No. 13 of 2015

Tuesday, 20 October 2015
on the following Bills

Adoption Amendment
(Adoption by Same-Sex Couples)
Bill 2015

Gambling Legislation Amendment
Bill 2015

Justice Legislation Amendment
(Police Custody Officers)
Bill 2015

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

Relationships Amendment Bill 2015

Victorian Energy Efficiency
Target Amendment
(Saving Energy, Growing Jobs)
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
Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015

Introduced 6 October 2015
Second Reading Speech 7 October 2015
House Legislative Assembly
Member introducing Bill Hon. Martin Foley MLA
Portfolio responsibility Minister for Equality

Purpose

The Bill would amend the Adoption Act 1984 to enable the adoption of children by same-sex and gender non-specific couples.

The Bill would also amend the Equal Opportunity Act 2010 to remove the exception to the prohibition to discriminate in relation to religious bodies providing adoption services.

Adoption Act 1984

Key amendments would include:

- insertion of the following new definitions:
  - ‘domestic partner’ — defined as a person who is either in a ‘registered domestic relationship’ or a ‘domestic relationship’
  - ‘domestic relationship’ — defined as a relationship between two persons who are living together as a couple on a domestic basis, irrespective of their sex or gender, and who are neither married, nor in a registered domestic relationship, with each other
  - ‘registered domestic relationship’ — defined as a relationship which has been registered under Part 2.2 of the Relationships Act 2008.
- the repeal of the definitions ‘de facto relationship’ and ‘de facto spouse’ in section 4(1) of the Act and the replacement of the term ‘de facto spouse’ by the new term ‘domestic partner’ throughout the Act. [4]
- amendment of section 11 to enable an adoption order to be made in favour of:
  - two persons ‘who are in a registered domestic relationship with each other and have been so for not less than 2 years’ (new section 11(1)(ba))
  - two persons ‘who are living in a domestic relationship and have been so living for not less than 2 years’ (amended section 11(1)(c)). [7] (See Charter report below)
- amendment of section 20A to reflect the new relationship categories introduced by clause 4 of the Bill. New section 20A would bar people in certain circumstances from being assessed for their suitability to adopt unless they ‘have been married to each other or living in that relationship with each other for not less than two years’. [9] (See Charter report below)
**Equal Opportunity Act 2010**

Existing section 82(2) of the Act provides that the prohibitions of discrimination in Part 4 of the Act do not apply to anything done by a religious body on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity that:

- conforms with the doctrines, beliefs or principles of the religion; or
- is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

New section 82(3) would provide that, despite the exception for religious bodies in section 82(2), the prohibitions of discrimination in Part 4 of the Act would apply to the actions of a religious body that is an ‘approved agency’ for or with respect to adoption under the Adoption Act 1984. [17] *(See Charter report below)*

**Submissions received**

The Committee received submissions on the Bill from the following organisations:

- the Australian Christian Lobby
- the Australian Family Association
- CatholicCare
- Freedom 4 Faith (F4F)
- Victorian Christian Legal Society.

Copies of the submissions are reproduced at Appendix 4.

The Committee thanks the above organisations for their submissions on the Bill.

**Charter report**

*Marital status discrimination – Adoption requirements – Certain couples must have been living with each other for not less than two years*

**Summary:** The Committee will write to the Attorney-General seeking further information as to the compatibility of clauses 7 and 9, to the extent that they require different living arrangements as preconditions for adoption, depending on whether applicants for adoption are married, in a registered domestic relationship or in an unregistered domestic relationship, with the Charter’s rights against discrimination on the basis of marital status.

The Committee notes that clause 7, amending existing s. 11, permits an adoption order to be made in favour of 2 persons ‘who are in a registered domestic relationship with each other and have been so for not less than 2 years’. By contrast, an adoption order can only be made in favour of people who are ‘living in a domestic relationship’, or a combination of a marriage and a domestic relationship, if they ‘have been so living for not less than two years’.

The Committee observes that the effect of clause 7 may be to permit people in registered domestic relationships for at least two year (but not people who are not in an unregistered relationship, or only registered within the previous two years), to adopt even if they have lived separately from their partners during part of those two years.
The Committee also notes that clause 9, amending existing s. 20A, bars people who are married to, in a registered domestic relationship with, or in a domestic relationship with either another applicant for adoption or a relative of the child, from being assessed for their suitability to adopt unless they ‘have been married to each other or living in that relationship with each other for not less than two years’.

The Committee observes that a possible effect of clause 9 is to bar people in domestic relationships (but not married people) from being assessed for their suitability to adopt if they have lived separately from their partners during part of the preceding two years.

The Committee considers that clauses 7 and 9, to the extent that require different living arrangements as preconditions for adoption depending on whether applicants for adoption are married, in a registered domestic relationship or in an unregistered domestic relationship, may engage the Charter’s rights against discrimination on the basis of marital status. Although the Statement of Compatibility addresses discrimination on the basis of gender identity, sex and sexual orientation, it does not address discrimination on the basis of marital status.

The Committee notes that similar laws in the ACT and NSW impose identical conditions on all couples who seek to adopt, whether married, registered or unregistered. For example, the ACT’s statute provides:

An adoption order for a child or young person may be made in favour of 2 people jointly if— ...

(b) they have lived together in a domestic partnership for at least 3 years (whether or not married or in a civil union); and

(c) the court considers they have demonstrated the stability of, and their commitment to, the domestic partnership...

The Committee will write to the Minister for Equality seeking further information as to the compatibility of clauses 7 and 9, to the extent that they require different living arrangements as preconditions for adoption, depending on whether applicants for adoption are married, in a registered domestic relationship or in an unregistered domestic relationship, with the Charter’s rights against discrimination on the basis of marital status.

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1 Charter s. 8. See Charter s. 3 (definition of ‘discrimination’) and Equal Opportunity Act 2010, s. 6(h).
2 Adoption Act 1993 (ACT), s. 14(b), (c); Adoption Act 2000 (NSW), s. 28(4). In Tasmania, couples are only required to have lived together during the required period before (but not after) registration: Adoption Act 1988 (Tas), s. 20(2). See also Adoption Act 1994 (WA), s. 39(3).
**Freedom of thought, conscience, religion and belief – Approved agencies barred from discriminating with respect to adoption – Parent’s wishes with respect to proposed adoptive parents**

Summary: The effect of clause 17 may be to bar an approved agency from acting on the wishes of the parent of a child as to the sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity of the proposed adoptive parents. The Committee refers to Parliament for its consideration the question of whether or not permitting approved agencies to identify (consistently with the best interests of the child) prospective adoptive parents who reflect the wishes of the parent as to the preferred domestic relationship of any prospective adoptive parents is a less restrictive means reasonably available to achieve clause 17’s purposes of preventing children missing out on the opportunity to be placed with the most suitable adoptive parents and removing discrimination against same-sex and gender diverse couples in accessing adoption services.

The Committee notes that clause 17, amending existing s. 82 of the *Equal Opportunity Act 2010*, prohibits approved agencies from discriminating under Part 4 of that Act when exercising powers or performing functions or duties with respect to adoption under the *Adoption Act 1984*.

The Committee also notes that existing s. 15 of the *Adoption Act 1984* provides that, before making an order for adoption of a child, the Court must have received a report in writing on behalf of the Secretary or the principal officer of an approved agency concerning the proposed adoption and be satisfied, amongst other things, that ‘the Secretary or principal officer has given consideration to any wishes expressed by a parent of the child in relation to the religion, race or ethnic background of the proposed adoptive parent or adoptive parents of the child.’ To the extent that this provision provides statutory authority to an approved agency to discriminate in arrangements or negotiations for, towards or with a view to adoption in order to give consideration to the wishes expressed by a parent of the child, it is likely only to permit the agency to discriminate on the basis of the religious belief or activity or race of the proposed adoptive parents.

The Committee observes that the effect of clause 17 may be to bar an approved agency from acting on the wishes of the parent of a child as to the sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity of the proposed adoptive parents.

The Committee considers that clause 17 may engage the right of a child’s parent to be free to demonstrate his or her religion or belief in practice, as part of a community in public or in private, in so far as the parent’s religion or belief informs his or her wishes about the proposed adoptive parents of his or her child. In particular, it prevents that parent from choosing to arrange or negotiate an adoption with an agency that is permitted to take account of or give effect to the parent’s wishes with respect to sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity of the proposed adoptive parent or adoptive parents.

The Statement of Compatibility remarks:

The bill’s exclusion of the ‘religious bodies exception’ in the EO act from applying to adoption services will prevent faith-based adoption service providers from discriminating against same-sex couples in the provision of adoption services. Although the right to freedom of religion and belief under section 14 of the charter may appear relevant, section 6(1) of the charter makes clear that only persons have human rights. As religious bodies are organisations, not persons, in my view clause 17 does not limit any human rights protected by the charter.

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3 See *Equal Opportunity Act 2010*, s. 75.
4 Charter s. 14(2).
However, the Committee notes that existing law bars parents from making their own arrangements with a view to adoption of a child (other than by a relative); bars the Secretary from approving an individual (rather than an organization) to conduct negotiations or make arrangements with a view to adoption of children; and deems anything done by statutory decision-makers within an approved agency to be done by that agency. The Committee considers that, when individuals are legally required to act only through organisations, Charter s. 6(1) may not operate so as to exclude those people from the Charter’s protections.

