58th Parliament
Alert Digest

No. 10 of 2016

Tuesday, 16 August 2016
on the following Bills

Crimes Amendment
(Sexual Offences)
Bill 2016

Environment Protection Amendment
(Banning Plastic Bags, Packaging
and Microbeads)
Bill 2016

Equal Opportunity Amendment
(Equality for Students)
Bill 2016

Freedom of Information Amendment
(Office of the Victorian
Information Commissioner)
Bill 2016

Melbourne College of Divinity
Amendment Bill 2016

Owners Corporations Amendment
(Short-stay Accommodation)
Bill 2016
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;

Terms of Reference - Scrutiny of Bills
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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


‘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 2015 one penalty unit equals $151.67)

‘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
**Environment Protection Amendment (Banning Plastic Bags, Packaging and Microbeads) Bill 2016**

** Introduced **
25 May 2016

** Second Reading Speech **
22 June 2016

** House **
Legislative Council

** Member introducing Bill **
Ms Nina Springle MLC,
Member for South-Eastern Metropolitan

** Private Members Bill **

** Purpose **

The Bill would amend the *Environment Protection Act 1970* (the Principal Act) to:

- restrict the supply and sale of plastic bags (defined as a bag that is made in whole or in part of polyethylene, including bags that are marketed as reusable and degradable). Exceptions would apply to plastic bags:
  - supplied and used for medical or health-related purposes
  - supplied and used for policing or security purposes
  - declared exempt by the Minister under the new section 53ZI.
- restrict the supply and sale of certain plastic and polystyrene packaging
- prohibit the supply and sale of certain items that contain plastic microbeads.

** Content **

*Delegation of legislative power — Delayed commencement — Whether justified*

Clauses 5, 6 and 7 of the Bill would come into effect on 1 September 2017, i.e., more than 12 months after the date of the Bill’s introduction. The Explanatory Memorandum provides the following explanation for the delayed commencement of those clauses:

This is to provide for a 6-month transitional period before the restrictions on the sale and supply of plastic bags and certain plastic and polystyrene packaging come into effect.

The Committee is satisfied that the delay in the commencement of clauses 5, 6 and 7 is justified.

*Entry, search and seizure without a warrant*

Clause 7 of the Bill would amend the Principal Act to provide authorised officers with the power to enter ‘at any reasonable time’ any premises from which prohibited plastic bags or restricted packaging is (or is likely) being supplied, sold or manufactured and to search for and seize samples (new section 55(1)(c)).

The Committee notes that while the above power would be exercisable without a warrant, it is for the purpose of determining compliance with the Principal Act by a person who elects to engage in activities regulated by that Act.
Charter report

The Environment Protection Amendment (Banning Plastic Bags, Packaging and Microbeads) Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.
Equal Opportunity Amendment (Equality for Students) Bill 2016

Introduced 21 June 2016
Second Reading Speech 22 June 2016
House Legislative Council
Member introducing Bill Ms Sue Pennicuik MLC,
Member for Southern Metropolitan

Private Members Bill

Purpose

The Bill would amend the Equal Opportunity Act 2010 to remove the special exemption for religious schools (or a person or body that establishes, directs, controls or administers such a school) to discriminate against a student on the basis of their sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity (new section 84A and amended sections 82(2), 83(2) and 84). [4 to 7]

Charter report

Freedom of religion – Discrimination by schools against students in accordance with religious beliefs, doctrines or principles

Summary: Clauses 5 and 7 bar schools conducted in accordance with religious beliefs, doctrines or principles from discriminating against students on any ground other than religious belief or activity, unless the discrimination falls within other exceptions provided by the Act. The Committee will write to the member seeking further information.

The Committee notes that clauses 5 and 7 create an exception to existing s. 83. Existing s. 83 is a general exception to the Act’s prohibition of various forms of discrimination that allows a person or body to discriminate in some circumstances on various grounds in the course of running an educational institution that is conducted in accordance with religious beliefs, doctrines and principles. Clause 7, inserting a new section 84A, provides that existing s. 83 does not permit a person or body that runs a ‘school’ to discriminate against a student on any ground other than religious belief or activity. Clauses 4 and 6 place the same limitation on general exceptions allowing religious bodies and persons to discriminate in some circumstances.

The Second Reading Speech remarks that clause 7:

will have the practical effect of outlawing discrimination against school students on the basis of their sexuality or gender identity and female students on the basis of being pregnant and unmarried.

The Committee observes that the effect of clause 7 also extends to discrimination against school students on the basis of their lawful sexual activity and discrimination against male students (e.g. on the basis of causing a pregnancy outside of marriage) but that the Act only outlaws discrimination by the person or body administering a school (and therefore not by parents, students and, in some cases, employees of the school.) The effect of clauses 5 and 7 may also be limited by existing s. 42, which provides:

(1) An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students.

(2) In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, a standard must be taken to be reasonable

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if the educational authority administering the school has taken into account the views of the school community in setting the standard

This provision is unique to Victoria and has not been the subject of any court or tribunal decisions, e.g. as to whether ‘behaviour’ may include sexual acts or expression.

The Committee notes that the effect of clauses 5 and 7 is to bar schools conducted in accordance with religious beliefs, doctrines or principles from discriminating against students on any ground other than religious belief or activity, subject to other exceptions in the Act.

The Statement of Compatibility remarks:

I am of the view that any limits on the freedom of religion and belief of a person who establishes or runs a school are reasonable limits under section 7(2) of the charter, as they need to be balanced against the purpose of the limitation which is to prevent discrimination against students based on personal attributes of sex, sexual orientation, lawful sexual activity, gender identity, or their parental or marital status.

The bill does not have an unfair or disproportionate impact on the rights of religious schools to exercise their religious freedom. The effect of limiting the special religious exception would be that the directors or administrators of a religious school would have the same rights to discriminate under the Equal Opportunity Act as their counterparts at any non-religious school, including the same ability to apply for an exemption, if they have a valid reason to discriminate.

Any limits to freedom of religion also need to be considered against the right for all children to equality before the law under section 8 of the charter, and to have their best interests protected under section 17(2). In my view, there is no less restrictive means available of removing discrimination.

The Committee observes that some North American courts have considered whether bans on religious universities discriminating against tertiary students are compatible with constitutional rights to freedom of religion. The United States Supreme Court has upheld withholding tax credits from a university that barred its students from interracial dating; and, more recently, narrowly upheld a law school’s refusal to accredit a student club that required its students to foreswear homosexual conduct.¹ In 2001, the Supreme Court of Canada remarked:²

Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs.

In that case, the Court held that a decision by a teaching accreditation institution to not accredit an education department solely because the university’s code of conduct prohibited sexual intimacy outside of opposite-sex marriage failed to base its concerns on evidence of specific harm the university’s policy would cause. More recently, lower Canadian courts have divided on whether or not law societies can refuse to accredit that university’s law degree.³

² Trinity Western University v British Columbia College of Teachers, [2001] 1 SCR 772, [34]-[38].
³ Trinity Western University v Nova Scotia Barristers’ Society, 2015 NSSC 25, [270]-[271] (see also The Nova Scotia Barristers’ Society v Trinity Western University, 2016 NSCA 59, [4]); Trinity Western University v The Law Society of
The Committee notes that the majority of Australian jurisdictions either specifically permit discrimination in education for religious reasons on grounds that include sex, sexuality and pregnancy, or generally permit such discrimination in some circumstances by religious bodies (including bodies that run schools). New South Wales also completely exempts private schools from its prohibitions on discrimination on the grounds of sex, transgender, marital or domestic status, disability, homosexuality and age. By contrast, Queensland’s general exemptions for religious bodies do not permit discrimination in education and Tasmania’s general exemptions for religious bodies are limited to discrimination on the grounds of gender or religious belief, affiliation or activity.

The Committee observes that the effect of clause 7 is limited to an educational institution that is a ‘school’. However, the term ‘school’ is not defined in the Bill or the Act. The definition of ‘school’ in the Education and Training Reform Act 2006 is limited to ‘a place at or from which education is provided to children of compulsory school age during normal school hours’ and excludes home school, TAFEs, universities and a variety of bodies exempted by regulation. However, in ordinary usage, the word ‘school’ can bear a broader meaning that applies to bodies that teach specialised topics to people of any age, e.g. ‘swimming school’, ‘bible school’.

The Committee will write to the member seeking further information as to the meaning of ‘school’ in clause 7.

The Committee makes no further comment.

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4 Sex Discrimination Act 1984 (Cth), s. 38(3); Discrimination Act 1991 (ACT), s. 33(2); Anti-Discrimination Act 1977 (NSW), s. 56(d); Anti-Discrimination Act 1992 (NT), s. 51(d); Equal Opportunity Act 1984 (SA), s. 50(1)(c); Equal Opportunity Act 1984 (WA), s. 72(d) (and see also s. 73(3)). Queensland and South Australia removed provisions specifically permitting religious schools to discriminate on the ground of sexuality in 2002 and 2009 respectively: Discrimination Law Amendment Act 2002, ss. 17 & 18; Equal Opportunity Amendment (Miscellaneous) Act 2009 (SA), s. 26.

