

No. 10 of 2014

Tuesday, 19 August 2014
on the following Bills

Children, Youth and Families
Amendment (Permanent Care and
Other Matters) Bill 2014

Crimes Amendment (Abolition of
Defensive Homicide) Bill 2014

Criminal Organisations Control and
Other Acts Amendment Bill 2014

Electoral Amendment Bill 2014

Emergency Management Amendment
(Critical Infrastructure Resilience)
Bill 2014

Gambling and Liquor Legislation Further
Amendment Bill 2014

Local Government Legislation
Amendment (Environmental Upgrade
Agreements) Bill 2014

Resources Legislation Amendment
(BTEX Prohibition and Other Matters)
Bill 2014

Sentencing Amendment (Emergency
Workers) Bill 2014

Tobacco Amendment Bill 2014

Transfer of Land Amendment Bill 2014

The Committee



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Member for Eastern Metropolitan



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Member for Pascoe Vale



Ms Ann Barker MLA
Member for Oakleigh



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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 *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

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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 from 1 July 2013 one penalty unit equals \$144.36)

'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. 10 of 2014

Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014

Introduced	6 August 2014
Second Reading Speech	7 August 2014
House	Legislative Assembly
Member introducing Bill	Hon Mary Wooldridge MP
Portfolio responsibility	Minister for Community Services

Purpose

The Bill amends the *Children, Youth and Families Act 2005* to make further provision for the protection and permanent care of children. The new protection orders introduced by the Bill are:

- family preservation orders
- family reunification orders
- care by Secretary orders
- long term care orders
- permanent care orders
- amend provisions relating to contact conditions
- require Aboriginal children placed in out-of-home to have a plan made to support their cultural needs when they are first placed in care
- provide that statements made by children participating in treatment voluntarily are not admissible in criminal proceedings of the child
- abolish the Youth Residential Board and transfer its functions to the Youth Parole Board
- provide for group conferences where the Children's Court is considering making certain youth justice orders
- increase penalties for offences relating to child protection
- enable entry to private premises in the execution of a warrant issued on the cancellation of parole of young persons
- provide consistent timeframes for lodging court reports
- change the timeframes for lodging an application for breach of a good behaviour bond
- further improve the operation of that Act.

The Bill also amends the *Commission for Children and Young People Act 2012* (the Commission) relating to the requirement to consult persons or service providers, likely to be adversely effected by a report by the Commission to the Secretary or the Minister, following an inquiry.

The Bill makes consequential amendments to other Acts.

Submission

The Committee has received a written submission from the Law Institute of Victoria and will consider the submission at a future meeting.

Content

Delayed commencement of more than 12 months

The Bill provides that some of its provisions may not commence operation until 1 March 2016. In respect to the delayed commencement the explanatory memorandum provides: **[2]**

The remaining provisions will come into operation on a day or days to be proclaimed, or, if not proclaimed sooner, on 1 March 2016. This allows time to prepare for the implementation of the extensive changes to the child protection system made by this Bill.

Power to enter private premises to execute warrants – Privacy

The Bill makes provision for entry to private premises to execute warrants. Extract from the statement of compatibility: **[113]**

Sections 456 and 460 of the Act provide for the issuing of warrants to apprehend young persons and return them to a youth justice centre or youth residential centre. However, there is no express or implied power to enter private premises to execute such a warrant. This has resulted in young persons avoiding apprehension, and poses risk to the safety of the young person and members of the community. Clause 119¹ inserts a new provision into the Act authorising entry into premises under warrant where the person is believed to be located and the use of reasonable force to do so.

Although this involves interference with the privacy of the occupier of the premises, I consider that the interference is neither unlawful nor arbitrary and is therefore compatible with the right to privacy in section 13 of the Charter Act.

Charter report

The Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee notes that there are a number of cross reference errors to clause numbers in the Statement of Compatibility. The Minister wrote to the Committee indicating that she intended to table a revised Statement of Compatibility at the next opportunity.

The Committee makes no further comment

¹ The reference should be to clause 113 (Cancellation of parole) of the Bill.

Electoral Amendment Bill 2014

Introduced	5 August 2014
Second Reading Speech	6 August 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the:

- *Electoral Act 2002* to implement certain recommendations made by the Electoral Matters Committee (EMC) of the Parliament in its inquiry into the conduct of the 2010 State election and matters related thereto and to further improve the operation of electoral processes
- *Constitution Act 1975* to clarify that a Presiding Officer retains their administrative responsibilities after the expiry of the Parliament pending an election until their successor is chosen.

