58th Parliament
Alert Digest

No. 10 of 2018

Tuesday, 24 July 2018
on the following Bills

Environment Protection Amendment Bill 2018

Firearms Amendment (Silencers) Bill 2018

Justice Legislation Miscellaneous Amendment Bill 2018

Justice Legislation (Police and Other Matters) Bill 2018

Prevention of Family Violence Bill 2018

Racing Amendment (Integrity and Disciplinary Structures) Bill 2018

State Taxation Acts Amendment Bill 2018

Toll Fine Enforcement Bill 2018

Victorian Industry Participation Policy (Local Jobs First) Amendment Bill 2018
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 2016 one penalty unit equals $155.46)
‘Statement of Compatibility’ refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights
‘VCAT’ refers to the Victorian Civil and Administrative Tribunal
[ ] denotes clause numbers in a Bill
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Environment Protection Amendment Bill 2018

Bill Information

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<th>Minister</th>
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Bill Summary

The Bill, which represents the second tranche of reforms arising from the Government’s response to the Independent Inquiry into the Environment Protection Authority (EPA), would reform Victoria’s legislative framework for environment protection.

The Bill would:

- repeal the Environment Protection Act 1970
- introduce a new prevention-focussed regulatory scheme based on a ‘general environmental duty’
- reform the framework for the granting of permissions by the EPA to engage in certain activities
- increase the maximum penalties available to the EPA for certain breaches of the law
- introduce a civil penalty scheme that would allow the EPA to take enforcement action for moderately serious breaches and empower the courts to impose monetary benefits orders
- reform waste management regulation by improving the ability of the EPA to apply targeted regulatory controls to priority and industrial wastes
- introduce a new duty to manage contaminated land, which would clarify the obligation of the person in control and management of a contaminated site to ensure that it is safe for its current or planned future use and to prevent harm to neighbours
- reform the environmental audit process by introducing a Preliminary Risk Screen assessment requirement
- introduce access to information reforms and new third party rights to seek civil remedies for breaches of the environment protection law.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☐ NONE ☒ Inappropriately delegates legislative power
☐ Other: ☒ Trespasses unduly on Rights or Freedoms
Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 provides that the Bill would come into operation on a day or days to be proclaimed. However, the Bill also provides:

- a forced commencement day for Part 3 of 1 July 2019, which is more than 12 months from the date of the Bill’s introduction (Part 3 provides for amendments to the Mineral Resources (Sustainable Development) Act 1990)
- that section 19 would come into operation on Royal Assent
- a forced commencement date for the remainder of the Act of 1 December 2020, which is more than 12 months from the date of the Bill’s introduction.

The Explanatory Memorandum states in relation to the forced commencement date of 1 December 2020:

The forced commencement date is intended to ensure that the Authority, and members of the community, businesses, industry and others who will be required to comply with the measures contained in the Bill, have adequate time to prepare for the commencement of the significant reforms in the Bill.

The forced commencement date also provides additional time for the making of new regulations and other subordinate instruments under the Bill, such as environment reference standards, which will be required to ensure the effective implementation of the new legislative framework.

The Committee is satisfied that the possible delayed commencement of the Bill (with the exception of section 19 and Part 3) is reasonable and justified in the circumstances.

The Committee notes that there is no explanation for the forced commencement of 1 July 2019 for Part 3 in the Explanatory Memorandum or Second Reading Speech.

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

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

Power of entry without a warrant

The Bill contains a number of provisions that would provide police and other officers with a power of entry without a warrant in certain circumstances.

Under new section 124, a litter enforcement officer would be empowered to enter any non-residential premises or place (at a reasonable time) if they reasonably believe that an offence under new Part 6.3 (which deals with litter and waste) is being or is likely to be committed at that premises or place.

Under new section 176, a police officer (of or above the rank of senior constable) would be authorised to apply to a court officer for an order enabling entry to residential premises, using reasonable force if necessary, to investigate the emission of unreasonable noise.
Under new section 246 (Division 1 of Part 9.3), an authorised officer would be empowered to enter and inspect a place for the purpose of performing a function or exercising a power under the Bill, including monitoring compliance with the Bill, determining whether there is a risk of harm to human health or the environment and the inspection or testing of equipment or vehicles. However, the officer would only be authorised to enter and inspect residential premises without a warrant with the consent of the occupier or if they believed it was necessary to determine whether a person has contravened, is contravening or is about to contravene, a provision of the Bill, or there is an immediate risk of material harm to human health or the environment (new section 248).

The Statement of Compatibility states in relation to the powers of entry in Division 1 of Part 9.3:

The authorised officer’s power to enter and inspect premises is subject to a number of safeguards, in addition to those mentioned above. The authorised officer must take all reasonable steps to notify the occupier of the premises of the entry and produce their identity card for inspection immediately on entering the premises, unless doing so would unreasonably interfere with the performance of a function or exercise of a power under the Bill. The officer must also take reasonable steps to minimise disruption and only remain at the place as long as is reasonably necessary, and must produce their identity card for inspection upon request. Further, the authorised officer must give a report to the occupier of the premises setting out the time and purpose of the entry and inspection, a description of any actions taken at the premises, a summary of any observations and the procedure for contacting the Authority for further details.

The Committee is satisfied that the power of entry without a warrant in sections 124, 176 and 246 is necessary and reasonable in the circumstances.

**Strict liability offences**

The Bill contains a number of strict liability offences, which are identified in the Explanatory Memorandum.\(^1\) The Committee notes that (with the exception of sections 45, 46, 47 and 88(2)), each of these offences is subject to a financial penalty only and that the possibility of imprisonment does not apply. However:

- section 89(1) provides that if ‘a prohibited person’ who is a natural person commits an offence against section 45, 46 or 47 and the permission activity that was the subject of the offence is prescribed for the purposes of the section, a court may impose a penalty of up to 2 years imprisonment in addition to, or in place of, the penalty included in section 45, 46 or 47
- section 88(2) provides that ‘a prohibited person’ must not engage in an activity that is prescribed for the purposes of the section, subject to a penalty in the case of a natural person, of 240 penalty units or 2 years imprisonment or both.

The Committee notes that an offence is one of strict liability if there is no requirement to prove mens rea\(^2\) on the part of the accused but where the defence of ‘honest and reasonable mistake of fact’ is available.

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\(^1\) Sections 28(2), 44(1), 45(1), 46(1), 47(1), 63(1), (2) and (3), 64, 88(2), 115, 119, 121(5) and (7), 125(3) and (6), 127(3), 132(2), 133(3), 137(2), 142(2), 143(2), 155(1), 167, 168, 169, 172, 175, 205, 209, 210, 213, 215, 252, 253(3), 255(2), 259(3), 260(2), 264(3),286, 287, 288, 289, 290, 292, 293, 453, 460, 461, 463(3).

\(^2\) Mens rea is a Latin term which means ‘guilty mind’. Different standards of mens rea apply depending on the offence, i.e., that the accused: actually intended to do the act for which they have been charged; or had knowledge as to the possible harmful consequences of the act; or was negligent regarding the likelihood of the harm that would be caused by the act.
The Committee also notes that there is no explanation of the reasons for the application of strict liability to sections 45, 46, 47 and 88(2) in the Statement of Compatibility or Explanatory Memorandum. It is also notable that the provisions would require a person to have knowledge of a regulation prescribing the prohibited behaviour.

Paragraph A (iv) of the Committee’s Practice Note provides that where a Bill provides insufficient or unhelpful explanatory material particularly in respect to rights or freedoms (including the creation of strict or absolute liability offences), the Committee expects Parliament to be provided with an explanation as to why this is necessary or desirable.

**The Committee will write to the Minister to bring paragraph A (iv) of the Practice Note to her attention and to request further information as to the reasons for the application of strict liability to the above provisions.**

**Privilege against self-incrimination**

Under new section 34, a person would not be excused from notifying the Authority of the occurrence of a notifiable incident on the grounds that the information provided might tend to incriminate the person or make them liable to a penalty.

Similarly, under new section 42, a person would not be excused from notifying the Authority of the occurrence of a notifiable contamination on the grounds that the information might tend to incriminate the person or make them liable to a penalty.

The Statement of Compatibility states in relation to sections 32 and 42:

> ...any information given by a person as part of a notification is not admissible in evidence against the person in a proceeding for an offence or for the imposition of a penalty, other than a proceeding relating to false or misleading information provided by the person in a notification.

The Committee is satisfied that the limitation of the privilege against self-incrimination in new sections 34 and 42 is reasonable and justified in the circumstances.

Under new section 268, it would not be a reasonable excuse for a person to refuse or fail to produce a document required to be produced under new Part 9.3 (see sections 252 and 255) if doing so would tend to incriminate them.

The Statement of Compatibility states:

This is therefore a limited abrogation of the privilege against self-incrimination because a document required to be produced may contain evidence that would tend to incriminate the person with respect to certain offences under the Bill.

The privilege against self-incrimination generally covers the compulsion of any information or documents which might incriminate a person. However, the application of the privilege to pre-existing documents is considerably weaker than that accorded to oral testimony or documents that are required to be brought into existence to comply with a request for information. I note that some jurisdictions have regarded an order to hand over existing documents as not engaging the privilege against self-incrimination.

The primary purpose of this limited abrogation is to enable authorised officers to monitor compliance with the environment protection scheme, investigate potential contraventions and prevent harm to human health and the environment. Taking into account the protective purpose of the Bill, there is significant public interest in ensuring that authorised officers are able to access information and evidence that may be difficult or impossible to ascertain by
alternative evidentiary means, and to use such evidence to bring enforcement action where appropriate.

Any limitation on the right in section 25(2)(k) that is occasioned by the limited abrogation is directly related to its purpose. The documents that an authorised officer can require to be produced are those necessary for the purpose of monitoring compliance with the Bill. Importantly, the requirement to produce a document to an authorised officer does not extend to having to explain or account for the information contained in that document. If such an explanation would tend to incriminate, the privilege would still be available.

There are no less restrictive means available to achieve the purpose of enabling authorised officers to have access to relevant documents, and access to such documents is necessary to ensure public safety. To provide for a 'use immunity' that restricts the use of produced documents to particular proceedings would unreasonably obstruct the role of authorised officers and the aims of the scheme, as well as giving the holders of such documents an unfair forensic advantage in relation to criminal and civil penalty investigations. Any limitation on the right to protection against self-incrimination is therefore appropriately tailored and the least restrictive means to achieve the regulatory purpose.

The Committee is satisfied that the limitation of the privilege against self-incrimination under new section 268 is reasonable and justified in the circumstances.

