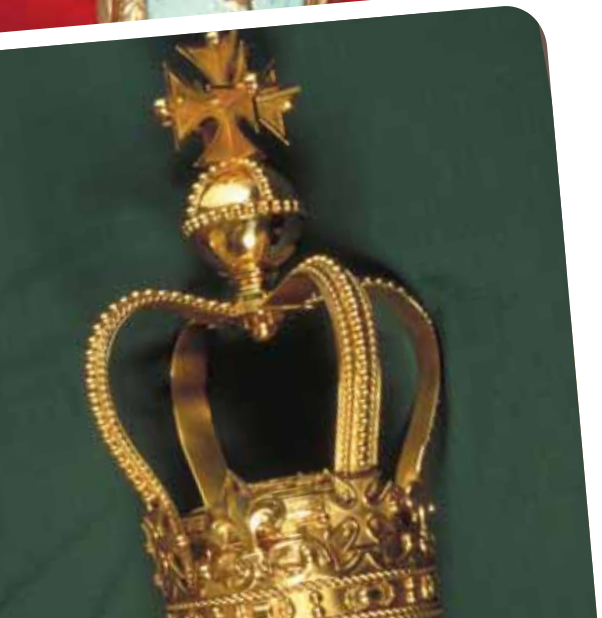

# 58th Parliament
# Alert Digest

## No. 10 of 2015

**Tuesday, 1 September 2015**
**on the following Bills**

Crimes Amendment (Child Pornography and Other Matters) Bill 2015

Firearms Amendment (Trafficking and Other Measures) Bill 2015

Heavy Vehicles Legislation Amendment Bill 2015

National Electricity (Victoria) Amendment Bill 2015

Public Health and Wellbeing Amendment (Safe Access) Bill 2015

Racing Amendment Bill 2015

Scrutiny of Acts and Regulations Committee

# The Committee

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Member for Pascoe Vale

Hon. Richard Dalla-Riva MLC
Deputy Chairperson
Member for Eastern Metropolitan

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Member for Sunbury

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# Terms of Reference - Scrutiny of Bills

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

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

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

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

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

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

# Table of Contents




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# Useful information

## Role of the Committee

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

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

## Interpretive use of Parliamentary Committee reports

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

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

## When may human rights be limited

Section 7 of the *Charter* provides –

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

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

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

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

(d) the relationship between the limitation and its purpose; and

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

## Glossary and Symbols

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

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

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

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

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

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

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

# Alert Digest No. 10 of 2015

## Firearms Amendment (Trafficking and Other Measures) Bill 2015

| | |
|---|---|
| **Introduced** | 18 August 2015 |
| **Second Reading Speech** | 19 August 2015 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Wade Noonan MLA |
| **Portfolio responsibility** | Minister for Police |

### Purpose

The Bill would amend the *Firearms Act 1996* to:

- reduce the number of unregistered firearms defined as a 'trafficable quantity' from 10 to 3 and expand the period during which trafficking can occur from 7 days to 12 months **[3, 6]**
- introduce higher penalties for persons who manufacture firearms other than in accordance with a firearms dealers licence **[5]**
- provide that a person is deemed to be in possession of a firearm if it is found 'on land or premises occupied by, in the care of or under the control or management of the person' or 'in a vehicle of which the person is in charge' **[7]**

The Bill would also amend the *Crimes Act 1958* to create a new offence of stealing a firearm, which would carry a higher penalty than for general theft **[9]**.

### Charter report

The Firearms Amendment (Trafficking and Other Measures) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment**

# Heavy Vehicles Legislation Amendment Bill 2015

| | |
|---|---|
| **Introduced** | 18 August 2015 |
| **Second Reading Speech** | 19 August 2015 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Luke Donnellan MLA |
| **Portfolio responsibility** | Minister for Roads and Road Safety |

## Purpose

The Bill is for an Act to:

- amend the *Heavy Vehicle National Law Application Act 2013* to provide for the use of a prescribed device (including a portable weighing device) to determine the mass of a heavy vehicle. The mass of a heavy vehicle determined in this way will be taken as proof of its mass in a proceeding for an offence against the Heavy Vehicle National Law (Victoria) (or the national regulations). **[4]**
- amend the *Road Safety Act 1986* to apply certain enforcement powers contained in Chapters 9 and 10 of the Heavy Vehicle National Law (Victoria) to the fatigue management of the drivers of light buses (a motor vehicle which seats more than 12 and has a maximum gross vehicle mass of 4.5 tonnes).

## Charter report

The Heavy Vehicles 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**

# National Electricity (Victoria) Amendment Bill 2015

| | |
|---|---|
| **Introduced** | 18 August 2015 |
| **Second Reading Speech** | 19 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 *National Electricity (Victoria) Act 2005* to provide the Minister and a person representing a consumer or user group with rights to intervene (under new section 29A) in appeals against decisions and determinations of the Australian Energy Regulator (AER) regarding Advanced Metering Infrastructure (AMI) charges.