The Statement of Compatibility continues:

In any case, to the extent that the bill may limit rights, I am of the view that any limits on the freedom of religion and belief of faith-based adoption services providers need to be balanced against the impact of the current discriminatory adoption policy. The continuation of a policy that permits adoption providers to discriminate against people on the basis of their gender identity, marital status and sexual orientation, or that of their parents, limits the rights of same-sex couples and children in same-sex families to equality before the law under section 8 of the charter. Approved adoption agencies, whether faith-based or secular, are providing services on behalf of the government and these services are essentially secular services that should be available to all members of the public.

However, the Committee observes that Supreme Court of Ireland has remarked that:

the internal disabilities and discriminations which flow from the tenets of a particular religion... do not derive from the State; it cannot be said that it is the State that imposed or made them; they are part of the texture and essence of the particular religion; so that the State, in order to comply with the spirit and purpose inherent in this constitutional guarantee, may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion.

Victoria’s Charter exempts public authorities from the obligations to act compatibly with and give proper consideration to human rights, in respect of acts or decisions of a private nature, or when the Charter’s obligations have the effect of impeding or preventing a religious body from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

The Committee notes that the Adoption Act 1984 does not specify that an approved agency provides services on behalf of the government or that those services are essentially secular. Rather, it requires that an agency must be:

an organization, corporate or unincorporate, formed or carried on primarily or principally for religious, charitable, benevolent, philanthropic or welfare purposes, but does not include an organization formed or carried on for the purpose of trading or securing a pecuniary profit to its members

and that it must appear to the Secretary to be:

suited to carrying on the activity of making arrangements with a view to the adoption of children, having regard to all relevant considerations, including the qualifications, experience, character and number of the persons taking part, or proposing to take part, in the management or control of the organization, or engaged or proposed to be engaged, on

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5 Adoption Act 1984, ss. 20(3), 31, 122.
6 McGrath v Maynooth College [1979] ILRM 166, 187.
7 Charter ss. 38(3), (4).
8 Adoption Act 1984, s. 21(4).
9 Adoption Act 1984, s. 22.
behalf of the organization, in the making of arrangements with a view to the adoption of children.

As well, like the Secretary, the principal officer of an approved agency must ‘have regard to adoption as a service for the child.’ 10

The Committee also notes that all four other Australian jurisdictions that permit same-sex or gender diverse adoptions nevertheless continue to permit agencies to discriminate against same-sex or gender diverse proposed adoptive parents in some circumstances. 11 For example, New South Wales’s Adoption Act 2000 provides:

45H Consideration of wishes of parents consenting to adoption

(1) A general consent of the parent of a child to the adoption of the child... may express the wishes of the parent as to the preferred background, beliefs or domestic relationship of any prospective adoptive parents of the child.

(2) Nothing in the Anti-Discrimination Act 1977 prevents the Director-General or a principal officer of an adoption service provider from identifying (consistently with the best interests of the child) prospective adoptive parents who reflect those wishes in the adoption selection process under this Part.

The Statement of Compatibility concludes:

An adoption policy that allows for discrimination may deprive children already living with same-sex step-parents and caregivers of the right to formalise that care arrangement through adoption and may result in children missing out on the opportunity to be placed with the most suitable adoptive parents. In my view, there is no less restrictive means available of removing discrimination against same-sex couples and children in same-sex families. Retaining the religious exception for adoption services would fundamentally undermine the intended aim of the bill, which is to remove discrimination against same-sex and gender diverse couples in accessing adoption services.

However, the Committee observes that, in the case of adoptions by step-parents or relatives of the parent of the child (i.e. so-called ‘known person’ adoptions’), Victorian law permits a parent to limit their consent to named persons and to make their own arrangements for adoptions, and does not require that the Secretary or an authorised agency approve prospective adoptive parents as fit and proper persons to adopt a child. 12

The Committee refers to Parliament for its consideration the question of whether or not permitting approved agencies to identify (consistently with the best interests of the child) prospective adoptive parents who reflect the wishes of the parent as to the preferred domestic relationship of any prospective adoptive parents is a less restrictive means reasonably available to achieve clause 17’s purposes of preventing children missing out on the opportunity to be placed with the most suitable adoptive parents and removing discrimination against same-sex and gender diverse couples in accessing adoption services.

The Committee makes no further comment

10 Adoption Act 1984, s. 32.
11 Adoption Act 1993 (ACT), ss. 39D(3)(a) (referring to ‘social... characteristics of the adoptive family’) & 39F(2)(b); Adoption Act 2000 (NSW), s. 45H and Anti-Discrimination Act 1977 (NSW), s. 59A; Adoption Act 1988 (Tas), s. 24(1)(b); Equal Opportunity Act 1984 (WA), s. 4(1) (definition of ‘services’).
12 Adoption Act 1984, ss. 13, 39(2) & 122(2).
Justice Legislation Amendment (Police Custody Officers) Bill 2015

**Introduced** 6 October 2015
**Second Reading Speech** 7 October 2015
**House** Legislative Assembly
**Member introducing Bill** Hon. Wade Noonan MLA
**Portfolio responsibility** Minister for Police

**Purpose**

The Bill would establish the statutory framework for police custody officers by amending the following Acts as outlined below. The term ‘police custody officer’ would be inserted into each of the below Acts and would be defined as a Victoria Police employee authorised by the Chief Commissioner to act as a police custody officer. [3]

**Victoria Police Act 2013**

Clause 7 of the Bill would insert a new Part 11A into the Act, under which police custody officers would have the duty to assist with the management and operation of police gaols and police stations, the supervision and transport of persons and other duties determined by the Chief Commissioner (new section 200B).

The duties of police custody officers in relation to arrested persons would include:

- the supervision of a person under lawful arrest at a police station, hospital or other medical facility (new sections 200G)
- the transport and supervision of a person between a police station and a hospital, court, police gaol, another police station or any other place (new section 200H)

The functions of police custody officers in relation to persons they supervise or transport would include preventing the escape or attempted escape of the person and ensuring their safety and welfare (new section 200I(1)). Their associated powers would include:

- search, examination and seizure of (any thing the seizure of which is necessary for the safety of the police custody officer, the person or any other person) where there is a belief on reasonable grounds that this is necessary (new section 200I(2))
- the application of an instrument of restraint where there is a belief on reasonable grounds that this is necessary (new section 200I(2))
- the use of reasonable force (new section 200J).

Under new subsection 200I(2), a police custody officer would not be liable for injury or damage caused by the use of force in accordance with the section. (See Charter report below)

Police custody officers would be authorised, if directed by the Chief Commissioner, to supervise or transport persons in circumstances where a police officer is so authorised under any other Act or under a regulation, warrant, court order, order or instrument (new section 200K).

Police custody officers would also have functions and powers in relation to persons detained in custody on court premises, in the custody of the court or attending court while being supervised and transported by a police custody officer (new section 200M). In addition to supervising such persons, at the court’s direction, police custody officers would have identical functions to those set out in new section 200I(1) (see above). They would also have:
identical powers to those set out in new section 200l(2) (see above), with the exception that the police custody officer would not be required to form a belief on reasonable grounds that the exercise of the power is necessary when exercising the power at the court’s direction (new section 200M)

identical powers to those set out in new section 200J (see above) in relation to the use of reasonable force (new section 200(M)). (See Charter report below)

**Corrections Act 1986**

The Bill would extend a number of powers and duties under the Act to police custody officers, including the:

- power to take a person’s fingerprints after they are received into a police gaol or in the vicinity of a police gaol and within a police station [10]
- power to transport a person — to or from a prison, police gaol or other place — in place of, or in conjunction with, an escort officer [11]
- authority to exercise various ‘management powers’ in Part 9A of the Act at or in relation to a police gaol that has been declared under section 200C of the *Victoria Police Act 2013*. [12-21]

The Bill would reorganise, expand and change the heading of Part 9A of the Act from ‘Search and seizure in police gaols’ to ‘Management of police gaols and transfer, transport and supervision powers’.

New Division 1 of Part 9A would set out the definitions of terms used in Part 9A.

New Division 2 of Part 9A would deal with management powers in police gaols. Key provisions would include:

- the right of any person to enter a police gaol and visit a detained person with the permission of the officer in charge (new section 104AC(1))
- the requirement that the officer in charge must not ‘unreasonably refuse’ the lawyer of a detained person permission to visit the person (new section 104AC(2))
- the power of the officer in charge to require that a person under 18 years of age who wishes to visit a police gaol be accompanied by a parent or guardian (new section 104AC(3))
- the requirement that a person visiting or wishing to visit a police gaol provide, at the request of a police officer or police custody officer, prescribed identity information and documents (new section 104AC(4))
- the power of a police officer or police custody officer to prohibit a person from visiting a detained person in a police gaol or to order that they immediately leave if they fail to comply with a request for identity information or documents or if they provide false or misleading information (new sections 104AC(7) to 104AC(10))
- the requirement that a detained person give his or her full name, date of birth and most recent residential address (new section 104AD)
- the power of a police officer or police custody officer to take photographs of a detained person (new section 104AF)
- the power of the officer in charge of a police gaol to apply, or authorise a police officer or police custody officer to apply, an instrument of restraint to a detained person in specified circumstances (new section 104AH). [16]
New Division 3 of Part 9A would deal with search and seizure powers in police gaols. It would comprise amendments to existing sections 104B to 104D in order to extend the search and seizure powers currently exercised by police officers to police custody officers. [17-20]

New Division 4 would deal with the transport and supervision of persons by police custody officers, at the Chief Commissioner’s direction, between a police gaol and a range of other facilities, including a police station, hospital, court, designated mental health service, remand centre, youth residential centre or youth justice centre (new section 104DA(1)).

