandum.[7] The Committee notes that each of these offences is subject to a financial penalty only and that the possibility of imprisonment does not apply.

The Committee notes that an offence is one of strict liability if there is no requirement to prove *mens rea*[8] on the part of the accused but where the defence of 'honest and reasonable mistake of fact' is available.

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7 New sections 498D(1), 498D(3), 498H, 498I, 498ZF, 498ZL, 498ZN, 498ZV, 498ZX, 498ZZZA, 498ZZZE, 498ZZZP, 498ZZZQ, 498ZZZR, 498ZZZS, 498ZZZT and 505C of the *Residential Tenancies Act 1997*.

8 *Mens rea* is a Latin term which means 'guilty mind'. Different standards of *mens rea* apply depending on the offence, i.e., that the accused: actually intended to do the act for which they have been charged; or had knowledge as to the possible harmful consequences of the act; or was negligent regarding the likelihood of the harm that would be caused by the act.

The Committee is satisfied that the application of strict liability to the offences identified in the Explanatory Memorandum is reasonable and justified in the circumstances.

Power of entry without a warrant

New section 498U sets out the circumstances in which an SDA provider or their agent would have a right to enter an SDA enrolled dwelling, with at least 24 hours notice, and at an agreed time. New section 498V sets out the grounds on which an SDA provider's right of entry may be exercised.

The Statement of Compatibility states:

> In relation to specialist disability accommodation, a SDA provider or their agent may enter a SDA enrolled dwelling at any time agreed with the SDA resident in advance, or at any time between the hours of 8.00am and 6.00pm (except on a public holiday), provided that at least 24 hours notice has been given. This is consistent with current rights of entry under the Residential Tenancies Act in relation to rented premises. The right of entry may only be exercised if it is required to show the dwelling to a prospective buyer, for valuation purposes, to enable inspection of the dwelling, to undertake maintenance or repairs, or to enable the SDA provider to carry out a duty.
>
> To the extent that the right of entry in respect of a SDA enrolled dwelling may interfere with the right to privacy, I do not consider that any such interference is unlawful or arbitrary. At least 24 hours notice must generally be provided to the SDA resident, except in cases of emergency or where it is necessary to protect health or safety and it may only be exercised for a limited set of purposes set out in new section 498U inserted into the Residential Tenancies Act. Accordingly, in my view, these provisions are compatible with the right to privacy.

The Committee is satisfied that the power of entry without a warrant under sections 498U and 498V is reasonable and necessary in the circumstances.

Recommendation

☐ **Refer to Parliament for consideration**	☐ **Write to Minister for clarification**	☒ **No further action required**

CHARTER ISSUES

☐ NONE	☒ Compatibility with Human Rights
☐ Other:	☐ Operation of the Charter

Details

Presumption of innocence – Exceptions to offence provisions – Onus on defendant to prove the exception applies

Summary: *The new section 498ZZZP inserted into the Residential Tenancies Act may impose a burden on a provider to prove that the excuse provided for in that section is made out, in order to avoid a penalty. The Committee will write to the Minister seeking further information.*

Relevant provisions

The Committee notes that sub-section 498ZZZP(2) that the Bill inserts into the Residential Tenancies Act contain a provision allowing a person to raise a 'reasonable excuse' defence to the prohibition contained in that section:

> (2) An SDA provider or a person acting on behalf of an SDA provider must not, except in accordance with this Part, obtain or attempt to obtain possession of the SDA enrolled dwelling by entering the SDA enrolled dwelling, whether the entry is peaceable or not, unless there are reasonable grounds to believe that the SDA resident has abandoned the SDA enrolled dwelling.

The Committee observes that this provision may be interpreted as requiring a provider to prove their innocence by either raising evidence of reasonable grounds or actually proving that they have reasonable grounds, for believing the resident had abandoned the dwelling.

Charter analysis

The Committee's *Practice Note* deals with reverse onus provisions in Part B(iii):

> The Statement of Compatibility for any Bill that creates a provision that reduces the prosecution's burden to prove the accused's guilt or requires an accused to offer evidence of their innocence (or extends the operation of or increases the applicable penalty in respect of such a provision) should state whether and how that provision satisfies the Charter's test for reasonable limits on rights. Examples of such provisions include ones that place the legal onus of proof on an accused with respect to any issue in a criminal proceeding; deem a fact to be proved in any circumstance; provide that proof of any fact is 'prima facie evidence' of a different fact; or place an evidential onus on an accused with respect to an essential element of an offence. The Committee would prefer that the analysis of reasonable limits assess the risk that the provision may allow an innocent person to be convicted of the offence and set out the demonstrable justification for allowing such a risk. In the case of a provision that places a legal onus on an accused, the analysis may address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision's purpose.
>
> In addition, the Statement of Compatibility (or explanatory material) for a provision that introduces or significantly alters an exception to a criminal offence should state whether or not the exception places a legal onus on the accused. Examples of such exceptions include provisions stating that 'It is a defence to a prosecution for an offence if…' or 'A person is not liable to be prosecuted for an offence if…' or 'A person is not guilty of an offence if…' or a particular offence provision 'does not apply if'. For exceptions to summary offences, the explanatory material may address the effect of s.72 of the Criminal Procedure Act 2009. For exceptions that impose a legal onus on the accused without express words to that effect, the statement of compatibility may address whether or not the inclusion of express words would be a less restrictive alternative reasonably available to achieve the exception's purpose.

The Committee notes that sub-section 498ZZZP(2) may impose a 'reverse onus' that places the burden on an accused to prove that the relevant excuse is made out. Whether the onus is on an accused to prove facts that would bring their case within the scope of the excuse, or to prove that the excuse applies, or whether the onus is on the prosecution to disprove the existence of such facts, will depend upon how the provision is interpreted.

Whilst the Statement of Compatibility discusses other reasonable excuse provisions in the bill, it does not consider the effect sub-section 498ZZZP(2) on the presumption of innocence.

Conclusion

The Committee will write to the Minister seeking further information as to whether the new sub-section 498ZZZP(2) places a legal or evidential onus of proof on an accused and if so, whether expressly addressing that onus would be a less restrictive alternative reasonably available to achieve the exception's purposes.

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Minister for clarification**	☐ **No further action required**

Environment Protection Amendment (Container Deposit Scheme) Bill 2018[9]

Bill Information

Member	Ms Nina Springle MLC	**Introduction Date**	18 August 2016
Private Members' Bill		**Second Reading Date**	25 July 2018

Bill Summary

The Bill would amend the *Environment Protection Act 2017* to establish a state-wide container deposit scheme to promote the recovery, reuse and recycling of empty beverage containers.

Type of Bill

☐ Government Bill ☒ Private Members Bill

CONTENT ISSUES

☐ NONE ☒ Inappropriately delegates legislative power

☐ Other: ☒ Trespasses unduly on Rights or Freedoms

Details

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 provides that the Bill, with the exception of section 6, would come into operation on 1 November 2019. Clause 2 also provides that section 6 would come into operation on 1 January 2022. Both dates are more than 12 months from the date of the Bill's introduction.

The Explanatory Memorandum states:

> The provisions of the Bill, except for section 6, will come into operation on 1 November 2019, providing in excess of 12 months to enter into contractual arrangements and develop the Scheme infrastructure. This provides more lead-time compared with the NSW scheme, where legislation passed in October 2016 with a start date of 1 December 2017 for the scheme. Section 6 will come into operation on 1 January 2022, which also gives a lead-time to avoid the new offence inserted by section 6.

The Committee is satisfied that the delayed commencement of the Bill is reasonable and justified in the circumstances.

Strict liability offences

The Bill contains a number of strict liability offences, which are identified as such in the Statement of Compatibility.[10] The Committee notes that each of these offences is subject to a financial penalty only and that the possibility of imprisonment does not apply.

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9 The Bill was introduced as the Environment Protection Amendment (Container Deposit and Refund Scheme) Bill 2018.

10 New sections 31W, 31X, 31ZC and 31ZI.

The Committee notes that an offence is one of strict liability if there is no requirement to prove *mens rea*[11] on the part of the accused but where the defence of 'honest and reasonable mistake of fact' is available.

The Statement of Compatibility states:

> These offences engage the presumption of innocence as they are all strict liability offences, with no requirement to prove the state of mind of the accused. The defence of reasonable mistake is, however, still available.
>
> The requirement to prove the intention of a person to do a particular act is an important safeguard for the rights of an accused person. Strict liability offences may be appropriate where the offences are of a regulatory nature (rather than serious criminal offences), don't attract a penalty that includes imprisonment; and don't require a person to rely on information from, or actions by, third parties to ensure compliance.
>
> This is the case in relation to each of the offences above.

The committee is satisfied that the application of strict liability to the offences identified in the Statement of Compatibility is reasonable and justified in the circumstances.

Right to be presumed innocent – Reversal of the onus of proof

As noted in the ***Charter Report*** below, sub-section 31W(3) may impose a 'reverse onus' that places a legal burden on an accused to prove that they were not the first supply in the State. The Statement of Compatibility does not consider the effect sub-section 31W(3) on the presumption of innocence.

The Committee will write to the Member seeking further information as to whether the new sub-section 31W(3) places a legal or evidential onus of proof on an accused.

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Member for clarification**	☐ **No further action required**

CHARTER ISSUES

☐ NONE
☐ Other:

☒ Compatibility with Human Rights
☐ Operation of the Charter

[11] *Mens rea* is a Latin term which means 'guilty mind'. Different standards of *mens rea* apply depending on the offence, i.e., that the accused: actually intended to do the act for which they have been charged; or had knowledge as to the possible harmful consequences of the act; or was negligent regarding the likelihood of the harm that would be caused by the act.

Details

Presumption of innocence – Exceptions to offence provisions – Onus on defendant to prove the exception applies

Summary: *The new section 31W may impose a burden on a provider to prove that the excuse provided for in that section is made out, in order to avoid a penalty. The Committee will write to the Member seeking further information.*

Relevant provisions

The Committee notes that sub-section 31W(3) contains a provision allowing a person to raise a 'reasonable excuse' defence to the prohibition contained in that section:

> (3) In proceedings for an offence against this section, if it is established that the beverage in the container has been supplied in the State, the onus of establishing that the supply is not a first supply in the State lies on the defendant.

The Committee observes that this provision may be interpreted as requiring a person to prove their innocence by either raising evidence, or actually proving, that they were not the first supply in the State.

Charter analysis

The Committee's *Practice Note* deals with reverse onus provisions in Part B(iii).

The Committee notes that sub-section 31W(3) may impose a 'reverse onus' that places the burden on an accused to prove that they were not the first supply in the State. Whether the excuse imposes an evidentiary or a legal burden will depend upon how the provision is interpreted.

The Statement of Compatibility does not consider the effect sub-section 31W(3) on the presumption of innocence.

Conclusion

The Committee will write to the Member seeking further information as to whether the new sub-section 31W(3) places a legal or evidential onus of proof on an accused and if so, whether expressly addressing that onus would be a less restrictive alternative reasonably available to achieve the exceptions' purposes.