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

Section 28 of the Principal Act would make it an offence for a person to engage in conduct that results in material harm to human health or the environment from pollution or waste. New section 28(3) would provide a defence if the person proves that they did not contravene the general environmental duty to minimise the risks of harm so far as reasonably practicable.3

The Statement of Compatibility states:

While the imposition of a legal burden on an accused will limit an accused's right to the presumption of innocence, I consider that the limit is reasonably justified under section 7(2) of the Charter. The matters required to be proven will be within the knowledge of the accused. In circumstances where the conduct of the accused has actually resulted in material harm to human health or the environment, the accused is best placed to lead this evidence. Due diligence can be practically demonstrated by detailing the reasonable steps taken to prevent the contravention or minimise the risk of harm. Further, these defences are available for the benefit of an accused to escape liability where they have taken reasonable steps to ensure compliance, in respect of what could otherwise be an absolute or strict liability offence. In my view, a less restrictive measure (such as imposing only an evidential onus on an accused) would not be appropriate in light of the strong public interest in ensuring that people do not engage in conduct that results in material harm and, in order to escape liability for contravening the Bill, are expected to demonstrate to a legal standard that they have taken all measures required by the Bill to discharge this responsibility.

The Committee is satisfied that the reversal of the onus of proof in new section 28(3) is reasonable and justified in the circumstances.

3 New section 28 creates a transitional duty in relation to material harm and would be repealed no later than four years from the commencement of the Bill. The Explanatory Memorandum states that section 28 is intended to work in a complementary manner to the general environmental duty in section 25. As such, a person who complies with the general environmental duty will not be liable for a contravention of section 28 and vice versa.
New section 349 would provide that if a body corporate that is a corporation commits an offence against certain provisions, an officer of the body corporate also commits that offence if they failed to exercise due diligence to prevent the offence.

New section 350 of the Principal Act would provide that an officer would be liable for certain offences committed by the body corporate and would be subject to a reversal of the burden of proof, such that the officer would be taken to have committed the offence unless they prove that they exercised due diligence to prevent it.

New section 351 of the Principal Act would provide that an officer would be liable for certain offences committed by the body corporate if they authorised or permitted the offence, or were knowingly concerned in any way with its commission.

The Statement of Compatibility states:

These provisions are relevant to the presumption of innocence as they may operate to deem as 'fact' that an individual has committed an offence based on the actions of the body corporate. Officers may rely on a defence that would be available to the body corporate if it were charged with the offence and bear the same burden of proof as the body corporate in doing so.

In my view, it is appropriate to extend these offences and reverse onus provisions to officers of bodies corporate. A person who elects to undertake a position as an officer of a body corporate accepts that they will be subject to certain requirements and duties, including a duty to ensure that the body corporate does not commit offences. In my view, new sections 349 and 351 do not limit the right to the presumption of innocence as the prosecution is still required to prove the main elements of the offence — that is, that the officer failed to exercise due diligence, or authorised or was knowingly concerned in the commission of the offence. I further consider that any limitation of the right to the presumption of innocence occasioned by the reverse onus in new section 350 is reasonably justified due to the gravity of the offences relevant to that provision, the obligations on officers of bodies corporate to exercise due diligence and the fact that the matters to be proven will be within the knowledge of the accused. In my view, there are no less restrictive means reasonably available for ensuring adequate deterrence of corporate offences that may cause significant public harm.

Courts in other jurisdictions have held that protections on the presumption of innocence may be subject to reasonable limits particularly in the context of compliance offences. Further, any limits imposed by the relevant reverse onus provisions are justifiable for the reasons set out in relation to those provisions above. Accordingly, I am satisfied that these provisions are compatible with the right under the Charter to the presumption of innocence.

The Committee is satisfied that the reversal of the onus of proof in new sections 349, 350 and 351 is reasonable and justified in the circumstances.

Recommendation

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

CHARTER ISSUES

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

Arbitrary detention – Strict liability offence – Where sentence of imprisonment imposed in respect of offence provision – Unpredictable or unjust imprisonment

Summary: The effect of clause 88(2) may be to expose a person to a sentence of imprisonment in circumstances where the scope of the prohibited behaviour is unclear or difficult to ascertain and where there is no requirement to prove intent. This may infringe the right not to be arbitrarily detained. The Committee will write to the Minister seeking further information.

Relevant provision

The Committee notes that the new subsection 88(2), which the Bill inserts into the Environment Protection Act 1970, provides that:

A prohibited person must not engage in an activity that is prescribed for the purposes of this section.

Penalty: In the case of a natural person, 240 penalty units or 2 years imprisonment or both; In the case of a body corporate, 1200 penalty units.

The legislation does not contain a definition of prescribed activity, rather activities are to be prescribed by regulation, on the Minister’s recommendation. This will require a person to find the relevant regulations before they can ascertain whether an activity is prescribed (and would therefore result in potential imprisonment).

The Explanatory Memorandum states that ‘this offence is intended to be a strict liability offence’. It is not clear from the Explanatory Memorandum or from the Bill which of the following elements of the offence are intended to be strict liability:

- being a prohibited person; and/or
- the commission of a prescribed activity (as yet undefined).

Depending on how the strict liability aspect of the section is interpreted, a person could be convicted and imprisoned despite not knowing that they were a prohibited person and not knowing that the activity they were engaged in was one that prohibited people are not allowed to engage in (when non-prohibited people are able to freely engage in it). A prohibited person who commits an activity that is prescribed by the regulations is exposed to the penalty of imprisonment for a period of up to two years (without the prosecution having to prove intent), which may be considered arbitrary.

The Committee observes that the restrictions imposed by the new subsection 88(2) could be considered insufficiently clear given that one or both of the elements of the offence are strict liability and therefore may be committed without the offender’s knowledge. An imprisonment resulting from a breach could therefore be considered arbitrary.

Charter analysis

Section 21(2) of the Charter provides that a person ‘must not be subjected to arbitrary arrest or detention’. The concept of arbitrariness in international human rights law involves considerations of proportionality.4 It is not settled whether the concept of arbitrariness in the Charter should be read

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4 See PJB v Melbourne Health (Patrick’s Case) (2011) 39 VR 373 at 395 [85] (Bell J); Director of Public Prosecutions v Kaba (2014) 44 VR 526 at 570-571 [154] (Bell J); Victoria Police Toll Enforcement v Taha (2013) 49 VR 1 at 66-67 [198]-[199] (Tate JA); ZZ v Secretary to the Department of Justice [2013] VSC 267 at [85] (Bell J). But see WBM v Chief Commissioner of Police (2010) 27 VR 469 at 483 [51], 484 [56] (Kaye J).
Scrutiny of Acts and Regulations Committee

consistently with international human rights law (which incorporates aspects of proportionality) or in accordance with its ordinary or ‘dictionary’ meaning. Present authority provides some support for the view that the international human rights law meaning applies. In PJB v Melbourne Health, Justice Bell stated that arbitrariness (emphasis added): ⁵

extends to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought.

In order to avoid arbitrary detention, a law imposing imprisonment must be predictable in its application. Above all, predictability is necessary in order for the law to be just, because without it people cannot know how they are required to behave in order to avoid imprisonment.

Where a law imposes strict liability in respect of an element of an offence there is no requirement for the prosecution to prove knowledge or intent in relation to that element. Strict liability offences are often imposed in regulatory contexts where the law seeks to impose an obligation on a person to actively ensure compliance with the relevant law. The Law Council of Australia has taken the position that strict liability should only be used ‘for offences which are readily understood and easily proven and where a failure to comply is obvious, unacceptable and deserving of punishment’. ⁶ However where provisions are complex or unclear, breaches may well be accidental, notwithstanding bona fide attempts to comply. The Law Council has argued that where breaches could be the result of inadvertence or oversight they should not attract strict liability.⁷

The Statement of Compatibility does not consider whether the new subsection 88(2) will create an offence that is ‘readily understood... and where a failure to comply is obvious’ such that the imposition of liability in the absence of any intent or fault is both proportionate and predictable. The Statement of Compatibility does not consider whether the new subsection could result in arbitrary detention.

Conclusion

The Committee will write to the Minister seeking further information as to whether the new subsection 88(2) will expose a person to arbitrary detention, contrary to s 21(2) of the Charter.

Recommendation

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

CHARTER ISSUES

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

☐ Other:

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⁵ (2011) 39 VR 373 at 395 [85] (Bell J).
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Details

Freedom of expression – Unreasonable noise provisions – Impact on artistic expression of musicians and in music venues

Summary: The new sections 166, 167, 168 and 169 prohibit the emission of unreasonable noise from residential premises and from entertainment venues. This may limit the right to freedom of expression in the form of artistic expression through loud music. The Committee will write to the Minister seeking further information.

Relevant provision

The Committee notes that the new sections 166, 167 and 169 respectively prohibit the emission of unreasonable noise from non-residential premises, residential premises and entertainment venues. The new section 168 makes provision for greater penalties for the emission of ‘aggravated noise’.

The Committee observes that the effect of these new sections, in particular section 169 in respect of entertainment venues, may be to limit the right to artistic expression of performers in entertainment venues and of musicians more broadly.

Charter analysis

Section 15(2) of the Charter provides for the right to freedom of expression in the following terms:

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

(a) orally; or
(b) in writing; or
(c) in print; or
(d) by way of art; or
(e) in another medium chosen by him or her.

The Statement of Compatibility does not address the effect of the prohibition on unreasonable noise on the right to seek, receive and impart information and ideas by way of art.

Section 15(3) of the Charter sets out when the right in s 15(2) may be subject to lawful restrictions:

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

(a) to respect the rights and reputation of other persons; or
(b) for the protection of national security, public order, public health or public morality.

The case law indicates that s 15(3) operates to reduce the scope of the right contained in s 15(2), so that if a restriction meets the requirements of s 15(3), the right is not limited for the purposes of s 7(2):

That is because, having decided that the wording of the section that confers the human right itself excludes the application of that right, there is no right to which any ‘reasonable limits as can be demonstrably justified’ can apply (Magee v Delaney (2012) 39 VR 50; [2012] VSC 407 [157]; see also LM [2008] VCAT 2084 [117] (s 21); PJB v Melbourne Health (Patrick’s case) (2011) 39 VR 373; [2011] VSC 327 [74]-[75] (s 13)).
The Statement of Compatibility does not discuss whether the potential of these provisions to limit the right to express ideas by way of art is reasonably necessary to respect the rights of other persons such that it falls within the internal limit in s 15(3).