Under new section 104DB(1), the functions of police custody officers in relation to persons they supervise or transport would be essentially identical to those in new section 200I(1) of the Victoria Police Act 2013 (see above).

Under new section 104DB(2), the powers of police custody officers in relation to persons they supervise or transport would be essentially identical to those in new section 200I(2) of the Victoria Police Act 2013 (see above).

New Division 5 deals with the use of reasonable force by police custody officers, transfers of detained persons in the legal custody of the Chief Commissioner as authorised by the Chief Commissioner and dealing with seized items.

New section 104DC is essentially identical to new section 200K of the Victoria Police Act 2013 (see above) in relation to the authorisation of police custody officers to supervise or transport persons under another Act, regulation, warrant, court order, order or instrument.

New section 104DD is essentially identical to new section 200J of the Victoria Police Act 2013 (see above) in relation to the use of reasonable force by police custody officers. (Refer to Charter report below)

Court Security Act 1980

The Bill would amend section 2(1) of the Act to empower police custody officers to exercise the powers of an authorised officer (i.e. a police officer, protective services officer or person appointed by the chief executive officer or clerk of a court under the Act) for the purposes of court security.

Crimes Act 1958

The Bill would amend section 464NA to enable the authorisation of police custody officers to exercise the same powers as a police officer in relation to the taking of a ‘fingerscan’ of a person for identification purposes. [26]

The Bill would also amend section 464Z to enable the Chief Commissioner to authorise police custody officers in relation to the taking of samples (i.e. scrapings from the mouth) and the conduct of physical examinations of a person who is in custody. [27]

Road Safety Act 1986

The Bill would amend section 55E of the Act to:

- enable the authorisation of police custody officers, by the Chief Commissioner, to carry out the procedure for the provision of a sample of oral fluid of motorists who have tested positive to a preliminary road side drug test
- provide that statements and certificates relating to the authority of police custody officers to carry out the procedure for the provision of a sample of oral fluid are admissible as evidence in any proceeding under the Act. [29]
Charter report

Life – Degrading treatment – Movement – Privacy – Security of the person – Treatment of detainees – Police custody officers not liable for injury or damage from use of reasonable force

Summary: The Committee will write to the Minister seeking further information as to whether or not clauses 7 and 21 bar a Victorian court from hearing and determining an injured person’s claim for declarations that a police custody officer’s use of reasonable force to compel a person the police custody officer is managing, transporting or supervising to obey an order is contrary to the obligation in Charter s. 38 for police custody officers to act compatibly with and give proper consideration to human rights.

The Committee notes that clause 7, inserting a new section 200J into the Victoria Police Act 2013, and clause 21, inserting a new section 104DD into the Corrections Act 1986, provide that a ‘police custody office may, where necessary, use reasonable force to compel a person the police custody officer is’ supervising, transporting or (for new section 104DD) managing ‘to obey an order given by the police custody officer in the exercise of a function or power the police custody has under’ new Part 11A of the Victoria Police Act 2013 or new Division 5 of Part 9A of the Corrections Act 1986.\(^\text{13}\)

The Statement of Compatibility remarks:

The power to use reasonable force to compel an offender to obey a direction and apply instruments of restraints will necessarily involve the physical restraint or apprehension of a person, which may constitute an interference with an offender’s rights to life (s 9), freedom of movement (s 12), bodily privacy (s 13), security of person (s 21), humane treatment when deprived of liberty (s 21) and protection from cruel, inhuman or degrading treatment (s 10).

The use of force may reasonably limit these rights provided it occurs within the framework of the law and with the objective of protecting public order, people’s lives or property. Human rights principles require that the law and policies governing the use of force protect life to the greatest extent possible and safeguard the circumstances in which force is used. Any use of force must be no more than absolutely necessary and strictly proportionate to achieving a clearly-defined lawful purpose.\...

Existing operational procedures for police officers exercising similar powers under the Corrections (Police Gaols) Regulations 2015 require that the use of force is always proportionate to the relevant safety risk and is a last resort. Officers are trained to appropriately assess security risks and must identify possible courses of action that involve the use of all other options before resorting to the use of force to manage risks to safety, such as verbal direction, communication or negotiation. PCOs will undergo similar training and be subject to similar operational procedures in how to manage difficult situations and how to use force safely when there are no other alternatives. I also note that PCOs are required to take all reasonable steps to ensure that a detained person’s safety and welfare is maintained.

However, the Committee notes that sub-section (2) of both new section 200J of the Victoria Police Act 2013 and new section 104DD of the Corrections Act 1986 provides that ‘[a] police custody officer who uses force in accordance with this section is not liable for injury or damage caused by that use of force.’

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\(^{13}\) See also new section 200M, extending new section 200J to police custody officers directed by a court to supervise a person who the court has detained on court premises or who has surrendered to the court’s custody in answer to the person’s bail.
Speaking generally of the Bill’s provisions, the Statement of Compatibility remarks:

PCOs will be subject to a range of internal and external measures to ensure appropriate oversight, discipline and management, including being:

- subject to the obligations of public authorities under section 38 of the charter, including the requirement to act in a way that is compatible with human rights, and, in making a decision, to give proper consideration to relevant human rights.

However, the Committee observes that Victoria’s Court of Appeal has recently held that a statutory ‘privative clause’ may have the effect of preventing a Victorian court from hearing and determining an injured person’s claim for declarations that a use of reasonable force is contrary to the obligation in Charter s. 38 for public authorities to act compatibly with and give proper consideration to human rights.14

The Committee will write to the Minister seeking further information as to whether or not clauses 7 and 9, inserting new section 200J(2) into the Victoria Police Act 2013 and new section 104DD(2) into the Corrections Act 1986, bar a Victorian court from hearing and determining an injured person’s claim for declarations that a police custody officer’s use of reasonable force to compel a person the police custody officer is managing, transporting or supervising to obey an order is contrary to the obligation in Charter s. 38 for police custody officers to act compatibly with and give proper consideration to human rights.

The Committee notes the very detailed and helpful statement of compatibility accompanying the Bill.

The Committee makes no further comment

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14 Bare v IBAC [2015] VSCA 197, discussing s. 109(1) of the now repealed Police Integrity Act 2008.
Relationships Amendment Bill 2015

Introduced 6 October 2015
Second Reading Speech 7 October 2015
House Legislative Assembly
Member introducing Bill Hon. Martin Pakula MLA
Portfolio responsibility Attorney-General

Purpose

The Relationships Act 2008 (the Principal Act) provides unmarried couples (both same-sex and opposite sex) with the option of registering their domestic relationship. Registration provides formal recognition of the relationship and evidence for the purpose of accessing various rights.

The Principal Act also provides for the registration of caring relationships between two adults who are not a couple or married to each other and where one or both of the persons provides personal or financial commitment and domestic support to the other person without fee or reward.

The Principal Act currently provides that both of the partners in a domestic or caring relationship must be domiciled or ordinarily resident in Victoria in order for the relationship to be registered.

The Bill would amend the Principal Act to:

• allow applications for the registration of domestic and caring relationships where only one of the persons lives in Victoria (new section 6(a)) [5]
• provide for the recognition of a ‘corresponding law relationship’ (i.e. a domestic relationship that has been registered or formally recognised under a prescribed law or a law of a State, Territory or another country) as a ‘registered domestic relationship’ under Victorian law (new Chapter 2A) [6] (See Charter report below)
• make other consequential amendments.

Charter report

Discrimination on the ground of gender identity, marital status, sex and sexuality – Recognition in Victoria of overseas same-sex and gender diverse marriages – No automatic recognition of overseas laws that permit some minors to marry – No local mechanism to end recognition

Summary: The Committee will write to the Minister seeking further information as to whether or not clause 6, by providing narrower rules for the recognition of overseas same-sex marriages and their end than those provided in Australian law for opposite-sex marriages, is compatible with the Charter’s rights against discrimination on the grounds of gender identity, marital status, sex and sexuality.

The Committee notes that clause 6, inserting a new section 33C, provides that a ‘[f]or the purposes of this Act, a corresponding law relationship, that is not a marriage within the meaning of the Marriage Act 1961 of the Commonwealth, is taken to be a registered domestic relationship’. New section 33A provides that a ‘corresponding law relationship’ includes a relationship registered or formally recognised under a law of another country that satisfies the ‘general requirements’ in new section 33B. The Marriage Act 1961 (Cth) presently defines a marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.  

