Tuesday, 11 October 2016
on the following Bills

Alpine Resorts Legislation Amendment Bill 2016

Births, Deaths and Marriages Registration Amendment Bill 2016

Child Wellbeing and Safety Amendment (Oversight and Enforcement of Child Safe Standards) Bill 2016

Equal Opportunity Amendment (Religious Exceptions) Bill 2016

Food Amendment (Kilojoule Labelling Scheme and Other Matters) Bill 2016

Lord Mayor’s Charitable Foundation Bill 2016

Medical Treatment Planning and Decisions Bill 2016

Traditional Owner Settlement Amendment Bill 2016

Victorian Fisheries Authority Bill 2016

and Subordinate Legislation

SR No. 47 – Sex Work Regulations 2016
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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Parliament of Victoria, Australia
Scrutiny of Acts and Regulations Committee
Reports to Parliament
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Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the Charter provides –

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

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

(a) the nature of the right; and

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

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

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

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

Glossary and Symbols

‘Assembly’ refers to the Legislative Assembly of the Victorian Parliament


‘Council’ refers to the Legislative Council of the Victorian Parliament

‘DPP’ refers to the Director of Public Prosecutions for the State of Victoria

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

‘IBAC’ refers to the Independent Broad-based Anti-corruption Commission

‘penalty units’ refers to the penalty unit fixed from time to time in accordance with the Monetary Units Act 2004 and published in the government gazette (as at 1 July 2016 one penalty unit equals $155.46)

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

‘VCAT’ refers to the Victorian Civil and Administrative Tribunal

[ ] denotes clause numbers in a Bill
Alpine Resorts Legislation Amendment Bill 2016

Introduced 13 September 2016
Second Reading Speech 14 September 2016
House Legislative Assembly
Member introducing Bill Hon. Lily D’Ambrosio MLA
Minister responsible Hon. Lily D’Ambrosio MLA
Portfolio responsibility Minister for Energy, Environment and Climate Change

Purpose

The Bill would amend the Alpine Resorts (Management) Act 1997 and the Alpine Resorts Act 1983 to:

- abolish the management boards of the Lake Mountain and Mount Baw Baw alpine resorts; and
- establish the Southern Alpine Resort Management Board to manage those resorts.

The Bill would also amend the Alpine Resorts Act 1983 to remove a reference to Mount Torbreck as a place where an alpine resort may be declared so that it can be reserved as a natural features reserve instead.

Charter report

The Alpine Resorts Legislation Amendment Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.
Child Wellbeing and Safety Amendment (Oversight and Enforcement of Child Safe Standards) Bill 2016

Introduced: 13 September 2016
Second Reading Speech: 14 September 2016
House: Legislative Assembly
Member introducing Bill: Hon. Martin Foley MLA
Minister responsible: Hon. Jenny Mikakos MLC
Portfolio responsibility: Minister for Families and Children

Purpose

The Bill would amend:

- the Child Wellbeing and Safety Act 2005 to provide for the oversight and enforcement of compliance by relevant entities with the Child Safe Standards\(^1\)
- the review and reporting obligations under the Commission for Children and Young People Act 2012
- the Children, Youth and Young Families Act 2005 to provide for the publication of certain information.

Charter report

The Child Wellbeing and Safety Amendment (Oversight and Enforcement of Child Safe Standards) Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.

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\(^1\) The Child Safe Standards, which are made by the minister under the Act, require certain entities with responsibility for children to put in place: child safety strategies, policies and codes of conduct; screening, supervision and training processes; processes for responding to and reporting suspected child abuse; strategies to identify and reduce or remove risks of child abuse; and strategies to promote the participation and empowerment of children.
Food Amendment (Kilojoule Labelling Scheme and Other Matters) Bill 2016

Introduced 14 September 2016
Second Reading Speech 15 September 2016
House Legislative Assembly
Member introducing Bill Hon. Jill Hennessy MLA
Minister responsible Hon. Jill Hennessy MLA
Portfolio responsibility Minister for Health

Purpose

The Bill would amend the Food Act 1984 to establish a kilojoule labelling scheme, which would require certain chain food businesses and chain supermarkets to display:

- the kilojoule content of standard, ready-to-eat food and non-alcoholic drinks on menus, menu boards and food labels; and
- a statement on menus, menu boards and display cabinets or stands that ‘the average daily adult energy intake is 8700 kJ’.

It would be an offence (subject to 20 penalty units for an individual and 100 penalty units for a corporation) for the proprietor of a chain food premises or chain supermarket not to display the above kilojoule information in the manner and location specified in the Bill (new sections 18D and 18F).

The Bill would exempt a number of food businesses from the operation of the kilojoule labelling scheme, including cinema candy bars, catering services, food vending machines and service stations selling petrol (new section 18H).

Content

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 of the Bill provides that the Bill, except Parts 2 and 3, would come into operation on the day after Royal Assent. Parts 2 and 3 would come into operation on a day to be proclaimed with a default commencement date of 1 July 2018, which is more than 12 months after the date of the Bill’s introduction.

The Second Reading Speech provides the following explanation for the possible delayed commencement of Parts 2 and 3 of the Bill:

The kilojoule labelling scheme is intended to take effect 12 months after the legislation passes through Parliament. This provides the food industry with adequate time to integrate the new arrangements with the normal turnover of menu boards and re-printing of menus.

Most restaurant and supermarket chains that will be subject to the Victorian scheme are national chains that operate in other Australian jurisdictions. They are already familiar with kilojoule labelling laws and how those laws apply.

The Victorian government intends to respond in a practical way to operational issues raised by businesses.

A communications strategy targeting affected businesses and food industry peak bodies and local government will be developed and implemented to support the smooth implementation of the new laws. Key stakeholders will be consulted in the development and
design of communication activities to ensure communication materials are clear, practical and effectively targeted.

The Committee is satisfied that the possible delay in the commencement of Parts 2 and 3 of the Act is justified.

Right to be presumed innocent — legal burden to prove defence

As noted in the Charter Report below, the Statement of Compatibility describes sections 18D(4) and 18F(4) as imposing an evidential burden on an accused. However, it appears that a proprietor of a chain food premises charged under section 18D or a proprietor of a chain supermarket charged under section 18F would bear a legal burden of establishing on the balance of probabilities that they ‘exercised all due diligence to prevent the commission of the offence’.

The Committee’s Practice Note provides that the Committee will draw to the attention of Parliament, and seek further advice from the responsible Minister or Member, where a Bill provides insufficient or unhelpful explanatory material, particularly in respect to rights or freedoms, such as the right to the presumption of innocence (i.e., provisions which reverse the onus of proof in criminal or civil penalty offences).

As noted in the Charter Report below, the Committee will write to the Minister seeking further information as to the compatibility of new sections 18D and 18F with the Charter’s right to the presumption of innocence and whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provisions’ purposes.

The Committee draws attention to the reversal of the onus of proof in sections 18D and 18F of the Bill.

Charter report

Presumption of innocence – Exceptions to criminal offences – Defendants must prove that they exercised due diligence to prevent the offence

Summary: Clause 4 introduces a new Part IIA into the Food Act 1984 including two new offence provisions relating to kilojoule labelling. These provisions (new ss 18D and 18F) impose criminal liability upon proprietors of certain chain food premises for failure to display required kilojoule information at the premises. The new sections provide that a proprietor is criminally liable unless they prove that they exercised due diligence to prevent the offence. The Committee will write to the Minister seeking further information.

The Committee notes that the new ss 18D(4) and 18F(4) both impose a requirement on the relevant proprietor to prove that they exercised due diligence to prevent the relevant offence. These new sections state:

Despite anything to the contrary in subsection (3), in any proceedings for an offence under this section, it is a defence if it is proved that the proprietor of the chain food premises [or chain supermarket] exercised all due diligence to prevent the commission of the offence by the proprietor or by a person under the proprietor’s control.

The Committee notes that any provision that places a legal onus of proof on a person accused of a criminal offence may engage the Charter right of an accused person to be presumed innocent until proved guilty according to law. The Committee’s practice note indicates that the Statement of

2 Charter s 25(1).
Compatibility for a bill that places the onus of proof on an accused should state whether and how that provision satisfies the Charter’s test for reasonable limits on rights. In particular where a legal onus is imposed the analysis in the Statement of Compatibility should address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision’s purpose.

The Statement of Compatibility states:

Offence-specific defences such as these can limit the presumption of innocence protected by section 25(1) of the charter, by placing an evidential burden on the defendant.

In these circumstances any limitation is justified. There are many different ways a proprietor could have exercised due diligence to prevent the commission of an offence under the bill. It is reasonable to expect that a defendant who claims to have exercised due diligence to bear an onus of pointing to or adducing evidence to establish the defence applies. The due diligence measures a proprietor has taken will be within the particular knowledge of the proprietor, whereas it would be very difficult for the prosecution to establish that a proprietor did not exercise due diligence due to the range of potential measures that could have been undertaken. Similarly, a proprietor is best placed to establish that the business is exempt under section 18H. Additionally, the burden placed on the defendant is an evidential burden, rather than a legal burden which would be a more restrictive measure. Finally, it is noted that the penalties for the offence are relatively small. (emphasis added)

The Statement of Compatibility examines whether the provisions satisfy the Charter’s test for reasonable limits on rights on the basis that the provisions only impose an evidential burden, whereas they appear to impose a legal burden. Offence provisions worded in the manner in which these provisions are worded (“it is a defence if it is proved”) may impose a legal burden on the accused because they are unlikely to be interpreted as merely imposing an evidentiary burden. The Act contains pre-existing offence provisions that also provide for the same defence of due diligence. In 2013 new legislation was introduced which brought a consistent approach to various director’s liability provisions in Victorian legislation. When referring to the pre-existing offence provisions in the Act, the Statement of Compatibility for that legislation (the Statute Law Amendment (Directors’ Liability) Act 2013) stated:

Currently all offences in the Food Act attract a type 3 DLP. Following a detailed review of the Food Act, this bill will reduce the number of offences which attract type 3 liability. Clause 23 of the bill (proposed section 51B) applies the type 3 DLP to those offences that are central to the regulatory regime established by the Food Act, and which relate to food handling and safety measures.