Conclusion

The Committee will write to the Minister seeking further information as to whether the new sections 166, 167, 168 and 169 are reasonably necessary to respect the rights of other persons such that the right to freedom of artistic expression is not limited.

Recommendation

☐ Refer to Parliament for consideration  ☒ Write to Minister for clarification  ☐ No further action required
Firearms Amendment (Silencers) Bill 2018

**Bill Information**

<table>
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<th>Member</th>
<th>Mr Jeff Bourman MP</th>
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<td>Private Members’ Bill</td>
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<tr>
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**Bill Summary**

The Bill would amend the *Firearms Act 1996* to:
- establish a system permitting the possession, use, carriage and acquisition of silencers
- establish a system of registering silencers
- establish requirements for the secure storage of silencers.

**Type of Bill**

- Government Bill
- Private Members Bill

**CONTENT ISSUES**

- NONE
- Inappropriately delegates legislative power
- Trespasses unduly on Rights or Freedoms

**Details**

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

**Recommendation**

- Refer to Parliament for consideration
- Write to Member for clarification
- No further action required

**CHARTER ISSUES**

- NONE
- Compatibility with Human Rights
- Operation of the Charter

**Details**

The Firearms Amendment (Silencers) Bill 2018 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.
## Recommendation

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Justice Legislation Miscellaneous Amendment Bill 2018

Bill Information

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<th>Hon Martin Pakula MP</th>
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<td>Attorney-General</td>
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Bill Summary

The Bill would:

- amend the *Children, Youth and Families Act 2005* in relation to the sentencing of certain young offenders by the Supreme Court or the County Court
- make various amendments to the *Coroners Act 2008* and a consequential amendment to the *Births, Deaths and Marriages Registration Act 1996*
- amend the *Crimes Act 1958* in relation to Aboriginal persons taken into custody and forensic procedure orders
- amend the *Criminal Procedure Act 2009* in relation to witnesses, recorded evidence, indictable offences that may be heard and determined summarily and the DPP’s right of appeal
- amend the *Domestic Building Contracts Act 1995* in relation to referred domestic building work disputes and publication of directions
- amend the *Estate Agents Act 1980* in relation to rebate statements and to make minor technical amendments
- amend the *Evidence Act 2008* to require that improper questions be disallowed
- amend the *Family Violence Protection Act 2008* in relation to the relationship of orders with certain conditions under that Act with certain orders under the *Sentencing Act 1991*
- amend the *Honorary Justices Act 2014* in relation to the use of the titles "JP (Retired)" and "BJ (Retired)"
- amend the *Personal Safety Intervention Orders Act 2010* in relation to the relationship of orders within certain conditions under that Act with certain orders under the *Sentencing Act 1991*
- amend the *Retirement Villages Act 1986* to provide for making regulations prescribing different infringement penalties for different classes of persons
- amend the *Rooming House Operators Act 2016* in relation to licence disqualification criteria and other rooming house operator provisions
- make various amendments to the *Sentencing Act 1991* and consequential amendments to the *Crimes Act 1958*.

Submission

The Committee received and considered a joint submission from the Federation of Community Legal Centres Victoria and the Law Institute of Victoria.

The submission is reproduced at Appendix 6 and on the Committee’s website: [https://www.parliament.vic.gov.au/sarc](https://www.parliament.vic.gov.au/sarc)
Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 provides that certain provisions⁸ would come into operation on a day or days to be proclaimed, with a default commencement date of 1 October 2019, which is more than 12 months from the date of the Bill’s introduction.

The Committee notes that there is no explanation for the default commencement date of 1 October 2019 in the Explanatory Memorandum or Second Reading Speech.

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

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

Retrospective application of laws

Family Violence Intervention Orders (FVIos) and Personal Safety Intervention Orders (PSIOs) with place or area exclusion condition

Clause 58 would amend the Family Violence Protection Act 2008 to ensure that a family violence intervention order (FVIO) would prevail over an existing community correction order (CCO) with a place or area exclusion condition, to the extent of any inconsistency.

Clause 59 would insert a transitional provision into the Family Violence Protection Act 2008 to provide for the amendment in clause 58 to apply to a FVIO or a recognised domestic violence order (DVO) that has effect on or after the commencement of the clause, irrespective of when the order was made. The amendment would therefore apply to existing orders. For example, a person who is subject to both a FVIO and a CCO with an inconsistent place or area exclusion condition would be required to behave as if the relevant conditions of the FVIO prevail.

Similarly, clause 62 would amend the Personal Safety Intervention Orders Act 2010 to ensure that a PSIO would prevail over an existing CCO with a place or area exclusion condition, to the extent of any inconsistency. Clause 63 would insert a transitional provision into the Personal Safety Intervention Orders Act 2010 to provide for the amendment in clause 62 to apply to a PSIO that has effect on or after the commencement of clause 62, irrespective of when the order was made.

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⁸ That is, the provisions of the Bill other than Part 1, clauses 72(2), 82 and 83, Part 15 and Division 1 of Part 7.
The Statement of Compatibility states:

The FVP Act and PSIO Act both expressly refer to residence restrictions, exclusion conditions and curfew conditions made under CCOs. However, neither refer to place or area exclusion conditions. The Bill will amend these acts to ensure that place and area exclusion conditions made under CCOs are treated similarly to residence and exclusion conditions and curfew conditions made under CCOs.

These changes will take effect from the date of the commencement of the relevant provisions, and will apply to persons subject to existing orders. This change can arguably be interpreted to negatively impact a person’s right to freedom of movement (section 12), and to mean that a person—who is subject to an existing CCO and FVIO or PSIO—is being subject to a greater restriction than previously through the requirement of the family violence orders thereby raising concerns about retrospective criminal laws (section 27).

In my view, these requirements would already have been imposed upon an offender and therefore this amendment—which is meant to aid in interpretation of rights and obligations—does not adversely impact any rights under the Charter. This amendment would also confirm the primacy of victim safety and promote the right under section 17 of protection of families and children.

The Committee considers that the retrospective effect of clauses 58, 59, 62 and 63 is reasonable and justified in the circumstances.

Insertion of former sex offences into list of offences requiring a custodial sentence

Clause 72(2) of the Bill would amend the Sentencing Act 1991 by inserting into the definition of ‘category 1 offence’ a number of repealed sex offences in the Crimes Act 1958 committed on or after 20 March 2017 and before 1 July 2017. Clause 82 provides that these amendments would apply to the sentencing of offenders on or after the day on which the amendments commence for offences alleged to have been committed on or after 20 March 2017.

The Statement of Compatibility states:

The repealed sex offences were in effect until 1 July 2017 when they were replaced by new offences through the Crimes Amendment (Sexual Offences) Act 2016. However, when the definition of Category 1 offence commenced operation on 20 March 2017, it only referred to the new sex offences. This means that the equivalent sex offences, committed on or after 20 March 2017 and before 1 July 2017, were not captured within the definition of Category 1 offence. This in turn means that persons who committed such offences between those dates can escape the mandatory custodial requirements of section 5(2G) of the Sentencing Act 1991.

The proposed amendment will require such offenders to be subject to the mandatory custodial requirements of section 5(2G) of the Sentencing Act 1991, and will therefore have a retrospective effect. This new sentencing requirement will only apply in respect of offenders whose sentences have not been finalised. This can potentially result in an offender being subject to a custodial sentence in circumstances where a court would otherwise have imposed a more lenient sentence.

This change therefore engages the right under section 27(2) of the Charter against a retrospective increase in penalty for a criminal offence. ...

In relation to the right under section 27(2), the proposed change will only apply to a small group of offenders, being those who committed the relevant sex offences within the three month gap between the commencement of the Category 1 offence requirements and the new sex offences.
These repealed sex offences describe offending of a very serious nature—specifically, offending including rape and sexual offences against children—and will ensure that similar offenders are treated similarly in sentencing. In relation to the rights under section 10 and 21, I refer to the statement of compatibility made with respect to the Sentencing (Community correction order) and Other Acts Amendment Bill 2016, which introduced the custodial sentencing requirements.

To summarise the most relevant reasons, the requirement for a custodial sentence resulting from categorisation of an offence as a Category 1 offence does not carry with it any prescribed minimum sentence, meaning the court retains full discretion as to the length of the custodial order imposed. This ensures that a proportionate sentence is applied taking into account the particular offence, level of criminality and any aggravating or mitigating factors.

The restrictions imposed on a court when sentencing a Category 1 offence do not compel a court to impose an arbitrary sentence, nor a sentence that is grossly disproportionate to the offending conduct. I also note that there are other fundamental procedures and requirements under Victorian law that protect against arbitrary detention, and disproportionate and unjust sentences.

The Committee considers that the retrospective effect of clause 72(2) is reasonable and justified in the circumstances.

Amendment of the meaning of ‘serious sexual offender’ (clause 76)

Clause 76 would amend the definition of ‘serious sexual offender’ for the purposes of part 2A (Serious offenders) of the Sentencing Act 1991. (Part 2A requires courts to apply certain presumptions in sentencing of serious sexual offenders, which may lead to longer sentences for such offenders.) Clause 82 provides that the amendment would apply to the sentencing of offenders after the commencement of the clause, irrespective of when the offence was committed.

The statement of Compatibility states:

The current definition of ‘serious sexual offender’ includes offenders who have been convicted and sentenced to custody for the current offence of persistent sexual abuse of child under 16. As amended, the definition will also include persons who have been convicted and sentenced to custody for historical versions of this offence. This change therefore limits the right under section 27(2) of the Charter against a retrospective increase in penalty for a criminal offence. For similar reasons, the change could also engage the rights under section 10 and 21 of the Charter.

Historical versions of the offence of persistent sexual abuse of child under 16 are currently included in Schedule 1 to the Sentencing Act, which lists offences relevant to the Part 2A provisions. However, an offender will only be captured within the definition of ‘serious sexual offender’ if they have been convicted and detained for that offence, as well as another sexual offence or a violent offence in the same course of conduct. In other words, an offender would need to have been convicted and detained for at least two offences.

By contrast, an offender need only be convicted and detained for one offence of the current offence of persistent sexual abuse of a child, or for the incidents of sexual offences in one course of conduct charge, to be caught within the definition. The policy basis for requiring only one such offence is because such offenders would have engaged in multiple instances of sexual offending.