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Member for clarification**	☐ **No further action required**

Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018

Bill Information

Minister	Hon Martin Pakula MP	**Introduction Date**	24 July 2018
Portfolio	Attorney-General	**Second Reading Date**	25 July 2018

Bill Summary

The Bill would amend the *Criminal Organisations Control Act 2012* to:

- make further provision in relation to the prohibition of individuals associating with individuals convicted of serious criminal offences for the purpose of preventing the commission of offences
- provide for IBAC oversight in relation to the issue of unlawful association notices.

The Bill would also amend the *Children, Youth and Families Act 2005* and the *Criminal Procedure Act 2009* to: abolish de novo appeals[12] from criminal matters in the summary jurisdiction and replace them with new appeal processes; and abolish de novo appeals from final orders made by the Family Division of the Children's Court

Submissions

The Committee received and considered the following submissions on the Bill.

- Commissioner for Children and Young People
- Joint submission from the Law Institute of Victoria, Federation of Community Legal Centres Victoria and Human Rights Law Centre
- Young People's Legal Rights Centre (YouthLaw)

The submissions are reproduced on the Committee's website https://www.parliament.vic.gov.au/sarc

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☐ NONE ☒ Inappropriately delegates legislative power

☐ Other: ☒ Trespasses unduly on Rights or Freedoms

[12] In Victoria, appeals from criminal cases decided in the summary jurisdiction (the Magistrates' Court and the Children's Court) are heard 'de novo' in the County Court, which means that the County Court must hear all of the evidence again, consider the issues afresh and make a new decision. Appeals from final orders made by the Family Division of the Children's Court are also heard de novo. The right to a de novo appeal is a legacy of the 17th century English system of appeals, when justices of the peace began determining summary criminal matters. At that time, the de novo appeal provided a 'safety net' for an accused who gave up the right to have their matter heard by a jury. Victoria is the only Australian jurisdiction that has retained a de novo appeal process for these types of cases.

Details

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 provides that the Bill would come into operation on a day or days to be proclaimed, with a default commencement date of 2 March 2020, which is more than 12 months from the date of the Bill's introduction.

The Committee notes that there is no explanation in the Explanatory Memorandum or the Second Reading Speech for the possible delayed commencement.

Paragraph A (iii) of the Committee's *Practice Note* provides that where a Bill (or part of a Bill) is subject to delayed commencement (i.e., more than 12 months after the Bill's introduction) or to commencement by proclamation, the Committee expects Parliament to be provided with an explanation as to why this is necessary or desirable.

The Committee will write to the Attorney-General to bring paragraph A (iii) of the *Practice Note* to his attention and to request further information as to the reasons for the possible delayed commencement date.

Right to be presumed innocent – Reversal of the onus of proof

New section 124A(3) would provide that it is a defence to a charge under subsection (1) or (1A) if the individual associates with named convicted offenders who are a relative, a spouse or domestic partner of the individual and the association occurs for a purpose that is not an ulterior purpose.

Amended section 124A(4) would provide that it is a defence to a charge under subsection (1) if the individual served an unlawful association notice associates with the specified individual on an occasion as set out in that subsection.

New paragraph 124A(4)(fa) would provide that it is a defence to a charge if the individual served an unlawful association notice is a parent of a child and the other parent of the child is a named convicted offender and the association is for the purpose of managing the parental responsibilities of the child.

The Statement of Compatibility states:

> By providing that it is a defence to the offence of unlawful association if the association fell within one of the circumstances provided in the Act, the Bill requires, to a limited extent, that an accused prove matters to establish, or raise evidence to suggest, that they are not guilty of an offence. In doing so, the Bill limits the right under section 25(1).
>
> In my opinion, however, the imposition of a legal burden to rely on these defences is compatible with the right, as any limits on the right are reasonably justified under section 7(2) of the Charter. In particular, I note that the defences under the Act, for example the defences of lawful association with a person for the purpose of making childcare arrangements, being provided a health service or seeking legal advice, are all matters uniquely within the knowledge of the defendant. Conversely, it would be difficult for the prosecution to prove many of the matters giving rise to defences in the negative.

The Committee is satisfied that the imposition of a legal burden in relation to the defences under sections 124A(4) and 124A(4)(fa) is reasonable and justified in the circumstances. However, as discussed in the *Charter Report* below, the Committee will write to the Attorney-General, seeking further information as to whether or not replacing the reverse legal burden to show that associating with a family member was 'not for an ulterior purpose' under new section 124A(3)(b) with an

evidential burden, is a less restrictive alternative reasonably available to achieve the purpose of the provision.

Recommendation

☐ Refer to Parliament for consideration	☒ Write to Minister for clarification	☐ No further action required

CHARTER ISSUES

☐ NONE
☐ Other:
☒ Compatibility with Human Rights
☐ Operation of the Charter

Details

Equality – Association – Families – Presumption of innocence – Ban on associating with a convicted person even if ban is not likely to prevent the commission of an offence – Offence to associate with a family member unless the defendant can prove that the association was not for an ulterior purpose

Summary: *The effect of clause 5(2) may be that a person may commit an offence by associating with a family member if the person cannot prove on the balance of probabilities that the association wasn't for the purposes of either avoiding the anti-association offence, planning any offence or expanding a criminal network. The effect of clause 7 may be that a senior police officer may ban a person from associating with another person who has committed an indictable or serious youth offence even if the police officer does not reasonably believe that the ban is likely to prevent the commission of an offence. The Committee will write to the Attorney-General seeking further information.*

Relevant provision

The Committee notes that clause 5(1), substituting existing s. 124A(1) of the *Criminal Organisations Control Act 2012*, provides that 'an individual served an unlawful association notice' who 'associates' with any 2 or more named convicted offenders on 2 or more occasions at the same time or separately' (even where one of those occasions was before the notice was served) commits an offence punishable by 'imprisonment not exceeding 3 years or a fine not exceeding 360 penalty units or both'.

Clause 5(2), substituting existing s. 124A(3), provides that:

> It is a defence for a charge.. if the individual served an unlawful association notice associates with 2 or more named convicted offenders on an occasion as set out… and—
>
> (a) the named convicted offenders are a relative, spouse or domestic partner of the individual; and
>
> (b) the individual and the named convicted offenders associate for a purpose that is not an ulterior purpose.

An 'ulterior purpose' means the purposes of avoiding the application of the association offence, planning, inciting or committing any offence or expanding an organised criminal group or criminal network. Existing s. 124A(3) used the phrase 'Subsection (1) does not apply' instead of 'It is a defence'. The latter term could be read as imposing a reverse legal onus on the accused to satisfy the court on the balance of probabilities of the two matters set out in paras (a) and (b). Existing s. 124A(3) also used the term 'family member' instead of 'relative, spouse or domestic partner'. The latter term covers spouses, domestic partners, children, parents, grandchildren, grandparents, siblings, uncles, aunts,

nephew, nieces, cousins and relatives according to 'Aboriginal or Torres Strait Island tradition or contemporary social practice', while the former extended to:

- former spouses or domestic partners
- current or former intimate personal relationships (including non-sexual relationships)
- former relatives
- children who live or have lived regularly with the person
- any other person who is regarded as being like a family member or whom it is reasonable to regard as a family member by reference to a set of factors including social and emotional ties, residence, reputation, cultural recognition, duration, financial or other dependence, care or responsibility, sustenance or support when 'the relationship between the persons [is] considered in its entirety'.

The Committee observes that the effect of clause 5(2) may be that a person may commit an offence by associating with a family member on 2 or more occasions (assuming the family member is a named convicted offender and the person also associates with another named convicted offender) if either the family member falls outside traditional Western or Aboriginal or Torres Strait Islander definitions of a close family member (i.e. beyond a cousin or grandparent for non-Aboriginal persons) or the person cannot prove on the balance of probabilities that the association wasn't for the purposes of either avoiding the anti-association offence, planning any offence or expanding a criminal network.

The Committee also notes that clause 7, substituting existing s. 124D, permits a senior police officer to issue an unlawful association notice if the officer reasonably believes that the individual has associated on at least one occasion with an adult convicted of an applicable offence or a child convicted of a serious youth offence. Existing s. 124D is limited to 'an individual who is 18 years or older' where the officer 'reasonably believes that… the commission of an offence is likely to be prevented if those individuals are prevented from associating with each other.'

The Committee observes that the effect of clause 7 may be that a senior police officer may ban a person from associating with another person who has committed an indictable or serious youth offence even if the person is a child aged over 14 or the police officer does not reasonably believe that the ban is likely to prevent the commission of an offence.

Charter analysis

In relation to the Charter's equality rights, the Statement of Compatibility remarks:

> The Bill seeks to reduce the likelihood vulnerable groups are disproportionately targeted by requiring that an unlawful association notice can only be issued to these groups by a police officer at the rank of Senior Sergeant or above. In other cases, as noted above, an unlawful association notice may be issued by a police officer at or above the rank of Sergeant. This will increase the scrutiny placed on the use of these powers. The Bill will also provide that unlawful association notices issued to a vulnerable person expire after 12 months, instead of the usual period of three years. While Victoria Police may re-issue a notice once it expires, a shorter duration than would otherwise apply will cause the issuing of notices to vulnerable persons to be reviewed more regularly and reduce the likelihood that notices are issued improperly.
>
> The issuing of an unlawful association notice to a vulnerable person which does not take account of their status as a vulnerable person will not result in the notice's invalidity. To ensure the protection given to vulnerable groups is not diminished as a result, the Bill increases the requirements for information provided on an unlawful association notice, as noted above. A

> vulnerable person issued with a notice which does not take account of their special status will be provided with information to facilitate the review of that notice.

The Committee notes that clause 9(2), amending existing s. 124F, requires that the notice state that it remains in effect for 3 years 'if the individual in respect of whom the notice has been issued is not a vulnerable person' and 12 months 'if the individual in respect of whom the notice has been issued is a vulnerable person'. However, the Committee observes that clause 9 does not require that the notice provide a definition of 'vulnerable person' (which clause 3, amending existing s. 3, defines to mean a person with a cognitive, physical or mental health impairment that causes him or her to have difficulty understanding his or her rights, an Aboriginal person or a child over 14.) The Committee also observes that the terms of clause 9(2) may contradict those in clause 10, which inserts a new section 124FA, providing that an unlawful association notice issued to a vulnerable person by a sergeant and/or for a period of more than 12 months remains valid and continues to apply for up to 3 years, unless the vulnerable person seeks an internal review of the notice.