The Statement of Compatibility described a ‘type 3 DLP’:

[W]here an officer of the body corporate is deemed liable for the commission of the offence unless the individual can prove that he or she exercised due diligence to prevent the offending conduct by the body corporate.

The two new sections now added to the Act are similar in structure and also appear to be type 3 directors’ liability provisions (although notably these new offences do not relate to food handling and safety measures). The Statement of Compatibility for the Statute Law Amendment (Directors’ Liability) Act 2013 described the type 3 DLP as imposing a legal burden of proof:

Type 3 DLPs -- imposing a legal burden of proof

The bill retains or reapplys a type 3 DLP (which imposes a reverse legal onus of proof on the accused) to offences in the Food Act 1984, Dairy Act 2000, Taxation Administration Act 1997 and Duties Act 2000. The type 3 DLP requires that the prosecution must first prove beyond

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reasonable doubt that the body corporate committed the offence. The officer has a defence if they can prove on the balance of probabilities that they exercised due diligence to prevent the commission of the offence by the body corporate. This places a legal burden on the accused to prove their defence. I consider that in relation to the offences in each of these acts, the imposition of a legal burden is compatible with section 25(1).

The Statement of Compatibility’s examination of reasonable limits comes to a conclusion about the reasonableness of the limit on the right to the presumption of innocence on the basis of what appears to be an error about the nature and extent of the limitation (a mandatory consideration set out in s 7(2)(c)) and about whether there are less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve (a mandatory consideration set out in s 7(2)(e)).

As the Statement of Compatibility may have misconstrued the burden of proof, it may underestimate the extent of the limitation on the right because a legal burden of proof limits the presumption of innocence to a greater extent than an evidential burden of proof. There may also have been a resulting presumption that there were no less restrictive means reasonably available, when an evidential burden of proof may be a reasonably available option in relation to these sections (being the burden of proof that the Statement of Compatibility mistakenly assumes has been adopted).

The Committee will write to the Minister seeking further information as to the compatibility of new sections 18D and 18F with the Charter’s right to the presumption of innocence and whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provisions’ purposes.

The Committee makes no further comment.
Lord Mayor’s Charitable Foundation Bill 2016

Introduced 13 September 2016
Second Reading Speech 14 September 2016
House Legislative Assembly
Member introducing Bill Hon. Jill Hennessy MLA
Minister responsible Hon. Jill Hennessy MLA
Portfolio responsibility Minister for Health

Purpose

The Bill would repeal the Lord Mayor’s Charitable Fund Act 1996 and make new provision for the governance, management and powers of the body corporate that administers the fund, and for the administration of the fund and other funds.

Content

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 of the Bill states that the Act would come into operation on a day to be proclaimed and includes a default commencement date of 1 October 2017, which is more than 12 months after the date of the Bill’s introduction.

The Committee notes that there is no explanation for the possible delayed commencement of the Bill in the Explanatory Memorandum or Second Reading Speech.

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

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

Charter report

The Lord Mayor’s Charitable Fund Act 1996 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.
Medical Treatment Planning and Decisions Bill 2016

Introduced 13 September 2016
Second Reading Speech 14 September 2016
House Legislative Assembly
Member introducing Bill Hon. Jill Hennessy MLA
Minister responsible Hon. Jill Hennessy MLA
Portfolio responsibility Minister for Health

Purpose

The Bill would:

- enable a person (including a child) to execute an ‘advance care directive’, which would give binding instructions — or a ‘values directive’ expressing the person’s preferences and values — in relation to their future medical treatment
- provide for the recognition, as a values directive, of any advance care directive (or equivalent document) made in another state or territory
- provide for the making of medical treatment decisions on behalf of persons who do not have decision-making capacity
- enable a person to appoint another person:
  - to make medical treatment decisions on their behalf when they do not have decision-making capacity
  - to support them and represent their interests in making medical treatment decisions
- establish a process for obtaining approval and consent for medical research procedures to be administered to a person who does not have decision-making capacity
- repeal the Medical Treatment Act 1988
- amend the Mental Health Act 2014 in relation to approval procedures for electroconvulsive treatment of adults who do not have capacity
- amend the Guardianship and Administration Act 1986 by removing all of Part 4A, with the exception of provisions relating to ‘special procedures’ which require VCAT approval (Part 4A deals with medical and other treatment of disabled patients who are incapable of giving consent)
- amend the Powers of Attorney Act 2014 to remove references to ‘health’ in order to recognise the division between financial and lifestyle decisions under the Act and medical treatment decisions under the Bill.

Content

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 of the Bill provides that the Bill will come into effect on a day or days to be proclaimed, with a default commencement date of 12 March 2018, which is more than 12 months, which is more than 12 months after the date of the Bill’s introduction.

The Committee notes that there is no explanation for the possible delayed commencement of the Bill in the Explanatory Memorandum or Second Reading Speech.
Paragraph A (iii) of the Committee’s *Practice Note* provides that where a Bill (or part of a Bill) is subject to delayed commencement (i.e., more than 12 months after the Bill’s introduction) or to commencement by proclamation, the Committee expects Parliament to be provided with an explanation as to why this is necessary or desirable.

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

**Charter report**

**Life – Advance care directives – Liability of health practitioners – Inciting, aiding, abetting or preventing suicide**

**Summary:** Clause 52 provides that a health practitioner who administers or does not administer medical treatment in accordance with an instructional direction is not liable criminally, professionally, civilly and ethically because of that administration or failure. The Committee will write to the Minister seeking further information.

The Committee notes that clause 52(2) provides:

A health practitioner who, in good faith, without negligence and in reliance on an instructional directive, administers or does not administer medical treatment that the practitioner believes on reasonable grounds is in accordance with that instructional directive is not because of the administration or failure to administer that medical treatment—

(a) guilty of an offence; or
(b) liable for unprofessional conduct or professional misconduct; or
(c) liable in any civil proceeding; or
(d) liable for contravention of any code of conduct.

Clause 18(1)(a) provides that an advance care directive must not contain a statement that ‘would require an unlawful act to be performed’.

The Committee observes that clause 18(1)(a) may not prevent an advance care directive from containing a statement that requires an unlawful omission. The Committee notes that the Bill does not contain an equivalent to existing s. 4(3)(a) of the *Medical Treatment Act 1988*, which provides that that Act ‘does not... affect the operation of section 6B(2) or 463B of the *Crimes Act 1958*, which respectively bar inciting, aiding or abetting suicide, and permit the prevention of suicide.\(^4\)

The Committee considers that clause 52 may engage the Charter’s right to life.\(^5\) The Statement of Compatibility does not address clause 52.

The Committee will write to the Minister seeking further information as to the compatibility of clause 52 with the Charter’s right to life.

\(^4\) See also *Advance Personal Planning Act 2013 (NT)*, s. 51(3).

\(^5\) Charter s. 9.
Non-consensual medical treatment – Professional standards – Blood transfusions – Duty of care – Palliative care

Summary: Clause 58 provides that a health practitioner who proposes to administer medical treatment to a person who does not have decision-making capacity must obtain or ascertain a decision to consent to or refuse medical treatment under a division that provides for giving effect to advance care directives and for decisions by medical treatment decision makers. However, the Bill limits the operation of these clauses in various ways. The Committee will write to the Minister seeking further information.

The Committee notes that clause 58 provides that a health practitioner who proposes to administer medical treatment to a person who does not have decision-making capacity for that treatment must obtain or ascertain a decision to consent to or refuse the commencement or continuation of medical treatment in accordance with Division 2 of Part 4. Division 2 provides:

- for the health practitioner to withhold or (if clinically appropriate) administer medical treatment in accordance with an instructional directive made by the person (clause 60(1)(a))
- for the person’s medical treatment decision maker to make decisions to consent to or refuse medical treatment that the decision maker believes the person would have made (clause 61(1))
- where no advance care directive or medical treatment decision maker can be located, for the health practitioner to administer ‘routine treatment’ and for the Public Advocate to consent to or refuse ‘significant treatment’ (clause 63(1))

The Statement of Compatibility remarks:

In my view, medical treatment or a medical research procedure in accordance with an instruction directive does not interfere with the rights under sections 10(c) or 13(a) of the charter, as the person has provided consent. On the contrary, advance care directives promote those rights....

The purpose of a medical treatment decision-maker is to enable a person who does not have decision-making capacity to have medical treatment decisions made on their behalf by an appropriate person. A person can exercise some control over their future treatment by appointing someone they trust to make decisions on their behalf. Alternatively, the bill enables people to have decisions made on their behalf by a person with whom they are in a close and continuing relationship, who can reasonably be expected to understand, and therefore make decisions based on, the person’s preferences and values...