Under existing section 29, electricity distributors can appeal, to the Australian Competition Tribunal, against a decision or determination under the AMI Order (which sets out the process for the recovery of costs incurred by electricity distributors for the rollout of AMI).

Currently, the Minister or a person who represents a consumer or user group must seek leave from the Australian Competition Tribunal to intervene in an appeal by an electricity distributor.

Under new section 29A, the Minister and a person representing a consumer or user group would have the right to intervene in an appeal without having to seek leave from the Australian Competition Tribunal and would be entitled to raise a ground of appeal that had not been raised by the appellant (i.e. the electricity distributor). **[4]**

Extract from the Second Reading Speech:

> The AER has set a budget, to be met by electricity distributors in installing advanced metering infrastructure. Electricity distributors cannot recover through AMI charges costs which are in excess of that budget, unless the AER determines that these excess costs are prudent and efficient.
>
> Although the roll-out of advanced metering infrastructure is substantially complete, and the budget period has ended, in 2016 electricity distributors may apply to the AER for a final assessment of costs incurred in the roll-out of advanced metering infrastructure. At this time, the AER will make a final determination of the prudency and efficiency of costs incurred by distributors in the advanced metering infrastructure roll-out and of related AMI charges. This determination will be subject to appeal to the Australian Competition Tribunal in accordance with the *National Electricity (Victoria) Act 2005*.
>
> If an electricity distributor chooses not to accept the AER's assessment of the prudency and efficiency of the costs the distributor incurred in installing advanced metering infrastructure, and appeals the AER's determination, the interests of electricity consumers should be represented in that appeal proceeding.

## Charter report

The National Electricity (Victoria) Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment**

# Public Health and Wellbeing Amendment (Safe Access) Bill 2015

| | |
|---|---|
| **Introduced** | 18 August 2015 |
| **Second Reading Speech** | 19 August 2015 |
| **House** | Legislative Council |
| **Member introducing Bill** | Ms Fiona Patten MLC |
| **Private Member's Bill** | |

## Purpose

The Bill is for an Act to amend the *Public Health and Wellbeing Act 2008* to provide for 'safe access zones' around premises offering 'reproductive health services'.

Reproductive health services are defined in new section 185A as 'services relating to advice, medication and treatment in respect of reproductive health, including the prevention and termination of pregnancy'.

The Bill would create an offence relating to 'prohibited behaviour' within a 'safe access zone', which is defined as an area within a 150 metre radius from premises where reproductive health services are provided. The offence would be subject to 500 penalty units (currently approximately $75,000) or a maximum of 12 months imprisonment (new section 185B).

Prohibited behaviour is defined in new section 185A as:

- besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding a person; or
- communicating about reproductive health services in a manner that is observable by a person who is accessing or attempting to access such services; or
- interfering with or impeding a footpath; or
- intentionally recording another person, without their consent, accessing or attempting to access premises at which reproductive health services are provided;
- or any other prescribed behaviour.

The Bill would also make it an offence to publish or distribute, without lawful excuse, a recording of a person accessing or attempting to access, premises at which reproductive health services are provided without that person's consent. This offence would also be subject to 500 penalty units or a maximum of 12 months imprisonment (new section 185C).

The Bill would also provide police with the power to seize any material that they believe on reasonable grounds was used, or is about to be used to commit an offence against section 185B or 185C (new section 185D).

## Content

***Trespasses unduly upon rights or freedoms – freedom of political communication – prohibition on communicating about reproductive health services in a manner observable by a person who is accessing or attempting to access such services***

Under section 17(a)(i) of the *Parliamentary Committees Act 2003*, the Committee is required to consider and report to Parliament on any Bill that trespasses unduly on rights or freedoms.

The High Court has found that there is an implied freedom of political communication contained in the Constitution and has formulated, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the following two-step test for determining whether a law is compatible with the implied freedom:

- Does the law effectively burden freedom of communication about government or political matters?
- If so, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure for submitting a proposed amendment of the Constitution to the people?[1]

There are two important exclusions in relation to the freedom. It does not protect non-political communications (such as purely commercial speech and communications solely concerning the exercise of judicial power), nor does it protect communications about non-federal matters (such as communication about discrete state issues or local government planning decisions).[2]

In other words, the implied freedom does not relate to communication on 'public issues' in general but to communications which 'illuminate the choice for electors at federal elections or in amending the Constitution' or which 'throw light on the administration of federal government'.[3]

While it is not beyond doubt, it seems reasonably likely that a court would find that prohibiting communication about reproductive health services in a manner that is observable by a person who is accessing or attempting to access such services is an issue of relevance to both state and federal government.[4] The exclusion in relation to non-federal communications may therefore not apply.