Extracts from the second reading speech:

... the Bill shortens the close of the roll period to three business days after the issue of the writ for general elections where the term of the Legislative Assembly expires. However, the period will remain at seven days where the Assembly is otherwise unexpectedly dissolved or where there is a by-election, as these times are not fixed.

... The Bill implements amendments to the Electoral Act to simplify the witnessing requirements for postal voting applications and to allow for electors to apply for a postal vote online.

... The Bill also implements two further EMC recommendations. One is to provide for early voting to commence on the Monday after nominations close as opposed to the current commencement which is on the Friday on which nominations close.

... The Bill removes the requirement for a witness to attest to an elector's identity on enrolment forms, and instead provides that verification of identity requirements be prescribed by regulation.

... The Electoral Act contains provisions which allow the VEC² to refuse to register a political party where the party has a name which is likely to mislead or confuse voters. The Bill further strengthens these provisions by providing the VEC with the power to refuse to register party names if the name suggests a connection or relationship with an existing political party, where no such connection or relationship exists.

... The Bill therefore amends the Constitution Act to provide that the Presiding Officers' administrative responsibilities continue after expiry, as well as dissolution, of the Parliament, until their successors are chosen. This will include the responsibilities vested in the Presiding Officers under the Bill.

Charter report

The Electoral Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

² Victorian Electoral Commission.

Emergency Management Amendment (Critical Infrastructure Resilience) Bill 2014

Introduced	5 August 2014
Second Reading Speech	6 August 2014
House	Legislative Assembly
Member introducing Bill	Hon Kim Wells MP
Portfolio responsibility	Minister for Police and Emergency Services

Purpose

The Bill amends the *Emergency Management Act 2013* (the Act) by inserting a new Part 7A to provide for emergency risk management arrangements for critical infrastructure resilience.

New Part 7A of the Act makes provision for the assessment of critical infrastructure (services such as transport, fuel, water, electricity or as may be prescribed); the respective responsibilities of the Minister and responsible entities in relation to critical infrastructure; the establishment of a critical infrastructure register; an annual resilience improvement cycle comprising statements of assurance, risk management planning and documentation; an independent audit to be conducted by responsible entities; and the provision of reverse evidential onus offences and other offences in respect to responsible entities.

The Bill also makes consequential amendments to the *Freedom of Information Act 1982* to provide exemption for documents created under new Part 7A.

The Bill will repeal Part 6 of the *Terrorism (Community Protection) Act 2003* which contains the existing critical infrastructure protection provisions. The amendments reflect the fact the obligations in respect of essential services infrastructure will now fall under the new Part 7A of the Act.

Extract from the explanatory memorandum:

The principal aim of the Bill is to provide for new emergency risk management arrangements for Victorian critical infrastructure, including by establishing the Victorian Critical Infrastructure Register. In doing so, the Bill gives effect to key elements of the Victorian Critical Infrastructure Resilience Interim Strategy, which was released in December 2013, and sets out the framework to reform Victoria's emergency risk management arrangements for critical infrastructure.

Charter report

The Emergency Management Amendment (Critical Infrastructure Resilience) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Gambling and Liquor Legislation Further Amendment Bill 2014

Introduced	5 August 2014
Second Reading Speech	6 August 2014
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MP
Portfolio responsibility	Treasurer

Purpose

The Bill amends *Gambling Regulation Act 2003*, the *Liquor Control Reform Act 1998*, the *Victorian Commission for Gambling and Liquor Regulation Act 2011* (the VCGLR Act), and the *Gambling and Liquor Legislation Amendment (Modernisation) Act 2014*.

Extracts from the second reading speech:

... the Bill removes the requirement for Victorian businesses to obtain a permit from the VCGLR to conduct a trade promotion lottery. ... The Bill also provides for the period of registration or licensing of a bookmaker, bookmaker's key employee, bingo centre operator and commercial raffle organiser to be extended from 5 to 10 years.

... The Bill provides that authorised deposit-taking institutions may possess and dispose of gaming machines and gaming equipment by way of security under a financial agreement.

... The Bill will provide that a sports controlling body can make an application to the VCGLR for the banning of a particular bet type. In the event that a sports controlling body believes that a bet type or contingency carries integrity risks or is not in the public interest, the sports controlling body will be able to apply to the VCGLR to consider banning the bet type or contingency. Any ban of a sports betting contingency made by the VCGLR will apply to all sports betting providers.