The proposed amendment would mean offenders who are in future sentenced for historical versions of the persistent sexual abuse against a child offence will be sentenced subject to the Part 2A provisions. The amendment will therefore enable similar offenders, who have engaged in similar offending, to be treated alike in sentencing.
It is anticipated that this amendment will have a limited effect, as it will only affect offenders who have committed a relevant persistent sexual abuse offence prior to 1 July 2017 (when the new version of the offence commenced), who have yet to be sentenced, and who will be sentenced to a term of imprisonment or detention in a youth justice centre. Further, these amendments will not affect offenders who are appealing a sentence which has already been imposed prior to these amendments taking effect.

The Committee considers that the retrospective effect of clause 76 is reasonable and justified in the circumstances.

Estate Agents Act 1980 – Rebate Statements

Clause 52 would insert new subsections 49A(6) and (7) to provide that a rebate statement contained in an engagement or appointment of an estate agent that is entered into on or before the Bill receives Royal Assent, would not fail to comply with section 49A(4) merely because it lacks the statements required by subsection (4)(a) and (c).

In addition:

- clause 2 provides that the amendments to the Estate Agents Act 1980 are deemed to commence on 9 June
- under clause 53, new section 104 provides that section 49A, as amended, applies retrospectively to the engagement or appointment of an estate agent in respect of work done by (or on behalf of) the agent or in respect of any outgoings incurred by the agent (new section 104(1) and to proceedings commenced before 9 June 2018 which concern validity of a rebate statement because the statement does not contain a rebate prohibition statement (new section 104(3)).

The Statement of Compatibility states:

The overarching purpose of the Bill is to ensure that mere non-conformity with the requirement to include statements under section 49A(4)(a) and (c), which in some instances may not be relevant to the particular transaction in issue, will not (of itself):

- cause an estate agent to commit an offence where they obtain or seek to obtain payment in respect of work or outgoings, or
- prevent the agent recovering commissions or money in respect of any outgoings for (or in respect of) any such transaction.

... The Bill provides that persons (such as a vendor) whose contractual liability to an estate agent would have been effectively extinguished by section 50 due to an agent’s non-compliance with section 49A(4)(a) and (c), will lose that protection and the agent’s (otherwise barred) cause of action will be effectively reinstated. The provision may also mean that vendors who have paid a commission to agents, and who seek restitution of that payment on the basis of the agent’s non-compliance with section 49A(4)(a) and (c) will have any claim that might otherwise have existed extinguished.

Insofar as an accrued cause of action may constitute property for the purpose of the Charter, arguably section 20 is engaged. However, for the following reasons, I do not consider that the provisions limit the right under section 20 of the Charter.

One effect of these provisions is to reinstate to an estate agent a cause of action that had previously been statutorily extinguished in respect of commission or outgoing not received. This is achieved by removing (in certain circumstances) a statutory bar limiting the cause of action. For the plaintiff, this confers rather than deprives them of the property in any cause of
action. By contrast, the impact on the defendant is to deprive them of a statutory right. In these circumstances, where the only right which a person is deprived of is a statutory defence, the provisions will not detrimentally affect a chose in action, and therefore the deprivation will not be of ‘property’.

The provisions may also affect persons who seek to recover money already paid to an agent who failed to comply with section 49A(4)(a) and (c). In those circumstances, the effect of the provisions may be to deprive that person of property and will need to be in accordance with law in order not to limit the right protected under the Charter.

I consider any resulting deprivation to be in accordance with law. The change is provided for by statute, which is clearly and precisely set out in the Bill. Even though the provisions have a narrow field of retrospective operation, I consider that any deprivation they effect is nevertheless in accordance with law.

Finally, even if the provisions do not qualify as being ‘in accordance with law’ for the purposes of the Charter insofar as they operate retrospectively, then I consider that the limitation that they place on the right is demonstrably justified in the circumstances.

The Committee considers that the retrospective effect of clause 52 and 53 is reasonable and justified in the circumstances.

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**Summary:** The effect of clause 35 may be to allow the DPP, but not the offender, to appeal a sentence to the Court of Appeal in some circumstances. The Committee will write to the Attorney-General seeking further information.

**Relevant provision**

The Committee notes that clause 35, inserting a new section 290A into the *Criminal Procedure Act 2009*, provides that ‘[t]he DPP may appeal to the Court of Appeal against a sentence’ imposed in an appeal brought by an offender against a sentence imposed by the magistrates’ court if the appeal court ‘made a finding’:

- under existing paras (a) to (e) of s. 5(2H) of the *Sentencing Act 1991*, which set out when a court can give a non-custodial sentence for a category 2 offence; or
- ‘that a special reason exists’ under existing s. 10A of the *Sentencing Act 1991*, which sets out when a court can give a sentence below a mandatory minimum sentence for an offence;
if the DPP considers that ‘there is an error in the sentence imposed’ and ‘a different sentence should be imposed’; and is also ‘satisfied’ that bringing a further appeal is ‘in the public interest’.

Offenders do not have an equivalent right to appeal to the Court of Appeal against a sentence imposed on appeal against a sentence imposed by a magistrates’ court. Instead, existing s. 283 of the Criminal Procedure Act 2009 only permits an offender to appeal against such a sentence if the first appeal replaced a sentence of non-imprisonment with a sentence of imprisonment and the Court of Appeal grants the offender leave to bring a further appeal.9

The Committee observes that the effect of clause 35 may be to allow the DPP, but not the offender, to appeal a sentence to the Court of Appeal in some circumstances, namely when the offender appealed against a sentence imposed by a magistrate and the appeal court made a finding permitting the court to impose a non-custodial or below-minimum sentence.

Charter analysis

The Committee notes that the United Nations Human Rights Committee has remarked, with respect to the international equivalent to the Charter’s right to a fair hearing:10

The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.

In relation to whether or not clause 35 engages a Charter right, the Statement of Compatibility remarks:

The right to a fair hearing is protected by section 24 of the Charter. Article 14 of the International Covenant on Civil and Political Rights, on which section 24 of the Charter is based, includes equality before the courts as part of the right to a fair hearing, where the same procedural rights are to be provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds that do not entail actual disadvantage or other unfairness on the defendant. Equality before the court includes ‘equality of arms’, which is breached where only the prosecutor, and not the defendant, is allowed to appeal a certain decision, as is the case in the Bill (International Covenant on Civil and Political Rights Committee General Comment no 32 (2007)). There is therefore a risk that the new DPP appeal right may be incompatible with the right to a fair hearing. The government nevertheless wishes to proceed with the amendments.

The government has decided to preclude offenders from having the equivalent appeal right because allowing offenders to appeal a court’s finding that special reasons did not exist is contrary to the intent of the emergency worker provisions. Currently, an offender is able to appeal to the Court of Appeal under section 283 of the CPA in circumstances where the County Court imposed a sentence of imprisonment on appeal, and the offender had not received a sentence of imprisonment in the Magistrates Court. That is, offenders are not entirely precluded from appealing a decision of the County Court on appeal. I believe it is necessary to provide this appeal right to the DPP to ensure that statutory minimum terms of imprisonment are being correctly imposed by the courts and the system can self-correct.

9 As recently occurred in El-Lababidi v The Queen [2018] VSCA 116.

However, the Committee observes that sentence appeals by offenders, like sentence appeals by the DPP, may also ‘ensure that statutory minimum terms of imprisonment are being correctly imposed by the courts and the system can self-correct.’

In relation to the extent to which clause 35 limits a Charter right, the Statement of Compatibility remarks:

[T]he appeal power only applies to special reasons under sections 5(2H) or 10A of the Sentencing Act 1991, and only after an appeal by an offender, and is therefore limited in its scope. This confines the power to the cases of particular concern to the government and the community.

However, the Committee observes that the DPP’s new ‘appeal power’ may not only apply to ‘special reasons under sections 5(2H) or 10A of the Sentencing Act 1991’. Rather, so long as the court hearing an appeal against a magistrate sentence brought by an offender ‘made a finding’ under ss. 5(2H) or 10A, the terms of clause 35 may permit an appeal to be brought against any error in the sentence, whether or not the error relates to such a finding. For example, new section 290A may permit the DPP to appeal on the ground that, although there was a special reason not to impose a mandatory minimum sentence on an offender, the sentence actually imposed on appeal was nevertheless inadequate.

On clause 35’s compatibility with the Charter, the Statement of Compatibility remarks:

Accordingly, while I acknowledge that Division 6 of Part 5 of the Bill may limit the right to a fair hearing and in so doing may be incompatible with the Charter, it is my view that the limitation is reasonable and justified and if it is not, the incompatibility is nevertheless necessary for the reasons outlined above.

The Committee observes that this may be a statement under Charter s. 28(3)(b) that ‘in the member’s opinion, any part of the Bill is incompatible with human rights’. The Charter requires that any such statement must include the ‘nature and extent of the incompatibility’. The Committee notes that, in the case of clause 35, the nature of the incompatibility may be that it ‘may limit the right to a fair hearing’ and the extent of the incompatibility may be that clause 35 may not provide ‘the same procedural rights... to all parties’ on a basis that ‘can be justified on objective and reasonable grounds that do not entail actual disadvantage or other unfairness on the defendant’.

Conclusion

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

- whether or not new section 290A permits the DPP to appeal on the ground of a sentencing error other than an erroneous finding under ss. 5(2H) or 10A of the Sentencing Act 1991, for example if the DPP considers that, regardless of whether or not a special reason exists that permits a below-minimum sentence, the sentence actually imposed was manifestly inadequate; and
- whether or not the statement of compatibility with respect to clause 35 is a statement under Charter s. 28(3)(b) (i.e. that part of the Bill is incompatible with the Charter’s right to a fair hearing) and, if so, the nature and extent of any incompatibility.

