No. 12 of 2014

Tuesday, 16 September 2014

on the following Bills

Casino and Gambling Legislation Amendment Bill 2014

Cemeteries and Crematoria Amendment Bill 2014

Crimes Amendment (Sexual Offences and Other Matters) Bill 2014

Family Violence Protection Amendment Bill 2014

Healthcare Quality Commissioner Bill 2014

Inquiries Bill 2014

Justice Legislation Amendment (Firearms and Other Matters) Bill 2014

Parks and Crown Land Legislation Amendment Bill 2014

The Committee

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Member for Eastern Metropolitan

Deputy Chairperson
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Member for Pascoe Vale

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Member for Oakleigh

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Terms of Reference - Scrutiny of Bills

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

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
  (i) trespasses unduly upon rights or freedoms;
  (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
  (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
  (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
  (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
  (vi) inappropriately delegates legislative power;
  (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
  (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

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

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

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Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the *Charter* provides –

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

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

(a) the nature of the right; and

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

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

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

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

Glossary and Symbols

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

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

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

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

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

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

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (as at 1 July 2014 one penalty unit equals $147.61)

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

'VCAT' refers to the Victorian Civil and Administrative Tribunal

[ ] denotes clause numbers in a Bill

Alert Digest No. 12 of 2014

Casino and Gambling Legislation Amendment Bill 2014

Introduced	3 September 2014
Second Reading Speech	4 September 2014
House	Legislative Assembly
Member introducing Bill	Hon Michael O'Brien MP
Portfolio responsibility	Minister for Liquor and Gaming Regulation

Purpose

This Bill amends the *Casino Control Act 1991*, the *Casino (Management Agreement) Act 1993* and the *Gambling Regulation Act 2003* to:

- extend the Melbourne Casino Licence until 18 November 2050
- ratify the tenth Deed of Variation to the Management Agreement for the Melbourne Casino to provide for the Melbourne Casino Operator to make further fixed payments to the State and other payments contingent on revenue growth and taxes paid, to remove additional taxes introduced in 2009, for the State not to take certain actions that adversely affect the Melbourne Casino Operator and for compensation to be payable to the Melbourne Casino Operator in certain circumstances if the State takes certain regulatory actions
- allow for an increase in the maximum number of gaming machines available for gaming at the Melbourne Casino
- enable the Minister to extinguish certain gaming machine entitlements that have not been allocated or have been forfeited.

Charter report

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

The Committee makes no further comment

Cemeteries and Crematoria Amendment Bill 2014

Introduced	2 September 2014
Second Reading Speech	3 September 2014
House	Legislative Assembly
Member introducing Bill	Hon Mary Wooldridge MP
Portfolio responsibility	Minister for Health

Purpose

The Bill amends the *Cemeteries and Crematoria Act 2003* to provide for the conversion of a right of interment for interring cremated human remains of deceased identified veterans for 25 years to a perpetual right of interment, and to provide for the re-interment of cremated human remains of deceased identified veterans and their family members in specified circumstances.

Extract from the second reading speech:

> The proposed changes to the Cemeteries and Crematoria Act 2003 are relatively small; however they represent a significant change in the way we as a community recognise, honour and manage the limited tenure cremated remains of our deceased veterans and their families.
>
> These changes will provide cemetery trusts with the power to convert these limited tenure rights of interment to permanent tenure where no one can be found to take responsibility for their ongoing care. It will also give cemetery trusts the power to put in place a memorial for the veteran.

Charter report

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

The Committee makes no further comment

Healthcare Quality Commissioner Bill 2014

Introduced	2 September 2014
Second Reading Speech	3 September 2014
House	Legislative Assembly
Member introducing Bill	Hon Mary Wooldridge MP
Portfolio responsibility	Minister for Health

Purpose

The Bill is for an Act to introduce a new Victorian healthcare complaints system. Establish the statutory position of Healthcare Quality Commissioner ('the Commissioner').

The Bill repeals the *Health Services (Conciliation and Review) Act 1987* and makes consequential amendments to other Acts.

The Bill:

- establishes an impartial, accessible and effective healthcare complaints system that is consistent with the repealed Act
- retains the voluntary resolution of healthcare complaints, while providing the Commissioner greater flexibility in determining the most effective and responsive approach to resolution of a complaint
- provides for local resolution of healthcare complaints, to enable complaints to be resolved directly with healthcare providers wherever possible
- gives the Commissioner powers to protect the health and safety of members of the public through the introduction of public warning notices
- strengthens the capacity of the Commissioner to play an important role in improving healthcare quality
- provides for greater accountability by establishing the Healthcare Quality Council to advise the Minister on the performance of the Commissioner.

Summary of major provisions

The Bill –

- *Third party complaints* – allows another person, whether family or a friends to initiate complaints. However, the person who needed the healthcare must consent to the complaint being made on their behalf.
- *Accompanying a complainant* – allows complainants and providers to be accompanied or represented by another person, including a legal practitioner when attending before the commissioner.
- *Carers may complain* – introduces a new ground of complaint, allowing carers to complain in their own right about how they have been treated in their caring role, by the healthcare practitioner.
- *Complaint data investigation* –allows the Commissioner, in circumstances where there are complaints data information relating to a single healthcare provider, indicating persistent or recurrent issues, to conduct an investigation about that provider to attempt to prevent that issue(s) persisting.

- *Compliance with agreed improvements* – empowers the Commissioner to keep track of whether providers have made the quality improvements they undertake to make as part of resolving a complaint or after an investigation
- *Minister or Parliament may initiate inquiry* – include a capacity for the Minister or the Parliament to refer a broader healthcare matter to the Commissioner for public inquiry in situations where a complaint has not necessarily been made by any person.
- *Patient Safety Advisory Committee* – establish the Ministerial Patient Safety Advisory Committee to provide advice and make recommendations to the Minister on improving quality and patient safety and to reduce preventable harm in Victorian public hospitals.
- *Disclosure of information* – allows the Commissioner to disclose otherwise confidential information (with appropriate safeguards) when there is a compelling public interest reason for doing so, and to issue public warnings where necessary to alert Victorians to serious risks to the health, safety or welfare of a person or the public more broadly.
- *General healthcare providers* – introduces a limited set of powers to fill the current regulatory gap that exists for healthcare providers ('general healthcare providers) who are not required to be registered under the National Law. In clearly defined circumstances, the Commissioner will have the power to prohibit a 'general healthcare provider' from providing healthcare temporarily or permanently if satisfied that it is necessary to avoid a serious risk to the health, safety or welfare of the public. This category of healthcare providers includes, speech therapists, naturopaths, psychotherapists and reiki therapists among others.

  The Bill also recognises corresponding orders made in other States and Territories and provide that the same penalty applies to a person who provides a general healthcare service in Victoria, if the person is prohibited from providing a service of that kind in another jurisdiction.
- *Commissioner principles* – the legislation puts in place a set of principles by which the Commissioner must abide in the course of their duties.
- *Healthcare Quality Council* - establishes the new Healthcare Quality Council to provide advice to the Minister about how the Commissioner's functions are being performed.
- *Referral of complaints to other bodies* – allow the Commissioner to refer a complaint if it is one that is more appropriately made to another entity, for instance the Disability Services Commissioner, the new Mental Health Complaints Commissioner or one of the national health professional registration boards established under the National Law.

  In circumstances where a matter also falls within the jurisdiction of another regulatory or enforcement agency, the Commissioner may refer the matter but also concurrently exercise their specialist jurisdiction. The Bill recognises that there will be significant overlap between the jurisdiction of the Commissioner and that of the Australian Health Practitioner Regulation Agency established under the National Law regulating many healthcare practitioners. The National Law describes a process for consultation and decision-making about which of the two entities takes precedence in dealing with a complaint.[i]
- *Alternative dispute resolution* – introduce a new role for the Commissioner to be more actively involved in early complaints resolution and gives statutory recognition to the breadth of alternative dispute resolution processes, which may include negotiation, mediation, as well as conciliation.
- *Investigation* – the Commissioner may investigate complaints that are not suitable for resolution, or which have not been able to be resolved. An investigation may also occur where a provider fails to participate in, or cooperate with, a complaints resolution process.