The purpose of clause 63 is to prevent a person without decision-making capacity being denied medical treatment, if they do not have an advance care directive and there is no one willing and able to make a decision in the circumstances.

While the Committee considers that clauses 60, 61 and 63 are compatible with the Charter’s right not to be subjected to medical treatment without full, free and informed consent, the Committee observes that the Bill limits the operation of these clauses in various ways, including the following:

First, clause 18(1)(b) provides that an advance care directive must not contain a statement that would ‘if given effect, cause a health practitioner to contravene a professional standard or code of conduct (however described) applying to the profession of that health practitioner.’ The Statement of Compatibility does not address clause 18(1)(b). The Committee notes that the effect of clause 18(1)(b) may be to permit a health practitioner to administer medical treatment that the person has specified that he or she does not want to be administered if doing so is required by a professional standard or code of conduct that applies to the profession of that health practitioner. The equivalent
provision in South Australia’s legislation expressly exempts ‘a standard or code of conduct prepared by or on behalf of a hospital, clinic, hospice, nursing home or any other place at which health care is provided to a person that regulates the provision of health care or other services at that place.’

Second, clause 48(2) provides that nothing in Part 4 ‘affects the operation of section 24 of the Human Tissues Act 1982’. The Statement of Compatibility remarks:

Section 24 of the Human Tissues Act 1982 permits a medical practitioner to override the substitute decision-maker of a child under the age of 16 years, where the child requires an emergency blood transfusion...

However, the Committee notes the Human Tissues Act 1982 defines a ‘child’ to mean ‘a person who... has not attained the age of 18 years; and... is not married.’

Third, clause 49 provides that nothing in Part 4 ‘affects any duty of care owed by a health practitioner to a patient’. The Statement of Compatibility does not address this provision. The Committee notes that the effect of clause 49 may be to permit a health practitioner to administer medical treatment that the person has specified that he or she does not want to be administered or a medical treatment decision maker has refused to permit if providing the treatment is part of a legal duty of care to the patient that applies to that health practitioner. The existing Medical Treatment Act 1988 provides that ‘[a] refusal of medical treatment under this Act does not limit any duty of a registered medical practitioner or other person... to provide medical treatment, other than medical treatment that has been refused.’

Fourth, clause 57 provides that clauses 58, 60, 61 and 63 do ‘not apply to palliative care’. As well, clause 12(3)(c)(ii) prevents a patient from making an effective instructional directive concerning ‘palliative care’ and clause 54 permits a health practitioner to administer ‘palliative care’ despite any decision of the person’s medical treatment decision maker. The Committee notes that the effect of these clauses may be to permit any health practitioner to provide palliative care to any person who lacks decision making capacity even if the person has specified in advance that he or she does not want to receive that particular treatment or the person’s appointed medical treatment decision maker believes that the person would refuse that treatment if he or she had decision making capacity. The Statement of Compatibility remarks:

By enhancing quality of life and relieving pain and suffering, palliative care enables people to face the end of life with dignity. These provisions enable a health practitioner to minimise a person’s pain and suffering when they are experiencing symptoms associated with dying. The decision to enable health practitioners to do so was made in consultation with a range of practitioners, consumer advocacy groups and the Office of the Public Advocate. Many of these stakeholders voiced strong concern about people refusing palliative care in advance, or substitute decision-makers refusing palliative care on another person’s behalf. A person cannot always fully appreciate the need for pain relief until they are actually experiencing pain. If this occurs at a point where they can no longer participate in decision-making, and a person has given an advance care directive regarding palliative care, they will not be able to alter their decision.

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6 Advance Care Directives Act 2013 (SA), s. 12(2).
7 Human Tissues Act 1982, s. 3(1). Section 20A, which modifies the definition of child to ‘a person who has not attained the age of 16 years’, only applies to the removal of blood from a child, not blood transfusions to children.
8 Medical Treatment Act 1988, s. 4(4)(b).
The Committee observes that clause 3(1) provides that:

palliative care includes the following—

(a) the provision of reasonable medical treatment for the relief of pain, suffering and discomfort;

(b) the reasonable provision of food and water.

Accordingly, the effect of clauses 12(3)(c)(ii), 54 and 57 may extend beyond treatment that minimises pain and suffering to include treatment that minimises ‘discomfort’, the provision of food and water and any other treatment that could be regarded as ‘palliative care’.9

The Committee will write to the Minister seeking further information as to the compatibility of clauses 18(1)(b) and 49 with the Charter’s right against non-consensual medical treatment.

Privacy – Freedom of expression – Offence to induce another person to give an advance care directive or appoint a medical treatment decision maker ‘by dishonesty or undue influence’

Summary: The effect of clause 14(1) may be to impose potentially lengthy terms of imprisonment on a person who engages in some types of discussions about medical treatment planning with another person. The Committee will write to the Minister seeking further information.

The Committee notes that clause 14(1) provides:

A person must not, by dishonesty or undue influence, induce another person to give an advance care directive.

Penalty: 600 penalty units or imprisonment for 5 years or both in the case of a natural person.

Clause 42(1) provides similarly for the appointment of an appointed medical treatment decision maker.10

While the Committee appreciates the need to protect people from being tricked, coerced or pressured into making medical treatment planning decisions, the Committee observes that that the effect of clauses 14(1) and 42(1) may be to impose potentially lengthy terms of imprisonment on a person who engages in some types of discussions about medical treatment planning with another person.

The Committee considers that clauses 14(1) and 42(1) may engage the Charter’s rights to privacy and freedom of expression.11 The Statement of Compatibility does not address these clauses.

The Committee notes that the Bill does not define either ‘dishonesty’ or ‘undue influence’. Under Victorian law, ‘dishonesty’ may mean ‘dishonest according to the standards of ordinary people’ or it

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9 Compare Consent to Medical Treatment and Palliative Care Act 1995 (SA), s. 3(1): “palliative care means measures directed at maintaining or improving the comfort of a patient who is, or would otherwise be, in pain or distress”.

10 Clause 14(1) is in similar terms to s. 56(1) of the Advance Care Directives Act 2013 (SA).

11 Charter ss. 13(a) & 15(2).
may be used in a ‘special sense’. The term ‘undue influence’ is not used in Victoria (without further definition) to define criminal conduct potentially attracting imprisonment.

The Committee will write to the Minister seeking further information as to the compatibility of clauses 14(1) and 42(1) with the Charter’s rights to privacy and to freedom of expression.

The Committee makes no further comment.

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13 Existing s. 264 of the Mental Health Act 2014 provides that ‘A person must not, by threats, intimidation, undue influence or coercion, persuade or attempt to persuade another person— (a) not to make a complaint to the Commissioner; or (b) to withdraw a complaint made to the Commissioner’, punishable by a fine of 240 penalty units.
Victorian Fisheries Authority Bill 2016

Introduced 13 September 2016
Second Reading Speech 15 September 2016
House Legislative Assembly
Member introducing Bill Hon. Jacinta Allan MLA
Minister responsible Hon. Jaala Pulford MLC
Portfolio responsibility Minister for Agriculture

Purpose

The Bill would:

- establish the Victorian Fisheries Authority (VFA) as an independent statutory authority with responsibility for regulating and supporting the development of recreational and commercial fishing and aquaculture in Victoria
- amend the Fisheries Act 1995 to enable the VFA and its chief executive officer to perform and exercise regulatory and other functions or powers under that Act
- make further consequential amendments to the Conservation, Forests and Lands Act 1987, the Fisheries Act 1995 and a number of other Acts.

Charter report

Equality and Cultural Rights – Principle of Equity – Matters Authority must have regard to when exercising powers

Summary: Clause 18 provides that the Victorian Fisheries Authority must have regard to the ‘principle of equity’ when making decisions under the Bill. Clause 14 defines that principle as requiring ‘equity’ between persons irrespective of their ethnicity or culture. This clause does not require consideration of the need for differential treatment in order to avoid discrimination or for the need for special measures to advance groups disadvantaged because of discrimination in s 8 of the Charter. The clause also does not require consideration of the cultural rights of Aboriginal people in s 19 of the Charter. The Committee will write to the Minister seeking further information.

The Committee notes that clause 18 provides that the Victorian Fisheries Authority must have regard to a number of specified matters ‘when exercising its powers, performing its functions or making a decision’ under the Bill, including ‘the principles set out in Division 2’.

One of the principles set out in Division 2 of the Bill is the ‘principle of equity’ contained in clause 14. Clause 14 specifies that:

The principle of equity means—
(a) equity between persons irrespective of their—
(i) personal attributes, including age, physical ability, ethnicity, culture, gender and financial situation; or
(ii) location, including whether in a growth, urban, regional, rural or remote area;

The term ‘equity’ is not defined in the Bill. The ordinary meaning of equity is ‘the quality of being fair and impartial’.14 The principle of equity appears to require impartiality in treatment of different people despite their differing ethnicity or culture. In many cases this impartiality will ensure respect

for the right to equality and freedom from discrimination under s 8 of the Charter but in some matters likely to be dealt with by the Authority a person’s Aboriginal ethnicity or culture will justify the partial rather than impartial treatment of that person by the Authority. For example where an Aboriginal person has a traditional relationship with a particular area of water in relation to which the Authority is making a decision. Partial treatment when making decisions of this kind may be required by the right to equality and freedom from discrimination in s 8(3) of the Charter and is allowed for by the special measures provision in s 8(4) of the Charter. Partial treatment may also be required in order to respect the cultural rights of Aboriginal people to maintain their distinctive relationship with any waters with which they have a connection under their traditional laws and customs under s 19(2)(d).