15 Marriage Act 1961 (Cth), s. 5(1).
The Explanatory Memorandum remarks:

This means that a corresponding law relationship will be treated as if it were a registered domestic relationship for the purposes of Victorian law, even though it is not recorded in the Relationships Register.

It is not necessary for a corresponding law relationship to include marriages under the Marriage Act 1961 of the Commonwealth because these relationships are already recognised as marriages for the purposes of Victorian law.

However, the Committee notes that the opening words of new section 33C, ‘[f]or the purposes of this Act’, may prevent the section from applying to Victorian laws other than the Relationships Act 2008.\(^\text{16}\)

The Statement of Compatibility remarks:

The recognition of relationships formalised in corresponding jurisdictions in clause 6 of the bill will mean that a couple in Victoria that has formalised their relationship under a corresponding law, either before or after commencement of the bill, will not need to re-register their relationship under the Victorian registration scheme to enjoy the benefits of registration. This provides recognition under Victorian law for couples who have formalised their relationships under interstate registration schemes and overseas laws that allow for same-sex marriage and civil unions. Accordingly, the bill promotes the right to equality in the charter for people in couple relationships, regardless of their sex, sexual orientation or gender identity.

However, the Committee notes that new section 33B provides that a ‘corresponding law’ must provide that ‘a relationship must be between two adult persons’, defined in existing s. 3 to mean persons who are ‘18 years of age or more’. The Committee observes that the effect of clause 6 is therefore to only permit the automatic recognition in Victoria of same-sex or gender diverse marriages and civil unions made under laws that are only available to people aged 18 or over. By contrast, the Marriage Act 1961 (Cth) provides for the automatic recognition in Australia of overseas opposite-sex marriages of people aged 16 or over.\(^\text{17}\) For example, same-sex or gender diverse marriages under Canadian or Scottish law (which permit marriage at 16\(^\text{18}\)) will not be automatically recognised under clause 6,\(^\text{19}\) even though opposite-sex marriages under those same laws are automatically recognised as valid marriages under Australian law. The Committee considers that new section 33B, in requiring that a ‘corresponding law’ must provide that a relationship be between two persons who are 18 years of age or older, may engage the right to equal and effective protection against discrimination under section 8 of the Charter.

The Committee also notes that, while the Relationships Act 2008 provides for the revocation of the ‘registration of a registered relationship’,\(^\text{20}\) it does not appear to provide for the cessation of the application of new section 33C to a corresponding law relationship. The Committee observes that the only apparent way for a party to such a relationship to prevent it from being treated as a registered domestic relationship under Victorian law is to end it in a way that is recognised by a corresponding relationship.

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\(^\text{16}\) The Committee also notes that corresponding law relationships that are not recorded in the Relationships Register may not be automatically recognised for the purposes of Commonwealth and Tasmanian law: see Acts Interpretation Act 1901 (Cth), s. 2E and Acts Interpretation Regulations 2008, reg 3(a) (recognising relationships that are ‘registered’ under the Relationships Act 2008 as a registered domestic relationship under the Act); and Relationships Act 2003 (Tas), s. 65A (recognising registered domestic relationships that are ‘registered’ under the Registration Act 2008.)

\(^\text{17}\) Marriage Act 1961 (Cth), s. 8BD(3).

\(^\text{18}\) Civil Marriage Act 2005 (Canada), s. 2.2 (although most provinces requires parental, but not court, consent for marriages under 18.); Marriage (Scotland) Act 1977 (Scotland), s. 1(1).

\(^\text{19}\) Unless those laws are prescribed under new section 33A(a).

\(^\text{20}\) Existing s. 11.
law. However, while Australian law permits people in any opposite-sex marriage (whether Australian or overseas) to obtain an Australian court order dissolving that marriage (a dissolution which will in turn be automatically recognised under Victorian law), Australian law does not provide for the dissolution of same-sex or gender diverse marriages. For example, a person who married under Irish law to a same-sex or gender diverse person and is now living in Victoria must obtain a divorce in an Irish court to prevent the recognition of that marriage in Victoria under new section 33C, while a similarly placed person in an equivalent opposite-sex marriage can obtain a divorce in the Family Court of Australia.

The Committee will write to the Attorney-General seeking further information as to the effect of the opening words ‘[f]or the purposes of this Act’ in clause 6 and as to whether or not clause 6, by providing narrower rules for the recognition of overseas same-sex marriages and their end than those provided in Australian law for opposite-sex marriages, is compatible with the Charter’s rights against discrimination on the grounds of gender identity, marital status, sex and sexuality.

The Committee makes no further comment
Victorian Energy Efficiency Target Amendment (Saving Energy, Growing Jobs) Bill 2015

Introduced: 6 October 2015
Second Reading Speech: 7 October 2015
House: Legislative Assembly
Member introducing Bill: Hon. Jacinta Allan MLA, on behalf of Hon. Lily D’Ambrosio
Portfolio responsibility: Minister for Energy and Resources

Purpose

The Bill is for an Act to amend the Victorian Energy Efficiency Target Act 2007 to:

• specify the Victorian Energy Efficiency Target (VEET) scheme target for the years 2016, 2017, 2018, 2019 and 2020
• provide that the VEET scheme target for each year from 2021 to 2029 will be specified by regulations
• require that the greenhouse gas reduction rates for electricity and gas be fixed having regard to the VEET scheme target.

Charter report

The Victorian Energy Efficiency Target Amendment (Saving Energy, Growing Jobs) 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

The Bill was introduced into the Legislative Assembly on 15 September 2015 by Hon Jill Hennessy MLA, Minister for Health. The Committee considered the Bill on 5 October 2015 and made the following comments in Alert Digest No. 12 of 2015 tabled in the Parliament on 6 October 2015.

Committee comments

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.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

¹ Charter s. 24(1).
(including all Australian and overseas police and prosecutors) for the purposes of law enforcement.ii

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.iii

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.

Minister’s response

The Committee thanks the Minister for the attached response.

ii See ss. 3.8A.27 & 10. 1.29(1).

iii Sex Work Act 1994, s. 87(7); Victorian Civil and Administrative Tribunal Act 1998, s. 36(3).
Ms Lizzie Blandthorn MLA  
Chairperson, Scrutiny of Acts and Regulations Committee  
Parliament of Victoria  
Spring Street  
EAST MELBOURNE VIC 3002

Dear Ms Lizzie Blandthorn,  

Gambling Legislation Amendment Bill 2015

Thank you for your letter of 6 October 2015 enclosing the Charter Report from the Scrutiny of Acts and Regulations Committee (SARC) Digest No. 12 of 2015, which raises an issue regarding the Gambling Legislation Amendment Bill 2015. I am pleased to take this opportunity to address the Committee’s concerns.

Charter Report

In the Alert Digest, SARC makes a comment regarding the Charter of Human Rights and Responsibilities (the Charter) in relation to pre-commitment information and the restriction on its disclosure to a court or tribunal.

Pre-commitment is a voluntary system that will capture the personal details and play history of players who choose to register for pre-commitment. Players who choose not to register for pre-commitment will have the option to use a casual play card which allows a player to use the pre-commitment system anonymously.

Regardless of whether a player is registered or is playing with a casual pre-commitment card, the pre-commitment system will only record the play that a player chooses to record. For example, additional play will not be recorded if a player makes the decision to remove the pre-commitment card from a machine after that player’s pre-determined play limits have been reached.

As noted by SARC, the confidentiality provisions in the Gambling Regulation Act 2003 (the Act) relating to pre-commitment currently provide for disclosure in a number of circumstances including:
• with consent (express or implied) of the person to whom the information relates (section 3.8A.26)
• to enforcement agencies for the purpose of law enforcement (section 3.8A.27).

If there is a situation in which pre-commitment information is necessary in order to ensure a fair hearing, new section 3.8A.25A permits disclosure if the Minister for Gaming certifies that it is necessary in the public interest that the information should be disclosed. I am of the view that this new
provision recognises that there may be additional circumstances under which confidential pre-commitment information should be released.

SARC notes that clause 8 of the Gambling Legislation Amendment Bill may engage the Charter rights 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.

Section 24 of the Charter of Human Rights and Responsibilities Act 2006 (Charter Act) refers to the right to a fair hearing. Section 24(1) provides that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Having considered section 24(1) of the Charter Act, I note that this right may be engaged but not likely limited as the circumstances in which pre-commitment information would be essential evidence in a hearing are remote. The circumstances in which proceedings involving third parties or criminal defendants relying on pre-commitment information, in my view, are unlikely to arise. Additionally, as a consequence of the constraints on the information recorded by the pre-commitment system, pre-commitment information may not be fulsome and would be of limited utility in respect of aiding a fair hearing.

What constitutes a fair hearing depends on the facts of the case and requires a weighing of a number of public interest factors. It is unlikely that pre-commitment information would be a key piece of evidence in such a proceeding. In any event, if it was, there is a process by which the Minister can certify that the information should be disclosed to the court in the public interest.

Pre-commitment is a vital harm minimisation and consumer protection measure that will help players control their gambling and avoid it escalating to harmful levels. The government understands that the potential risk of disclosure of pre-commitment information to a court may create a strong disincentive to register among players. This has the capacity to undermine the take-up of pre-commitment and therefore its utility as a harm minimisation tool.