[i] See section 150 of the *Health Practitioner Regulation National Law (Victoria) Act 2009*

- *Handling complaints* – requires all healthcare providers who employ or engage more than 100 people to employ or engage a person to coordinate and manage complaints. The Bill will require all healthcare providers to comply with the complaints handlings standards. Failure to comply or inconsistent compliance with the standards will be a ground for complaint to the Commissioner.
- *Review of Act* – The Minister must conduct a review of the first three years of operation of the Act and table the report of the review in each House of the Parliament

Charter report

The Healthcare Quality Commissioner Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Parks and Crown Land Legislation Amendment Bill 2014

Introduced	2 September 2014
Second Reading Speech	3 September 2014
House	Legislative Assembly
Member introducing Bill	Hon Ryan Smith MP
Portfolio responsibility	Minister for Environment and Climate Change

Purpose

The Bill amends the :

- *Coastal Management Act 1995* and the *Crown Land (Reserves) Act 1978* to provide that the Minister may by notice published in the Government Gazette declare land to be a national surfing reserve **[3-7]**
- *Crown Land (Reserves) Act 1978* to provide for (i) the revocation of several permanent Crown land reservations and a Crown grant; and (ii) the creation of Hepburn Regional Park and Kerang Wildlife Reserve **[8-16]**

  Extract from the second reading speech relating to the creation of Hepburn Regional Park:

  > The formal creation of the park will enable Aboriginal title to be granted over the park to the Dja Dja Wurrung Traditional Owner Group in accordance with the 2013 recognition and settlement agreement between the Dja Dja Wurrung and the state. The park will continue to be managed under the Crown Land (Reserves) Act.

- *Land Act 1958* and other Acts to reform bee site licensing on Crown land. The Bill makes consequential amendments to the *Forests Act 1958* and the *Crown Land (Reserves) Act 1978* the *National Parks Act 1975* and the *Wildlife Act 1975.* Existing apiary licences will continue until they expire or a licence is granted under the new licensing provisions. **[17-38]**
- *National Parks Act 1975* to alter the boundaries of several parks. Clause 41 declares that the amendments made by the Bill to this Act do not effect native title rights or interests **[39-46]**
- *Conservation, Forests and Lands Act 1987* and the *Sustainable Forests (Timber) Act 2004* in relation to the content of, availability of, and compliance with Codes of Practice relating to Crown land legislation. The Bill removes the duplication of consultation, tabling and disallowance provisions so as to provide for these matters only under the *Subordinate Legislation Act 1994.* **[50-51]**
- *Land Conservation (Vehicle Control) Act 1972* to increase the maximum penalties for offences **[52-55]**
- *Mineral Resources (Sustainable Development) Act 1990* in relation to restricted Crown land. The provisions respectively amend the new Hepburn Regional Park and insert the Kerang Regional Park into the description of restricted Crown land in Schedule 3 of that Act **[56-57]**
- *Owner Drivers and Forestry Contractors Act 2005* to update the names of three bodies currently represented on the Forestry Industry Councils and to allow for further changes to be made by the Minister and published in the Government Gazette. A number of spent provisions are to be repealed and other minor amendments made. **[58-59]**
- *Sustainable Forests (Timber) Act 2004* makes a consequential amendment to clarify that a person complying with an exemption will not be committing an offence under the Act (breaching a Code of Practice) if they are acting in accordance with the exemption relating to timber harvesting under the *Conservation, Forests and Lands Act 1987*. **[60]**

Charter report

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

The Committee makes no further comment

Crimes Amendment (Sexual Offences and Other Matters) Bill 2014

The Bill was introduced into the Legislative Assembly on 20 August 2014 by the Hon Robert Clark MLA. The Committee considered the Bill on 1 September 2014 and made the following comments in Alert Digest No. 11 tabled in the Parliament on 2 September 2014.

Committee comments

Charter report

Protection of children – Exceptions to child pornography offences for minors – Whether law applies to still and moving images

Summary: Clauses 8 and 28 introduce various defences to child pornography offences for minors. The Committee will write to the Attorney-General seeking further information as to whether or not the new defences introduced by clauses 8 and 28 apply to both still and moving images.

The Committee notes clauses 8 and 28, inserting a new section 70AA into the *Crimes Act 1958* and amending existing s. 57A of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 2005*, introduce various defences to child pornography offences for minors. Each of the defences only applies if the child pornography 'is an image'.

The Statement of Compatibility remarks:

> The bill's new exceptions to child pornography offences enhance the protection of minors who engage in non-exploitative peer-to-peer sharing of images from unwarranted prosecution for child pornography offences.

However, the Committee observes that the new defences do not define 'image'. By contrast, the new offence of distributing an intimate image (discussed below) expressly applies to a 'moving or still image'.

The Committee notes that the Parliament's Law Reform Committee recommended that the new defence for minors should apply to a 'film or photograph'.[i]

The Committee will write to the Attorney-General seeking further information as to whether or not the new defences introduced by clauses 8 and 28 apply to both moving and still images.

In the event that it is intended that the new defences apply to both moving and still images, the Committee seeks further information as to whether or not expressly providing to that effect in the text of clauses 8 and 28 would be a less restrictive alternative reasonably available to achieve those clause's purposes of protecting minors from unwarranted prosecution for child pornography offences.

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[i] Law Reform Committee, *Inquiry into Sexting*, Parliament of Victoria, May 2013, p. 145. The term 'film or photograph' appears in the current defence for minors to possessing child pornography: see *Crimes Act 1958*, s. 70(2)(d-e). 'Film' is defined to include any 'form of recording from which a visual image, including a computer generated image, can be produced': *Classification (Publication, Films and Computer Games) Act 1995* (Cth), s. 5.

Equality – Retrospective criminal liability – Abolition of immunity from prosecution arising because of time limits – Lawful sexual activity – Whether proposed law permits prosecution for lawful sexual activity

Summary: Clause 10 abolishes any immunity from prosecution arising because of time limits applicable between 1928 and 1991 requiring prosecutions within twelve months for various sexual offences. The Committee observes that, in some instances, clause 10 removes immunity from prosecution for past consensual sexual activity that would be lawful if it occurred now. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 10, inserting a new section 7A into the Criminal Procedure Act 2009, abolishes '[a]ny immunity from prosecution arising because of the time limit imposed by' various provisions requiring prosecutions within twelve months for:

- offences between 1928 and 1980 of unlawful carnal knowledge of:[ii]
    - a girl aged between 12 and 16, unless the girl consented and was older than or the same age as the accused, generally punishable by up to ten years imprisonment:[iii] immunity from prosecution removed by new sections 7A(a-c).
    - a female aged between 16 and 18, unless either the female was married or not a virgin or the accused was under 21, punishable by up to one year's imprisonment: immunity from prosecution removed by new sections 7A(a-c).
- offences between 1980 and 1991 of taking part in an act of sexual penetration with:
    - a person aged between 12 and 16, unless the person consented and the accused was either no more than two years older or believed on reasonable grounds that the person was over 16 or married to him or her, generally punishable by up to ten years imprisonment:[iv] immunity from prosecution removed by new section 7A(d).
    - a person aged between 16 and 18, unless the person was married to the accused; or consented to the act of sexual penetration and at the time either was not a virgin or the accused was no more than five years older or believed on reasonable grounds that the person was over 18 or married to him or her, generally punishable by up to two years imprisonment:[v] immunity from prosecution removed by new section 7A(e).

The Statement of Compatibility remarks:

> Section 27(1) of the charter act provides that '[a] person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. The bill (at clause 10) retrospectively removes historical time limits on the prosecution of certain sexual offences against children committed prior to 1991. This repeal does not retrospectively create any criminal offence, because the conduct was (and remains) a criminal offence at the time the conduct was engaged in. Removing the immunity from prosecution that arose 12 months after the offending does not limit

[ii] s. 47, *Crimes Act 1928*, s. 51, *Crimes Act 1957*, s. 51, *Crimes Act 1958*

[iii] The punishment was fifteen years if the accused was a teacher of the girl, and three years (five for teachers) for attempt or assault with intent.The offences (but not the twelve-month time limit) also applied where the girl was aged between 10 and 12.