5 Anti-Discrimination Act 1977 (NSW), ss. 31A(3)(a), 38K(3); 46A(3); 49L(3)(a), 49ZO(3) & 49ZYL(3)(b).

6 Anti-Discrimination Act 1992 (Qld), s. 109(2); Anti-Discrimination Act 1998 (Tas), ss. 27(1)(a), 51A.
Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016

Introduced: 22 June 2016
Second Reading Speech: 23 June 2016
House: Legislative Assembly
Member introducing Bill: Hon. Martin Pakula MLA
Minister responsible: Hon. Martin Pakula MLA
Portfolio responsibility: Attorney-General

Purpose

The Bill would amend the Freedom of Information Act 1982 (the FOI Act) and the Privacy and Data Protection Act 2014 (the PDP Act 2014) to establish the Office of the Victorian Information Commissioner (OVIC).

The Information Commissioner would assume the existing functions of the Freedom of Information Commissioner (the FOI Commissioner) and of the Commissioner for Privacy and Data Protection, both of which would be abolished.

The Bill would also amend the Freedom of Information Act 1982 (the FOI Act) to:

- allow the Information Commissioner to review decisions made by Ministers and principal officers refusing to grant access to a document [21]
- allow the Information Commissioner to review decisions to exempt Cabinet documents [11, 21]
- reduce the current timeframes:
  - for agencies and Ministers to process FOI requests (from 45 to 30 days, with provision for extensions of time in limited circumstances) [8]
  - for an agency to lodge an application with VCAT for review of an OVIC decision from 60 to 14 days [44]
- provide for professional standards set by the Information Commissioner (regarding the administration of the FOI Act) to be: binding on agencies and principal officers without needing to be prescribed by regulation; and applicable to ministers. (Currently, professional standards are not binding on agencies unless prescribed by regulation and do not apply to ministers.) [7]
- provide the Information Commissioner with the power to conduct investigations under the FOI Act into an agency or principal officer (new Part VIB) and to exercise new coercive powers, including a power to compel agencies (in the form of a written notice served on a person) to produce a specified document or to give evidence (new Part VIC) [66]. (The Bill would also insert new Division 10 into Part 3 of the PDP Act to provide the Information Commissioner with largely identical coercive powers under that Act. [88])

The Bill would also amend:

- the Victorian Inspectorate Act 2011 to enable oversight by the Victorian Inspectorate of the use of OVIC’s new coercive powers under the Bill (Part 4) [107-127]
- the Independent Broad-based Anti-corruption Commission Act 2011 (the IBAC Act) to clarify that documents relating to IBAC investigations are exempt from freedom of information review if they are in the possession of IBAC [128-129]
• the Parliamentary Committees Act 2003 to allow the Accountability and Oversight Committee (AOC) oversight of the OVIC and to clarify the role of the Committee by adding to the list of findings and determinations under the FOI and PDP Acts that the AOC cannot reconsider. [130-132]

Charter report

Protection of children – Communication of personal information – Alternative notice requirements where person is a child.

Summary: Clause 17 inserts a new notice requirement into the Freedom of Information Act 1982 where a document is requested and the person required by that Act to be notified about the request is a child. The alternative notice provisions in the new section may not provide adequate protection to children. The Committee refers to Parliament for its consideration the question of whether or not clause 17 is a reasonable limit on the rights of children to protection in s. 17(2) of the Charter.

Clause 17 inserts a new s. 33A into the Freedom of Information Act 1982, which provides that for the purposes of ss. 33 and 35 of that Act, if the person who is required to be notified about a request for documents is a child, the agency or Minister may notify either or both the child and/or the parent. The section does not provide any guidance in relation to what factors are relevant to making the decision to notify either or both the child and parent, and if just one of them, which one.

Under s. 17(2) of the Charter children have the right to such protection as is in their best interests and is needed by reason of being a child. The notice provisions in ss. 33 and 35 allow a person an opportunity to object to the release of documents that contain information about them, or were provided by them in confidence, before those documents are released. In certain circumstances, this notice provision may not provide adequate protection to children. For example if notice is provided to a child under the new s. 33A (and not to their parent) the child’s privacy may not be adequately protected because the child may not be capable of effectively acting upon that notification. In other circumstances, the provision of notice to a child’s parent may not be in the child’s best interests (for example where an older child is involved or the child is not in the care of that parent). Equally, it may not be in the child’s best interests if the child themselves is not notified of the proposed release of documents in circumstances where the interests of the child and the interests of the parent do not coincide and the child wishes to make submissions about the release that are different to those that the parent makes.

The Committee observes that the effect of clause 17 is to allow notification of either a child and/or their parent, in circumstances where the choice of who to notify may afford significantly different protection to the child.

The Committee notes that the rights of children to protection in s. 17(2) of the Charter may be limited by the new s. 33A of the Freedom of Information Act 1982. The potential for the new section to limit the right of children to protection could be significantly reduced (and any limit on the right may be more likely to meet the reasonable limits test in s. 7(2) of the Charter) if the decision about whether to notify the child, the parent or both the child and the parent were required to be made on the basis of what is in the best interests of the child. The effect of clause 17 is not considered in the Statement of Compatibility.

The Committee will write to the Minister seeking further information as to the compatibility of clause 17 with the Charter’s right of children to such protection as is in their best interests.

The Committee makes no further comment.
Ministerial Correspondence

Crimes Amendment (Sexual Offences) Bill 2016

The Bill was introduced into the Legislative Assembly on 7 June 2016 by Hon. Martin Pakula MLA, Attorney-General. The Committee considered the Bill on 20 June 2016 and made the following comments in Alert Digest No. 9 of 2016 tabled in the Parliament on 21 June 2016.

Committee comments

Charter report

**Discrimination on the grounds of disability, gender identity and sex — Sexual penetration — External and surgically constructed male genitalia — Surgically constructed anuses, breasts and labia**

Summary: While clause 5 provides that the word ‘vagina’ includes external genitalia and a surgically constructed vagina, it does not provide similarly for penises, anuses, breasts and labia. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 5, inserting a new section 35A(2) into the Crimes Act 1958, provides that:

A person (A) sexually penetrates another person (B) if—

(a) A introduces (to any extent) a part of A’s body or an object into B’s vagina;

(b) A introduces (to any extent) a part of A’s body or an object into B’s anus; or

(c) A introduces (to any extent) their penis into B’s mouth;...

Other provisions provide for penetration by others, continued penetration, self-penetration and penetration of or by animals. The Bill uses these definitions to distinguish between different forms of non-consensual sexual offences, and to define the boundaries of incest and bestiality offences.

The Committee also notes that new section 35B provides that ‘[t]ouching may be sexual due to... the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female, or a person who identifies as female, the breasts.’ This provision is used to assist in identifying the boundaries of non-consensual sexual offences.

The Statement of Compatibility remarks:

A number of definitions and offences in the bill adopt terminology that recognise transgender and intersex status and promote anti-discrimination. For example, a number of offences in the bill contain an element that the accused touches another person and the touching is sexual. The definition of when touching is sexual in section 35B(2) refers to the breasts of a female or a person who identifies as female.

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The definition of self-penetration does not cover a person introducing (to any extent) their own penis into their own mouth. The definition of penetration by an animal applies to the definition used for humans and provides that ‘a reference to the vagina or anus includes a reference to any similar part, but does not provide similarly for references to a penis (e.g. a shark’s claspers.)

Existing s. 38, 39 and 43, and new sections 40A, 49B, 49C, 49D, 50C, 50D, 50E and 52B.

E.g. existing ss. 40 & 41 and new sections 45, 46, 47, 49D, 49E & 52C.
However, the Committee observes that, while clause 5, substituting existing s. 35, provides that:

vagina includes—

(a) the external genitalia; and

(b) a surgically constructed vagina.

it does not provide similarly for penises, anuses, breasts and labia. This may mean that the definition of sexual penetration (and, hence, the definitions of incest and bestiality, and the more serious forms of non-consensual sexual offences) does not extend to a person introducing his or her surgically constructed penis or external male genitalia (i.e. his or her scrotum) into someone’s mouth or introducing any object into a surgically constructed anus (i.e. a colostomy). As well, the reference to external genitalia in the definition of vagina may not extend to surgically constructed external genitalia (e.g. surgically constructed labia majora) and the reference to breasts in the definition of touching may not extend to surgically constructed breasts. Clause 5 therefore may engage the Charter’s right to equal protection of the law without discrimination on the grounds of disability, gender identity and sex.iv

The Committee notes that South Australia’s criminal law statute provides that ‘a reference to a breast, vagina, labia majora, penis or other sexual organ includes a reference to a surgically constructed or altered breast, vagina, labia majora, penis or sexual organ (as the case may be).v Statutes in the federal jurisdiction, the Australian Capital Territory, Queensland and Tasmania expressly provide for ‘surgically constructed or altered genitalia’, without reference to gender.vi

The Committee will write to the Attorney-General seeking further information as to whether the definition of sexual penetration inserted by clause 5 extends to the introduction of external or surgically constructed male genitalia into a person’s mouth or an object or body part into a surgically constructed anus, and whether the references to external genitalia in the definition of sexual penetration and to breasts in the definition of touching include surgically constructed external genitalia and breasts.

Equality – Privacy – Consensual sex between adults who are not biologically related – Adoptive siblings – Lineal step-relationships – People with a mental illness

**Summary:** The Committee refers to Parliament for its consideration the question of whether or not clause 16, by prohibiting penetrative sex between adult siblings by adoption; (in some circumstances) penetrative sex between adults in a lineal step-relationship; and casual penetrative sex between a person with a mental illness and a person who provides him or her with personal care or support services in a professional capacity, is compatible with the Charter’s rights against disability discrimination and arbitrary interferences in privacy.

