58th Parliament
Alert Digest

No. 9 of 2015
Tuesday, 18 August 2015
on the following Bills

Corrections Legislation Amendment Bill 2015
Crimes Amendment (Child Pornography and Other Matters) Bill 2015
Education and Training Reform Amendment (Miscellaneous) Bill 2015
Emergency Management (Control of Response Activities and Other Matters) Bill 2015
Resources Legislation Amendment Bill 2015
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;
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Parliament of Victoria, Australia
Scrutiny of Acts and Regulations Committee
Reports to Parliament
Alert Digests 2015
ISSN 1440-2939

Ordered to be Published
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
‘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 2014 one penalty unit equals $147.61)
‘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
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Crimes Amendment (Child Pornography and Other Matters) Bill 2015

Introduced 4 August 2015
Second Reading Speech 5 August 2015
House Legislative Assembly
Member introducing Bill Hon. Martin Pakula MLA
Portfolio responsibility Attorney-General

Purpose

The Bill would amend the Crimes Act 1958 and the Criminal Procedure Act 2009 and make minor amendments to certain other Acts.

The amendments to the Crimes Act 1958 would include:

- the creation of three new child pornography offences, each with a maximum penalty of level 5 imprisonment (10 years maximum):
  - administering a child pornography website (new section 70AAAB)
  - encouraging the use of a website to deal with child pornography (new section 70AAAB)
  - assisting a person to avoid apprehension for child pornography (new section 70AAD)
- an increased penalty for the offence of possessing child pornography (from 5 years to 10 years imprisonment — section 70).
- provision for the use of random sample evidence in child pornography offence proceedings (new section 70AAAE)
- provision for directions under a search warrant to require a person to assist police with knowledge of a computer or computer network (new section 465AAA).

The Bill would also amend the Criminal Procedure Act 2009 to restrict the right of the accused to inspect evidence that is child pornography (new sections 43A and 185A).

The Bill would also make consequential amendments to a number of other Acts.

New offences under the Crimes Act 1958

Administering a child pornography website

Under new section 70AAAB(1) a person will commit an offence if they administer, or assist in the administration of, a website which they intend is used, or are aware is being used, by another person to ‘deal’ with child pornography.

It will not be necessary to prove the identity of the person who uses the website to deal with child pornography, only that someone other than the accused did so (new section 70AAAB(3)).
New sections 70AAAB(4) and 70AAAB(5) provide a defence to the new offence where the person ‘takes all reasonable steps in the circumstances’ to prevent the continued use of the website to deal with child pornography, such as: notifying a police officer and complying with their reasonable directions; notifying a relevant industry regulatory authority and complying with their reasonable directions; shutting down the website; or modifying the website.

New section 70AAAB(6) creates an exception to the offence where a person engages in conduct in good faith in the course of their official duties (connected with the administration of the criminal justice system or as an authorised employee of the Department of Justice and Regulation) or for a genuine medical, scientific or educational purpose.

New section 70AAAB(7) creates a further exception for dealings with material that has been classified (or would have been classified) under the Classification, Films and Computer Games) Act 1995 (Cth) as other than RC or X18+. 1

New sections 70AAAB(8) and (9) provide for the new offence to have extra-territorial application, provided one of the key aspects of the offence is in or occurs in Victoria. For example, a person may be charged with the offence even if they were interstate at the time of the offending.

Encouraging use of a website to deal with child pornography

Under new section 70AAAC a person would commit an offence if they encourage use of a website to deal with child pornography. Examples would include where a person posts advertisements for a child pornography website online or where an adult uses a minor as an innocent agent to encourage another person to use a website to deal with child pornography.

The offence will not apply to persons who are under 18 years of age. The Explanatory Memorandum states that this is to ensure that ‘sexual exploration by teenagers…is not inappropriately criminalised’.

The offence may apply even if the person who was encouraged by the accused did not go on to use the website to deal with child pornography (new section 70AAAC(3)). However, an attempt to commit the offence will not itself constitute an offence (new section 70AAAC(4)).

New sections 70AAAC(5) and (6) provide for the new offence to have extra-territorial application, provided one of the key aspects of the offence is in or occurs in Victoria. For example, a person may be charged with the offence even if they were interstate at the time of the offending.

Assisting a person to avoid apprehension for a child pornography offence

New section 70AAAD(1) sets out the elements of the offence, which requires that the person intentionally provides information to another person and intends that they use the information to avoid or reduce the likelihood of apprehension for a child pornography offence. Examples include the provision of information to another person on: how to use a website to deal with child pornography anonymously; how to encrypt electronic files containing child pornography; or how to delete electronic data that records information about the other person’s identity.

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1 Refused Classification (RC) is a classification category that is commonly referred to as being ‘banned’. Films, computer games and publications that are classified RC cannot be sold, hired, advertised or legally imported in Australia. Material that is classified RC contains content that is very high in impact and falls outside generally accepted community standards.

X18+ classification is a special and legally restricted category which contains only sexually explicit content. That is, material which shows actual sexual intercourse and other sexual activity between consenting adults. X18+ films are only available for sale or hire in the ACT and the NT.
Under new section 70AAAD(3) it would not be necessary to prove the identity of the person to whom the information was provided or that they actually used the information.

New sections 70AAAD(4) and (5) provide for the new offence to have extra-territorial application, provided one of the key aspects of the offence is in or occurs in Victoria. For example, a person may be charged with the offence even if they were interstate at the time of the offending.

New section 70AAAD(6) effectively provides that a person may still be charged with the offence if the person to whom they sent the information was interstate when they received the information (i.e. the person receiving the information is deemed to be in the same place as the accused at the time that they receive the information).

**Other amendments to the Crimes Act 1958**

**Use of random sample evidence in child pornography cases**

New section 70AAAE would allow a court to make findings about the nature and content of child pornography material based on a random sample of ‘seized material’. It would therefore not be necessary for each item of child pornography to be viewed and assessed, thereby: facilitating the prosecution of cases involving a high-volume of child pornography; reducing the occupational health and safety risks for participants in the prosecution process; and reducing the extent to which the violation and exposure of the child victims is compounded by repeated viewing.

Examination of random samples would be conducted by an ‘authorised classifier’ (a class of persons to be prescribed by regulations under section 67A), whose signed certification that they have conducted an examination of a random sample of seized material and made certain findings would be admissible as evidence in proceedings for a child pornography offence (new sections 70AAAE(2), (4) and (5)).

Evidence about a random sample would only be admissible if the trial judge is satisfied that the accused or their legal practitioner has been given a reasonable opportunity to inspect all of the material (new section 70AAAE(6)). However, new section 70AAAE(7) provides that the right of the accused to inspect evidence personally is subject to the restrictions also introduced by the Bill via amendments to the *Criminal Procedure Act 2009* (see below).

**Power of police officer to direct a person to provide information or other assistance**

New section 465AAA would enable a police officer, acting under a search warrant, to direct a specified person to provide information or other assistance where the person has knowledge of a computer or computer network. Such information or assistance could include the provision of computer passwords, or the copying or conversion of data. The list of specified persons would include: the owner or lessee of the computer or device; their employee; a contractor; a person who has used the computer or device; or a system administrator. Failure to comply with the direction without reasonable excuse would be an offence liable to level 7 imprisonment (2 years maximum).