[iv] s. 48(6) *Crimes Act 1958* (between 1980 and 1991). The punishment was fifteen years if the accused was a teacher of the girl, and five years (seven for teachers) for attempt or assault with intent. The offence (but not the twelve-month time limit) also applied where the person was aged between 10 and 12.

[v] s. 49(6) *Crimes Act 1958* (between 1980 and 1991). The punishment was three years if the person was in the care, supervision or the authority of the accused.

section 27(1) of the charter act because such changes to criminal procedure do not amount to the retrospective creation of criminal liability.

However, the Committee observes that various overseas courts have held (albeit sometimes by narrow majorities) that retrospective repeals of limitation periods enacted after the limitation period has expired impose retrospective criminal liability.[vi] In particular, the European Court of Human Rights has held a provision in Europe's human rights convention that is worded in a similar way to Charter s. 27 'in principle prevents any restoring of the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation'.[vii]

The Committee notes that, in some instances, clause 10 removes immunity from prosecution for past consensual activity (for example, consensual sex between a 15 year-old boy and a 14 year-old girl in 1980 or between a 23 year-old and a 17 year-old virgin in 1990) that would be lawful if committed today. The Committee also notes that some of the offences turn on outmoded distinctions based on age[viii], lawful sexual activity (e.g. non-virginity[ix]), marital status and (for pre-1980 offences) sex.[x]

The Committee observes that a similar A.C.T. law enacted in 2013 expressly preserved immunity from prosecution in some circumstances to 'reflect current comparable child sexual offences'.[xi]

The Committee will write to the Attorney-General seeking further information as to whether or not preserving immunity from prosecution for past consensual sexual activity that would be lawful if it occurred now would be a less restrictive means reasonably available to achieve clause 10's purpose of ensuring that perpetrators of sexual crimes against children can be brought to justice. Pending the Attorney-General's response, the Committee draws attention to clause 10.

Fair hearing – Prosecution may include more than one incident in a single charge – Prosecution need not prove number or particulars of incidents – Defendant must be

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vi E.g. *Stogner v California*, 539 US 607 (2003); *DPP v Judge Devins* [2012] IESC 7. See also *Kaing Guek Eav - Decision on the Defence preliminary objection concerning the statute of limitations of domestic crimes* [2010] ECCC 91 (Extraordinary Chambers in the Courts of Cambodia), [51], listing decisions of various constitutional courts in Europe.

vii *Kononov v Latvia* [2008] ECHR 695, [144]. See also the discussion of an equivalent provision of the *Human Rights Act 2004* (ACT) by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 13*, 22 November 2013, pp. 2-5, also discussing the rights to a fair hearing and to be tried without unreasonable delay.

viii See Law Reform Commission of Victoria, *Report No. 18: Sexual Offences Against Children*, November 1988, p. 4: "The present age of consent to sexual relations is 18. It is excessively protective of 16 and 17 year-olds and does not realistically reflect contemporary patterns of behaviour… except in relation to a person who occupies a position of authority over a child."

ix Specifically, prior consensual sex with someone else. *Crimes Act 1927*, s. 46(3), *Crimes Act 1957*, s. 50(3) and *Crimes Act 1958*, s. 50(3) (until 1980) each provided that 'the expression "female" does not include a female who with her consent has previously had intercourse with a male person other than the accused'. *Crimes Act 1958*, s. 49(4)(b) (between 1980 and 1991) provided that consent is not a defence unless 'the person had previously willingly taken part in an act of sexual penetration with a person other than the accused'.

x Charter s. 8(3) provides that every person is entitled to equal protection of the law without discrimination. Discrimination is defined to mean discrimination on the basis of an attribute listed in s. 6 of the *Equal Opportunity Act 2010*. Those attributes include age, 'lawful sexual activity' (defined to mean 'engaging in, not engaging in or refusing to engage in a lawful sexual activity'), marital status and sex.

xi *Crimes Legislation Amendment Act 2013* (ACT), s. 7, inserting new sections 441 and 441A into the *Crimes Act 1900* (ACT). Section 441A preserves the immunity for offences against people under 16 where the defendant was no more than two years older than the complainant and for other offences where the conduct was consensual. See explanatory memorandum to the Crimes Legislation Amendment Bill 2013 (ACT) at p. 8.

sentenced for the totality of course of conduct – Whether proposed law requires punishment after uncertain verdict

Summary: The Committee will write to the Attorney-General seeking further information as to the effect of clause 13's insertion of new sub-clauses 4A(8), (9) and (10) into Schedule 1 of the *Criminal Procedure Act 2009*, in the absence of any provision in the Act stating that Schedule 1 'has effect'. The Committee refers to Parliament for its consideration the question of whether or not clauses 13 and 17, respectively amending the *Criminal Procedure Act 2009* and the *Sentencing Act 1991*, by providing that a defendant may be punished for committing multiple incidents of an offence without proof of the number of incidents or particulars of any of them (including which type of act was committed) when the court decides the defendant's guilt, is compatible with the defendant's Charter right to have the charge decided after a fair hearing.

The Committee notes that clause 13, inserting a new clause 4A into Schedule 1 of the *Criminal Procedure Act 2009*, provides that a charge for a sexual offence, a theft (or similar) offence, identity crime, money laundering, cheating at gambling or a computer offence may include more than one incident in a single charge, so long as each incident constitutes an offence under the same provision (even though they involve '[m]ore than one type of act'), the incidents take place on more than one occasion over a specified period and together they amount to a course of conduct.

The Committee also notes that clause 13 also inserts further sub-clauses into new clause 4A of Schedule 1 concerning how course of conduct charges must or may be proved.[xii] The Committee observes that the effect of these clauses may be unclear. The terms of the *Criminal Procedure Act 2009* do not provide that Schedule 1 'has effect' but only that a charge sheet or indictment 'must comply with Schedule 1' (s. 6(3)(c) & s. 159(3)(c)) and that a charge sheet or indictment 'is not invalid by reason only of a failure to comply with Schedule 1' (s. 9(1) & s. 166(1)).[xiii]

To the extent that they are effective, new sub-clauses 4A(8-10) provide that the prosecution must prove beyond reasonable doubt that the incidents amount to a course of conduct, but does not need to prove:

- an incident of the offence 'with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted only by that incident'
- any particular number of incidents; the dates, times, places, circumstances or occasions of those incidents; that there were distinctive features differentiating any of those incidents; or the general circumstances of any particular incident.

Clause 17, amending existing s. 5 of the *Sentencing Act 1991*, provides that a court sentencing an offender under a course of conduct charge 'must impose a sentence that reflects that the totality of the offending that constitutes the course of conduct'. [xiv]

The effect of clauses 13 and 17 is that a defendant may be punished for committing multiple incidents of an offence without proof of the number of incidents or particulars of any of them (including the particular type of act committed) when the court decides the

[xii] New clauses 4A(8)-(10).

[xiii] Compare existing s. 439, providing that 'Schedule 4 has effect'. The Committee notes that, although s. 36(2) of the *Interpretation of Legislation Act 1984* provides that a Schedule to an Act forms part of the Act, s. 7 (which removes the need for introductory words to give effect to part of an Act) only applies to a 'section of an Act'.

[xiv] In addition, clause 18, amending existing s. 6B of the *Sentencing Act 1991*, provides that a court sentencing an offender for a course of conduct charge may impose a sentence longer than that which is proportionate to the gravity of the offence

defendant's guilt. The Committee considers that clauses 13 and 17 may engage a criminal defendant's Charter right to have the charge decided after a fair hearing.[xv]

The Statement of Compatibility remarks:

> The course of conduct charge will still disclose to the accused the nature of the charge, namely that the accused engaged in a course of conduct of offending. The prosecution will still need to prove that charge beyond reasonable doubt, and will not be at a forensic advantage. Where the course of conduct charge concerns repeated sexual offending, it is unfair to victims of such sustained sexual abuse to have their evidence systematically excluded because of a lack of specificity that may be due to the repeated nature of the offending.

