58th Parliament
Alert Digest

No. 12 of 2015

Tuesday, 6 October 2015
on the following Bills

Children, Youth and Families
Amendment (Aboriginal Principal Officers) Bill 2015

Criminal Organisations Control
Amendment (Unlawful Associations) Bill 2015

Education and Training Reform
Amendment (Miscellaneous) Bill 2015

Gambling Legislation Amendment Bill 2015

National Parks Amendment (No 99 Year Leases) Bill 2015

Public Health and Wellbeing
Amendment (No Jab, No Play) Bill 2015

Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Bill 2015

Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Bill 2015

Victims of Crime Commissioner Bill 2015

Wrongs Amendment Bill 2015
The functions of the Scrutiny of Acts and Regulations Committee are –

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

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

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

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

Interpretive use of Parliamentary Committee reports
Section 35 (b)(iv) of the Interpretation of Legislation Act 1984 provides –

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

When may human rights be limited
Section 7 of the Charter provides –

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

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

(a) the nature of the right; and

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

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

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

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

Glossary and Symbols
‘Assembly’ refers to the Legislative Assembly of the Victorian Parliament
‘Council’ refers to the Legislative Council of the Victorian Parliament
‘DPP’ refers to the Director of Public Prosecutions for the State of Victoria
‘human rights’ refers to the rights set out in Part 2 of the Charter
‘IBAC’ refers to the Independent Broad-based Anti-corruption Commission

‘penalty units’ refers to the penalty unit fixed from time to time in accordance with the Monetary Units Act 2004 and published in the government gazette (as at 1 July 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 2015

Children, Youth and Families Amendment (Aboriginal Principal Officers) Bill 2015

Introduced 15 September 2015
Second Reading Speech 16 September 2015
House Legislative Assembly
Member introducing Bill Hon. Natalie Hutchins MLA
Portfolio responsibility Minister for Aboriginal Affairs

Purpose

Section 18 of the Children, Youth and Families Act 2005 (the Principal Act) currently provides that the Secretary may authorise the principal officer of an Aboriginal agency (a registered community service managed by Aboriginal persons) to act on behalf of the Secretary in relation to a protection order for an Aboriginal child.

The purpose of the Bill is to amend the Principal Act to make further provision regarding the authorisation of the principal officers of Aboriginal agencies. The Bill would:

- define the term ‘principal officer’, as the chief executive officer or equivalent of an Aboriginal agency (to be inserted into section 3(1) of the Principal Act)
- authorise an acting principal officer of an Aboriginal agency to perform the same functions and exercise the same powers specified in an authorisation under section 18 in respect of an Aboriginal child as the principal officer, even if they are not an Aboriginal person (new section 18A)
- empower the principal officer of an Aboriginal agency to delegate to an employee of the agency any function or power that they have been authorised to perform or exercise (new section 18B)
- empower the Secretary to disclose information to the principal officer of an Aboriginal agency about an Aboriginal child who is (or is to be) subject to an authorisation under section 18
- prohibit disclosure of information provided by the Secretary to an Aboriginal agency or the principal officer of an Aboriginal agency under section 18(2A) to any other person unless the disclosure is to a person employed by the agency and is for the purpose of assisting in making a decision whether or not to agree to an authorisation (new section 18D)
- require the Secretary to provide the Aboriginal agency and the principal officer with all information that is reasonably necessary to assist them to make an informed decision whether or not to agree to an authorisation under section 18 (new section 18(2A))
- require the principal officer, following the revocation of an authorisation, to provide the Secretary with relevant records regarding the child (new section 18(7))
- require the principal officer of an Aboriginal agency who has been authorised under section 18 to establish a system of internal review (i.e. review within the agency) of decisions made as part of the decision-making process under the authorisation (new section 332)
• provide that child protection decisions made by a principal officer of an Aboriginal agency under a section 18 authorisation are subject to review by the Victorian Civil and Administrative Tribunal on the application of a child or parent (new section 333(1)(b)).

Charter report

The Children, Youth and Families Amendment (Aboriginal Principal Officers) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Gambling Legislation Amendment Bill 2015

Introduced 15 September 2015
Second Reading Speech 16 September 2015
House Legislative Assembly
Member introducing Bill Hon. Jane Garrett MLA
Portfolio responsibility Minister for Consumer Affairs, Gaming and Liquor Regulation

Purpose


The Bill would amend the Casino Control Act 1991:

- by substituting a new definition of ‘interstate exclusion order’ to clarify that it includes an order made by an interstate Chief Commissioner of Police that excludes, or requires another person to exclude, a person from an interstate casino [3]
- with respect to the training requirements of ‘special employees’ in relation to gaming machines (a ‘special employee’ is a person who is employed in a casino in a managerial capacity or who is authorised to make decisions that regulate operations in a casino or in a capacity relating to a range of specified activities, including the movement, exchange or counting of money or chips in the casino or security and surveillance). [4–6]

The Bill would amend the Gambling Regulation Act 2003:

- in relation to compulsory training requirements for certain gaming industry employees [9]
- to provide that pre-commitment information cannot be disclosed to a court or tribunal or certain other authorities and persons except in certain circumstances [8] (Refer to Content and Charter report below)

The Bill would amend the Victorian Responsible Gambling Foundation Act 2011 to:

- confer new policy and advocacy functions on the Victorian Responsible Gambling Foundation
- empower the Foundation to impose and collect fees and charges in relation to education and information programs
- empower the Board of the Foundation to appoint and dismiss the chief executive officer. [14–17]
Content

Repeal, alteration or variation of section 85\(^1\) of the Constitution Act 1975 (unlimited jurisdiction of the Supreme Court)\(^2\)

Clause 11 of the Bill declares that it is the intention of substituted section 3.8A.25 of the Gambling Regulation Act 2003 (contained in clause 8 of the Bill) to alter or vary section 85 of the Constitution Act 1975.

Clause 8 relevantly provides that a person must not disclose pre-commitment information to a court or a tribunal (new section 3.8A.25(2)(a)) unless the Minister certifies that such disclosure is necessary in the public interest (new section 3.8A.25A). (Refer to Charter report below)

Having reviewed the declaratory provisions in clauses 11 and 8 and the section 85 statement of the member introducing the Bill in the Second Reading Speech, the Committee is satisfied that the limitation provisions are appropriate and desirable in the circumstances.

Charter report

Fair hearing – Information from a pre-commitment system – Prohibition of disclosure to a court or tribunal – Exception where Minister certifies that disclosure in public interest

Summary: The Committee will write to the Minister seeking further information as to whether or not clause 8’s ban on the use of evidence from a pre-commitment system in a Victorian court or tribunal without the permission of either a Minister or the person to whom the information relates is compatible with the Charter rights of third party civil litigants and criminal defendants to have the proceeding or charge determined after a fair hearing.

The Committee notes that clause 8, substituting a new section 3.8A.25, prohibits the disclosure of information obtained from the pre-commitment system to a court or tribunal. New section 3.8A.25A permits such disclosure if the Minister for Gaming ‘certifies that it is necessary in the public interest that the information should be disclosed’. Existing s. 3.8A.26 permits any disclosure with the consent of the person to whom the information relates.