**Amendment of the Criminal Procedure Act 2009**

New section 43A would limit an accused who is legally represented from personally inspecting exhibits that include child pornography where the material is an exhibit in a full brief in a summary proceeding. Under the section, the accused may instead request inspection of the exhibit, or part of the exhibit, by their legal practitioner. However, the Bill would also amend section 46 to allow the

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2 This reform is based on a similar procedure used in New South Wales under section 289B of the *Criminal Procedure Act 1986*. 


The accused is to apply to the Magistrates’ Court to personally inspect the exhibit of child pornography evidence following the informant’s initial decision to refuse disclosure to the accused personally. In deciding whether to make such an order, and any conditions that should apply, the court would be required to have regard to whether or not the accused is legally represented but could order disclosure to the accused’s legal practitioner only or to the accused personally.

The Bill would also introduce a new section 185A to deal with disclosure of evidence that is child pornography during trial proceedings. Under the new section, the prosecution would not be required to disclose any information, document or thing that is required by section 185 (the prosecution’s continuing obligation of disclosure in trial proceedings) if they believe that doing so would result in the disclosure of child pornography to the accused personally. However, under section 185A(2) the accused would be able to apply to the court for an order to allow such disclosure. In deciding whether to make such an order, and any conditions that should apply, the court would be required to have regard to whether or not the accused is legally represented but could order disclosure to the accused’s legal practitioner only or to the accused personally.

**Charter report**

**Presumption of innocence – Child pornography – Defences of classification and artistic merit – Practice Note – Reverse onus provisions**

Summary: The Committee will write to the Attorney-General seeking further information as to whether or not clause 4, by increasing the penalty for an offence that imposes a legal onus on the accused to prove the classification or artistic merit of material, and new section 70AAAB(7), in providing a defence relating to the classification of material on a website without specifying whether or not it imposes a legal onus on the accused, is compatible with the Charter’s right to be presumed innocent until proved guilty.

The Committee notes that clause 4, amending existing s70(1) of the Crimes Act 1958, doubles the penalty for possessing child pornography from 5 years imprisonment to 10 years imprisonment. The Committee also notes that existing s70(2) provides that "[i]t is a defence to a prosecution for an offence against subsection (1) to prove‘ one of various matters, including the material possessed is or would be classified other than RC, X or X18+ by the Australian Classification Board or that it possesses artistic merit."

The Committee observes that similar legal onuses on a person accused of possessing child pornography exist elsewhere in Australia; however, the defences of classification and artistic merit are more important in Victoria than elsewhere because Victoria’s definition of ‘child pornography’, which includes any description or depiction of a minor engaged in sexual activity, does not require proof that the material is offensive or obscene. The effect of existing s70(2) is that the accused

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3 Other defences relate to the purpose of the possession and the accused’s beliefs as to the child’s age or marriage or the identity of the child, matters that are likely to be more readily provable by the accused.

4 Crimes Act 1900 (NSW), s. 91HA(7) (read with s. 407A); Criminal Code 1899 (Qld), s. 228E(5); Criminal Law Consolidation Act 1935 (SA), s. 63C(4) (arguably when read with Summary Procedure Act 1912 (SA), s. 56); Classification (Films, Publications and Computer Games) Act 1995 (Tas), s. 74B(1); Criminal Code (Tas), s. 130E(1); and Criminal Code (WA), s. 221(1)(a). By contrast, Crimes Act 1900 (ACT), s. 67(2); Crimes Act 1900 (NSW), s. 578C(1); Criminal Code (NT), s. 125B (read with s. 125A); and Classification of Films Act 1991 (Qld), s. 64 do not impose reverse onuses on the issue of classification.

5 Crimes Act 1958, s. 67A: “child pornography” means a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context; ‘minor’ means a person under the age of 18 years.

6 Compare Criminal Code (Cth), s. 473.1; Crimes Act 1900 (NSW), s. 91FB; Criminal Code (NT), s. 125A; Criminal Code (Qld), s. 207A; Criminal Code (Tas), s. 1A; Criminal Code (WA), s. 217A. See also Crimes Act 1900 (ACT), s. 64(5); Criminal Law Consolidation Act 1935 (SA), s. 62.
could be convicted of possessing child pornography (and exposed to the new maximum penalty of 10 years imprisonment) if he or she possessed material depicting or describing a person apparently under 18 engaging in sexual activity and a court was left unsure as to whether or not the material would be classified other than RC, X or X18+ by the Australian Classification Board or otherwise had artistic merit.

The Committee’s Practice Note of 26 May 2014 states:

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... 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.

The Statement of Compatibility does not address clause 4.

The Committee also notes that clause 6, inserting a new section 70AAAB(7) into the Crimes Act 1958, also provides for an exception to the new offence of administering a child pornography website for dealings with material that have received or would receive a classification other than RC or X18+ from the Australian Classification Board, but does not specify whether or not that exception imposes a legal onus on the accused. The Committee’s Practice Note states:

[T]he 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... 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 Statement of Compatibility does not address new section 70AAAB(7).

The Committee observes that if new section 70AAAB(7) does not impose a legal onus on the accused, then an accused who administers a website may be acquitted of administering a child pornography website but convicted of complicity in possession of child pornography in relation to the same alleged online dealing with child pornography. If new section 70AAAB(7) imposes a legal onus on the accused, then it may engage the Charter’s right to be presumed innocent until proved guilty.7

The Committee will write to the Attorney-General seeking further information as to whether or not clause 4, by increasing the penalty for an offence that imposes a legal onus on the accused to prove the classification or artistic merit of material, and new section 70AAAB(7), in providing a defence relating to the classification of material on a website without specifying whether or not it imposes a legal onus on the accused, is compatible with the Charter’s right to be presumed innocent until proved guilty.8

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7 New section 70AAAB(4) and (6) also sets out exceptions for people who take reasonable steps to prevent access, are acting in the course of official duties or are acting for a genuine medical, scientific or educational purpose. These matters are likely to be known and provable by the accused.

8 Charter s. 25(1).
Expression – Encouraging the use of a website to deal with child pornography – No defence of classification – Material that can be lawfully published

Summary: By omitting a defence for material that is or would be classified by the Australian Classification Board as other than RC or X18+, the effect of new section 70AAAC may be to prohibit adults from encouraging anyone to visit a website to view or download material that can otherwise be lawfully published in Australia. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 6, inserting a new section 70AAAC into the Crimes Act 1958, makes it an offence, punishable by ten years imprisonment, for an adult to encourage another person to use a website intending that the other person will use it to ‘deal’ with ‘child pornography’. ‘Deal’ includes viewing or downloading, or facilitating viewing or downloading.

The Committee observes that existing s. 67A defines ‘child pornography’ as:

a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context.