The Statement of Compatibility does not address clause 14. Whilst clause 18 does not prohibit the Authority from considering matters that are not contained in that clause, the inclusion of the principle of equity in clause 14 makes it mandatory for the Authority to consider the principle that people be treated impartially. As a result, these clauses may implicitly require a decision maker to disregard consideration of those aspects of the right to equality and cultural rights in the Charter that require people to be treated partially by the Authority.

The Committee will write to the Minister seeking further information as to the compatibility of clauses 18 and 14 with the Charter’s right to equality and the cultural rights of Aboriginal people.

The Committee makes no further comment.

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15 This right was given detailed consideration by the Victorian Civil and Administrative Tribunal in Lifestyle Communities Ltd (No 3) [2009] VCAT 1869.
16 This right was considered by the Court of Appeal in Clarke-Ugle v Clarke [2016] VSAC 44 at [143] – [149] (Tate AJA, Ferguson and McLeish JJA agreeing).
Births, Deaths and Marriages Registration Amendment Bill 2016

The Bill was introduced into the Legislative Assembly on 18 August 2016 by Hon. Martin Pakula MLA, Attorney-General. The Committee considered the Bill on 12 September 2016 and made the following comments in Alert Digest No. 12 of 2016 tabled in the Parliament on 13 September 2016.

Committee comments

Charter report

Equality – Acknowledgment of sex – Requirement for support by another adult – People in detention or supervision – Refusal if likely to be offensive to a victim of crime or an appreciable sector of the community

Summary: Clauses 8 and 10 provide that adults, wherever their birth is registered, may apply for an official acknowledgement of their believed sex in Victoria. However, only a person whose birth is registered in Victoria will automatically be a person of the acknowledged sex for the purposes of Victorian law. The Registrar cannot acknowledge the believed sex of an adult if no other adult ‘supports’ the application or, for a person in detention or supervision, if the acknowledgment is likely to offend a victim of crime or an appreciable sector of the community. The Committee will write to the Attorney-General seeking further information.

The Committee notes that, where an application is made to the Registrar stating the person’s sex to be as nominated:

- for a person whose birth is registered in Victoria, clause 9, inserting a new section 30C, provides that the Registrar may alter the record of the person’s sex in the person’s birth registration; and

- for a person whose birth is not registered in Victoria, clause 11, amending existing s. 30F, provides that the Registrar may issue a document acknowledging the name and believed sex of the person.

The Committee observes that existing s. 30G provides that effect of the alteration of the record by a person whose birth is recorded in Victoria is that, ‘for the purposes of, but subject to, the law of Victoria’, the person is a person of the sex as altered. However, as there is no equivalent provision for a document acknowledging the believed sex of a person, only a person whose birth is recorded in Victoria that will automatically be a person of the acknowledged sex for the purposes of Victorian law. By contrast, in the ACT, ACT residents whose birth is registered elsewhere will be treated as a person of the acknowledged sex stated in a ‘recognised details certificate’ under (but subject to) ACT law.

The Statement of Compatibility remarks:

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1 Existing s. 30G(3).
2 New section 30FA requires that the Registrar notify the interstate registering authority of the sex acknowledged in the document. This may have the effect that the person will be treated as a person of the acknowledged sex under the law of the state or territory where the person’s birth is registered (e.g. Births, Deaths and Marriages Registration Act 1997 (ACT), s. 29D(2)), but not as a person of the acknowledged sex under Victorian law.
3 Births, Deaths and Marriages Registration Act 1997 (ACT), s. 29D(1). See also Births, Deaths and Marriages Registration Act 1995 (NSW), s. 32J, providing similarly for a registered change of sex by a person whose birth is not registered in Australia.
New section 30A in clause 8 of the bill removes the current requirements to have undergone sex affirmation surgery and to be unmarried. New section 30E in clause 10 of the bill similarly removes these requirements for a person whose birth is registered in a place other than Victoria, in order to apply for a document that acknowledges their sex in accordance with their nominated sex descriptor.

In removing these unnecessary barriers, the bill promotes the right to equality and makes it easier for trans, gender diverse and intersex people to alter their birth record in a way that recognises the inherent dignity and autonomy of a person.

The Committee notes that new sections 30A(3)(c)(i) and 30E(4)(c)(i) provide that applications by adults must be accompanied by a supporting statement. New sections 30A(4) and 30E(5) provide that the supporting statement must:

(b) be made by a person who is aged 18 years or over and who has known the applicant for at least 12 months; and

(c) state that the person making the supporting statement—

(i) believes that the applicant makes the application to alter the record of the sex of the applicant in good faith; and

(ii) supports the application.

There is no requirement in the existing law on recognition of sex or the new provisions on acknowledgment of a child’s believed sex that anyone expressly state that they ‘support’ the application.

The Committee observes that the effect of new sections 30A(4)(c)(ii) and 30E(5)(c)(iii) is that an adult will be unable to have their believed sex officially acknowledged unless there is another adult (who has known them for at least 12 months and believe the application is in good faith) who ‘supports the application’. While the Committee understands that verification of the application is made in good faith is necessary to protect the integrity of the register, the Committee notes that the further requirement for a statement that another person who has known the applicant for 12 months ‘supports’ the application may exclude people whose families and friends do not want the adult’s believed sex to be acknowledged.

The Committee also notes that clause 13, inserting a new section 30FC, provides that applications made by a ‘restricted person’ (including prisoners, parolees and registered sex offenders) ‘must be accompanied by an appropriate approval.’ Clauses 20, 21, 22, 23 and 24, inserting new sections 488R(2)(d) of the Children, Youth and Families Act 2005, 47Q(2)(d) and 79HD(2)(b) of the Corrections Act 1986, 181D(2)(b) of the Serious Sex Offenders (Detention and Supervision) Act 2009 and 70T(2)(a) of the Sex Offenders Registration Act 2004, bar any approval if the application if the approver ‘is satisfied that the alteration of the record of sex if registered or the issuing of a document acknowledging name and sex would be reasonably likely... to be regarded as offensive by a victim of crime or an appreciable sector of the community.’ There is no such restriction in the existing law for applications for recognition of sex.

The Committee observes that the effect of new sections 488R(2)(d) of the Children, Youth and Families Act 2005, 47Q(2)(d) and 79HD(2)(b) of the Corrections Act 1986, 181D(2)(b) of the Serious Sex Offenders (Detention and Supervision) Act 2009 and 70T(2)(a) of the Sex Offenders Registration Act 2004 is that a restricted person (including a child) will be unable to have their believed sex acknowledged if any victim of crime or any appreciable sector of the

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Existing s. 30B requires two statutory declarations ‘verifying’ that an adult applicant has undergone sex affirmation surgery. New section 30B requires a statement by a doctor or psychologist stating that the alteration is in a child applicant’s best interest and that the child applicant has the capacity to consent to the alteration.
community would be offended by that acknowledgment. The Second Reading Speech remarks:

[T]he bill will provide additional checks and safeguards in respect of applications by people (both adults and juveniles) in detention or under supervision who wish to make an application to alter their recorded sex. The additional conditions are very similar to those that currently apply in relation to the change of name process. The approval process provides for the relevant supervising authority to consider the application with regard to its reasonableness, necessity and other relevant considerations including security or the safe custody or welfare of the person or any other person.

While the Committee understands the need for special checks and safeguards to ensure the bona fides and safe management of people in detention or under supervision, the Committee notes that the effect of these provisions is that even otherwise reasonable, necessary and safe applications by restricted persons for an acknowledgement of believed sex must be refused if others strongly object." Unlike change of name applications, a person’s believed sex is a protected characteristic under the Charter’s equality rights. As well, an inquiry by the relevant supervising authority into whether a victim of crime or an appreciable sector of the community is likely to find the acknowledgement offensive may interfere with the privacy of the restricted person.vii

The Committee will write to the Attorney-General seeking further information as to whether or not:

- extending existing s. 30G(3) to applications under new section 30E, so that a person whose birth is registered outside of Victoria who receives a document acknowledging their believed sex, is a person of that sex ‘for the purposes of, but subject to, the law of Victoria’ would be a less restrictive alternative on the Charter’s equality rightsviii with respect to gender identity that would be reasonably availableix to achieve the purpose of making it easier for trans, gender diverse and intersex people to alter their birth record or have their sex acknowledged in a way that recognises the inherent dignity and autonomy of a person, while ensuring the integrity of the Register and ensuring the security or the safe custody or welfare of any person.

Expression – Altered birth certificate – Certificate must not state that the record has been altered

Summary: The effect of new section 30D(b) is to absolutely prohibit the inclusion of the person’s previously registered sex in the person’s birth certificate. The Committee will write to the Attorney-General seeking further information.

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v New sections 30C(3) and 30F(6), read with clause 5’s new definition of ‘prohibited sex descriptor’, provide that the Registrar may refuse to acknowledge a believed sex if the nominated ‘sex descriptor’ is offensive or obscene. As well, clauses 20 to 24 provide that a relevant supervising authority may only approve an application by a restricted person that is ‘necessary or reasonable’ and must refuse applications that are reasonably likely to (for detainees) ‘be a threat to... security’, ‘jeopardise the safe custody of welfare of any’ detainees or ‘be used to further an unlawful activity or purpose’ or (for people under supervision) ‘be used to evade or hinder supervision’.

vi Charter s. 8. See Equal Opportunity Act 2010, s. 6(d) (‘gender identity’, defined to include ‘identification on a bona fide basis by a person... as a member of a particular sex (whether or not the person is recognised as such)... by seeking to live, as a member of that sex.’)

vii Charter s. 13(a).

viii Charter s. 8(2) & (3).

ix Charter s. 7(2)(e).
The Committee notes that clause 9, inserting a new section 30D(b), provides that:

After the record of a person’s or a child’s sex in the person’s or the child’s birth registration is altered, any certificate issued by the Registrar concerning the birth registration—...

