58th Parliament
Alert Digest

No. 16 of 2015

Tuesday, 8 December 2015
on the following Bills

Aboriginal Heritage Amendment
Bill 2015

Assisted Reproductive Treatment
Amendment Bill 2015

Bail Amendment Bill 2015

Consumer Acts and Other Acts
Amendment Bill 2015

Drugs, Poisons and Controlled Substances
Amendment Bill 2015

Education and Training Reform Amendment
(Victorian Institute of Teaching)
Bill 2015

Occupational Licensing National Law
Repeal Bill 2015

And Subordinate Legislation
Notice of Amendments to Australian Rules of Harness
Racing (ARHR) and Australian Trotting Stud Book
Regulations (ATSBR)
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;

Parliamentary Committees Act 2003, section 17
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Useful information

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

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

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

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

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

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

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

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

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

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

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

‘VCAT’ refers to the Victorian Civil and Administrative Tribunal

[ ] denotes clause numbers in a Bill
Alert Digest No. 16 of 2015

Assisted Reproductive Treatment Amendment Bill 2015

Introduced 24 November 2015
Second Reading Speech 25 November 2015
House Legislative Assembly
Member introducing Bill Hon. Jill Hennessy MLA
Portfolio responsibility Minister for Health

Purpose

The Bill would amend the Assisted Reproductive Treatment Act 2008 (the Principal Act) to:

- enable a person born as a result of a pre-1998 donor treatment procedure (i.e., assisted reproductive treatment involving donated gametes), or their descendants, to obtain identifying information about their donor from the Victorian Assisted Reproductive Treatment Authority (VARTA), whether or not the donor consents (substituted sections 59 and 60) [18, 19] (Refer to Charter report below)

- establish a contact preference scheme (to be administered by VARTA) for donors and persons born as a result of a donor treatment (as well as their parents and descendants), under which the person lodging the preference would be indicate whether they consent to contact and if so, on what basis (new Divisions 3A and 3B of Part 6) [23]
  - it would be an offence (subject to 50 penalty units) for a donor-conceived person to contact their pre-1998 donor where the donor has lodged a no contact preference (new section 63(3) and 63(2)) [23]
  - it would also be an offence (subject to 50 penalty units) for a donor to contact a person born as a result of a donor treatment procedure where that person has lodged a no contact preference (new section 63(2)) [23]

- provide for the making of a ‘production order’ by the Magistrates’ Court, requiring that a person provide records relating to a pre-1988 donor treatment procedure to VARTA (new sections 56D, 56F, 56H and 56I) (Refer to Charter report below)

- make it an offence (subject to 50 penalty units) for a person to disclose to any other person that VARTA has requested that they provide:
  - records relating to a pre-1988 donor treatment procedure that the Authority believes on reasonable grounds is in their possession or control (new section 56C) or
  - information relating to a pre-1998 donor or donor treatment procedure (new section 56K)

It would be an excuse to both offences for the person to show that the disclosure was reasonably necessary for the purposes of locating the relevant records or information or was made to the person to whom the records relate. [15] (Refer to Charter report below)

The Bill would also make consequential amendments to the Births, Deaths and Marriages Registration Act 1996.
Comment

Delayed commencement — commencement by proclamation or by 1 March 2017

Clause 2 of the Bill provides that the Bill will come into operation on a day or days to be proclaimed or on 1 March 2017 if the Bill is not proclaimed before that date.

The Bill therefore provides for commencement by proclamation or on a day that is more than 12 months after the introduction of the Bill.

The Committee notes the following statement in the Explanatory Memorandum:

The default commencement date of 1 March 2017 is necessary as it is anticipated that a period of up to 12 months will be required to prepare for implementation. The Victorian Assisted Reproductive Treatment Authority will require this time to establish policies and procedures for management of the Central Register and the Voluntary Register for which the Authority will become responsible on the commencement of the Bill.

Submissions received

The Committee received a submission on the Bill from Monash University’s Castan Centre for Human Rights Law.

A copy of the submission is reproduced at Appendix 5. The submission is also available on the Committee’s website.

The Committee thanks the Castan Centre for Human Rights Law for its submission on the Bill.

Charter report

Privacy – Freedom of conscience – Magistrate may require person to produce records relating to a pre-1988 donor treatment procedure – Requirement overrides medical professional privilege, professional ethics, medical patient confidentiality and sexual offence victim confidentiality

Summary: The effect of new sections 56H and 56I is that a person who is ordered to provide records relating to a pre-1988 donor treatment procedure may be required to breach medical professional privilege, professional rules and ethics or the confidentiality of patients or sexual offence victims. The Committee will write to the Minister seeking further information.