Recommendation

- Refer to Parliament for consideration
- Write to Minister for clarification
- No further action required
Justice Legislation (Police and Other Matters) Bill 2018

Bill Information

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<tr>
<th>Minister</th>
<th>Hon Lisa Neville MP</th>
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Bill Summary

The Bill would:

- amend the *Crimes Act 1958*:
  - to create new offences of recklessly discharging a firearm and intimidation of law enforcement officers and family members
  - to further provide for the maximum term of imprisonment that applies to the offence at common law of common assault

- amend the *Bail Act 1977* to make provision in relation to the granting of bail for a new offence and a certain offence at common law of common assault in the *Crimes Act 1958*

- amend the *Sentencing Act 1991* to make provision in relation to the sentencing for the new offence and a certain offence at common law of common assault in the *Crimes Act 1958*

- amend the *Drugs, Poisons and Controlled Substances Act 1981*:
  - to further provide for the commercial and large commercial quantities for particular drugs of dependence specified in Schedule Eleven
  - to provide for the offence of trafficking in a commercial quantity of a drug of dependence for the benefit of or at the direction of a criminal organisation

- amend the *Bail Act 1977*, the *Confiscation Act 1997*, the *Sentencing Act 1991* and the *Surveillance Devices Act 1999* in relation to the new offence of trafficking in a commercial quantity of a drug of dependence for the benefit of or at the direction of a criminal organisation in the *Drugs, Poisons and Controlled Substances Act 1981*

- amend the *Second-Hand Dealers and Pawnbrokers Act 1989* to provide for interim closure notices and long-term closure orders

- amend the *Confiscation Act 1997*:
  - to provide for offences against the *Second-Hand Dealers and Pawnbrokers Act 1989* to be Schedule 1 offences
  - to provide for offences against other Acts to be Schedule 1 or 2 offences

- amend the *Victoria Police Act 2013*:
  - to provide for a restorative engagement process
  - to further provide for parental leave arrangements

- amend the *Firearms Act 1996*:
  - to provide for lever action shotguns
  - to provide for the offence to possess a traffickable quantity of firearms
  - to further provide for the offence to acquire or dispose of a traffickable quantity of firearms
• amend the Sex Offenders Registration Act 2004:
  o to further provide for access to and disclosure of personal information from the Register
  o to further provide for Class 1 offences and Class 2 offences

• amend the Crimes Act 1958:
  o to provide for the giving of an authorisation by a senior police officer for the taking of a DNA profile sample from a DNA person
  o to provide for a senior police officer to authorise the taking of a DNA profile sample from certain persons
  o to provide for a senior police officer to authorise the taking of a sample from certain persons who have previously provided a sample
  o to provide for the immunity of certain health practitioners who may take a DNA profile sample under a direction or an authorisation given by a senior police officer

• amend the Corrections Act 1986:
  o to provide for a police officer and a registered medical practitioner or nurse who accompanies the police officer to enter and remain in a prison for the purpose of taking a DNA profile sample from a prisoner
  o to validate any sample taken by a forensic procedure conducted under section 464ZFAB before the commencement of section 80

• make minor and consequential amendments to various Acts.

## Type of Bill

- Government Bill
- Private Members Bill

## CONTENT ISSUES

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

## Details

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

Clause 2 of the Bill provides that, unless proclaimed earlier, Parts 2, 3, 4, 5, 6, Divisions 1 and 2 of Part 8, Divisions 1 and 4 of Part 9 and clauses 51 and 52, would commence on 19 June 2019, which is more than 12 months from the introduction of the Bill.

The Statement of Compatibility states:

The default commencement date of 19 June 2019 is more than 12 months after the date of the introduction of the Bill to enable the amendments of the Bill to come into operation at a time that will ensure they are effective. For example, clause 18 of the Bill makes a consequential amendment to section 71AA(2) of the Drugs, Poisons and Controlled Substances Act 1981 that needs to commence after section 129 of the Voluntary Assisted Dying Act 2017 and clause 10(2) of the Bill. The default commencement date of the Voluntary Assisted Dying Act 2017 is 19 June 2019.
Clause 2 also provides that clauses 51 and 52 of the Bill will commence on a day or days to be proclaimed. The Statement of Compatibility states that no default commencement date applies to these clauses because their commencement is connected to the passage and commencement of legislation currently before the Commonwealth Parliament.

The Committee is satisfied that the possible delayed commencement of the above clauses is reasonable and justified in the circumstances.

**Power of arrest with a warrant**

Clause 63 would insert new section 464ZFA-D into the *Crimes Act 1958* to provide a procedure for issuing a notice to attend where a senior police officer authorisation for taking a DNA profile sample has been made and the person is a relevant person (defined in new section 464ZFA-D(1) to mean a person who is not a detained or protected person).

New section 464ZFA-D(5) would authorise a police officer to apply to the Magistrates’ Court for a warrant to arrest the person, and detain them for so long as is reasonably necessary to take a DNA profile sample, if the person does not attend in response to the notice.

The Explanatory Memorandum states:

Before issuing a warrant, the magistrate or registrar must be satisfied by evidence on oath or by affidavit that a notice was served on a person lawfully, and the person has not had their DNA profile sample taken.

New section 464ZFA-D(6), (7) and (8) provide a procedure for when the notice to attend is not able to be served within the same 6 month period during which a senior police officer authorisation may be given, under new section 464ZFA-C(2)(b).

In these circumstances, a police officer may apply to the Magistrates' Court for a warrant within 28 days of the expiry of the period for serving the notice. Before issuing a warrant, the magistrate or registrar must be satisfied that reasonable attempts have been made to serve the notice and the notice was not served on the person and a DNA profile sample has not been taken from the person.

The Committee is satisfied that the power of arrest under new section 464ZFA-D(5) is reasonable and justified in the circumstances.

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**CHARTER ISSUES**

- NONE
- Other: Compatibility with Human Rights
- Operation of the Charter
Details

Privacy – Presumption of innocence – DNA sampling of arrestees – No requirement that the sampling may tend to confirm or disprove the person’s involvement in the offence

Summary: The effect of clause 56 may be to permit the taking of a DNA sample from people under lawful arrest for an indictable offence regardless of whether there are reasonable grounds to believe that taking the DNA sample may tend to confirm or disprove the person’s involvement in the commission of the offence. The Committee will write to the Minister seeking further information.

Relevant provision

The Committee notes that clause 56, inserting a new section 464SE into the Crimes Act 1958, provides that a senior police officer who is not involved in investigating the offence for which the taking of a sample is required may authorise the taking of blood, hair, saliva or a mouth scraping for the purpose of deriving a DNA profile from a person if the person is suspected or charged with an indictable offence (or, for a child aged 15 to 17, an indictable offence in schedule 9) and the senior police officer is satisfied that:

- the person is under lawful arrest or is a prisoner subject to court-ordered investigative custody; and
- the person (and any child’s parent or guardian) has refused to consent to a request for DNA sample; and
- there are reasonable grounds to believe that the person has (or, for a child, that the child is believed on reasonable grounds to have) committed the offence; and
- taking the sample without consent is justified in all the circumstances.

By contrast, existing provisions currently permit the taking of DNA samples without consent on the authority of:

- a senior police officer who is not involved in investigating the offence, who may authorise the taking of a hair from an adult suspected or charged with an indictable offence;¹¹
- a magistrate, who may authorise the taking of a sample from an adult suspected or charged with an indictable offence (or a child between 10 and 18 suspected or charged with certain indictable offences);¹²

if the officer or magistrate is satisfied that:

- the person is under lawful arrest or is a prisoner under court-ordered investigative custody; and
- the person (and, for a child, the child’s parents or guardians) have refused to consent to a request to a forensic procedure; and
- there are reasonable grounds to believe that the person has (or, for a child, that the child is believed on reasonable grounds to have) committed the offence; and
- material reasonably believed to be from the body of a person who committed the offence has been found; and

¹¹ Existing s. 464SA, Crimes Act 1958.
there are reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence; and

in all the circumstances, the authorisation is justified.

Accordingly, clause 56 alters not only the decision-maker (in some instances of DNA sampling of suspects) but also the threshold test in all instances of such sampling, omitting the current express requirement of a reasonable belief that the sampling will cast light on the guilt or innocence of the suspect with respect to the offence they are believed to have committed. The remaining threshold test – that the sampling ‘is justified’ – appears to be the same test currently used by a court to assess whether an offender found guilty of an indictable offence must provide a DNA sample.13

The Committee observes that the effect of clause 56 may be to permit the taking of a DNA sample from people under lawful arrest for an indictable offence on the same grounds that DNA samples can currently be taken from people found guilty of an indictable offence, regardless of whether any material has been found that is believed to be from the body of the offender and whether or not there are reasonable grounds to believe that taking the DNA sample may tend to confirm or disprove the person’s involvement in the commission of the offence they are believed to have committed.

Charter analysis

The Statement of Compatibility remarks:

I am of the view that removing court oversight for some suspects and some offenders is necessary and justified in order to streamline DNA sampling. The new suspect DNA sampling will only be authorised by a police officer of the rank of senior sergeant or above where taking the sample without consent is justified in all the circumstances. The threshold test of being justified in all the circumstances is also applied by the courts when considering applications for compulsory procedure orders....

However, the Committee notes that ‘courts [and senior police officers] considering applications for compulsory procedure orders’ must currently be satisfied of additional threshold tests – that material believed to be from the body of the offender has been found and that the sampling procedure may tend to confirm or disprove the suspect’s involvement in the commission of an offence – that are not present in new section 464SE. The Statement of Compatibility does not address the absence of these express requirements in new section 464SE.

The Statement of Compatibility also remarks:

The Charter protects certain rights in criminal proceedings, including the right to be presumed innocent until proven guilty and the right not to self-incriminate. While taking DNA profile samples from suspects may only be authorised when a person is suspected or believed of committing certain offences, they do not engage the right to be presumed innocent because they are an investigation tool that may also exonerate a suspect and assist them in the proof of their innocence.

However, the Committee notes that new section 464SE does not expressly require that the DNA sampling be done for the purpose of investigating the offence for which the person is under investigation, but only that DNA sampling be justified in all the circumstances. Moreover, even if the suspect is subsequently cleared of any suspicion for the offence (including by the DNA sample itself), the effect of clause 53(6), amending the definition of ‘suspects index’ in existing s. 464 of the Crimes Act 1958, s. 464ZF(8)(b).

13 Crimes Act 1958, s. 464ZF(8)(b).
Act 1958, may be that the suspect’s DNA profile can still be placed on the suspect index of the DNA database and compared with any unsolved crime sample for up to 12 months after the sample is taken.

Relevant comparisons

The Committee notes that the Commonwealth, the ACT, New South Wales, Tasmania and Western Australia all presently only permit a senior police officer to order a DNA sampling procedure on a suspect in custody if the officer is satisfied that ‘there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence’. By contrast, there is no such requirement for DNA sampling of arrestees or suspects in the Northern Territory, Queensland and South Australia.

The Committee observes that the federal and ACT provisions provide additional guidance about the ‘justified in all the circumstances’ threshold test in the case of DNA sampling of suspects as follows:

In determining whether the carrying out of the forensic procedure without consent is justified in all the circumstances, the senior police officer must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.

In balancing those interests, the senior police officer must have regard to the following matters:

- the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence;
- the degree of the suspect’s alleged participation in the commission of the relevant offence;
- the age, physical health and mental health of the suspect, to the extent that they are known to the senior police officer or can reasonably be discovered by the senior police officer (by asking the suspect or otherwise);
- whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence;
- if the suspect gives any reasons for refusing to consent—the reasons;
- any other matter considered relevant to balancing those interests.