The Committee observes that the effect of clause 8 is that evidence from a pre-commitment system can only be used in a Victorian court with the permission of either a Minister or the person to whom the information relates. For example, if the estate of a gambler sues for losses caused by negligent operation of the pre-commitment system, then the estate’s ability to prove its claim using information from the pre-commitment system will be at the discretion of the Minister for Gaming.

The Committee considers that clause 8 may engage the Charter right of civil litigants and criminal defendants (other than the person to whom the pre-commitment information relates) to have the proceeding or charge determined after a fair hearing.\(^3\)

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\(^1\) Section 85 provides that the Supreme Court is created the superior court of Victoria with unlimited jurisdiction and further provides that where a provision of an Act seeks to repeal, alter or vary the court’s unlimited jurisdiction, the provision(s) will not be effective unless certain procedures are followed. Briefly, these procedures require the relevant provisions that intend to limit the court’s jurisdiction to be specifically identified by the Bill (the declaratory provision) and also requires the member of Parliament introducing the Bill to make a statement of the reasons for seeking to limit the court’s jurisdiction. Section 18(2A) of the Constitution Act 1975 further provides that a limitation amendment fails if it does not receive an absolute majority of the members in both Houses.

\(^2\) Section 17(b) of the Parliamentary Committees Act 2003 requires the Committee to report to the Parliament on any provision in a Bill that directly or indirectly repeals, alters or varies section 85 of the Constitution Act 1975 and to consider whether such provisions are in all the circumstances appropriate and desirable.

\(^3\) Charter s. 24(1).
The section 85 statement remarks:

The reason for altering or varying section 85 of the Constitution Act 1975 is that the potential risk of disclosure of precommitment information to a court (including the Supreme Court) may create a strong disincentive to register among players. This has the capacity to undermine the take-up of precommitment. The limitation is essential to protect public confidence in the confidentiality of precommitment information.

The Committee notes that existing ss. 3.8A.26-30 permit disclosure of precommitment information in a variety of situations, including disclosure to any enforcement agency (including all Australian and overseas police and prosecutors) for the purposes of law enforcement.4

The Statement of Compatibility does not address the compatibility of clause 8 with the Charter’s right to a fair hearing, but remarks:

The amendments will promote section 13 privacy rights by aligning the provision with the general confidentiality provisions of the Gambling Regulation Act 2003 to prevent a person’s precommitment information from being disclosed in court proceedings unless specifically authorised by the GRA.

The Committee notes that similar general confidentiality provisions in the Sex Work Act 1994 and the Victorian Civil and Administrative Tribunal Act 1998 contain an exception for disclosure in any proceeding for an indictable offence.5

The Committee will write to the Minister seeking further information as to whether or not clause 8’s ban on the use of evidence from a pre-commitment system in a Victorian court or tribunal without the permission of either a Minister or the person to whom the information relates is compatible with the Charter rights of third party civil litigants and criminal defendants to have the proceeding or charge determined after a fair hearing.

The Committee makes no further comment

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4 See ss. 3.8A.27 & 10.1.29(1).
5 Sex Work Act 1994, s. 87(7); Victorian Civil and Administrative Tribunal Act 1998, s. 36(3).
National Parks Amendment (No 99 Year Leases) Bill 2015

Introduced 15 September 2015
Second Reading Speech 16 September 2015
House Legislative Assembly
Member introducing Bill Hon. Lisa Neville MLA
Portfolio responsibility Minister for Environment, Climate Change and Water

Purpose

The Bill is for an Act to amend the National Parks Act 1975 to:

- reduce the maximum term of a lease that may be granted under the general leasing power from 99 years to 21 years (repeal of section 19I) [5]
- reduce the maximum term of a lease that may be granted for specific areas of land in the Point Nepean National Park, the Mount Buffalo National Park and the Arthurs Seat State Park from 99 years to 50 years [8–12]
- make other miscellaneous consequential and administrative amendments.

Charter report

The National Parks Amendment (No 99 Year Leases) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015

Introduced 15 September 2015
Second Reading Speech 16 September 2015
House Legislative Assembly
Member introducing Bill Hon. Jill Hennessy MLA
Portfolio responsibility Minister for Health

Purpose

The Bill is for an Act to amend the Public Health and Wellbeing Act 2008 (the Principal Act) which would in effect require that a parent provide evidence that their child has been immunised, according to the appropriate schedule, as a condition of enrolment at an ‘early childhood service’ (new section 143B). (Refer to Charter report below)

The bill would insert a new definition of ‘early childhood service’ into section 3(1) of the Principal Act, which would include childcare centres and kindergartens but would exclude services for school-age children such as out-of-school-hours care and vacation care programs, as well as casual occasional care such as crèches at shopping centres and gyms.

Section 143B would not apply for several categories of disadvantaged and vulnerable children (listed in section 143C(1)), including children in circumstances to be specified by the Secretary under new section 143D. For a child in one of those categories, the early childhood service would instead be required to take reasonable steps to ensure that evidence of immunisation is provided by a parent within 16 weeks of the child’s first attendance at the centre (new section 143C(2)).

A medical exemption (from the requirement to provide evidence of immunisation) would apply for children with a contraindication to a vaccine (new section 147(2)(c)).

The Secretary would also have the power to specify (in a notice published in the Government Gazette) particular documents as evidence of immunisation (new section 147(2)(d)).

Submissions received

The Committee received a number of submissions in relation to the Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015. Submissions accepted by the Committee will be published on the Committee’s website.

The Committee also received correspondence in relation to the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015, which is currently before the Commonwealth parliament.

The Committee thanks all those who took the time to share their views with the Committee.
Charter report

**Discrimination on the basis of possible future disease – Unvaccinated children cannot enrol in early childhood services – Race discrimination – Unvaccinated Aboriginal and Torres Strait Islander children can enrol in early childhood services**

**Summary:** The Committee will write to the Minister seeking further information as to whether or not new section 143B’s ban on the enrolment of most unvaccinated children in early childhood services is compatible with the Charter’s rights against direct or indirect discrimination on the basis of possible future disease.

The Committee notes that clause 5, inserting a new section 143B, bars the confirmation of a child’s enrolment at an early childhood service unless the child’s parent has provided an immunisation status certificate indicating that either:

- the child is vaccinated for all vaccine-preventable diseases in accordance with a vaccination schedule determined in a federal legislative instrument;\(^6\) or
- the child’s immunisation is medically contraindicated in accordance with specifications set out in the *Australian Immunisation Handbook*.\(^7\)

The Committee observes that the effect of new section 143B is to exclude most unvaccinated children from early childhood services.\(^8\) The Committee considers that, to the extent that new section 143B distinguishes between vaccinated and unvaccinated children because of their different future susceptibility to acquiring a vaccine-preventable disease,\(^9\) clause 5 may engage the Charter’s rights against direct or indirect discrimination on the basis of the possible future presence in children’s bodies of organisms that may cause disease.\(^10\)

The Committee also notes that new section 143C exempts various categories of children from the prohibition in new section 143B. The Second Reading Speech remarks:

> The bill recognises that there are a number of vulnerable and disadvantaged children in the community who may be in exceptional circumstances or whose families find it difficult to access immunisation services. Children in these circumstances, which are outlined in the bill, will be able to enrol in an early childhood education and care service if their immunisations

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\(^6\) See the definition of ‘age appropriately immunised’ inserted by clause 4 and the definition of ‘immunised’ in existing s. 3. Reg 81 of the *Public Health and Wellbeing Regulations 2009* currently prescribes Diptheria, Tetanus, Whooping Cough, Poliomyelitis, Haemophilus influenza type b, Hepatitis B, Pneumococcal, Rotavirus, Measles, Mumps, Rubella, Meningococcal C and Varicella as vaccine-preventable diseases. The *Family Assistance (Vaccination Schedules) (FaHCSIA) Determination 2012* (Cth) presently specifies vaccinations at 2, 4, 6 and 12 months, and 4 years. (The new definition wrongly refers to the ‘A New Tax (Family Assistance) Act 1999 of the Commonwealth’, rather than the *A New Tax System (Family Assistance) Act 1999* (Cth)).