However, the Committee observes that, in a 1989 judgment involving 'evidence of a number of [sexual] offences said to have been repeated at two-monthly intervals over a period of one year (which period might fall anywhere within a period of almost three years)', a majority of the High Court commented:[xvi]

> [T]he basis upon which the evidence was left to the jury allowed for the real possibility that different jurors might have different acts in mind when they came to consider each of the verdicts. Indeed, in view of the way the matter was left to the jury, it might even be possible that, in relation to one or all of the counts, individual jurors had no specific act in mind, but simply reasoned from the evidence as to frequency that the applicant committed one such act within each of the specified periods. In these circumstances, it is impossible to say, in relation to any one count in the indictment, that the jury as a whole was satisfied as to the applicant's guilt of an individual act answering to the description of the offence charged…
>
> In the course of argument it was stated by counsel for the Crown that it was impossible to particularize or identify any individual act as the offence the subject of any count in the indictment. Accordingly, it was said, unless the case could be left to the jury on the basis allowed by the trial judge, no case could be prosecuted… Whatever practical difficulties may exist, those difficulties (even if amounting to an impossibility) cannot justify a criminal trial attended with such uncertainty that the verdict or verdicts must also be seen as uncertain.

The Committee will write to the Attorney-General seeking further information as to the effect of clause 13's insertion of new sub-clauses 4A(8), (9) and (10) into Schedule 1 of the Criminal Procedure Act 2009, in the absence of any provision in the Act stating that Schedule 1 'has effect'.

The Committee refers to Parliament for its consideration the question of whether or not clauses 13 and 17, by providing that a defendant may be punished for committing multiple incidents of an offence without proof of the number of incidents or particulars of any of them (including which type of act was committed) when the court determines the defendant's guilt, is compatible with the defendant's Charter right to have the charge decided after a fair hearing.

Minister's response

Thank you for your letter dated 2 September 2014 outlining the concerns of the Scrutiny of Acts and Regulation Committee regarding several issues in the above Bill.

Course of conduct charge

[xv] Charter s. 24(1).

[xvi] *S v R* (1989) 168 CLR 266, 287-288.

The Committee has referred to the Parliament the question whether the 'course of conduct' charge is a departure from the common law principle that an accused be given specifics of the alleged offence(s).

The introduction of the course of conduct charge has two principal purposes, namely:

- to enable the criminal justice system to respond effectively to the worst cases of repeated and systematic sexual abuse, often of children, and
- to facilitate the effective management of prosecutions for very high volume theft and fraud related offences.

As the Parliamentary Family and Community Development Committee's *Betrayal of Trust* report found, repeated and systematic sexual abuse of children is all too common. Despite previous attempts by parliaments around Australia to provide an effective response to the well known limitations of the criminal law in dealing with systematic sexual abuse, the criminal law does not effectively deal with systematic offending where the victim is not able to give precise details as to each incident of offending.

Where the course of conduct charge concerns repeated sexual offending, it is unfair to victims of such sustained sexual abuse to have their evidence systematically excluded because of a lack of specificity that may be due to the repeated nature of the offending itself.

The reforms contained in Part 3 of the Bill introduce a new way of addressing this problem, based on the approach used in the United Kingdom and similar to the approach used in New Zealand. I note that both of these jurisdictions have legislation similar to Victoria's *Charter of Human Rights and Responsibilities Act 2006*.

While the reforms in Part 3 alleviate some of the requirements concerning certain particulars that must be proved, the prosecution must prove an additional element when using a course of conduct charge. It must prove beyond reasonable doubt that the accused engaged in a course of conduct. Proof of guilt by a course of conduct is also known to the law. For example, the offence of stalking involves a course of conduct.

The Committee refers to extradition cases involving consideration of applications to extradite a person to New Zealand to face sexual offence charges based on a similar basis to the course of conduct charge in Part 3 of the Bill. Those cases concerned the application of the *Extradition Act 1988* (Cth) in light of the High Court's statements about the need for specificity in particulars. As the Federal Court indicated in *Newman v New Zealand* [2012] FCAFC 133 at [42] its assessment was based on the differences between New Zealand's laws and the prevailing common law position in Australia. The court noted that statute law had not changed the common law position. This Bill proposes to change the law based on a view of fairness that is similar to that adopted in the United Kingdom and New Zealand. Indeed, the court in *Newman* said that (at [17]:

> These distinctions and the relative simplicity of procedure entailed are but a present manifestation of a longstanding assumption by the Australian Parliament, evident in earlier extradition regimes, of fairness on the part of New Zealand, based on the closeness of the relationship between Australia and that country and the high regard in which its courts are held here: *Moloney* (at para [36] and [37]).

The degree of particulars in each course of conduct charge will need to be determined on a case-by-case basis. The courts retain their power to order the prosecution to provide more particulars if this is necessary. Further, the court retains the power to stay a proceeding if it involves an abuse of process.

Moving and still images

The Committee seek further information as to whether or not the new defences introduced by clauses 8 and 28 apply to both moving and still images. A definition of image, including

still and moving images, is included in clause 24 of the Bill because there are no existing definitions in the *Summary Offences Act 1966* that already apply.

The exceptions in clauses 8 and 28 narrow the scope of the offences and apply to both moving and still images. The *Crimes Act 1958* and the *Classification (Publication, Films and Computer Games) (Enforcement) Act 1995* define a 'film' by reference to the definition in the *Classification (Publication, Films and Computer Games) Act* 1995 (Cth). A 'film' is described in the Commonwealth Act as including 'a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer generated image, can be produced…'. Therefore no definition is required for the exceptions in clauses 8 and 28.

In addition, section 37(c) of the *Interpretation of Legislation Act 1984* provides that a reference to words in the singular includes the plural.

Removal of immunity for historic sexual offences

The Committee has sought further information as to whether or not preserving immunity from prosecution for past consensual sexual activity that would be lawful if it occurred now would be a less restrictive means reasonably available to achieve clause 10's purpose of ensuring that perpetrators of sexual crimes against children can be brought to justice.

I thank the Committee for raising this issue and the approach adopted in the Australian Capital Territory to this issue. I am giving consideration to introducing a House Amendment to address this issue.

Schedule 1 of the Criminal Procedure Act 2009 (the CPA)

The Committee has sought further information as to the effect of clause 13's insertion of new sub-clauses 4A(8), (9) and (10) into Schedule 1 of the CPA, in the absence of any provision in the Act stating that Schedule 1 'has effect'.

It is not necessary to state when the changes to Schedule 1 have effect from, or that it has effect. Transitional provisions apply to determine when an offence may be alleged to have been committed (i.e. when an offence is operative from). Irrespective of when the offence is alleged to have been committed, section 5 of the CPA sets out the ways in which a criminal proceeding may be commenced. The filing of a charge-sheet or an indictment must then be done in accordance with that Act, which includes Schedule 1. I also note that when the CPA commenced on 1 January 2010, no transitional provisions applied to Schedule 1 of the CPA. Schedule 1 had effect because it was referred to in other sections, which required charge-sheets and indictments to comply with the provisions in Schedule 1. That remains the case following these amendments.

The Committee has further raised whether or not clauses 13 and 17, by providing that an accused may be punished for committing multiple incidents of an offence without proof of the number of incidents or particulars of any of them (including which type of act was committed) when the court determines the accused's guilt, is compatible with the accused's Charter Act right to have the charge decided after a fair hearing.

The Committee's question raises similar issues to those discussed above concerning the course of conduct charge. As discussed above, sufficient particulars will be available for the accused to conduct their defence. If not, the court may stay the proceeding as an abuse of process. What the Bill does is reduce the requirement for certain particulars but adds the requirement for proof that the accused engaged in a course of conduct.

While the particulars may be different with a course of conduct charge, the nature of the allegation is clear and will need to be supported by evidence. If the jury accepts that evidence and convicts the accused, the judge will be able to sentence on the evidence in the

trial. Judges are already required to determine the sentencing facts based on the evidence called at the trial and in light of the jury's verdict.