The Committee notes that clause 16, inserting new sections 50D, 50E and 50F into the Crimes Act 1958, make it an offence for ancestors and descendants (including step-relationships) and siblings or half-siblings (including by siblings or half-siblings by adoption) to engage in sexual penetration. New sections 50H, 50I and 50J provide defences where:

- the accused did not consent to the penetration

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iv Charter s. 8. See Equal Opportunity Act 2010, s. 6(d), (e) & (o).

v Criminal Law Consolidation Act 1935 (SA), s. 5(3).

vi Crimes Act 1900 (ACT), s. 50. See also Criminal Code (Cth), ss. 71.8, 268.14, 268.59, 268.82; Crimes Act 1900 (ACT), s. 50; Criminal Code (Qld), s. 1; Criminal Code (Tas), s.1.
for sex with an ancestor, the accused was a child

for sex with a step-ancestor, the accused had not at any time been under the step-ancestor’s care, supervision or authority.

for sex with an adult step-descendant, the accused had never engaged in sexual activity with the step-descendant when he or she was a child and the step-descendant has not at any time been under the accused’s care, supervision or authority

New section 50K provides that consent is otherwise not a defence to any incest offence.

The Committee observes that the effect of clause 16 is to prohibit consensual penetrative sex between adults who are not biologically related and are:

- adult siblings by adoption (e.g. one party’s parents adopted the other party at any time, including after the first party was an adult)

- adults in a lineal step-relationship where one has ever been in the other’s care, supervision or authority (e.g. one party was in a relationship with a parent of the other party at any time when the other party was under 18

- adults in a lineal step-relationship who had ever engaged in a sexual activity when one party was a child (e.g. the parties had once engaged in lawful sexual activity when both were seventeen and one party later entered into a relationship with the other party’s parent.)

The Statement of Compatibility does not address new sections 50D, 50E and 50F. The European Court of Human Rights, when ruling that Germany’s prohibition on sex between biologically related opposite-sex siblings is compatible with the European Convention’s right to privacy, remarked: viii

The Court observes that there is no consensus between the member States as to whether the consensual commitment of sexual acts between adult siblings should be criminally sanctioned... Still a majority of altogether twenty-four out of the forty-four States reviewed provide for criminal liability. The Court further notes that all the legal systems, including those which do not impose criminal liability, prohibit siblings from getting married. Thus, a broad consensus transpires that sexual relationships between siblings are neither accepted by the legal order nor by society as a whole. Conversely, there is no sufficient empirical support for the assumption of a general trend towards a decriminalisation of such acts. The Court further considers that the instant case concerns a question about the requirements of morals. It follows from the above principles that the domestic authorities enjoy a wide margin of appreciation in determining how to confront incestuous relationships between consenting adults, notwithstanding the fact that this decision concerns an intimate aspect of an individual’s private life.

However, the Committee notes that Victoria is the only Australian jurisdiction that makes it an offence for adults in a step-relationship to have sex ix and that South Australia expressly

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vii New section 37(1)(a) deems all children to be under the care, supervision or authority of their step-parents (as well as parents, teachers, employers, health professionals, etc.) The Committee notes that the definition of step-parent in new section 37(2) ('includes the spouse or domestic partner of the person’s parent’) differs from the definition of step-parent in new section 50A (’means the spouse or domestic partner of the person’s parent’).

viii Stübing v Germany [2012] ECHR 656, [61].

ix See Crimes Act 1900 (ACT), s. 62(1)&(2) (which are limited to victims under 16); Crimes Act 1900 (NSW), s. 78A (and see R v Miller [2001] NSWCCA 209); Criminal Code (NT), s. 134; Criminal Code (Qld), s. 222(8) (and see R v Rose [2009] QCA 83); Criminal Law Consolidation Act 1930 (SA), s. 72; Criminal Code (Tas), s. 133. The ACT and WA laws only cover step-relationships if the victim is a child: Crimes Act 1900 (ACT), s. 62; Criminal Code (WA), s. 329.
excludes adoptive relationships from its incest law. The Committee also notes that federal law permits adults in step-relationships (but not siblings by adoption) to marry.

The Committee also notes that clause 16, inserting new section 52B, makes it an offence for anyone who ‘provides treatment or support services’ to a person who ‘has a cognitive impairment or mental illness’ to engage in sexual penetration with that person. New section 52A defines ‘mental illness’ to mean ‘a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory’ and ‘treatment or support services’ to mean ‘personal care or support services’ when ‘delivered in a professional capacity’. The Explanatory Memorandum explains that:

This excludes those who may provide assistance on an informal basis, such as a family member who cares for a person with a cognitive impairment or mental illness in their home, or a community member who occasionally assists a person with a cognitive impairment or mental illness to catch the bus. This non-professional and ad hoc assistance is not intended to be captured by these offences.

New section 52G provides an exception where the participants are married or in a domestic relationship with each other.

The Committee observes that the effect of clause 16 is to prohibit adults with a mental illness from having casual penetrative sex with someone who provides them with personal care or support services delivered in a professional capacity, whether or not the person’s illness impairs their ability to consent to sex, the services are related to the person’s illness or the sex is consensual. By contrast, existing s. 51 is limited to sex between a person who has an ‘impairment because of mental illness’ and another person who provides ‘medical or therapeutic services related to [that] impairment’. The Statement of Compatibility remarks:

These improvements recognise the particular vulnerability of persons with a cognitive impairment or mental illness, and promote their protection from sexual exploitation. The balancing of rights of persons with a cognitive impairment or mental illness to bodily privacy and freedom from cruel, inhuman or degrading treatment is prioritised over sexual autonomy in the limited circumstance of sexual conduct with workers or providers of treatment or support services. This is particularly important given the difficulties faced by persons with a cognitive impairment or mental illness in reporting sexual abuse within institutional contexts, and having that report proceed to prosecution.

However, the Committee notes that new section 52B is not limited to institutional contexts.

The Committee observes that no other Australian jurisdiction imposes a blanket prohibition on anyone with a mental illness having sex with a person who provides them with personal care or support services in a professional capacity. In New South Wales, the Northern Territory and Western Australia, the equivalent offence is limited to sex with a person with ‘a

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\[x\] Criminal Law Consolidation Act 1930 (SA), s. 72(3). The ACT, NSW, NT and Tasmanian laws do not specify whether or not adoptive relationships are covered. Queensland and (probably) Western Australia do cover adoptive relationships: Criminal Code (Qld), s. 222(5); Criminal Code (WA), s. 329(1).

\[xi\] Marriage Act 1961 (Cth), s. 23B (and see R v Rose [2009] QCA 83; R v AS [2016] QDC 80.)

\[xii\] New sections 52C, 52D and 52E regulate other sexual acts, but are subject to a requirement that the activity be contrary to community standards of acceptable conduct.

\[xiii\] The Explanatory Memorandum explains that ‘[t]he term mental illness is now defined separately as many forms of mental illness do not constitute a cognitive impairment as is medically defined’ and that, ‘[i]n line with existing offences, it is not an element of these offences that the complainant does not consent. That is because these offences are primarily intended to protect vulnerable persons from conduct that constitutes an abuse of a position of trust and an exploitation of the person’s vulnerability.’

\[xiv\] See existing ss. 50(1) & 51(4) and R v Patterson, unreported, County Court of Victoria, 29 March 1999 (as described by Victorian Law Reform Commission, Sexual Offences: Interim Report, 2003, [8.44].)
severe mental illness... that results in the person requiring supervision or social habilitation in connection with daily life activities’ or that makes him or her ‘incapable... of guarding himself or herself against sexual exploitation’.xv The equivalent offences in South Australia, Tasmania and Queensland provide a defence for consensual sex where there is no ‘sexual exploitation or ‘undue influence’.xvi

The Committee refers to Parliament for its consideration the question of whether or not clause 16, by prohibiting:

- penetrative sex between adult siblings by adoption
- penetrative sex between adults in a lineal step-relationship, where one party has ever been in the other’s care, supervision or authority, or where they had ever engaged in sexual activity when one party was under 18
- casual penetrative sex between a person with a mental illness and a person who provides him or her with personal care or support services delivered in a professional capacity

is compatible with the Charter’s rights against arbitrary interference in privacy and to equal enjoyment of human rights without discrimination on the ground of disability.xvii

Expression – Child abuse material – False or misleading representations resulting in a sexual act – Sexual activity resulting in fear or distress – Exposing a person’s anal or genital region in public

Summary: The Committee observes that new section 51A’s definition of ‘child abuse materials’ is wider than Victoria’s existing definition of ‘child pornography’ in two respects and that the Statement of Compatibility does not address other provisions of the Bill that may engage the Charter’s right to freedom of expression. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 16, inserting new section 51A into the Crimes Act 1958, defines ‘child abuse material’ to mean ‘material that’

(a) depicts or describes—

(i) a person who is, or who appears or is implied to be, a child—

(A) as a victim or torture, cruelty or physical abuse...; or

(B) as a victim of sexual abuse; or

(C) engaged in, or apparently engaging in, a sexual pose or sexual activity...; or

(D) in the presence of another person who is engaged in, or apparently engaged in, a sexual pose or activity; or

(ii) the genital or anal region of a person who is, or who appears or is implied to be, a child; or

(iii) the breast area of a person who is, or who appears or is implied to be, a female child; and

(b) reasonable people would regard as being, in the circumstances, offensive

xv Crimes Act 1900 (NSW), s. 61H(1A); Criminal Code (NT), s126; Criminal Code (WA), s. 330(1).
xvi Criminal Code (Qld), s. 216(4)(b); Criminal Law Consolidation Act 1935 (SA), s. 51; Criminal Code (Tas), s. 126(2);
xvii Charter ss. 8 & 13(a). See also Human Rights (Sexual Conduct) Act 1994 (Cth).
The Statement of Compatibility remarks:

This definition replaces the unclear and outdated notion of ‘indecency’ contained in the current definition of child pornography, by more clearly specifying what is child abuse material. It brings Victoria’s legislation into line with all other Australian jurisdictions, which have an ‘offensiveness’ standard in their definitions. Further, it contains an objective standard of the view of ‘reasonable persons’ and allows for the surrounding circumstances to be considered in determining ‘offensiveness’. The definition ensures that freedom of expression is only subject to such limits under the child abuse material offences as are lawfully necessary, in particular to respect the rights and reputation of other persons (being persons depicted in child abuse material) and for the protection of public morality.