\(^7\) The handbook presently specifies only anaphylaxis from a prior dose of a relevant vaccine or component or where the child is significantly immunocompromised as medical contraindications: *Australian Immunisation Handbook* 10\(^{th}\) Edition (Updated June 2015), Part 2.1.4, ‘Contraindications to vaccination’ (and see also ‘False contraindications to vaccination’). (New section 143B(1)(b) wrongly refers to the ‘A New Tax (Family Assistance) Act 1999 of the Commonwealth’, rather than the *A New Tax System (Family Assistance) Act 1999* (Cth).)

\(^8\) Clause 5 does not bar unvaccinated children from early childhood services where vaccination is medically contraindicated or an exemption in new section 143C applies.

\(^9\) The Committee notes that (subject to any future exemption under new section 143D) clause 5’s ban on most unvaccinated children from early childhood services extends to children with a natural immunity to a vaccine-preventable disease. (Compare existing s. 147(2)(b), providing for an immunisation status certificate certifying ‘laboratory evidence that the child has developed a natural immunity against the vaccine-preventable disease and does not require immunisation’, a condition which may be neither ‘age appropriately immunised’ nor a specified medical contraindication.)

\(^10\) Charter ss. 8(3), 17(2). See the definition of ‘discrimination’ in Charter s. 3, and para (d) and the concluding words of the definition of ‘disability’ in s. 4 of the *Equal Opportunity Act 2010*, and s. 6(e) of that Act.
are not up to date on the proviso that for a period of 16 weeks after commencement at the service, the service will take reasonable steps to obtain the immunisation status certificate for the child.

One category of children exempted by new section 143C(1)(d) is any child whose parent states that the child is an Aborigine or Torres Strait Islander. The Committee observes that new section 143C(1)(d) may engage the Charter’s rights against race discrimination, unless the exemption is a measure taken for the purpose of assisting or advancing persons or groups disadvantaged because of discrimination.\(^{11}\)

The Statement of Compatibility does not address the Charter’s equality rights.

**The Committee will write to the Minister seeking further information as to whether or not:**

- new section 143B’s ban on the enrolment of most unvaccinated children in early childhood services is compatible with the Charter’s rights against direct or indirect discrimination on the basis of possible future disease; and
- new section 143C(1)(d)’s exemption of all Aborigines and Torres Strait Islanders from this requirement is a measure taken for the purpose of assisting or advancing persons or groups disadvantaged by discrimination.

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**Medical treatment without free consent – Children must be vaccinated to enrol in early childhood services – Whether less restrictive alternative reasonably available**

Summary: The effect of clause 5 is that most parents must agree to have their children vaccinated if they wish to enrol their children in an early childhood service. The Committee refers to Parliament for its consideration the question of whether there is a less restrictive alternative reasonably available to achieve clause 5’s purpose.

The Committee notes that, currently:

- the Secretary of the Department of Health may direct the person in charge of a children’s services centre to ensure that a child who is not immunised against a vaccine-preventable disease does not attend the centre until the Secretary directs that such attendance can be resumed;\(^{12}\)
- certain federal benefits are not available to meet the costs of care to a child who is not immunised in accordance with the federal vaccination schedule, unless a recognised immunisation provider has certified that: the child has a specified medical contraindication; the child has natural immunity; or he or she has discussed with the parent the benefits and risks of immunising the child and the parent has declared in writing that he or she has a conscientious objection to the child being immunised based on a personal, philosophical, religious or medical belief against vaccination under the federal vaccination schedule.\(^{13}\)

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\(^{11}\) Charter ss. 8(3), 17(2). See the definition of ‘discrimination’ in Charter s. 3, and s. 6(m) of the *Equal Opportunity Act* 2010. Charter s. 8(4) provides that: ‘Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.’


\(^{13}\) See *A New Tax System (Family Assistance) Act 1999* (Cth), ss. 5, 6, 42(1)(c) (and see also Schedule 1, s. 38A). An exemption presently applies where an officer of the Church of Christ, Scientist, declares that the individual or the individual’s partner is a practising member of that Church: see s.7 and *Family Assistance (Exemption from Immunisation Requirements) (FaHCSIA) Determination 2012* (Cth). A Bill currently before the Federal Parliament would remove the exemptions for conscientious objectors and Christian Scientists: Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Cth).
By contrast, clause 5, inserting new section 143B bars the enrolment of children in an early childhood service unless they are vaccinated in accordance with a federal vaccination schedule, have a specified medical contraindication or fall within exemptions in new section 143C.

The Committee observes that the effect of clause 5 is that most Victorian parents must agree to have their children vaccinated if they wish to enrol their children in an early childhood service (whether or not they receive federal benefits for that care.)

The Statement of Compatibility remarks:

It is noted that the bill will not mandate vaccinations, nor will it provide for the administration of vaccinations without consent. The right in section 10(c) of the Charter that provides a person must not be subjected to medical or scientific treatment without his or her full, free and informed consent is therefore not engaged.

However, the Committee notes that a parent who is unable to care for a child themselves (for example due to employment or other commitments) and cannot afford or otherwise obtain private care for their child (for example from a family member or a nanny) may have no choice other than to have his or her child vaccinated in order to enrol that child in an early childhood service.\(^\text{14}\)

The Committee observes that the United States Supreme Court has held that both compulsory vaccination and a ban on school attendance of unvaccinated children are compatible with that country’s constitutional bill of rights.\(^\text{15}\) However, the United States and all other comparable jurisdictions lack any equivalent to a person’s express right under Victoria’s Charter not to be ‘subjected to medical... treatment without his or her full, free and informed consent.’\(^\text{16}\)

In relation to the Charter’s freedoms of conscience and expression, the Statement of Compatibility remarks:

I consider that any limitations imposed on sections 14 and 15 by the bill are justifiable having regard to the factors set out in section 7(2) of the charter, for the following reasons. Firstly, the bill does not purport to prevent a parent from holding or observing a belief that their child should not be vaccinated. Secondly, children and families have an interest in being protected from vaccine preventable diseases, which can have serious, even fatal, consequences. The weight of scientific evidence demonstrates that vaccines are safe and effective, with the benefits greatly outweighing the risks. As outlined above, high rates of immunisation in the community, particularly amongst children, are fundamental to maximising the benefits of immunisation in preventing the spread of vaccine preventable diseases. It is expected that the number of children whose participation in early childhood education and care is impacted will be smaller than the number of people who benefit from an increase in immunisation rates. Existing, less restrictive means available to increase immunisation rates — measures focused on promoting immunisation and facilitating access to immunisation services — have not achieved a significant increase in the overall immunisation rate.