Conclusion

The Committee will write to the Minister seeking further information as to:

- whether or not new section 464SE permits a DNA sample to be taken from a suspect in the absence of any reasonable grounds to believe that the sample may tend to confirm or disprove the involvement of the suspect in the commission of the offence;
- whether or not expressly requiring a senior police officer to be satisfied that the DNA sample may tend to confirm or disprove the involvement of the suspect in the commission of an offence (as currently required federally and in the ACT, NSW, Tasmania, Victoria and Western Australia) is a less restrictive alternative reasonably available to achieve the purpose of clause 56; and

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14 Crimes Act 1914 (Cth) s. 23WO(1)(c); Crimes (Forensic Procedures) Act 2000 (ACT), s. 29(1)(d); Crimes (Forensic Procedures) Act 2000 (NSW), s. 20(c); Forensic Procedures Act 2000 (Tas), s. 12(2); Criminal Identification (Identifying People) Act 2002 (WA), s. 43(4)(e)(ii).

15 Police Administration Act 1978 (NT), s. 145A; Police Powers and Responsibilities Act 2000 (Qld), s. 481; Criminal Law (Forensic Procedures) Act 2007 (SA), s. 14(2).

16 Crimes Act 1914 (Cth), s. 23WO(2) & (3); Crimes (Forensic Procedures) Act 2000 (ACT), s. 29(2) & (3).
whether or not setting out an express list of considerations to take account when assessing whether DNA sampling of a suspect is justified in all the circumstances (as currently required federally and in the ACT) is a less restrictive alternative reasonably available to achieve the purpose of clause 56.

Recommendation

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

CHARTER ISSUES

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

Details

Privacy – DNA sampling in prison – Where person who conducted procedure had no lawful authority to be or remain in prison – Retrospective validation of taking of sample

Summary: Clause 76 may engage a prisoner’s right not to be subject to ‘unlawful’ interferences in privacy, to the extent that the clause may validate sampling done by someone who was either not authorised to enter the prison or who remained in the prison despite the prisoner exercising his or her right to refuse a visit from a police officer. The Committee will write to the Minister seeking further information.

Relevant provision

The Committee notes that clause 76, inserting a new section 464ZLA(2) into the Crimes Act 1958, provides:

A sample taken in a forensic procedure conducted in accordance or purported to be conducted in accordance with section 464ZFA before the commencement day in a prison was not unlawfully taken only because the person taking the sample had no lawful authority to enter and remain in the prison.

Existing s. 464ZFA, which commenced on 1 March 2018, provides for a police office to direct that a forensic procedure for the taking of a sample from any part of the body be done on anyone who has been sentenced for a registrable offence under the Sex Offenders Registration Act 2004 where the Chief Commissioner of Police does not already have a ‘forensic sample’ from the person. (Clause 62 will limit this to procedures to take a DNA profile sample from the person.) The section provides for a notice to be served on a registrable offender to attend at a police station within 28 days and for a magistrate to issue an arrest warrant for a person who does not attend. However, the section makes no express provision for the taking of a sample from a registrable offender who is currently in prison.

Existing s. 41 of the Corrections Act 1986 provides that a police officer may enter a prison and visit a prisoner in accordance with the Corrections Regulations 2009 (which currently permit a police officer to visit any prisoner between 8AM and 3.30PM17) or with the permission of the Governor. However, s. 41(3) provides that ‘A prisoner may refuse a visit from a police officer under this section.’ The only express exception is where a court has ordered that the prisoner be transferred into the custody of

17 Corrections Regulations 2009, reg 62.
the police officer for investigation or questioning under s. 464B(5) of the *Crimes Act 1958*. While the Supreme Court of Victoria has held that a court order for the prisoner to be subject to DNA sampling is also an exception,18 this ruling may not extend to a police officer direction under s. 464ZFAB. (Clause 80 will insert a new section 43A that will allow a police officer accompanied by a registered medical practitioner or nurse to enter and remain in the prison for the purpose of taking a DNA profile sample from a prisoner who is the subject of a direction under s. 464ZFAB of the *Crimes Act 1958*.)

Charter analysis

The Statement of Compatibility does not address clause 76.

The Explanatory Memorandum remarks that clause 76:

> is necessary because clause 80 of the Bill inserts new section 43A into the Corrections Act 1986 to provide a procedure for lawfully obtaining samples from people detained in a prison that was not previously available.

However, the Committee notes that the effect of clause 76 may be to retrospectively validate the taking of a forensic sample from a prisoner who is a registrable offender even though the person who took the sample was not permitted to enter the prison or the prisoner exercised his or her then right to refuse a visit from the police officer under s. 41(3) of the *Corrections Act 1986*.

The Committee observes that, to the extent that clause 76 may validate sampling done by a person who was either not authorised to enter the prison or who remained in the prison despite the prisoner exercising his or her then right to refuse a visit from a police officer under s. 41(3) of the *Corrections Act 1986*, the clause may engage the prisoner’s right not to be subject to ‘unlawful’ interferences in privacy,19

Conclusion

The Committee will write to the Minister seeking further information as to the compatibility of clause 76, to the extent that it validates DNA sampling done in prison by a person who was not lawfully in the prison or who remained despite the prisoner exercising his or her statutory right to refuse a visit from a police officer under s. 41(3) of the *Corrections Act 1986*, with the Charter’s right against unlawful interferences in privacy.

Recommendation

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

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18 *Pavic v Magistrates’ Court of Victoria & Chief Commissioner of Police* [2003] VSC 99, [45].
19 Charter s. 13(a).
Prevention of Family Violence Bill 2018

Bill Information

Minister  
Hon Natalie Hutchins MP

Portfolio  
Prevention of Family Violence

Introduction Date  
19 June 2018

Second Reading Date  
20 June 2018

Bill Summary

The Bill would:

- establish the Family Violence Prevention Agency and provide for the functions, powers and duties of the Agency
- establish the Board of the Family Violence Prevention Agency and provide for the functions of the Board
- provide for the appointment of the Chief Executive Officer of the Family Violence Prevention Agency.

Type of Bill

☒ Government Bill  
☐ Private Members Bill

CONTENT ISSUES

☒ NONE  
☐ Inappropriately delegates legislative power

☐ Other:  
☒ Trespasses unduly on Rights or Freedoms

Details

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

Recommendation

☐ Refer to Parliament for consideration

☐ Write to Minister for clarification

☒ No further action required

CHARTER ISSUES

☒ NONE  
☐ Compatibility with Human Rights

☐ Other:  
☒ Operation of the Charter

Details

The Prevention of Family Violence Bill 2018 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.
### Recommendation

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

Scrutiny of Acts and Regulations Committee
# Racing Amendment (Integrity and Disciplinary Structures) Bill 2018

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## Bill Summary

The Bill would:

- establish the Victorian Racing Integrity Board
- replace the Racing Victoria (RV), Greyhound Racing Victoria (GRV) and Harness Racing Victoria (HRV) Racing Appeals and Disciplinary Boards (RADB) with a single Victorian Racing Tribunal (VRT)
- provide for the powers of the VRT to hear and determine a matter
- limit the right of appeal to the Victorian Civil and Administrative Tribunal (VCAT) to an appeal on a penalty imposed by the VRT
- make further provision in relation to the powers of the Racing Integrity Commissioner (RIC)
- make other operational and technical amendments to the Racing Act 1958 and consequentially amend the Victorian Civil and Administrative Tribunal Act 1998.

## Type of Bill

- **[X]** Government Bill
- **[ ]** Private Members Bill

## CONTENT ISSUES

- **[ ]** NONE
- **[X]** Inappropriately delegates legislative power
- **[X]** Trespasses unduly on Rights or Freedoms

## Details

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

Clause 2 provides that the Act would come into operation on a day or days to be proclaimed, with a default commencement date of 1 August 2019, which is more than 12 months from the date of the Bill’s introduction.

The Explanatory Memorandum states:

> The commencement provision will provide time for preparations for the commencement of the new Victorian Racing Tribunal.

The Committee is satisfied that the possible delayed commencement of the Bill is reasonable and justified in the circumstances.
The privilege against self-incrimination

Under new section 50ZJ of the *Racing Act 1958* [14], the privilege against self-incrimination would not constitute a reasonable excuse to refuse or fail to give information or a document to the VRT under the Act.

The Statement of Compatibility provides:

> Although these provision[s] may interfere with a person's rights in criminal proceedings, the Bill provides an information and document use immunity to such persons. Section 50ZI(2) of the Bill provides immunity from criminal proceedings in relation to information or documents that “might tend to incriminate the person”. As such, the effect of the interference is mitigated by the immunity.

Therefore, to the extent that these provisions are seen to impose a restriction on a person's rights in criminal proceedings, they are reasonable limitations that can be justified in a democratic society.

The Committee is satisfied that the limitation of the privilege against self-incrimination by section 50ZJ is reasonable and justified in the circumstances.

Power of entry without a warrant

Clause 32 would substitute current section 77A(1) and (2) of the *Racing Act 1958* to provide a member of the Board (i.e., Greyhound Racing Victoria), or an officer authorised by the Board in writing, with the power to enter certain premises for the purpose of enforcing or determining compliance with the Act and the rules.

The Statement of Compatibility states:

> Clause 32 of the Bill provides for a broad range of powers to inspect, make copies, take photographs or audio recordings, take or keep samples and mark or tag a greyhound. In exercising these powers, GRV may gather personal information in relation to a persons' privacy or correspondence in accessing, inspecting and/or taking samples or copies on premises.

> It is noted that the provisions relate only to premises associated with greyhounds as specified in clause 32(1) of the Bill and reflects pre-existing powers already exercised by the GRV Board through a voluntary contractual agreement with greyhound racing industry participants. As such individuals will have consented to this degree of interference.

> Further, the powers can only be exercised for the purposes of determining compliance with the Racing Act and the rules administered by the GRV Board. As such, it is submitted that the interference is justified in a democratic society.

The Committee is satisfied that the power of entry without a warrant under clause 32 is reasonable and justified in the circumstances.

Recommendation

- Refer to Parliament for consideration
- Write to Minister for clarification
- No further action required
**CHARTER ISSUES**

- **NONE**
- **Compatibility with Human Rights**
- **Operation of the Charter**

**Details**

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

Summary: The new sections 37BE, 37BF, 50U, 50ZG and 50ZH may impose a burden on an accused to prove that the excuse provided for in each of those sections is made out, in order to avoid a penalty. The Committee will write to the Minister seeking further information.