The Committee notes that, unlike all other similar definitions in Australia,9 there is no requirement that this material be offensive. Accordingly, the definition may apply to mainstream books or films (e.g. that describe or depict teenage sex) and documents or films viewed or downloaded for genuine medical, scientific or educational purposes (e.g. sex education material.)

The Committee also notes that, in contrast to new section 70AAAB’s offence of administering a child pornography website, there is no defence in new section 70AAAC for dealing in material that would be classified other than RC or X18+ by the Australian Classification Board, or dealings in the course of official duties connected with the administration of criminal justice or regulation, or for a genuine medical, scientific or educational purpose.10 Accordingly, new section 70AAAC may make it an offence for an adult to encourage anyone to visit a website that is nevertheless lawful to administer under new section 70AAAB.

The Committee observes that, by omitting a defence for material that is or would be classified by the Australian Classified Board as other than RC or X18+, the effect of new section 70AAAC may be to prohibit adults from encouraging anyone to visit a website to view or download material that can otherwise be lawfully published in Australia.

The Committee therefore considers that new section 70AAAC may engage the Charter’s right to freedom of expression.11 The Statement of Compatibility does not address new section 70AAAC.

The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 70AAAC, to the extent that, because it omits a defence for material that is or would be classified by the Australian Classified Board as other than RC or X18+, it prohibits adults from encouraging visits to a website to view or download material that can otherwise be lawfully published in Australia, with the Charter’s right to freedom of expression.

9 Criminal Code (Cth), s. 473.1; Crimes Act 1900 (NSW), s. 91FB; Criminal Code (NT), s. 125A; Criminal Code (Qld), s. 207A; Criminal Code (Tas), s. 1A; Criminal Code (WA), s. 217A. See also Crimes Act 1900 (ACT), s. 64(5); Criminal Law Consolidation Act 1935 (SA), s. 62.
10 See new section 70AAAB(6) and (7).
11 Charter s. 15(2).
Expression – Rights of criminal defendants – Offence to provide information for avoiding apprehension for child pornography offences – Legal advice in accordance with duties and ethical standards of Australian lawyers to a person who has, or may have, committed a child pornography offence

Summary: New section 70AAAD makes it an offence to provide information to another person intending it to be used to avoid or reduce the likelihood of apprehension for the other person’s child pornography offences. The Committee observes that the terms of new section 70AAAD may cover legal advice given in accordance with the duties and ethical standards of Australian lawyers to a person who has, or may have, committed a child pornography offence. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 6, inserting a new section 70AAAD into the Crimes Act 1958, makes it an offence, punishable by ten years imprisonment, to provide ‘information’ to another person intending it to be used by the other person for ‘avoiding or reducing the likelihood of apprehension’ for the other person’s production, procuring, possessing, administering or encouraging use of a website dealing with, or publishing or transmitting, child pornography.

The Committee observes that, while the two examples in new section 70AAAD relate to providing technical information on how to hide a person’s online identity or to encrypt or delete files, the terms of new section 70AAAD are not limited to such information. In particular, they may cover legal advice to a person who has, or may have committed a child pornography offence, including both professional advice given in accordance with the duties and ethical standards of Australian lawyers to a person who has, or may have, committed a child pornography offence (e.g. on how to exercise certain procedural rights, such as to not to answer questions, to refuse entry without a warrant or to challenge an extradition request; or on negotiating with police to avoid arrest) and lay advice (e.g. ‘unless you delete that, you could go to jail for years.’)

The Committee therefore considers that new section 70AAAD, to the extent that it prohibits giving certain legal advice in accordance with the duties and ethical standards of Australian lawyers to a person who has, or may have, committed a child pornography offence, may engage the Charter’s right to freedom of expression and, in some circumstances, rights of criminal defendants. The Statement of Compatibility does not address new section 70AAAD.

The Committee notes that Australian law usually addresses people who assist others to avoid arrest through the laws of complicity, perverting the course of justice, hindering the police, failure to report certain offences, harbouring offenders, destroying evidence or concealing an offence for personal benefit, which do not typically apply to the giving of legal advice to accused persons. The Committee also notes that jurisdictions that have created general offences of ‘hindering apprehension or prosecution’ likewise typically limit such offences to such conduct.

The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 70AAAD, to the extent that it prohibits giving legal advice, in accordance with the duties and ethical obligations of Australian lawyers, to a person who has, or may have, committed a child pornography offence, with the Charter’s rights to freedom of expression and the rights of criminal defendants.

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12 Charter ss. 15(2), 25(2).
13 See also Criminal Code (Qld), s. 133(5).
14 E.g. the United States ‘Model Penal Code’, section 242.3;
Rights of criminal defendants – Random sample evidence – Admissibility of findings – Cross-examination of authorised classifier – Defence experts

Summary: New section 70AAAE provides for an authorised classifier to conduct an examination of a random sample of material possessed by a police officer that is alleged to be child pornography. The Committee will write to the Attorney-General seeking further information as to whether an accused person can challenge the admissibility of the findings of the authorised classifier, whether an accused person can require that the authorised classifier be made available for cross-examination and whether new section 70AAAE applies to defence evidence.

The Committee notes that clause 6, inserting a new section 70AAAE into the Crimes Act 1958, provides for an authorised classifier to conduct an examination of a random sample of material possessed by a police officer that is alleged to be child pornography. New sub-sections 70AAAE(2) and (3) provide that the authorised classifier’s findings are ‘admissible as evidence of the nature and content of the whole of the material from which the random sample was taken’ and can be used by a court to ‘find that any type of child pornography found by an authorised classifier to be present in the random sample is present in the same proportion in the material from which the random sample was taken. New section 70AAAE(4) provides that a certificate of an authorised classifier that certifies the findings of the authorised classifier as to the nature and content of the random sample ‘is admissible... as evidence of’ those findings. An ‘authorised classifier’ is a ‘class of person, prescribed by the regulations’.

The Statement of Compatibility remarks:

This reform does not limit a right to a fair hearing because the prosecution must still prove the charge against the accused, the evidence may be challenged in the same way as other expert evidence, and random sample evidence will only be admissible if the court is satisfied that the accused or the accused’s lawyer has been given a reasonable opportunity to inspect all of the material.

The random sample provisions carefully balance the rights of the accused with the right of (child) victims to protection under s 17(2) and the right not to be degraded under s 10, by limiting the volume of the material exposed and the number of people who must view it.

However, the Committee observes that random sample evidence may not necessarily ‘be challenged in the same way as other expert evidence’ for three reasons.