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\(^{14}\) Section 494(1) of the Children, Youth and Families Act 2005 makes it an offence, punishable by six months’ imprisonment, for a person who has control or charge of a child to leave the child without making reasonable provision for the child’s supervision and care.

\(^{15}\) *Jacobson v Massachusetts*, 197 US 11 (1905); *Zucht v King*, 260 US 174 (1922).

\(^{16}\) Charter s. 10(c). The Explanatory Memorandum to the Charter states that the requirement ‘that consent must be full, free and informed... is intended to reflect the requirements for consent outlined in section 5(1) of the Medical Treatment Act 1988.’ Those requirements include ‘that the patient’s decision is made voluntarily and without inducement or compulsion’: s. 5(1)(b), *Medical Treatment Act 1988* (Vic).
The Committee notes that a similar ban on enrolment of most unvaccinated children in child care facilities that commenced in New South Wales in 2014 is subject to an exception where:17

(i) the parent of the child certifies that the parent has a conscientious belief of a kind specified in the approved form that vaccination for specified vaccine preventable diseases should not take place, and

(ii) an authorised practitioner certifies that the practitioner has explained the benefits and risks associated with immunisation to the parent and has informed the parent of the potential danger if a child is not immunised.

The Committee refers to Parliament for its consideration the question of whether there is a less restrictive alternative reasonably available to achieve clause 5’s purpose.18

The Committee makes no further comment

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17 Public Health Act 2010 (NSW), s. 87(2)(b).
18 See Charter s. 7(2)(e).
Victims of Crime Commissioner Bill 2015

Introduced 15 September 2015
Second Reading Speech 16 September 2015
House Legislative Assembly
Member introducing Bill Hon. Martin Pakula MLA
Portfolio responsibility Attorney-General

Purpose

The Bill is for a new Principal Act, which would:

- establish the office of the Victims of Crime Commissioner to:
  - advocate for the recognition, inclusion, participation and respect of victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police [13]
  - carry out inquiries on systemic victims of crime matters [23]
  - report to the Attorney-General on any systemic victim of crime matter [25]
  - provide advice to the Attorney-General and government departments and agencies regarding improvements to the justice system to meet the needs of victims of crime [13]
  - refer a matter to IBAC, the Director of Public Prosecutions, the Chief Commissioner of Police or the Ombudsman. [26–27]

- establish the Victims of Crime Consultative Committee to:
  - provide a forum for victims of crime, justice agencies and victims of crime services to discuss improvements to policies, practices and service delivery in respect of victim of crime issues and victim of crime support services
  - provide advice to the Attorney-General regarding victims of crime issues and support services
  - promote the interests of victims of crime
  - provide advice on a matter referred to the Committee by the Attorney-General. [31–32]

Charter report

The Victims of Crime Commissioner Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Wrongs Amendment Bill 2015

Introduced 15 September 2015
Second Reading Speech 16 September 2015
House Legislative Assembly
Member introducing Bill Hon. Martin Pakula MLA
Portfolio responsibility Attorney-General

Purpose

The Bill is for an Act to amend the Wrongs Act 1958 to:

- change the method by which the maximum amount of damages for economic loss (injury resulting in loss of income or wealth) is calculated [5]
- increase the maximum amount of damages for non-economic loss (i.e. pain, suffering and loss of companionship) [6] and change the method by which that amount is indexed into the future [7]
- provide a new statutory entitlement to damages for loss of the capacity to provide gratuitous care for dependants, which would apply in limited circumstances [8]
- change the threshold impairment level used for determining whether a person has suffered significant psychiatric or spinal injury [11]
- confer on courts a power to stay a proceeding to which Part VBA of the Wrongs Act 1958 applies in respect of a claim for damages for non-economic loss in cases where the claimant has not served a certificate of assessment on the respondent. [12]

The bill also includes a number of transitional provisions aimed at providing guidance on, and avenues for resolving any issues arising regarding, the application of certain amended, substituted or inserted sections of the Principal Act. [10, 13]

Charter report

The Wrongs Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Ministerial Correspondence

Criminal Organisations Control Amendment (Unlawful Associations) Bill 2015

The Bill was introduced into the Legislative Assembly on 1 September 2015 by Hon Martin Pakula MP. The Committee considered the Bill on 14 September 2015 and made the following comments in Alert Digest No. 11 of 2015 tabled in the Parliament on 15 September 2015.

Committee comments

Charter report

Expression – Offence to ‘communicate with’ specified people – Group electronic communications

Summary: The effect of new section 124A is that people who are served with an unlawful association notice face up to three years in prison if they ‘communicate with’ anyone specified in that notice more than three times in three months or six times in one year, including electronically. The Committee will write to the Attorney-General seeking further information whether or not the prohibition on electronic communication extends to group communications where one of the participants is a specified person.

The Committee notes that clause 5, inserting a new section 124A into the Criminal Organisations Control Act 2012, makes it an offence for a person served with an unlawful association notice to ‘associate with’ an individual specified in that notice on 3 occasions within 3 months or 6 occasions with 12 months. The offence is punishable by 3 years imprisonment and is subject to exceptions including for family members and genuine political purposes.

The Committee also notes that existing s. 3 provides that:

“associate with” means—

(a) to be in company with; or

(b) to communicate with by any means (including by electronic communication)

The Committee observes that the effect of new section 124A, when read with para (b) of this definition, is that people who are served with an unlawful association notice face up to three years in prison if they ‘communicate with’ anyone specified in that notice (other than family members, for genuine political purposes or various narrow exceptions) more than three times in three months or six times in one year, including electronically.

The Committee considers that new section 124A may engage the Charter’s right to freedom of expression.1 Although the Statement of Compatibility addresses new section 124A’s effect on the Charter’s rights to movement, privacy, freedom of association and protection of families, it does not address the right to freedom of expression.

The Committee observes that new section 124A’s prohibition on ‘electronic communication’ may cover, not only one-to-one communications (such as personal SMS and email) but also

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1 Charter s. 15(2).
group communications (such as social media.) For example, new section 124A may make it an offence for a person served with an unlawful association notice to:

- send or contribute to an email newsletter with multiple recipients including a person specified in the notice
- post updates, links or photos to his or her Facebook feed if the person’s Facebook ‘friends’ include a person specified in the notice
- post tweets on Twitter if he or she ‘is followed’ by anyone specified in the notice
- post or comment on a blog, if anyone specified in that notice reads that blog more than three times in three months or six times in a year, other than with family members or for genuine political purposes. By contrast, the existing consorting offence in the Summary Offences Act 1966 and other equivalent Australian offences only regulate when someone ‘consorts by’ electronic communication.ii The High Court has held that the term ‘consorts’ requires proof of ‘some seeking or acceptance of the association’ by the defendant.iii

The Committee notes that a similar offence in South Australia provides that no offence is committed ‘unless the person knew that the act or omission constituted a contravention of, or failure to comply with, the notice or was reckless as to that fact.iv

The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 124A with the Charter’s right to freedom of expression and, in particular, whether or not the prohibition in that section extends to group electronic communications (such as mass emails, social media or webpages) where one of the participants (e.g. a Facebook friend, Twitter follower or blog reader) is a specified person.