In relation to freedom of association, the Statement of Compatibility remarks:

> The formation of the requisite belief necessary to issue a notice is a high threshold to satisfy. Its removal will enable the scheme to operate more effectively and achieve its purpose of disrupting serious and organised crime….
>
> When exercising the power to issue notices and other related powers, a senior police officer must have regard to freedom of association and other relevant rights under the Charter. This is because section 38 of the Charter provides that it is unlawful for a public authority, such as Victoria Police, to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right….
>
> The Bill also introduces new safeguards to ensure Charter rights such as the right to freedom of association are only limited to the extent necessary. It creates a new robust oversight role for the Independent Broad-based Anti-corruption Scheme (IBAC). IBAC will now monitor the use of police powers under the scheme and report on their exercise to the Attorney-General every two years, with the power to make recommendations as to possible improvements to the scheme… IBAC will also have the power to review the making of any unlawful association notice or a proportion of such notices. In support of this function, the Chief Commissioner of Police will be required to report on the number of issued notices to IBAC every three months. These robust and independent oversight powers will protect against inappropriate use of the scheme and allow for continued evaluation of its effectiveness.

However, the Committee notes that clause 19, inserting a new section 124ZA, provides that, when IBAC reviews a notice:

> IBAC must review whether or not the notice should have been made having regard to the matters set out in section 124D(1)(a) and (b), (3), (4), (5), (6), (8) and (9).

The Committee observes that the listed matters concern whether or not the person is over 18 or 14, the person's relevant conviction and its timing, and whether the person is vulnerable. However, the list of matters IBAC must review does not include the names specified in the notice (under sub-section 124D(7)) and the question of whether the senior police officer's decision complied with Charter s. 38 and whether the officer should have exercised his or her discretion to issue the notice at all.

In relation to the protection of families, the Statement of Compatibility remarks:

> The prohibition on associating for an ulterior purpose recognises that organised crime gang members often share common interests, and in some cases this common interest is a family connection. By narrowing the provision relating to lawful associations with family members, the Bill clarifies who is captured under the definition and prevents a person from undermining

> the unlawful association scheme by claiming that another person is like a family member for the purpose of associating with them. Permitting associations with a 'relative', 'spouse' or 'domestic partner' for a lawful purpose is consistent with the rights of families under section 17.

However, the Committee notes that, in light of clause 5(2), a person will not avoid liability merely by 'claiming that another person is like a family member for the purpose of associating with them'; rather, the person will have to prove on the balance of probabilities that the person they associated with falls within that description.

In relation to the presumption of innocence, the Statement of Compatibility remarks:

> By providing that it is a defence to the offence of unlawful association if the association fell within one of the circumstances provided in the Act, the Bill requires, to a limited extent, that an accused prove matters to establish, or raise evidence to suggest, that they are not guilty of an offence. In doing so, the Bill limits the right under section 25(1).
>
> In my opinion, however, the imposition of a legal burden to rely on these defences is compatible with the right, as any limits on the right are reasonably justified under section 7(2) of the Charter. In particular, I note that the defences under the Act, for example the defences of lawful association with a person for the purpose of making childcare arrangements, being provided a health service or seeking legal advice, are all matters uniquely within the knowledge of the defendant. Conversely, it would be difficult for the prosecution to prove many of the matters giving rise to defences in the negative.

However, the Committee notes that, while it would be straightforward for a defendant to prove that a particular person is a relative or that they were associating for a particular defined person, it may be very difficult for a defendant to prove that he or she and a relative associated 'for a purpose that is not an ulterior purpose' (e.g. that the defendant did not associate with, say, a spouse, child, cousin or Aboriginal kin to circumvent new section 124A, to plan an offence or to expand a criminal network.) The Committee observes that the Statement of Compatibility does not 'address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision's purpose.'[13]

Relevant comparisons

The Committee notes that there are similar laws to new sections 124A and 124D in New South Wales, the Northern Territory, Queensland and South Australia.

In relation to the making of non-association orders, New South Wales simply permits a police officer to give an 'official warning' to any convicted offender.[14] In 2014, three judges of the High Court remarked:

> Other hypothetical measures were suggested, such as a law which provides a clearer link with criminal activity or requires the police to form the view that it was reasonably necessary to give a warning in order to prevent future crime. These measures would add another requirement to proof of the offence.[15]

However, the remaining jurisdictions impose further requirements that the police 'reasonably believes that giving the notice is likely to prevent the commission of a prescribed offence'; that 'the police officer must consider whether it is appropriate to give the warning having regard to the object of

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13 Scrutiny of Acts and Regulations Committee, *Practice Note*, 26 May 2014, B.iii.

14 *Crimes Act 1900* (NSW), s. 93X(3).

15 *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35, [123].

disrupting and preventing criminal activity by deterring recognised offenders from establishing, maintaining or expanding a criminal network'; or that 'issuing of the notice is appropriate in the circumstances.'[16] Only Queensland prohibits giving a notice to a child.[17]

In relation to associating with family members:

- New South Wales provides a defence for all 'consorting with family members… if the defendant satisfies the court that the consorting was reasonable in the circumstances.' The legislation does not define 'family members'.[18]
- The Northern Territory provides a defence of 'reasonable excuse'.[19]
- Queensland provides a defence for consorting with a 'close family member', which is defined very similarly to 'spouses, domestic partners and relatives' in amended s. 124A(2).[20]
- South Australia provides a defence for 'associations between close family members', which is defined to include spouses, parents, grandparents, children, grandchildren, siblings, former spouses or domestic partners and 'a guardian or carer' (but not uncles, aunts, nephews, nieces, cousins or traditional kin.)[21]

In New South Wales, the Northern Territory and Queensland, the defendant bears the onus of proof on whether the consorting was 'reasonable'.[22]

In South Australia, a person given a 'consorting prohibition notice' may, within 4 weeks, apply for the Magistrates' Court to review the notice as to whether sufficient grounds exist to satisfy the Court that the notice was properly issued; whether any person specified in the notice is a close family member of the recipient or there are otherwise good reasons why a particular person should not be so specified; and whether the notice should specify particular circumstances in which it does not apply.[23]

Conclusion

The Committee will write to the Attorney-General seeking further information as to whether or not:

- **extending the exception for 'spouses, domestic partners and relatives' under new section 124A(3)(a) to include 'guardians or carers' or others whom the accused can prove on the balance of probabilities are family members;**
- **replacing the reverse legal burden to show that associating with a family member was 'not for an ulterior purpose' under new section 124A(3)(b) with an evidential burden;**
- **requiring that the notice under amended s. 124F(a)(v) provide a definition of 'vulnerable person' and describe the effect of new section 124FA (which preserves the validity of a notice wrongly given to a vulnerable person);**

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16 *Summary Offences Act 1979* (NT), s. 55A(4)(b); *Police Powers and Responsibilities Act 2000* (Qld), s. 55BAC(3); *Summary Offences Act 1953* (SA), s.66A(1)(c).

17 *Police Powers and Responsibilities Act 2000* (Qld), s. 53BAB.

18 *Crimes Act 1900* (NSW), s. 93Y(a).

19 *Summary Offences Act 1979* (NT), s. 55A(2)(a).

20 *Criminal Code* (Qld), s. 77C(1)(a). Section 77C(3) provides the 'it is not reasonable for a person to consort with a recognised offender if the purpose (or 1 of the purposes) of the consorting is related to criminal activity.'

21 *Summary Offences Act 1953* (SA), ss. 66(2)(b) & 66A(2)(a).

22 *Crimes Act 1900* (NSW), s. 93Y; *Summary Offences Act 1979* (NT), s. 55(2); *Criminal Code* (Qld), s. 77C(2);

23 *Summary Offences Act 1953* (SA), s. 66D.

- **expressly permitting IBAC to review, under new section new section 124ZA, the names specified in the notice, whether the senior police officer's decision complied with Charter s. 38 and whether the officer should have exercised his or her discretion to issue the notice;**

are less restrictive alternatives reasonably available to achieve the purpose of these provisions.

Recommendation

☐ Refer to Parliament for consideration	☒ Write to Minister for clarification	☐ No further action required

Fair hearing – Second appeal for prosecution but not defence

Summary: *The effect of clause 50 may be that offenders are entirely precluded from appealing a decision of the County Court on appeal, while the DPP is not. The Committee will write to the Attorney-General seeking further information as to the compatibility of clause 50, in the event that clause 36 of the Justice Legislation Miscellaneous Amendments Bill 2018 is enacted, with the Charter's right to a fair hearing.*

Relevant provision

The Committee notes that clause 50, repealing existing s. 283 of the *Criminal Procedure Act 2009*, abolishes the existing right of a person sentenced to imprisonment on appeal, where that person was not sentenced to imprisonment at the original sentencing, to appeal the sentence to the Court of Appeal if the Court of Appeal gives the person leave to appeal. The Committee observes that, if clause 36 of the Justice Legislation Miscellaneous Amendment Bill 2018 is enacted, the DPP, but not the offender, will have a right to appeal a sentencing imposed on appeal, where the appellate court has made a finding under the regimes for mandatory custodial or minimum sentences.

Charter analysis

The Statement of Compatibility remarks:

> Currently, the offender may appeal to the Court of Appeal against a sentence imposed by the County Court on a de novo appeal under section 283 of the CPA. This only applies where the person is sentenced to a term of imprisonment by the County Court and the original court did not order that the person be imprisoned. This appeal right exists because the County Court is making a new decision on a de novo appeal, which is effectively a first decision. Under the new appeal processes provided for in clauses 27 and 40 of the Bill, the County Court will be conducting an appeal proper and making a second decision in the matter. As there is no longer a need for the County Court's decision to be reviewed again by the Court of Appeal, clauses 36 and 50 of the Bill repeal this right of appeal. Safeguards will still exist for the offender. For example, the County Court must warn the appellant if it is considering imposing a more severe sentence than the original sentence (and the appellant may then choose to withdraw the appeal). Section 302A of the CPA also allows for the reservation of a question of law to the Court of Appeal, and judicial review will still be available. In addition, rather than appealing to the County Court, the offender may appeal to the Supreme Court on a question of law under Part 6.2 of the CPA.

The Statement of Compatibility does not address clause 36 of the Justice Legislation Miscellaneous Amendments Bill 2018.

The Committee notes that the Statement of Compatibility for the Justice Legislation Miscellaneous Amendments Bill 2018 remarked that:

> under the current provisions, where a County Court judge makes a finding of 'special reasons' when imposing a sentence on appeal, there is no right of appeal if the DPP considers that there is an error in that decision. A right of appeal will assist the courts to self-correct.
>
> The new right to appeal is based on the DPP's current right to appeal an inadequate sentence in section 287 of the CPA. It will apply where an offender has appealed from the Magistrates Court and the County Court has made a finding that a special reason exists under sections 5(2H) or 10A of the Sentencing Act 1991 when imposing a sentence on the offender. The appeal may only be brought if the DPP considers that there was an error in the sentence imposed and a different sentence should be imposed. The DPP must also be satisfied that an appeal should be brought in the public interest. The DPP will only be able to utilise this new appeal right from an appeal in the County Court that was brought by the offender. That is, the Bill does not enable the DPP to appeal after a DPP appeal in the County Court.
>
> The right to a fair hearing is protected by section 24 of the Charter. Article 14 of the International Covenant on Civil and Political Rights, on which section 24 of the Charter is based, includes equality before the courts as part of the right to a fair hearing, where the same procedural rights are to be provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds that do not entail actual disadvantage or other unfairness on the defendant. Equality before the court includes 'equality of arms', which is breached where only the prosecutor, and not the defendant, is allowed to appeal a certain decision, as is the case in the Bill (International Covenant on Civil and Political Rights Committee General Comment no 32 (2007)). There is therefore a risk that the new DPP appeal right may be incompatible with the right to a fair hearing. The government nevertheless wishes to proceed with the amendments.
>
> The government has decided to preclude offenders from having the equivalent appeal right because allowing offenders to appeal a court's finding that special reasons did not exist is contrary to the intent of the emergency worker provisions.
>
> Currently, an offender is able to appeal to the Court of Appeal under section 283 of the CPA in circumstances where the County Court imposed a sentence of imprisonment on appeal, and the offender had not received a sentence of imprisonment in the Magistrates Court. That is, offenders are not entirely precluded from appealing a decision of the County Court on appeal.