First, because new sections 70AAAE(2) and (3) provide that the findings of an authorised classifier are ‘admissible as evidence as to the nature and content of the whole of the material’ and can be used by a court to make particular findings about the whole of the material, they may prevent the accused from challenging the admissibility of the authorised classifier’s findings under the Evidence Act 2008, including the law regulating the admissibility of opinion evidence.15

Second, because new section 70AAAE(4) provides that a certificate of an authorised classifier is ‘admissible in proceedings of a child pornography offence as evidence of the matters certified’, it may mean that the authorised classifier’s evidence can be used against the accused without the authorised classifier being called as a witness or otherwise made available for cross-examination by the accused. The Committee notes that, although (as mentioned in a note to new section 70AAAE) the Evidence Act 2008 provides a procedure for accused persons to require that an expert witness be made available for cross-examination, the provisions of that Act ‘do not affect the operation of the provisions of any other Act’.16

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15 Evidence Act 2008, ss. 76, 79.
16 Evidence Act 2008, ss. 8, 177.
Third, because new section 70AAAE only applies to examinations by an ‘authorised classifier’, the accused may be unable to use that section to challenge the random sample evidence using a random sample conducted by an expert retained by the accused. For example, in New South Wales, equivalent regulations limit authorised classifiers to ‘members of the NSW Police Force’. If new section 70AAAE does not apply to a defence expert’s findings about a random sample, then the defence’s expert may need to examine all of the material, at considerable financial cost to the accused and psychological cost to the defence expert, the court and the complainant.

The Committee therefore considers that new section 70AEEE may limit the accused’s Charter right to a fair hearing and, in particular, the accused’s rights to ‘examine, or have examined, witnesses against him or her, unless otherwise provided by law’ and ‘to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution’.

The Committee will write to the Attorney-General seeking further information as to whether an accused person can challenge the admissibility of the findings of the authorised classifier under the Evidence Act 2008, whether an accused person can require that the authorised classifier be made available for cross-examination and whether new section 70AAAE applies to random sample evidence from an expert chosen by the defence.

Self-incrimination – Compelled production of computer passwords – Application to charged persons – Admissibility of production of password

Summary: The effect of new section 465AAA is that a police officer may require a suspect to provide passwords for certain computers, devices or accessible remote data. The section does not specify whether or not it can be used against people who have been charged with an offence and whether or not the information provided or only discoverable as a result of a direction is admissible in any future prosecution of the person who provided the password. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 9, inserting a new section 465AAA into the Crimes Act 1958, provides that the Magistrates’ Court, when issuing a search warrant under existing s. 465, may authorise a police officer executing the warrant to direct a specified person to provide information or assistance that is reasonable and necessary to allow a police officer to access, copy or convert into an intelligible form data in or accessible from a computer or data storage device. Non-compliance with the direction without a reasonable excuse is an offence punishable by up to two years imprisonment. The Committee also notes that, unlike a similar federal provision, new sub-section 465AAA(7) provides that such a person is not excused from complying on the ground that compliance may result in the provision of information about that person’s crimes.

The Committee observes that the effect of new section 465AAA is that a police officer may require a suspect to provide passwords for certain computers, devices or accessible remote data where either the provision of the password or the data obtained may be evidence of that person’s offending. The Committee considers that clause 9 may engage the suspect’s Charter’s rights to a fair hearing, including the right against compelled self-incrimination set out in Charter s. 25(2)(k).

The Statement of Compatibility remarks:

The bill does not limit section 25(2)(k), because the person required to assist police is not a person who has been charged with a criminal offence. The execution of the warrant occurs

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17 Criminal Procedure Regulation 2010 (NSW), reg 27A.
18 Charter ss. 24(1), 25(2)(g), (h).
19 Crimes Act 1914 (Cth), s. 3LA.
before charges, if any, are filed. In addition, the person is not being required to testify against himself or herself because they are not giving evidence in court. Finally, the person is not being required to confess guilt. While the information the person provides may enable police to obtain evidence that incriminates the person, the giving of that information, such as a computer password or similar, is not in itself a confession of guilt.

Even if the bill could be said to limit s 25(2)(k), the limitations are reasonable and justified because of the serious nature of the crimes being investigated (such as child pornography offences) and the fact that the police investigation could be blocked by non-disclosure of the relevant information (such as a password to access a computer). If a person has locked hard copy child pornography in a cupboard, the police do not need the person's assistance in breaking into the cupboard, under warrant, to seize that evidence and the person has no right to try to block the police breaking into that cupboard. If the person has also 'locked' electronic child pornography inside a computer through encryption, the person should not, simply because of their use of more sophisticated technology, now be empowered to stymie police investigations by refusing to divulge the electronic key to that evidence. Moreover, such information can assist police in identifying children being abused and preventing further abuse of such children in Victoria. There is also the safeguard that the magistrate issuing the search warrant will have discretion not to include such a power in the warrant where the police officer applying for the warrant has not made out an adequate case for the need for such a power.

The Committee notes that new section 465AAA applies to any indictable offences, not just child pornography offences.

The Committee observes that the Supreme Court of Victoria has held that coercive powers requiring suspects to supply incriminating computer encryption keys do limit the Charter rights of criminal defendants with respect to self-incrimination. The Court also held (in the context of questions asked by the Chief Examiner, supervised by the Supreme Court and used to investigate organised crime offences) that such powers are not reasonable limits on those rights unless any evidence discovered as a result (and not otherwise discoverable) is inadmissible in any future prosecution of the person.

The Committee notes that new section 465AAA does not specify whether or not it can be used against people who have been charged with an offence. Also, it does not specify whether or not the information provided or only discoverable as a result of a direction is admissible in any future prosecution of the specified person.

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20 Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381, [91]-[92]. Compare English authorities that have held that both the making of an order requiring a suspect to divulge a password and the prosecution of a suspect for failing to do so are compatible with European fair hearing rights (e.g. R v S & A [2008] EWCA Crim 2177; Greater Manchester Police v Andrews [2011] EWHC 1966 (Admin), discussing s. 49 of the Regulation of Investigatory Powers Act 2000 (UK)) and North American authorities that have held that such powers are incompatible with rights against compelled self-incrimination where the supply of passwords may be evidence of the person’s access to, or the existence of, incriminatory data (e.g. R. c. Boudreau-Fontaine 2010 QCCA 1108, [46] [Quebec Court of Appeal]; In Re: Grand Jury Subpoena Duces Tecum dated March 25, 2011; USA v Doe, 670 F. 3d 1355 (2012) [United States Court of Appeals for the 11th Circuit]), unless the person’s access to, and the existence and nature of, the incriminatory data is already known to investigators (e.g. Commonwealth v Gelfgatt (unreported, Massachusetts Supreme Judicial Court, 25th June 2014).


22 See Lee v New South Wales Crime Commission [2013] HCA 39, holding that court-supervised questioning powers (in that case, in relation to proceeds of crime) could be applied to a person charged with an offence that the proposed questions would address.

The Committee will write to the Attorney-General seeking further information as to whether or not new section 465AAA can be used to require a person currently charged with an offence to supply a password that may afford evidence of that offence and whether or not the fact that a person supplied the password (and any evidence only discoverable as a result) is admissible in any future prosecution of that person (e.g. as evidence that the person had access to a computer or file that contained child pornography.)

Fair hearing – Rights of criminal defendants – Prosecutors may refuse to disclose child pornography to an accused personally – Whether less restrictive alternatives reasonably available

Summary: Clauses 14, 15(1) and 21 provide that an informant or prosecutor may refuse any disclosure of evidence that would result in ‘disclosure of child pornography to the accused personally.’ The Committee will write to the Attorney-General seeking further information as to whether or not narrower provisions in NSW and Queensland are a less restrictive alternative reasonably available to achieve these clauses’ purposes.