(b) must not state that the record of the person’s or the child’s sex has been altered....

The Committee observes that the effect of new section 30D(b) is to absolutely prohibit the inclusion of the person’s previously registered sex in the person’s birth certificate. The Committee considers that clause 9 may engage the Charter’s right to freedom of expression.\(^x\)

While new section 30D(b) reflects existing Victorian law, the Committee notes that some Australian jurisdictions provide for the person to opt to have the person’s previously registered sex or the fact of the alternation included as a notation in the birth certificate.\(^{xi}\) As well, some jurisdictions permit various people (including the person and a child of the person) to obtain a copy of the certificate that shows one of these facts.\(^{xii}\)

The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 30D(b) with the Charter’s right to freedom of expression.

The Committee thanks the Minister for the attached response.

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\(^x\) Charter s. 15(2).

\(^{xi}\) Births, Deaths and Marriages Registration Act 1995 (NSW), s. 32E; Births, Deaths and Marriages Registration Act 1996 (NT), s. 28E; Births, Deaths and Marriages Registration Act 1999 (Tas), s. 28D. See also existing s. 30F(4), which provides similarly for documents acknowledging the believed sex of persons whose birth is registered outside of Victoria.

\(^{xii}\) Births, Deaths and Marriages Registration Act 1997 (ACT), s. 27(2); Births, Deaths and Marriages Registration Act 1995 (NSW), s. 32F; Births, Deaths and Marriages Registration Act 1996 (NT), s. 28F; Births, Deaths and Marriages Registration Act 1999 (Tas), s. 28E.
Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002
By email: nathan.bunt@parliament.vic.gov.au

Dear Ms Blandthorn,

I refer to your letter of 13 September 2016 regarding the Births, Deaths and Marriages Registration Amendment Bill 2016 (the Bill). In your letter you request further information on a number of issues raised by the Scrutiny of Acts and Regulations Committee (SARC) in relation to the Bill.

Please find below further information as requested in your letter responding to the issues identified by SARC.

Equality rights

Effect of alteration of Register and interstate recognition certificates

SARC has sought further information on whether there would be a less restrictive approach on the Charter’s equality rights than that provided for in relation to existing section 30G(3) of the Births, Deaths and Marriages Registration Act 1996 (the Act).

The purpose of existing section 30G(3) of the Act is to set out the legal effect of altering a record of sex in a birth registration or issuing an interstate recognition certificate. It provides that an adult’s sex for the purposes of Victorian law is their recorded sex as altered in their birth registration or as stated in their interstate recognition certificate. The Act defines an ‘interstate recognition certificate’ to mean a current certificate identifying a person as being of a particular sex that is issued under the Gender Reassignment Act 2000 (WA), the Sexual Reassignment Act 1988 (SA) or any other law prescribed by the regulations for the purposes of Part 4A of the Act (no other law has currently been prescribed).

The Bill amends section 30G(3) of the Act to ensure that the effect in Victorian law of a child’s record of sex being altered or of a child being issued with an interstate recognition certificate is the same as for adults. The amendment to section 30G(3) ensures that Victorian law has equal effect for both children and adults. I am satisfied that the amendments to existing section 30G(3) of the Act promote the Charter’s equality rights by extending its application to children consistent with the section’s purpose to provide for the effect of altering the Register and the issuing of interstate recognition certificates.
The Government has noted the Committee’s comments on whether a document acknowledging a person’s believed sex issued in response to an application under section 30E should be included within the scope of section 30G(3) and will give further consideration to the issue.

**Requirement for a supporting statement**
SARC has sought further information on whether there would be a less restrictive approach on the Charter’s equality rights than that provided for in the Bill in relation to the new requirement in the Bill that an application made by an adult must be accompanied by a statement from a person who supports the application.

New sections 30A(3)(c)(i) and 30E(4)(c)(i) of the Bill provide that applications made by adults must be accompanied by a supporting statement. The person making the supporting statement must state that they support the application.

Although the existing law does not require the applicant to provide evidence with their application that another person supports their application, the existing law has more onerous requirements in relation to the supporting evidence that the applicant must provide with their application. The Act currently requires an applicant to provide supporting evidence in the form of two statutory declarations from each of two doctors verifying that the applicant has undergone sex affirmation surgery.1

New sections 30A and 30E of the Bill propose a simplified and ‘de-medicalised’ process that is based on a self-declaratory model, with supporting evidence to ensure the integrity of the Register. Under the proposed application process in the Bill, an applicant self-declares their nominated sex by means of a statutory declaration and provides a supporting statement from another adult who has known the applicant for at least 12 months. The person making the statement must state that they believe the applicant makes the application in good faith and must support the application.

The requirement that the person making the supporting statement expressly indicate their support for the application is important to ensure that the person has turned their mind to the significance of the applicant’s decision to change their recorded sex. It also reinforces the nature of the supporting statement.

A supporting statement need not be made by a family member or friend of the applicant. It could be made by any adult as long as the person has known the applicant for at least 12 months, for instance a neighbour or work colleague. I am therefore satisfied that the requirement is not overly restrictive and is appropriate to ensure the integrity of the Register.

SARC further observes that there is no requirement in the new provisions that anyone expressly state that they ‘support’ an application made in relation to a child. In this regard, I note that the Bill provides for an application to alter a child’s record of sex where none has previously been provided.

The requirements for making an application in relation to a child are robust. They require the parents or guardian of the child to make an application on the child’s behalf. An application cannot be made unless the child consents, and the application must include a statutory declaration that the parents believe the alteration is in the best interests of the child. The application must also be accompanied by a supporting statement from a doctor, registered psychologist or other prescribed person stating that it is in the best interests of the child and, if the child is under 16, that the child has capacity to consent to the alteration.2 These requirements provide important safeguards appropriate to ensure the health and wellbeing of the child.

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1 *Births, Deaths and Marriages Registration Act 1996*, s 30B.
2 The new application processes in relation to children are set out in new sections 30B and 30EA of the Bill.
Requirements for acknowledgement of sex applications by restricted persons
SARC has sought further information on whether there would be a less restrictive approach on the Charter’s equality rights than that provided for in the Bill in relation to the requirement that a restricted person’s acknowledgment of sex application be refused by the relevant person or body, if it would be reasonably likely to be regarded as offensive by a victim of crime or an appreciable sector of the community.

Clauses 20, 21, 22, 23 and 24 of the Bill make consequential amendments to other Acts in order to provide an appropriate approval process where a restricted person³, being a prisoner, prisoner on parole, youth detainee or sex offender, seeks to make an acknowledgment of sex application⁴. This means a restricted person must first obtain the approval from the relevant person or body (for instance, the Adult Parole Board or Secretary of the Department of Justice and Regulation) before making an application.

The amendments set out the considerations that the relevant person or body must take into account when making a decision about whether a restricted person can make an acknowledgment of sex application. In each case, the relevant person or body may only approve the application if satisfied that the application is in all the circumstances necessary or reasonable. In addition, the amendments set out the circumstances when the relevant person or body must not approve an application, including where the alteration of the record of sex if registered or the issuing of a document acknowledging name and sex would be reasonably likely to be regarded as offensive by a victim of crime or an appreciable sector of the community.

Each application will be determined on a case by case basis. There is no requirement for the relevant person or body to notify a victim of crime or appreciable sector of the community in order to determine whether the alteration would be regarded as offensive. This assessment would be undertaken on the information already available to the relevant person or body. I am therefore satisfied that the circumstances set out in the Bill providing for when the relevant person or body must not approve an application do not interfere with the privacy of the restricted person.

I am also satisfied that the requirement not to approve an application if it would be offensive to a victim of crime or an appreciable sector of the community is not overly restrictive for the following reason. Where an application is reasonably likely to result in causing offense to a victim of crime or an appreciable sector of the community, the application will not in all the circumstances be reasonable or necessary.

Further, I note the issue raised in your letter that an application by a restricted person must be refused if others strongly object. In this regard I note that new sections 30C(4) and 30F(6) of the Bill provide the Registrar with a discretion to refuse to acknowledge a ‘prohibited sex descriptor’ as defined in clause 5 of the Bill. This discretion is not limited to restricted persons: the Registrar may exercise this discretion in relation to any application to alter a person’s recorded sex.

Further, this discretion does not require the Registrar to refuse to acknowledge a sex descriptor on the basis that others strongly object or to conduct an inquiry into whether others strongly object. The Registrar’s discretion is intended to ensure the integrity of the Register as an accurate record of a person’s sex and is therefore limited to refusing descriptors that reference profanities or that are not reasonably established as sex descriptors.

Freedom of expression
SARC has also sought further information on the compatibility with the Charter’s right to freedom of expression of the requirement in the Bill that a birth certificate issued after the record of sex has been altered not state that the record of sex has been altered.