... The Bill also increases the penalty for offering betting on events without an agreement with the relevant sports controlling body in place, assisting to ensure that sporting bodies receive a fair share of the revenues from betting on sports.

... The Bill also provides for mutual recognition of sports controlling bodies approved in another Australian jurisdiction provided that the approval process in that jurisdiction is equivalent to that in Victoria.

... The Bill provides for the collection of unclaimed money from gaming machines to occur in accordance with the *Gambling Regulation Act 2003* rather than the more complicated requirements of the *Unclaimed Money Act 2008*.

... The Bill also clarifies the method for calculating gaming machine taxation to make it clear that tax is calculated on the basis of the number of gaming machines connected to the monitoring system.

... The impact of planning and amenity issues on their business is a primary concern for the live music industry. In considering any complaint about whether a live music venue is affecting the amenity of the area in which the licensed premises is situated, the VCGLR will have a legislative obligation to consider whether the licensee was operating before any change occurred to the local area which raises concern about amenity.

Charter report

The Gambling and Liquor Legislation Further Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Local Government Legislation Amendment (Environmental Upgrade Agreements) Bill 2014

Introduced	6 August 2014
Second Reading Speech	7 August 2014
House	Legislative Council
Member introducing Bill	Hon Damien Drum MLC
Portfolio responsibility	Minister for Local Government

Purpose

The Bill amends the:

- *Local Government Act 1989* to enable Councils, including the City of Melbourne, to enter into environmental upgrade agreements
- *City of Melbourne Act 2001* to remove provisions relating to environmental upgrade agreements as a consequence of the amendments being made to the *Local Government Act 1989* which will enable all Councils to enter into environmental upgrade agreements.

Extracts from the second reading speech:

Under an environmental upgrade agreement, a lender provides finance to a building owner for upgrades, and the local council collects repayments in a property charge levied through the rates system. The council then passes the property charge onto the lender. This mechanism provides a greater level of security for lenders because environmental upgrade charges are a first charge on the land that takes priority over all other mortgages, charges on, or interests in the land. This enables lenders to offer more competitive loan terms.

The Bill also enables tenants to contribute to the costs of environmental upgrades. Standard commercial leases provide for tenants to pay outgoings, such as energy costs and council charges. Subject to the agreement of the affected tenants, they can contribute to the repayment of the environmental upgrade charges while receiving compensating benefits in the form of reduced energy costs and improved working conditions.

Charter report

The Local Government Legislation Amendment (Environmental Upgrade Agreements) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Resources Legislation Amendment (BTEX Prohibition and Other Matters) Bill 2014

Introduced	5 August 2014
Second Reading Speech	6 August 2014
House	Legislative Assembly
Member introducing Bill	Hon Russell Northe MP
Portfolio responsibility	Minister for Energy and Resources

Purpose

The Bill amends the *Geothermal Energy Resources Act 2005*, the *Greenhouse Gas Geological Sequestration Act 2008*, the *Mineral Resources (Sustainable Development) Act 1990* and the *Petroleum Act 1998* to prohibit the use of BTEX chemicals³ in hydraulic fracturing

The Bill makes other amendments to those Acts and amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2010* and the *Pipelines Act 2005*.

Extracts from the second reading speech:

... The Bill introduces a statutory condition restricting the adding of BTEX chemicals into hydraulic fracturing fluids in the *Mineral Resources (Sustainable Development) Act 1990*, the *Petroleum Act 1998*, the *Geothermal Energy Resources Act 2005* and the *Greenhouse Gas Geological Sequestration Act 2008*. BTEX refers to the chemicals benzene, toluene, ethylbenzene, and xylene, which are naturally occurring compounds found in petroleum products. These chemicals have been known to have harmful effects on human health.

... The Bill amends the *Mineral Resources (Sustainable Development) Act 1990* to offer enforceable undertakings to authority holders in relation to contraventions of the Act or regulations.

... The Bill amends the *Mineral Resources (Sustainable Development) Act 1990* to remove the requirement to mark out licences.

... The Bill also amends the *Mineral Resources (Sustainable Development) Act 1990* to extend an inspector's power of entry to include unauthorised worksites.