Clause 8 under the Gambling Legislation Amendment Bill is necessary to protect public confidence in the confidentiality of pre-commitment information. It is important to find an appropriate balance between the privacy interests of those using the pre-commitment system (as discussed in the Second Reading Speech) and the remote possibility of needing to protect the right to a fair hearing. I am of the view that the amendments achieve this balance, and that the right to fair hearing is not limited in any event.

Yours sincerely

Jane Garrett MP
Minister for Consumer Affairs, Gaming & Liquor Regulation

cc: Mr Nathan Bunt
    Senior Legal Advisor
    Scrutiny of Acts and Regulations Committee
    By email: nathan.bunt@parliament.vic.gov.au

TRIM ID: CD/15/462011
Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015

The Bill was introduced into the Legislative Assembly on 15 September 2015 by Hon Jill Hennessy MLA, Minister for Health. The Committee considered the Bill on 5 October 2015 and made the following comments in Alert Digest No. 12 of 2015 tabled in the Parliament on 6 October 2015.

Committee comments

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; or
- the child’s immunisation is medically contraindicated in accordance with specifications set out in the _Australian Immunisation Handbook._

The Committee observes that the effect of new section 143B is to exclude most unvaccinated children from early childhood services. 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, clause 5 may engage the Charter’s

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iv 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).)

v 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_ 10th 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).)

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

vii 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.)
rights against direct or indirect discrimination on the basis of the possible future presence in children’s bodies of organisms that may cause disease.\textsuperscript{viii}

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 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.\textsuperscript{ix}

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.

Minister’s response

The Committee thanks the Minister for the attached response.

Committee Room
19 October 2015

\textsuperscript{viii} 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.

\textsuperscript{ix} 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.’
Dear Ms Blandthorn,

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

Thank you for your letter on behalf of the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria (the Committee) requesting information in relation to the amendments to the Public Health and Wellbeing Act 2008, contained in the Public Health and Wellbeing Amendment (No Jab, No Play) Bill 2015.

You have asked me to respond to two questions raised in the Committee’s Charter report on the Bill in Alert Digest No 12, 2015 tabled in Parliament on 6 October 2015.

Specifically, the Committee queried whether:

- clause 5, which inserts a new section 143B into the Public Health and Wellbeing Act 2008 is compatible with the rights against direct or indirect discrimination on the basis of the possible future presence in children's bodies of organisms that may cause disease;

- the exemption from complying with clause 143B in clause 143C(1)(d) for Aboriginal and Torres Strait Islander children is a measure taken for the purpose of assisting or advancing persons or groups disadvantaged by discrimination.

As set out in the Statement of Compatibility, in my opinion, the Public Health and Wellbeing Amendment (No Jab No Play) Bill 2015, as introduced to the Legislative Assembly, is compatible with human rights as set out in the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

In my response to the Committee, I address how these provisions are compatible with the Charter as follows:

**New section 143B - right to equality**

New section 143B provides that the person in charge of an early childhood service may not confirm the enrolment of a child at the service unless the parent or guardian of the child has provided an immunisation status certificate that demonstrates the child:

(a) is immunised according to the appropriate standard vaccination schedule, or a vaccination
catch-up schedule, or

(b) has a medical contraindication for one or more vaccines.

The Committee has queried whether the provision limits the right to equality of individuals under s 8 of the Charter. In particular, the Committee has queried whether the provision amounts to discrimination on the ground of disability. Section 3 of the Charter defines discrimination to mean discrimination within the meaning of and on the basis of attributes set out in s 6 of the Equal Opportunity Act 2010 (EO Act). Direct discrimination under the EO Act means unfavourable treatment because of an attribute set out in section 6 of that Act. 'Disability' is an attribute and is defined to include 'the presence in the body of organisms that may cause disease' and also includes 'a disability that may exist in the future'. Discrimination may be direct or indirect, but different treatment must be based on the prohibited attribute to be discriminatory.

**Whether new section 143B is discriminatory**

It is important to carefully identify the relevant disability with some precision, as well as identifying how the alleged discrimination is based on that particular disability.¹

New section 143B does treat unimmunised children differently from immunised children. However, in my view the different treatment provided for under new section 143B is not simply based on the likelihood of a child having disease causing organisms in their body in the future. Rather, the basis of the different treatment is the failure to take a step which may prevent or minimise the impact of a disease.

It has been argued that the restriction on the enrolment of unimmunised children in early childhood services is not on the basis of disability and therefore not discrimination. Even if the different treatment were considered to be discrimination within the meaning of the EO Act, in my view new section 143B is a reasonable and demonstrably justifiable limit on the right, having regard to the factors in section 7(2) of the Charter.

Particularly relevant in these circumstances is the importance of the purpose of the limitation, as contemplated by section 7(2)(b) of the Charter. The Parliament has explicitly recognised in section 86 of the EO Act that measures taken for the protection of the health of individuals and/or the public generally is a purpose which justifies a limit on the right.

The Second Reading Speech of the Bill and the Statement of Compatibility summarised its important public health objectives. The stated objective of the Bill is to increase the rate of childhood immunisation and thereby 'herd immunity', which is proven to benefit both the individual and the wider community. Measures that increase the numbers of vaccinated children attending early childhood services protect the interests of the children and families who access those services. This protection is particularly important for those who cannot receive vaccines, due to age or a medical contraindication.

The measure in new section 143B is directly related to achieving the purposes of the Bill. 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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It is of note that in the United States of America, which has laws requiring proof of immunisation in order to be enrolled in schools in every state, the Supreme Court has held that such laws are consistent with the Fourteenth Amendment of the Constitution, which provides for due process and equal protection of the law.  

Clause 143C(1)(d) - right to equality

New section 143(1)(d) provides that the person in charge of an early childhood service is not required to refuse enrolment under new section 143B if the child in question is descended from, identifies or is accepted as an Aborigine or Torres Strait Islander. New section 143C(2) requires that within 16 weeks after commencement at the service, the service will take reasonable steps to obtain the immunisation status certificate for the child. This will provide an opportunity for engagement with families, which is a chance to identify and address any issues that are preventing the child from becoming immunised.

Section 8(4) of the Charter provides that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

It is my view that this provision of the Bill strikes a reasonable balance between achieving public health objectives and allowing access to early childhood services. Aboriginal and Torres Strait Islander children have been identified as a group that are under-represented in early childhood services enrolments and who face barriers from accessing services on the basis of their race based on historical systemic discrimination. For example, according to the 2014 report by the Productivity Commission, in 2013 the proportion of Aboriginal and Torres Strait Islander children enrolled in a pre-school program in the year before school was lower than for non-Indigenous children (in Victoria it was 83.6% as opposed to 105.5%). The 2014 National Report from the National Assessment Program Literacy and Numeracy (NAPLAN) indicates that for Year 3 school children, across Australia, in every domain (reading, spelling, persuasive writing, spelling, grammar, punctuation and numeracy), more than 22% of Indigenous students failed to reach the national minimum standard, compared to less than 6% of non-Indigenous students.

Accordingly, I consider new section 143C(1)(d) is a measure is taken for the purpose of advancing or assisting members of a group who are recognised as being disadvantaged and does not constitute discrimination.

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2 See Zucht v King 260 US 174 (1922), recently applied in Phillips v. City of New York, 14-2156-cv (2d Cir. 2015).

3 Productivity Commission, Overcoming Indigenous Disadvantage: Key Indicators 2014
Thank you for the opportunity to respond to the Committee's concerns. I trust that this information is of assistance to the Committee. Should the Committee require any additional information or clarification of the effect of the amendments, please do not hesitate to contact my office.

Yours sincerely

[Signature]

Hon Jill Hennessy MP
Minister for Health
Minister for Ambulance Services

16/10/2015
### Appendix 1

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Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly on rights and freedoms

Wrongs Amendment (Prisoner Related Compensation) Bill 2015 5, 6

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

Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 13
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Relationships Amendment Bill 2015 13
Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Bill 2015 11, 12
Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Bill 2015 11, 12
### Table of correspondence between the Committee and Ministers or Members during 2015

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

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Appendix 4

Submissions to the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015

The Committee received submissions on the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 from the following organisations:

- the Australian Christian Lobby
- the Australian Family Association
- CatholicCare
- Freedom 4 Faith (F4F)
- Victorian Christian Legal Society.
Ms Lizzie Blandthorn MP  
Chair  
Scrutiny of Acts and Regulations Committee,

Dear Ms Blandthorn,

The Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (the Bill) explicitly removes any existing protection for faith based adoption agencies from the Equal Opportunity Act.

It is submitted that the Bill directly trespasses unduly upon rights and freedoms and should be reported as such to the Parliament pursuant to section 17 of the Parliamentary Committees Act 2003.

The stated purposes of the Bill are:

(a) to amend the Adoption Act 1984 to enable the adoption of children by same-sex couples; and

(b) to amend the Equal Opportunity Act 2010 to remove the exception to the prohibition to discriminate in relation to religious bodies providing adoption services.

It is submitted that the removal of the exemption which appears in section 17 of the Bill breaches long standing religious freedoms.

For example, a Catholic adoption agency in Melbourne, CatholicCare, which has been in operation for 80 years, is at grave risk of being unable to comply with relinquishing parents requests for a mother and a father in accordance with the agency’s religious views.