The Committee notes that clauses 14, 15(1) and 21, amending existing s. 45 of, and inserting new sections 43A(2) and 185A into, the Criminal Procedure Act 2009, provide that an informant or prosecutor may refuse any inspection of an exhibit to a legally represented accused person or disclosure of evidence that would be reasonably likely to result in ‘disclosure of child pornography to the accused personally.’ The child pornography must still be disclosed to the accused’s legal practitioner (if any) and the accused can ask a court to order that the child pornography be disclosed to the accused personally.

The Committee observes that Victoria’s definition of ‘child pornography’ includes ‘any written or pictorial matter’ that describes a minor engaged in sexual activity or in a sexual context. This may include a witness statement or interview containing an allegation of child sexual abuse or rape where the complainant is under 18.

The Statement of Compatibility remarks:

Because it may not be appropriate to allow a person accused of child pornography offences to view the pornography for his or her gratification, the bill will enable an informant to refuse to disclose evidence that is child pornography to an accused personally. This will not limit the accused’s right to be informed of the nature and reason for the charge because the right of the accused’s lawyer to inspect that evidence on the accused’s behalf is unaffected and the accused can still obtain a court order for personal inspection of the evidence.

Section 24 of the charter provides for the right to a fair hearing. The bill engages with this right, because it regulates the procedures for disclosing material on which an informant relies to bring a charge for child pornography offences by creating a higher threshold for inspection of that material. This restriction may be imposed at pre-hearing and pre-trial disclosure stages. At both stages, the accused may obtain a court order to personally inspect the material. Section 24 will not be limited by these procedures, because the hearing overall will still be fair and appeal rights are maintained.

The Committee notes that clauses 14, 15(1) and 21 are not limited to prosecutions for child pornography offences, but instead apply to prosecutions for any offence.

24 See Clause 12, amending s. 3. And see Crimes Act 1958, s. 67A and Classification (Publications, Films and Computer Games) Act 1995 (Cth), s. 3.
The Committee considers that clauses 14, 15(1) and 21 may engage the accused’s Charter rights ‘to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her’ and ‘to defend himself or herself personally’.25

The Committee observes that similar provisions in NSW and Queensland are narrower than clauses 14, 15(1) and 21 in three ways:

First, the equivalent provisions in NSW and Queensland are limited to obscene, indecent or private images of a person, e.g. a naked child, or audio recordings of an offence, e.g. a rape.26 By contrast, clauses 14, 15(1) and 21 apply to all ‘child pornography’ and therefore also bar informants and prosecutors from disclosing written material that describes a minor engaging in sexual activity (whether or not the material is offensive or private), including witness statements or interviews that are typically the principal evidence against an accused in a child sexual offence or rape prosecution.

Second, the equivalent provisions in NSW and Queensland expressly require the prosecutor to inform the accused if any evidence has not been disclosed because it is sensitive evidence, including a description of its nature.27 By contrast, there is no express obligation on prosecutors in the Bill to disclose the fact of non-disclosure of child pornography to an unrepresented accused.

Third, the equivalent provisions in NSW and Queensland provide a procedure that permits (and, in NSW, requires) prosecutors to allow an accused to personally view sensitive evidence subject to conditions that ensure that the viewing is for a legitimate purpose, that the item is not reproduced and its integrity is protected.28 By contrast, clause 14 only provides a procedure for an accused’s legal representative (and not the accused) to view an exhibit that is child pornography, while 15(1) and 21 merely give informants and prosecutors a discretion not to disclose evidence without specifying how they may allow accused persons to view such evidence.

The Committee will write to the Attorney-General seeking further information as to whether or not alternative provisions to clauses 14, 15 and 21(1) in NSW and Queensland that:

- are limited to images of people and audio recordings of offences;
- expressly require prosecutors to inform accused persons if child pornography has not been disclosed;
- expressly permit prosecutors to allow accused persons to view exhibits that are child pornography in controlled circumstances without a court order;

are a less restrictive alternative reasonably available29 to achieve the clauses’ purposes of preventing a person accused of child pornography offences from viewing child pornography for his or her gratification.

The Committee makes no further comment

25 Charter s. 25(2)(b) & (d).
26 Criminal Procedure Act 1986 (NSW), s. 281B; Criminal Code (Qld), s. 590AF.
27 Criminal Procedure Act 1986 (NSW), s. 281D(1); Criminal Code (Qld), s. 590AO(2).
28 Criminal Procedure Act 1986 (NSW), s. 281D(4); Criminal Code (Qld), s. 590AO(2)(f).
29 Charter s. 7(2)(e).
Education and Training Reform Amendment (Miscellaneous) Bill 2015

Introduced 4 August 2015
Second Reading Speech 5 August 2015
House Legislative Assembly
Member introducing Bill Hon. James Merlino MLA
Portfolio responsibility Minister for Education

Purpose

The Bill is for an Act to amend the Education and Training Reform Act 2006 (the Principal Act) to:

- provide the Victorian Registration and Qualifications Authority (the VRQA) with the power to monitor and assess the financial capability of registered non-Government schools (new section 4.3.1A); report to parents of students attending schools assessed as financially unviable or at-risk of becoming financially unviable (new section 4.31.A(3)); and impose registration conditions on the school to establish a protection scheme (such as a trust) for student fees that have been paid or are to be paid to the school (new section 4.31.A(3)) [15]
- enable a school council to grant a licence in relation to school lands or buildings or any other land to create greater flexibility in school operations, such as enabling the installation of closed-circuit television cameras on school premises to monitor adjacent land or to temporarily license land or buildings adjacent to the school from another party [6]
- allow Adult, Community and Further Education (ACFE) Regional Councils to reduce their membership from nine to five or more members and require the Minister to ensure that, in appointing Council members, consideration is given to their knowledge and experience of the local industry and the broader local community [11]
- allow ACFE Regional Councils to determine their own arrangements with respect to the frequency of meetings (by repealing the current requirement that they meet at least six times per year) [12]
- make other minor amendments, including
  - in relation to the registration of teachers and early childhood teachers [8, 9, 10]
  - providing the Minister with the power, by Order, to dissolve a school council and any parents’ club of a school [5]

The Bill also proposes a number of minor and technical amendments to the Education and Training Reform Amendment (Skills) Act 2011 and the Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Act 2014.

Content

Sections 17(a)(iv) and (v) of the Parliamentary Committees Act 2003 — unduly requires or authorises acts or practices that may have an adverse effect on personal privacy or on the privacy of health information

As noted below under the Charter Report, the Committee notes that clause 23 would insert a new section 5.5.26(1) which would allow the VRQA to disclose any information it obtains when exercising its functions in relation to apprentices to: the Secretary to the Department of Education and Early Childhood Development; any other government department, state or statutory body or ‘special body’; and any Commonwealth government department, ‘if the information relates to the performance of a function of that person or body’.
Under the *Parliamentary Committees Act 2003*, the Committee is required to report to Parliament as to whether a Bill, directly or indirectly, 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* (section 17(a)(iv)) or
- privacy of health information within the meaning of the *Health Records Act 2000* (section 17(a)(v)).