The Committee notes that clause 15, inserting new section 56F, provides that, if:

- the Victorian Assisted Reproductive Treatment Authority has asked a person to locate and give it records relating to a pre-1988 donor treatment procedure that resulted in the birth of someone who (or whose parent or child, or a donor) has requested information;
- the person did not provide all the requested records within 90 days;
- the Authority believes on reasonable grounds that the person is in possession or has control of the requested records; and
- the Magistrates’ Court is satisfied that there are reasonable grounds for believing that the person is in possession or has control of the requested records;

‘the court may make a production order requiring the person to produce to the Authority... the records specified in the order’.
New Section 56H provides that it is an offence (punishable by a fine of up to 50 penalty units, or about $7500) to fail to comply with the order without a reasonable excuse. New section 56I provides that:

- the grounds of medical professional privilege or that compliance would constitute unprofessional conduct or a breach of professional ethics are not reasonable excuses; and
- existing statutory provisions that bar:
  - physicians or surgeons from divulging any information in a civil suit, action or proceeding that they have necessarily acquired in attending a patient without that patient’s consent (or, if the patient is deceased, the consent of any legal personal representative, spouse or child of the patient); and
  - anyone producing a document containing a communication made in confidence by an alleged sexual offence victim to a registered medical practitioner or counsellor in a legal proceeding unless a court finds that the information in the document would have substantial probative value and that disclosure is in the public interest
do not apply to prevent the production of documents under the order.

**The Committee observes that the effect of new sections 56H and 56I is that a person who is ordered to provide records relating to a pre-1988 donor treatment procedure may be required to breach medical professional privilege, professional rules and ethics or the confidentiality of patients or sexual offence victims.**

The Statement of Compatibility remarks:

The enquiry and production powers contained in the bill will engage the right of privacy of the donor, the donor’s family and any other person whose information is disclosed as a result of the exercise of the powers by VARTA. However, the bill ensures that the interference is neither unlawful nor arbitrary by clearly setting out the procedures that will govern the disclosure of the information and providing appropriate safeguards which protect the privacy of personal and health information.

In the case of applications to the Magistrates’ Court for production orders, they must be supported by an affidavit which sets out the grounds on which VARTA holds the belief that the person against whom the order is sought holds the relevant records. The application and affidavit must be served on the person holding the records (the respondent) prior to the hearing, and the respondent will have an opportunity to attend court and present their case. It is the court, rather than VARTA, who will decide whether the records a person has refused to provide must be produced, and the court will make its decision having regard to the matters contained in VARTA’s affidavit and any other evidence before it. Applications for production orders will be heard in closed court, given the sensitivity of the information involved.

However, the Committee notes that:

- new section 56F provides that a magistrate who is satisfied that a person has a requested record ‘may’ require that person to produce that record to the Authority. The Committee observes that the section does not specify any criteria for how the magistrate should exercise this apparent discretion.
- new section 56I(1) provides that the grounds that compliance ‘would constitute unprofessional conduct or a breach of professional ethics’ are not a reasonable excuse for non-compliance with an order to produce a record of a pre-1988 donor treatment

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procedure. The Committee observes that this may mean that a lawyer may be required to produce a document containing confidential information supplied by a client (for example, where the client sought legal advice about his or her possible liability for child support as a result of the donation) even though that would breach ethical, professional and legal rules protecting lawyer-client confidentiality.

- new section 56I(2) may mean that a document relating to a pre-1988 donor treatment procedure that contains a communication made in confidence by an alleged sexual offence victim (for example, a questionnaire where a donor revealed, as part of his or her medical history or pre-donation counselling, that he or she was a rape victim) may be produced in a legal proceeding without a court first finding that the disclosure would have substantial probative value and would be in the public interest.

The Committee observes that new section 56I(1), to the extent that it may require doctors, counsellors or other professionals to act in breach of their profession’s ethics or personal promises (for example, by requiring them to divulge information about a patient that they had promised would be kept confidential) may engage the Charter’s right to freedom of conscience, including the freedom to demonstrate that belief in practice and not to be coerced in a way that limits that freedom.3

The Statement of Compatibility does not address the Charter’s right to freedom of conscience, but does address the compatibility of new section 56F with the Charter’s right to privacy as follows:

The enquiry and production powers contained in the bill will engage the right of privacy of the donor, the donor’s family and any other person whose information is disclosed as a result of the exercise of the powers by VARTA. However, the bill ensures that the interference is neither unlawful nor arbitrary by clearly setting out the procedures that will govern the disclosure of the information and providing appropriate safeguards which protect the privacy of personal and health information.

In the case of applications to the Magistrates Court for production orders, they must be supported by an affidavit which sets out the grounds on which VARTA holds the belief that the person against whom the order is sought holds the relevant records. The application and affidavit must be served on the person holding the records (the respondent) prior to the hearing, and the respondent will have an opportunity to attend court and present their case. It is the court, rather than VARTA, who will decide whether the records a person has refused to provide must be produced, and the court will make its decision having regard to the matters contained in VARTA’s affidavit and any other evidence before it. Applications for production orders will be heard in closed court, given the sensitivity of the information involved.

**The Committee will write to the Minister seeking further information as to:**

- what criteria govern a magistrate’s discretion under new section 56F to refuse to order a person (who the magistrate is satisfied has possession or control of a document relating to a pre-1988 donor treatment procedure) to produce a record to the Victorian Assisted Reproductive Treatment Authority;

- whether a lawyer can refuse to produce a document under new section 56H on the ground that doing so would breach lawyer-client confidentiality; and

- the purpose of new section 56I(2)’s provision that existing s. 32C of the Evidence (Miscellaneous Provisions) Act 1958, which limits when documents containing certain communications made in confidence by alleged sexual offence victims can be produced in legal proceedings, does not apply to prevent the disclosure of a document relating to a pre-1988 donor treatment procedure that a magistrate has ordered to be produced.

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3 Charter s. 14.
The Committee refers to Parliament for its consideration the question of whether or not new section 56I(1), to the extent that it may require doctors, counsellors or other professionals to act in breach of their professional ethics, is compatible with the right to freedom of conscience in Charter s. 14.