... The Bill amends the *Mineral Resources (Sustainable Development) Act 1990*, the *Petroleum Act 1998*, the *Geothermal Energy Resources Act 2005* and the *Greenhouse Gas Geological Sequestration Act 2008*, to provide for standard conditions on earth resources authorisations which will enable enforcement of obligations under the *Traditional Owner Settlement Act 2010*.

Content

Commencement by proclamation – Delegation of legislative power – Whether justified

Clause 3, 6, 13, 25, 63 and 69 come into operation on proclamation. These provisions relate to the statutory conditions prohibiting the use of BTEX chemicals.

³ BTEX refers to the chemicals benzene, toluene, ethylbenzene, and xylene which are naturally occurring compounds in petroleum.

The explanatory memorandum provides:

Clauses 3, 6, 13, 25, 63 and 69 relate to the statutory condition prohibiting the use of BTEX chemicals in hydraulic fracturing. In order for the statutory condition to take effect, substantial amendment to associated regulations will be required. At the time of writing, a moratorium is in place which has banned hydraulic fracturing in Victoria until at least July 2015. The moratorium will continue while scientific studies and community consultations are completed to inform the Government's decision making on this matter. The legislated ban on the use of BTEX chemicals in hydraulic fracturing will form part of the overall decision made on whether hydraulic fracturing can be completed within Victoria.

Charter report

The Resources Legislation Amendment (BTEX Prohibition and Other Matters) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Tobacco Amendment Bill 2014

Introduced	5 August 2014
Second Reading Speech	6 August 2014
House	Legislative Assembly
Member introducing Bill	Hon Mary Wooldridge MP
Portfolio responsibility	Minister for Health

Purpose

The Bill amends the *Tobacco Act 1987* to:

- ban smoking within the grounds of, and at and near entrances to all Victorian childcare centres, kindergartens or preschools, and primary and secondary schools
- ban smoking at and near entrances, to children's indoor play centres, and Victorian public premises, which are all Victorian public hospitals, registered community health centres and certain Victorian government buildings
- quadruple the penalty for possession of illicit tobacco by retailers and wholesalers to discourage trade in illicit tobacco
- amend the powers of entry for inspectors to enhance enforcement of outdoor smoking bans.

Note from the explanatory memorandum:

The Bill will insert a number of new outdoor smoking bans into the Principal Act which expand on the 2012 and 2013 amendments. These amendments prohibited smoking between the flags at patrolled beaches and within a 50 metre radius of each of those flags, in outdoor areas of public swimming pool complexes and at and in the vicinity of outdoor public children's playground equipment, outdoor public skate parks and outdoor sporting venues during underage sporting events. It is intended that the new smoking bans will further limit exposure to second hand smoke, de-normalise smoking, minimise littering and improve public amenity.

Charter report

The Tobacco Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Transfer of Land Amendment Bill 2014

Introduced	5 August 2014
Second Reading Speech	6 August 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MP
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Transfer of Land Act 1958* (the Act) to facilitate efficiencies in the conveyancing process by enabling the phasing out of paper certificates of title; facilitate nationally consistent conveyancing practices; and improve the efficiency and equity of the compensation scheme under the Act. Specifically the Bill amends the Act to:

- give the Registrar the power to decide whether to issue a paper certificate of title
- give the Registrar the power to cease issuing paper certificates of title and to declare that those issued have no effect from a specified date
- amend the provisions relating to the power of the Registrar to determine verification of identity requirements in order to provide clarity to stakeholders
- give the Registrar the power to set client authorisation and certification requirements for paper conveyancing transactions and any other amendments necessary to align paper and electronic processes and provide that the Registrar may require a certification in place of any evidence otherwise required to be presented to the Registrar
- introduce Priority Notices
- streamline the processes relating to mortgages
- remove the requirement for a mortgagee's consent to an instrument to be lodged with the Registrar and instead, provide that an instrument is not binding on a mortgagee if the mortgagee did not consent to it
- provide that a mortgage, variation of mortgage or transfer of mortgage, will be void if reasonable steps were not taken to verify the identity of the mortgagor
- provide that the rate of interest due on a fraudulent mortgage will be limited to a rate that represents reasonable borrowing costs
- give the Registrar the power to require that certain types of instruments be lodged electronically and to facilitate electronic processes
- give the Registrar the power to determine who can lodge certain types of instruments.