The Committee observes that the effect of clause 50 may be that 'offenders are… entirely precluded from appealing a decision of the County Court on appeal', while the DPP is not.

Conclusion

The Committee will write to the Attorney-General seeking further information as to the compatibility of clause 50 with the Charter's right to a fair hearing, in the event that clause 36 of the Justice Legislation Miscellaneous Amendments Bill 2018 is enacted.

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Minister for clarification**	☐ **No further action required**

Owner Drivers and Forestry Contractors Amendment Bill 2018

Bill Information

Minister	Hon Natalie Hutchins MP	**Introduction Date**	24 July 2018
Portfolio	Industrial Relations	**Second Reading Date**	25 July 2018

Bill Summary

The Bill would make various miscellaneous amendments to the *Owner Drivers and Forestry Contracts Act 2005*, including provision for:

- the powers of authorised officers to monitor compliance and investigate contraventions of the Principal Act or regulations
- accessorial liability of officers of bodies corporate and imputing conduct to bodies corporate and partners.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☒ NONE ☐ Inappropriately delegates legislative power

☐ Other: ☐ Trespasses unduly on Rights or Freedoms

Details

The Committee makes no comment on the Bill with respect to its non-Charter terms of reference under section 17 of the Parliamentary Committees Act 2003.

Recommendation

☐ **Refer to Parliament for consideration**	☐ **Write to Minister for clarification**	☒ **No further action required**

CHARTER ISSUES

☐ NONE ☒ Compatibility with Human Rights

☐ Other: ☐ Operation of the Charter

Details

Presumption of innocence – Exceptions to offence provisions – Onus on defendant to prove the exception applies

Summary: *The new section 60H may impose a burden on a provider to prove that the excuse provided for in that section is made out, in order to avoid a penalty. The Committee will write to the Minister seeking further information.*

Relevant provisions

The Committee notes that sub-section 60H(1) contains a provision allowing a person to raise a 'reasonable excuse' defence to the prohibition contained in that section:

> (1) A person must not, without reasonable excuse, fail to comply with—
>
> (a) a notice to produce documents or give information under section 60E; or
>
> (b) a requirement to produce documents under section 60F(1)(d).

The Committee observes that this provision may be interpreted as requiring a person to prove their innocence by either raising evidence, or actually proving, that they have a reasonable excuse.

Charter analysis

The Committee's *Practice Not*e deals with reverse onus provisions in Part B(iii).

The Committee notes that sub-section 60H(1) may impose a 'reverse onus' that places the burden on an accused to prove that they have a reasonable excuse. Whether the excuse imposes an evidentiary or a legal burden will depend upon how the provision is interpreted.

The Statement of Compatibility does not consider the effect sub-section 60H(1) on the presumption of innocence.

Conclusion

The Committee will write to the Minister seeking further information as to whether the new sub-section 60H(1) places a legal or evidential onus of proof on an accused and if so, whether expressly addressing that onus would be a less restrictive alternative reasonably available to achieve the exceptions' purposes.

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Minister for clarification**	☐ **No further action required**

Victims and Other Legislation Amendment Bill 2018

Bill Information

Minister	Hon Martin Pakula MP	**Introduction Date**	24 July 2018
Portfolio	Attorney-General	**Second Reading Date**	25 July 2018

Bill Summary

The Bill would amend:

- the *Victims' Charter Act 2006*:
  - in relation to the requirements for communication with victims; victim impact statements; and complaints
  - to provide for a review of victims' experiences in summary proceedings for criminal offences
- the Victims of *Crime Commissioner Act 2015*:
  - to provide for the review of certain complaints made by victims (within the meaning of the *Victims' Charter Act 2006*) about certain agencies
  - in relation to the Commissioner's monitoring and reporting functions
  - to provide for the review by the Commissioner of the *Victims' Charter Act 2006* and its benefits for victims (within the meaning of that Act)
- the *Sentencing Act 1991* in relation to victim impact statements
- the *Jury Directions Act 2015* in relation to directions on the language and cognitive skills of child witnesses
- the *Children, Youth and Families Act 2005* to:
  - clarify that relevant historical care and protection orders made by courts on the application of the State were not convictions or findings of guilt
  - acknowledge the harm and distress caused by certain practices relating to relevant historical care and protection orders.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☐ NONE ☒ Inappropriately delegates legislative power

☐ Other: ☐ Trespasses unduly on Rights or Freedoms

Details

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 provides that the Bill would come into operation on a day or days to be proclaimed, with a default commencement date of 4 November 2019, which is more than 12 months from the date of the Bill's introduction.

The Committee notes that there is no explanation in the Explanatory Memorandum or the Second Reading Speech for the possible delayed commencement.

Paragraph A (iii) of the Committee's *Practice Note* provides that where a Bill (or part of a Bill) is subject to delayed commencement (i.e., more than 12 months after the Bill's introduction) or to commencement by proclamation, the Committee expects Parliament to be provided with an explanation as to why this is necessary or desirable.

The Committee will write to the Attorney-General to bring paragraph A (iii) of the *Practice Note* to his attention and to request further information as to the reasons for the possible delayed commencement date.

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Minister for clarification**	☐ **No further action required**

CHARTER ISSUES

☐ NONE
☐ Other:

☒ Compatibility with Human Rights
☐ Operation of the Charter

Details

Fair hearing – Jury must be directed that children can accurately remember and report past events

Summary: *Clause 30 provides that a trial judge must inform the jury that children can accurately remember and report past events. The Committee will write to the Attorney-General seeking further information as to the precise meaning of the direction and as to its compatibility with the Charter's right to have criminal charges determined by an independent court.*

Relevant provision

The Committee notes that clause 30, inserting a new section 44N(4) into the *Jury Directions Act 2015*, provides that, in a trial where the credibility or reliability of a child witness is likely to be at issue, the trial judge 'must inform the jury that':

(a) children can accurately remember and report past events; and

(b) children are developing language and cognitive skills, and this may affect—

  (i) whether children give a detailed, chronological or complete account; and

  (ii) how children understand and respond to the questions they are asked; and

(c) experience shows that, depending on a child's level of development, they—

  (i) may have difficulty understanding certain language, whether because that language is complicated for children or complicated generally; and

  (ii) may have difficulty understanding certain concepts, whether because those concepts are complicated for children or complicated generally;

  (iii) may not request the clarification of a question they do not understand; and

  (iv) may not clarify an answer they have given that has been misunderstood.

'unless there are good reasons for not doing so'.

The Committee observes that the first of these directions (on the accuracy of child memory and testimony) uses the word 'can', while the remaining directions (on the impact of children's skills and development on their memory and testimony) use the word 'may'. While the verbs 'may' and 'can' overlap in their modern usage, 'may' always refers to a possibility, while 'can' refers to a possibility, a capacity or a certainty. Accordingly, the phrase 'children can accurately remember and report past events' could be understood as stating that such accuracy is either a mere possibility (i.e. children may accurately remember and report past events), a capacity (i.e. children have the ability to accurately remember and reports past events) or a certainty (i.e. children accurately remember and report past events.)

The Committee notes that new section 44N(4)(a) will be in Part 4 of the *Jury Directions Act 2015*. Existing s. 4A provides that 'a court's reasoning' in summary hearings, committal hearings and appeal hearings 'must be consistent with how a jury would be directed in accordance with this Act' under Part 4. Accordingly, the effect of clause 30 is that judges' reasoning in such hearings must be consistent with the statement that 'children can accurately remember and report past events'.

Charter analysis

The Statement of Compatibility remarks:

> The Bill promotes the right to a fair trial by addressing juror misconceptions about children's reliability and credibility. The aim of the Jury Directions Act 2015 is to assist trial judges in providing simple, clear and focused directions on the law and the evidence in the case that jurors are likely to listen to, understand and apply.
>
> The Bill builds on this by inserting a specific evidentiary jury direction on children's abilities as witnesses. The purpose of the direction is educative, to provide the jury with information that is based on empirical research and the experience of the courts, so that the jury does not rely on misconceptions.
>
> Research has shown that children can give accurate evidence, and the assumed gap between the reliability of adult and child testimony has been overestimated. However, as the Australian Law Reform Commission noted in its inquiry into children and the legal process, the common law in Australia has traditionally viewed children as unreliable witnesses. Research shows that there are a number of commonly held misconceptions about child witnesses, such as that they frequently lie, are prone to fantasy or cannot retain and recall accurate information. Jurors may reflect these widely held assumptions, which in turn can affect the quality and integrity of jury verdicts.
>
> The aim of the direction is to neutralise misconceptions that may unfairly affect the assessment of child witnesses, to ensure that charges are determined in a fair manner by a competent and impartial jury.

The Committee notes that the Australian Law Reform Commission's report *on Children in The Legal Process* was published in 1997.[24] However, the Commission's more recent joint report with the NSW Law Reform Commission in 2010 on *Family Violence* recommended that 'Federal, state and territory legislation should authorise the giving of jury directions about children's abilities as witnesses and responses to sexual abuse, including in a family violence context' and that 'Judges should develop

[24] Australian Law Reform Commission, 'Seen and heard: priority for children in the legal process' [1997] ALRC 84.

model jury directions, drawing on the expertise of relevant professional and research bodies, about children's abilities as witnesses and responses to sexual abuse, including in a family violence context'.[25]

The Statement of Compatibility does not address the requirement in Charter s. 24(1) that criminal charges must be determined by an 'independent' court or tribunal. The Committee notes that, to the extent new section 44N(4)(a) encourages or obliges a jury or judge to reach factual conclusions about the reliability or credibility of child witnesses in accordance with the factual findings made by the legislature or executive, it may, in cases where a child testifies on behalf of the prosecution, limit the right of a criminal defendant to have the charge determined by an independent court. The Committee observes that the High Court has remarked:[26]

> The distinction between a matter for comment and a matter for judicial direction reflects the fundamental division of functions in a criminal trial between the judge and the jury. It is for the jury to decide the facts of the case. It is for the judge to explain to the jury so much of the law as they need to know in deciding the real issue or issues in the case. In the course of directing the jury, the judge must give the jury such warnings as may be called for by the particular case, not only against following impermissible paths of reasoning, but also about the care that is needed in assessing some types of evidence such as evidence of identification.
>
> It is, however, not the province of the judge to direct the jury about how they may (as opposed to may not) reason towards a conclusion of guilt. That is the province of the jury. The judge's task in relation to the facts ends at identifying the issues for the jury and giving whatever warnings may be appropriate about impermissible or dangerous paths of reasoning. That is not to say that the judge may not comment on the evidence that has been given and comment about the facts that the jury might find to be established. But the distinction between comment and direction is important.