While the child abuse material offences themselves provide limits to freedom of expression, there are several exceptions and defences which promote freedom of expression within acceptable lawful restrictions. These include exceptions and a defence applying to children, defences for an image of oneself, of a person within two years of the person’s age, or of a person’s spouse or domestic partner. There are also merit or purpose based defences, such as where material has artistic merit or a public benefit such as a medical, legal, scientific or educational purpose...

While the child abuse material offences create limits to the right to freedom of expression, these limits are such lawful restrictions as are reasonably necessary.

However, the Committee observes that new section 51A’s definition of ‘child abuse materials’ is wider than Victoria’s existing definition of ‘child pornography’\textsuperscript{xxvii} in two respects.

First, the definition now incorporates any description or depiction of a person under 18’s ‘genital or anal region’ or female breasts that reasonable people would regard as offensive, without any requirement that the description or depiction has a violent or sexual aspect. Apart from NSW,\textsuperscript{xx} all other Australian jurisdictions require proof that a description or depiction has a violent or sexual aspect before it can be classified as child abuse material.\textsuperscript{xx} For example, the equivalent federal definition only covers ‘material the dominant characteristic of which is the depiction, for a sexual purpose, of’ a genital or anal region or female breasts.\textsuperscript{xxi} The effect of new section 51A is to potentially criminalise production, possession and other dealings with non-violent and non-sexual descriptions or depictions of child nudity that, apart from material that reasonable people would not consider offensive or that would satisfy a defence such as classification, artistic merit or public interest.

Second, new section 51A defines ‘material’ to mean ‘any film, audio, photograph, printed matter, image, computer game or text’, ‘any electronic material’ and ‘any other thing of any kind’. By contrast, the existing definition of ‘child pornography’ is limited to ‘a film, photograph, publication or computer game’. In 2004, the Supreme Court of Victoria ruled that, under the existing formulation: \textsuperscript{xxii}

\textsuperscript{xxi} See Crimes Act 1958 (Vic), s. 67A.

\textsuperscript{xx} Crimes Act 1900 (NSW), s. 91FB (‘child abuse material’). See also Crimes Act 1900 (ACT), s. 64(5)(a) (‘child exploitation material’), which is limited to material ‘substantially for the sexual arousal or sexual gratification of someone other than the child’.

\textsuperscript{xx} Criminal Code (NT), s. 125A (‘child abuse material’); Criminal Code (Qld), s. 207A (‘child exploitation material’); Criminal Law Consolidation Act 1935 (SA), s. 62 (‘child exploitation material’), and see the requirement of ‘pornographic nature’; Criminal Code (Tas), s. 1A (‘child exploitation material’); Criminal Code (WA), s. 217A (‘child exploitation material’).

\textsuperscript{xxi} Criminal Code (Cth), s. 473.1.

\textsuperscript{xxii} R v Quick [2004] VSC 270, [94]-[95].
Written or pictorial matter comprising expressions of thought which are brought into existence privately by an individual for their exclusive private use and which are not intended or likely to be disseminated to others, does not constitute a publication. To construe the accused’s private writings as a publication would fall outside Parliament’s purpose, producing unintended consequences. It would involve a curtailment of the freedom of each individual to record their thoughts. The keeping of a diary or other record of a person’s fantasies or the writings of a teenage child concerning themselves, where they describe or depict pornographic conduct would be criminalised.

In making this ruling, Victoria’s Supreme Court followed a decision by the Supreme Court of Canada applying that nation’s constitutional right to freedom of expression to read Canada’s child pornography law as not applying to ‘[s]elf-created expressive material: i.e., any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use’. The effect of new section 51A may be to criminalise the creation and possession of such self-expressive material (including teenage diaries or texts) in Victoria if reasonable people would regard the material as offensive.

The Committee also notes that the Statement of Compatibility does not address the following other provisions of the Bill that may engage the Charter’s right to freedom of expression:

• an offence of knowingly making ‘a false or misleading representation’ that results in (and is intended to result in) someone ‘taking part in a sexual act’. In contrast to existing s. 57, this provision is not limited to ‘fraudulent means’, a term that usually requires proof of conduct that reasonable people would regard as dishonest. Although similar provisions exist elsewhere in Australia, no provision criminalises sex obtained by ‘misleading’ statements. New section 45 may make it a crime to tell lies or half-truths to a sexual partner, e.g. ‘I love you’, this means nothing’, ‘I’m single’, etc.

• an offence of engaging in a sexual activity knowing that someone else ‘will probably experience fear or distress from seeing the activity’. The Explanatory Memorandum explains that ‘[f]or example, this offence may apply when someone jumps out in front of a lone jogger and masturbates or simulates a sexual activity while fully clothed, to cause that person fear or distress’. However, the Committee notes that the offence is not limited to non-consensual interactions. New section 48 may criminalise any visual communication of disturbing sexual events, such as a rape scene in a television drama or an artistic performance, and also some elements of private, consensual sexual role-play.

• a provision that ‘behaviour that is indecent offensive or insulting includes behaviour that involves a person exposing (to any extent) the person’s anal or genital region’, including ‘mooning’ and ‘streaking’. The effect clause 24’s

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1 R v Sharpe [2001] 1 SCR 45, [115]. The Supreme Court also required an exception for ‘Private recordings of lawful sexual activity’, which is largely covered by new section 51N, 51O and 51P.

2 The Committee notes that exceptions for classification and for children in new section 51K and 51M to 51Q, may not apply to written material, and that much self-expressive material would fail to qualify for defences such as artistic merit or public interest.

3 New section 45 of the Crimes Act 1958, inserted by clause 15.

4 See also Criminal Law Consolidation Act 1930 (SA), s. 60(b) (‘false pretences, false representations and other fraudulent means’), Criminal Code (QLD), s. 218 (‘false pretence’), Criminal Code (Tas), s. 129 (‘false pretence’); Criminal Code (WA), s. 192(1)(b) (‘false pretence’). NSW abolished a similar provision in 2003.

5 New section 48 of the Crimes Act 1958, inserted by clause 15.

amendment to existing s. 17 of the Summary Offences Act 1966 is that, if such behaviour occurs ‘in or near a public place or within the view or hearing of any person being or passing therein or thereon’, then the person commits an offence punishable by two months imprisonment. In contrast to existing s. 17, the existing statutory offence of obscene exposure and the common law offence of wilful exposure, the prosecution is not required to prove that the exposure of a person’s anal or genital region ‘outrages public decency’, ‘is injurious to public morals’ or is either obscene, indecent, offensive or insulting. Clause 24 may therefore prohibit all public lower body nudity (except in prescribed nudist beaches), regardless of context or surroundings, including where it is part of a play or political protest.

No other Australian jurisdiction prohibits the mere public exposure of a person’s ‘anal region’ or ‘genital region’, let alone merely ‘exposing’ that ‘region’ ‘to any extent’. Depending on the precise meaning of ‘exposing’, ‘region’ and ‘extent’, new subsection 17(1A) may criminalise the public wearing of revealing lower-body clothing, e.g. low-slung trousers or swimming clothes that reveal pubic hair, a genital bulge or a person’s buttocks.

The Committee observes that none of these provisions are subject to exceptions or defences for consent, political expression, artistic expression, public interest, reasonable excuse or lack of offensiveness.

The Committee will write to the Attorney-General seeking further information as to:

- whether or not the definition of ‘child abuse material’ in new section 51A of the Crimes Act 1958 extends to ‘written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use’
- the meaning of the terms ‘exposing (to any extent)’ and ‘anal or genital region’ in clause 24
- the compatibility of new sections 45 and 48 of the Crimes Act 1958 and new subsection 17(1A) of the Summary Offences Act 1966 with the Charter’s right to freedom of expression.

