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Parliament of Victoria, Australia

Scrutiny of Acts and Regulations Committee

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Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the *Charter* provides –

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

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

(a) the nature of the right; and

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

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

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

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

Glossary and Symbols

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

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

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

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

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

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

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (as at 1 July 2015 one penalty unit equals $151.67)

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights

'VCAT' refers to the Victorian Civil and Administrative Tribunal

[ ] denotes clause numbers in a Bill

Alert Digest No. 11 of 2016

Crimes Amendment (Carjacking) Bill 2016

Introduced	23 June 2016
Second Reading Speech	17 August 2016
House	Legislative Council
Member introducing Bill	Hon. Edward O'Donohue MLC, Member for Eastern Victoria

Private Members Bill

Purpose

The Bill would amend the *Crimes Act 1958* to create the new offences of carjacking and aggravated carjacking, which would be subject to maximum terms of imprisonment of 15 and 25 years respectively (new sections 77A and 77B). **[3]** ***Refer to Charter Report below***

The Bill would also amend the *Sentencing Act 1991* to introduce statutory minimum sentences for adult offenders found guilty of carjacking or aggravated carjacking (imprisonment with a minimum non-parole period of three years), subject to the existence of a special reason as set out in existing section 10A of the *Sentencing Act 1991*. **[4]**

Charter report

Arbitrary detention – Aggravated carjacking – Minimum term of imprisonment unless special circumstances exist

Summary: *Clause 3 provides for an offence of 'aggravated carjacking'. The Committee observes that, if the terms of a new offence that carries a presumptive minimum sentence are not clear, they may engage the Charter's right against arbitrary detention. The Committee will write to the member seeking further information.*

The Committee notes that clause 3, inserting a new section 77B into the *Crimes Act 1958*, provides for an offence of 'aggravated carjacking' if a person commits carjacking (as defined by new section 77A) and:

(a) at the time is in possession of any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or

(b) in the course of the carjacking, causes injury to another person

Clause 5, inserting a new section 10AD into the *Sentencing Act 1991*, provides that a sentencing court must impose a non-parole period of not less than five years for an offence against new section 77B unless a special reason exists. In determining whether such a reason exists, a court must have regard to 'the Parliament's intention that a sentence of imprisonment of not less than 5 years should ordinarily be imposed for an offence covered by section 10AD'.[1]

[1] Clause 5, amending s. 10A of the *Sentencing Act 1991*.

The Statement of Compatibility remarks:

> In my opinion, the statutory minimum sentences introduced by the bill do not limit the protection from cruel, inhuman or degrading punishment, as they do not compel the imposition of a grossly disproportionate sentence.
>
> The bill contains safeguards that protect against the imposition of a sentence of imprisonment that is inappropriate, unjust or disproportionate, including the availability of full sentencing discretion where a court is satisfied of the existence of a special reason in relation to an offender or the particular circumstances of a case as set out in section 10A of the Sentencing Act.

While the Committee considers that existing s. 10A means that clauses 3 and 5 are compatible with the Charter's right against cruel, inhuman or degrading treatment,[2] it observes that, if the terms of a new offence that carries a presumptive minimum sentence are not clear, those clauses may engage the Charter's right against 'arbitrary' detention.[3]

The Committee notes that the terms of new section 77B contrast with a similar offence in New South Wales,[4] which provides for the following 'circumstances of aggravation':[5]

> (b) the alleged offender is armed with an offensive weapon or instrument,
>
> (c) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person.

The New South Wales requirement that the offender be 'armed', which is defined to include 'bearing or having the immediate physical possession',[6] may be narrower than new section 77B(1)(a)'s requirement that the offender have a firearm or explosive 'at the time… in possession'. As well, the New South Wales requirement that the offender 'intentionally or recklessly' inflict harm may be narrower than new section 77B(1)(b)'s equivalent requirement, which does not specify any mental state.

The Committee will write to the member seeking further information as to whether or not replacing new section 77B(1)(a) & (b) with terms equivalent to s. 154C(3)(b) & (c) of the *Crimes Act 1900* (NSW) is a less restrictive alternative reasonably available[7] to achieve new section 77B's purpose of effectively deterring carjacking.

The Committee makes no further comment.

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2 Charter s. 10(b).

3 Charter s. 21(2).

4 *Crimes Act 1900* (NSW), s. 154C is titled 'Taking motor vehicle or vessel with assault or occupant on board' and has different (non-mandatory) punishments to the offence in the Bill, but s154C(1)(a) is in similar terms to new section 77A and s154C(2) is in similar terms to new section 77B. The second reading speech remarks: 'Unlike New South Wales, Victoria does not have a specific offence of carjacking or aggravated carjacking. This needs to change.'

5 *Crimes Act 1900* (NSW), s. 154C(3). Para (a) of this provision has no equivalent in new section 77B.

6 *Crimes Act 1900* (NSW), s. 4(1).