Freedom of expression – Person requested to provide documents or information must not disclose that request to most others

Summary: The Committee will write to the Minister seeking further information as to whether or not new sections 56C and 56K, which generally bar a recipient of a request from the Victorian Assisted Reproductive Treatment Authority for reports or information about donors or donor treatment procedures from disclosing to any other person that the Authority has made that request, are compatible with the Charter’s right to freedom of expression.

The Committee notes that clause 15, inserting new sections 56C and 56K, makes it an offence (punishable by 50 penalty units, or approximately $7500) for a person who receives a request from the Victorian Assisted Reproductive Treatment Authority:

- to locate and give to the Authority records relating to a pre-1988 donor treatment procedure (section 56C) or
- for information relating to a pre-1998 donor or donor treatment procedure (section 56K)

to ‘disclose, whether directly or indirectly, to any other person that the Authority has made such a request unless’:

- ‘the disclosure is reasonably necessary for the purposes of locating the’ records or information ‘that is the subject of the request’; or
- in the case of a request for records, ‘the disclosure is made to the person to whom the requested records relate.’

The Committee observes that new sections 56C and 56K may engage the Charter’s right to freedom of expression.4 The Statement of Compatibility does not discuss the Charter’s right to freedom of expression.

The Committee notes that new sections 56C and 56K appear to bar a person who receives a request from the Victorian Assisted Reproductive Treatment Authority for records or information relating to a donor or a donor treatment procedure from disclosing the fact or nature of that request to:

- the donor or a donor-conceived person, to the extent that the request is for information that is not part of a record.
- a non-donor who is potentially affected by the request (for example the donor’s family.)
- a family member, counsellor, advisor or confidant of the recipient of the request (for example, a person who the recipient wishes to consult with about the ramifications of complying with the request.)
- a lawyer (for example, where the person who receives the request wishes to seek legal advice about the request, or wishes to engage a lawyer to represent him or her in court proceedings relating to the request).
- a court (for example, where the person wishes to challenge the legality of the request in the Supreme Court.)

4 Charter s. 15(2).
the media (for example, as part of a political campaign against the new legal rules contained in the Bill).

The Committee observes that new sections 56C and 56K apply even if the making of the request is no longer confidential.

The Committee will write to the Minister seeking further information as to whether or not new sections 56C and 56K, which generally bar a recipient of a request from the Victorian Assisted Reproductive Treatment Authority for reports or information about donors or donor treatment procedures from disclosing to any other person that the Authority has made that request, are compatible with the right to freedom of expression in Charter s. 15(2), including whether or not there are any less restrictive alternatives reasonably available to achieve the purposes of new section 56C and 56K.

Medical or scientific treatment without full, free and informed consent – Disclosure of information that will or may identify a donor – Removal of requirement for donor consent – Donations made on basis of anonymity

Summary: The effect of clauses 18 and 19 may be to require the disclosure of information about a donor of gametes on a basis that is inconsistent with the basis on which the donor consented to donate those gametes. The Committee will write to the Minister seeking further information.

The Committee notes that clauses 18 and 19, substituting existing ss. 59 and 60, provide that, on receipt of an application from a person born as a result of a donor treatment procedure or a descendant of such a person for the disclosure of information recorded on the Central Register, the Victorian Assisted Reproductive Treatment Authority must disclose to the applicant information that will or may disclose the identity of another person, such as a donor. This replaces an existing provision that, in the case of donations made before 31 December 1997, the information can only be disclosed if ‘the donor gives consent to the disclosure’.

The Statement of Compatibility remarks:

Section 8 of the charter protects the right of all people, including a child, to enjoy his or her human rights without discrimination.

As noted in the submission of the Victorian Equal Opportunity and Human Rights Commission to the Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors (Law Reform Committee Inquiry) this right is engaged when donor-conceived children are provided with different rights to obtain information about their donors based on when they were conceived.

However, the Committee observes that the Charter defines ‘discrimination’ as meaning discrimination on the basis of an attribute set out in s. 6 of the Equal Opportunity Act 2010. That list of attributes includes neither the date of a person’s conception nor the date of the relevant donation of gametes (which is the criterion stated in existing s. 59(b)).

The Committee also notes that the purpose of existing s. 59’s requirement for the donor’s consent to any disclosure in the case of any donation prior to 31 December 1997 is that, prior to that date, it

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5 The list of attributes in s. 6 of the Equal Opportunity Act 2010 are: age, breastfeeding, employment activity, gender identity, disability, industrial activity, lawful sexual activity, marital status, parental or carer status, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation, an expunged homosexual conviction, or personal association with a person who is identified by reference to any of these attributes.
was lawful to make donations of gametes for assisted reproductive treatment on the basis of anonymity. The Committee observes that the effect of clauses 18 and 19 may be to require the disclosure of information about a donor of gametes on a basis that is inconsistent with the basis on which the donor consented to donate those gametes.

Charter s. 10(c) provides that a person must not be ‘subjected to medical or scientific... treatment without his or her full, free and informed consent.’ The Committee notes that this right was recommended by the Human Rights Consultation Committee because of ‘[o]ther Victorian laws concerning medical consent [which] stress that consent must be both voluntary and that the person must have been given sufficient information for an informed decision to be made.’