³ New section 30FB sets out the definition of ‘restricted person’.
⁴ New section 30FB defines ‘acknowledgement of sex application’ to mean an application by or on behalf of a restricted person under new section 30A, 30B, 30E or 30EA or under a law of another State to alter the record of sex of the restricted person in the restricted person’s birth registration.
Clause 9 of the Bill inserts new section 30D(b), requiring that a birth certificate issued after the record of sex has been altered must not state that the record of sex has been altered. The purpose of new section 30D(b) is to ensure that an adult or a child is not forced to disclose personal information regarding the alteration of their record of sex when required to provide their birth certificate, for example, to organisations, institutions or prospective employers.

This provision is an important privacy protection that supports the right not to have one’s privacy unlawfully or arbitrarily interfered with under section 13 of the Charter. New section 30D(b) is strongly supported by Lesbian, Gay, Bisexual, Trans and Intersex individuals and organisations as it is seen as an important safeguard of their right to privacy.

I consider that any interference with the Charter’s right to freedom of expression as a result of new section 30D(b) is the least restrictive way of achieving its purpose, consistent with the Charter’s right to privacy.

If further information is required I would be pleased to assist.

Yours sincerely

THE HON MARTIN PAKULA MP
Attorney-General
Traditional Owner Settlement Amendment Bill 2016

The Bill was introduced into the Legislative Assembly on 30 August 2016 by Hon. Martin Pakula MLA, Attorney-General. The Committee considered the Bill on 12 September 2016 and made the following comments in Alert Digest No. 12 of 2016 tabled in the Parliament on 13 September 2016.

Committee comments

Retrospective application of laws — Future application based on past events — Grants of aboriginal title made prior to commencement of the Bill — Whether any person adversely affected

Clause 26 of the Bill would insert a number of transitional provisions, including new section 93, in new Part 8, after Part 7 of the Principal Act.

New section 93 would provide that amendments to Part 3 of the Principal Act (relating to the effect of granting aboriginal title on interests in land) would apply in relation to any grants of aboriginal title made prior to the commencement of the Bill.

The Committee notes that new section 93 would therefore make clauses 7-10 operate retrospectively.

On the available material, the Committee is unable to conclude whether any person may be adversely affected by this retrospective amendment. The Committee will therefore write to the Minister to seek clarification on this point.
Ms Lizzie Blandthorn MLA  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002

By email: nathan.bunt@parliament.vic.gov.au

Dear Ms Blandthorn,

Thank you for your letter of 13 September 2016 regarding the Scrutiny of Acts and Regulations Committee’s recent consideration of the Traditional Owner Settlement Amendment Bill 2016 (the Bill). The Committee notes that clause 26 of the Bill inserts new section 93 in the Principal Act, which would make clauses 7 – 10 of the Bill operate retrospectively. The Committee seeks clarification as to whether any person may be adversely affected by this retrospective amendment.

Clauses 7 – 10 of the Bill protect existing interests in Crown land that are the subject of an Aboriginal title grant. These clauses are necessary in order to allow the State to deliver on some outstanding commitments to make grants of Aboriginal title under the GunaiKurnai and the Dja Dja Wurrung settlements.

I am advised that the original policy intention of the Traditional Owner Settlement Act 2010 was that existing interests should survive a grant of Aboriginal title. Aboriginal corporations that currently hold grants of Aboriginal title received those grants knowing that existing interests were intended to survive.

Further, the State is not aware of any existing interests that have not survived the granting of Aboriginal title (over the 13 parks and reserves already granted). Therefore, it is my view that no person is expected to be adversely affected by the retrospective application of new section 93 proposed by the Bill.

Yours sincerely,

THE HON MARTIN PAKULA MP  
Attorney-General
Report on Subordinate Legislation

SR No. 47 – Sex Work Regulations 2016

The Committee wrote to the Minster for Consumer Affairs, Gaming and Liquor Regulation in relation to the above legislative instrument.

The Committee thanks the Minister for the attached response.

10 October 2016
Committee Room

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The Committee reports on this regulation pursuant to section 17(fa) of the Parliamentary Committees Act 2003 and section 21(1)(ha) of the Subordinate Legislation Act 1994.
16 August 2016

The Honourable Marlene Kairouz MP
Minister for Consumer Affairs, Gaming and Liquor Regulation
Level 26, 121 Exhibition Street,
Melbourne 3000

By email: Marlene.Kairouz@parliament.vic.gov.au
mark.o'brien@minstaff.vic.gov.au

Dear Minister

SR No. 47 – Sex Work Regulations 2016

The Regulations were considered by the Regulation Review Subcommittee (the Subcommittee) of the Scrutiny of Acts and Regulations Committee (the Committee) at a meeting on 15 August 2016 within its terms of reference as per the attached advice of the Secretariat and the Human Rights adviser.

The Subcommittee would appreciate your advice in respect of its queries.

The Subcommittee would appreciate your office forwarding a signed copy of the response by email to our legal adviser at – helen.mason@parliament.vic.gov.au

The Subcommittee will meet to consider the Regulations on 12 September 2016 and would appreciate your response on or before 9 am on that date.

Please do not hesitate to contact me should you wish to discuss any of the matters raised by the Subcommittee.

Yours sincerely

Ms Lizzie Blandthorn MP
Chair
Regulation Review Subcommittee
ADVICE TO SARC: Prepared by the Secretariat and the Human Rights Adviser

SR No. 47 – Sex Work Regulations 2016

Keywords – Equality – Expression – Presumption of innocence – Sex work advertising

Regulation of sex work advertising in Victoria

Sex work advertising in Victoria is governed by both the Sex Work Act 1994 and the Sex Work Regulations 2016.

Existing s. 17 of the Sex Work Act 1994 provides:

(1) A person must not publish or cause to be published an advertisement for sex work services that—
   (a) describes the services offered; or
   (b) contravenes the regulations.
   
   Penalty: 40 penalty units.

Other parts of s. 17 ban advertisements from being ‘broadcast or televised’ (s. 17(2)), inducing a person to seek sex work employment (s. 17(3)) and referring to the word ‘massage’ (s. 17(4)). Section 17(5) provides that an advertisement for a sex work service business is deemed to be published by the owner of that business unless the owner proves the contrary.

Regulation 11 of the 2016 regulations (made under s. 18 of the Act) sets out contraventions of the regulations for the purposes of s. 17(1)(b). It replaces regulation 9 of the now repealed 2006 regulations. Marked additions are underlined and subtractions are indicated by strikethrough (ignoring any numbering changes):

(4) An advertisement for a business carried on by a sex work service provider must not—
   (a) subject to subregulation (5), contain a photographic or other pictorial representation of a person unless it is restricted to the head and shoulders; or
   (b) be published through radio, television, film or video recording; or
   (c) contain a photographic or other pictorial representation of a particular person unless that person has given written consent for that advertisement and a copy of the signed consent has been given to that person; or
   (d) refer to the health of, or any diagnostic procedures or medical testing undertaken by, the person offering sexual services.

(5) An advertisement for a business carried on by a sex work service provider that is published on the Internet may contain a photographic or other pictorial representation of a person which is not restricted to the head and shoulders, provided that the advertisement does not contain a photographic or other pictorial representation of—
(a) the bare sexual organs, buttocks or anus of a person, or frontal nudity of the genital region; or  
(b) bare breasts; or  
(c) a sexual act or simulated sexual act; or  
(d) a person under the age of 18 years.

(6) An advertisement for a business carried on by a sex work service provider may—
(a) must not contain references to the race, colour or ethnic origin of the person offering sexual services; and
(b) may contain references to the sexual orientation, race, colour or ethnic origin of the person offering sexual services; and
(c) may state that safer sexual practices are engaged in and that condoms are always used.

The 2016 regulations make three changes to previous regulations:

- a new ban on publishing advertising for a business carried on by a sex work service provider through radio, television, film or video recording (reg 11(4)(b)) (albeit overlapping with an existing ban on broadcasting or televising an advertisement);
- a new permission to publish advertising for a business carried on by a sex work service provider that contains a photograph that goes beyond the head and shoulders on the Internet, but only if it does not show bare sexual organs, buttocks, anus or frontal nudity of the genital region, bare breasts, a sexual act or simulated sexual act, or a person under 18 (reg 11(5));
- replacing the earlier ban on advertising for a business carried on by a sex work service provider that contains references to the race, colour or ethnic origin of the person offering sexual services with a new permission to publish such ads (reg 11(6)(a)).

**Human rights certificate**

The original regulations were enacted in 2006 before SARC’s Charter scrutiny role commenced (on 1 January 2007), so the sex work regulations (and s17 of the Act) have not previously gone through SARC scrutiny. In the new regulations’ human rights certificate, the Minister for Community Affairs certifies that the new regulations ‘do not limit any human right set out in’ the Charter. However, there are some aspects of regulation 11 that potentially limit human rights. These include all three changes noted above, and also an existing prohibition (reg. 11(4)(d)).

Reg 11 engages the Charter’s right to freedom of expression (and also, potentially, the right to effective protection against discrimination.) However the view may be that the regulation doesn’t limit those rights, because it falls within specific limitation on those rights (e.g. Charter s. 15(3), on reasonably necessary limits to protect public health, public morality or others’ rights, or Charter s. 8(4), which permits some positive discrimination.) In contrast to Charter s. 28 (for Bills), s. 12A of the Subordinate Legislation Act (for statutory rules) does not require the Minister to explain how a regulation is compatible with human rights.
Reg 11(4)(b)’s ban on advertising of sex work by broadcast and video recording

Existing s. 17(2) states:

A person must not cause an advertisement for sex work services to be broadcast or televised.
Penalty: 40 penalty units.