7 Charter s. 7(2)(e).

Local Government Amendment Bill 2016

Introduced	16 August 2016
Second Reading Speech	17 August 2016
House	Legislative Assembly
Member introducing Bill	Hon. Richard Wynne MLA
Minister responsible	Hon. Natalie Hutchins MLA
Portfolio responsibility	Minister for Local Government

Purpose

The Bill would repeal section 76C(1) of the *Local Government Act 1989* to remove the requirements that:

- councils approve a revised councillor code of conduct within four months of the commencement of section 15 of the *Local Government Amendment (Improved Governance) Act 2015* (which commenced on 1 March 2016)
- councillors make a compliant declaration stating that they will abide by their revised councillor code of conduct within one month of its approval.

Instead, councils would be required to review and amend their councillor code of conduct within four months of a general election and councillors would then be required to make a compliant declaration within one month of the approval of amendments to their code.

Charter report

The *Local Government Amendment Bill 2016* is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.

Melbourne and Olympic Parks Amendment Bill 2016

Introduced	16 August 2016
Second Reading Speech	17 August 2016
House	Legislative Assembly
Member introducing Bill	Hon. John Eren MLA
Minister responsible	Hon. John Eren MLA
Portfolio responsibility	Minister for Sport

Purpose

The Bill would amend the *Melbourne and Olympic Parks Act 1985* to incorporate land and strata of land containing a new pedestrian-cyclist bridge (to be named Tanderrum Bridge) as national tennis centre land. This would enable the Melbourne and Olympic Parks Trust to manage and maintain the bridge.

The Bill would also revoke the reservation of a stratum of airspace over Batman Avenue that was previously leased by the state to City Link Extension Pty Ltd under the *Melbourne City Link Act 1995* but surrendered back to the state with effect from 17 December 2015.

Charter report

The *Melbourne and Olympic Parks Amendment Bill 2016* is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.

National Domestic Violence Order Scheme Bill 2016

Introduced	23 June 2016
Second Reading Speech	16 August 2016
House	Legislative Assembly
Member introducing Bill	Hon. Martin Pakula MLA
Minister responsible	Hon. Martin Pakula MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill would give effect in Victoria to a national domestic violence order (DVO) scheme to provide for the automatic mutual recognition and enforcement of a domestic violence order issued in any State or Territory. This would replace the existing requirement that a protected person apply to a court in the jurisdiction where they are residing for registration of a DVO made in another State or Territory before it can be recognised or enforced.

In addition to incorporating the model laws for the scheme, the Bill would amend the *Family Violence Protection Act 2008* and a number of other Victorian Acts to give effect to the scheme.

Under the Bill:

- a DVO made anywhere in Australia, or a New Zealand DVO registered anywhere in Australia (a 'non-local DVO'), would be recognised and enforceable in Victoria (this would include recognition in Victoria of disqualification to hold a firearms or weapons licence under a non-local DVO) **[17]** ***(Refer to Charter Report below)***
- a 'local DVO' — defined as a police-issued family violence safety notice (FVSN) or a court-made family violence intervention order (FVIO) made in Victoria under the *Family Violence Protection Act 1986* — would be recognised and enforceable in any other State or Territory
- a nationally recognised DVO could be amended in any jurisdiction, but only by a court
- if necessary, a new DVO could be made by a court in a new jurisdiction, even if a DVO made in an another jurisdiction was in force, in which case the most recent DVO would prevail
- police in Victoria would be able to issue a new FVSN if necessary to ensure the safety of an affected family member or to preserve their property or to protect a child, even if a court-made DVO was in force in another jurisdiction. The respondent would be required to comply with both the new FVSN and any recognised court-made DVO until the matter returned to court (or with the notice if it was not possible comply with both at the same time).
- a Victorian court would empowered to vary or revoke recognised non-local DVOs (however, clause 23(2) would bar a Victorian court from varying or revoking a recognised DVO that cannot be varied by a court in the jurisdiction where that order was made **[23]** ***(Refer to Charter Report below)***
- a Victorian court would also be empowered to make decisions about the hearing of applications for variation or revocation of recognised non-local DVOs (however, clause 25(5) would bar a Victorian court from hearing an application by a respondent to vary or revoke a recognised DVO during any period where the respondent is not entitled to apply to vary or revoke the order in the jurisdiction where it was made **[25]** ***(Refer to Charter Report below)***
- provide for defences to a charge of contravening a recognised DVO **[54, 55]** ***Refer to Charter Report below***

Content

Delegation of legislative power – Commencement by proclamation – Whether appropriate provision

The Bill provides that the Act will come into force on a day or days to be proclaimed. There is no default commencement date for the Bill.

The Explanatory Memorandum states that there is no default commencement date set for the Bill because it relates to the establishment of a national scheme.