Community standards

The Committee raises the question whether or not clauses 24 and 25, by criminalising any distribution 'contrary to community standards' of sexual or semi-naked images depicting third parties who are either under 18 or where it is unclear that they freely agreed to that distribution or its manner, are sufficiently accessible and precise to satisfy the test in section 15 of the Charter Act, being the test for lawful restrictions on freedom of expression.

The Bill provides that consent to distribution (whether express or implied or reasonably considered to be expressed or implied) is relevant if the person whose image is distributed is an adult. However, the consent of a child is not a defence to distribution of intimate images of children.

The community standards test will apply most commonly to distribution of an intimate image of a child. The new test of 'acceptable to community standards' essentially reflects the common law test which has been applied for many years in the context of determining whether an act is an 'indecent' act. However, the Bill provides more guidance than that common law test by setting out five relevant considerations. These considerations provide guidance on the myriad of different circumstances in which an image may be distributed. It is not feasible nor practical for legislation to specifically set out all of the different permutations of circumstances in which distribution of an intimate image might be contrary to the law. However, the guidance provided appropriately balances the need for people to know what conduct is criminalised and the need for the law to apply in a wide range of circumstances.

I trust this information addresses the issues raised by the Committee.

ROBERT CLARK MP
Attorney-General

12 September 2014

The Committee thanks the Attorney-General for this response.

Family Violence Protection Amendment Bill 2014

The Bill was introduced into the Legislative Council on 20 August 2014 by the Hon Edward O'Donohue MLC. The Committee considered the Bill on 1 September 2014 and made the following comments in Alert Digest No. 11 tabled in the Parliament on 2 September 2014.

Committee comments

Charter report

Fair hearing – Police sergeants may issue family violence safety notices during court hours – Matter must be listed before a court within five 'working days' – Whether orders made without a court hearing

Summary: The Committee will write to the Attorney-General seeking further information as to the effect of the new definition of 'working days' inserted by clause 6. The Committee refers to Parliament for its consideration the question of whether or not clauses 5 and 6, by potentially permitting a police officer attending an incident involving family violence to choose to seek orders from a police sergeant rather than a court even though a court is available to make those orders, and by potentially delaying court scrutiny of some police orders, are compatible with the Charter right of respondents to have civil proceedings determined by an independent court or tribunal after a fair and public hearing.

The Committee notes that clause 5, amending existing s. 24, allows police attending an incident of family violence during court hours to apply for a family violence safety notice from a police sergeant, rather than being required to seek an order from a court. Clause 6, amending existing s. 31, extends the time within which a hearing for a court order must be listed from 120 hours to five 'working days', but also requires that the order be listed 'as soon as is practicable' if the notice includes a condition excluding the respondent from the protected person's residence.

The Statement of Compatibility remarks:

> The bill expands the system of family violence safety notices (FVSN) issued by police by allowing FVSNs to be issued 24 hours per day, seven days per week and extending the maximum period before a FVSN has to be reviewed by a court from 120 hours to five working days. As a result, a FVSN can be issued at any time (and not only outside of court hours) and any limitations on charter act rights arising out of conditions included in the FVSN may operate for a longer period before judicial review of the FVSN….
>
> Any limitation on freedom of movement of a respondent to a FVSN is justifiable under section 7(2) of the charter because FVSNs only operate for a limited duration, can only be issued in circumstances that require an urgent response, are confined to prohibiting movement near particular family members and particular locations and are subject to the supervision of the Magistrates court. The limitation is also necessary for the purpose of protecting the safety of affected family members and enhances the right to protection of families and children under the charter act.

The Committee observes that the effect of clause 5 may be to allow a police officer responding to an incident involving family violence to choose to seek orders from a police sergeant rather than a court, even though the court is available to make those orders.[xvii] The

[xvii] See existing s. 53 (permitting a court to make an interim order) and s. 44(1)(c)(ii) (permitting an application to be made by electronic communication if 'the distance from the nearest venue of the court where the court is sitting is so great that it is impracticable to make the application in person'. Existing s. 26(1) provides that a police sergeant can impose the same conditions a court can impose in a final order, other than orders with respect to weapons approval

Committee considers that clause 5 may engage respondents' Charter right to have civil proceedings determined by an independent court or tribunal after a fair and public hearing.[xviii]

The Statement of Compatibility does not address the right to a fair hearing. The Second Reading Speech remarks:

> Currently, FVSNs can only be issued outside of court hours. This has the anomalous result that police have less capacity to protect victims during court hours than they have after court hours. It also contributes to unnecessary differences in the handling of family violence matters depending on the time of day, and the day of the week, on which they occur…. These FVSN amendments will provide swifter protection for more affected family members by enabling police to take immediate action whenever a family violence incident occurs.
>
> The amendments will also improve the operation of the FVSN system for police. It is more efficient for police to commence FVIO applications by FVSN, which are also resolved with fewer court hearings. Courts will be better able to manage their listings, as a result of police making fewer FVIO applications during court hours and through the longer period of operation of FVSNs.

The Committee notes that the effect of clause 6's provision for when a court hearing must be listed following the making of a family violence safety notice varies depending on the conditions the police sergeant includes in the notice:

- if the notice includes a condition excluding the respondent from the protected person's residence, clause 6 enhances the respondent's Charter right to a fair hearing by also requiring that a court hear the matter 'as soon as practicable' (rather than merely within 120 hours);
- if the notice does not include a condition excluding the respondent from the protected person's residence or a speedier hearing isn't 'practicable', clause 6 may reduce the respondent's Charter right to a fair hearing by extending the requirement for a court hearing from 120 hours to 'five working days'.

The Committee also notes that the new definition of 'working day' – 'a day on which the court is open to normal business'[xix] – may mean that some family violence safety notices may operate without court supervision for longer in parts of Victoria where the Magistrates' Court has fewer sitting days or where it provides reduced services for some days (e.g. nominating particular days of the week when family violence matters are generally heard.)[xx]

The Committee will write to the Attorney-General seeking further information as to the effect of the new definition of 'working days' (inserted by clause 6) in parts of Victoria where the Magistrates' Court has reduced sitting days or reduced services on some days

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of firearms licences. A police sergeant also cannot impose the finalisation condition that clause 8 will allow courts to include in an interim order. The Committee notes that, while a court making an interim family violence protection order must be satisfied on the balance of probabilities that an order is necessary, a police sergeant making a family violence safety notice must only be satisfied that a police officer has reasonable grounds to believe that such an order is necessary: existing ss. 26(2)(b) and 53(1)(a).

[xviii] Charter s. 24(1). The Committee notes that the UK House of Lords has held that injunctions to prevent anti-social behaviour are civil proceedings for the purposes of the right to a fair hearing: *Clingham v Royal Borough of Kensington and Chelsea* [2002] UKHL 39.

[xix] Clause 3(2), amending existing s. 4.

[xx] Compare *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s. 29(3); *Domestic and Family Violence Protection Act 2012* (Qld), s. 105(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s. 18(3)(d), providing different tests depending on how often the local court sits. However, the Committee notes that these jurisdictions each include extremely isolated communities.

(e.g. nominating particular days of the week when family violence matters are generally heard.)

The Committee refers to Parliament for its consideration the question of whether or not:

- **clause 5, by potentially permitting a police officer attending an incident involving family violence to choose to seek orders from a police sergeant rather than a court, even though a court is available to make those orders; and**
- **clause 6, by potentially delaying court scrutiny of some police orders (particularly in parts of Victoria where courts have reduced services)**

are compatible with the Charter right of respondents to have civil proceedings determined by an independent court or tribunal after a fair and public hearing.

Minister's response

Thank you for your letter of 2 September, enclosing the report of the Scrutiny of Acts and Regulations Committee on the Family Violence Protection Amendment Bill 2014. The Committee has raised some important issues, which I will address.

The Committee has queried the operation of the new definition of 'working day' and its intended operation in the context of family violence safety notices. Clause 6 of the Bill will extend when the first mention date for family violence intervention order (FVIO) applications commenced by family violence safety notice (FVSN) must occur from within 120 hours of the respondent being served with the FVSN to within five working days.