Minister’s response

The Committee thanks the Minister for the attached response.

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ii Crimes Act 1900 (NSW), s. 93X(1)(a): Summary Offences Act 1979 (NT), s. 56(1)(e)(i); Summary Offences Act 1953 (SA), s. 13(1)(a); Summary Offences Act 1966 (Vic), s. 49F(1); Police Offences Act 1935 (Tas), s. 6(1); Criminal Code (WA), ss. 557J(2), 557K(4).

iii Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales [2014] HCA 35, [68], [101], [135], [211]-[218].

iv Summary Offences Act 1953 (SA), s. 66K(2). See also Summary Offences Act 1979 (NT), s. 55A(6).
Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Chairperson

Thank you for your letter of 15 September 2015 regarding the report of the Scrutiny of Acts and Regulations Committee (the Committee) on the Criminal Organisations Control Amendment (Unlawful Associations) Bill 2015 (the Bill).

In its report, the Committee observed that the effect of proposed new section 124A of the Criminal Organisations Control Act 2012, as contained in clause 5 of the Bill, may engage the right to freedom of expression in section 15 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter). That section relevantly provides that every person has the right to hold an opinion without interference (s 15(1)), and to seek, receive and impart information and ideas of all kinds (s 15(2)).

By way of preliminary comment on the freedom of expression, I note that the threshold for establishing whether an act falls within the words ‘impart information and ideas’ is a low one: Magee v Delaney (2012) 39 VR 50, 64 [64] (Kryou J) (‘Magee’). However, public policy considerations do ‘inform the scope of the protection conferred by section 15(2) on forms of expressive conduct’: Magee (2012) 39 VR 50, 69 [90] (Kryou J). Further, section 15(3) states that ‘special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary — to respect the rights and reputation of other persons; or for the protection of national security, public order, public health or public morality’.\(^1\)

As the Statement of Compatibility to the Bill notes, the purpose of the Bill is the prevention of serious crime and the promotion of community safety by preventing associations that may lead to the commission of criminal offences. The unlawful association offence provision only applies when a person continues to associate in breach of an unlawful association notice issued by a senior police officer. In turn, an unlawful association notice is only issued when a senior police officer reasonably believes that preventing associations is likely to prevent the commission of an offence. As such, any limit on freedom of expression will only arise in circumstances where a senior officer has come to the view that there is a risk to public order.

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\(^1\) Section 15(3) is based on Article 19(3) of the International Covenant on Civil and Political Rights.
It is clear that the term ‘public order’ in section 15(3) of the Charter ‘includes measures for peace and good order, public safety and prevention of disorder and crime’: Magee (2012) 39 VR 50, 79 [151] (Kyrour J). I consider that section 124A is a lawful restriction on freedom of expression that is reasonably necessary to protect public order, and that the internal limitation in section 15(3)(b) applies.

Turning to the specific example raised by the Committee, an electronic communication can count as an association for the purposes of the offence in proposed section 124A. This can take the form of a mass email or message on social media. As the Committee notes, however, there may be a question in cases of mass electronic communication whether the fault element for the offence is made out.

I note that as this is a serious offence carrying a maximum penalty of three years’ imprisonment, a mental element will apply to the offence according to ordinary principles of statutory interpretation.\(^2\) This is consistent with the interpretation of the NSW provision in Tajjour v New South Wales [2014] HCA 35, and the decision in Johanson v Dixon (1979) 143 CLR 376. An accidental meeting or communication will not be an ‘association’ for the purpose of the offence. For example, if the person posts a message on their Facebook account, or sends a tweet, oblivious to the fact that their social media privacy settings mean that it may be read by anyone, including a person named in an unlawful association notice, there is no ‘seeking’ of the association, or intention to associate. This can be contrasted with posting a notice to a Facebook account that can be read by a limited number of ‘friends’ that may include the other person subject to the notice. Each case will be determined on its own facts.

I trust that this further information assists the Committee, and I thank the Committee for raising this matter.

Yours sincerely

[Signature]

THE HON MARTIN PAKULA MP
Attorney-General

\(^2\) See, eg, He Kaw Teh v The Queen (1985) 157 CLR 523.
Education and Training Reform Amendment (Miscellaneous) Bill 2015

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

Committee comments

Content

Sections 17(a)(iv) and (v) of the Parliamentary Committees Act 2003 — unduly requires or authorises acts or practices that may have an adverse effect on personal privacy or on the privacy of health information

As noted below under the Charter Report, the Committee notes that clause 23 would insert a new section 5.5.26(1) which would allow the VRQA to disclose any information it obtains when exercising its functions in relation to apprentices to: the Secretary to the Department of Education and Early Childhood Development; any other government department, state or statutory body or ‘special body’; and any Commonwealth government department, ‘if the information relates to the performance of a function of that person or body’.

Under the Parliamentary Committees Act 2003, the Committee is required to report to Parliament as to whether a Bill, directly or indirectly, 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 (section 17(a)(iv)) or
• privacy of health information within the meaning of the Health Records Act 2000 (section 17(a)(v)).

The Committee notes that, according to the Statement of Compatibility, the VRQA and the recipient entities would be subject to the Privacy and Data Protection Act 2014 or the Privacy Act 1988 (Ch) in relation to information provided under new section 5.5.26(1). However, as noted below under the Charter report, new section 5.5.26(2) provides for the exclusion of other statutes with respect to information sharing by the VRQA.

It is therefore unclear whether the Privacy and Data Protection Act 2014 would apply to new section 5.5.26(2), particularly since section 6 of that Act relevantly provides that if a provision relating to an Information Privacy Principle or applicable code of practice is inconsistent with a provision made by or under any other Act, the latter provision prevails.

It is also unclear whether the Health Records Act 2001 (section 7 of which is essentially identical to section 6 of the Privacy and Data Protection Act 2014) would apply.

The Committee will write to the Minister seeking further information as to whether or not the Victorian Registrations and Qualifications Authority is subject to the Privacy and Data Protection Act 2014 and the Health Records Act 2001 in relation to the provision of information under new section 5.5.26(1).

Charter report

Privacy — Victorian Registrations and Qualifications Authority – Functions relating to apprentices – Disclosure of information – Exclusion of other laws

Summary: The Committee will write to the Minister seeking further information as to whether or not the Victorian Registrations and Qualifications Authority is subject to the
Charter’s obligations for public authorities to give proper consideration to, and act compatibly with, human rights when it discloses information under new section 5.5.26.

The Committee notes that clause 23, inserting a new section 5.5.26(1), allows the Victorian Registrations and Qualifications Authority to disclose any information it obtains when exercising its functions in relation to apprentices to the Secretary to the Department of Education and Early Childhood Development, any other government department, state or statutory body or ‘special body’ and any Commonwealth government department ‘if the information relates to the performance of a function of that person or body’.

The Statement of Compatibility remarks:

I consider that the proposed information sharing powers in clause 23 are neither unlawful nor arbitrary. The bill specifies the circumstances in which the VRQA will be empowered to disclose information relating to its apprenticeship functions and powers, and entities to which such information may be disclosed. The bill provides that disclosure may only occur if the information relates to the recipient entity’s functions.