The Attorney-General's Second Reading Speech provides the following further explanation:

> We will not commence the bill until we are satisfied that the interim information technology system will adequately support the enforcement of recognised domestic violence orders under the national domestic violence order scheme, and will not put the safety of victims of family violence at risk.
>
> We owe it to victims of family violence to get the scheme right. The stakes are too high for us to get it wrong. For this reason, the bill does not contain a default commencement date, and will not be commenced until the government is assured the interim information technology system will not jeopardise victim safety.…

The Committee considers that commencement on proclamation is justified in the circumstances.

Power to enter and search without a warrant

Clause 59 would amend section 157(1)(b) of the *Family Violence Protection Act 2008*, to empower a police officer to enter and search any premises without a warrant where the officer on reasonable grounds believes a person to be if the officer reasonably believes the person is on the premises in contravention of a recognised DVO.

Clause 61 would make a similar amendment to section 159(1), which provides for police power to enter and search certain premises without a warrant.

The Committee notes the following explanation in the Statement of Compatibility:

> The entry and search powers in part 7 of the FVP act also have the potential to interfere with a person's privacy as protected by section 13 of the charter. It is arguable that, particularly where the searches occur in the absence of a requirement to seek a warrant, these searches have the potential to arbitrarily intrude into the private and home spheres of individuals. However, I am of the view that any such interferences will not constitute a limit on the right to privacy because they will occur lawfully and not arbitrarily. The interference is not arbitrary because it is in accordance with the provisions, aims and objectives of the charter (particularly section 17, which provides for the protection of children and families) and is reasonable in the circumstances, where the intent is to protect a person from further family violence incidents. The power to enter and search without a warrant is confined to circumstances where a DVO has been issued, or an application has been made, and a police officer is aware or has reasonable grounds to suspect that the person who is subject to the DVO or application is in possession of a firearm, a firearms authority, ammunition or a weapon. Where entry is authorised pursuant to a warrant, the procedures governing search warrants under the Magistrates' Court Act 1989 apply, and there are additional safeguards such as the requirement to announce before entry under the warrant.

The Committee is satisfied that the amendments in relation to the power to enter and search premises without a warrant are necessary and reasonable in the circumstances.

Right to be presumed innocent — legal burden to prove defence — where accused cannot comply with recognised DVO and family violence safety notice at the same time

Clauses 54 and 55 of the Bill would amend sections 123 and 123A of the Family Violence Protection Act 2008 to provide that a person charged with contravening a recognised DVO would be required to prove in their defence that:

- a FVSN in relation to the same parties was issued after the recognised DVO was made and was in force at the time of the alleged offence; and
- their conduct complied with the FVSN and they could not have complied with the recognised DVO at the same time.

As a result, a person charged with contravening a recognised DVO under section 123 or 123A would bear the legal burden of establishing their defence on the balance of probabilities, as opposed to an evidential burden under which they would be required only to point to evidence that suggests a reasonable possibility of the conflicting requirements. ***(Refer to Charter Report below)***

Charter report

Practice Note – National uniform legislation schemes – Non-Victorian orders enforceable under Victorian law – Where non-Victorian laws bar some variations or revocations of those orders

Summary: *The effect of clause 17 is to treat some orders made under non-Victorian laws as if they are orders made under Victorian laws. However, some clauses impose non-Victorian restrictions on Victorian courts with respect to interstate DVOs. The Committee will write to the Attorney-General seeking further information.*

The Committee notes that clause 17 provides that a recognised DVO may be enforced in Victoria as if it were a family violence intervention order or a family violence safety notice made (and properly notified) under Victoria's *Family Violence Protection Act 2008*. A recognised DVO includes an interstate order that is prescribed, substantially corresponds to a family violence intervention order or a family violence safety notice and is made under a law that substantially corresponds to the *Family Violence Protection Act 2008* in a jurisdiction that has provisions that substantially correspond to this Bill.

The Committee observes that the effect of clause 17 is to treat some orders made under non-Victorian laws as if they are orders made under Victorian laws.

The Committee's *Practice Note* states:

> The Statement of Compatibility (or explanatory material) for a Bill that applies non-Victorian laws… should fully explain those laws' human rights impact. The Committee would prefer that the explanation have two components: First, the Statement of Compatibility may assess the human rights compatibility of all existing non-Victorian laws that are to be applied in Victoria. Second, the Statement of Compatibility (or explanatory material) may set out whether, and to what extent, the Charter's operative provisions will apply under the national uniform legislation scheme.