I would like to take this opportunity to clarify that the proposed five working day period will apply to all FVSNs regardless of the conditions that are included. However, if the FVSN includes a condition excluding the respondent from the protected person's home, the first mention date must be as soon as practical within that five working day period. This additional express provision recognises the potential hardship that may be caused to respondents who are excluded from their home.

In your letter, you sought further information as to the effect of the new definition of working day in parts of Victoria where the Magistrates' Court has reduced sitting days or reduced services on some days. In relation to a court, the Bill provides that working day means a day on which a court is open for normal business. The definition was intended to capture regular working days, and exclude weekends and public holidays. However, I can see that there could be some confusion as to how the definition operates in the context of some of our smaller Magistrates' Courts which may operate only one day each week. To avoid this confusion I am considering a possible house amendment to alter the definition of 'working day' to ensure that it is read as intended.

The five working day period is the maximum period within which the first mention date must occur, and I understand that the Magistrates' Court endeavours to list these matters as soon as practicable within the required period. The extension of time from 120 hours to five working days will allow courts more flexibility to list these matters on designated family violence hearing days where this is a practical option.

The Committee also referred to Parliament for its consideration the question of whether or not clauses 5 and 6 of the Bill are compatible with the respondent's right to have civil proceedings determined by an independent court or tribunal after a fair and public hearing.

Clause 5 will remove the existing prohibition on police officers applying to a Sergeant for a FVSN when the court is open. The effect of this amendment will be that FVSNs may be issued at any time of the day on any day of the week; rather than only when the court is closed. As noted by SARC, the effect of clause 6 may be a longer period before the first mention date occurs for a FVIO application.

In my view, if clause 5 and 6 are in fact relevant to the respondent's right to a fair hearing, they do not limit that right. A FVSN represents the start of a civil proceeding and all respondents can have that matter determined by the Magistrates' Court following a fair hearing. The paramount consideration at the time a FVSN is issued is the safety of the affected family member and any children. The Family Violence Protection Act provides that the Sergeant may, if practicable, hear from the respondent before making a decision to issue a FVSN.

Allowing a FVSN to be made during court hours will enable police to take a consistent approach to family violence matters, regardless of the time of day or day of the week on which police are called. Currently, police who attend an incident at midday on a working day have fewer options than police who attend an incident at six in the evening or on the weekend. The issue of a FVSN is still limited by the conditions at s24 of the *Family Violence Protection Act 2008*, which requires, among other things, that the police officer believes on reasonable grounds that, until an application for a family violence intervention order can be decided by the court, a family violence safety notice is necessary to ensure the safety of the affected family member.

In addition to providing temporary protection for the affected family member until a FVIO application can be determined by a court, the *Family Violence Protection Act 2008* provides that a FVSN is taken to be: an application for a FVIO by police; and a summons for the respondent to attend court at the first mention date for the application. As I noted above, the new definition of 'working day' will ensure that this first mention date is within five working days of the issue of the FVSN.

This may be contrasted with the process that would be followed if police immediately applied to the court for an interim family violence intervention order on behalf of the affected family member. These orders are often granted ex parte, and a return date for the first mention of the final FVIO can vary depending on which court the application is heard in. In these circumstances, the respondent would still not have an opportunity to appear before the court at the time the order was made, and would in some cases have to wait longer than five working days before he was able to appear before the court that made the interim order.

Thank you again for the detailed comments on this Bill. I trust this response is of assistance.

ROBERT CLARK MP
Attorney-General

10 September 2014

The Committee thanks the Attorney-General for this response.

Inquiries Bill 2014

The Bill was introduced into the Legislative Assembly on 20 August 2014 by the Hon Dr Denis Napthine MLA. The Committee considered the Bill on 1 September 2014 and made the following comments in Alert Digest No. 11 tabled in the Parliament on 2 September 2014.

Committee comments

Charter report

Privacy – Expression – Person who receives information from an inquiry must not 'take advantage' of the information to anyone's 'benefit' – Whether offence prohibits honest or innocuous behaviour

Summary: Clauses 45, 85 and 117 provide that a person who is given information by an inquiry 'must not take advantage of the information to benefit the person or any other person'. The Committee notes that these provisions may apply to honest or innocuous behaviour. The Committee will write to the Premier seeking further information.

The Committee notes that clauses 45, 85 and 117 provide that a person who is given information by a Royal Commission, Board of Inquiry or Formal Review, or by an officer of those bodies in the course of an inquiry, 'must not take advantage of the information to benefit the person or any other person', unless the information is lawfully in the public domain. A breach of these clauses is an offence punishable by up to 12 months in prison.

The Committee observes that offences of this type usually only apply to statutory officers and, in that context, are designed to prevent the misuse of public office.[xxi] Such officers typically have the knowledge and resources to identify relevant ethical constraints on their behaviour. By contrast, clauses 45, 85 and 117 apply to any people, including witnesses before an inquiry.

The Committee notes that the terms of clauses 45, 85 and 117 may apply to honest or innocuous behaviour, such as a person altering his or her testimony in response to the information, seeking legal advice concerning the information he or she received or adjusting his or her work practices to avoid a potential hazard suggested by the information.

The Committee will write to the Premier seeking further information as to the compatibility of clauses 45, 85 and 117 with the Charter's rights to privacy and expression. Pending the Premier's response, the Committee draws attention to clauses 45, 85 and 117.

Minister's response

Thank you for your letter regarding clauses 45, 85 and 117 of the *Inquiries Bill 2014*, which provide that a person who is given information by an inquiry must not intentionally take advantage of that information to benefit them or any other person.

These clauses:

- promote fairness by protecting the use of information provided by participants to inquiries;

[xxi] E.g. *Ombudsman Act 1973*, s. 26B.

- promote the effective conduct of inquiries by removing a possible disincentive to participants voluntarily providing information to inquiries; and
- respond to concerns raised by the Hazelwood Coal Mine Fire Board of Inquiry that there was no ability to ensure that information provided by it, in the interests of procedural fairness, to other participants was only used for the purposes of its inquiry (page 50 of its report tabled 2 September).

Given the wide subject matters that inquiries can investigate, it is appropriate that these clauses do not apply only to public officers. The effect of the clauses is intended to be similar to the "implied undertakings" that apply to all parties in respect of discovered documents in civil litigation.

These clauses are not intended to apply to "honest or innocuous" behaviour. It is intended that these clauses will be interpreted in the context of the Bill as a whole, which contemplates that inquiries involve persons considering, responding to, and obtaining legal advice on information before inquiries. Further, taking advantage of information is intended to capture behaviour that involves profiting or gaining from that information for a purpose other than the inquiry. For example, using the information to obtain a commercial advantage.

I consider that these clauses do not limit the right to privacy. Rather, these clauses protect and promote the right to privacy and reputation of persons who provide information to an inquiry.

I also consider that these clauses do not limit the right to freedom of expression. These offences only apply to the improper use of information that is provided by an inquiry, to which the person would not otherwise have access. In any event, I consider that these clauses are reasonably necessary and justified to protect the privacy of participants who provide information to inquiries and to promote the important public interest in effective inquiries.

Thank you for raising these matters with me in respect of this important Bill.

The Hon Dr Denis Napthine MP
Premier

14 September 2014

The Committee thanks the Premier for this response.

Justice Legislation Amendment (Firearms and Other Matters) Bill 2014

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

Committee comments

Charter report

Presumption of innocence – Deemed possession of firearms on the accused's premises or vehicle

Summary: The Committee will write to the Minister seeking further information as to the compatibility of clause 26, to the extent that it conclusively deems a person to possess every firearm that he or she knows is in his or her premises or vehicle, with the Charter's right to be presumed innocent until proved guilty of an offence.

The Committee notes that clause 26 replaces existing s.145 of the Firearms Act 1996:

> In any proceedings under this Act, evidence that a person occupies any land or premises on or in which any firearm is found is evidence, and, in the absence of evidence to the contrary, is proof that that person possessed the firearm.

with a new section 145:

> A firearm is taken to be in the possession of a person if the firearm is found—
>
> (a) on land or premises occupied, in the care of or under the control or management of the person; or
>
> (b) in a vehicle of which the person is in charge—
>
> unless the person did not know, or could not reasonably be expected to know, that the firearm was on the premises or in the vehicle.