Proper allowance was made for religious freedom in NSW when same-sex adoption was passed in 2010 under the ALP Keneally Government.

Hon. Linda Burney (then NSW ALP Minister for Community Services) expressed her support for the exemption for faith-based organisations in NSW in regard to same-sex adoptions, stating that:

“I believe what is required in this debate is to find a balance between law and conscience and between equality and freedom… Does the exemption for faith-based organisations, as included in the proposed bill, result in the religious beliefs of faith-based adoption service providers prevailing over the rights and the ability of same-sex couples to adopt a child in New South Wales? The answer is no. Gay couples will have full and equal access to adoption through New South Wales Community Services and Barnardos. Examples in the United Kingdom show negative outcomes where faith-based organisations were not provided with an automatic exemption.”
In Victoria in 2015, in its submission to the Department of Premier and Cabinet in the “Review to permit adoption by same-sex couples under Victorian Law”, the Catholic Archdiocese of Melbourne expressed the following concerns:

“If same-sex adoption is introduced in Victoria, there is a risk that if CatholicCare declined to provide adoption services to persons on the grounds of their sexual orientation it would be found to have breached the Equal Opportunity Act 2010… In the absence of an appropriate amendment to the Equal Opportunity Act or the Adoption Act, it is possible that CatholicCare would be forced to cease providing adoption services as it could not do so without the risk of breaching the Equal Opportunity Act.”

How this was achieved in NSW- by amending 2 Acts.

NSW Adoption Amendment (Same Sex Couples) Bill 2010

Amending the **Adoption Act 2000**

45B Consideration of wishes of parents consenting to adoption

(1) A general consent of the parent of a child to the adoption of the child, as referred to in section 53, may express the wishes of the parent as to the preferred background, beliefs or domestic relationship of any prospective adoptive parents of the child.

(2) Nothing in the Anti-Discrimination Act 1977 prevents the Director-General or a principal officer of an adoption service provider from identifying (consistently with the best interests of the child) prospective adoptive parents who reflect those wishes in the adoption selection process under this Part.

And the **Anti-Discrimination Act 1977**

Insert after section 59: 59A Adoption services

(1) Nothing in Part 3A or 4C affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the Adoption Act 2000 or anything done to give effect to any such policy or practice. Note. Section 8 (1) (a) of the Adoption Act 2000 requires decision makers to follow the principle that, in making a decision about the adoption of a child, the best interests of the child, both in childhood and in later life, must be the paramount consideration.

(2) Subsection (1) does not apply to discrimination against any child who is or may be adopted.

(3) In this section, faith-based organisation means an organisation that is established or controlled by a religious organisation and that is accredited under the Adoption Act 2000 to provide adoption services.

The **Adoption Amendment (Adoption by Same- Sex Couples) Bill 2015** did not provide the NSW type exemptions sought.

Instead the Bill explicitly removes any generally worded protection for faith based adoption agencies from the Equal Opportunity Act.
Adoption in Victoria is provided through the Department of Human Services and Anglicare as well as CatholicCare.

A birth parent may request of a faith based agency, that their child be raised by say a catholic mother and father. However an agency acting on this request risks breaching the Equal Opportunity Act.

Same Sex couples have ample opportunities to adopt through the Department of Human Services and Anglicare.

It is relevant that same sex couples have substantial choice in relation to adoption agencies.

In these circumstances, clause 17 of the Bill trespasses unduly upon longstanding freedoms of religion for birth parents and faith based agencies who act on their requests.

I am available to give vive voce evidence in support of this submission at your early convenience.

Yours faithfully,

Daniel Flynn
Victorian Director

(Note: WA also has a faith based adoption agency exemption)

This is from the 2010 NSW report.


“As discussed in Chapter 2, there are three Australian jurisdictions that currently permit adoption by same-sex couples: the Australian Capital Territory, Western Australia and (to a more limited extent) Tasmania. As far as the Committee is aware, only in Western Australia are faith-based adoption agencies effectively exempt from the application of antidiscrimination legislation.

In relation to Western Australia, the Acts Amendment (Lesbian and Gay Law Reform) Act 2001 (WA) implemented a number of measures to equalise the status of gay and lesbian people including amending the Adoption Act 1994 (WA) to allow same-sex couples to adopt. Following debate on the Bill, changes were made to include a specific amendment to the definition of ‘services’ under Section 4 of the Equal Opportunity Act 1984. This amendment effectively excluded the Equal Opportunity Commission from reviewing any allegation of discrimination relating to the adoption of a child.” Citation 481 (WAPD (Legislative Assembly), 2 August 2001, p 1983 and WAPD (Legislative Assembly), 11 December 2001, pp 6851-6852]
Ms Lizzie Blandthorn MP
Chair
Scrutiny of Acts and Regulations Committee,

Dear Ms Blandthorn,

Further to my letter of 15 October, The Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (the Bill) (by removing any existing protection for faith based adoption agencies from the Equal Opportunity Act the Bill) discriminates against individuals who work in a religious body which is an adoption agency who may be opposed to same sex adoption (ssa) on religious or conscience grounds.

People who work in such agencies who have a religious or conscientious objection to ssa will suffer the discrimination in that their Charter rights to freedom of conscience, religion and belief will be infringed.

This impact on Section 14 of the Charter has not been addressed in the Statement of Compatibility and it should have been.

14 Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and
(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Archbishop Hart said on 6 October 2015, in relation to this issue:
“The Catholic position on marriage and family holds that the well-being of the community and children are best served when they experience the love of both a mother and father in a safe, secure and stable relationship”

As a matter of context, or weighing the competing rights, those who will benefit from the Bill will suffer no harm if the Equal Opportunity amendment is removed from the Bill because they will be able to access adoption from DHS and other agencies.

Yours faithfully,

Daniel Flynn
Victorian Director
Ms Lizzie Blandthorn MP,
Chair,
Scrutiny of Acts and Regulations Committee

Mr Nathan Blunt
Executive Officer
Scrutiny of Acts and Regulations Committee

I write on behalf of the Australian Family Association (AFA) as its Victorian President. The AFA is of the view that children do best with a mother and a father and therefore oppose the proposed Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (the Bill).

However I am emailing specifically in relation to the Committee’s scrutiny of the Bill to ask the Scrutiny of Acts and Regulations Committee (SARC) to consider the following points:

- The functions of the Committee are set out in the Parliamentary Committees Act (the Act);

- Section 17 of the Act requires the Committee “(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 on rights or freedoms”;

- One of the stated purposes of the Bill, as set out in Clause 1 (b), is: “to amend the Equal Opportunity Act 2010 to remove the exemption to the prohibition to discriminate in relation to religious bodies providing adoption services.”

- The present Section 82 (2) of the Equal Opportunity Act protects the right of religious bodies, which includes faith-based organisations and institutions, against claims of discrimination for “anything done on the basis of a person’s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—

  (a) conforms with the doctrines, beliefs or principles of the religion; or

  (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.”

- At present faith-based agencies that provide adoption services have the freedom to place children for adoption in a way that is not opposed to their religious doctrines, beliefs or principles and avoiding injury to the religious sensitivities of the adherents of their religion.

- However Clause 17 of the Bill seeks to remove the protection of that right and freedom from faith-based agencies that provide adoption services.
• CatholicCare, a Catholic adoption agency, has said in its submission to the inquiry on the Bill that it risked breaching equal opportunity laws if it declined to provide adoption services to people based on sexual orientation.

• The AFA submits the Bill trespasses upon the rights and freedoms of faith-based adoption agencies to make decisions in keeping with their religious beliefs and principles and their religious sensitivities when placing children for adoption.

• The AFA submits further that the Bill unduly so trespasses on the rights and freedoms of faith-based adoption agencies in that it is unnecessary to remove the protection of the rights and freedoms of faith-based agencies to ensure there are services that will place children with same-sex couples. There are other agencies who would provide same-sex couples with adoption services and they will have choice. The Department of Human Services provide adoption services as does Anglicare.

• Further, Section 15 of the Adoption Act 1984 provides that in making an order for adoption the Court must be satisfied that consideration has been given to any wishes expressed by the parent(s) of the child in relation to “the religion, race or ethnic background” of proposed adoptive parents. At present there is no issue about the sexual orientation of any proposed adoptive couple as only heterosexual couples can adopt. If the Act is passed to allow same-sex couples to adopt the AFA is of the view that will raise another fundamental issue for relinquishing parents upon which they should have the freedom to express their wishes and that those wishes should have to be given consideration in placing the child for adoption. Although the expressed wishes of relinquishing parents may not amount to right to have those wishes met there is nevertheless a serious question. Should they not have the right to express their wishes in regard to their child going to a family where he/she will have a mother and a father and the right that those wishes be given consideration in making the decision as to the placement of the child? If the Bill was passed in its present form then that expressed wish of the relinquishing parent(s) could not be met as that would not be possible as it would amount to discrimination. There could be other reasons for a particular child being placed with a heterosexual couple but the wishes of the relinquishing parent(s) could not be the reason to do so.