The Statement of Compatibility remarks:

> Although the adoption of a national uniform legislative scheme can raise issues of non-Victorian laws applying in Victoria, in this case the national DVO scheme is being implemented through each State and Territory separately enacting legislation based on the model laws, with any modifications necessary in each jurisdiction. While DVOs made in one State or Territory will now be recognised and enforceable in all participating States or

> Territories, they will be enforced according to the model laws as enacted by the jurisdiction where the enforcement is taking place. Accordingly, no non-Victorian laws will be applied in Victoria under the bill. Further, although the bill will require Victorian police officers and courts to enforce DVOs made in other jurisdictions, these non-local DVOs will be enforced under the FVP act as if they were local DVOs. As such, police and courts will be exercising their enforcement functions according to Victorian law, and the charter's operative provisions will apply.
>
> In addition, the nature and effect of DVOs in each jurisdiction are comparable in respect of key matters such as the types of conduct that may constitute domestic or family violence and the grounds on which DVOs may be made, the kinds of prohibitions, restraints and conditions that a DVO may impose on the person against whom it is made, and the effect of contravening a DVO (i.e. a criminal offence). Accordingly, I am satisfied that no issues affecting the human rights compatibility of the bill arise from the enforcement within Victoria of DVOs made under non-Victorian laws.

However, the Committee observes that some clauses of the Bill impose non-Victorian restrictions on Victorian courts with respect to interstate DVOs. In particular, clause 23(2) bars a Victorian court from varying or revoking a recognised DVO that cannot be varied by a court in the jurisdiction where that order was made and clause 25(5) bars a Victorian court from hearing an application by a respondent to vary or revoke a recognised DVO during any period where the respondent is not entitled to apply to vary or revoke the order in the jurisdiction where it was made.

For example, assuming South Australian intervention orders are prescribed, the effect of clause 17 is that any South Australian intervention order concerning domestic violence would be enforceable in Victoria under Victorian law as soon as it was made and notified to the respondent. However, clause 25(2) will bar a Victorian court from hearing any application by the respondent to vary or revoke that law for at least 12 months, because s. 26(3) of the I*ntervention Orders (Prevention of Abuse) Act 2009* (SA) bars a South Australian court from hearing an application forbidden by the terms of the order and s. 15 permits a South Australian court to forbid such an application for a specified period and requires that the period be at least 12 months.[8] So, clause 25(5), in its application to a recognised DVO from South Australia, may engage the respondent's Charter right to have Victorian civil proceedings determined by a Victorian court or tribunal.[9]

The Committee notes that, while clauses 23(2) and 25(2) are themselves subject to the Charter's operative provisions, the non-Victorian restrictions that they impose on Victorian courts may not be subject to the Charter's operative provisions. For example, even though the South Australian statute and court may limit the powers of the Victorian court to hear applications to vary or revoke recognised DVOs, neither the statute nor the court will be subject to the Charter's operative provisions.[10] As well, any future changes to any participating state's laws on the jurisdiction of a court to vary or revoke an order or when an application can be received will not be subject to the Charter's provisions on scrutiny of new legislation.[11]

The Committee will write to the Attorney-General seeking further information as to the compatibility of clauses 23(2) and 25(5), in their application to interstate recognised DVOs, with the Charter's right to have civil proceedings determined by a court or tribunal.

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8 Section 26(3) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) bars defendants from applying for a variation or revocation during the ban.

9 Charter s. 24(1).

10 For example, Charter ss. 6(2)(b) and 32.

11 For example, Charter ss. 28 and 30.

Presumption of innocence – Where accused cannot comply with recognised DVO and family violence safety notice at the same time

Summary: *The effect of clauses 54 and 55 is that a person who is charged with contravening a recognised DVO who alleges that he or she was unable to comply with it due to a conflicting notice issued by a police officer will be convicted if he or she cannot prove the timing and content of the police officer's notice at his or her trial. The Committee considers that clauses 54 and 55 may be incompatible with the Charter's right to be presumed innocent.*

The Committee notes that clause 44, inserting a new section 26A(1) into the *Family Violence Protection Act 2008*, provides that:

> A police officer may issue a family violence safety notice for the protection of a person against a respondent whether or not there is a recognised DVO in relation to the same respondent and protected person.

If this occurs, then:

- the respondent must comply with both the notice and the order[12]
- if it is not possible to comply with both, then the respondent must comply with the family violence safety notice[13]
- in a prosecution for contravening a family violence safety notice, compliance with the recognised DVO is no defence.[14]

Clauses 54 and 55, amending existing ss. 123 and 123A, provide that, in a prosecution for contravening a recognised DVO, it is a defence:

> for the accused to prove that:
>
> (a) the accused was the respondent under the recognised DVO; and
>
> (b) a family violence safety notice in relation to the same protected person and respondent—
>
> (i) was issued after the recognised DVO was made; and
>
> (ii) was in force at the time the offence was alleged to have been committed; and
>
> (c) the accused's conduct complied with the family violence safety notice; and
>
> (d) the accused could not have complied with the recognised DVO at the same time.

The Committee observes that the effect of clauses 54 and 55 is that a person who is charged with contravening an interstate DVO who alleges that he or she was unable to comply with it due to a conflicting notice issued by a Victorian police officer will be convicted if he or she cannot prove the timing and content of the police officer's notice at his or her trial.