While existing s. 145 permits an accused to adduce any evidence to show that he or she did not possess a firearm on his or her premises, new section 145 requires that the accused must adduce evidence that he didn't know of the firearm or that it was reasonable for him to not know of the firearm.[xxii]

The Committee observes that the effect of clause 26 may be to conclusively deem a person to possess every firearm that he or she is aware is on his or her premises or vehicle, even if the firearm is lawfully possessed by another occupant of the premises or vehicle (such as a visitor, roommate or passenger who holds a licence to possess it.) New section 145 may apply to a criminal prosecution, for example the offence in s.5 barring prohibited persons from possessing a firearm, which is punishable by 10 years in prison.

The Statement of Compatibility addresses the compatibility of clause 26 with the presumption of innocence, [xxiii] but only in regards to it placing an evidentiary burden on the

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[xxii] The Committee notes that this drafting, in providing that either an actual 'or' a reasonable lack of knowledge will suffice, is unusual. It is more common for an accused to have to adduce evidence that he or she both actually and reasonably lacked knowledge of an incriminating fact: see, e.g. *Firearms Act 1997* (NT), s. 105(1)(b); *Firearms Act 1996* (NSW), s. 4A(1)(b); *Weapons Act 1990* (Qld), s. 163(3A)(b); *Firearms Act 1977* (SA), s. 5(15)(a). As presently drafted, the phrase 'or could not reasonably be expected to know' appears to be redundant, as the presumption will be displaced by mere lack of knowledge, reasonable or otherwise.

[xxiii] Charter s. 25(1).

accused. It does not address the possible narrowing of the circumstances when the presumption of possession can be displaced.

The Committee notes that similar presumptions in the firearms laws of other Australian jurisdictions[xxiv] expressly permit for the presumption to be displaced in one or both of the following circumstances:

- the firearm was placed in or on, or brought into or on to, the premises by or on behalf of a person who was lawfully authorised by or under this Act to possess the firearm;[xxv] or
- on the evidence before the court, the person was not in possession of the firearm.[xxvi]

The Committee will write to the Minister seeking further information as to the compatibility of clause 26, to the extent that it conclusively deems a person to possess every firearm that he or she knows is in his or her premises or vehicle (even if it is lawfully brought there by someone else), with the Charter's right to be presumed innocent until proved guilty of an offence.

To the extent that new section 145 is intended to allow an accused to adduce evidence of lack of possession on grounds other than lack of knowledge, the Committee seeks further information from the Minister as to whether providing expressly for that alternative in the text of new section 145 would be a less restrictive alternative reasonably available to achieve the section's purpose.

Minister's response

Thank you for your letter of 5 August 2014 enclosing an Alert Digest report by the Scrutiny of Acts and Regulations Committee in relation to clause 26 of the Justice Legislation Amendment (Firearms and Other Matters) Bill 2014.

The Bill was introduced into Parliament on 24 June 2014 and second read on 25 June 2014. Debate on the Bill has not yet commenced.

The intention of clause 26 is to allow Victoria Police to state that a person is in possession of a firearm in specific circumstances when they discover a firearm in a building or vehicle, and no person in the building or vehicle states that they are the owner or possessor of that firearm.

The definition of 'possession' in the *Firearms Act 1996* (the Act) is as follows:

> ***possession*** in relation to a firearm, includes—
>
> (a) actual physical possession of the firearm; or
>
> (b) custody or control of the firearm; or
>
> (c) having and exercising access to the firearm, either solely or in common with others…

Clause 26 substitutes a new section 145 of the Act and intends, in the same manner that the current section 145 intended, to provide Victoria Police with further ability to allege that a person is in actual possession of a firearm, in circumstances where the current definition may not be fully applied. It is not intended to facilitate allegations that a person is in possession of

[xxiv] Tasmania has a conclusive presumption without any exceptions, but it only applies to people who are subject to firearms prohibition orders: *Firearms Act 1996* (Tas), s. 133. See also *Firearms Act 1997* (NT), s. 58(4).

[xxv] *Firearms Act 1996* (ACT), s. 10(1)(b); *Firearms Act 1997* (NT), s. 105(1)(a); *Firearms Act 1996* (NSW), s. 4A(1)(a); *Weapons Act 1990* (Qld), s. 163(3A)(a); *Firearms Act 1977* (SA), s. 5(15)(b).

[xxvi] *Firearms Act 1996* (ACT), s. 10(1)(d); *Firearms Act 1997* (NT), s. 105(1)(c); *Firearms Act 1996* (NSW), s. 4A(1)(c); *Weapons Act 1990* (Qld), s. 163(3A)(c).

a firearm if another person claims ownership or possession of that firearm or there is other sufficient evidence to prove such ownership or possession.

An example of the existing difficulty that the new provision is designed to address is the scenario whereby a number of people are in attendance at a motorcycle gang clubhouse in which an unregistered firearm is located and it cannot be proved that all or any of the persons then present possess the firearm, even though they may all technically have access to that firearm. If a person is not aware of the firearm, or the person had not visited the clubhouse before and could not be expected to know if firearms were on the premises, clause 26 will not apply to them.

I believe that the provision as drafted in the Bill is compatible with the Charter's right to presumed innocent until proven guilty of an offence, as the clause merely places an evidential onus on the accused.

I note that the Committee has provided alternative wording for clause 26, having taken the view that an actual, or a reasonable expectation of, no knowledge is unusual wording. Due to the circumstances in which clause 26 may be applied, I believe it is appropriate to allow a person to either produce evidence that they were not aware of the firearm, or state that it would not be reasonable for them to be aware of the firearm in the premises or vehicle. I believe that this wording, whilst different to the wording used in some similar provisions, does not impede the ability of a person to inform a court that they had no knowledge of the firearm in the building or vehicle.

I hope the above information is of assistance to the Committee.

KIM WELLS MP
Minister for Police and Emergency Services
Minister for Bushfire Response

3 September 2014

The Committee thanks the Minister for this response.

Committee Room
15 September 2014

Appendix 1
Index of Bills in 2014

Alert Digest Nos.

Bills

Regulations

Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

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

Appendix 3

Ministerial Correspondence 2014

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

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Legal Profession Uniform Law Application Bill 2013	Attorney-General	04-02-14 *14-02-14*	1 of 2014 *2 of 2014*
Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	Planning	09-12-13 *17-02-14*	17 of 2013 *2 of 2014*
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	Planning	09-12-13 *17-02-14*	17 of 2013 *2 of 2014*
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	Education	18-02-14 *26-02-14*	2 of 2014 *3 of 2014*
Mental Health Bill 2014	Mental Health	06-03-14 *24-03-14*	3 of 2014 *4 of 2014*
Vexatious Proceedings Bill 2014	Attorney-General	06-03-14 *22-03-14*	3 of 2014 *4 of 2014*
Gambling and Liquor Legislation Amendment (Modernisation) Bill 2014	Liquor and Gaming	06-05-14 *23-05-14*	5 of 2014 *6 of 2014*
Building Legislation Amendment Bill 2014	Planning	27-05-14 *06-06-14*	6 of 2014 *7 of 2014*
Melbourne Market Authority Amendment Bill 2014	Major Projects	24-06-14 *30-07-14*	8 of 2014 *9 of 2014*
Crimes Amendment (Abolition of Defensive Homicide) Bill 2014	Attorney-General	05-08-14 *15-08-14*	9 of 2014 *10 of 2014*
Criminal Organisations Control and Other Acts Amendment Bill 2014	Attorney-General	05-08-14 *15-08-14*	9 of 2014 *10 of 2014*
Justice Legislation Amendment (Firearms and other Matters) Bill 2014	Police and Emergency Services	05-08-14 *03-09-14*	9 of 2014 *12 of 2014*
Sentencing Amendment (Emergency Workers) Bill 2014	Attorney-General	05-08-14 *18-08-14*	9 of 2014 *10 of 2014*
Water Bill 2014	Water	05-08-14 *19-08-14*	9 of 2014 *10 of 2014*