It is also important to note that the High Court has found that the freedom protects communicative activity that does not involve speech, such as the physical presence of protestors.[5]

Returning to the first limb of the *Lange* test, it seems clear that the proposed prohibition on communicating about reproductive health services with a person who is accessing or attempting to access such services does effectively burden the implied freedom. For example, the High Court has found in a number of cases that laws subjecting a person to criminal liability effectively burdened freedom of political communications.[6]

Turning to the second limb of the *Lange* test, the Committee notes that even if a law does pursue a 'legitimate' objective, it is also important to consider whether it is 'suitable, necessary and proportionate'.[7] As noted in the Charter report below, Tasmania's *Reproductive Health (Access to Terminations) Act 2013* (Tas) is similar to the current Bill but differs in some key respects:

- an 'access zone' is defined as an area within a radius of 150 metres from premises at which terminations are provided
- the definition of 'prohibited behaviour' does not include the act of 'communicating' within an access zone in a manner that is observable by a person who is accessing such premises

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1 See George Williams and David Hume, *Human rights under the Australian constitution*, 2nd edition, 2013, p. 172.

2 See George Williams and David Hume, *Human rights under the Australian constitution*, 2nd edition, 2013, pp. 184-186.

3 *Lange* (1997) 189 CLR 520, 571.

4 See George Williams and David Hume, *Human rights under the Australian constitution*, 2nd edition, 2013, p. 187.

5 See *Levy* (1997) 189 CLR 579, 594 (Brennan CJ).

6 See George Williams and David Hume, *Human rights under the Australian constitution*, 2nd edition, 2013, p. 193.

7 See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws, Interim Report*, July 2015, p. 93.

> but instead includes a 'protest in relation to terminations' within an access zone that can be seen or heard by such a person.

The Committee also notes the submission of the Human Rights Law Centre (HRLC) to the Tasmanian Parliament on the *Reproductive Health (Access to Terminations) Bill 2013*, which stated:

> Access zones will be consistent with international human rights law if they are tailored to achieve legitimate aims such as protecting the rights of women while avoiding any unnecessary limitation of freedom of expression or assembly. Some aspects of the proposed Bill may not strike this balance.[8]

The HRLC noted that in other jurisdictions, such as British Columbia in Canada, access zones apply only up to 50 metres from a clinic. It also stated that the 'severity' of the fines for 'prohibited behaviour' under the Bill (a maximum of $65,000 or 12 months imprisonment or both) 'should also be reconsidered to ensure that they are the "least restrictive" means of achieving the desired end.[9]

The HRLC went on to recommend that consideration should be given as to whether the radius of the access zone and the penalty for non-compliance could be reduced while maintaining safe access to clinics for clients and staff.[10]

The Committee also notes for the purposes of comparison that a person who contravenes a direction to move on under section 6 of the *Summary Offences Act 1966* is currently subject to a penalty of $758.35 (five penalty units).

**The Committee refers to Parliament for its consideration the question of whether or not new section 185B — by prohibiting a person from communicating about reproductive health services within 150m of premises at which such services are provided in a manner that is observable by people accessing those premises, and the associated penalty, — is a suitable, necessary and proportionate limitation on the implied freedom of political communication.**

## Charter report

***Expression – Reproductive health services – Prohibition of communicating within 150m of premises that is observable by people accessing premises – Whether lawful restriction – Whether reasonably necessary***

Summary: *The effect of new section 185B is to prohibit all communicating about services relating to advice, medication and treatment in respect of reproductive health within 150m of premises at which those services are provided that is observable by anyone accessing those premises. The Committee refers to Parliament for its consideration the question of whether or not new section 185B is a lawful restriction on the Charter's right to freedom of expression that is reasonably necessary to protect privacy rights and public health.*

The Committee notes that clause 3, inserting a new section 185B, makes it an offence to 'engage in prohibited behaviour within a safe access zone', punishable by up to 500 penalty units (presently around $75,000) or twelve months imprisonment. New section 185A provides that:

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8 Human Rights Law Centre, Submission on the *Reproductive Health (Access to Terminations) Bill 2013*, July 2013, http://www.hrlc.org.au/wp-content/uploads/2013/07/TAS_ReproductiveHealthBill_HRLC_Submission_July2013.pdf, p. 7.

9 Ibid.

10 Ibid.

- **'prohibited behaviour'** includes 'communicating in relation to reproductive health services in a manner that is able to be seen or heard by a person accessing, or attempting to access, premises at which reproductive health services are provided' (para (b) of the definition)
- **'reproductive health services**' means services relating to advice, medication and treatment in respect of reproductive health, including the prevention and termination of pregnancy'[11]
- **'safe access zone'** means an area within a radius of 150 metres from premises at which reproductive health services are provided'

**The Committee observes that the effect of new section 185B is to prohibit all communicating about services relating to advice, medication and treatment in respect of reproductive health within 150m of premises at which those services are provided that is observable by anyone accessing those premises.**

The Committee notes that clause 3 is broader than a similar Tasmanian law enacted in 2013 in three ways:

- new section 185B's prohibition applies to 'communicating' observable by anyone accessing a premises. By contrast, Tasmania's equivalent prohibition is of a similarly observable 'protest'.[12]
- new section 185B's prohibition applies to communicating in relation to 'services relating to advice, medication and treatment in respect of reproductive health, including prevention and termination of pregnancy.' By contrast, Tasmania's equivalent prohibition applies to protests in relation to 'terminations'.[13]
- new section 185B's prohibition applies to behaviour within 150m of and observable by people accessing premises at which 'services relating to advice, medication and treatment in respect of reproductive health, including prevention and termination of pregnancy' are provided. By contrast, Tasmania's equivalent prohibition applies to premises at which 'terminations' are provided.[14]

The Committee observes that new section 185B's prohibition extends beyond communications intended to dissuade people from terminating a pregnancy. For example, it may extend to positive or neutral communications (including directions and commercial signage) concerning any aspect of reproductive health (including fertility, conception, contraception, pregnancy and birth) outside any premises that provides services of advice, medication or treatment about reproductive health (including sale or provision of contraceptives, pregnancy tests, assisted reproduction, ultrasounds and midwifery services.)