The Statement of Compatibility remarks:

> The bill amends sections 123 and 123A of the FVP act, by inserting new defences to the offences of contravening a FVIO. The right to be presumed innocent in section 25(1) of the charter is relevant to these provisions, because they place the legal onus of proof on a defendant….

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12 Clause 49, inserting a new section 40(2) into the *Family Violence Protection Act 2008*.

13 Clause 49, inserting a new section 40(3) into the *Family Violence Protection Act 2008*.

14 Clauses 47 and 48, amending existing ss. 37 & 37A of the *Family Violence Protection Act 2008*.

> In these circumstances, the existence of the FVSN and the recognised DVO are matters that are peculiarly within the defendant's knowledge as they will have been personally served with copies of both the notice and the order or otherwise have had the making of the order brought to their attention. The imposition of a burden of proof on the accused is directly related to the purpose of enabling the relevant offence to operate as an effective deterrent while also providing a suitable defence where in these particular circumstances new section 40 of the FVP act provides that the respondent must comply with the FVSN… Although an evidential onus would be less restrictive than a legal onus, it would not be as effective because it could be too easily discharged. The inclusion of a defence with a burden on the accused to prove the matters on the balance of probabilities achieves an appropriate balance of all interests involved.

However, the Committee observes that the parties, timing and content of the notice and order may not be matters 'peculiarly' within the respondent's knowledge. Rather, the applicants for the notice or order will be equally aware of these matters and they may be known to state keepers of official records of those orders. Indeed, where state parties have access to official records, prosecutors may be better placed than the defendant at the time of the trial to prove precise details about the parties, timing and content of an interstate court order and a Victorian police notice.

For example, if a person who was charged with breaching an interstate order requiring him to attend weekly counselling wanted to argue that he couldn't attend because a police officer had barred him from the suburb where the counselling took place for 24 hours, he may be poorly placed to prove when the police officer had issued the ban, who it related to and what it consisted of at a criminal trial some months later; by contrast, if he was only required to give or point to evidence that suggests a reasonable possibility of the conflicting requirements (for example, by identifying the police officer's home station, the week the ban was issued and the broad effect of the ban), then a state prosecutor could readily prove, using police records or by calling the police officer to testify, whether or not the situation was covered by the exception created by clauses 54 and 55.

Because clauses 54 and 55 may result in an accused with a good defence to a criminal charge nevertheless being convicted of that charge, the Committee considers that those clauses may be incompatible with the Charter's right to be presumed innocent.[15]

The Committee refers to Parliament for its consideration the question of whether or not only requiring an accused to present or point to evidence that suggests a reasonable possibility (rather than proving) that he or she was unable to comply with both a recognised DVO and a family violence safety notice (i.e. an evidential rather than a legal burden) is a less restrictive alternative reasonably available to achieve clauses 54 and 55's purpose of deterring non-compliance with interstate DVOs while providing a suitable defence where a defendant cannot comply with both an interstate DVO and a family violence safety notice at the same time.

The Committee makes no further comment.

[15] Charter s. 25(1).

Police and Justice Legislation Amendment (Miscellaneous) Bill 2016

Introduced	16 August 2016
Second Reading Speech	17 August 2016
House	Legislative Assembly
Member introducing Bill	Hon. Lisa Neville MLA
Minister responsible	Hon. Lisa Neville MLA
Portfolio responsibility	Minister for Police

Purpose

The Bill would:

- amend the *Crown Proceedings Act 1958* to clarify that State liability for tortious acts of police officers and protective services officers (PSOs) arises under the *Victoria Police Act 2013* **[3]**
- amend the *Victoria Police Act 2013*:
  - to clarify that State liability for tortious acts of public servants, including Victoria Police employees and police custody officers, arises under the *Crown Proceedings Act 1958* **[8]**
  - in relation to the operation of the Police Registration and Services Board, including the appointment of former police officers in Victoria Police **[6]** and officers from other jurisdictions **[5]**
  - to provide for the reappointment of an Acting Assistant Commissioner (i.e., a maximum of two consecutive terms) **[4]**
  - in relation to the transfer of certain police officers **[7]**
  - to require the Police Registration and Services Board to exclude from its reasons and prohibit disclosure from a hearing information likely to identify a complainant, witness or affected person unless it considers that releasing the information is in the public interest **[15, 17] (*Refer to Charter Report below)***
- amend the *Crimes Act 1958*, the *Estate Agents Act 1980*, the *Sentencing Act 1991*, the *Serious Sex Offenders (Detention and Supervision) Act 2009*, and the *Sex Offenders Registration Act 2004* to update references to CrimTrac to the Australian Crime Commission.