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xxxi Nudity (Prescribed Areas) Act 1983, s. 3.
xxiii E.g. M Calligeros, ‘Melbourne University students get high, naked for environmental cause’, The Age, 19th April 2016, <http://www.theage.com.au/victoria/melbourne-university-students-get-high-naked-for-environmental-cause-20160419-go9rzm.html>. The Committee notes that, because s. 17 carries a potential prison sentence, the effect of clause 24 may be to make children who take photos of others moaning or streaking in public ineligible for the exceptions to child abuse material offences provided in new sections 51N, 51O and 51P (as each defence requires that an image ‘does not depict an act that is a criminal offence punishable by imprisonment’: new sections 51N(1)(d)(i), 51O(1)(c) and 51P(1)(c) of the Crimes Act 1958.) For example, a 17 year-old who takes a photo of another 17 year-old ‘mooning’ or ‘streaking’ may commit the offences of producing and possessing child abuse material if the photo would be offensive to reasonable people and does not qualify for the defences of classification, artistic merit or public interest.

xxiv Queensland prohibits the mere exposure of ‘genitals’ (rather than a person’s ‘genital region’) but that offence only attracts a prison sentence if the prosecution proves that there was an intent to ‘offend or embarrass another person’ and is subject to a defence of ‘reasonable excuse’. Summary Offences Act 2005 (Qld), s. 9.

xxv Existing s. 40 of the Summary Offences Act 1966 partly defines ‘genital or anal region’, but only for the purposes of Division 4A of Part 1.
Protection of children – Sex between similarly aged children – Causing a child to take part in a sexual performance

Summary: The Committee observes that the offences of sexual penetration of children and causing a child to take part in a sexual performance may be committed by children. The Committee will write to the Attorney-General seeking further information as to the compatibility of these offences with the Charter right of children to protection.

The Committee notes that clause 16, inserting new sections 49A and 49B, makes it an offence for anyone (‘A’) to sexual penetrate, cause themselves to be sexually penetrated by, or cause self-penetration or sexual penetration by or of a third party, of a child (‘B’) under the ages, respectively, of 12 and 16. The Statement of Compatibility remarks:

The bill promotes a child’s right to protection under section 17 of the charter by making significant improvements to Victoria’s existing sexual offences against children. The bill simplifies the structure of offences, replaces outdated language, modernises offences to cover new ways of offending, including via technology, and broadens the range of inappropriate sexual conduct against children that is criminalised. The reforms will result in more effective prosecutions of sexual offences and enable appropriate punishment of those who breach a child’s right to protection from sexual offending.

However, the Committee observes that these offences may be committed by children (i.e., if A and B are both children.) In contrast to the offences of incest in new sections 50C, 50D, 50E and 50F, there is no provision that ‘it is a defence to a charge for an offence… if A did not consent to conduct constituting the offence’. For example, a child may be guilty of a sexual offence if he or she passively submits to sex with another child or does not understand the sexual nature of the act.

The Committee also notes that new section 49V provides that:

It is a defence to a charge for an offence against section 49B(1) if, at the time of the conduct constituting the offence—

(a) A was not more than 2 years older than B; and

(b) B was 12 years of age or more; and

(c) B consented to the sexual penetration.

The Statement of Compatibility remarks:

The bill contains various exceptions and defences to sexual offences against a child under the age of 16 that apply where children of similar age engage in sexual activity. For example, it will be a defence to the offence of sexual penetration of a child under 16 if the accused is no more than two years older than the child, who must be aged 12 years or more, and consents (new section 49V.) These provisions protect children of a similar age from criminal sanction when engaging in non-exploitative sexual activity.

However, the Committee observes that:

- this defence is not available where B is under 12, even if A is close in age to (or even younger than) B.
- this defence is not available if B did not ‘consent’ to the sexual penetration. By contrast, a similar age defence is available for the offences of sexual assault and

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xxvi New section 50K.
xxvii See substituted s. 36(2)(h) & (l). The Committee notes that the defence of duress in existing s. 322O requires that a ‘threat of harm’ is made to the accused and that the criminal conduct is a ‘reasonable response’ to that threat. However, only children over 10 can be criminally responsible and children under 14 must be shown to understand that their actions are wrong. There is no barrier to prosecution of children aged 14 or over.
sexual activity in the presence of a child, even if B did not ‘consent’ to the touching or activity. xxxviii As well, a requirement of ‘consent’ in the case of, say, a 12 year-old is not equivalent to whether A engaged ‘in non-exploitative sexual activity’.

- new section 49V does not specify who bears the burden of proof with respect to this defence, xxxix and nor is the burden of proof for this defence specified in the Explanatory Memorandum or Statement of Compatibility. xl

- neither new section 49V nor 49ZC (which provides that various mistaken but honest and reasonable beliefs are not a defence to various charges) specify whether or not it is a defence if the accused believes (or reasonably believes) that A is 2 years older than B, and B is older than 12, and that B consented to sexual penetration.

The Committee further notes that new sections 49Q and 49R make it an offence for the accused (‘A’) to cause, allow, invite or offer for a child under 18 (‘B’) to ‘take part in a sexual performance’ if it ‘occurs in circumstances that involve any person receiving payment, reward or other benefit’. New sub-sections 49ZC(f) & (g) provide that it is not a defence to a charge under new section 49Q or 49R that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that the sexual performance did not occur in circumstances that involved payment, reward or other benefit to any person in respect of the performance.’ There is no express exclusion of this defence in Victoria’s existing sexual performance offence. xli

The Statement of Compatibility does not address new section 49ZC(f) & (g). The Explanatory Memorandum remarks:

This means that the element of these offences in section 49Q(1) and 49R(1) (that the sexual performance occurs in circumstances that involve, or the invitation or offer involves, payment, reward or other benefit) is an absolute liability element. This reflects the purpose of these offences, namely, to protect children and recognises that an adult should not involve a child in a sexual performance in any event.

However, the Committee observes that the offences in new sections 49Q and 49R may be committed by a child. Neither offence contains a defence for similarly aged children.

The Committee will write to the Attorney-General seeking further information as to:

- whether or not an accused’s lack of consent is a defence to a charge against new sections 49A and 49B;

- who bears the burden of proof under new section 49V;

- whether an honest but reasonable mistake about the matters in section 49V is a defence to a charge under new section 49B; and

- the compatibility of new sections 49V(b) & (c) and new sections 49ZC(f) & (g) with the Charter right of children to protection by the state. xlii

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xxxviii New section 49U.

By contrast, the existing s. 45(4A) of the Crimes Act 1958 provides that, for the equivalent provision to new section 49B, ‘[i]f consent is relevant to a charge..., the prosecution bears the burden of proving lack of consent.’

xlii The Committee’s Practice Note states that: ‘the Statement of Compatibility (or explanatory material) for a provision that introduces or significantly alters an exception to a criminal offence should state whether or not the exception places a legal onus on the accused. Examples of such exceptions include provisions stating that “It is a defence to a prosecution for an offence if...”’. Scrutiny of Acts and Regulations Committee, Practice Note of 25 May 2014, clause B.iii.

xliii Crimes Act 1958, s. 70AC.

Charter s. 17(2).
Presumption of innocence – Examination of witnesses – Presumptions about familial relationships

Summary: New section 50B, which provides for rebuttable presumptions about familial relationships, may engage the Charter right of people accused of incest to the presumption of innocence and to examine witnesses against them. The Committee will write to the Attorney-General seeking further information.

The Committee notes that new section 50B (which is in the subdivision concerned with incest offences) provides that:

In a proceeding for an offence against a provision of this Subdivision, there is a rebuttable presumption that—

(a) A knows that A is related to B in the way alleged; and

(b) people who are reputed to be related to each other in a particular way are in fact related in that way.

Neither new section 50B nor the Explanatory Memorandum nor the Statement of Compatibility states how the presumption may be rebutted. The Committee observes that new sub-section 50B may allow the prosecution to prove part of the case against a person accused of a serious offence through hearsay evidence (allegations and repute), without conforming to the requirements for such evidence imposed by Part 3.2 of the Evidence Act 2008. xliii New section 50B may therefore engage the Charter rights of people accused of incest to the presumption of innocence and to examine witnesses against them. xlv

The Statement of Compatibility does not address this provision. xlv The Committee observes that sub-section 50B(b) is not a matter that is peculiarly in the personal knowledge of the accused and indeed may be an issue on which the accused is unable to adduce any evidence. The Committee notes that, while new section 50B applies to all incest offences, a similar provision in Victoria’s existing incest offence does not apply to the offence of sexual penetration with a lineal step-descendant; the existing provision also specifies that the presumption can be rebutted by ‘evidence to the contrary’. xlvii

The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 50B with the Charter rights of people accused of incest to the presumption of innocence and to examine witnesses against them.

The Committee thanks the Minister for the attached response.

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xliii E.g. Evidence Act 2008, ss. 65 & 66, which bar prosecutors from adducing hearsay evidence unless the source of the evidence is first-hand and either unavailable or did not provide the evidence as part of the investigation of an offence, and s. 73(2)(b), which bars prosecutors from using the hearsay rule’s exception for reputation evidence unless it contradicts similar evidence adduced by the accused.
xlv Charter ss. 25(1) & 25(2)(g).
xlv The Committee’s Practice Note states that ‘[t]he 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... should state whether and how that provision satisfies the Charter’s test for reasonable limits on rights. Examples of such provisions include ones that... deem a fact to be proved in any circumstance; provide that proof of any fact is ‘prima facie evidence’ of a different fact; or place an evidential onus on an accused with respect to an essential element of an offence. The Committee would prefer that the analysis of reasonable limits assess the risk that the provision may allow an innocent person to be convicted of the offence and set out the demonstrable justification for allowing such a risk.’: Scrutiny of Acts and Regulations Committee, Practice Note of 25 May 2014, clause B.iii.
xlvii Crimes Act 1958, s. 44(7), exempting s. 44(2), the equivalent to new section 50D. There are similar provisions in the ACT and South Australia (for para (a) only) and Western Australia: Crimes Act 1900 (ACT), s. 62(5); Criminal Law Consolidation Act 1930 (SA), s. 72(2); Criminal Code (WA), s. 329(11).
The Hon Lizzie Blandthorn MLA  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002

Dear Chairperson,

Crimes Amendment (Sexual Offences) Bill 2016

Thank you for your letter dated 21 June 2016 on behalf of the Scrutiny of Acts and Regulations Committee (the Committee) with regard to the Crimes Amendment (Sexual Offences) Bill 2016 ('the Bill').