New reg. 11(4)(b) states:

An advertisement for a business carried on by a sex work service provider must not—
(b) be published through radio, television, film or video recording.

The explanatory memorandum says that reg 11(4)(b) ‘provides that a sex work service provider must not publish an advertisement for a sex work business through video recording (in addition to existing proscription.’)

There is no explanation of what exactly this ban is meant to cover (e.g. distributing video ads by DVD, email?; placing videos online?; only ‘recordings’ or all moving images, e.g. digital slideshows, graphics, etc?, what is meant by ‘published through’? why the passive voice?) or why. There is no similar ban on video recordings in the NT or NZ (which also regulate sex work advertising), but there is a similar ban in Qld legislation (Prostitution Act 1999 (Qld), s. 93(3): ‘A person must not publish any advertisement for prostitution through radio or television or by film or video recording.’)

The Subcommittee seeks further information about the intended operation of new reg. 11(4)(b) and whether it is compatible with Charter s. 15(2)’s right to freedom of expression.

In addition, the extension of the prohibition in existing s. 17 beyond print and broadcast (including, presumably, the internet) seems to extend the scope of existing s. 17(5)’s reverse onus on advertising (which requires the owner of a sex work service that is advertised to prove that he or she did not publish the ad.) It is one thing for an owner to prove that he or she did not place a commercial ad with a traditional publisher. But it is another for an owner to prove that he or she did not publish a webpage or an Internet banner or distribute a video recording. Accordingly, the Subcommittee seeks further information about the compatibility of reg 11(4)(b), when read with existing s. 17(5), with Charter s. 25(1)’s right to be presumed innocent until proved guilty.

Reg 11(4)(d)’s ban on advertising health or medical testing of sex worker

Most of the existing prohibitions on print ads for sex work fall fairly clearly within Charter s. 15(3):

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
(a) to respect the rights and reputation of other persons; or
(b) for the protection of national security, public order, public health or public morality.
For example, the requirement for written authorisations by the subject of a photo falls within Charter s. 15(3)(a) and the limitation to head and shoulders shots in print advertising presumably falls within the ‘public morality’ wing of Charter s. 15(3)(b).

It is not clear how reg 11(4)(d)’s ban pm ads that ‘refer to the health of, or any diagnostic procedures or medical testing undertaken by, the person offering sexual services’ (or the identical previous ban in reg 9(6)(b)) (aside from referring to safer – not ‘safe’? – sex and condoms) falls within either wing of Charter s. 15(3). Insofar as the claims about health or testing are correct, the purpose of this ban is also unclear. There do not seem to be similar bans in other jurisdictions where sex work is legal, such as NT, Tasmania, Qld, WA and NZ. However, in the ACT, prostitutes are banned from telling anyone the details or results of a medical test if the prostitute intends that the other person believe that the prostitute does not have an STD (Prostitution Act 1992 (ACT), s. 26(2)). Older laws in NSW and Victoria barred prostitutes from ‘mak[ing] use of any certificate signifying or implying that such person is cured of or is free from venereal disease... for the purpose of or in relation to or in connexion with prostitution...’.

**The Subcommittee seeks further information about the compatibility of reg 11(4)(d) with Charter s. 15(2)’s right to freedom of expression.**

Reg 11(5)’s prohibition of advertising sex work online with sexual full-body photos

New reg 11(5) removes the previous limit on photography in advertisements for sex work services to head and shoulders images in online advertising, so long as the photos don’t show:

- *(a)* the bare sexual organs, buttocks or anus of a person, or frontal nudity of the genital region; or
- *(b)* bare breasts; or
- *(c)* a sexual act or simulated sexual act; or
- *(d)* a person under the age of 18 years.

No reasons have been given for regs 11(5)(a)-(c). Is the purpose to keep the internet free of such images or to protect sex workers?

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1 According to ACT Hansard from 1991: “This Bill provides for the situation where somebody attempts to use a test as a method of showing that a prostitute is in some way clean, which is an entirely inappropriate way to go. I think that comes through very clearly in the Bill.” An earlier interim committee report stated: “The committee believes that a certificate stating that a prostitute is free from disease is valid at the time of testing only and, therefore, is of only limited value. Whilst of the opinion that a medical practitioner should be able to issue a certificate stating that, at the time of the testing, a person was, or was not, infected with an STD, the committee believes it to be unacceptable that someone should be able to use such a certificate to claim they are free of disease. Further, a licence holder should not be allowed to display a medical certificate, or use the result of an examination, to induce a belief that the prostitution is disease free.” Select Committee on HIV, Illegal Drugs & Prostitution, *Prostitution in the ACT* (Interim Report), ACT Legislative Assembly, April 1991, [11.22].

2 *Venereal Diseases Act 1958* (Vic), s. 12; *Venereal Diseases Act 1918* (NSW), s.15.
The terms of reg 11(a) and (b) are unclear. While a ban on showing a person’s ‘bare sexual organs’ or ‘anus’ is straightforward, what does a ban on ‘frontal nudity of the genital region’ add? And what is exactly covered (or, more to the point, not covered) by a ban on showing ‘bare... buttocks’ or ‘bare breasts’? As well, does the ban on ‘bare breasts’ extend to the chests of male sex workers? By contrast, Queensland’s equivalent provision (Prostitution Regulation 2014, reg. 15(1)(i)) only bans a photograph or image of:

(A) the sexual organs or anus of a person; or
(B) a sexual act or a simulated sexual act; or
(C) a child; or
(D) an animal.

The Subcommittee seeks further information about the operation of reg 11(5) and its compatibility with Charter s. 15(2)’s right to freedom of expression, including whether or not Queensland’s reg 15(1)(i) is a less restrictive alternative reasonably available.

Regulation 11(6)(a)’s permission to advertise a sex worker’s race, colour and ethnicity

Until 1 June this year, sex work ads could refer to the ‘sexual orientation’ of the person offering sexual services but not to his or her race, colour or ethnicity. However, from June 1, sex work ads can refer to all of these things. By contrast, existing legislation in NT (Prostitution Regulations 1992 (NT), reg. 4(3)(b)) ban such references (as well as to age and physical attributes) and other jurisdictions are silent on this. No explanation has been given for this provision or its potential effects.

Because it is expressed as a positive permission, reg 11(6)(a) potentially limits the effect of Victoria’s Equal Opportunity Act 2010, which bans discrimination on the ground of race (including colour and ethnicity) in employment. That is because s. 75 of that Act provides:

(1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of—
   (a) an Act, other than this Act; or
   (b) an enactment, other than an enactment under this Act.

(2) For the purpose of subsection (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

The Sex Work Regulations 2016 are an ‘enactment’ under s. 75(1)(b) and it may be argued that reg 11(6)(a) ‘authorises or necessitates’ potentially discriminatory conduct in response to customer demands such as preferring particular races in hires and pay.

The Subcommittee seeks further information about the interaction of reg 11(6)(a) with the Equal Opportunity Act 2010 in light of s 75(1)(b) of that Act, and also whether reg 11(6)(a) is compatible with Charter s. 8(3)’s right to equal and effective protection against discrimination.
Ms Helen Mason  
Legal Adviser  
Scrutiny of Acts and Regulations Committee  
By email: helen.mason@parliament.vic.gov.au

Dear Ms Mason

Queries regarding SR No. 47 — Sex Work Regulations 2016

Thank you for your letter dated 16 August 2016 regarding the Regulation Review Subcommittee’s (the Subcommittee’s) questions about the Sex Work Regulations 2016 (the Regulations).

I am pleased to provide the following advice in relation to the policy and human rights related queries raised by the Subcommittee.

Regulation 11(4)(b) new prohibition on publication of sex work advertising as a video recording

As the Subcommittee notes, the Regulations introduce a new prohibition (in regulation 11(4)(b)) on publishing advertisements relating to sex work businesses by ‘video recording’.

The addition of ‘video recording’ to the list of prohibited media for advertising relating to a sex work business is intended to address the growth of Internet advertising and ‘streaming’ media. The prohibition on the use of video recordings contemplates the use of any video file format, such as WAV and MP4 files, whether posted online or made available via other media, to represent images of sex workers. It is not intended to capture animated picture formats which are covered by the regulations as images.

The Subcommittee has queried whether regulation 11(4)(b) is compatible with the right to freedom of expression under section 15(2) of the Charter of Human Rights and Responsibilities Act 2006 (the Charter). Section 15(3)(b) states that the right to freedom of expression may be subject to lawful restrictions reasonably necessary for the protection of public morality. In my view, any interference with freedom of expression occasioned by regulation 11(4)(b) falls within this internal qualification on the right. Regulation 11(4)(b) has the same purpose as the existing section 17(2) of the Sex Work Act 1994 (the Act), which prohibits a person from broadcasting or televising an advertisement for sex work services. Both provisions protect people from exposure to sex work advertising which they have not sought out. Regulation 11(4)(b) ensures that section 17(2) is not outflanked by the growth of Internet advertising and ‘streaming’ media since the Act came into effect. In my opinion, regulation 11(4)(b) therefore does not limit the right to freedom of expression under the Charter.

I also note that the inclusion of ‘video recording’ is particularly intended to restrict sex work advertising on electronic media that can have a higher exposure rate to children, such as streaming video platforms similar to YouTube. In this respect, regulation 11(4)(b) promotes the
right of every child to such protection as is in his or her best interests under section 17(2) of the Charter.