The Statement of Compatibility does not address the Charter’s right against medical or scientific treatment without full, free and informed consent, but does address the compatibility of clauses 18 and 19 with donors’ Charter right to privacy as follows:

[T]he interference with privacy and family life of a donor and their family is not arbitrary because it is balanced against the rights that the bill seeks to promote, namely the rights of the donor-conceived person to recognition and equality before the law, privacy (in the broader sense), protection of families and children, and cultural rights. The Law Reform Committee Inquiry found that 'while the release of identifying information to donor-conceived people may potentially cause discomfort and distress to donors (although this will not always be the case), it is certain that donor-conceived people are actually suffering from their lack of knowledge about their donors'. The committee noted that 'knowledge about parentage and heredity often forms a substantial part of the person’s sense of identity, and donor-conceived people who want this information but are unable to obtain it, experience significant stress and frustration. Where people learn as youths or adults that they are donor-conceived, and are consequently forced to evaluate who they are through newly perceived relationships, the stress and frustration of not being able to find out more about their donor can be exacerbated. Unlike their parents, their donor, or the treating physician, the children are passive participants in donor conception, and have no influence over agreements made between those parties, even though they are substantially affected by those agreements. The recognition of the right of a donor-conceived person to have access to identifying information about their donor, despite the competing right of the donor to privacy, is consistent with the principle of the best interests of the child set out in section 17(2) of the charter. This best interest principle is also contained in the guiding principles of the Assisted Reproductive Treatment Act 2008 (the act) which provide that the welfare and interests of persons born or to be born as a result of treatment procedures are paramount, and children born as a result of the use of donated gametes have a right to information about their genetic parents (sections 5(a) and (c)).

The Committee will write to the Minister seeking further information as to which attribute of discrimination listed in s. 6 of the Equal Opportunity Act 2010 is engaged when donor-conceived children are provided with different rights to obtain information about their donors based on when they were conceived or when the donation that led to their conception occurred.

The Committee refers to Parliament for its consideration the question of whether or not clauses 18 and 19, to the extent that they require the disclosure of information about a donor of gametes on a basis that is inconsistent with the basis on which the donor consented to donate those gametes,

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are compatible with the right against being subjected to medical or scientific treatment without full, free and informed consent in Charter s. 10(c).

The Committee makes no further comment
Bail Amendment Bill 2015

Introduced: 24 November 2015
Second Reading Speech: 25 November 2015
House: Legislative Assembly
Member introducing Bill: Hon. Martin Pakula MLA
Portfolio responsibility: Attorney-General

Purpose

The Bill would amend the Bail Act 1977 (the Principal Act) by:

- requiring that bail be refused (unless there are exceptional circumstances) when an accused is charged with:
  - intentionally providing documents or information to facilitate a terrorist act or
  - obstructing or hindering the exercise of special police powers to combat terrorism [4] (Refer to Charter report below)
- adding 'any expression of support for a terrorist act or terrorist organisation or the provision of resources to a terrorist organisation' to the list of matters to be taken into account in assessing ‘unacceptable risk’ under section 4(3) of the Principal Act [5] (Refer to Charter report below)
- increasing the maximum penalty for the offence of ‘failure to appear’ from 12 months to two years [8]
- reversing the presumption in favour of bail for people charged with serious offences who have also been convicted of failing to appear in the previous five years [7]
- inserting new child specific factors that address the specific needs of children to be considered in bail decisions [10]
- exempting children from the offence of breaching a condition of their bail. [16]

The Bill would also amend the Children, Youth and Families Act 2005 to create a presumption in favour of initiating criminal proceedings against children by summons, rather than arrest. [20]

Charter report

Automatic detention of people awaiting trial – People charged with obstructing special police powers – Court must refuse bail unless exceptional circumstances proved

Summary: The Committee refers to Parliament for its consideration the question of whether or not clause 4, by requiring that most people charged with obstructing, hindering or disobeying police exercising special police powers be detained until their trial, is a reasonable limit on the Charter right of persons awaiting trial to not be automatically detained.

The Committee notes that clause 4, amending existing s. 4, provides that a court shall refuse bail to a person charged with offences under:
• existing s. 4B(1) of the Terrorism (Community Protection) Act 2003, which makes it an offence (punishable by up to ten years imprisonment) to provide information to anyone with an intent to facilitate preparation for a terrorist act;\(^7\) or

• existing s. 21W of the Terrorism (Community Protection) Act 2003, which makes it an offence (punishable by up to two years imprisonment) to obstruct or hinder a police officer, where that police officer is exercising a special police power to search a person, vehicle or premises or seize a thing, or to fail to comply with a direction given by a police officer as a special police power, without a reasonable excuse;\(^8\)

unless the court is satisfied that exceptional circumstances exist which justify the grant of bail.

The Committee observes that the effect of clause 4 is that most people charged with obstructing, hindering or disobeying a police officer exercising special police powers will be detained until that charge comes to trial.

The Committee considers that clause 4 may limit the Charter right of persons awaiting trial to ‘not be automatically detained in custody’.\(^9\)

The Statement of Compatibility remarks:

The inclusion of terrorism related offences in the list of offences that require an accused to show exceptional circumstances is a reasonable limitation on the right to liberty, as it is required to protect the community. Terrorism, by its very definition poses an increased risk to community safety.