Charter report

Freedom of expression – Information likely to identify complainants, witnesses and affected persons – Board must exclude information from reasons and prohibit disclosure from hearings unless in the public interest

Summary: *Clauses 15 and 17 require the Police Registration and Services Board to exclude from its reasons and prohibit disclosure from a hearing information likely to identify a complainant, witness or affected person unless it considers that releasing the information is in the public interest. The effect of clauses 15 and 17 may, create a presumption against open justice and expression that cannot be lightly displaced. The Committee will write to the Minister seeking further information.*

The Committee notes that clauses 15 and 17, amending existing ss. 154A and 157 of the *Victoria Police Act 2013*, provide that the Police Registration and Services Board must, respectively:

- exclude from any statement of reasons it publishes for a decision under review; and
- make an order prohibiting the reporting or other publication or disclosure from a hearing

any information that is likely to lead to the identification of a complainant, witness or person affected by the applicant's conduct unless the Board considers that releasing the information is in the public interest.

The Statement of Compatibility remarks:

> These clauses engage the privacy and reputation rights provided in section 13(a) and (b) of the charter act. However, any disclosure of identifying information is not arbitrary or unlawful as the default position is non-disclosure. This acts as a safeguard against unwarranted or inappropriate disclosure of personal or identifying information. The PRSB must make an assessment of the public interest, with regard to the circumstances of the particular case, before it can allow identifying information to be released. This prevents identifying information from being dealt with unlawfully or arbitrarily. The public interest test is a long standing one that is construed with regard to the subject matter and scope of the particular statutory scheme. The public interest test allows for a flexible balance between interests common to the public and the personal rights of individuals involved.
>
> …
>
> As the PRSB would be considered to be a tribunal for the purposes of the charter when exercising its appeal and review functions, the right to a fair hearing may be engaged by clauses 15 and 17 of the bill (concerning the protection of identifying information). Section 24(3) of the charter requires that all judgements or decisions made by a court or tribunal in a criminal or civil proceeding be made public unless the best interests of a child otherwise requires or a law other than this charter otherwise permits.
>
> However, section 24(3) is not limited, as PRSB decisions on a review will continue to be published, as required by section 154A of the police act. It is only the identifying information about informants or those who have made a complaint about, raised a concern about, or who are adversely affected by, the actions of an applicant for review that, prima facie, will not be published. This is an appropriate balancing of the right to a fair hearing in section 24 of the charter with the right to privacy and reputation and the safety of persons appearing at, or providing information relevant to, PRSB hearings.

However, the Committee observes that clause 15 may substantially restrict the reasons the Board publishes in some cases. For example, earlier this year, the Board issued an order prohibiting the publication of the name of every person mentioned in a hearing (including the applicant) and the towns and locations where the events addressed took place (because the publication of those matters would, in practice, identify witnesses and the applicant's family, who may be affected by the disclosure), and also declined to publish any of its reasons.[16]

The Committee also observes that clause 17 prevents anyone, including the complainants, witnesses and affected persons themselves, as well as attending members of the public and the media, from disclosing such information, unless the Board finds that the disclosure of those matters is in the public interest. The Statement of Compatibility does not address the Charter's right to freedom of expression.[17]

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16 *In the Matter of ABC and the Chief Commissioner of Police* (Police Registration and Services Board Review Division, 22 January 2016).

17 Charter s. 15(2).

The Committee notes that clauses 15 and 17 replace existing provisions that only permit the Board to not publish or exclude information from its reasons, or to make an order prohibiting the reporting or other publication or disclosure of any information from a hearing, if it finds that the exclusion or non-disclosure is, or is necessary, in the public interest.[18] Earlier this year, the Board, after hearing submissions from the Chief Commissioner, the Police Association, the Independent Broad-based Anti-corruption Commission and the Victorian Equal Opportunity and Human Rights Commission, and considering guidance from the common law, the *Open Courts Act 2013* and the Charter, published what it intended to be 'a practice note or guidelines on the factors to consider in identifying the public interest factors related to non-publication orders or decisions to exclude identifying information'.[19] The decision listed a number of factors and remarked:[20]

> The presumption cannot be lightly displaced. The fact that parties agree to an order or course of action will not displace the presumption in the Act in favour of open justice. It will not be sufficient to make a bald claim that an 'order should be made'. The public interests must be identified, be soundly based on facts and then properly balanced and applied.

The Committee observes that the effect of clauses 15 and 17 may, in the case of information likely to identify a complainant, witness or affected person, create a presumption against open justice and expression that cannot be lightly displaced.

The Committee also notes that neither the Act nor clause 17 defines 'reporting or other publication or disclosure' and that 'information' is not limited to confidential information.[21] The terms of clause 17 would ordinarily cover any communication to anyone, including employees of the Board, participants in the hearing, the parties, witnesses, affected persons, family members, psychologists and lawyers; such communications will only be permitted if the Board determines that they are in the public interest.[22]

The Committee will write to the Minister seeking further information as to the compatibility of clauses 15 and 17 with the Charter's right to freedom of expression.

The Committee makes no further comment.

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18 Existing ss. 154A(2) & 157(3).

19 *In the Matter of ABC and the Chief Commissioner of Police* (Police Registration and Services Board Review Division, 22 January 2016), p. 7.