However, the Committee observes that new section 5.5.26(2) provides:

The Authority, when disclosing information under subsection (1) or under a law of another jurisdiction corresponding to subsection (1), does not contravene an obligation not to disclose the information or give the document, whether imposed by an Act or by another rule of law.

The Committee notes that the terms of new section 5.5.26(2) predate the Charter and omit the common approach since the Charter’s enactment of expressly providing that the exclusion of other statutes does not include the Charter. The Court of Appeal of Victoria has recently ruled that a provision immunising a Victorian public authority from Victorian law may exempt that public authority from the Charter’s obligations for public authorities to give proper consideration to, and act compatibility with, human rights.

The Committee will write to the Minister seeking further information as to whether or not the Victorian Registrations and Qualifications Authority is subject to the Charter’s obligations for public authorities to give proper consideration to, and act compatibly with, human rights when it discloses information under new section 5.5.26.

The Committee makes no further comment

Minister’s response

The Committee thanks the Minister for the attached response.

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v See Victorian Qualifications Authority (National Registration) Act 2004, s. 11; Education and Training Reform Act 2006, s. 4.9.4.(2).
vi E.g. Court Services Victoria Act 2014, s. 57; Education and Training Reform Act 2006, s. 5.7A.28; Sex Offenders Registration Act 2004, s. 71A.
vi See Bare v IBAC [2015] VSCA 197.
Dear Ms Blandthorn,

Thank you for your correspondence of 18 August 2015 regarding the Education and Training Reform Amendment (Miscellaneous) Bill 2015 ('the Bill') on behalf of the Scrutiny of Acts and Regulations Committee.

The Committee has requested for information regarding the application of the Privacy and Data Protection Act 2014 and the Health Records Act 2001 in relation to the provision of information by the Victorian Registrations and Qualifications Authority ('the VRQA') under new section 5.5.26.

I am advised that the VRQA would be subject to the Privacy and Data Protection Act and the Health Records Act in relation to the provision of information under new section 5.5.26.

Clause 2.1(f) of the Information Privacy Principles (appearing as Schedule 1 to the Privacy and Data Protection Act) provides that an organisation must not use or disclose personal information about an individual for a purpose other than for the primary purpose of collection unless the use or disclosure is required or authorised by or under law.

New section 5.5.26(1) authorises the VRQA to disclose certain information to other bodies. Accordingly, the disclosure of information under new section 5.5.26(1) would be a disclosure authorised by law, and would therefore be a permitted disclosure under clause 2.1(f) of the Information Privacy Principles. Please note that clause 2.1(f) of the Information Privacy Principles is replicated as clause 2.2(c) of the Health Privacy Principles (appearing as Schedule 1 to the Health Records Act).

As the disclosure of information by the VRQA under new section 5.5.26(1) would be a permitted disclosure under the Privacy and Data Protection Act and the Health Records Act, new section 5.5.26(2) would not operate to exclude the operation of these Acts.

The Committee has also requested for information regarding whether the VRQA is subject to the Charter’s obligations for public authorities to give proper consideration to, and act compatibly with, human rights when it discloses information under new section 5.5.26.
The VRQA would be required to give proper consideration to, and act compatibility with, human rights when making a decision whether to disclose information under new section 5.5.26.

Section 38(1) of the Charter provides that it is unlawful for a public authority, in making a decision, to fail to give proper consideration to a relevant human right. Section 38(2) provides that section 38(1) does not apply if, as a result of a statutory provision, the public authority could not reasonably have acted differently or made a different decision.

New section 5.5.26(1) provides the VRQA with a discretion whether or not to disclose information. As such, section 38(2) does not apply to the VRQA when exercising its powers under new section 5.5.26(1) because the VRQA is not compelled to act in a particular way; for example, to disclose certain information.

Accordingly, in making a decision whether to release information under new section 5.5.26, the VRQA would be required to comply with the requirement set out in section 38(1) of the Charter to give proper consideration to relevant human rights. This would include the right to privacy, as set out in section 13 of the Charter.

New section 5.5.26(2) provides specifically that an authority will not contravene an obligation not to disclose the information as imposed by another Act or rule of law. This provision does not prevent the authority from being subject to the obligations imposed by the Charter in making a decision or acting under the new section 5.5.26(1). The Charter does not "impose an obligation not to disclose the information" as set out in new section 5.5.26(2).

However, new section 5.5.26(2) may inform an analysis of whether any limitation of human rights protected by the Charter by a decision or action taken under new section 5.5.26(1) is a reasonable limitation within the meaning of section 7 of the Charter. For example, in determining whether a disclosure made under new section 5.5.26(1) breaches an individual’s right to privacy protected by section 13 of the Charter, consideration would be given to whether any limitation on the right to privacy is reasonable and this may include consideration of the nature of the limitation imposed in the context of the statute explicitly providing in new section 5.5.26(2) that disclosure does not constitute a breach of other laws.

If the Committee would like further information, it may contact Andrew Douglas, Senior Lawyer, Legal Division, Department of Education and Training, on (03) 9657 2054 or by douglas.andrew.h@edumail.vic.gov.au.

Yours sincerely

[Signature]

The Hon James Merlino MP
Deputy Premier
Minister for Education

18.9.15
Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Bill 2015

The Bill was introduced into the Legislative Assembly on 1 September 2015 by Hon Wade Noonan MP. The Committee considered the Bill on 14 September 2015 and made the following comments in Alert Digest No. 11 of 2015 tabled in the Parliament on 15 September 2015.

Committee comments

Charter report

Equal protection of the law without discrimination – Discrimination on the basis of mental or psychological disease or disorder – Minimum nurse to patient ratios – Ratio does not apply to mental illness wards

Summary: The effect of clause 9(2) is to permit wards predominantly utilised for the care of persons being treated for a mental illness to be staffed with fewer nurses per patient than wards predominantly utilised for the care of persons being treated for a non-mental illness, and to exclude mental illness wards from the enforcement provisions in Part 4 of the Bill. The Committee will write to the Minister seeking further information as to the compatibility of clause 9(2) with the Charter’s right to equal protection of the law without discrimination on the basis of mental or psychological disease or disorder.

The Committee notes that clause 9(1)(a) provides that a nurse to patient ratio applies in every ward in each hospital in which it is specified to apply. Clause 9(1)(b) provides that ‘a ratio is a minimum requirement only’. However, clause 9(2) provides:

Despite anything to the contrary in this Act, a ratio does not apply in respect of any ward that is being predominantly utilised for the care of persons being treated for a mental illness within the meaning of the Mental Health Act 2014.

The Committee observes that the effect of clause 9(2) is to permit wards predominantly utilised for the care of persons being treated for a mental illness to be staffed with fewer nurses per patient than wards predominantly utilised for the care of persons being treated for a non-mental illness, and to exclude mental illness wards from the enforcement provisions in Part 4 of the Bill.

The Committee considers that clause 9(2) may engage the Charter’s right to equal protection of the law without discrimination on the basis of a mental or psychological disease or disorder.

The Statement of Compatibility does not address clause 9(2). The Explanatory Memorandum remarks:

The staffing arrangements for health professionals working within mental health areas and wards (including nurses) are not intended to be covered by this Bill, but rather by an enterprise agreement where ratios are not utilised.