Charter report

The Transfer of Land Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Ministerial Correspondence

Crimes Amendment (Abolition of Defensive Homicide) Bill 2014

The Bill was introduced into the Legislative Assembly on 25 June 2014 by the Hon Edward O'Donohue MLC. The Committee considered the Bill on 4 August 2014 and made the following comments in Alert Digest No. 9 tabled in the Parliament on 5 August 2014.

Committee Comments

Charter report

Right to life / Security – no recourse to the defence of duress where voluntary association for the purpose of 'violent conduct'

Clause 322O provides a new defence of duress that applies to all offences. It replicates the current provision in s.9AG, *Crimes Act 1958*, but applies it to all offences (unlike s.9AG which only applies to fatal offences).

Clause 322O(3) provides an exception to the defence of duress where 'the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.'

'Violent conduct' is not defined in the Bill (or the current Act). The Committee notes that the explanatory memorandum states that the 'provision is designed to ensure duress cannot be relied upon by people voluntarily involved in criminal activities'. It appears that the term 'violent conduct' may be intended to be limited to criminal conduct.

If 'violent conduct' is construed more broadly to include non-criminal activities, depriving a person who is engaging in activities that are 'violent' of the defence of duress could limit their right to life (s 9(1), Charter) or their right to liberty and security (s 21(1), Charter), depending on the nature of the threat. This is because it puts the person in the situation of succumbing to the threat to their (or someone else's) life or personal security or face prosecution without being able to avail themselves of the defence of duress.

The Committee will write to the Attorney-General seeking clarification as to whether expressly limiting the exception to the defence of duress in clause 322O(3) to circumstances where the violent conduct is criminal conduct is less restrictive of the right to life and the right to liberty and security of the person than the current wording of the provision. Pending the Attorney-General's response, the Committee draws attention to clause 322O(3).

Minister's Response

Thank you for your letter dated 5 August 2014 outlining the concerns of the Scrutiny of Acts and Regulation Committee regarding new section 322O(3) of the *Crimes Act 1958* to be introduced by the above Bill.

You have sought further clarification as to whether new section 322O(3) should be limited to circumstances where the relevant violent conduct is also criminal conduct.

New section 322O(3) replicates section 9AG of the *Crimes Act 1958* (which currently applies in relation to fatal offences). Section 9AG was introduced following recommendations by the Victorian Law Reform Commission in its *Defences to Homicide: Final Report* (2004) and

reflects the common law (see discussion of *R v Hurley* [1967] VR 526 in the Criminal Charge Book [8.11.1]) and laws in other jurisdictions (including under the Commonwealth Criminal Code).

In my view, it is not necessary to expressly limit clause 3220(3) to circumstances where violent conduct is also criminal conduct. This is because violent conduct, whether through physical acts or the making of threats, would normally be unlawful. Accordingly, a further definition of violent conduct is unlikely to be any less restrictive of the right to life and to liberty and security of the person. Further, it may make the provisions in the Bill unduly complex for 'violent conduct' to be defined by reference to specific criminal offences.

For these reasons, I have formed the view that that the wording of section 3220(3) is appropriate and should remain in its current form.

I trust this information addresses the issue raised by the Committee. If I can provide any further information, please do not hesitate to contact me.

ROBERT CLARK MP
Attorney-General

15 August 2014

The Committee thanks the Minister for the response.

Criminal Organisations Control and Other Acts Amendment 2014

The Bill was introduced into the Legislative Assembly on 24 June 2014 by the Hon. Robert Clark MLA. The Committee considered the Bill on 4 August 2014 and made the following comments in Alert Digest No. 9 tabled in the Parliament on 5 August 2014.

Committee Comments

Charter report

Reputation – Confidentiality of witness summons – Publication of evidence

Summary: The effect of clauses 158 and 163 may be to permit or require the publication of defamatory claims about a person, which the person may not be able to contest in court. The Committee will write to the Attorney-General seeking further information as to the compatibility of these clauses with the Charter right of a person not to have his or her reputation unlawfully attacked.