The Committee considers that new section 185B, when read with para (b) of the definition of 'prohibited behaviour' in new section 185A, may engage Charter s. 15's right to freedom of expression, which provides:

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11 The terms of this definition appear to exclude the application of the general definition of 'health service' in s. 3, which is limited to services, premises or proprietors of day procedure centres, multi purpose services and hospitals.

12 *Reproductive Health (Access to Terminations) Act 2013* (Tas), s. 9(1) (para (b) of definition of 'prohibited behaviour')

13 *Reproductive Health (Access to Terminations) Act 2013* (Tas), s. 9(1) (para (b) of definition of 'prohibited behaviour')

14 *Reproductive Health (Access to Terminations) Act 2013* (Tas), s. 9(1) (definition of 'access zone'). Section 3(1) excludes 'supply or procurement of any thing for the purpose of discontinuing a pregnancy' and 'the administration of a drug or a combination of drugs for the purpose of discontinuing a pregnancy by a nurse or midwife acting under the direction of a medical practitioner' from the definition of 'terminate'.

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.

The Statement of Compatibility remarks:

> The provision of a safe access area is a critical component of this bill, as the activities reported outside of these clinics (including threats, harassment, verbal abuse, and singing loudly so as to be overheard in consultation rooms while women are receiving medical advice and treatment) heavily infringe of both the rights to privacy (section 13(a) of the charter act) of clients and staff, and the protection of public health (s15(3)(b)).
>
> I believe that this restriction is also in line with section 15(3)(2) of the charter act, which provides for such restrictions on freedom of expression for the protection of public health, as the activities outside these clinics represent a traumatising occurrence for women seeking lawful health services, as well as for the staff working at such a clinic. Reports of these issues deterring women from seeking health services further support the need to protect public health, and as such this is a proportionate, limited response designed to uphold the objectives of the Public Health and Wellbeing Act 2008.

The Committee notes that the Charter s. 15(3) provision that the right to freedom of expression 'may be subject to' measures to promote others' rights and public health only applies to 'lawful restrictions reasonably necessary' to achieve those ends.

The Committees observes that the European Court of Human Rights has said, applying an equivalent provision to Charter s. 15(3)'s provision that the right to freedom of expression may be 'subject to lawful restrictions':[15]

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

[15] *Sunday Times v UK* [1979] ECHR 1, [49].

The Committee notes that new section 185B's prohibition may be difficult for some citizens to understand, even with legal advice, for example whether or not:

- 'communications in relation to services… relating to advice, medication or treatment relating to reproductive health' include general statements about matters associated with some reproductive health services (e.g. about the sanctity of all life), prayers or songs associated with religions that oppose certain reproductive health services, general protests against federal or state laws regulating reproductive health, industrial action by reproductive health workers, commercial signage or advertising for reproductive health premises, on-site media reporting of reproductive health protests and conversations about a particular person's choices, options, circumstances or treatment relating to reproductive health.
- 'reproductive health' includes assisted reproductive technology and counselling; sexual counselling or merchandise; relationship advice and counselling; pregnancy advice, treatment, support or merchandise; and general health services for maternal health, or for men's or women's health.
- 'premises that provide reproductive health services' include general medical premises whose services include some reproductive health services (e.g. hospitals, doctors' surgeries, chemists and government health departments and agencies); and general stores that stock some reproductive health products (e.g. supermarkets and convenience stores that sell condoms.)

The Committee also observes that North American courts, applying similar constitutional provisions to Charter s. 15(3)'s provision that the right to freedom of expression may be subject to restrictions that are 'reasonably necessary', have ruled that:

- a court injunction barring all protests within 10m of a particular abortion clinic and imposing noise restrictions was reasonably necessary, while bans on images observable within the clinic and on approaching potential clinic patients within 90m of the clinic were not reasonably necessary.[16]
- a court injunction barring all counselling within 5m of the entrance to abortion clinics was reasonably necessary, while a bar on protests and counselling within 5m of anyone seeking to access such clinic (unless they consent) was not reasonably necessary.[17]
- a law barring anyone within 30m of the entrance to any health care facility from knowingly approaching within 2.5m of anyone without consent in order to protest, educate or counsel with signs, leaflets or speech was reasonably necessary.[18]
- a law barring all protests, advice, information or persuasion about abortion services within a zone prescribed by regulations up to 30m around a particular clinic was reasonably necessary.[19]
- a law barring anyone (other than patients, staff, police and passers-by) from knowingly entering or remaining on public footpaths within 10m of the entrance of any facilities (other than hospitals) providing abortions was not reasonably necessary.[20]

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16 *Madsen v Women's Health Centre Inc*., 512 US 753 (1994).