• Relinquishing parents who want their child to go to a heterosexual couple so the child will have a mother and a father will have no agency which would be able to meet their wishes. Faith-based adoption agencies would not be able to do so without risking being in breach of the Equal Opportunity Act. Relinquishing parents will have their right and freedom to have an adoption agency which can seek to meet their wishes overruled.

I respectfully request you to put these points to the Committee to take into account in its consideration of the Bill.

Yours faithfully,

Terri M. Kelleher,
Victorian President,
Australian Family Association
16 October 2015

Ms Lizzie Blandthropn
Chair
Scrutiny of Acts and Regulations Committee
Parliament House,
Spring Street
EAST MELBOURNE VIC 3002

Dear Ms Blandthorn,

In relation to the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Bill) I would be grateful if the Scrutiny of Acts and Regulations Committee (Committee) would consider the following points concerning the services provided by CatholicCare.

**Charter of Human Rights**

For the purposes of this submission to your Committee, the specific concerns of CatholicCare relate to Clause 17 of the Bill which if enacted will make anything done by a religious body that is an approved agency within the meaning of the Adoptions Act 1984 subject to Part 4 of the Equal Opportunity Act 2010.

In particular I submit that Clause 17 of the Bill will:

- trespass unduly upon the freedom of thought, conscience, religion and belief contained in Section 14 of the Charter of Human Rights and Responsibilities Act 2006 (Charter);
- infringe the right to freedom of association contained in Section 16 of the Charter;
- by virtue of the above, be incompatible with the rights set out in Sections 14 and 16 of the Charter.

Section 14(1) of the Charter provides that “every person has the right to freedom of thought, conscience, religion and belief, including ... the freedom to demonstrate his or her religion or belief in observance, practice and teaching, either individually or as part of a community, in public or in private”.

Section 14(2) provides that “a person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion in ... observance, [or] practice or teaching.”

Section 14(1) of the Charter emphasises being ‘part of a community’ and public demonstration of belief through a variety of forms. Both of these are important in the present case: they underscore that religious freedom is not restricted to individual or private expression — it
recognises the long historical and continuing manifestation of religious belief in works and deeds carried out publicly by religious believers organised in groups and communities. A restriction on a ‘religious body’ is a restriction on the ability of the religious believers who comprise it to express their belief “as part of a community”. In exposing “a religious body that is an approved agency within the meaning of the Adoption Act 1984” to the full anti-discrimination provisions of the EO Act, the Bill restrains the religious body (which may be, and is here, an individual) in a way which may limit the individual’s freedom to have a religion in observance and practice.

Staff employed by CatholicCare must, in exercising the functions of CatholicCare as an approved agency under the Adoption Act, comply with the law that governs those functions. If the Bill is enacted as presently drafted, CatholicCare staff will be required to act in accordance with the law, no matter their religious beliefs.

CatholicCare is a work of the Archbishop of Melbourne, Archbishop Denis Hart, on behalf of the Archdiocese of Melbourne. As an approved Adoption Agency, CatholicCare provides services to a range of people including children to be adopted; applicants for assessment as adoptive parents; potential adoptive parents; adoptive parents; natural parents; adoptive persons and relatives of adoptive parents, adoptive parents and natural parents all of whom are individuals and persons with rights recognised and protected by the Charter.

In stating that religious freedom is a paramount right, the position of the Church is in harmony not only with the beliefs and values expressed in the Charter but also in the major international statements, Declarations and Covenants, concerning human rights and religious freedom.

Family Life

Central to Catholic mission is a set of reasonable beliefs about the constitution of family life that we believe best serves the community and the development of children. The Church holds that children’s development is most effectively served when they experience the love of both a mother and a father in a safe, secure and stable relationship.

For many children and families that situation is not the reality. We recognize that there are those who do not agree with the Catholic position on marriage and family and we accept also that there are many cases where children thrive in family situations that do not conform to the Catholic ideal.

Exemption

While the amendments to the Adoptions Act will create a capacity for same-sex couples to adopt, the amendments to the Equal Opportunity Act require faith groups to act contrary to their reasonably and sincerely held religious beliefs.
In the United Kingdom where similar reforms were made to Adoption regulations but without express exemptions for faith bodies the Catholic Church found that it could no longer remain true to its religious convictions in the provision of an adoption service.

By contrast in New South Wales where an exemption was granted for faith based agencies there has been no major disruption in the services provided by faith based agencies and same-sex couples are able to find support within the broader service system.

**Adoption Support Services**

While the number of adoptions facilitated by CatholicCare in Victoria may currently be small, the children who are placed have high and complex needs. CatholicCare currently provides extensive post legal placement support for these families. The needs of the children are high and our experience has shown that without extra support and advocacy those placements may fail. CatholicCare is funded through the Department of Health and Human Services to provide 228 hours of support annually but we are on target to provide in excess of 600 hours of support in this current year alone.

**Adoption Information Service**

In addition CatholicCare provides an Adoption Information Service. This service assists natural mothers who gave up their child for adoption in the past, to return to our service and work through the often considerable grief and loss issues that remain for them. The service often provides information as to the welfare of their child and facilitates contact where possible. The Adoption Information Service also assists children who were adopted in the past to gain information about their natural parents and again to facilitate contact where appropriate.

Since the State Government apology for past adoption practices in October 2012 the Adoption Information Service has opened an average of sixty five new files each year. While the Department of Health and Human Services provides approximately $100,000 per annum to provide this service CatholicCare has supplemented this by a further $89,000 in 2013-2014, $82,000 in 2014-2015 and a budgeted $92,000 for the current financial year. CatholicCare has been prepared to provide this extra service because of the level of demand and the high degree of human distress that often accompanies such cases.

If the Bill is passed, including the removal of exemptions under the Equal Opportunity Act, and if the experience of CatholicCare is that it cannot operate in adoptions with integrity as a Catholic organisation, it would also be forced to discontinue its work as an adoption agency.

In that case CatholicCare would be required return its adoption records into the custody of the Secretary of the Department of Health and Human Service and so would not only lose its capacity to work with families in facilitating an adoption but would also lose its capacity to provide post placement support and an adoption information service.
This would be quite disruptive to the service system and to the vulnerable people that CatholicCare currently looks after. I am certain that this would not be an intended consequence of the Bill. The maintenance of an exemption would ensure that CatholicCare can continue to provide the high level and quality of care that it currently provides in the area of adoption and related services.

In a pluralist democratic society, fundamental principles of freedom to hold and express particular religious beliefs and freedom of association are of vital importance which underpin society and strengthen social cohesion. At a time when the community is demanding greater religious tolerance, the Parliament by its actions should foster rather than undermine these fundamental principles by its legislative actions.

I request that the Committee consider this submission when providing its report to the Parliament on the Bill.

I am willing and available if required to meet with the Committee to address any questions which the Committee may have.

I thank the Committee for its consideration of this submission.

Yours sincerely,

Fr Joe Caddy
Chief Executive Officer
CatholicCare
Dear Ms Blandthorn,

Adoption Amendment (Adoption by Same Sex Couples) Bill 2015 (Vic)

We write to make a submission to the Committee on the Adoption Amendment (Adoption by Same Sex Couples) Bill 2015 (Vic).

Freedom 4 Faith (F4F) is a legal think tank that exists to see religious freedom protected and promoted in Australia. F4F’s leadership team includes senior Christian leaders from the Anglican, Baptist, Presbyterian, Seventh-day Adventist and Australian Christian Church traditions.

Currently only a couple who are a man and a woman can adopt a child under the Act, The general purpose of the Bill is to permit 2 people of the same sex to adopt children – this covers both adoption of a child who is related to one of the persons and adoption of a child who is related to neither of the persons.

Clause 17 of the Bill

Clause 17 of the Bill removes the existing exemption from the Equal Opportunity Act for religious organisations in relation to their provision of adoption services.
That exemption currently allows religious organisations to refuse to arrange adoptions of children to same sex couples if that refusal conforms with the doctrines, beliefs or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

Clause 17 is unnecessary for the Bill to achieve its main goal.

Adoption in Victoria is provided through the Department of Human Services and Anglicare and Catholic Care. We understand that only Catholic Care will refuse to arrange adoption by same sex couples because of religious doctrines and beliefs of itself, its employees and, often, of a birth parent. (A birth parent may request a faith based adoption agency to have their child raised by a mother and father because of a religious or conscience-based belief that is in the best interests of the child).

If the main part of the Bill becomes law, same sex couples will be able to use the services of the Department of Human Services and Anglicare to adopt and no same sex couple will be denied the ability to adopt. Clause 17 of the Bill is unnecessary to achieve the provision of same sex adoption services in Victoria.

Clause 17 limits the freedom to demonstrate religion or belief in practice of adoption agencies, their employees and relinquishing parents who have a religious or conscience-based conviction that children should be raised by opposite sex couples.

This limitation is contrary to Charter s.14 (1)(b) and (2) and to the common law right to freedom of religion and conscience.

Section 14 of the Charter provides that

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Because of clause 17, a religious adoption agency which acts on its genuinely held religious belief or a birth parent's conviction by refusing to arrange adoptions by same sex couples will breach the Equal Opportunity Act. That consequence leaves:
• the religious body with the choice of breaking the law or closing its adoption service to all couples or abandoning its religious convictions;
• employees of adoption agencies with such religious convictions with a similar choice of acting against their deeply held religious or conscientious beliefs or quitting their jobs;
• relinquishing parents with no ability to have their religious or conscientious beliefs about the parenting of their child considered and implemented by an adoption agency.