The Committee notes that clause 158, amending existing s.20 of the *Major Crime (Investigative Powers) Act 2004*, specifies circumstances when the Supreme Court and Chief Examiner must or may give a person who has been given a witness summons a notice that the summons is a confidential document and that it is a criminal offence to disclose its existence, its subject-matter or any official matter connected with it. The new version of section 20 omits existing requirements that a notice must or may be given if a failure to do so respectively would or might 'prejudice the... reputation of a person'.ⁱ

The Committee also notes that clause 163, amending existing s.43, specifies circumstances when the Chief Examiner must direct that evidence must not be published or communicated by anyone. The new version of section 43 omits an existing requirement that a direction must be given if a failure to do so 'might prejudice the... reputation of a person'.ⁱⁱ

The Committee observes that a witness summons and evidence or documents adduced to the Chief Examiner may contain claims of serious misconduct about any person, including claims that a person has committed a serious offence. Witnesses who give evidence before the Chief Examiner have the same immunities as witnesses in the Supreme Court and therefore cannot be sued in defamation in respect of their evidence.ⁱⁱⁱ **The effect of clauses 158 and 163 may be to permit or require the publication of defamatory claims about a person, which the person may not be able to contest in court.** The Committee considers that clauses 158 and 163 may engage the Charter right of a person 'not to have his or her reputation unlawfully attacked'.^{iv}

The Statement of Compatibility does not discuss clauses 158 and 163. The second reading speech remarks:

The bill also amends the criteria the Supreme Court must consider when giving notices under section 20 of the Major Crime (Investigative Powers) Act... The provision protects witnesses who have been summonsed. However, under the new amendments, the effect on witness' reputation will no longer be a consideration for the court in determining when to make such a notice... As with the amendments to section 20 of the Major Crime (Investigative Powers) Act, the bill amends section 43(2) so that the effect on witness' reputation will no longer be a consideration for the court in determining

ⁱ Existing s. 20(2)(a), (3)(a)(i).

ⁱⁱ Existing s. 43(2).

ⁱⁱⁱ Existing s. 33.

^{iv} Charter s. 13(b).

when to restrict the publication and communication of evidence and identifying information.

However, the Committee observes that both the existing and new sections 20 and 43 regulate decisions by the Chief Examiner (in addition to or instead of courts) and are expressed to protect any 'person' (rather than just the summoned witness). As well, neither new section expressly states that 'witness' reputation will no longer be a consideration'.^v

The Committee notes that equivalent provisions governing the Australian Crime Commission, the NSW Crime Commission and Western Australia's Corruption and Crime Commission require the giving of a confidentiality or non-publication notice to protect the reputation of any person,^{vi} and that no equivalent provisions in Australia bar a crime commissioner from considering such effects.^{vii}

The Committee will write to the Attorney-General seeking further information as to the compatibility of clauses 158 and 163 with the Charter right of a person not to have his or her reputation unlawfully attacked. Pending the Attorney-General's response, the Committee draws attention to clauses 158 and 163.

Ministerial Response

Thank you for your letter of 5 August 2014 in relation to the above Bill. I have also read the discussion of the amendments in Alert Digest No.9 of 2014.

The *Major Crime (Investigative Powers) Act 2004* (the Act) creates a legislative scheme enabling persons who have information about an organised crime offence to be coercively examined about their knowledge of serious criminal activity.

The scheme provides for an application by a member of Victoria Police to the Supreme Court for a coercive powers order. Once such an order is made, the Supreme Court or the Chief Examiner can issue a witness summons to compel a person to attend an examination to give evidence and/or produce specified documents or things. The examination itself is held in private and the Chief Examiner may give directions as to who may be present.

In the context of serious organised activity, it is notorious that evidence is difficult to uncover because people are afraid to speak out or because people subscribe to a misguided 'code of silence'. The coercive scheme established in the Act seeks to overcome such difficulties by requiring a person to provide evidence. The evidence might assist criminal investigations or it might be produced in subsequent criminal prosecutions. The subsequent use of the evidence occurs in the normal course and it can be challenged in the same way as evidence that has been obtained in the ordinary course of an investigation.

It is important to understand that the Supreme Court can only make a coercive powers order after finding that there is an organised crime offence in which named offenders are involved and that it is in the public interest for the order to be made, taking into account the seriousness of the organised crime offence and the impact of the use of coercive powers orders on the rights of members of the community.

^v In the case of new section 20, it is possible that such effects may still be considered to the extent that any prejudice to someone's reputation would or may be 'contrary to the public interest': see new section 20(2)(b), (3)(b). In the case of new section 43, clause 163 only alters the circumstances where a non-publication direction 'must' be given, not when the Chief Examiner 'may' give such a direction: see existing s. 43(1).