17 *Schenk v Pro-Choice Network of Western New York*, 519 US 357 (1997).

18 *Hill v Colorado*, 530 US 703 (2000).

19 *R v Spratt*, 2008 BCCA 340.

20 *McCullen v Coakley*, 573 US ___ (2014).

**The Committee refers to Parliament for its consideration the question of whether or not new section 185B, by prohibiting all communicating about reproductive health services within 150m of premises at which such services are provided that is observable by people accessing those premises, is a lawful restriction on the Charter's right to freedom of expression that is reasonably necessary to protect privacy rights and public health.**

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***Peaceful assembly – Impeding a footpath – Whether less restrictive alternative reasonably available***

Summary: *New section 185B's prohibition on 'impeding a footpath' within 150m of premises at which reproductive health services are provided is not subject to the Summary Offences Act's general requirement that the court be satisfied that there was undue obstruction of the footpath in the circumstances. The Committee will write to the Member seeking further information.*

The Committee notes that clause 3, inserting a new section 185B when read with para (c) of the definition of prohibited behaviour in new section 185A, prohibits 'impeding a footpath' within 150m of premises at which reproductive health services are provided. The offence is punishable by up to 500 penalty units (presently about $75,000) or twelve months imprisonment.

The Committee observes that the effect of new section 185B may be to prohibit people from gathering in a group on any footpath within 150m of premises at which reproductive health services are provided, whether or not doing so affects access to those premises.

The Committee considers that new section 185B, when read with para (c) of the definition of prohibited behaviour in new section 185A, may engage the Charter s. 16(1)'s 'right of peaceful assembly'.

The Statement of Compatibility remarks:

> Section 16(1) is predicated on the word 'peaceful', and the behaviour described in section 185A of the bill (including besetting, harassment, and communication pertaining to private medical services) does not fall within this category. Nor is any such assembly permitted to limit the rights of others through impeding access to health services, or distributing recordings in regards to private medical information.
>
> Preserving order in public places, and protecting the rights of others from infringement, will support the reasonable limitation of this right. I submit that this limitation is reasonable and justified, in that it does not prohibit assembly or association, but rather prohibits a set of behaviours that infringe on the rights of others.

The Committee notes that other Victorian prohibitions on anyone who 'obstructs a footpath' (such as s. 4(e) of the *Summary Offences Act 1966*, punishable by a fine of up to 5 penalty units) are subject to the following provision (in s. 5 of the *Summary Offences Act 1966*) that is apparently designed to minimise such prohibitions' impact on the right of peaceful assembly:

> Where in a prosecution for obstructing a footpath street or road under—
>
> (a) paragraph (e) of section 4; or
>
> (b) any local law made under section 111 of the Local Government Act 1989 or any corresponding previous enactment—
>
> the obstruction alleged is by assemblage of persons (not being a procession) or by any person or persons forming part of or connected with such assemblage the court shall not convict the accused unless it is satisfied that, having regard to all the circumstances of the case and to

> the amount of traffic which actually was at the time on the footpath street or road, there was undue obstruction thereof.

**However, new section 185B's prohibition on 'impeding a footpath' within 150m of premises providing reproductive health services is not subject to the requirements imposed by s. 5 of the *Summary Offences Act 1966*.**

**The Committee will write to the Member who introduced the Bill into the Legislative Council seeking further information as to whether or not applying s. 5 of the *Summary Offences Act 1966* (which provides that a court 'shall not convict the accused… in a prosecution for obstructing a footpath… by assemblage of persons.. unless it is satisfied that… there was undue obstruction' of the footpath in the circumstances) to new section 185B's prohibition on 'impeding a footpath' within 150m of premises providing a reproductive health service is a less restrictive alternative reasonably available to achieve clause 3's purposes of preserving order in public places and protecting the rights of others from infringement.**

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***Charter's savings provision for laws applicable to abortion – Safe access to reproductive health services – Whether Charter's provisions on interpretation, declarations and obligations of public authorities apply***

Summary: *The effect of the savings provision for laws applicable to abortion in Charter s. 48 may be that the Charter will not affect some or all of new Part 9A's regulation of behaviour within 150m of premises providing reproductive health services. The Committee will write to the Member seeking further information.*

Charter s. 48, a 'savings provision', provides:

> Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

The Committee notes the meaning of 'law applicable to abortion' in Charter s. 48 has not yet been the subject of judicial interpretation. Charter s. 48 may apply to a law such as new Part 9A that aims to provide safe access to premises providing services 'in respect of reproductive health, including the… termination of pregnancy.'