Relevant provisions

The Committee notes that the new sections 37BE, 37BF, 50U, 50ZG and 50ZH that are inserted by the Bill each contain a provision allowing a person to raise a ‘reasonable excuse’ defence to the prohibition contained in each of those sections.

The Committee observes that these provisions may be interpreted as requiring an accused to prove their innocence by either raising evidence of a reasonable excuse or actually proving that they have a reasonable excuse, for committing the relevant acts.

Charter analysis

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

The Statement of Compatibility for any Bill that creates a provision that reduces the prosecution’s burden to prove the accused’s guilt or requires an accused to offer evidence of their innocence (or extends the operation of or increases the applicable penalty in respect of such a provision) should state whether and how that provision satisfies the Charter’s test for reasonable limits on rights. Examples of such provisions include ones that place the legal onus of proof on an accused with respect to any issue in a criminal proceeding; deem a fact to be proved in any circumstance; provide that proof of any fact is ‘prima facie evidence’ of a different fact; or place an evidential onus on an accused with respect to an essential element of an offence. The Committee would prefer that the analysis of reasonable limits assess the risk that the provision may allow an innocent person to be convicted of the offence and set out the demonstrable justification for allowing such a risk. In the case of a provision that places a legal onus on an accused, the analysis may address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision’s purpose.

In addition, the Statement of Compatibility (or explanatory material) for a provision that introduces or significantly alters an exception to a criminal offence should state whether or not the exception places a legal onus on the accused. Examples of such exceptions include provisions stating that 'It is a defence to a prosecution for an offence if...' or 'A person is not liable to be prosecuted for an offence if...' or 'A person is not guilty of an offence if...' or a particular offence provision 'does not apply if'. For exceptions to summary offences, the explanatory material may address the effect of s.72 of the Criminal Procedure Act 2009. For exceptions that impose a legal onus on the accused without express words to that effect, the statement of compatibility may address whether or not the inclusion of express words would be a less restrictive alternative reasonably available to achieve the exception’s purpose.
The Committee notes that the new sections 37BE, 37BF, 50U, 50ZG and 50ZH may impose a ‘reverse onus’ that places the burden on an accused to prove that the relevant excuse is made out. Whether the onus is on an accused to prove facts that would bring their case within the scope of the excuse, or to prove that the excuse applies, or whether the onus is on the prosecution to disprove the existence of such facts, will depend upon how the provisions are interpreted.

The Statement of Compatibility does not consider the effect of any of these ‘reasonable excuse’ provisions on the presumption of innocence.

Conclusion

The Committee will write to the Minister seeking further information as to whether the new sections 37BE, 37BF, 50U, 50ZG and 50ZH place a legal or evidential onus of proof on the accused and if so, whether expressly addressing that onus would be a less restrictive alternative reasonably available to achieve the exceptions’ purposes.

Recommendation

- Refer to Parliament for consideration
- Write to Minister for clarification
- No further action required
Toll Fine Enforcement Bill 2018

Bill Information

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<th>Member</th>
<th>Ms Huong Truong MP</th>
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| Introduction Date | 19 June 2018 |
| Second Reading Date | 20 June 2018 |

Bill Summary

The Bill would amend the *Melbourne City Link Act 1995* and the *EastLink Project Act 2004* to reduce the number of infringement notices and criminal proceedings to one per 7-day period of driving without paying tolls and to introduce other minor changes.

Type of Bill

☐ Government Bill  
☒ Private Members Bill

CONTENT ISSUES

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

Details

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

Recommendation

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

CHARTER ISSUES

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

Details

The Toll Fine Enforcement Bill 2018 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

Recommendation

☐ Refer to Parliament for consideration  
☐ Write to Member for clarification  
☒ No further action required
Victorian Industry Participation Policy (Local Jobs First) Amendment Bill 2018

Bill Information

Minister  Hon Ben Carroll MP
Portfolio  Industry and Employment
Introduction Date  19 June 2018
Second Reading Date  20 June 2018

Bill Summary

The Bill would:

- provide for the establishment of the office of the Local Jobs First Commissioner
- provide for the development and implementation of a Local Jobs First Policy
- provide for compliance with and enforcement of the Local Jobs First Policy
- require reporting to the Parliament on the implementation of and compliance with the Local Jobs First Policy.

Type of Bill

☒ Government Bill  ☐ Private Members Bill

CONTENT ISSUES

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

Details

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

Recommendation

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

CHARTER ISSUES

☒ NONE  ☐ Compatibility with Human Rights
☐ Other:  ☐ Operation of the Charter
The Victorian Industry Participation Policy (Local Jobs First) Amendment Bill 2018 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

### Recommendation

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Appendix 1
Ministerial responses to Committee correspondence

The Committee received a Ministerial response on the Bill listed below.

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

State Taxation Acts Amendment Bill 2018
Hon Richard Dalla-Riva  
Deputy Chairperson, Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
MELBOURNE VIC 3002

Dear Mr Dalla-Riva,

State Taxation Acts Amendment Bill 2018

I refer to your letter of 22 May 2018, in which you sought further information on whether Division 7 of the State Taxation Acts Amendment Bill 2018 (Bill) limits the right to equality or whether it constitutes a reasonable limit under section 7(2) of the Charter of Human Rights and Responsibilities Act 2006 (Charter).

Division 7 of the Bill increases the value of the stamp duty exemption already provided to young farmers in the Duties Act 2000. The ‘young farmers’ exemption was introduced by the State Taxation Acts Amendment Act 2011, and the Charter implications of this measure were thoroughly considered in a Statement of Compatibility at that time. Parliament found that the limitation to section 8(3) was reasonably justifiable in a free and democratic society based on human dignity, equality and freedom.

The intended effect of this amendment is to give an additional boost to young people in the early stages of their farming careers. The existence of the exemption does not exclude people over the age of 35 from entering the business of primary production; instead it provides targeted assistance to induce younger people to pursue careers in primary production.

To the extent that amendments made by the Bill to increase the young farmer stamp duty exemption could be characterised as limiting the right to equality before the law without discrimination under section 8(3) of the Charter, this limitation is reasonable and justified in accordance with section 7(2) of the Charter because the additional benefit represented by expanding the exemption will continue to encourage individuals under 35 from traditional farming backgrounds to stay in the agricultural sector. It also provides an additional incentive for others – specifically younger people – to consider a farming career.
Supporting Victoria’s agricultural sector through measures such as these is vital to keeping Victoria’s rural communities viable.

Thank you for the opportunity to provide further information about Division 7 of the Bill.

Yours sincerely

TIM PALLAS MP
Treasurer

12 JUN 2018
## Appendix 2
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<td>3, 4</td>
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<tr>
<td>Planning and Environment Amendment (Distinctive Areas and Landscapes) Bill 2017</td>
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<tr>
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<tr>
<td>Public Administration Amendment (Public Sector Redundancies and Other Matters) Bill 2018</td>
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<tr>
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</tr>
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<tr>
<td>Treasury and Finance Legislation Amendment Bill 2018</td>
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<tr>
<td>Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Bill 2017</td>
<td>1</td>
</tr>
<tr>
<td>Victorian Industry Participation Policy (Local Jobs First) Amendment Bill 2018</td>
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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.

### Section 17(a)

<table>
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<th>Bills and Amendments</th>
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<td>Audit Amendment Bill 2017 1, 2, Crimes Amendment (Unlicensed Drivers) Bill 2018 8, 9, Electoral Legislation Amendment Bill 2018 7, 8, Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018 2, 3, Engineers Registration Bill 2018 4, 5, Environment Protection Amendment Bill 2018 10, Flora and Fauna Guarantee Amendment Bill 2018 8, 9, Guardianship and Administration Bill 2018 4, 5, Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018 2, 3, Marine and Coastal Bill 2017 1, 2</td>
</tr>
<tr>
<td>(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities</td>
<td>Advancing the Treaty Process with Aboriginal Victorians Bill 2018 5, 8, Audit Amendment Bill 2017 1, 2, 3, Bail Amendment (Stage Two) Bill 2017 1, 2, Charities Amendment (Charitable Purpose) Bill 2018 4, Children Legislation Amendment (Information Sharing) Bill 2017 1, 2, Crimes Amendment (Unlicensed Drivers) Bill 2018 8, 9, Electoral Legislation Amendment Bill 2018 7, 8, Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018 2, 3</td>
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</table>
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Justice Legislation (Police and Other Matters) Bill 2018 10
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National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 7, 8
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Section 17(b)

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

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

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

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<td></td>
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<td>20.02.18 02.03.18</td>
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<tr>
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<td>Children Legislation Amendment (Information Sharing) Bill 2017</td>
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</tr>
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<td>Industrial Relations</td>
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</tr>
<tr>
<td>Charities Amendment (Charitable Purpose) Bill 201820</td>
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<td>27.03.18</td>
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<tr>
<td>Engineers Registration Bill 2018</td>
<td>Treasurer</td>
<td>27.03.18 27.04.18</td>
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<tr>
<td>Guardianship and Administration Bill 2018</td>
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20 On 28 March 2018, the President of the Legislative Council ruled that the Bill infringed the provisions of section 62 of the Constitution Act 1975 and ordered that the Bill be withdrawn.
<table>
<thead>
<tr>
<th>Bill Title</th>
<th>Minister/ Member</th>
<th>Date of Committee Letter / Minister’s Response</th>
<th>Alert Digest No. Issue raised / Response Published</th>
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</thead>
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<tr>
<td>Advancing the Treaty Process with Aboriginal Victorians Bill 2018</td>
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<tr>
<td>Justice Legislation Amendment (Terrorism) Bill 2018</td>
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<tr>
<td>National Redress Scheme for Institutional Child Sexual Abuse</td>
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<tr>
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<tr>
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</tr>
<tr>
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<td>Dr Rachel Carling-Jenkins MP</td>
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<tr>
<td>Local Government Bill 2018</td>
<td>Local Government</td>
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</tr>
<tr>
<td>Environment Protection Amendment Bill 2018</td>
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</tr>
<tr>
<td>Justice Legislation Miscellaneous Amendment Bill 2018</td>
<td>Attorney-General</td>
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</tr>
<tr>
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<td>Racing</td>
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</tr>
</tbody>
</table>
Appendix 5
Statutory Rules and Legislative Instruments considered

The following Statutory Rules were considered by the Regulation Review Subcommittee on 23 July 2018.