Sexual penetration and touching – surgically constructed body parts and external genitalia – discrimination

The letter seeks clarification as to whether the definition of sexual penetration captures the insertion of a surgically constructed male penis into a person's mouth, or an object or body part into a surgically constructed anus. These provisions were subject to extensive stakeholder and public consultation during which no concern was raised with the definition of sexual penetration and surgically constructed genitalia and body parts. However, given the importance of recognising gender identity and using non-discriminatory language, I will consider the express inclusion of genitalia and body parts that are surgically constructed in future legislation.

In relation to the query whether the definition of sexual penetration captures the insertion of external male genitalia (i.e. the scrotum) into a person's mouth, I note that the definition of sexual penetration does not extend to the insertion of male genitalia other than the penis into the mouth of another person.

The Committee also queries whether the reference to external genitalia in the definition of vagina includes surgically constructed external genitalia. The definition of 'vagina' in new section 35 is inclusive. The reference to external genitalia reinforces the position that penetration to any extent of the external lips of the vagina ('labia majora') constitutes penetration of the vagina. As the definition of vagina includes the labia majora, a surgically constructed vagina will also extend to surgically constructed labia majora.

The letter also asks whether the reference to breasts in the definition of touching in new section 35B includes surgically constructed breasts. The definition of when touching may be sexual in new section 35B(2) is inclusive. The reference to the area of the body that is touched is expressly not
limited and is intended to apply broadly. This would capture the touching of surgically constructed breasts.

**Coverage of certain forms of sexual penetration – incest offences**

The Committee raises the relationship of adult adoptive siblings and a step-grandparent and grandchild for consideration.

The incest offences prohibit sexual penetration between close family members in biological or corresponding legal relationships. This includes adoptive and step-relationships, and relationships arising from the use of assisted reproductive technology, such as the use of surrogacy or donor sperm. Adoptive siblings grow up in family roles that are no different to biological siblings, and sexual penetration between adoptive siblings can be equally as destructive to the family structure, and the individuals themselves. The exception for an adult step-parent and adult step-child in clause 16 new section 50I, is limited in application to ensure that it does not legalise exploitative sexual relationships between family members.

**Coverage of certain forms of sexual penetration – Sexual offences against persons with a cognitive impairment or mental illness**

The Committee raises concerns regarding the limitation on the right of a person to engage in sexual conduct with a worker or service provider. The statement of compatibility addressed this issue stating ‘the balancing of rights of persons with a cognitive impairment or mental illness to bodily privacy and freedom from cruel, inhuman or degrading treatment is prioritised over sexual autonomy in this limited circumstance.' Parliament’s recent Family and Community Development Committee Report on the Inquiry into Abuse in Disability Services heard that:

> sexual abuse appears to be widespread in the disability sector. In particular, the Committee received evidence that suggests that the sexual assault of people with disability is far from uncommon, especially within supported residential accommodation.

The Department of Justice & Regulation consulted with stakeholders representing persons with a cognitive impairment or mental illness during the development of the offences. Stakeholders emphasised the need to prioritise protection in this context, as compared to other scenarios in which capacity based approaches are suitable (for example, supported decision making for service choices). Persons with a cognitive impairment or mental illness are particularly vulnerable to sexual abuse from workers or service providers. The offences recognise this vulnerability and provide appropriate protection.

**New section 51A – child abuse material – freedom of expression**

The Committee notes that the definition of ‘child abuse material’ may include text that is self-expressed and not distributed to another person.

In relation to a child who writes a diary containing personal thoughts related to sexual exploration, I note that this material is highly unlikely to fall within the definition of child abuse material. The definition requires that it is material that ‘reasonable persons would regard as being, in the circumstances, offensive’. This must be proven by the prosecution beyond reasonable doubt. The Victorian community is increasingly aware of the importance of healthy sexual exploration of young people, and is most unlikely to be offended by the personal diary of a child.

In contrast, it is possible that textual material can contain detail of paedophilic desires, or violent fantasies regarding children. To the extent that the Bill limits individual freedom of expression by criminalising the production of textual child abuse material for an individual’s personal use or interest, this limitation is a lawful restriction that is reasonably necessary to protect against the risk
of harm to children should that material lead to offending against children by that individual, or should that material be distributed in any way.

Section 17 Summary Offences Act 1966 – exposure of the anal or genital region

The Committee asks for clarification of the meaning of the terms ‘exposing (to any extent)’ and ‘anal or genital region’ in clause 24, which amends section 17 of the Summary Offences Act 1966 (Obscene, indecent, threatening language and behaviour etc. in public).

In light of the amendments to section 19 (Sexual exposure) of the Summary Offences Act, new subsection 17(1A) is inserted to ensure that section 17 captures non-sexual genital exposure and exposure of the anal region that may be ‘indecent’, ‘offensive’ or ‘insulting’. The words ‘genital or anal region’ refer to the male or female genitalia, anus or buttocks. The term ‘exposing (to any extent)’ refers to exposure of an area of the body referred to (i.e. removal of clothing or underpants). The words ‘to any extent’ are inserted to ensure that exposure of a part of the genital or anal region may be captured by this provision. For example, a person who exposes his penis at a bus stop by lowering the zip of his pants and removing only his penis, but does not also expose his scrotum (i.e. the entire genital region). The examples of ‘mooning’ or ‘streaking’ provide guidance as to the type of non-sexual exposure that this offence would cover.

The Committee also seeks further information on the compatibility of subsection (1A) with the Charter’s right to freedom of expression. Subsection (1A) is not intended to limit the right to freedom of expression, for example, as stated in the letter, by criminalising low-slung trousers or swimming clothes that reveal a person’s buttocks. I thank the Committee for raising this matter and will consider the language used in this provision in a later bill.

Section 45 (Procuring sexual act by fraud) – freedom of expression

The letter notes that the offence in new section 45 of procuring sexual act by fraud may criminalise sex obtained by false or misleading statements. As you note, the offence does not pick up any common law requiring that the accused was ‘dishonest by the standards of ordinary and reasonable people’. That is not the intention of the new offence.

The offence includes a fault element that the accused intends that as a result of their false or misleading representation the other person will take part in a sexual act with the accused or another person, and a result element that this sexual act in fact takes place. This element will capture a misleading or fraudulent representation intended to lead another person to engage in a sexual act that they would not otherwise engage in, not ‘white lies’ or ‘half truths’ that may be told in a social context. For example, a person may misleadingly say that he will pay a prostitute for sexual services with no intention to do so, and refuse to pay after engaging in the act of sexual penetration. The Bill does not specify the level of gravity of a false or misleading representation required to make out the offence. This will be determined on a case by case basis.

For the victim of such an offence, this conduct is rarely considered trivial. I note that at the higher end of this conduct, a person may be guilty of rape (see section 36(2)(i) and (j)). Falling short of rape, this fraudulent activity can be very serious in nature (see Onnis v The Queen [2013] VSCA 271). As such, I consider that the offence, to the extent that it limits the right to freedom of expression, falls within the exception in section 15 of the Charter as a lawful restriction that is reasonably necessary for respecting the rights of others.

Section 48 (Sexual activity directed at another person) – freedom of expression

The letter asks for further information as to the compatibility of new section 48 with the Charter right to freedom of expression. In particular, the Committee notes that the offence is not limited to non-consensual sexual activity and may criminalise visual communication of disturbing sexual events and elements of private sexual role-play.
The new offence is designed to target sexually intimidating behaviour that causes fear or distress. The fault element of new section 48 (intention, knowledge or recklessness as to causing fear or distress) distinguishes the offence from the summary offence of sexual exposure and means it is sufficiently serious to be categorised as indictable. The question of consensual sexual activity that causes fear or distress was considered during consultation on the development of this offence. It was determined that lack of consent was not a necessary element of the offence. The central harm of the offence is the intention of the accused to cause the victim to experience fear or distress. Generally, where the fault element is satisfied, the other person will not consent to the act in question, and will lack consent because of his or her fear or distress.

In the case of visual electronic communications containing sexually disturbing events, the offence applies only where a person is physically present during a sexual activity, or a part of a sexual activity, directed at that person. The offence would not capture sexual activity seen in a television drama or an artistic video performance, as in the examples provided. In the case of persons engaging in consensual sexual role playing, such as sadomasochistic activity, there may be a certain kind of fear or distress intended at one level. However, the pleasure they ultimately derive from such experiences, which is indeed why a person consents to the activity in the first place, serves to remove the conduct from the scope of the offence.

Given this, I do not consider that the offence of sexual activity directed at another person operates to limit the right to freedom of expression guaranteed by the Charter.