The Explanatory Memorandum remarks:

> Child witnesses are expected to understand complex language and grammar that may intimidate and confuse even the most prepared witnesses. The content set out in this subsection explains a number of factors that may affect the quality of children's evidence, each of which is supported by extensive empirical research…
>
> New paragraph (c) also includes examples of language and concepts that may be difficult for children to understand, including hypothetical, ambiguous, repetitive, multi-part or yes/no questions, the use of the passive voice, negatives and double negatives, and relative concepts such as time, duration, measurement or frequency. A number of these examples, along with other useful commentary on the evidence of children, was discussed by the Court of Appeal in Ward (a Pseudonym) v The Queen [2017] VSCA 37 at [96]-[103] and [109]-[114].
>
> The direction will remind the jury of the need to take a child witness's age and level of development into consideration when assessing their evidence. In particular, by explaining key areas of difficulty that children face when giving evidence, the direction acknowledges that over the past 25 years, the research focus has shifted from asking whether or not children are unreliable witnesses, to looking at the circumstances or conditions that may affect the quality of children's evidence.
>
> As with other "corrective" directions in the Jury Directions Act 2015, it will remain up to the jury to determine the reliability and credibility of the particular child witness. Jurors should use their own experiences and common sense when evaluating the evidence of a child. However, research on children's cognitive and recall skills are not within the average juror's ambit of knowledge. The purpose of the direction is educative, to provide the jury with information that

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25 Australian Law Reform Commission & NSW Law Reform Commission, *Family Violence – A National Legal Response*, [2010] ALRC 114, [27.166-168].

26 *Azzopardi v The Queen* [2001] HCA 25, [49]-[50].

> is based on empirical research and the experience of the courts, so that the jury does not rely on misconceptions. This direction will assist the jury to assess those witnesses' evidence fairly and impartially.

The Committee notes that, while the content of the directions in new section 44N(4)(b) & (c) explain 'a number of factors that may affect the quality of children's evidence' and are reflected in the Victorian Court of Appeal's discussion of on 'The Testimony of Children' in *Ward v The Queen* [2017] VSCA 37, the direction in new section 44N(4)(a) is a wholly general statement that refers to children of all ages and development, does not refer to 'factors' and does not appear to be based on the Victorian Court of Appeal's judgment. The explanatory memorandum does not address new section 44N(4)(a).

The Committee also notes that new section 44N(4)(a) resembles a statement made by the Chief Justice of NSW in 2006 that 'There is a substantial body of psychological research indicating that children, even very young children, give reliable evidence.'[27] However, the Committee observes that, in 2011, Victoria's Court of Appeal considered a jury direction that included the following:[28]

> Children are not inherently unreliable as witnesses. [Counsel for the appellant] put to you that they can be less reliable because they do not have the full intellectual capacity of adults and because they are children they do not appreciate the full consequence of telling lies. He also said the children are more easily influenced and respond to leading-type questions, that is, questions which suggest the answers. He also said that people do lie and some children, not all, lie habitually until their lies are exposed.
>
> While it is true to say that children do not have the intellectual capacity of adults, I need to draw to your attention that the rest of those comments are common misconceptions about children as witnesses. Indeed, the Chief Justice of the Supreme Court of New South Wales said in a case in 2006, there is a substantial body of psychological research indicating that children, even very young children, give reliable evidence. Therefore I need to caution you against making any false assumptions about children's evidence generally or about [the complainant's] evidence in particular.

The Court of Appeal held:[29]

> The judge herself categorised what she had said to the jury as directions of law. If so, they were binding on the jury. The very real danger, therefore, is that the jury understood (for example) that they were bound to accept that a study as long ago as 1993 found that children, even very young children, are able to remember and retrieve from their memory large amounts of information; or that there is no evidence that indicates that the honesty of children is less than that of adults…
>
> The comments of her Honour were not properly within the scope of directions of law, and they were controversial. They took the judge into the arena. This is prohibited territory. In these circumstances, the appeal in my opinion had to be allowed.

The Committee also observes that directions under section 44N(4)(a) are also 'directions of law'.

The Committee further notes that, in 2009, a five-judge bench of Victoria's Court of Appeal ruled that, in a trial where a 17-year-old gave a detailed account of alleged abuse when she was aged three, it was an error of law for a trial judge to refuse to permit the defence to call an expert to testify that such detailed memories are not possible because of infantile amnesia.[30] The Committee observes that a

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27 *JJB v R* [2006] NSWCCA 12, [7].

28 *C M G v The Queen* [2011] VSCA 416, [11].

29 *C M G v The Queen* [2011] VSCA 416, [14], [18].

30 *R v B D X* [2009] VSCA 28.

trial judge's direction that 'children can accurately remember and report past events' may contradict such expert evidence.

Relevant comparisons

The Committee notes that existing s. 33 of the *Jury Directions Act 2015* provides:

> The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that—
>
> (a) children as a class are unreliable witnesses; or
>
> (b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
>
> (c) a particular child's evidence is unreliable solely on account of the age of the child; or
>
> (d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.

A version of this provision has applied in Victoria since 2010 and also applies in most other Australian jurisdictions.[31] The Committee observes that this provision bars generalised statements about the unreliability of 'children as a class' and about age as the sole basis for a particular child's unreliability, but does not mandate any positive directions about children's reliability.

No Australian jurisdiction requires a direction like section 44N(4)(a). However, regulations in New Zealand provide:[32]

> If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:
>
> (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would:
>
> (b) this does not mean that a child witness is any more or less reliable than an adult witness:
>
> (c) one difference is that very young children typically say very little without some help to focus on the events in question:
>
> (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults:
>
> (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths.

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31 *Evidence Act 1995* (Cth), s. 165A; *Evidence Act 2011* (ACT), s. 165A; *Evidence Act 1995* (NSW), s. 165A; *Evidence (National Uniform Legislation) Act* (NT), s. 165A; *Evidence Act 1929* (SA), s. 12A(2); *Evidence Act 2001* (Tas), s. 165A; *Evidence Act 1906* (WA), s. 106D. In Western Australia, any direction given by the judge to the jury on a complainant's evidence must be consistent with any admitted expert evidence on child behaviour: *Evidence Act 1906* (WA), s. 36BE(3).

32 *Evidence Regulations 2007* (NZ), cl. 49.

The Committee observes that this provision, like new section 44N(4)(a), uses the word 'can' but, unlike new section 44N(4)(a), discusses both the possible strengths and weaknesses of (very young) children's evidence in a single direction.

In England, a sample jury direction for Crown Court judges includes the following:[33]

> The fact that a witness is young does not mean that his/her word is any more or less reliable than that of an adult and you should assess V's evidence in the same fair way as you assess any other evidence in the case.

Conclusion

The Committee will write to the Attorney-General seeking further information as to the precise meaning of the direction in new section 44N(4)(a) and as to the compatibility of that section with the Charter's right to have criminal charges determined by an 'independent' court or tribunal.

Recommendation

☐ **Refer to Parliament for consideration**	☒ **Write to Minister for clarification**	☐ **No further action required**

[33] Judicial College, *The Crown Court Compendium*, June 2018, [10-23],

Appendix 1

Ministerial responses to Committee correspondence

The Committee received Ministerial responses on the Bills listed below.

The response are reproduced in this appendix – please refer to Appendix 4 for additional information.

Environment Protection Amendment Bill 2018

Justice Legislation Miscellaneous Amendment Bill 2018

Justice Legislation (Police and Other Matters) Bill 2018

Racing Amendment (Integrity and Disciplinary Structures) Bill 2018

Hon Lily D'Ambrosio MP

Minister for Energy, Environment and Climate Change
Minister for Suburban Development

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Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
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Dear Ms Blandthorn

ENVIRONMENT PROTECTION AMENDMENT BILL 2018

Thank you for your letter of 24 July 2018 requesting further information about the Environment Protection Amendment Bill 2018.

Delayed commencement

The committee has requested further information as to the reasons for the possible delayed commencement of Part 3 of the Bill.

The forced commencement date for Part 3 of the Bill is 1 July 2019, which is more than 12 months after the Bill's introduction. Part 3 of the Bill establishes the Environment Protection Authority (EPA) as a mandatory referral authority for mining licence work plans and work plan variations under the *Mineral Resources (Sustainable Development) Act 1990*. The forced commencement date of 1 July 2019 allows time for:

- the EPA to establish and train a team to manage referrals;
- the Earth Resources Regulator and the EPA to implement the reforms by updating their operations, guidance and memorandum of understanding; and
- the Earth Resources Regulator and the EPA to educate industry about the practicalities of the reform.

Strict liability offences

New sections 45, 46 and 47 set out offences for engaging in an operating licence, permit or registration activity except as authorised by an operating licence, permit or registration, respectively. Financial penalties apply for an offence against these sections. As noted by the Committee, new section 89(1) also provides that the court may impose an additional or alternative penalty of up to 2 years' imprisonment if a 'prohibited person' engages in an activity in contravention of section 45, 46 or 47 and that activity is prescribed for the purposes of section 89(1). Prohibited persons are specified in section 88(1) and include those who have been convicted of specified offences, who have had a permission revoked, or who are insolvent under administration.

New section 88(2) sets out an offence for a prohibited person to engage in an activity that is prescribed for the purposes of that section.

The Committee has requested further information as to the reasons for the application of strict liability to the offences in new sections 45, 46, 47 and 88(2).

As noted by the Committee, strict liability offences are often imposed in regulatory contexts where the law seeks to impose an obligation on a person to actively ensure compliance with the law, and should be reserved for offences where the offending conduct is readily understood, easily proven and a failure to comply is obvious, unacceptable and deserving of punishment. In my view, for the reasons set out below, these factors apply to new sections 45, 46, 47 and 88(2).

The Committee further notes that it is not clear from the Explanatory Memorandum which element of the offence in new section 88(2) is intended to be strict liability. I advise that, similarly to new sections 45, 46 and 47, it is intended that strict liability only applies to whether a person is engaging in the prescribed activity.

Importance for ensuring persons comply with the law

The offences in section 45, 46 and 47 are critical to managing risks of harm to human health and the environment from pollution and waste, by ensuring that those who engage in prescribed activities do so in accordance with a permission. This serves an important public purpose by ensuring oversight of the activity by the regulator and allowing for conditions to be imposed to manage those risks.

The purpose of making imprisonment available as a sentencing option under sections 88(2) and 89(1) for a prohibited person unlawfully engaging in an activity prescribed for the purposes of that section is to ensure there is an appropriate penalty and a suitable deterrent for those who may not be deterred by a financial penalty alone.