Statutory Rules Series 2018

SR No. 32 – Supreme Court (Appeals to the Trial Division, Judicial Review and Further Powers of Judicial Registrars Amendment) Rules 2018
SR No. 33 – Supreme Court (Chapters I and VI Miscellaneous Amendments) Rules 2018
SR No. 34 – County Court (Chapter II Family Violence Protection Amendment) Rules 2018
SR No. 35 – Domestic Animals Amendment (Puppy Farms and Pet Shops) 2018
SR No. 36 – Family Violence Protection Amendment Regulations 2018
SR No. 37 – Judicial Proceedings Reports Regulations 2018
SR No. 38 – Building Regulations 2018
SR No. 39 – Victorian Police Amendment Regulations 2018
SR No. 40 – Subordinate Legislation (Firearms Regulations 2008) Extension Regulations 2018
SR No. 41 – Greenhouse Gas Geological Sequestration (Exemption) Regulations 2018
SR No. 42 – Magistrates’ Court (Family Violence Protection) Amendment Rules 2018
SR No. 43 – Constitution Regulations 2018
SR No. 44 – Sheriff Amendment Regulations 2018
SR No. 45 – Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Regulations 2018
SR No. 46 – Criminal Procedure Amendment Regulations 2018
SR No. 47 – Road Safety (Drivers) and (General) Amendment (Behaviour Change Program and Other Matters) Regulations 2018
SR No. 48 – Estate Agents (General, Accounts and Audit) Regulations 2018
SR No. 49 – Estate Agents (Professional Conduct) Regulations 2018
SR No. 50 – Wildlife (State Game Reserves) Amendment Regulations 2018
SR No. 51 – Seafood Safety Amendment Regulations 2018
SR No. 57 – Supreme Court (Miscellaneous Civil Proceedings) Rules 2018
SR No. 58 – Supreme Court (E-Filing and Other Amendments) Rules 2018

Legislative Instruments

Determination under Section 3.6.5A of the Gambling Regulation Act 2003 Fixing the Value of the Supervision Charge for Venue Operators for 2016-7
Wildlife (Commercial Fisheries – Interaction with Protected Wildlife) Orders No 1/2018
Determination of the Cost Recovery Fee for Participants in the First-Stage Behaviour Change Program
Event Management Declaration for Kardinia Park
Order Declaring Offences against the Laws of Other States and Territories to be Corresponding Interstate Drink-Driving Offences
Orders Approving Codes under Section 149 of the Occupational Health and Safety Act, Hazardous Manual Handling, Facilities in Construction, Confined Spaces, Plant and Noise

Notice of Order Approving the Demolition Compliance Code

Notice of Order Approving the Excavation Compliance Code
Appendix 6
Submission to the Justice Legislation
Miscellaneous Amendment Bill 2018
Joint Submission to the Scrutiny of Acts and Regulations Committee

Attention
Lizzie Blandthorn MLA
Chair, Scrutiny of Acts and Regulations Committee

Date
20 July 2018

Legislation
Justice Legislation Miscellaneous Amendment Bill 2018

Status
Introduced by the Attorney-General
Second reading moved: 21 June 2018

Submitted by
Federation of Community Legal Centres Victoria (Federation)
Law Institute of Victoria (LIV)

Contact
Federation of Community Legal Centres:
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Lara Freidin – 9607 9380 lfreidin@liv.asn.au
Sarah O’Brien – 9607 9345 sobrien@liv.asn.au

Overview
The Federation of Community Legal Centres Victoria and the Law Institute of Victoria seek to jointly contribute to the Scrutiny of Acts and Regulations Committee’s (‘SARC’) consideration of the Justice Legislation Miscellaneous Amendment Bill 2018 (‘the Bill’).

The Bill was introduced to the Legislative Assembly by the Attorney-General on 20 June 2018 and is due to be debated during the week beginning 23 July 2018.

We are strongly concerned that the Bill:

I. trespasses unduly upon rights or freedoms; and
II. is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities (‘the Charter’).

The Bill elevates injury offences against on-duty emergency workers, custodial officers and youth justice custodial workers to Category 1 offences that are subject to a mandatory minimum custodial sentence or other custodial order, and narrows the ‘special reasons’ exceptions.

We are concerned that the Victorian Government has introduced such a complex Bill without conducting any effective consultation process with the community. This submission outlines our concern that several provisions of the Bill likely contravene the Charter.
In our view, the proposed legislation undermines both human rights as well as core values of the justice system by removing judicial discretion.

**Human rights concerns**

<table>
<thead>
<tr>
<th><strong>The right to a fair hearing</strong></th>
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<tbody>
<tr>
<td>We are deeply concerned that the Bill impacts the right to a fair hearing(^1) and believe that the Government has not justified the limitation on this right. The Bill disadvantages defendants by not allowing judges to consider all the relevant facts when sentencing and limits the discretion of judges.</td>
</tr>
<tr>
<td>In particular, we are concerned by section 33 of the Bill which abrogates this right by removing an offender’s ability to have their offence tried summarily. This option is open to other offenders who have been convicted of the same offence against a person who is not an exposed worker.</td>
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</table>

<table>
<thead>
<tr>
<th><strong>The rights of young people</strong></th>
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<tbody>
<tr>
<td>We are concerned about the requirement for higher courts to have regard to the existence of the statutory minimum sentencing provisions when sentencing children between the ages of 16 and 17 years.(^2)</td>
</tr>
<tr>
<td>This requirement does not reflect the right of a child to protection that is in their best interests and is needed by reason of them being a child,(^3) and the right of a child convicted of an offence to be treated in a way that is appropriate for their age or the principle that children should only be detained as a measure of last resort.(^4) The requirement will interact with the recently introduced presumption of uplift to result in more 16 and 17-year old’s being detained and facing harsher sentences.(^5)</td>
</tr>
<tr>
<td>In our view, the removal of special reasons available to young people aged 18 to 21 years also trespasses unduly upon the rights of young people. The provision of special reason of substantial and compelling circumstances will not accommodate for the removal of other special reasons. This is because the Bill significantly heightens the threshold and now requires circumstances to be so exceptional it will likely have no practical application in most instances.(^6)</td>
</tr>
</tbody>
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\(^1\) Charter of Human Rights and Responsibilities Act 2006, s 24(1).
\(^3\) Charter of Human Rights and Responsibilities 2006 (VIC) s 17(2).
\(^5\) Children, Youth and Families Act 2005 (VIC) section 356(6).
The right to be free from cruel, inhuman and degrading punishment and arbitrary detention

The provisions in the Bill do not reasonably limit the right to be free from cruel, inhuman and degrading punishment and arbitrary detention. The Bill’s statement of compatibility claims that the amendments are proportionate as they capture the objective gravity of the relevant offending, and increasing the penalty for these offences will ‘demonstrate to the community that this serious offending will attract equally serious outcomes’.9

Mandatory sentences are an unreasonable limitation because sentences will be disproportionate to the offending behaviour. Under the proposed legislation an assault that would ordinarily be considered a low-level offence and tried summarily will be elevated to the same category as rape and murder.10 The behaviour exhibited in these offences should not be considered comparable and the sentencing options available to judges ought to reflect this difference.

In our view, sentences imposed under mandatory sentencing provisions will be inhuman and excessive. The Bill expressly requires judges to give less weight to the personal circumstances, previous good behaviour or prospects of rehabilitation of the offender in favour of general deterrence and denunciation.11

There is a real question about whether available evidence supports mandatory sentencing as the best way to achieve a deterrent effect. In the absence of this evidence, it will not be possible for a statement of compatibility to declare that the part of the legislation that establishes minimum sentencing is compatible with human rights. It is incumbent on Government to provide clear and cogent evidence that supports the introduction of any legislation that is contrary to rights protected in the Charter.

The right to equality

The Bill in its current form does not justifiably limit the right to equality and does not provide for equal protection before the law without discrimination.12

The Bill disproportionately affects vulnerable members of the community. We are concerned that the Bill does not contain sufficient safeguards to protect against racial profiling and discrimination against vulnerable people. We are concerned that people of African appearance are at least 2.4 times more likely to be stopped by police than anyone else. We are also concerned that Aboriginal and Torres Strait Islander peoples are chronically over-represented in the criminal justice system - incarcerated at a rate 14 times higher than non-Indigenous people.

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7 Ibid s 10(b).
8 Ibid s 21(2) and (3).
10 For example, injury under s 18 of the Crimes Act 1958 will be considered a Category 1 offence. Injury in this provision includes unconsciousness, substantial pain and impairment of bodily function.
11 Justice Legislation Miscellaneous Amendment Bill 2018 cl 75(8).
12 Charter of Human Rights and Responsibilities Act 2006, s 8(3).
The Government has argued that despite indirect discrimination against vulnerable persons the Bill contains protective safeguards in the special reasons exceptions. The special reasons categories in the Bill will not be broad enough to protect vulnerable persons. The introduction of the ‘impaired mental functioning’ exception will not provide effective protection as the threshold test is too high and will be difficult to prove. The narrowing of the current special reason of substantial and compelling circumstances is also deeply concerning because it also limits protections.

Mandatory sentencing takes away equality before the law by limiting what relevant facts can be considered, such as a defendant’s personal circumstances, likelihood of recidivism and rehabilitation prospects. These are important factors in determining how a defendant should be treated within the criminal justice system to ensure that both the defendant and the community are protected.

**Additional considerations**

**Unfair burden on law enforcement officers**

Mandatory sentencing impinges on the discretion afforded to judicial officers in sentencing matters and removes the discretion of courts to decide a penalty which fits the individual circumstances of the crime and the offender. By doing so, it arguably places an unfair onus on law enforcement officers to effectively perform the role of the judiciary when determining whether to lay charges. Mandatory sentencing thus serves to distort the role of law enforcement officers.

**Conflict of interest for law enforcement officers**

Police officers and protective services officers will be considered an ‘emergency worker’ under the Bill despite the fact that they carry protective weapons such as guns, tasers and batons. It is a significant conflict of interest that under the Bill, police will have the capacity to charge an alleged offender with ‘assault’ with a mandated, six-month jail sentence as the consequence. This will significantly deter people from complaining about police misconduct.

The legislation has been drafted to remove any nuance or recognition of severity of alleged offending. For example, the legislation refers to ‘reckless injury’ which could be interpreted to mean a scratch, bruise or even just physical contact between two parties, police and the community member.

In Victoria, police accountability mechanisms are weak and do not function effectively as police investigate police. Independent and effective oversight of police becomes even more critical where mandatory sentencing applies.

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13 Justice Legislation Miscellaneous Amendment Bill 2018 cl 75.
14 Justice Legislation Miscellaneous Amendment Bill 2018 s 75(2).
15 Ibid s 75(6).