The Statement of Compatibility does not address Charter s. 48. **The Committee observes that the effect of Charter s. 48 may be that the Charter will not 'affect' some or all of Part 9A's regulation of behaviour within 150m of premises providing reproductive health services.**

The Committee notes that the meaning of 'affect' in Charter s. 48 has not been the subject of judicial interpretation. Charter s. 48's possible application to new Part 9A may mean that the Charter's provisions for:

- interpretation and declarations of inconsistent interpretation may not apply to new Part 9A;[21]
- scrutiny of legislation, interpretation and declarations of inconsistent interpretation may not apply to regulations made under new Part 9A, including the provision in para (e) of the definition of 'prohibited behaviour' for regulations to proscribe further behaviour within 150m of a reproductive health service;[22]

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21 Charter ss. 32, 36.

22 Charter ss. 32, 36; *Scrutiny of Legislation Act 1994*, ss. 12A, 12D, 21(1)(ha), 25A(1)(c).

- obligations for public authorities may not apply to enforcement of new Part 9A, including the police's seizure of material under new section 185D.[23]

**The Committee will write to the Member who introduced the Bill into the Legislative Council seeking further information as to whether or not the Charter's provisions on scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities will apply to new Part 9A, regulations made under it or its enforcement.**

**The Committee makes no further comment**

[23] Charter s. 38.

# Racing Amendment Bill 2015

| | |
|---|---|
| **Introduced** | 18 August 2015 |
| **Second Reading Speech** | 19 August 2015 |
| **House** | Legislative Assembly |
| **Member introducing Bill** | Hon. Martin Pakula MLA |
| **Portfolio responsibility** | Minister for Racing |

## Purpose

The Bill is for an Act to amend the *Racing Act 1958*, which would include the following amendments:

- alteration of the appointment provisions for the Board of Harness Racing Victoria to allow for the appointment of board members with skills other than the current requirements of business, marketing or industry experience **[6]**
- provision for the establishment of a Harness Racing Advisory Council to advise the Board on harness racing matters and to facilitate consultation between the Board and harness racing industry participants **[8]**
- provision for the appointment of an administrator to manage the harness racing industry if, in the Minister's opinion, the Board has failed in its management of the harness racing industry or if it is otherwise in the public interest to do so **[7]**
- the addition of Racing Analytical Services Limited as a body to which the Racing Integrity Commissioner can disclose integrity related information. The Act would also list a number of additional agencies to which the Commissioner would be able to disclose integrity related information — these agencies were previously specified via ministerial orders **[4].**

The Bill also provides for other minor and technical amendments to the Act.

## Charter report

The Racing 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

## Crimes Amendment (Child Pornography and Other Matters) Bill 2015

The Bill was introduced into the Legislative Assembly on 4 August 2015 by the Hon. Martin Pakula MLA. The Committee considered the Bill on 17 August 2015 and made the following comments in Alert Digest No. 9 of 2015 tabled in the Parliament on 18 August 2015.

## Committee comments

**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 that 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.[1]

The Committee observes that similar legal onuses on a person accused of possessing child pornography exist elsewhere in Australia;[2] however, the defences of classification and artistic merit are more important in Victoria than elsewhere because Victoria's definition of 'child pornography'[3], which includes any description or depiction of a minor engaged in sexual activity, does not require proof that the material is offensive or obscene.[4] The effect of existing s70(2) is that the accused could be convicted of possessing child pornography (and exposed to the new maximum penalty of 10 years imprisonment) if he or she possessed

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1 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.

2 *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), 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.

3 *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.

4 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.

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.[5]

**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.**[6]

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[5] 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.

[6] 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,[7] 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.[8] 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.[9] 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.**

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7 *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.

8 See new section 70AAAB(6) and (7).

9 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.[10] 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.[11] The Committee also notes that jurisdictions that have created general offences of 'hindering apprehension or prosecution' likewise typically limit such offences to such conduct.[12]

**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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10 Charter ss. 15(2), 25(2).

11 See also *Criminal Code* (Qld), s. 133(5).

12 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 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.[13]

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

[13] *Evidence Act 2008*, ss. 76, 79.

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'.[14]

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'.[15] 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'.[16]

**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.**

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**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,[17] 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

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14 *Evidence Act 2008*, ss. 8, 177.

15 *Criminal Procedure Regulation 2010* (NSW), reg 27A.

16 Charter ss. 24(1), 25(2)(g), (h).

17 *Crimes Act 1914* (Cth), s. 3LA.

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 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 465AA 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.[18] 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.[19]

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[18] *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).

[19] *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [155]-[156].

**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.[20] 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.[21]**

**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.)**

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**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'[22] 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

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20 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.

21 Compare *Confiscation of Criminal Assets Act 2003* (ACT), ss. 220, 255(3)(a); *Search and Surveillance Act 2012* (NZ), ss. 130(4), 138.

22 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.

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.

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'.[23]

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.[24] 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.[25] 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.[26] 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;**

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23 Charter s. 25(2)(b) & (d).

24 *Criminal Procedure Act 1986* (NSW), s. 281B; *Criminal Code* (Qld), s. 590AF.