Further, as with all offences that attract the exceptional circumstances exception the proposed insertion of this new category of offence into section 4(2) of the Bail Act will not result in an automatic refusal of bail. An accused person still has the ability to argue that exceptional circumstances exist, and if the court is convinced by such arguments, will be granted bail.

However, the Committee observes that the offence in s. 21W of the Terrorism (Community Protection) Act 2003 does not require proof of any connection to terrorism or any risk to community safety.

The Committee notes that the ACT Supreme Court has declared that a provision requiring the detention until trial of people charged with murder, attempted murder or commercial drug offences except in exceptional circumstances is incompatible with the right under the Human Rights Act 2004 (ACT) of a person awaiting trial ‘not to be detained in custody as a general rule’.\(^10\) The Statement of Compatibility remarks that:

the reasoning in that decision is not transferable to the Victorian Bail Act for two reasons.

Firstly, the court held that the underlying purpose of s 9C of the ACT Bail Act was not apparent, as it applied only to murder and not other serious crimes. In contrast, the Victorian exceptional circumstances provision applies to a number of very serious crimes.

Secondly, the right to liberty in the ACT Human Rights Act is drafted differently from section 21 of the charter. The relevant provision in the ACT Human Rights Act states that that 'anyone who is awaiting trial must not be detained as a general rule'. In contrast, section 21

\(^7\) See the discussion of this offence by this Committee in Alert Digest No. 14 of 2015 (reporting on the Terrorism (Community Protection) Amendment Bill 2015), pp. 18-19.

\(^8\) See the discussion of special police powers by this Committee in Alert Digest No. 14 of 2015 (reporting on the Terrorism (Community Protection) Amendment Bill 2015), pp. 25-28.

\(^9\) Charter s. 21(6).

\(^10\) In the matter of an application for bail by Islam [2010] ACTSC 147, [403].
of the charter prohibits 'automatic' detention rather than a 'general rule'. Requiring certain classes of accused to establish exceptional circumstances in order to be granted bail may constitute a 'general rule', but does not mean that their detention is 'automatic'. Their circumstances must still be considered by the court in making a determination about bail and in every case the Court retains the discretion to grant an accused bail. Further, the ACT Supreme Court acknowledged that the right to liberty in the ACT Human Rights Act is 'not protected in an equivalent form in any other human rights instrument'.

However, the Committee observes that the ACT law barring bail except in exceptional circumstances does not apply 'only to murder' but also covers serious drug offences, all punishable by life imprisonment. The present Victorian provision similarly covers murder, treason or drug offences punishable by either life imprisonment or 25 years imprisonment. By contrast, the offence of obstructing, hindering or disobeying police exercising special police powers is a summary offence punishable by a maximum of two years imprisonment.

The Committee refers to Parliament for its consideration the question of whether or not clause 4, by requiring the detention until their trial of people charged with obstructing, hindering or disobeying police exercising special police powers (a summary offence punishable by a maximum of two years imprisonment) unless they can prove that there are exceptional circumstances which justify their release, reasonably limits the Charter right of persons awaiting trial to not be automatically detained.

**Expression – Bail – Court shall have regard to accused’s public support for a terrorist act or organisation – Whether less restrictive alternative reasonably available**

Summary: The effect of clause 5 may be to make it more likely that a person charged with any criminal offence will be detained until his or her trial if the person has made a public statement in support of a terrorist act or organisation. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 5, amending existing s. 4, provides that a court, in assessing whether or not there is an unacceptable risk that an accused will fail to surrender, commit a further offence, endanger public safety or obstruct the course of justice if released on bail, shall have regard, as appears relevant, to:

whether or not the accused has expressed publicly support for—

(i) a terrorist act or a terrorist organisation; or

(ii) the provision of resources to a terrorist organisation.

The Committee observes that:

- the term ‘expressed publicly support for’ may include statements made as part of public political debate about a terrorist act or organisation.

- as noted in Alert Digest No. 14 of 2015, the term ‘terrorist act’ may include military actions that are lawful under the international law of war, such as attacks on government infrastructure as part of a civil war, including by a group that is supported by the Australian government.  

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11 Bail Act 1992 (ACT), s. 9C(1)(b).
the term ‘terrorist organisation’ introduced into existing s. 3 by clause 3 may be broader in one respect than the equivalent term in the federal Criminal Code. The federal definition includes an organisation ‘preparing... the doing of a terrorist act’,\(^\text{13}\) while clause 3’s definition includes an organisation ‘preparing for... the doing of a terrorist act’.

- the term ‘resources’ may include neutral humanitarian support or legal services.

The Statement of Compatibility remarks:

Clause 5 does not limit the right to freedom of expression in section 15... as it does not prohibit expressions of support for terrorism, but merely points to such expressions as a relevant consideration to take into account when assessing risk for the purposes of a bail decision.

Further, to the extent that clause 5 could be said to limit section 15, the limitation would fall within the internal limitation in section 15(3) that allows for lawful restrictions that are reasonably necessary for the protection of national security or public order. This limitation recognises that special duties and responsibilities are attached to the right of freedom of expression.

However, the Second Reading Speech remarks that ‘[t]he inclusion of a terrorism specific factor will make it clear that this heightens the risk of a person’s release into the community’.