The Committee notes that similar Californian legislation provides that ‘[t]he licensed nurse-to-patient ratio in a psychiatric unit shall be 1:6 or fewer at all times’.

The Committee will write to the Minister seeking further information as to the compatibility of clause 9(2)’s provision that minimum nurse to patient ratios do not apply to wards predominantly utilised for the care of persons being treated for a mental illness.

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viii Charter s. 8(3). See Equal Opportunity Act 2010, ss. 3 (definition of ‘disability’, para (d)(i)) and 6(e).
ix 22 CA ADC § 70217(a)(13).
with the Charter’s right to equal protection of the law without discrimination on the basis of mental or psychological disease or disorder.

Minister’s response

The Committee thanks the Minister for the attached response.
Dear Ms Blandthorn,

I refer to the correspondence from the Scrutiny of Acts and Regulations Committee sent to me on 16 September 2015 regarding the Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Bill 2015 (‘the Bill’).

The intent of this Bill is to replicate and enshrine the nurse and midwife to patient ratios that are contained in the Nurses and Midwives (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2012–2016 (‘the Agreement’) into legislation.

The staffing arrangements for wards that predominantly care for persons affected by a mental illness are excluded from the Bill via clause 9(2) as these services are not covered by this Agreement. Public mental health services are instead covered by the Victorian Public Mental Health Services Enterprise Agreement 2012–2016 which has different arrangements in place to determine the numbers of nurses required for each ward.

The nursing staffing levels within mental health services have never been determined through ratios. Clause 59.2 of the Victorian Public Mental Health Services Enterprise Agreement 2012–2016 outlines the staffing requirements for acute mental health inpatient units. This does not mean that mental health inpatient wards are staffed with fewer nurses per patient than non-mental health wards; rather the methodology used to determine the numbers of nurses required is different.

The staffing provisions in the Victorian Public Mental Health Services Enterprise Agreement 2012–2016 will continue to apply following the commencement of the Bill, and therefore I am confident that the nurses working within mental health facilities and the patients receiving care in these facilities will not be adversely impacted by the implementation of the Bill.

Yours sincerely,

Hon Jill Hennessy MP
Minister for Health
Minister for Ambulance Services

2015
Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Bill 2015

The Bill was introduced into the Legislative Assembly on 1 September 2015 by Hon Wade Noonan MP. The Committee considered the Bill on 14 September 2015 and made the following comments in Alert Digest No. 11 of 2015 tabled in the Parliament on 15 September 2015.

Committee comments

Charter report

Right not be automatically detained when awaiting trial – Detention of certain sex offenders when charged with an indictable offence – Sex offender must show cause why detention not justified

Summary: The effect of clause 40 is to require the detention of certain serious sex offenders after they are charged with any indictable offence unless they show cause why detention is not justified. The Committee will write to the Minister seeking further information.

The Committee notes that clause 40, amending existing s. 4 of the Bail Act 1977, extends the operation of s. 4(4). Section 4(4) currently provides that a ‘court shall refuse bail unless the accused shows cause why his detention in custody is not justified’ where the accused is charged with an indictable offence committed while on bail, a recidivist stalking or family violence offence, aggravated burglary, arson causing death or various drug offences. Clause 40 extends this provision to a person charged with an indictable offence, where the person was subject to a supervision order under the Serious Sex Offenders (Detention and Supervision) Act 2009, either when the indictable offence was allegedly committed or at any time during the bail proceeding.

The Committee observes that the effect of clause 40 is to require the detention of sex offenders when they are charged with any indictable offence unless they show cause why detention is not justified (so long as the sex offender was subject to a serious sex offender supervision order either when the indictable offence was allegedly committed or when the charge was laid.) This requirement applies regardless of whether or not the indictable offence has any connection to sex offending and:

- if the person was subject to a supervision order when the charge was laid, even if the indictable offence was committed long ago
- if the person was subject to a supervision order when the indictable offence allegedly committed, even if the supervision order expired long before the charge was laid.

For example, a sex offender charged with a social security fraud allegedly committed a decade ago would have to show cause why he or she should not be detained from the time the fraud charge was laid until the completion of his or her trial, so long as he or she is now, or was subject a decade ago, to a supervision order.

The Committee considers that clause 40 may engage Charter s. 21(6)’s requirement that ‘person awaiting trial must not be automatically detained in custody’.

The Statement of Compatibility remarks:

While clause 40 introduces a new obstacle in certain circumstances to an accused being granted bail, I am of the view that a reverse onus in this context which requires an accused to show cause why detention in custody is not justified does not limit this right. Clause 40

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x Charter s. 21(6).
applies to a narrow range of circumstances, involving a person charged with an indictable offence who is the subject of a supervision or interim supervision order. This is a serious and concerning category of offending, as it involves a person who has served a custodial sentence for certain sexual offences, who has been found by a court to present an unacceptable risk of harm to the community to warrant the imposition of a supervision or interim supervision order, and who has committed a further indictable offence in addition to the offence which has drawn the application of the SSODSA.

The Committee notes that clause 40 applies to a sex offender who has been charged with committing a further indictable offence, rather than a sex offender ‘who has committed a further indictable offence’, and that it may apply even where a sex offender who was once ‘found by a court to present an unacceptable risk of harm to the community’ has since been found by a court to no longer present such a risk.

The Committee observes that courts in the A.C.T., the United Kingdom and Europe have held that any law that places an onus on a person charged with an offence to establish why he or she should not be detained while awaiting trial may limit statutory and European treaty rights against ‘general’ rules requiring the detention of people awaiting trial or defining when a person can be detained.xi However, Canadian courts have held that such laws for alleged drug traffickers or alleged offences committed while on bail are compatible with a constitutional right not to be denied bail ‘without just cause’.xii

The Statement of Compatibility remarks:

It is my view that it is reasonable to draw an inference that an accused in such circumstances presents an elevated risk of absconding, a threat to public safety or a likelihood of committing further serious offences while on bail, including further sexual offences, which justifies a reversal of onus requiring the accused to show that he or she should be released on bail. The standard of proof of ‘show cause’ will allow an accused opportunity to discharge the presumption if the nature of alleged offending and personal circumstances of the offender support a conclusion that detention in custody is not justified.

The Committee notes that a person who has just been charged with an indictable offence may know less about the details of the alleged offending and the evidence supporting the charge than the person who lays the charge.xiii The Committee also notes that a similar NSW provision is limited to indictable offences allegedly committed while the person was subject to a supervision order, rather than to indictable offences allegedly committed before a person became subject to current supervision.xiv

The Committee observes that Victoria’s Court of Appeal has not determined whether the reverse onus in existing s. 4(4) applies only to the requirement to ‘show cause’ why detention is not justified, or whether it also applies to the question of whether or not the release of the accused on bail poses an unacceptable risk under existing s. 4(2)(d).xv The

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xi In the matter of an application for Bail by Breen [2009] ACTSC 172, [51]; In the matter of an application for bail by Islam [2010] ACTSC 147, [293]; O v Crown Court at Harrow [2006] UKHL 42, [35]; Iljikov v Bulgaria [2001] ECHR 489, [85]. See also M Sheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Australia: Study on Human Rights Compliance While Countering Terrorism (United Nations General Assembly, 14 December 2006), [34].


xiii The Committee notes that clause 33 removes an existing requirement of 14 days advance notice for a charge of breaching a supervision order.

xiv Bail Act 2013 (NSW), s. 168(1)(i).

xv Robinson v The Queen [2015] VSCA 161, [46].
Victorian Supreme Court has observed that limiting the reverse onus in s. 4(4) to the former requirement is ‘more consistent with the presumption of innocence’ than extending the reverse onus to the latter requirement.\textsuperscript{xvi}

The Committee will write to the Minister seeking further information as to whether or not the reverse onus in s. 4(4) applies only to the requirement to ‘show cause’ why detention is not justified, or whether it also extends to the question of whether or not the release of the accused on bail poses an unacceptable risk under existing s. 4(2)(d).