In 2007 the UK Labour government adopted a similar law to the Bill without exceptions for religious adoption services and that forced the closure of all UK Catholic adoption agencies or the abandonment of their religious conviction: see http://www.telegraph.co.uk/news/religion/7952526/Last-Catholic-adoption-agency-faces-closure-after-Charity-Commission-ruling.html

The only practical effect of clause 17 is to limit the rights of religious bodies, their employees and relinquishing parents to act in accordance with their religious beliefs that children should be raised by a couple who are a woman and man and who can provide male and female role models to the children. It is an unnecessary overreach by the government which breaches human rights.

**Clause 17 is discriminatory contrary to s.8 of the Charter**

Clause 17 also amounts to discrimination against people with such religious convictions. A general requirement which has the effect of disadvantaging people with an attribute protected under the Equal Opportunity Act (in this case a particular religious belief) and is not reasonable, amounts to indirect discrimination under s.9 of the Equal Opportunity Act and is contrary to s.8 of the Charter. It is not reasonable to compel religious persons to comply with this law because there is a reasonable accommodation available which still achieves the result sought (s.9(3)(e)). That accommodation is to remove clause 17 and exempt religious persons and adoption agencies - same sex adoption will still be widely available through DHS and other adoption services.

In the Statement of Compatibility the Minister asserts that there is no less restrictive means available of removing discrimination against same sex couples (as required by section 7(2) of the Charter). But that is plainly wrong. The Bill will achieve its goal of enabling full access to same sex adoptions in practice without clause 17.
The NSW same sex adoption legislation achieves that goal of enabling same sex adoption while continuing to respect and accommodate genuine religious convictions to the contrary.¹

The Government has failed to recognise that there are multiple human rights at stake in this change which can be accommodated. The Premier has spoken recently of the great value of diversity in our multi-faith and multi-cultural society; but clause 17 is designed to compel a single opinion and course of conduct in public life, not diversity.

Victoria can follow the NSW model and remove clause 17 and accommodate both same sex adoption and religious convictions. But clause 17 unnecessarily tramples on the human rights of religious people and organisations without practically assisting the human rights of same sex couples.

We would also be happy to meet with you or your representative should you wish any clarification of our position or if we could be of some other assistance. You can reach me directly on 0422 947 309.

Many thanks for your consideration of this important matter.

Yours sincerely,

Michael Kellahan
Executive Director
Freedom 4 Faith
www.freedom4faith.org.au

¹ NSW Adoption Amendment (Same Sex Couples) Bill 2010, amending the Adoption Act 2000 as follows:

s. 45B (1) A general consent of the parent of a child to the adoption of the child, as referred to in section 53, may express the wishes of the parent as to the preferred background, beliefs or domestic relationship of any prospective adoptive parents of the child.

(2) Nothing in the Anti-Discrimination Act 1977 prevents the Director-General or a principal officer of an adoption service provider from identifying (consistently with the best interests of the child) prospective adoptive parents who reflect those wishes in the adoption selection process under this Part.

And amending the Anti-Discrimination Act 1977 (NSW), s 59A as follows:

(1) Nothing in Part 3A or 4C affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the Adoption Act 2000 or anything done to give effect to any such policy or practice. Note. Section 8 (1) (a) of the Adoption Act 2000 requires decision makers to follow the principle that, in making a decision about the adoption of a child, the best interests of the child, both in childhood and in later life, must be the paramount consideration.

(2) Subsection (1) does not apply to discrimination against any child who is or may be adopted.

(3) In this section, faith-based organisation means an organisation that is established or controlled by a religious organisation and that is accredited under the Adoption Act 2000 to provide adoption services.
18 October 2015

Ms Lizzie Blandthorn MP  
Chair  
Scrutiny of Acts and Regulations Committee,

By email: sarc@parliament.vic.gov.au

Dear Ms Blandthorn,

**Adoption Amendment (Adoption by Same Sex Couples) Bill 2015 (Vic).**

I wish to make a submission to the Committee on the **Adoption Amendment (Adoption by Same Sex Couples) Bill 2015 (Vic).**

The state purpose of the Bill is to amend the Adoption Act 1984 to enable the adoption of children by same-sex couples and to amend the Equal Opportunity Act 2010 to remove the exception to the prohibition to discriminate in relation to religious bodies providing adoption services.

While I am not supportive of the intended purposes of the Bill, my submission today focuses on the infringement on the freedom of religion.

**Clause 17 of the Bill**

Clause 17 of the Bill removes the existing exemption from the Equal Opportunity Act for religious organisations in relation to their provision of adoption services. That exemption currently allows religious organisations to refuse to arrange adoptions of children to same sex couples if that refusal conforms with the doctrines, beliefs or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

Adoption in Victoria is provided through the Department of Human Services and Anglicare and Catholic Care. I understand that only Catholic Care will refuse to arrange adoption by same sex couples because of religious doctrines and beliefs of itself, its employees and, often, of a birth parent. (A birth parent may request a faith based adoption agency to have their child raised by a mother and father because of a religious or conscience-based belief that is in the best interests of the child).

If the main part of the Bill becomes law, same sex couples will be able to use the services of the Department of Human Services and Anglicare to adopt and no same sex couple will be denied the ability to adopt. Clause 17 of the Bill is unnecessary to achieve the provision of same sex adoption services in Victoria.

Clause 17 limits the freedom to demonstrate religion or belief in practice of adoption agencies, their employees and relinquishing parents who have a religious or conscience-based conviction that children should be raised by opposite sex couples.

This limitation is contrary to Charter s.14 (1)(b) and (2) and to the common law right to freedom of religion and conscience.

Section 14 of the Charter provides that

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

   (a) the freedom to have or to adopt a religion or belief of his or her choice; and

   (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.
If the Bill is allowed to pass unamended, a religious adoption agency which acts on its genuinely held religious belief or a birth parent’s conviction by refusing to arrange adoptions by same sex couples will breach the Equal Opportunity Act. That consequence leaves:

- the religious body with the choice of breaking the law or closing its adoption service to all couples or abandoning its religious convictions.
- employees of adoption agencies with such religious convictions with a similar choice of acting against their deeply held religious or conscientious beliefs or quitting their jobs.
- relinquishing parents with no ability to have their religious or conscientious beliefs about the parenting of their child considered and implemented by an adoption agency.

This is particularly concerning as Catholic Care has already publicly expressed they would consider closing down their services altogether. This would mean less adoption agencies and less options for children. Catholic Care has been operating for decades in accordance with their religious beliefs.

In 2007 the UK Labour government adopted a similar law to the Bill without exceptions for religious adoption services and that forced the closure of all UK Catholic adoption agencies or their abandonment of their religious conviction: see: http://www.telegraph.co.uk/news/religion/7952526/Last-Catholic-adoption-agency-faces-closure-after-Charity-Commission-ruling.html

The only practical effect of clause 17 is to limit the rights of religious bodies, their employees and relinquishing parents to act in accordance with their religious beliefs that children should be raised by a couple who are a woman and man and who can provide male and female role models and model gender complementarity to the children. It is an unnecessary overreach by the government which breaches human rights.

**Clause 17 is discriminatory contrary to s.8 of the Charter**

Clause 17 amounts to discrimination against people with such religious convictions. A general requirement which has the effect of disadvantaging people with an attribute protected under the Equal Opportunity Act (in this case a particular religious belief) and is not reasonable, amounts to indirect discrimination under s.9 of the Equal Opportunity Act and is contrary to s.8 of the Charter.

It is not reasonable or necessary to compel religious persons to comply with this law because there is a reasonable accommodation available which still achieves the result sought (s.9(3)(e)). That accommodation is to remove clause 17 and exempt religious persons and adoption agencies - same sex adoption will still be widely available through DHS and other adoption services.

In the Statement of Compatibility the Minister asserts that there is no less restrictive means available of removing discrimination against same sex couples (as required by section7(2) of the Charter). But that is plainly wrong. The Bill will achieve its goal of enabling full access to same sex adoptions in practice without clause 17.

The NSW same sex adoption legislation achieves that goal of enabling same sex adoption while continuing to respect and accommodate genuine religious convictions to the contrary.

The government has failed to recognise that there are multiple human rights interests in this change which can be accommodated.

In a recent interview with 3AW on 9 October 2015 (in relation to protests over building a mosque) Premier Daniel Andrews told Neil Mitchell that “This is a secular country, we are a multi-faith, multicultural state. This diversity is our greatest asset.” Further, he stated that “I will always speak out for that, I will always stand up for it.”

Clause 17 reflects a totalitarian government policy which clearly and directly contradicts the Premier’s own value placed on diversity in our multi-faith and multi-cultural society.
Victoria can follow the NSW model and remove clause 17 and accommodate both same sex adoption and religious convictions. But clause 17 unnecessarily tramples on the human rights of religious people and organisations without practically assisting the human rights of same sex couples.

I strongly urge you to review clause 17 of this Bill.

Yours sincerely

Derrick Toh
President of the Victorian Christian Legal Society