The Subcommittee has also asked whether regulation 11(4)(b), when read with section 17(5) of the Act, is compatible with the right to be presumed innocent until proved guilty under section 25(1) of the Charter. Section 25(1) states that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. Section 17(5) of the Act has the effect that, in a proceeding for an offence against advertising controls imposed by the Act or regulations, where it is proved that an advertisement has been published for or relating to a sex work business, the owner of the business is presumed to have caused the advertisement to be published, in the absence of proof to the contrary. Section 17(5) thereby imposes a legal burden of proof on the owner of the business, which they must discharge in order to avoid liability for the offence.

In my view, regulation 11(4)(b) does not, in and of itself, limit the right to be presumed innocent, as all it does is prohibit certain conduct (rather than impose the reverse onus). Further, no amendment to regulation 11(4)(b) could address the issue at hand. However, I recognise that section 17(5) of the Act (which pre-dates the Charter) applies to prosecutions of a range of offences, including that contained in regulation 11(4)(b), and limits the right to be presumed innocent. Further consideration will be given to whether such limitation can be demonstrably justified within the meaning of section 7(2) of the Charter when the Act is next reviewed.

In the meantime, I note that offences against section 17 are punishable by a penalty of up to 40 penalty units, rather than a term of imprisonment.

Regulation 11(4)(d) prohibition on advertising health or medical testing of a sex worker

As the Subcommittee has noted, regulation 11(4)(d) prohibits advertisements that refer to the health of, or any diagnostic procedures or medical testing undertaken by, a person offering sexual services.

The Subcommittee has queried whether regulation 11(4)(d) is compatible with the right to freedom of expression under section 15(2) of the Charter. On this point, I note that section 15(3)(b) recognises that the right to freedom of expression may be subject to lawful restrictions reasonably necessary for the protection of public health.

Advertisements that refer to the health of or testing undertaken by a sex worker may create an impression that the sex worker does not have a sexually transmissible infection. As a consequence, sex workers and clients may be less careful about engaging in safer ('safer' being the current preferred term) sexual practices, such as using condoms, which can limit the spread of sexually transmissible infections.

This is problematic because, although claims about health or testing may be correct, they are not necessarily current. In particular, a test only establishes that a person is free of sexually transmissible infections at the time of the test, and is therefore only valid only until the person next engages in sexual activity. Moreover, some sexually transmissible infections, such as HIV, are not detectable for a certain period of time after they are transmitted, and therefore may not necessarily be picked up in a sexual health test.

Regulation 11(4)(d) helps to ensure that an advertisement does not create a misleading impression that a sex worker does not have a sexually transmissible infection, when this cannot be guaranteed. In my opinion, regulation 11(4)(d) falls within the internal qualification in section 15(3)(b) of the Charter, and therefore does not limit the right to freedom of expression.
Regulation 11(5) and the form of the advertising content restrictions

Previously, regulation 9(4) of the Sex Work Regulations 2006 provided that a photographic or other pictorial advertisement of a sex worker could only show the head and shoulders of the sex worker (the 'head and shoulders restriction'). This applied to all forms of advertising, whether it was published in the newspaper, on posters and billboards or on the Internet.

The general response from sex work businesses, sex workers and other stakeholders consulted on this provision during the process of remaking the Regulations was that it was outmoded, easily circumvented via the Internet and created personal safety and privacy risks for sex workers.

In recognition of this feedback, and with the intention of promoting the use of the Internet as a medium for sex work advertising, the head and shoulders restriction was removed for advertising published on the Internet (although certain content restrictions were introduced in regulation 11(5)). Traditional media was considered separately from the Internet because any person can be exposed to its advertising in public, from outdoor or print advertising. This may be contrasted with the Internet, where a person needs to be online in order to be exposed to the relevant material.

In its letter, the Subcommittee queries the purpose of restricting the content of sex work advertising published on the Internet. The content restrictions in regulation 11(5) are intended to balance the effect of removing the head and shoulders restriction for Internet advertisements, by limiting the potential for sexually explicit advertising to be published on the Internet. The regulation is intended to be interpreted with regard to the objectives of the advertising controls, including the limitation of content that is considered sexually explicit by the general public.

The Subcommittee has also questioned whether regulation 11(5) is compatible with the right to freedom of expression under s 15(2) of the Charter. Section 15(3)(b) of the Charter states that freedom of expression may be subject to lawful restrictions reasonably necessary for the protection of public morality.

Regulation 11(5) prevents sex work businesses from using sexually explicit images in their advertisements on the Internet. While regulation 11(5) aims to promote the use of the Internet as a medium for sex work advertising, it also recognises that people cannot always control the advertising to which they are exposed on the Internet. In my opinion, people should be able to use the Internet without being exposed inadvertently to sexually explicit advertising.

Regulation 11(5) covers very similar subject matter to regulation 15(1)(i) of the Prostitution Regulation 2014 (Qld) (the Queensland provision), although regulation 11(5) also bans images of bare buttocks or bare breasts. While images of bare buttocks and bare breasts may not always be sexually explicit, in my opinion they are sexually explicit in the context of an advertisement for a sex work business. The Queensland provision thus does not achieve, to the same extent as regulation 11(5), the purpose of protecting people from being exposed to sexually explicit images inadvertently. For these reasons, I consider that regulation 11(5) falls within the internal qualification in section 15(3)(b) of the Charter, and therefore does not limit the right to freedom of expression.

Regulation 11(6)(a) lifting the restriction on advertising a sex worker's race, colour and ethnicity

Regulation 9(6)(a) of the Sex Work Regulations 2006 prohibited advertising for sex work services from making reference to the race, colour or ethnic origin of the person offering sexual services. The regulation was originally intended to protect sex workers from the risk of racially motivated violence. However, feedback from sex worker peer associations during the public consultation process indicated that the prohibition had the opposite effect because it exposed sex workers to racism which would have otherwise been filtered through advertising.
Lifting the restriction against advertising ethnicity, race or colour through regulation 11(6)(a) of the Regulations gives sex workers a greater degree of control over the promotion of their services, the clients that they engage and the tools to avoid racially motivated violence and client dissatisfaction.

The Subcommittee has asked whether regulation 11(6)(a) could 'authorise or necessitate' discriminatory conduct within the meaning of section 75(1)(b) of the Equal Opportunity Act 2010 (the EO Act), such as discriminatory hiring practices or rates of pay, based on a sex worker’s particular race or ethnicity. Regulation 11(6)(a) only authorises a sex work business to refer in its advertisements to the race, colour or ethnic origin of the sex workers. Regulation 11(6)(a) does not authorise or require the business to restrict its services on these grounds, which could then lead to discrimination against workers or potential workers. It is not intended to operate as an exception within the meaning of section 75(1)(b) of the EO Act.

Finally, the Subcommittee queried whether regulation 11(6)(a) is compatible with the right to equal and effective protection against discrimination under section 8(3) of the Charter. As discussed above, regulation 11(6)(a) does not interfere with the protection of sex workers against discrimination under the EO Act. On the contrary, regulation 11(6)(a) enables sex workers to better protect themselves against racism and racially motivated violence. Regulation 11(6)(a) does not limit the right under section 8(3) of the Charter.

If you have any further questions about the Regulations, please contact the responsible officer Amel Masinovic, Department of Justice & Regulation, on 8684 7274 or amel.masinovic@justice.vic.gov.au.

Yours sincerely

Hon Marlene Kairouz MP
Minister for Consumer Affairs, Gaming and Liquor Regulation
## Appendix 1

### Index of Bills in 2016

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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 upon rights or freedoms

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(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

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(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

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(vi) inappropriately delegates legislative power

Lord Mayor’s Charitable Foundation Bill 2016 13
Melbourne College of Divinity Amendment Bill 2016 9, 10
Owners Corporations Amendment (Short-stay Accommodation) Bill 2016 8, 10
Traditional Owner Settlement Amendment Bill 2016 12, 13
Victorian Funds Management Corporation Amendment Bill 2016 6, 8

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

Access to Medicinal Cannabis Bill 2015 1, 3
Assisted Reproductive Treatment Amendment Bill 2015 16 of 2015, 1
Bail Amendment Bill 2015 16 of 2015, 1
Births, Deaths and Marriages Registration Amendment Bill 2016 12, 13
Confiscation and Other Matters Amendment Bill 2016 4, 5
Crimes Amendment (Carjacking and Home Invasion) Bill 2016 12
Crimes Amendment (Carjacking) Bill 2016 11
Crimes Amendment (Sexual Offences) Bill 2016 9, 10
Education and Training Reform Amendment (Miscellaneous) Bill 2016 5, 6
Equal Opportunity Amendment (Equality for Students) Bill 2016 10, 11
Food Amendment (Kilojoule Labelling Scheme and Other Matters) Bill 2016 13
Freedom of Information Amendment (Office of the Victorian Information Commissioner) Bill 2016 10, 12
Health Complaints Bill 2016 2, 3
Infant Viability Bill 2015 6, 7
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Appendix 3
Ministerial Correspondence 2016

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

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

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Appendix 4

Submission to the Equal Opportunity Amendment (Religious Exceptions) Bill 2016

The Committee received a joint submission on the Equal Opportunity Amendment (Religious Exceptions) Bill 2016 from the following organisations:

- Catholic Education Melbourne and Catholic Archdiocese Melbourne

The submission is available on the Committee’s website.