The Committee notes that, according to the Statement of Compatibility, the VRQA and the recipient entities would be subject to the *Privacy and Data Protection Act 2014* or the *Privacy Act 1988* (Cth) in relation to information provided under new section 5.5.26(1). However, as noted below under the Charter report, new section 5.5.26(2) provides for the exclusion of other statutes with respect to information sharing by the VRQA.

It is therefore unclear whether the *Privacy and Data Protection Act 2014* would apply to new section 5.5.26(2), particularly since section 6 of that Act relevantly provides that if a provision relating to an Information Privacy Principle or applicable code of practice is inconsistent with a provision made by or under any other Act, the latter provision prevails.

It is also unclear whether the *Health Records Act 2001* (section 7 of which is essentially identical to section 6 of the *Privacy and Data Protection Act 2014*) would apply.

The Committee will write to the Minister seeking further information as to whether or not the Victorian Registrations and Qualifications Authority is subject to the *Privacy and Data Protection Act 2014* and the *Health Records Act 2001* in relation to the provision of information under new section 5.5.26(1).

**Charter report**

*Privacy – Victorian Registrations and Qualifications Authority – Functions relating to apprentices – Disclosure of information – Exclusion of other laws*

**Summary**: The Committee will write to the Minister seeking further information as to whether or not the Victorian Registrations and Qualifications Authority is subject to the Charter’s obligations for public authorities to give proper consideration to, and act compatibly with, human rights when it discloses information under new section 5.5.26.

The Committee notes that clause 23, inserting a new section 5.5.26(1), allows the Victorian Registrations and Qualifications Authority to disclose any information it obtains when exercising its functions in relation to apprentices to the Secretary to the Department of Education and Early Childhood Development, any other government department, state or statutory body or ‘special body’ and any Commonwealth government department ‘if the information relates to the performance of a function of that person or body’.

The Statement of Compatibility remarks:

I consider that the proposed information sharing powers in clause 23 are neither unlawful nor arbitrary. The bill specifies the circumstances in which the VRQA will be empowered to disclose information relating to its apprenticeship functions and powers, and entities to which such information may be disclosed. The bill provides that disclosure may only occur if the information relates to the recipient entity's functions.

However, the Committee observes that new section 5.5.26(2) provides:
The Authority, when disclosing information under subsection (1) or under a law of another jurisdiction corresponding to subsection (1), does not contravene an obligation not to disclose the information or give the document, whether imposed by an Act or by another rule of law.

The Committee notes that the terms of new section 5.5.26(2) predate the Charter and omit the common approach since the Charter’s enactment of expressly providing that the exclusion of other statutes does not include the Charter. The Court of Appeal of Victoria has recently ruled that a provision immunising a Victorian public authority from Victorian law may exempt that public authority from the Charter’s obligations for public authorities to give proper consideration to, and act compatibly with, human rights.

The Committee will write to the Minister seeking further information as to whether or not the Victorian Registrations and Qualifications Authority is subject to the Charter’s obligations for public authorities to give proper consideration to, and act compatibly with, human rights when it discloses information under new section 5.5.26.

The Committee makes no further comment

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30 See Victorian Qualifications Authority (National Registration) Act 2004, s. 11; Education and Training Reform Act 2006, s. 4.9.4(2).

31 E.g. Court Services Victoria Act 2014, s. 57; Education and Training Reform Act 2006, s. 5.7A.28; Sex Offenders Registration Act 2004, s. 71A.

32 Bare v IBAC [2015] VSCA 197.
Emergency Management (Control of Response Activities and Other Matters) Bill 2015

Introduced 4 August 2015
Second Reading Speech 5 August 2015
House Legislative Assembly
Member introducing Bill Hon. Jane Garrett MLA
Portfolio responsibility Minister for Emergency Services

Purpose

The Bill is for an Act to:

- amend the *Emergency Management Act 2013* to
  - implement operational improvements to the emergency response arrangements, including the appointment of controllers
  - introduce an explicit requirement for agencies to act in accordance with the state emergency response plan
  - refine the powers and functions of the Inspector-General for Emergency Management
- amend the *Victoria State Emergency Service Act 2005* to provide members of the Victoria State Emergency Service and certain volunteers with:
  - the power to enter land or premises with or without the consent of the occupier (new section 32AB) and
  - the power to construct, alter or remove a levee or debris (new section 32AC)
- amend the *Country Fire Authority Act 1958* and the *Metropolitan Fire Brigades Act 1958* in relation to the fire services property levy and fire insurance policies
- consequentially amend a number of other Acts in relation to offences and liability concerning levees.

Content

*Delayed commencement — commencement by proclamation following approval of state emergency response plan and training and policy development by Victoria State Emergency Service or by 1 December 2016*

Clause 2 of the Bill provides that clauses 6, 10, 11, 15, 26(2) and 27 and Division 4 of Part 3 come into operation on a day to be proclaimed or by 1 December 2016.

The Committee notes that in relation to clauses 6, 10, 11 and 15, which relate to the new requirement for agencies to act in accordance with the state emergency response plan, the Explanatory Memorandum states that this requirement will come into force after the plan is approved by the State Crisis and Resilience Council.

The Committee notes that in relation to clauses 26(2) and 27 and Division 4 of Part 3, the Explanatory Memorandum states that the commencement by proclamation or by 1 December 2016 is to provide the Victoria State Emergency Service with sufficient time to conduct adequate training.

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33 Clause 26 inserts new definitions of ‘State Response Controller’ and ‘levee’ into the *Victoria State Emergency Service Act 2005*. Clause 27 inserts new sections 32AA, 32AB and 32AC. Division 4 of Part 3 deals with amendments to other Acts in relation to offences and liability concerning levees.
of its Service members and to develop and implement supporting policies and Standing Orders with which its Service members must comply under section 32A of the Victoria State Emergency Service Act 2005.

**Charter report**

The Emergency Management (Control of Response Activities and Other Matters) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment**
Resources Legislation Amendment Bill 2015

Introduced 4 August 2015
Second Reading Speech 5 August 2015
House Legislative Assembly
Member introducing Bill Hon. Lily D’Ambrosio MLA
Portfolio responsibility Minister for Energy and Resources

Purpose

The Bill is for an Act to:

- amend the Mineral Resources (Sustainable Development) Amendment Act 2014 to require work plans under licences and extractive industry work plans to identify risks to infrastructure [3, 4]

- amend the Mineral Resources (Sustainable Development) Act 1990 to:
  o increase penalties for carrying on an extractive industry without an extractive industry work authority
  o enable the Minister to set conditions on, or vary, a licence or extractive industry work authority relating to the elimination or minimisation of risk
  o enable the Minister to require a licensee or holder of an extractive industry work authority to report on work undertaken under the licence or work authority,
  o enable the Head of the Department of Economic Development, Jobs, Transport and Resources to direct that a work plan that was lodged or approved before the commencement of the Mineral Resources (Sustainable Development) Amendment Act 2014 be varied in order to minimise risks.