20 *In the Matter of ABC and the Chief Commissioner of Police* (Police Registration and Services Board Review Division, 22 January 2016), p. 15.

21 Compare existing s. 218; *Judicial Proceedings Reports Act 1958*, s. 4(1) ('publish') & (1D).

22 Compare *In the Matter of ABC and the Chief Commissioner of Police* (Police Registration and Services Board Review Division, 22 January 2016), p. 18, excluding disclosure to people who had been at the hearing, police officers and employees who already knew the information and the parties' lawyers from the definition of 'disclose' in the Board's order.

Equal Opportunity Amendment (Equality for Students) Bill 2016

The Bill was introduced into the Legislative Council on 21 June 2016 by Hon. Sue Pennicuik MLC, Member for Southern Metropolitan Region. The Committee considered the Bill on 15 August 2016 and made the following comments in Alert Digest No. 10 of 2016 tabled in the Parliament on 16 August 2016.

Committee comments

Charter report

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

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

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

The Second Reading Speech remarks that clause 7:

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

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

> (1) An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students.
>
> (2) In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, a standard must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard

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

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

The Statement of Compatibility remarks:

> I am of the view that any limits on the freedom of religion and belief of a person who establishes or runs a school are reasonable limits under section 7(2) of the charter, as they need to be balanced against the purpose of the limitation which is to prevent discrimination against students based on personal attributes of sex, sexual orientation, lawful sexual activity, gender identity, or their parental or marital status.
>
> The bill does not have an unfair or disproportionate impact on the rights of religious schools to exercise their religious freedom. The effect of limiting the special religious exception would be that the directors or administrators of a religious school would have the same rights to discriminate under the Equal Opportunity Act as their counterparts at any non-religious school, including the same ability to apply for an exemption, if they have a valid reason to discriminate.
>
> Any limits to freedom of religion also need to be considered against the right for all children to equality before the law under section 8 of the charter, and to have their best interests protected under section 17(2). In my view, there is no less restrictive means available of removing discrimination.

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

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

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

The Committee notes that the majority of Australian jurisdictions either specifically permit discrimination in education for religious reasons on grounds that include sex, sexuality and pregnancy, or generally permit such discrimination in some circumstances by religious bodies

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[i] *Bob Jones University v United States*, 461 US 574 (1983); *Christian Legal Society v Martinez*, 561 US 661 (2011).

[ii] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772, [34]-[38].

[iii] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, [270]-[271] (see also *The Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59, [4]); *Trinity Western University v The Law Society of Upper Canada,* 2016 ONCA 518, [143]; *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326, [152].

(including bodies that run schools.)[iv] New South Wales also completely exempts private schools from its prohibitions on discrimination on the grounds of sex, transgender, marital or domestic status, disability, homosexuality and age.[v] By contrast, Queensland's general exemptions for religious bodies do not permit discrimination in education and Tasmania's general exemptions for religious bodies are limited to discrimination on the grounds of gender or religious belief, affiliation or activity.[vi]

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

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

The Committee thanks the Member for the attached response.

29 August 2016
Committee Room

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

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

[vi] *Anti-Discrimination Act 1992* (Qld), s. 109(2); *Anti-Discrimination Act 1998* (Tas), ss. 27(1)(a), 51A.

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Monday, 29 August 2016

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

Dear Ms Blandthorn,

Re: Equal Opportunity Amendment (Equality for Students) Bill 2016

Thank you for your letter of 16 August, seeking further information as to the meaning of 'school' in clause 7 of the bill.

It is intended that 'school' would have the same meaning as 'school' under the Education and Training Reform Act 2006, that is:

> ***school*** means a place at or from which education is provided to children of compulsory school age during normal school hours, but does not include—
>
> (a) a place at which registered home schooling takes place;
>
> (b) a University;
>
> (c) a TAFE institute;
>
> (d) an education service exempted by Ministerial Order;
>
> (e) any other body exempted by the regulations;

Yours faithfully,

Sue Pennicuik MLC
Member for Southern Metropolitan Region

Appendix 1
Index of Bills in 2016

Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Privacy and Data Protection Act 2014

Judicial Commission of Victoria Bill 2015 1, 2

(v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2001

Judicial Commission of Victoria Bill 2015 1, 2

(vi) inappropriately delegates legislative power

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

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

Access to Medicinal Cannabis Bill 2015 1, 3
Assisted Reproductive Treatment Amendment Bill 2015 16 of 2015, 1
Bail Amendment Bill 2015 16 of 2015, 1
Confiscation and Other Matters Amendment Bill 2016 4, 5
Crimes Amendment (Carjacking) Bill 2016 11
Crimes Amendment (Sexual Offences) Bill 2016 9, 10
Education and Training Reform Amendment (Miscellaneous) Bill 2016 5, 6
Equal Opportunity Amendment (Equality for Students) Bill 2016 10, 11
Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 10
Health Complaints Bill 2016 2, 3
Infant Viability Bill 2015 6, 7
Justice legislation (Evidence and Other Acts) Amendment Bill 2016 6, 7
Local Government (Greater Geelong City Council) Act 2016 6, 7
National Domestic Violence Order Scheme Bill 2016 11
Police and Justice Legislation Amendment (Miscellaneous) Bill 2016 11
Primary Industries Legislation Amendment Bill 2016 7, 8
Racing and Other Acts Amendment (Greyhound Racing and Welfare Reform) Bill 2015 1, 2
Road Legislation Amendment Bill 2015 14 of 2015, 3
Rooming House Operators Bill 2015 1, 2
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016 5, 6