25 *Criminal Procedure Act 1986* (NSW), s. 281D(1); *Criminal Code* (Qld), s. 590AO(2).

26 *Criminal Procedure Act 1986* (NSW), s. 281D(4); *Criminal Code* (Qld), s. 590AO(2)(f).

**are a less restrictive alternative reasonably available[27] to achieve the clauses' purposes of preventing a person accused of child pornography offences from viewing child pornography for his or her gratification.**

## Minister's response

Thank you for your letter dated 18 August 2015 outlining the queries of the Scrutiny of Acts and Regulations Committee (the Committee) in regard the Crimes Amendment (Child Pornography and Other Matters) Bill 2015 (the Bill).

**Child pornography offences — onus of proof in relation to offence**

In your letter you query whether the increase in the maximum penalty for possession of child pornography and new section 70AAAB(7) are compatible with the right to be presumed innocent until proved guilty.

Clause 4 of the Bill increases the maximum penalty for the offence of possession of child pornography from five to ten years imprisonment. This reform does not affect the existing elements of the offence, relevant defences, or the burden of proof.

As discussed in my second reading speech, this Bill constitutes the first stage of reforms to child pornography offences. A second stage of reforms is currently under consideration and I will consider your comments further as part of the development of further reforms. However, I note that the existing offence has been drafted in a manner that clearly establishes a legal burden on the accused to prove the defence. This is consistent with other defences in the Crimes Act 1958 and child pornography offences in other Australian jurisdictions.

Clause 6's new section 70AAAB(7) creates an exception for the new offence of administering a child pornography website where the material is or would be classified other than RC and X18+. Subsection (7) does not place an onus on the accused to prove the exception, and so the usual rule that the accused will bear only the evidential onus in relation to the exception will apply.

**Encouraging use of a child pornography website — no defence of classification**

You have raised the question of whether the omission of a defence for material that is or would be classified as other than X18+ or RC for the new offence of encouraging use of a child pornography website (new section 70AAAC) is compatible with the right to freedom of expression.

This encouraging offence is targeted at people who advertise, promote or otherwise encourage the use of websites containing child pornography. The person does not need to have any particular images in mind when they are encouraging the use of the website. It is the use of the website containing child pornography and not the accessing of particular images which is what is encouraged. It would be exceptionally rare that the person will in fact have any particular image in mind when encouraging use of the website. The offence would be of little use if it required the prosecution to prove that the accused encouraged another person to view or deal in a specific item of child pornography. Further, the offence will apply even if the person encouraged did not subsequently use the website to deal with child pornography. This is because the offence has a preventative focus.

The classification defence is used in some other offences. These offences all require the prosecution to prove that the offence involved specific child pornography. In the case of the encouraging offence, the prosecution is not required to prove that accessing specific items of

[27] Charter s. 7(2)(e).

child pornography was encouraged. Accordingly, the classification defence does not conceptually fit the nature and structure of the encouraging offence. This would mean that proof by the accused that a particular item that was accessible through the relevant website is classifiable would not address the substance of the criminality of the encouraging conduct. The defence would be at cross-purposes with the prosecution's case.

However, the issues you have raised will be considered further in the light of the second stage of reforms to child pornography offences.

**Legal advice regarding child pornography offences**

In your letter you ask if new section 70AAAD (offence of providing information with the intention of assisting a person to evade apprehension for child pornography offences) prohibits giving legal advice to a person who has or may have committed a child pornography offence.

Appropriate legal advice is not provided to a client with the intention that the client use that advice to avoid or reduce the likelihood of being caught for an offence. Rather, properly given legal advice is given with the intention that the client be able to exercise their legal rights.

To the extent that legal advice might, nonetheless, be thought to come within the scope of the information covered by this offence, it is well established that the right to claim legal professional privilege will only be displaced if it is expressly abrogated by legislation. The presumption may only be displaced by clear words or implication, which the Bill does not do.

**Random sample evidence**

A further matter raised is whether the Bill's random sample provisions will prevent the accused from challenging the admissibility of random sample evidence or from presenting their own expert evidence in such cases.

There is nothing in the Bill that will prevent an accused from questioning whether an authorised classifier is in fact an expert or otherwise cross-examining that witness. The Bill simply enables the prosecution to use random sample evidence; it does not give such evidence any greater evidential weight or special protection from cross-examination.

There is also nothing in the Bill to prevent an accused from having their own expert analyse the seized material, make findings about the material's composition, and to then use those findings in cross-examination to attack the findings of the authorised classifier. The Bill does not permit an accused to tender that evidence in a certificate form as evidence in chief. The accused would simply call that expert as a witness, which would be the normal process where an accused disputes the prosecution's evidence.

**Compelled production of computer passwords**

In your letter you query whether compelling production of computer passwords limits the privilege against self-incrimination.

In relation to the compelled production of computer passwords, a person who has been charged with an offence could potentially be subject to such a police direction, though in the great majority of cases the search warrant will be executed in relation to persons who have not yet been charged.