Charter report

The Resources Legislation Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Ministerial Correspondence

Corrections Legislation Amendment Bill 2015

The Bill was introduced into the Legislative Assembly on 23 June 2015 by the Hon. Wade Noonan MLA. The Committee considered the Bill on 3 August 2015 and made the following comments in Alert Digest No. 8 of 2015 tabled in the Parliament on 4 August 2015.

Committee comments

Charter report

Arbitrary detention – Parole automatically cancelled if parolee sentenced to imprisonment – Non-Victorian sentences

Summary: Clause 3 provides for the automatic cancellation of a prisoner’s parole if the parolee is sentenced ‘whether in Victoria or elsewhere, to another term of imprisonment’, but does not define ‘elsewhere’ or ‘imprisonment’. The Committee will write to the Minister seeking further information.

The Committee notes that clause 3, amending existing s. 77 of the Corrections Act 1986, provides that a prisoner’s parole ‘is to taken to have been cancelled’ if the parolee is sentenced ‘whether in Victoria or elsewhere, to another term of imprisonment’.

The Committee observes that clause 3 differs from the existing provision for automatic parole cancellation if the prisoner receives certain sentences while on parole in two ways. First, it expressly covers sentences handed down ‘elsewhere’ than in Victoria (using the same terminology as the existing provision for discretionary parole cancellation for offences committed while on parole). Second, it replaces the term ‘prison sentence’ used in the existing provisions for automatic and discretionary parole cancellation with ‘term of imprisonment’. New sub-section 77(7C) provides that a ‘term of imprisonment includes a sentence of imprisonment imposed by a court, whether in Victoria or elsewhere’, other than one that is ‘wholly suspended.’

The Explanatory Memorandum remarks:

Clause 3 makes clear that any prison term imposed by an Australian court at sentencing requiring a Victorian offender to be returned to prison automatically cancels their Victorian parole.

However, the Committee notes that clause 3 does not define ‘elsewhere’ or ‘imprisonment’.

The Statement of Compatibility remarks:

The provision for the cancellation of parole where a person is sentenced to a term of imprisonment for a further offence is compatible with the right to liberty (section 21). Decisions concerning the cancellation of parole may be regarded as decisions resulting in detention or deprivation of liberty...

In my view, these provisions are compatible with the right to liberty. The grounds for cancelling parole are clearly set out in the legislation. They are for the purpose of
protecting the integrity of the parole regime and ensuring community safety, and cannot be regarded as arbitrary.

The Committee observes that the word ‘elsewhere’ may cover non-Australian jurisdictions, including ones that have quite different sentencing processes to Australia. In ruling that the current provision for automatic parole cancellation is limited to sentences by Victorian courts, Weinberg JA remarked:

Assume, hypothetically, that a person on parole in Victoria is sentenced, in absentia, to a term of imprisonment by an overseas regime, for offences committed years earlier. Can it be that this would have the automatic effect of cancelling that person’s parole, possibly rendering him or her liable to years of additional incarceration? Would a sentence of imprisonment of perhaps several days, in a foreign jurisdiction, lead automatically to cancellation of Victorian parole?

The Committee also observes that, while Victorian legislation uses the word ‘imprisonment’ to refer exclusively to custody in a prison, some non-Victorian jurisdictions use that word to cover other quite different custodial settings. For example, under New South Wales legislation, the term ‘sentence of imprisonment’ includes sentences served at drug treatment centres, at home or (under intensive correction) in the community.

The Committee considers that, to the extent that clause 3 requires the automatic cancellation of parole for a prisoner who is sentenced elsewhere under processes that are significantly less protective than Victorian ones or to ‘imprisonment’ in settings that significantly differ from prisons, it may limit the Charter right of Victorian parolees against ‘arbitrary... detention’.

The Committee will write to the Minister seeking further information as to whether or not clause 3’s provision for automatic cancellation of parole applies if a parolee is sentenced by a non-Australian court or to ‘imprisonment’ other than in a prison.

Minister’s response

I refer to the letter of the Scrutiny of Acts and Regulations Committee (the Committee) dated 4 August 2015.

The Committee has queried the operation of clause 3 of the Bill which provides that parole is taken to be cancelled if the prisoner on parole is sentenced, while on parole, by a court to another term of imprisonment in Victoria or elsewhere and the offending occurred before or during the parole period. The prisoner’s parole is taken to have been cancelled on the sentence being imposed.

Clause 3 clarifies a provision within existing section 77 of the Corrections Act 1986 which provides for automatic cancellation of parole if a prisoner on parole is re-imprisoned due to a sentence imposed by a court. The original provision was inserted into section 77 on 1 July 2014 by the Corrections Amendment (Further Parole Reform) Act 2014.

In Mercorella v The Secretary to the Department of Justice [2015] VSC 18, the Supreme Court of Victoria found, among other things, that the relevant provision was not intended to encompass prison sentences imposed outside of Victoria and queried whether it applied to

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1 The phrase ‘Victoria or elsewhere’ overcomes the usual rule that Victorian statutes are limited to Victoria: see Interpretation of Legislation Act 1984, s. 48(2).
2 Mercorella v The Secretary to the Department of Justice [2015] VSC 18, [30]. Compare Criminal Procedure Act 2009, s. 87(1), which forbids the Magistrates’ Court of Victoria from issuing a custodial sentence in offender’s absence.
3 Crimes (Sentencing Procedure) Act 1999 (NSW), ss. 5-7. See also Sentencing Act 1995 (NT), s. 488.
4 Charter s. 21(2).
offences committed before the parole period. The amendment in the Bill clarifies that the cancellation of parole provision is intended to apply in those circumstances.

Clause 3 should be considered in the broader context of the Corrections Act. Before sentencing, under existing section 77 of the Corrections Act parole may be cancelled if a prisoner on parole is charged with or convicted of an offence. For example, if a prisoner on parole leaves Victoria without permission, it is an offence and the offender can be arrested and detained under the Corrections Act 1986.

Parole may be cancelled even in the absence of a criminal charge or before a criminal charge is laid. As the Supreme Court of Victoria recently held in Marrogi v The Secretary of the Department of Justice [2015] VSC 300 at [34], the Adult Parole Board has power to cancel parole if it is satisfied that cancellation is necessary for the safety and protection of the community, whether or not the prisoner on parole has breached any of the conditions of their parole.

Clause 3 confirms that a person cannot be in prison under another sentence and be on parole at the same time. This is because a prisoner cannot comply with parole conditions such as a residence condition, curfew or community treatment conditions while detained in prison. A new prison sentence ordinarily demonstrates a risk to community safety, even if the offending was committed before the parole period.

Terms of imprisonment wholly served in the community are not intended to be the subject of clause 3. Due to the Supreme Court case of Mercorella, the phrase 'prison sentence' in the Corrections Act has been replaced with the phrase 'term of imprisonment' because the Supreme Court found 'prison sentence' was limited to those sentences only imposed in Victoria.