The Committee notes that the effect of clause 5 may be to make it more likely that a person charged with any criminal offence will be detained until his or her trial if he or she has made a public statement in support of a terrorist act or organisation, potentially including political statements, statements about acts that are lawful under international law and statements supporting the provision of humanitarian aid or legal services to a terrorist organisation.

The Committee observes that a similar provision recently introduced in New South Wales requires that bail authorities in that state consider ‘whether the accused person has made statements or carried out activities advocating support for terrorist acts’.\(^\text{14}\)

The Committee will write to the Attorney-General seeking further information as to whether or not there are less restrictive alternatives reasonably available to achieve clause 5’s purpose.

The Committee makes no further comment

\(^{13}\) Criminal Code Act 1995 (Cth), Schedule, s. 102.1.

\(^{14}\) Bail Act 2013 (NSW), s. 18(1)(r). The provision also includes actions and statements in support of ‘violent extremism’. Sub-sections (q) and (s) provide for consideration of associations with terrorist groups and groups advocating support for terrorist acts or violent extremism.
Consumer Acts and Other Acts Amendment Bill 2015

Introduced 24 November 2015
Second Reading Speech 25 November 2015
House Legislative Assembly
Member introducing Bill Hon. Jane Garrett MLA
Portfolio responsibility Minister for Consumer Affairs, Gaming and Liquor Regulation

Purpose

The Bill would amend the Australian Consumer Law and Fair Trading Act 2012 (the Principal Act) to improve the alignment between the:

- enforcement provisions (entry and search of premises) and
- remedies provisions (injunctions, undertakings, non-punitive orders and declarations)

in the Principal Act and the equivalent provisions of the Australian Consumer Law (Victoria) and the Competition and Consumer Act 2010 (Cth).

Notably, the Bill would provide that a search warrant issued under section 157(3) of the Principal Act may authorise an inspector from Consumer Affairs Victoria to require certain persons to provide information or assistance to enable access to information held in, or accessible from, any computer or other electronic device located on the premises (new section 158). [11] (Refer to Charter report below)

The person subject to such a direction would not be excused from complying on the ground that compliance may result in the provision of information about their crimes (new section 170(3)). [12] (Refer to Charter report below)

The Bill would also amend:

- the Associations Incorporation Reform Act 2012 to provide that a person must vacate their position on the committee of an incorporated association where they have been disqualified from managing a corporation or an Indigenous corporation under relevant commonwealth legislation or have been disqualified from managing a cooperative under the Co-operatives National Law (Victoria)
- the Residential Tenancies Act 1997, including in relation to the service of notices under the act by electronic communication
- the Sale of Land Act 1962 and the Property Law Act 1958 in relation to certain property transactions carried out by legal practitioners and conveyancers
- the Property Law Act 1958 to apply to conveyancers the same conditions that apply to legal practitioners in relation to the payment of costs and expenses by purchasers in relation to the sale of land
- the Retirement Villages Act 1986 by moving the formula for the calculation of the annual maintenance charge from regulations into the act
- the Sex Work Act 1994 to change all references to a 'sexually transmitted disease' to the term 'sexually transmissible infection' and to provide that action may be taken against a person who is not a licensee under the act if the person was a licensee at the time the grounds for taking the action existed
the Second-Hand Dealers and Pawnbrokers Act 1989 to provide that action may be taken under that Act against a person who is not a registered second-hand dealer or an endorsed pawnbroker if the person was registered or endorsed at the time the grounds for taking the action existed

- the State Trustees (State Owned Company) Act 1994 to remove a redundant requirement for State Trustees to make a quarterly prudential declaration to the director.

Charter report

Self-incrimination – Compelled production of computer passwords

Summary: The Committee refers to Parliament for its consideration the question of whether or not clauses 11 and 12, by providing that a court may permit an inspector to require a suspect to provide passwords for certain computers, devices or accessible remote data where either the provision of the password or the data obtained may be evidence of that person’s crimes, reasonably limits the Charter rights of criminal defendants to a fair hearing and against self-incrimination.

The Committee notes that clause 11, inserting a new section 158A, provides that the Magistrates’ Court, when issuing a search warrant under existing s. 158, may authorise an inspector executing the warrant to direct a specified person, including a person alleged to have contravened the Australian Consumer Law and Fair Trading Act 2012 or its regulations, to provide information or assistance that is reasonable and necessary to allow the inspector to access, download or copy information in or accessible from a computer or data storage device. Non-compliance with the direction without a reasonable excuse is an offence punishable by 60 penalty units (approximately $9000.) Clause 12, amending existing s. 170, provides that (unlike a similar federal provision15) such a person is not excused from complying on the ground that compliance may result in the provision of information about that person’s crimes.

The Committee observes that the effect of clauses 11 and 12 is that an inspector may require a person alleged to have contravened consumer protection law to provide passwords for certain computers, devices or accessible remote data where either the provision of the password or the data obtained may be evidence of that person’s crimes. The Committee considers that clauses 11 and 12 may engage the person’s Charter’s right to a fair hearing, including the right against compelled self-incrimination set out in Charter s. 25(2)(k).

The Statement of Compatibility remarks:

The bill does not limit section 25(2)(k), because the person required to assist an inspector is not a person who has been charged with a criminal offence. The execution of the warrant occurs before any action for a contravention of the act or regulations is taken. In addition, the person is not being required to testify against himself or herself because they are not giving evidence in court. Finally, the person is not being required to confess guilt. While the information the person provides may enable an inspector to obtain evidence that incriminates the person, the giving of that information, such as a computer password or similar, is not in itself a confession of guilt.