The Bill does not provide a use immunity in relation to material seized as a result of the disclosure of a password. To do so would undermine the central point of the new power, to enable police to access material that has been intentionally hidden or encrypted. A person who locked child pornography in a cupboard cannot prevent police breaking their way into that cupboard under a search warrant. Where the person has simply used a more

technologically sophisticated form of locking device (computer encryptions), they should not have any greater power to stymie police investigations.

**Access to evidence that is child pornography**

The final matter raised is whether restrictions on the accused inspecting evidence that exist in New South Wales and Queensland are a less restrictive way to prevent a person accused of child pornography offences from viewing child pornography.

The Bill does not draw any distinction between different kinds of child pornography for the purpose of restricting an accused's access to the material. The prospect of an informant not allowing access to witness statements which detail sexual offending is remote. Even if an informant did so, ultimately a court would determine the accused's access to the material.

In addition, under the Criminal Procedure Act 2009, the full brief and hand up brief must refer to any exhibits on which the prosecution intends to rely. Accordingly, the law already requires prosecutors to inform accused persons if there is an exhibit that includes child pornography. The Criminal Procedure Act then regulates the circumstances under which an accused may inspect an exhibit. The Bill is simply adding a new category of exhibit whose inspection by an accused is subject to restrictions.

Victoria has an existing statutory regime in place allowing prosecutors to restrict access to certain kinds of evidence. Introducing the New South Wales sensitive evidence regime alone would create inconsistencies and increased complexity. The proposed process in the Bill fits within the existing disclosure regime in Victoria and integrates disclosure processes into existing processes with which informants, practitioners and courts are familiar.

Finally, there is nothing in the Bill which would prevent an informant from permitting disclosure in controlled circumstance without a court order. If the accused were dissatisfied with the conditions imposed, he or she can apply to the court for an order permitting inspection under different conditions.

I hope this information is of assistance and I thank you for raising these issues.

**THE HON MARTIN PAKULA MP**
Attorney-General

29 August 2015

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

## Committee Room
## 31 August 2015

# Appendix 1

## Index of Bills in 2015

| | Alert Digest Nos. |
|---|---|
| Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2015 | 3 |
| Sentencing Amendment (Correction of Sentencing Error) Bill 2015 | 4 |
| State Taxation Acts Amendment Bill 2015 | 5 |
| Statute Law Repeals Bill 2014 | 1 |
| Statute Law Revision Bill 2014 | 1 |
| Summary Offences Amendment (Move-on Laws) Bill 2015 | 1 |
| Veterans and Other Acts Amendment Bill 2015 | 2 |
| Victoria Police Amendment (Validation) Bill 2015 | 6 |
| Wrongs Amendment (Asbestos Related Claims) Bill 2014 | 1 |
| Wrongs Amendment (Prisoner Related Compensation) Bill 2015 | 5, 6 |

# 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, 9 |
| Crimes Amendment (Child Pornography and Other Matters) Bill 2015 | 9, 10 |
| Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Bill 2015 | 6, 7 |
| Justice Legislation Amendment Bill 2015 – House Amendment | 6, 7 |
| Public Health and Wellbeing Amendment (Safe Access) Bill 2015 | 10 |

# 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.*

| **Bill Title** | **Minister/ Member** | **Date of Committee Letter / *Minister's Response*** | **Alert Digest No. Issue raised / *Response Published*** |
|---|---|---|---|
| Back to Work Bill 2014 | Treasurer | 24-02-15<br>*13-03-15* | 1 of 2015<br>*2 of 2015* |
| Wrongs Amendment (Prisoner Related Compensation) Bill 2015 | Attorney-General | 26-05-15<br>*03-06-15* | 5 of 2015<br>*6 of 2015* |
| Justice Legislation Amendment Bill 2015 – House Amendment | Attorney-General | 09-06-15<br>*19-06-15* | 6 of 2015<br>*7 of 2015* |
| Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Bill 2015 | Treasurer | 10-06-15<br>*22-06-15* | 6 of 2015<br>*7 of 2015* |
| Corrections Legislation Amendment Bill 2015 | Corrections | 04-08-15<br>*13-08-15* | 8 of 2015<br>*9 of 2015* |
| Crimes Amendment (Child Pornography and Other Matters) Bill 2015 | Attorney-General | 18-08-15<br>*29-08-15* | 9 of 2015<br>*10 of 2015* |
| Public Health and Wellbeing Amendment (Safe Access) Bill 2015 | Ms Fiona Pattern MLC | 01-09-15 | 10 of 2015 |

# Appendix 4
# Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 31 August 2015.

**Statutory Rules Series 2015**

No. 45 – Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) 2015

SR No. 66 – Victorian Civil and Administrative Tribunal (Fees) Further Amendment Regulations 2015

SR No. 67 – Electricity Safety (Electric Line Clearance) Regulations 2015

SR No. 69 – Subordinate Legislation (Dangerous Goods (HCDG) Regulations 2005) Extension Regulations 2015

SR No. 72 – Transport (Compliance And Miscellaneous)(Conduct on Public Transport) Regulations 2015

SR No. 81 – Guardianship and Administration (Fees) Amendment Regulations 2015