In New South Wales and other jurisdictions some terms of imprisonment may be served in the community, such as an intensive correction order, and have the legal status as a term of imprisonment. This was also the case in Victoria until intensive corrections orders were abolished on 16 January 2012. Suspended sentences were also abolished for all offences in Victoria on 1 September 2014. For example, clause 3 excludes wholly suspended sentences. These sentences were replaced by the community correction order (CCO). In Victoria’s sentencing hierarchy, the CCO is the only community based sentence before imprisonment. Under the Sentencing Act 1991 imprisonment is a custodial order.5

In this context, like 'prison sentence', the phrase 'sentenced to another term of imprisonment' in the Corrections Act ordinarily means a sentence served incarcerated in a prison (which may include a period in a police gaol). 'Term of imprisonment' is often used interchangeably with 'prison term'.6

Even if the new sentence imposed by the court is one served in the community such as a CCO, the Adult Parole Board may still exercise its discretion under existing section 77 of the Corrections Act to cancel parole.

Clause 3 applies if the prison sentence is imposed by a court in Victoria or elsewhere. The phrase 'in Victoria or elsewhere' used in clause 3 is not new. Existing sections 76 and 77(7) of the Corrections Act use that phrase. For example, clause 3 applies if a New Zealand sentencing court re-imprisons a person who is on parole in Victoria at the time of new sentence.

Sentencing outcomes are reported to the Adult Parole Board. The Board then considers the matter. A sentence imposed for a historical offence and an overseas sentence is considered


6 'Prison' also includes a transition centre: section 4 of the Corrections Act 1986. For example see Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen [2014] VSCA 342.
in context, including the nature and gravity of the offending and current circumstances of the offender. The Board would take into the rarity of a sentence imposed outside Victoria in the absence of a prisoner on parole. The Board may revoke a cancellation of parole and re-grant parole. In deciding whether to re-grant parole, the Board must give paramount consideration to community safety and protection. The amendments in the Bill reflect the fundamental principle that parole is a privilege, not a right.

Thank you for raising this important matter.

Hon Wade Noonan MP
Minister for Corrections

13 August 2015

The Committee thanks the Minister for this response.

Committee Room
17 August 2015

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7 In accordance with existing sections 73A, 77A and 78 of the Corrections Act 1986.
### Appendix 1

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<td>Education and Training Reform Amendment (Child Safe Schools) Bill 2015</td>
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<td>Education and Training Reform Amendment (Funding of Non-Government Schools) Bill 2014</td>
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<td>Education and Training Reform Amendment (Miscellaneous) Bill 2015</td>
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<td>Emergency Management (Control of Response Activities and Other Matters) Bill 2015</td>
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<td>Energy Legislation Amendment (Publication of Retail Offers) Bill 2015</td>
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<td>Infrastructure Victoria Bill 2015</td>
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<td>Interpretation of Legislation Amendment Bill 2015</td>
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<td>Judicial Entitlements Bill 2015</td>
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<td>Jury Directions Bill 2015</td>
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<td>Legal Profession Uniform Law Application Amendment Bill 2015</td>
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<td>Limitation of Actions Amendment (Child Abuse) Bill 2015</td>
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<td>Local Government Legislation Amendment (Environmental Upgrade Agreements) Bill 2015</td>
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<td>Mental Health Amendment Bill 2015</td>
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<td>National Parks Amendment (Prohibiting Cattle Grazing) Bill 2015</td>
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<td>Parliamentary Committees and Inquiries Acts Amendment Bill 2015</td>
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<td>Public Health and Wellbeing Amendment (Hairdressing Registration) Bill 2015</td>
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<td>Regional Development Victoria Amendment (Jobs and Infrastructure) Bill 2015</td>
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<td>Road Safety Amendment (Private Car Parks) Bill 2015</td>
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<td>Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2015</td>
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<td>Sentencing Amendment (Correction of Sentencing Error) Bill 2015</td>
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<td>State Taxation Acts Amendment Bill 2015</td>
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<td>Statute Law Repeals Bill 2014</td>
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<td>Statute Law Revision Bill 2014</td>
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<td>Alert Digest Nos.</td>
<td>Bill Description</td>
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<td>1</td>
<td>Summary Offences Amendment (Move-on Laws) Bill 2015</td>
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<td>Veterans and Other Acts Amendment Bill 2015</td>
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<td>Victoria Police Amendment (Validation) Bill 2015</td>
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<td>Wrongs Amendment (Asbestos Related Claims) Bill 2014</td>
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<td>5, 6</td>
<td>Wrongs Amendment (Prisoner Related Compensation) Bill 2015</td>
</tr>
</tbody>
</table>
Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly on rights and freedoms

Wrongs Amendment (Prisoner Related Compensation) Bill 2015 5, 6

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

Back to Work Bill 2014 1, 2
Corrections Legislation Amendment Bill 2015 8
Crimes Amendment (Child Pornography and Other Matters) Bill 2015 9
Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Bill 2015 6, 7
Justice Legislation Amendment Bill 2015 – House Amendment 6, 7
# Appendix 3
## Ministerial Correspondence 2015

### Table of correspondence between the Committee and Ministers or Members during 2015

*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.*

<table>
<thead>
<tr>
<th>Bill Title</th>
<th>Minister/ Member</th>
<th>Date of Committee Letter / Minister’s Response</th>
<th>Alert Digest No. Issue raised / Response Published</th>
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<tbody>
<tr>
<td>Crimes Amendment (Child Pornography and Other Matters) Bill 2015</td>
<td>Attorney-General</td>
<td>18-08-15</td>
<td>9 of 2015</td>
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</table>
Appendix 4
Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 17 August 2015.

Statutory Rules Series 2015
SR No. 55 – Gambling Regulations 2015
SR No. 61 – Road Management (Works and Infrastructure) Regulations 2015
SR No. 73 – Transport (Infringements) Amendment Regulations 2015
SR No. 74 – Transport (Ticketing) Amendment (Bus Drivers’ Obligations) Regulations 2015
SR No. 75 – Transport (Ticketing) Amendment (Prescribed Devices and Processes) Regulations 2015
SR No. 76 – Transport (Safety Schemes Compliance and Enforcement)(Infringements) Amendment Regulations 2015
SR No. 78 – Road Safety (Drivers) Amendment (Renewal Fees) Interim Regulations 2015
SR No. 79 – Road Safety (Drivers) and (Vehicles) Amendment (Fees) Regulations 2015
SR No. 80 – Plant Biosecurity Further Amendment Regulations 2015
SR No. 82 – Emergency Management (Critical Infrastructure Resilience) Regulations 2015
SR No. 83 – Regional Development Regulations 2015
SR No. 84 – Road Safety (Drivers) Amendment (Driver Licence) Regulations 2015
SR No. 85 – Road Safety (Traffic Management) and (General) Amendment (Stock Crossings) Regulations 2015
SR No. 86 – Road Safety Road Rules Amendment (Stock Crossings) Regulations 2015
Legal Profession Uniform Regulations 2015

Legislative Instruments
Legal Profession (Approved Clerks Trust Account) Rules 2015
Domestic Animals Act 1994 – Section 5 Order
Greater Metropolitan Cemetery Trust Scale of Fees and Charges
Southern Metropolitan Cemetery Trust Scale of Fees and Charges