Even if the bill could be said to limit section 25(2)(k), the limitations are reasonable and justified because of the fact that the investigation could be blocked by non-disclosure of the relevant information (such as a password to access a computer). If a person has locked hard copy business documents in a cupboard, an inspector would not need the person’s assistance in breaking into the cupboard, under warrant, to seize that evidence and the person has no

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15 Competition and Consumer Act 2010 (Cth), s. 154RA. The offence of not complying with an order under the federal regime carries a maximum penalty of six months imprisonment.
right to try to block the inspector from breaking into that cupboard. If the person has also ‘locked’ business records inside a computer through encryption, the person should not, simply because of their use of more sophisticated technology, now be empowered to stymie investigations by refusing to divulge the electronic key to that evidence.

The Committee observes that the Supreme Court of Victoria has said that coercive powers requiring suspects to supply incriminating computer encryption keys limit their Charter rights against self-incrimination, even if they have not yet been charged. The Supreme Court also held (in the context of questions asked by the Chief Examiner, supervised by the Supreme Court and used to investigate organised crime offences) that such powers are not reasonable limits on those rights unless any evidence discovered as a result (and not otherwise discoverable) is inadmissible in any future prosecution of the person.

The Committee refers to Parliament for its consideration the question of whether or not clauses 11 and 12, by providing that a court may permit an inspector to require a suspect to provide passwords for certain computers, devices or accessible remote data where either the provision of the password or the data obtained may be evidence of that person’s crimes, reasonably limits the Charter rights of criminal defendants to a fair hearing and against self-incrimination.

The Committee makes no further comment

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16 Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381, [91]-[92]. Compare English authorities that have held that both the making of an order requiring a suspect to divulge a password and the prosecution of a suspect for failing to do so are compatible with European fair hearing rights (e.g. R v S & A [2008] EWCA Crim 2177; Greater Manchester Police v Andrews [2011] EWHC 1966 (Admin), discussing s. 49 of the Regulation of Investigatory Powers Act 2000 (UK)).

17 Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381, [155]-[156]. The Committee notes that North American courts have generally held that requiring people to divulge passwords that establish their access to or knowledge of information or could lead to the discovery of new information that may incriminate them is incompatible with constitutional rights against self-incrimination: R. c. Boudreau-Fontaine 2010 QCCA 1108, [46] (Quebec Court of Appeal); In Re: Grand Jury Subpoena Duces Tecum dated March 25, 2011; USA v Doe, 670 F. 3d 1355 (2012) (United States Court of Appeals for the 11th Circuit.) For a decision upholding such a requirement where the person’s access to, and the existence and nature of, the incriminatory data was already known to investigators, see Commonwealth v Gelfgatt (unreported, Massachusetts Supreme Judicial Court, 25th June 2014.) For a very recent holding in a civil enforcement action relating to alleged white collar crime, where a judge refused to order a suspected insider trader to provide the passcode for access to a smartphone, see Securities and Exchange Commission v Huang (unreported, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 15-269, 23 September 2015.)
Education and Training Reform Amendment (Victorian Institute of Teaching) Bill 2015

Introduced 24 November 2015
Second Reading Speech 25 November 2015
House Legislative Assembly
Member introducing Bill Hon. James Merlino MLA
Portfolio responsibility Minister for Education

Purpose

The Bill would amend the Education and Training Reform Act 2006 (the Principal Act) to provide the Victorian Institute of Teaching (the Institute) with the power to suspend the registration of teachers and early childhood teachers where necessary for the protection of children.

The Bill also would also alter the membership requirements of the Council of the Institute. Notably, the Bill would require that, of the 14 members of the Council of the Institute, 5 must be registered teachers nominated by the Australian Education Union and 2 must be nominated by the Independent Education Union (amended section 2.6.6). [15] (Refer to Charter report below)

Charter report

Participation in the conduct of public affairs – Industrial activity discrimination – Council of Victorian Institute of Teaching – Half of members must be nominated by particular unions

Summary: The Committee refers to Parliament for its consideration the questions of whether or not clause 15, by requiring that half of the members of the Council of the Victorian Institute of Teaching be nominated by the Australian Education Union or the Independent Education Union, reasonably limits the Charter’s right to have the opportunity to participate in public affairs without discrimination on the basis of membership or representation of a particular union.

The Committee notes that clause 15, amending existing s. 2.6.6, provides that, of the 14 members of the Council of the Victorian Institute of Teaching, 5 must be registered teachers nominated by the Australian Education Union and 2 must be nominated by the Independent Education Union.

The Committee observes that the effect of clause 15 may be that only members of those two unions will be considered for appointment to half of the available positions on the Council of the Victorian Institute of Teaching.

The Statement of Compatibility remarks:

Under the bill the minister must consider those people nominated by the AEU or the IEU for seven out of the 13 appointed positions on the council.

The bill may therefore limit the right to take part in public life under section 18(1) of the charter. I consider this limitation to be reasonable and proportionate in accordance with section 7(2) of the charter....