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Crimes Amendment (Sexual Offences and Other Matters) Bill 2014	Attorney-General	02-09-14 *12-09-14*	11 of 2014 *12 of 2014*
Family Violence Protection Amendment Bill 2014	Attorney-General	02-09-14 *10-09-14*	11 of 2014 *12 of 2014*
Inquiries Bill 2014	Premier	02-09-14 *14-09-14*	11 of 2014 *12 of 2014*

Appendix 4
Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 4 August 2014

Statutory Rules Series 2014

SR No. 12 – Corrections Amendment (Breach of Parole and Other Matters) Regulations 2014
SR No. 17 – Local Government (Planning and Reporting) Regulations 2014
SR No. 25 – Corrections (Victims Register) Regulations 2014
SR No. 26 – Prisoners (Interstate Transfer) Regulations 2014
SR No. 27 – Road Safety (Drivers) Amendment (Variation of Driver Licence and Learner Permit) Regulations 2014
SR No. 28 – Magistrates' Court (Judicial Registrars)(Personal Safety Intervention Orders Amendment) Rules 2014
SR No. 29 – Financial Management Regulations 2014
SR No. 30 – Rail Safety Amendment Regulations 2014
SR No. 31 – Rail Safety National Law (Limited Accreditation Exemptions) Regulations 2014
SR No. 32 – Transport (Safety Schemes Compliance and Enforcement)(Infringements) Regulations 2014
SR No. 33 – Transport (Conduct) Further Amendment Regulations 2014
SR No. 34 – Transport (Infringements) Amendment Regulations 2014
SR No. 35 – Victorian Civil and Administrative Tribunal (Amendment No.10) Rules 2014
SR No. 36 – Electricity Safety (Installations) Amendment (Fees) Regulations 2014
SR No. 37 – Building Amendment (General) Regulations 2014
SR No. 38 – Subordinate Legislation (Architects Regulations 2004) Extension Regulations 2014
SR No. 39 – Survey Co-ordination Regulations 2014

Legislative Instruments

Ministerial Direction to Governing Boards of Adult Education Institutions on Executive Remuneration and Classification
Ministerial Direction under Section 3.8A.2 of the Gambling Regulation Act 2003
Ministerial Order 749 – Structured Workplace Learning and Work Experience – Arrangement Forms and Travel and Accommodation Forms

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 18 August 2014

Statutory Rules Series 2014

SR No. 40 – Conservation, Forests and Lands (Infringement Notice) and (Primary Industries Infringement Notices) Amendment Regulations 2014
SR No. 41 – Workplace Injury Rehabilitation and Compensation Regulations 2014
SR No. 42 – Crimes (Confiscation) Regulations 2014
SR No. 43 – Child Employment Regulations 2014
SR No. 44 – Transfer of Land (Fees) Amendment Regulations 2014
SR No. 45 – Subordinate Legislation (Legislative Instruments) Amendment Regulations 2014
SR No. 46 – Road Safety (Drivers) and (Vehicles) Amendment Regulations 2014
SR No. 47 – Supreme Court (Commercial, Tec and Intellectual Property Lists Amendment) Rules 2014

SR No. 48 – Supreme Court (Redcrest Electronic Case Management System Amendment) Rules 2014
SR No. 50 – Drugs, Poisons and Controlled Substances (Confiscation) Regulations 2014
SR No. 51 – Building Amendment (National Construction Code) Regulations 2014
SR No. 54 – Occupational Health and Safety Amendment Regulations 2014
SR No. 55 – Equipment (Public Safety) Amendment Regulations 2014
SR No. 56 – Dangerous Goods (Storage and Handling) Amendment Regulations 2014

Legislative Instruments
Harness Racing Victoria – Notice of Amendments to Australian Rules of Harness Racing
North Central Catchment Management Authority By-laws No. 1/2014 Waterways Protection
Ministerial Order No 765 – Victorian Institute of Teaching Schedule of Registrations Fees 2014-15
Order in Council – Declaration of Class of Motor Vehicles to be Tractors

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 1 September 2014

Statutory Rules Series 2014
SR No. 49 – Freedom of Information (Access Charges) Regulations 2014
SR No. 53 – Wildlife (Game) Amendment Regulations 2014
SR No. 57 – Sentencing Further Amendment Regulations 2014
SR No. 58 – Liquor Control Reform Amendment (Live Music Events and Other Matters) Regulations 2014
SR No. 59 – Drugs, Poisons and Controlled Substances (Volatile Substances) Regulations 2014
SR No. 60 – Plumbing Amendment Regulations 2014
SR No. 61 – Subordinate Legislation (Port Management (Local Ports) Regulations 2004) Extension Regulations 2014
SR No. 63 – Transport (Taxi-Cabs) Amendment Regulations 2014
SR No. 64 – Transport (Passenger Vehicles) Amendment (Taxi Services Reforms and Other Matters) Regulations 2014
SR No. 65 – Transport (Taxi-Cabs) and (Taxi-Cabs Licences – Market and Trading) Amendment Regulations 2014
SR No. 66 – Transport (Ticketing) Amendment (On-the-Spot Penalty Fares) Regulations 2014
SR No. 67 – Road Safety (General) Amendment (Corporate Penalties) Regulations 2014
SR No. 68 – Road Safety Road Rules Amendment (Corporate Penalties) Rules 2014
SR No. 69 – Water (Resource Management) Amendment Regulations 2014
SR No. 70 – Magistrates' Court (Chapters I and II Miscellaneous Amendments) Rules 2014

Legislative Instruments
Ministerial Direction MD141 – Special Religious Instruction in Government Schools
Ministerial Direction – MD 144 – Amendment to Ministerial Direction MD141 Special Religious Instruction in Government Schools ('MD 144])

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 15 September 2014

Statutory Rules Series 2014
SR No. 52 – Forests (Fire Protection) Regulations 2014
SR No. 62 – Transport (Taxi-cab Industry Accreditation) Amendment Regulations 2014
SR No. 71 – Workplace Injury Rehabilitation and Compensation (Savings and Transitional) Regulations 2014
SR No. 73 – Sale of Land (Public Auctions) Regulations 2014
SR No. 74 – Victorian Energy Efficiency Target Amendment Regulations 2014
SR No. 75 – Wildlife Amendment Regulations 2014

SR No. 76 – Tobacco (Victorian Health Promotion Foundation) Amendment Regulations 2014
SR No. 77 – Mental Health Regulations 2014
SR No. 78 – Police Regulation Revocation Regulations 2014
SR No. 80 – Victoria Police (Fees and Charges) Regulations 2014
SR No. 81 – Country Fire Authority Amendment (Member Compensation) Regulations 2014
SR No. 82 – Metropolitan Fire Brigades (General) Amendment (Road Accident Rescue Service) Regulations 2014
SR No. 83 – Subordinate Legislation Regulations 2014
SR No. 85 – Road Safety (Drivers) and (Vehicles) Amendment (Fees) Regulations 2014
SR No. 86 – Water Industry Revocation Regulations 2014
SR No. 88 – Water (Trade Waste) Regulations 2014
SR No. 89 – Mental Health Tribunal Rules 2014
SR No. 90 – Domestic Animals Amendment Regulations 2014
SR No. 93 – Gambling Regulation and Gambling Regulation (Prescribed Connection and Prescribed Profit) Amendment Regulations 2014
SR No. 94 – Country Fire Authority (Community Fire Refuges) Regulations 2014
SR No. 95 – Drugs, Poisons and Controlled Substances (Poppy Cultivation and Processing) Amendment Regulations 2014
SR No. 96 – Fisheries and Fisheries (Fees, Royalties and Levies) Further Amendment Regulations 2014
SR No. 97 – Subordinate Legislation (Court Security Regulations 2004) Extension Regulations 2014
SR No. 98 – Conservation, Forests and Lands (Infringement Notice) Amendment (Forests and Wildlife) Regulations 2014
SR No. 99 – Water (Long Service Leave) Amendment Regulations 2014
SR No. 100 – County Court (Chapters I and III Miscellaneous Amendments) Rules 2014

National Law
Education and Care Services National Amendment Regulations 2014

Legislative Instruments
Amendment to the Determination that Specified Areas are Designated Bushfire Prone Areas