New section 88(2) provides that prohibited persons must not engage in an activity prescribed for the purposes of that section without first obtaining the approval of the Authority. This requirement is suitable for activities where a permission is not required but there is still a public interest in keeping unsuitable persons out of the industry. This may be the case, for example, where the industry is attractive to criminal elements, or where there are financial incentives for non-compliance, or where the nature of the activity is such that there are risks of harm to human health or the environment from operators that do not meet probity criteria.

New section 88(3) circumscribes the scope of activities that may be prescribed for the purposes of section 88(2) to activities (other than permission activities) that relate to waste management and resource recovery or activities that otherwise pose serious risk of harm to human health or the environment. Waste management has been identified to be an industry that may be vulnerable to infiltration by organised crime.[1] Importantly, a prohibited person may apply to the Authority under section 90 for approval to engage in the activity. A decision to refuse such an approval can be reviewed by the Victorian Civil and Administrative Tribunal.

Offending conduct will be readily understood and clear

As noted by the Committee, the activities in sections 45, 46, 47 and 88(2) will be prescribed in regulations and are not specified in the Bill. This is because, similarly to the *Environment Protection Act 1970*, the Bill will apply to a potentially wide range of activities. To ensure the scheme can be applied flexibly and proportionately as intended, it is more suitable for this detail to be specified in

[1] Victorian Law Reform Commission, 'Use of regulatory regimes in preventing the infiltration of organised crime into lawful occupations and industries' (February 2016), paragraphs 1.19, 2.107 and 3.13.

regulations. I note that these offences have no operational effect until regulations are made. In developing the regulations, the requirements of the *Subordinate Legislation Act 1994* will apply, including requirements on consultation, preparation of a human rights certificate, regulatory impact assessment, notification of the making of the regulations and review by the Scrutiny of Acts and Regulations Committee. Accordingly, the regulation-making process will assist to ensure that in prescribing the activities, the scope of the activities will be clear and readily understood, the activities will be of such a nature that is appropriate for the relevant offences to apply to, and the public will be made aware of the relevant requirements.

Further, as part of its statutory functions under the Bill, the Authority is required to administer the Act and provide information and education to the Victorian community, including in relation to regulatory obligations, and would therefore also be expected to widely publicise the activities to which these provisions apply. Moreover, the types of activities that are likely to be prescribed are those for which a person engaging in the activity would reasonably be expected to know are subject to regulation, and for which a person should therefore inquire as to the requirements for engaging in the activity.

Arbitrary detention

In relation to section 88(2), the Committee observes that imprisonment resulting from a breach of the section could be considered arbitrary because the elements of the offence are insufficiently clear and that the lack of clarify may expose a person to arbitrary detention contrary to section 21(2) of the Human Rights Charter. As I advised above, it is intended that strict liability only applies to whether a person is engaging in the prescribed activity.

A person is not assumed to be ignorant of the law, regardless if the law sits in primary legislation or regulations, and I do not consider it likely that a person would not know that an activity prescribed for the purposes of new section 88(2) was one that a prohibited person is not allowed to engage in. As discussed above, the activities will be prescribed in regulations in a manner that is clear and readily understood, and the making of the regulations will be subject to the Subordinate Legislation Act, including human rights assessment. The prohibited persons to which the section applies are also clearly specified in the Bill.

Moreover, the provision is intended to serve an important public purpose of ensuring that unsuitable operators do not engage in prescribed activities without the approval of the Authority. A person seeking to engage in such activities should therefore actively seek to ensure compliance with the law before, and while, engaging in the activity. I consider that the requirements of new section 88(2), including the application of strict liability, are directly related to and are proportionate to the legitimate objectives sought to be achieved by these provisions.

Accordingly, I do not consider that new section 88(2) will expose a person to arbitrary detention based on lack of knowledge of the statutory and regulatory requirements, and I also do not consider this section will expose a person to arbitrary detention contrary to the Charter.

Unreasonable noise provisions

New sections 166, 167 and 169 prohibit the emission of unreasonable noise from non-residential premises, residential premises and entertainment venues respectively. New section 168 makes provision for higher penalties for 'aggravated noise'. The Committee notes that these provisions, in particular new section 169 in respect of entertainment venues, may limit the right to artistic expression of performers in entertainment venues and of musicians more generally.

The residential noise provisions protect against the impacts of unreasonable noise necessary for respecting the rights of other persons, such as a person's right to use and enjoy their land.

Public health is enhanced by the unreasonable noise provisions because individuals and families will be better protected from sleep disturbances and other nuisances associated with unreasonable noise. Individuals and families who regularly experience unreasonable noise disturbances in their own home are at risk of having physical and mental health impacts. Unreasonable noise disturbances also erode the fabric of residential communities by impacting neighbourly relationships.

New section 169 enables police to deal with significant noise disturbances from entertainment venues where music noise impacts on local communities late at night. Importantly, directions under new section 169 can only be given by police and cannot take effect before midnight. In deciding whether to give a direction to control noise from an entertainment venue, police balance the need for a vibrant music culture and the impact of sleep disturbances.

For the reasons above, new sections 166, 167, 168 and 169 do not limit the right to freedom of expression because, to the extent that they may restrict the right, any restriction will remain lawful under section 15(3) of the *Charter of Human Rights and Responsibilities Act 2006* as reasonably necessary to protect the rights of other persons and for the protection of public health.

Please contact my office should the committee require any additional information or clarification in relation to this Bill.

Yours sincerely

Hon Lily D'Ambrosio MP
Minister for Energy, Environment and Climate Change
Minister for Suburban Development

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The Hon Lizzie Blandthorn MP
Chairperson
Scrutiny of Acts and Regulations Committee
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Dear Chairperson Lizzie

Justice Legislation Miscellaneous Amendment Bill 2018

Thank you for your letter of 24 July 2018 on behalf of the Scrutiny of Acts and Regulations Committee (the Committee) with regard to the Justice Legislation Miscellaneous Amendment Bill 2018 (the Bill).

Delayed commencement

The letter brings Paragraph A (iii) of the *Practice Note* to my attention and seeks further information as to the reasons for the possible delayed commencement date of 1 October 2019.

This default commencement date was chosen based on the anticipated date of passage and to ensure that various stakeholders (such as the courts, Victoria Police and the Office of Public Prosecutions) have adequate time to prepare and implement the varied reforms in the Bill. Some aspects of the Bill are likely to be proclaimed earlier, such as the amendments to the *Sentencing Act 1991* (the Sentencing Act).

DPP appeal to the Court of Appeal

The letter seeks further information as to whether clause 36[1] of the Bill allows the Director of Public Prosecutions (DPP), but not the offender, to appeal a sentence to the Court of Appeal when the offender appealed against a sentence imposed by a magistrate and the appeal court made a finding permitting the court to impose a non-custodial or below-minimum sentence.

Clause 36 provides the DPP, not the offender, with a right of appeal. This new right will only apply where an offender has appealed against their original sentence and on appeal, the County Court made a finding under section 5(2H) or 10A of the Sentencing Act. The DPP will not be able to appeal against a sentence imposed after the DPP appealed the offender's original sentence.

[1] Your letter refers to clause 35, however, as a result of unrelated House amendments, this is now clause 36.

VICTORIA State Government

The Committee also queried whether new section 290A of the *Criminal Procedure Act 2009* permits the DPP to appeal on the ground of a sentencing error other than an erroneous finding under section 5(2H) or 10A of the Sentencing Act.

New section 290A will only apply if the County Court has made a finding under section 5(2H) or 10A of the Sentencing Act. The DPP is not specifically required to appeal on the ground that the judge erred in making that finding. However, in accordance with other DPP appeal rights, the Bill provides that the DPP may only appeal if she considers that there was an error in the sentence imposed, that a different sentence should be imposed, and is satisfied that bringing an appeal is in the public interest.

These principles reflect the common law approach to DPP appeals and, in particular, require the DPP to consider that the sentence is manifestly inadequate (an error in principle) or that the sentencing judge fell into material error of law or fact, in addition to the public interest threshold. The consideration of these principles is necessarily linked to the finding of the court under section 5(2H) or 10A of the Sentencing Act because such a finding allows the sentencing court to impose a non-custodial or below-minimum sentence.

In these circumstances, and given the limited offences that can be heard and determined summarily for which a finding under section 5(2H) or 10A of the Sentencing Act can be made, I consider that the new right of appeal is limited in its scope and confined to cases of particular concern to the government and the community.

Compatibility with the right to a fair hearing

The letter seeks further information about the compatibility of the new DPP right of appeal and, in particular, whether or not the Statement of Compatibility with respect to clause 36 is a statement to the effect that it is incompatible with the right to a fair hearing in section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), and if so, the nature and extent of any incompatibility.

As outlined in the Statement of Compatibility, I consider that overall this Bill is compatible with human rights as set out in the Charter. However, there is a risk that the new DPP right of appeal may be incompatible with the right to a fair hearing.

Nature and extent of any incompatibility

The risk of incompatibility arises because the Bill provides a right of appeal to the DPP that is not extended to an offender, which may offend the principle of 'equality of arms' protected by the right to a fair hearing in section 24 of the Charter.

The Supreme Court of Victoria has noted that procedural fairness 'will depend on all the circumstances of the case' (*Knight v Wise* [2014] VSC 76, [36]) and broadly, ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a disadvantage compared to their opponent. The new DPP right of appeal only applies where an offender has already exercised their right to appeal from the Magistrates' Court to the County Court. The Bill does not enable the DPP to appeal after a DPP appeal in the County Court.

The new right of appeal may only be utilised if the DPP considers that there is an error in the sentence imposed, that a different sentence should be imposed, and that an appeal is in the public interest. In addition, the *Policy of the Director of Public Prosecutions for Victoria* requires the DPP to be satisfied that there is a reasonable prospect that the appeal will succeed. That is, the DPP acts as a model litigant and has been entrusted with the sole responsibility for personally ensuring that Crown appeals are only commenced where the circumstances are exceptional (*Director of Public Prosecutions (Vic) v Karazisis* (2010) 31 VR 634).

These important checks significantly confine the scope of the right of appeal, which is then further confined by the requirement that the court had made a finding under section 5(2H) or 10A of the Sentencing Act.

The government has therefore decided not to extend the equivalent appeal right to an offender – that is, the Bill does not allow offenders to appeal after a DPP appeal against the original sentence, in circumstances where the appeal court does not make a finding under section 5(2H) or 10A of the Sentencing Act. It may be suggested that the equivalent appeal right would be to allow the offender to appeal when the appeal court does not make a finding under section 5(2H) or 10A of the Sentencing Act. However, this would allow an offender to first appeal against their sentence to the County Court and then again to the Court of Appeal, which could result in an offender appealing against two separate decisions to not make a finding under section 5(2H) or 10A of the Sentencing Act. This would significantly expand the circumstances in which an offender could appeal their sentence in a way that is broader than appeal rights for other summary cases and the new DPP right of appeal.