^{vi} *Australian Crime Commission Act 2002* (Cth), ss. 25A(9), 29A(2)(a)(i), (b)(i); *Crime Commission Act 2012* (NSW), 45(2); *Corruption and Crime Commission Act 2003* (WA), s. 99(4)(a).

^{vii} *Crime and Misconduct Commission Act 2001* (Qld), ss. 84, 202; *Corruption and Crime Commission Act 2003* (WA), s. 151(4)(a).

The coercive examination scheme is one that takes place in private (unlike, for example, public hearings held by a Royal Commission). The purpose of the notice in section 20 is to protect a person who is required to give evidence before the Chief Examiner by prohibiting communication from the time of service of the summons or order until the person attends the examination. Section 43 restricts the publication and communication of evidence and information that identifies a person once they have given evidence.

The process requires the provision of evidence relevant to the organised crime offence in relation to which the coercive powers order was made. The evidence elicited in an examination remains confidential until and unless it is used in subsequent investigations or prosecutions, as such, the processes available under the scheme represent a reasonable limitation on an individual's Charter Act right to not have their reputation unlawfully attacked.

In the context of the purposes of the scheme and the threshold elements that must be satisfied, the amended provisions are a reasonable limitation on that right and are the outcome of a lawful process that is triggered by a judicial determination of the Supreme Court. I am satisfied that the provisions are compatible with the Charter Act.

I thank the Committee for drawing these matters to my attention.

ROBERT CLARK MP
Attorney-General

15 August 2014

The Committee thanks the Minister for the response.

Sentencing Amendment (Emergency Workers) Bill 2014

The Bill was introduced into the Legislative Assembly on 25 June 2014 by the Hon. Robert Clark MLA. The Committee considered the Bill on 4 August 2014 and made the following comments in Alert Digest No. 9 tabled in the Parliament on 5 August 2014.

Committee Comments

Committee comment

Insufficient explanatory material – Court may order sum to cover damage from besetting premises – Practice Note A.iv

The explanatory memorandum to clause 15 does not address clause 15(3), which amends existing s.52(2) of the Summary Offences Act 1966. The Committee notes that the apparent purpose of clause 15(3) is to empower a court to order that a person who is guilty of besetting premises pay a sum sufficient to cover damage resulting from the besetting.

The Committee observes that:

- the terms of new sub-section 52(2) refer to ‘assault, resistance... or delay’, but none of those terms appear in the offence of besetting premises in s.52(1A).
- the terms of new sub-section 52(2) appear to be limited to damage sustained by the person whose lawful right to enter, use or leave premises was impeded. The Committee notes that, in some instances (for example, where a commercial premises is beset), it is the owner of the premises who is more likely to have suffered damage (for example, because of the lost custom to the premises.)

In accordance with the Committee’s Practice Note (A.iv), the Committee will write to the Attorney-General seeking further explanation of clause 15(3).

Charter report

Non-consensual medical treatment – Offence to resist, obstruct, hinder or delay an ambulance or hospital emergency treatment employee

Summary: The Committee considers that, to the extent that a patient’s refusal of medical treatment may amount to resisting, obstructing, hindering or delaying an ambulance service employee or hospital emergency treatment employee attempting to provide medical treatment to the patient, clause 14 may engage the patient’s Charter right not to be subjected to medical treatment without his or her consent. The Committee notes that the Charter’s right against non-consensual medical treatment may be reasonably limited in the case of patients who lack the capacity to give informed consent. The Committee will write to the Minister seeking further information.

The Committee notes that clause 14, substituting existing s.51 of the *Summary Offences Act 1966*, provides (in new sub-section 51(2)) that a person ‘must not assault, resist, obstruct, hinder or delay an emergency worker on duty’. An ‘emergency worker’ includes a person employed or engaged by an ambulance service as an ambulance paramedic, an intensive care paramedic or in any other capacity to provide medical or other assistance to patients in an emergency, or a person employed or engaged to provide, or support the provision of, emergency treatment to patients in a hospital. Such persons are ‘on duty’ if they are ‘providing, or attempting to provide, care or treatment to a patient’.

The Committee observes that the equivalent offence in existing s.51(1) expressly provides in existing s.51(2) that it 'does not apply to a patient' who is being given treatment.^{viii} A possible purpose of existing s.51(2) is to ensure that patients retain the right to refuse medical treatment, including medical treatment provided by ambulance officers and hospital emergency treatment employees.