The Committee refers to Parliament for its consideration the question of whether or not clause 40, by requiring the detention of serious sex offenders when they are charged with any indictable offence unless they show cause why detention is not justified (so long as the sex offender was subject to a supervision order either when the indictable offence was allegedly committed or when the charge was laid) is a reasonable limit on the Charter right of people awaiting trial not to be automatically detained.

The Committee makes no further comment

\textbf{Minister’s response}

The Committee thanks the Minister for the attached response.

\textbf{Committee Room}

5 October 2015

\textsuperscript{xvi} Woods \textit{v} DPP [2014] VSC 1, [56].
Ms Lizzie Blandthorn MP  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament of Victoria  
Spring Street MELBOURNE VIC 3000

Dear Chairperson,

Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Bill 2015 – new presumption against bail

I refer to the Alert Digest report No. 11 of 2015 of the Scrutiny of Acts and Regulations Committee (the Committee) dated 15 September 2015 in relation to the Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Bill 2015 (the Bill).

A recent event has rightly raised community concern about those serious sex offenders who are under supervision in our community. Immediately after this event, the Andrews government took swift action and ordered an immediate review by the Department of Justice and Regulation of the management of this individual. All recommendations of this review have been acquitted. In addition, Corrections Victoria immediately reviewed the compliance of all serious sex offenders under supervision orders in the community at the time and stronger management arrangements were put in place including in some circumstances new residential arrangements.

The Andrews government announced earlier this year a review of the Serious Sex Offenders (Detention and Supervision) Act 2009 led by former Court of Appeal Judge David Harper. The review is to be completed at the end of October this year. The government will consider additional reforms and associated legislative amendments that may be required as a result of the Harper review.

In the meantime the Bill will strengthen the current scheme for serious sex offenders. The recent event has demonstrated the community is rightly concerned about the inadequacy of current bail laws in relation to serious sex offenders charged with further serious offending. Currently, there are no provisions in the Bail Act 1977 that deal specifically with serious sex offenders subject to a supervision order.

In relation to the Committee’s query, the Bill amends section 4(4) of the Bail Act so that a serious sex offender who is alleged to have committed an indictable offence while subject to a supervision order, or charged with an indictable offence while on a supervision order, must show cause why they should be released from custody on bail.

A charge for an indictable offence demonstrates a new risk to the community. An indictable offence under the Bill includes sexual offences, violent offences and other serious offences which are not
sexual or violent. Some offences may not be disclosed by a victim for some time and may have taken time to detect due to the complexity or nature of the investigation.

This reform is a reasonable limit on the right to bail. Serious sex offenders are not ordinary accused persons. As the Statement of Compatibility to the Bill explains, when a supervision order is put in place by the Supreme Court or County Court it is because the serious sex offender is an unacceptable risk to the community. The starting point reflected in this Bill is that serious sex offenders charged with an indictable offence must not be released unless they can show cause why their detention in custody is not justified.

The Committee notes the relationship between the new presumption against bail in clause 40 and the removal by clause 33 of the requirement for Victoria Police and the Secretary to the Department of Justice and the Regulation to give 14 days' notice of an intention to charge for breach of supervision order. This amendment is entirely appropriate. Following consultation with Victoria Police and the Office of Public Prosecutions, the requirement that an offender be given at least 14 days' notice of the intention to charge them for an alleged breach has become redundant. As most breaches are considered serious, notice is often dispensed with. The Bill does not alter existing protections in the Criminal Procedure Act 2009 and the common law which allow an accused person to know the case against them and to raise a reasonable excuse to a charge.

In relation to the Committee's further query, even if the accused person is able to show cause why their detention is not justified, as per current law the court may still refuse bail if the court is satisfied that the person poses an unacceptable risk under section 4(2)(d) of the Bail Act. Whether the accused is an unacceptable risk if released on bail is ultimately a matter for the court.

A review of provisions of the Bail Act by the Attorney-General, the Hon Martin Pakula MP, is well underway. The Government is committed to improving bail laws for the safety and protection of the community.

Hence, the Bill provides that bail must not be granted to serious sex offenders alleged to have committed an indictable offence unless they can show cause why their detention is not justified, and the court is satisfied they are not an unacceptable risk. This reform aims to ensure all risk to the community from these offenders are considered by the courts in bail decisions.

In that context, the governing principle demonstrated by this Bill is that the paramount consideration is for the safety and protection of the community from risks posed by serious sexual offenders.

Thank you for raising this important matter.

Yours sincerely

Hon Wade Noonan MP
Minister for Corrections
## Appendix 1

### Index of Bills in 2015

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Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly on rights and freedoms

Wrongs Amendment (Prisoner Related Compensation) Bill 2015

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

Back to Work Bill 2014
Corrections Legislation Amendment Bill 2015
Crimes Amendment (Child Pornography and Other Matters) Bill 2015
Criminal Organisations Control Amendment (Unlawful Associations) Bill 2015
Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Bill 2015
Education and Training Reform Amendment (Miscellaneous) Bill 2015
Gambling Legislation Reform Amendment Bill 2015

Justice Legislation Amendment Bill 2015 – House Amendment
Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015
Public Health and Wellbeing Amendment (Safe Access) Bill 2015
Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Bill 2015
Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Bill 2015
### Table of correspondence between the Committee and Ministers or Members during 2015

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Appendix 4
Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 5 October 2015.

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SR No. 94 – Corrections (Police Gaols) Regulations 2015
SR No. 95 – Corrections Amendment (Firearms) Regulations 2015
SR No. 96 – Greenhouse Gas Geological Sequestration Amendment Regulations 2015
SR No. 97 – Pipelines Amendment Regulations 2015
SR No. 98 – Mineral Resources (Sustainable Development) (Mineral Industries) Amendment Regulations 2015
SR No. 99 – Victorian Civil and Administrative Tribunal (Allocation to Lists Amendment) Rules 2015
SR No. 100 – Infringements (General) Further Amendment Regulations 2015
SR No. 101 – Victorian Civil and Administrative Tribunal (Fees) Amendment (Powers of Attorney) Regulations 2015
SR No. 102 – Supreme Court (Adoption) Rules 2015

Legislative Instruments 2015
Fee Notice under the Livestock Disease Control Act 1994
Amendment to the Determination that Specified Areas are Designated Bushfire Prone Areas (BPA)
Appointment of Easter Sunday and the Friday before the Australian Football League Grand Final Public Holidays – Public Holidays Act 1933