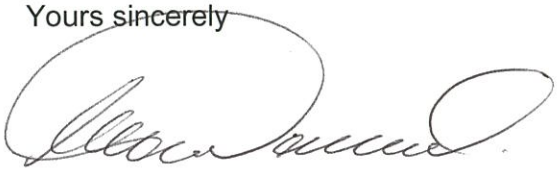
In addition, other protections in the form of appeal rights remain. Both the DPP and an offender will continue to be able to appeal to the Supreme Court against a decision of the Magistrates' Court on a question of law. In addition, a decision of the County Court on appeal is still subject to judicial review.

It is my view that the new DPP right of appeal is a reasonable and justified limitation on the right to a fair hearing given the confined circumstances in which the DPP right of appeal will apply and the other avenues of appeal available to an offender. For this reason, the statement of compatibility did not state pursuant to section 28(3)(b) of the Charter that the new appeal right is incompatible with section 24 of the Charter.

I am aware that, nonetheless, even with its limited scope, the DPP right of appeal may be considered by others to unjustifiably limit the right to a fair hearing. That is, it may be seen as not providing the same procedural rights to all parties on a basis that can be justified on objective and reasonable grounds that do not entail actual disadvantage or other unfairness on the defendant. If this is the case, I consider that this limitation on the right to a fair hearing is nevertheless necessary to ensure that statutory minimum terms of imprisonment are being correctly imposed by the courts in line with government and community expectations, and to ensure that the system can self-correct.

I trust this information is of assistance to the Committee.

Yours sincerely



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Dear Chairperson

Justice Legislation (Police and Other Matters) Bill 2018

Thank you for your letter dated 24 July 2018 on behalf of the Scrutiny of Acts and Regulations Committee (the Committee) with regard to the Justice Legislation (Police and Other Matters) Bill 2018 (the Bill).

Application of new section 464SE

You seek further information about whether new section 464SE of the *Crimes Act 1958* (the *Crimes Act*) permits a DNA sample to be taken from a suspect in the absence of 'reasonable grounds to believe that the sample may tend to confirm or disprove the involvement of the suspect in the commission of the offence' (the 'forensic relevance test').

New section 464SE does not require the senior police officer to be satisfied that there is forensic relevance before authorising the taking of the DNA sample. DNA is an important investigative tool and it is my view that police should not be limited to taking a suspect's DNA sample only where there is forensic relevance. There have been a number of examples of DNA being taken in jurisdictions that do not rely on the forensic relevance threshold that have been linked to unsolved serious crimes in Victoria, allowing for the investigation and prosecution of the person. However, the forensic relevance test will still be a relevant consideration in many cases and will often provide the justification for taking a suspect's DNA sample. For example, in any case where police recover forensic material from the crime scene.

Importantly, new section 464SE requires the senior police officer to be satisfied that the person is believed on reasonable grounds of having committed the DNA sample offence in respect of which the authorisation is sought before being able to authorise the taking of their DNA.

Less restrictive means on achieving the purpose of clause 56

Satisfied that the DNA sample may tend to confirm or disprove the involvement of the suspect in the commission of an offence

VICTORIA State Government

You query whether expressly requiring the senior police officer to be satisfied of forensic relevance is a less restrictive alternative reasonably available to achieve the purpose of clause 56.

The Committee observed that Victoria, the Commonwealth, Australian Capital Territory, New South Wales, Tasmania and Western Australia currently have a forensic relevance test for the taking of DNA from suspects in custody. I note that there are differences in approach in these jurisdictions that require further clarification:

- In Tasmania, if the suspect is charged and in custody, forensic relevance is not required to take the suspect's DNA (and there is no further threshold test).[1]
- In Tasmania (for uncharged suspects or suspects not in custody) and the Commonwealth, the forensic relevance test requires that the DNA sample may tend to confirm or disprove the involvement of the suspect in the commission of *an* offence.[2] There is no requirement that the forensic relevance be linked to the particular offence under investigation, which allows for a broad interpretation and application of the test.
- In Western Australia, if the person has been charged (whether or not they are in custody), forensic relevance is not required to take the suspect's DNA (and there is no further threshold test).[3] In addition, the lower threshold of 'suspicion' (not belief) is used for authorisations relating to uncharged suspects where forensic relevance is required.

As the Committee observed, Victoria currently has an additional requirement that material reasonably believed to be from the body of a person who committed the offence has been found before DNA can be taken from a suspect. While it will usually be the case that the suspect's DNA is needed so that it can be analysed against another sample taken from the crime scene, this requirement can be difficult to satisfy, particularly where a suspect is in police custody but will be released prior to the completion of crime scene analysis. New section 464SE requires the suspect to be in lawful custody so if this requirement remained, this difficulty would continue to arise. I note that police in other jurisdictions are not required to meet this additional threshold – it is unique to Victoria.

I consider that allowing police to take DNA samples from suspects without a further threshold test (as is the case in for charged suspects in Western Australia and Tasmania, and suspects in Queensland for which proceedings have commenced) could lead to the charging of suspects before an investigation is complete in order to take their DNA at a much earlier stage in an investigation. This could lead to unfair outcomes. Accordingly, the Bill includes a threshold test and does not rely on a person being charged by police.

The Bill also contains other safeguards. New section 464SE allows a senior police officer to authorise the taking of a DNA sample if the person is under lawful arrest or a prisoner subject to court-ordered investigative custody only if the person is believed on reasonable grounds of having committed the DNA sample offence in respect of which the authorisation is sought.

New section 464SE also includes a threshold test, that the taking of the sample without the consent of the person is 'justified in all of the circumstances' (the 'justified test'). The Committee has suggested that this appears to be based on the test for offender samples. However, the justified test is also a requirement for taking DNA from a suspect by court order and for a senior police officer to authorise the taking of a non-intimate sample from a suspect.[4] As set out in the Explanatory Memorandum, the justified test is an important safeguard and focuses on the ultimate issue that is to be determined by the senior police officer. For example, under the current law even if a DNA sample has forensic relevance, the DNA sample cannot be taken if the giving of the authorisation is not justified in all of the circumstances.

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[1] *Forensic Procedures Act 2000* (Tas), s12(1).
[2] See also the broad definition of 'relevant offence' in the *Crimes Act 1914* (Cth), s23WA(a)(iii).
[3] *Criminal Investigation (Identifying People) Act 2002*, s51.
[4] *Crimes Act 1958* (Vic), s464SA, s464T.

It follows that while the forensic relevance test would provide a different approach, I do not consider it a less restrictive alternative to achieve the purpose of the clause. In my view, the justified in all the circumstances test in new section 464SE sets out an appropriate threshold that, depending on the circumstances, may encompass the forensic relevance test. That is, the forensic relevance test is not being excluded by the Bill. For example, if police are investigating an offence and forensic evidence has been found, or is likely to be found, on the victim or at the crime scene, the forensic relevance in taking the suspect's DNA sample will still be a relevant consideration in the justified test.

Express list of consideration when assessing whether taking a DNA sample is justified in all the circumstances

You query whether or not setting out an express list of considerations to consider when assessing the justified test (as in the Commonwealth and the ACT) is a less restrictive alternative reasonably available to achieve the purpose of clause 56.

The list of considerations referred to by the Committee is not currently in either of the justified tests in the Crimes Act.[5] I do not consider that having an express list of considerations would change the nature of the justified test or be determinative. The senior police officer would only be required to consider those factors, where relevant, as a guide when making a determination. However, the Explanatory Memorandum provides that the senior police officer may need to turn their mind to the types of considerations raised by the Committee, and specifically 'the circumstances of the alleged offending, the extent to which the DNA profile sample is likely to assist with the investigation, and the age, cognitive, physical or mental health of the person'.

In addition, I note that there are other important safeguards that will ensure that the senior police officer takes into account all relevant considerations when making this determination. First, under section 38 of the *Charter of Human Rights and Responsibilities Act 2006*, Victoria Police is required to act compatibly with human rights and to properly consider the relevant human rights that arise in the circumstances of the case when making decisions. Second, the senior police officer's decision will be subject to judicial review by the Supreme Court (including on the ground of failure to take into account relevant considerations). Finally, the admissibility of any evidence obtained as a result of a DNA profile sample will be a matter for the courts and will be a question for the trier of fact in each case. As is currently the case, the evidence will generally be inadmissible if the senior police officer fails to comply with the law, including the application of the justified test.

For these reasons, I do not consider that including an express list of considerations to take into account when assessing the justified test is a less restrictive alternative to achieve the purpose of clause 56. The justified test will require the senior police officer to take into account relevant considerations regardless of whether these are expressly set out in the Bill.

Compatibility of clause 76

You seek further information as to the compatibility of clause 76, to the extent that it validates DNA sampling done in prison by a person who was not lawfully in the prison or who remained despite the prisoner exercising his or her statutory right to refuse a visit from a police officer, with the Charter's right against unlawful interferences in privacy.

Clause 80 inserts new section 43A into the *Corrections Act 1986* to allow a police officer accompanied by a registered medical practitioner or nurse to enter and remain in prison for the purpose of taking a DNA profile sample from a prisoner who is the subject of a direction under

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[5] *Crimes Act 1958* (Vic), s464SA, s464T.

section 464ZFAB of the Crimes Act or an authorisation under proposed new section 464ZFAC of that Act.

As the Committee has indicated, the Supreme Court of Victoria has held that a court order for the taking of a DNA sample from a prisoner is an exception to section 41 of the *Corrections Act 1986*,[6] in that the court order confers the lawful authority to enter the prison to execute the order and a prisoner cannot refuse the visit. The clear intent of section 464ZFAB of the Crimes Act is to allow a police officer to lawfully direct a registrable offender (whether a prisoner or not) to undergo a forensic procedure for the taking of a DNA sample in the same manner in which a court order would operate. To clarify this intent both in respect to section 464ZFAB and proposed new section 464ZFAC, clause 80 is included in the Bill. To ensure that new section 43A of the Corrections Act does not cast any doubt on the validity of DNA samples that have been taken in accordance with section 464ZFAB of the Crimes Act, clause 76 is included in the Bill.

Section 13(a) of the Charter provides that a person has the right not to have his or her privacy unlawfully or arbitrarily interfered with. To the extent that the right to privacy is engaged and limited by clause 76 of the Bill, I consider it is justified because any interference will not be unlawful or arbitrary. I consider that clause 76 simply validates lawfully obtained DNA samples in case of any doubt. However, even if DNA sampling on a prisoner conducted under section 464ZFAB was found to be unlawful (despite the clear intent of that section) because the person taking the sample had no lawful authority to enter and remain in the prison, clause 76 would validate that sample. Clause 76 is serving the important purpose of validating DNA samples that are authorised by law to be taken from registrable offenders in line with the overall purpose of the *Sex Offenders Registration Act 2004* and more broadly, the Crimes Act. Further, this is the least restrictive way to achieve the intent of securing DNA from registrable offenders who are prisoners, as the only other means would be to require the registrable offender to undergo a further forensic procedure for the taking of a DNA sample.

Yours sincerely

Hon Lisa Neville MP
Minister for Police

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[6] *Pavic v Magistrates' Court of Victoria & Chief Commissioner of Police* [2003] VSC 99, [45].