**Whether there is a defence for the accused's lack of consent to an offence against sections 49A and 49B**

The letter seeks further information as to whether or not an accused’s lack of consent is a defence to a charge of sexual penetration of a child pursuant to new sections 49A and 49B, with particular reference to the defence in new section 50H.

New section 50H provides a defence to the incest offences (sections 50C – 50F) if the accused did not consent to the sexual penetration. This replaces existing section 44(6) and (6A) of the *Crimes Act 1958*, and reflects a policy of ensuring victims of familial sexual abuse are not criminalised by the incest offences.

The sexual penetration offences against children do not provide for a similar defence. Unlike the offence of rape or rape by compelling sexual penetration, the absence of consent is not an element of child sexual penetration offences. This reflects the policy that consent is irrelevant to sexual offences against children, given the inability of a child to provide informed consent to sexual activity. To provide a defence based on a lack of consent to the sexual penetration would contradict this policy and may unnecessarily confuse the jury.

The new sexual penetration offences provide for all permutations of compelled sexual penetration in the elements of the offence. Where a child does not consent to sexual penetration with another child (e.g. where the child ‘passively submits’), that child does not commit an offence. In those circumstances, it is likely that a third person has caused or compelled the sexual penetration. As such, the third person may be charged with an offence of sexual penetration of a child, not the children compelled to sexually penetrate one another.

**Section 49V – similarity in age defence – burden of proof**

The letter seeks further information on who bears the burden of proof under new section 49V. In the Bill, the allocation of a legal burden of proof applies to certain elements of some defences, while an evidential burden is allocated in others. As noted in the Statement of Compatibility, a legal burden of proof for an element of a defence may limit the presumption of innocence. For this reason, where the Bill allocates a legal burden of proof, this is specified. Where an evidential
burden of proof applies to all elements of a defence, the Bill does not specify the relevant burden. Section 49V contains a single defence with an evidential burden applying to each element of the defence (see also, for example, section 50H). For this reason, the Bill does not specify the relevant applicable burden of proof as no legal burden applies.

Existing section 45(4A) combined three different defences, which made it necessary to specify the burden of proof that applied to certain elements. The Bill provides for exceptions and defences in separate sections to simplify and clarify these provisions.

**Availability of defence of honest but reasonable mistake of fact as to matters in section 49V**

The letter seeks clarification about whether an honest but reasonable mistake about the matters in new section 49V is a defence to a charge under new section 49B. The Bill expressly provides for all exceptions and defences to sexual offences against children in new sections 49T – ZB. A defence of honest but reasonable mistake as to similarity in age is not provided for in the Bill nor does it exist under the current law. These provisions were subject to extensive stakeholder and public consultation, with no issue as to this aspect of the law being identified. I note that new section 49ZC sets out where a defence of honest but reasonable mistake of fact does not apply to elements of sexual offences against children (i.e. where absolute liability applies). It does not refer to absolute liability elements of exceptions or defences.

**Compatibility of 49V(b) and (c) and 49ZC(f) and (g) with Charter right to protection of children – where accused is a child**

The letter queries the compatibility of new section 49V(b) and (c) with the Charter right to protect children in the circumstance where the accused is also a child. The ‘similarity in age’ defence in new section 49V is consistent with current law. The limitation of this defence to where a complainant is 12 years of age or more reflects the purpose of this offence, that is, to protect children, and the policy that there is no defence to sexual penetration of a child under the age of 12.

As this reflects current law, no issue has been identified in practice with limiting this defence to cases involving complainants aged 12 years or more. As questions of *doli incapax* are relevant where an accused is under 14 years of age, it is unlikely that a ‘similarity in age’ defence would arise in cases where the complainant is under 12. In particular, this is relevant to the example provided in the letter where an accused child does not understand the sexual nature of the act of penetration.

The letter also queries the compatibility of new section 49ZC(f) and (g) with section 17(2) of the Charter. Section 49ZC provides for absolute liability as to the circumstance of payment, reward or other benefit in the sexual performance offences (new sections 49Q and 49R). As the letter notes, similarity in age is not a relevant exception or defence to these offences. This reflects the policy that commercial or other beneficial transactions involving sexual performances by children should not occur, even if the accused is also a child. Such offending is exploitative by its very nature. Also, unlike other sexual offences against children, there is no corresponding general offence that can be charged where a person accused of a sexual performance offence is of a similar age and consent is in issue.

It is important to balance the rights available under the Charter. To the extent that new sections 49V(b) and (c), and 49ZC(f) and (g) may affect the right to protection of children under section 17(2) of the Charter where a child is accused of a sexual offence, this limitation is justified in order to promote the protection of children from sexual offending generally.
Section 50B – presumption of innocence – examination of witnesses – presumptions about familial relationships

The Committee notes that the rebuttable presumption as to family relationship in new section 50B of the Bill may engage the presumption of innocence and right to examine witnesses against them in section 17(2) of the Charter.

The presumption is necessary because of the difficulty of proving many relationships as a matter of fact (such as genetic relationship), or a matter of fact and law (such as a marriage). Obtaining direct evidence will be necessarily invasive or difficult, requiring DNA testing, birth certificates, marriage certificates and where relevant, legal opinion (e.g. that a marriage was valid). These matters may be more difficult to ascertain where documents are lost, unavailable, or births and marriages occurred outside of Australia. This is unnecessary where there is no reason to question the status of the relationship. The presumption ensures that there is an evidential basis for the difficult exercise of obtaining admissible evidence of family relationship.

The presumption places an evidentiary onus on the accused to rebut the reputed family relationship. Evidence of a reputed relationship may be given by family or community members, for instance, by the wife of a person, or the mother of a child. As noted by the Committee, new section 50B does not state that the presumption is rebutted by ‘evidence to the contrary’. The presumption may be displaced by the accused pointing to or adducing evidence. Upon there being evidence adduced which puts the issue in question, the evidentiary burden will be discharged and the presumption would be displaced. As a result the prosecution will need to prove the relationship based on admissible evidence adduced in the case, and like other elements of an offence, must prove the specified relationship beyond reasonable doubt.

This is clearer than the previous law which indicated that the presumption is rebutted by evidence to the contrary which was unclear as to whether the accused bears an evidentiary or legal onus to rebut the presumption and created uncertainty as to whether, once such evidence was adduced, the prosecution then had the legal burden of proving beyond reasonable doubt that the accused and the victim were related in the way alleged.

The Committee notes that only the knowledge of the family relationship is uniquely within the knowledge of the accused. However, the non-existence of the family relationship is also likely to be uniquely within the knowledge of the accused. For example, if the accused knows he was infertile, knows a domestic relationship did not exist at the time of the alleged offence, or knows that he has never had sexual intercourse with the mother of a child. It is appropriate for the accused to bear the onus of pointing to or presenting this evidence and thereby shifting the onus to the prosecution to prove this factor beyond reasonable doubt. To require the contrary would necessitate measures such as DNA testing in cases in which there is no doubt amongst family members regarding paternity.

In my view the rebuttable presumption as to family relationship is not a limitation on the presumption of innocence.

Yours sincerely

THE HON MARTIN PAKULA MP
Attorney-General
Melbourne College of Divinity Amendment Bill 2016

The Bill was introduced into the Legislative Assembly on 7 June 2016 by Hon. James Merlino MLA, Minister for Education. The Committee considered the Bill on 20 June 2016 and made the following comments in Alert Digest No. 9 of 2016 tabled in the Parliament on 21 June 2016.

Committee comments

*Delegation of legislative power — Delayed commencement — Whether justified*

Clause 2 provides that the Bill will come into operation on a day to be proclaimed or on 1 August 2017 if not proclaimed earlier.

The Committee notes that the Explanatory Memorandum does not contain an explanation for the possible delayed commencement of the Bill.

The Committee will therefore write to the Minister to request further information as to the reasons for the possible delayed commencement date.

The Committee thanks the Minister for the attached response.
The Hon. Lizzie Blandthorn MLA  
Chairperson, Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
EAST MELBOURNE 3002

Dear Chairperson

Thank you for your letter of 21 June 2016 to the Hon. James Merlino MP, Deputy Premier, Minister for Education, regarding your request for advice as to the effect of clause 2 of the Melbourne College of Divinity Amendment Bill 2016 (the Bill). As previously advised by the Department of Education and Training, this Bill falls within my Training and Skills portfolio and therefore I am pleased to provide a response to your letter on behalf of the Government.

Clause 2 of the Bill provides that the Bill comes into operation on a day to be proclaimed or, if not proclaimed earlier, on 1 August 2017 (the “default commencement date”).

The Scrutiny of Acts and Regulations Committee (the Committee) raises an issue regarding the possible delayed commencement of the Bill, noting that the Explanatory Memorandum which accompanies the Bill does not contain an explanation for the possible delay.

**Explanation for clause 2**

The default commencement date was chosen to ensure the commencement of the Bill was not open-ended and that there was an appropriate time limit within which proclamation must occur. It was also chosen to ensure sufficient time for any administrative changes the Melbourne College of Divinity may need to make in anticipation of the new legislative provisions taking effect.

The date of 1 August 2017 was anticipated to be as close as possible to 12 months from the date the Bill is likely to receive Royal Assent, which was considered to be a reasonable time limit within which proclamation must occur.