The Committee therefore considers that, to the extent that a patient's refusal of medical treatment may amount to resisting, obstructing, hindering or delaying an ambulance service employee or hospital emergency treatment employee providing that treatment, clause 14 may engage the patient's Charter right not to be subjected to medical treatment without his or her consent.^{ix} The Committee notes that the Charter's right against non-consensual medical treatment may be reasonably limited in the case of patients who lack the capacity to give informed consent. The Statement of Compatibility does not address clause 14 or the Charter's right to refuse medical treatment.

The Committee will write to the Minister seeking further information as to the compatibility of clause 14, to the extent that a patient's refusal of medical treatment may amount to resisting, obstructing, hindering or delaying an ambulance service employee or hospital emergency treatment employee providing that treatment, with the Charter's right not to be subjected to medical treatment without consent.

To the extent that new section 51 is intended not to limit a patient's right to refuse medical treatment, the Committee seeks further information from the Minister as to whether providing expressly to that effect in the text of new section 51 would be a less restrictive alternative reasonably available to achieve the section's purpose.

Minister's Response

I refer to your correspondence of 5 August 2014 in relation to the Sentencing Amendment (Emergency Workers) Bill 2014 (the Bill). I have reviewed the matters raised in your correspondence and have provided further clarification below for consideration at your meeting on 18 August 2014.

Protection from medical treatment without consent

The abrogation or limitation of the right of a patient to refuse medical treatment would require unambiguous legislative intent. There is no legislative intent for the new offences targeting assaults against emergency workers to limit a person's right to refuse medical treatment under the common law or as set out in section 10(3) of the *Charter of Rights and Responsibilities Act 2006* (the Charter Act).

The common law provides that medical treatment can only be administered with an individual's consent, except in certain circumstances (see *Hunter and New England Area Health Service v A (2009) 74 NSWLR 88* and *Brightwater Care Group Inc v Rossiter (2009) WASC 229*). This is supported by a general presumption that an adult person is capable of deciding whether to consent to or to refuse medical treatment. As such, the lawful refusal of medical treatment would not amount to resisting, obstructing, hindering or delaying an emergency worker on duty. To provide treatment contrary to a lawful refusal of treatment would itself be unlawful and may constitute an offence against the person to whom it is provided. Further, a patient can invoke the defence of self-defence to a charge of resisting a health practitioner if he or she resists treatment that, because it is given without consent, constitutes a battery.

^{viii} Compare *Health Services Act 1997* (NSW), s. 67J, which is limited to a person obstructing or hindering an ambulance officer attempting to provide services to another person, and *Emergency Workers (Obstruction) Act 2006* (UK), s. 1, which contains an exception for a 'reasonable excuse'.

^{ix} Charter s. 10(c).

In relation to the Committee's observations with regard to sub-section 52(2) of the *Summary Offences Act 1966*, I am considering these matters further and will provide a response shortly.

ROBERT CLARK MP
Attorney-General

Received 18 August 2104

The Committee thanks the Minister for the response.

The Committee refers to Parliament for its consideration the question of whether or not, to the extent that new section 51 is intended not to limit a patient's right to refuse medical treatment, providing expressly to that effect in the text of new section 51 would be a less restrictive alternative reasonably available to achieve the section's purpose.

Committee Room
18 August 2014

Appendix 1

Index of Bills in 2014

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Appendix 2

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

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

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Appendix 3

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Table of correspondence between the Committee and Ministers and members during 2013-14

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Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	Education	18-02-14 26-02-14	2 of 2014 3 of 2014
Mental Health Bill 2014	Mental Health	06-03-14 24-03-14	3 of 2014 4 of 2014
Vexatious Proceedings Bill 2014	Attorney-General	06-03-14 22-03-14	3 of 2014 4 of 2014
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	Liquor and Gaming	06-05-14 23-05-14	5 of 2014 6 of 2014
Building Legislation Amendment Bill 2014	Planning	27-05-14 06-06-14	6 of 2014 7 of 2014
Melbourne Market Authority Amendment Bill 2014	Major Projects	24-06-14 30-07-14	8 of 2014 9 of 2014
Crimes Amendment (Abolition of Defensive Homicide) Bill 2014	Attorney-General	05-08-14 15-08-14	9 of 2014 10 of 2014
Criminal Organisations Control and Other Acts Amendment Bill 2014	Attorney-General	05-08-14 15-08-14	9 of 2014 10 of 2014
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