Appendix 3
Ministerial Correspondence 2016

Table of correspondence between the Committee and Ministers or Members during 2016

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

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Road Legislation Amendment Bill 2015	Roads and Road Safety	10.11.15 *23.02.16*	14 of 2015 *3 of 2016*
Assisted Reproductive Treatment Amendment Bill 2015	Health	08.12.15 *05.02.16*	16 of 2015 *1 of 2016*
Bail Amendment Bill 2015	Attorney-General	08.12.15 *24.12.15*	16 of 2015 *1 of 2016*
Access to Medicinal Cannabis Bill 2015	Health	09.02.16 *25.02.16*	1 of 2016 *3 of 2016*
Judicial Commission of Victoria Bill 2015	Attorney-General	*09.02.16* *22.02.16*	1 of 2016 *2 of 2016*
Racing and Other Acts Amendment (Greyhound Racing and Welfare Reform) Bill 2015	Racing	09.02.16 *22.02.16*	1 of 2016 *2 of 2016*
Rooming House Operators Bill 2015	Consumer Affairs, Gaming and Liquor Regulation	09.02.16 *22.02.16*	1 of 2016 *2 of 2016*
Health Complaints Bill 2016	Health	23.02.16 *25.02.16*	2 of 2016 *3 of 2016*
Corrections Amendment (No body, no parole) Bill 2016	Hon Edward O'Donohue MP	08.03.16 *16.03.16*	3 of 2016 *4 of 2016*
Sex Offenders Registration Amendment Bill 2016	Police	08.03.16 *18.03.16*	3 of 2016 *4 of 2016*
Upholding Australian Values (Protecting Our Flags) Bill 2015	Mr Daniel Young MP	08.03.16	3 of 2016
Confiscation and Other Matters Amendment Bill 2016	Attorney-General	22.03.16 *06.04.16*	4 of 2016 *5 of 2016*
Education and Training Reform Amendment (Miscellaneous) Bill 2016	Education	12.04.16 *02.05.16*	5 of 2016 *6 of 2016*
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016	Corrections	12.04.16 *29.04.16*	5 of 2016 *6 of 2016*
Witness Protection Amendment Bill 2016	Police	12.04.16 *29.04.16*	5 of 2016 *6 of 2016*

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Infant Viability Bill 2015	Dr Rachel Carling-Jenkins MP	03.05.16 *23.05.16*	6 of 2016 *7 of 2016*
Justice legislation (Evidence and Other Acts) Amendment Bill 2016	Attorney-General	03.05.16 *20.05.16*	6 of 2016 *7 of 2016*
Local Government (Greater Geelong City Council) Act 2016	Attorney-General	03.05.16 *23.05.16*	6 of 2016 *7 of 2016*
Victorian Funds Management Corporation Amendment Bill 2016	Treasurer	03.05.16 *31.05.16*	6 of 2016 *8 of 2016*
Primary Industries Legislation Amendment Bill 2016	Agriculture	24.05.16 *06.06.16*	7 of 2016 *8 of 2016*
Owners Corporations Amendment (Short-stay Accommodation) Bill 2016	Consumer Affairs, Gaming and Liquor Regulation	07.06.16 *18.07.16*	8 of 2016 *10 of 2016*
Tobacco Amendment Bill 2016	Health	07.06.16 *16.06.16*	8 of 2016 *9 of 2016*
Crimes Amendment (Sexual Offences) Bill 2016	Attorney-General	21.06.16 *03.08.16*	9 of 2016 *10 of 2016*
Melbourne College of Divinity Amendment Bill 2016	Education	21.06.16 *21.07.16*	9 of 2016 *10 of 2016*
Equal Opportunity Amendment (Equality for Students) Bill 2016	Ms Sue Pennicuik MLC	16.08.16 *29.08.16*	10 of 2016 *11 of 2016*
Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016	Attorney-General	16.08.16	10 of 2016
Crimes Amendment (Carjacking) Bill 2016	Hon Edward O'Donohue MP	30.08.16	11 of 2016
National Domestic Violence Order Scheme Bill 2016	Attorney-General	30.08.16	11 of 2016
Police and Justice Legislation Amendment (Miscellaneous) Bill 2016	Police	30.08.16	11 of 2016