Minister for Racing

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Ms Lizzie Blandthorn MLA
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Dear Ms ~~Blandthorn~~ Lizzie

I refer to your letter of 24 July 2018 regarding the Racing Amendment (Integrity and Disciplinary Structures) Bill 2018 (the Bill).

You have requested advice on the compatibility of new sections 37BE, 37BF, 50U, 50ZG and 50ZH with the right to the presumption of innocence in section 25 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

Sections 37BE & 37BF

The existing section 37BA of the *Racing Act 1958* (the Act) provides that sections 14, 15, 16 and 21A of the *Evidence (Miscellaneous Provisions) Act 1958* (the EMPA) apply to the Racing Integrity Commissioner (RIC) when exercising powers of inquiry or investigation. The EMPA provisions set out offences and associated penalties for failing to comply with certain directions of the RIC.

The EMPA provisions have subsequently been repealed but saved by the *Inquiries Act 2014* making it difficult for individuals within the racing industry to understand the powers available to the RIC. The inclusion of new sections 37BE and 37BF is intended to provide greater transparency in relation to the penalty for failing, without reasonable excuse, to attend as required or to produce a document.

The offences established under the proposed provisions seek to replicate those in place under the EMPA. There is no intention, through those sections, to expand the powers of the RIC or to create new offences.

Sections 50ZG & 50ZH

Proposed provisions 50ZG and 50ZH relate to the powers of the newly established Victorian Racing Tribunal (the Tribunal) to compel the production of documents and the attendance of witnesses to give evidence in relation to proceedings before the Tribunal.

The Tribunal has been established to replace the existing racing code specific Racing Appeals and Disciplinary Boards (RADBs). The RADBs are currently constituted under the Act and are

operated by the controlling bodies of each of the three racing codes. Decisions of the RADBs are subject to merits review by the Victorian Civil and Administrative Tribunal (VCAT).

The Bill removes the right of individuals to seek a merits review of a decision of the proposed Tribunal at VCAT. To ensure a party's right to a fair hearing while safeguarding the integrity of the Victorian racing industry a number of the offences and powers that are available to VCAT have been conferred on the Tribunal. This includes the offences outlined in proposed sections 50ZG and 50ZH.

The offences and penalties for failing to comply with a notice to produce or attend are set out at proposed section 50ZG. Proposed section 50ZH creates an offence and sets out penalties in relation to failing to comply with a direction of the Tribunal to take an oath or make an affirmation, or to answer a question.

These offences are modelled on similar offences established under the VCAT Act. Once again there is no intention to create new offences but simply to ensure the Tribunal has the same enforcement powers at its disposal as VCAT has currently.

The Right to the Presumption of Innocence (Section 25 of the Charter)

Proposed sections 37BE, 37BF, 50ZG and 50ZH all establish offences in relation to certain conduct. Each provision uses the phrase "without reasonable excuse" in relation to that conduct. The provisions are not intended to reverse the burden of proof in relation to these offences. The intention is to provide for a defence of having reasonable excuse.

The provisions do impose an evidential burden on an accused, however once the accused has produced evidence that would establish reasonable excuse, the burden shifts back to the prosecution to show beyond reasonable doubt the absence of the excuse or that the excuse was not reasonable.

As outlined above, all of these offences already exist in substantially the same form by virtue of other enactments. The Bill seeks to bring all of these provisions within the Act to provide greater transparency for participants and enhance the integrity and disciplinary structures of the Victorian racing industry.

Section 50U

Proposed section 50U provides persons, who have been given a direction by the Tribunal, grounds for refusing to comply. While this section does place the onus on a person to show that they have a reasonable excuse for not complying with the direction, it does not of itself create an offence. Proposed section 50U(2) sets out a list of specific circumstances that constitute a reasonable excuse for failing to comply, however this list is explicitly not exhaustive.

For the reasons outlined above, I do not consider that proposed sections 37BE, 37BF, 50U, 50ZG and 50ZH of the Bill place a limitation on the presumption of innocence contained in section 25 of the Charter.

Yours sincerely

THE HON MARTIN PAKULA MP
Minister for Racing

Appendix 2
Index of Bills in 2018

Appendix 3
Committee Comments classified by Terms of Reference

This Appendix lists Bills under the relevant Committee terms of reference where the Committee has raised issues requiring clarification from the appropriate Minister or Member.

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Audit Amendment Bill 2017	1, 2
Crimes Amendment (Unlicensed Drivers) Bill 2018	8, 9
Electoral Legislation Amendment Bill 2018	7, 8
Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018	2, 3
Engineers Registration Bill 2018	4, 5
Environment Protection Amendment Bill 2018	10, 11
Environment Protection Amendment (Container Deposit Scheme) Bill 2018	11
Flora and Fauna Guarantee Amendment Bill 2018	8, 9
Guardianship and Administration Bill 2018	4, 5
Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018	2, 3
Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018	11
Marine and Coastal Bill 2017	1, 2

(vi) inappropriately delegates legislative power

Audit Amendment Bill 2017	1, 2
Charities Amendment (Charitable Purpose) Bill 2018	4
Environment Protection Amendment Bill 2018	10, 11
Guardianship and Administration Bill 2018	4, 5
Justice Legislation Amendment (Access to Justice) Bill 2018	5, 7
Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018	11
Justice Legislation Miscellaneous Amendment Bill 2018	10, 11
Labour Hire Licensing Bill 2017	1, 2
Legal Identity of Defendants (Organisational Child Abuse) Bill 2018	4, 5
Local Government Bill 2018	8, 9
Long Service Benefits Portability Bill 2018	5, 8
Parks Victoria Bill 2018	3, 4
Victims and Other Legislation Amendment Bill 2018	11

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

Advancing the Treaty Process with Aboriginal Victorians Bill 2018	5, 8
Audit Amendment Bill 2017	1, 2, 3
Bail Amendment (Stage Two) Bill 2017	1, 2
Charities Amendment (Charitable Purpose) Bill 2018	4

Section 17(b)

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

Appendix 4
Current Ministerial Correspondence

Table of correspondence between the Committee and Ministers or Members

This Appendix lists the Bills where the Committee has written to the Minister or Member seeking further advice, and the receipt of the response to that request.

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Primary Industries Legislation Amendment Bill 2017	Agriculture	12.12.17 *20.12.17*	18 of 2017 *1 of 2018*
Audit Amendment Bill 2017	Special Minister for State	06.02.18 *19.02.18*	1 of 2018 *2 of 2018*
	Attorney-General	20.02.18 *02.03.18*	2 of 2018 *3 of 2018*
Bail Amendment (Stage Two) Bill 2017	Attorney-General	06.02.18 *19.02.18*	1 of 2018 *2 of 2018*
Children Legislation Amendment (Information Sharing) Bill 2017	Family and Children	06.02.18 *14.02.18*	1 of 2018 *2 of 2018*
Labour Hire Licensing Bill 2017	Industrial Relations	06.02.18 *14.02.18*	1 of 2018 *2 of 2018*
Marine and Coastal Bill 2017	Energy, Environment and Climate Change	06.02.18 *15.02.18*	1 of 2018 *2 of 2018*
Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018	Energy, Environment and Climate Change	20.02.18 *03.03.18*	2 of 2018 *3 of 2018*
Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018	Special Minister of State	20.02.18 *05.03.18*	2 of 2018 *3 of 2018*
Parks Victoria Bill 2018	Energy, Environment and Climate Change	06.03.18 *23.03.18*	3 of 2018 *4 of 2018*
Charities Amendment (Charitable Purpose) Bill 2018[34]	Fiona Patten MP	27.03.18	4 of 2018
Engineers Registration Bill 2018	Treasurer	27.03.18 *27.04.18*	4 of 2018 *5 of 2018*
Guardianship and Administration Bill 2018	Attorney-General	27.03.18 *30.04.18*	4 of 2018 *5 of 2018*
Legal Identity of Defendants (Organisational Child Abuse) Bill 2018	Attorney-General	27.03.18 *30.04.18*	4 of 2018 *5 of 2018*

[34] On 28 March 2018, the President of the Legislative Council ruled that the Bill infringed the provisions of section 62 of the *Constitution Act 1975* and ordered that the Bill be withdrawn.

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Advancing the Treaty Process with Aboriginal Victorians Bill 2018	Aboriginal Affairs	01.05.18 *22.05.18*	5 of 2018 *8 of 2018*
Justice Legislation Amendment (Access to Justice) Bill 2018	Attorney-General	01.05.18 *21.05.18*	5 of 2018 *7 of 2018*
Long Service Benefits Portability Bill 2018	Industrial Relations	01.05.18 *21.05.18*	5 of 2018 *8 of 2018*
Electoral Legislation Amendment Bill 2018	Special Minister of State	22.05.18 *01.06.18*	7 of 2018 *8 of 2018*
Justice Legislation Amendment (Terrorism) Bill 2018	Attorney-General	22.05.18 *01.06.18*	7 of 2018 *8 of 2018*
National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018	Attorney-General	22.05.18 *01.06.18*	7 of 2018 *8 of 2018*
Serious Offenders Bill 2018	Corrections	22.05.18 *04.06.18*	7 of 2018 *8 of 2018*
State Taxation Acts Amendment Bill 2018	Treasurer	22.05.18 *12.06.18*	7 of 2018 *10 of 2018*
Crimes Amendment (Unlicensed Drivers) Bill 2018	Dr Rachel Carling-Jenkins MP	05.06.18 *06.06.18*	8 of 2018 *9 of 2018*
Flora and Fauna Guarantee Amendment Bill 2018	Energy, Environment and Climate Change	05.06.18 *15.06.18*	8 of 2018 *9 of 2018*
Local Government Bill 2018	Local Government	05.06.18 *15.06.18*	8 of 2018 *9 of 2018*
Environment Protection Amendment Bill 2018	Energy, Environment and Climate Change	24.07.18 *05.08.18*	10 of 2018 *11 of 2018*
Justice Legislation Miscellaneous Amendment Bill 2018	Attorney-General	24.07.18 *06.08.18*	10 of 2018 *11 of 2018*
Justice Legislation (Police and Other Matters) Bill 2018	Police	24.07.18 *06.08.18*	10 of 2018 *11 of 2018*
Racing Amendment (Integrity and Disciplinary Structures) Bill 2018	Racing	24.07.18 *03.08.18*	10 of 2018 *11 of 2018*
Corrections Amendment (Parole) Bill 2018	Corrections	07.08.18	11 of 2018
Disability Service Safeguards Bill 2018	Housing, Disability and Ageing	07.08.18	11 of 2018
Environment Protection Amendment (Container Deposit Scheme) Bill 2018	Ms Nina Springle MLC	07.08.18	11 of 2018
Justice Legislation Amendment (Unlawful Association and Criminal Appeals) Bill 2018	Attorney-General	07.08.18	11 of 2018

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Owner Drivers and Forestry Contractors Amendment Bill 2018	Industrial Relations	07.08.18	11 of 2018
Victims and Other Legislation Amendment Bill 2018	Attorney-General	07.08.18	11 of 2018