I note the default commencement date inadvertently fails to comply with the Committee’s practice note of 26 May 2014. The practice note requires that Parliament be provided with an explanation of commencement by proclamation or delayed commencement that is longer than 12 months after introduction.
The Bill was introduced into the Legislative Assembly on 7 June 2016. Therefore, the default commencement date possibly delays commencement of the Bill by just over 14 months from the date of introduction.

I note that there is no intention to unnecessarily delay commencement of the Bill. Both the Melbourne College of Divinity and I are eager to ensure the Bill is considered by Parliament in as timely a manner as possible. It is intended that proclamation will be arranged as soon as practicable after the Bill receives Royal Assent, assuming it is passed by both Houses. It is therefore highly unlikely the default commencement date will be triggered.

In any case, I respectfully submit that the default commencement date is reasonable as the Bill is not scheduled to be debated in the Legislative Assembly before 16 August 2016 and therefore the default commencement date will be less than 12 months from the date that the Bill is anticipated to receive Royal Assent.

If you would like further information, you may contact Kathryn Johnson, Acting Executive Director, Legal Division, Department of Education and Training, on 963 73713 or by email: johnson.kathryn.k@edumail.vic.gov.au.

Yours sincerely

[Signature]

The Hon Steve Herbert MP
Minister for Training and Skills

Cc: The Hon. James Merlino MP, Deputy Premier, Minister for Education
Cc by email: nathan.bunt@parliament.vic.gov.au
Owners Corporations Amendment (Short-stay Accommodation) Bill 2016

The Bill was introduced into the Legislative Assembly on 24 May 2016 by Hon. Jane Garrett MLA, Minister for Consumer Affairs Gaming and Liquor Regulation. The Committee considered the Bill on 6 June 2016 and made the following comments in Alert Digest No. 8 of 2016 tabled in the Parliament on 7 June 2016.

Committee comments

_Delegation of legislative power — Delayed commencement — Whether justified_

Clause 2 provides that the Bill will come into operation on a day to be proclaimed or on 1 July 2017 if not proclaimed earlier.

The Committee notes the Explanatory Memorandum does not contain an explanation for the possible delayed commencement of the Bill.

_The Committee will therefore write to the Minister to request further information as to the reasons for the possible delayed commencement date._

The Committee thanks the Minister for the attached response.

15 August 2016
Committee Room
18 JUL 2016

Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament of Victoria
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Ms Blandthorn

OWNERS CORPORATIONS AMENDMENT (SHORT-STAY ACCOMMODATION) BILL 2016

Thank you for your letter of 7 June 2016 regarding the commencement date for this Bill.

The Bill is intended to be proclaimed to commence three months after it receives Royal Assent, to give short-stay accommodation providers sufficient time to put in place any desired screening procedures to ensure that their apartments are not let to problematic short-stay guests, and so avoid the joint and several liability imposed on short-stay accommodation providers under the Bill for liability incurred by unruly short-stay guests.

The Bill responds to the pressing problem of unruly short-stay parties in apartment buildings and it is not considered desirable that its commencement be delayed unnecessarily or unduly.

A period of three months is considered an appropriate balance between the interests of the various stakeholders. In further balancing stakeholder interests, a default commencement date of 1 July 2017, the start of a new financial year, is considered the most appropriate ‘cut-off’ date, even if the Bill does not receive Royal Assent in time to allow a three month lead-in period before that date.

All key stakeholders were consulted on the draft Bill and are aware of the Government’s intentions regarding the commencement date.

I trust this information is sufficient for the Committee.

Yours sincerely

Hon Marlene Kairouz MP
Minister for Consumer Affairs, Gaming & Liquor Regulation
## Appendix 1

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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)

(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

Judicial Commission of Victoria Bill 2015 1, 2

(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

Judicial Commission of Victoria Bill 2015 1, 2

(vi) inappropriately delegates legislative power

Melbourne College of Divinity Amendment Bill 2016 9, 10
Owners Corporations Amendment (Short-stay Accommodation) Bill 2016 8, 10
Victorian Funds Management Corporation Amendment Bill 2016 6, 8

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

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Assisted Reproductive Treatment Amendment Bill 2015 16 of 2015, 1
Bail Amendment Bill 2015 16 of 2015, 1
Confiscation and Other Matters Amendment Bill 2016 4, 5
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Table of correspondence between the Committee and Ministers or Members during 2016

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.

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<td>Infant Viability Bill 2015</td>
<td>Dr Rachel Carling-Jenkins MP</td>
<td>03.05.16</td>
<td>6 of 2016&lt;br&gt;23.05.16&lt;br&gt;7 of 2016</td>
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<td>Justice legislation (Evidence and Other Acts) Amendment Bill 2016</td>
<td>Attorney-General</td>
<td>03.05.16&lt;br&gt;20.05.16</td>
<td>6 of 2016&lt;br&gt;7 of 2016</td>
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<tr>
<td>Local Government (Greater Geelong City Council) Act 2016</td>
<td>Attorney-General</td>
<td>03.05.16&lt;br&gt;23.05.16</td>
<td>6 of 2016&lt;br&gt;7 of 2016</td>
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<tr>
<td>Victorian Funds Management Corporation Amendment Bill 2016</td>
<td>Treasurer</td>
<td>03.05.16&lt;br&gt;31.05.16</td>
<td>6 of 2016&lt;br&gt;8 of 2016</td>
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<td>Primary Industries Legislation Amendment Bill 2016</td>
<td>Agriculture</td>
<td>24.05.16&lt;br&gt;06.06.16</td>
<td>7 of 2016&lt;br&gt;8 of 2016</td>
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<tr>
<td>Owners Corporations Amendment (Short-stay Accommodation) Bill 2016</td>
<td>Consumer Affairs, Gaming and Liquor Regulation</td>
<td>07.06.16&lt;br&gt;07.06.16&lt;br&gt;18.07.16</td>
<td>8 of 2016&lt;br&gt;10 of 2016</td>
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<td>Tobacco Amendment Bill 2016</td>
<td>Health</td>
<td>07.06.16&lt;br&gt;16.06.16</td>
<td>8 of 2016&lt;br&gt;9 of 2016</td>
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<td>Crimes Amendment (Sexual Offences) Bill 2016</td>
<td>Attorney-General</td>
<td>21.06.16&lt;br&gt;03.08.16</td>
<td>9 of 2016&lt;br&gt;10 of 2016</td>
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<tr>
<td>Melbourne College of Divinity Amendment Bill 2016</td>
<td>Education</td>
<td>21.06.16&lt;br&gt;21.07.16</td>
<td>9 of 2016&lt;br&gt;10 of 2016</td>
</tr>
<tr>
<td>Equal Opportunity Amendment (Equality for Students) Bill 2016</td>
<td>Ms Sue Pennicuik MLC</td>
<td>16.08.16</td>
<td>10 of 2016</td>
</tr>
<tr>
<td>Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016</td>
<td>Attorney-General</td>
<td>16.08.16</td>
<td>10 of 2016</td>
</tr>
</tbody>
</table>
Appendix 4
Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 15 August 2016.

Statutory Rules Series 2016

SR No. 18 – Local Government (General) Amendment Regulations 2016
SR No. 28 – Non-Emergency Patient Transport Regulations 2016
SR No. 33 – Building Amendment Regulations 2016
SR No. 34 – Residential Tenancies (Caravan Parks and Movable Dwellings Registration and Standards) Amendment Regulations 2016
SR No. 35 – Transport (Ticketing) Amendment (Prescribed Devices and Processes) Regulations 2016
SR No. 37 – Wrongs (Part VB)(Dust and Tobacco-Related Claims) Regulations 2016
SR No. 38 – Sentencing Amendment Regulations 2016
SR No. 40 – Tobacco (Victorian Health Promotion Foundation) Amendment Regulations 2016
SR No. 41 – Magistrates’ Court (Outworkers) Rules 2016
SR No. 43 – County Court (Chapters I and II Miscellaneous Amendments) Rules 2016
SR No. 45 – Magistrates’ Court Criminal Procedure (Amendment No.6) Rules 2016
SR No. 46 – Victims of Crime Assistance Amendment Rules 2016
SR No. 49 – Building Amendment (Siting Requirements) Regulations 2016
SR No. 50 – Road Safety (Drivers) and (Vehicles) Amendment (Fees) Regulations 2016
SR No. 51 – Supreme Court (Chapter I Judicial Review Amendment) Rules 2016
SR No. 52 – Supreme Court (Chapter I Expert Witness Code Amendment) Rules 2016
SR No. 53 – Plant Security Regulations 2016
SR No. 54 – Australian Consumer Law and Fair Trading (Code of Practice for Fuel Price Boards) Regulations 2016
SR No. 55 – Parliamentary Salaries and Superannuation (Provision of Motor Vehicles) Amendment Regulations 2016
SR No. 56 – Infringements Regulations 2016
SR No. 58 – Public Health and Wellbeing Amendment (Registered Premises) Regulations 2016
SR No. 62 – Tobacco (Victorian Health Promotion Foundation) Further Amendment Regulations 2016
Legislative Instruments 2016

Industrial Waste – Classification for Architectural and Decorative Paint
Greater Metropolitan Cemeteries Trust (GMCT) Scale of Fees and Charges
Conveyancers Professional Indemnity Insurance Order
Ministerial Order No 900 – Victorian Institute of Teaching Schedule of Registration Fees 2016-17