In Victoria, there are approximately 120 000 registered teachers as at June 2015. The institute’s functions were expanded on 30 September 2015 to include the regulation and registration of an additional 5000 early childhood teachers. The AEU has a membership base of about 53 000 teachers and early childhood teachers. The IEU has about 20 000 members. The proposed composition of the council reflects the proportion of registered teachers and early childhood teachers represented by these unions.
The appointment of members of the council could be based solely on the minister’s discretion. However, this will not guarantee that the interests of a majority of teachers (who are represented by the AEU and IEU) will be represented on the council. The bill seeks to ensure that representation on the council.

However, the Committee notes that Charter s. 18(1) provides that:

Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

The Charter defines ‘discrimination’ to mean discrimination on the basis of an attribute set out in s. 6 of the Equal Opportunity Act 2010. One of those attributes is ‘industrial activity’, which is defined to include ‘being or not being a member of, or joining, not joining or refusing to join, an industrial organisation or industrial association’ and ‘representing or advancing the views, claims or interests of members of an industrial organisation or industrial association’.

The Committee observes that, in contrast to the existing position in Victoria where no positions on the Council of the Victorian Institute of Teaching are nominated by unions representing teachers, most other Australian jurisdictions provide that membership of government bodies with functions concerning teaching registration must include members nominated by a particular union. However, except in South Australia, those statutes only require that one member be a nominee of each union. In New South Wales, half of the members of the Quality Teaching Council (which advises the Board of Studies, Teaching and Educational Standards) are elected by employed or recently employed teachers.

The Committee refers to Parliament for its consideration the questions of:

- whether or not clause 15, by requiring that half of the members of the Council of the Victorian Institute of Teaching be nominated by the Australian Education Union or the Independent Education Union, limits the Charter’s right to have the opportunity to participate in public affairs without discrimination on the basis of membership or representation of a particular union.
- If so, whether or not the clause reasonably limits that right to achieve the purpose of ensuring that the interests of a majority of teachers (who are represented by the AEU and IEU) are represented on the Council.

The Committee makes no further comment.

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18 ACT Teacher Quality Institute Act 2010 (ACT), s. 15(2)(f),(g); Board of Studies, Teaching and Education Standards 2013 (NSW), s. 5(2)(e),(h); Teacher Registration (Northern Territory) Act 2004 (NT), s. 7(1)(b),(f); Education (Queensland College of Teachers) Act 2005 (Qld), s. 239(1)(e),(f); Teachers Registration and Standards Act 2004 (SA), s. 9(1)(c),(f); Teachers Registration Act 2000 (Tas), s. 6(1)(f),(h). The exception is Western Australia: see Teacher Registration Act 2012 (WA), s. 87.

19 South Australia requires 5 nominees of the Australian Education Union and 2 nominees by the Independent Education Union on its 16 member Teachers Registration Board: Teachers Registration and Standards Act 2004 (SA), s. 9(1).

20 Teacher Accreditation Act 2004 (NSW), s. 13(1)(a). See also Education (Queensland College of Teachers) Act 2005 (Qld), s. 239(1)(j), which requires elections for 3 of the 16 members of the Queensland College of Teachers.
Occupational Licensing National Law Repeal Bill 2015

Introduced 24 November 2015
Second Reading Speech 25 November 2015
House Legislative Assembly
Member introducing Bill Hon. Tim Pallas MLA
Portfolio responsibility Treasurer

Purpose

The Bill would repeal the *Occupational Licensing National Law Act 2010* and enact related savings and transitional arrangements. This would give effect in Victoria to:

- the decision of the Council of Australian Governments to discontinue the scheme to replace State and Territory based licensing arrangements with a National Occupational Licensing System and
- to disestablish the National Occupational Licensing Authority.

Content

*Delayed commencement — commencement by proclamation*

Clause 2 provides that the Bill will come into operation on a day to be proclaimed. There is no default date for commencement in the Bill.

The Committee notes the following explanation in the Explanatory Memorandum:

> There is no default day for the commencement of the Bill to enable the timing of commencement to coincide with the commencement of corresponding repeal laws in other jurisdictions.

Charter report

The Occupational Licensing National Law Repeal Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Aboriginal Heritage Amendment

The Bill was introduced into the Legislative Assembly on 10 November 2015 by Hon Natalie Hutchins MLA, Minister for Aboriginal Affairs. The Committee considered the Bill on 23 November 2015 and made the following comments in Alert Digest No. 15 of 2015 tabled in the Parliament on 24 November 2015.

Committee comments

Charter report

Equality – Property – Secret or sacred Aboriginal objects – Transfer of ownership from non-Aboriginal persons

Summary: The effect of new section 21A is to deprive any non-Aboriginal person who currently owns (or comes to own) a secret or sacred Aboriginal object in Victoria of that ownership (and to criminalise his or her subsequent custody of it.) The Committee will write to the Minister seeking further information.

The Committee notes that clause 20, inserting a new section 21A, provides that the traditional owners of an area where an Aboriginal secret or sacred object is reasonably believed to have originated ‘become the owners’. New section 21A applies to any object that is:

• in Victoria or the coastal waters of Victoria;
• of archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance to the Aboriginal peoples of Victoria (generally or of a particular group) according to the body of traditions, observances, customs and beliefs of those peoples;
• either secret or sacred according to those traditions or directly associated with a traditional Aboriginal burial;
• either relates to the Aboriginal occupation of any part of Australia (whether or not the object existed prior to the occupation of that part of Australia by people of non-Aboriginal descent) or is removed or excavated from an area of such significance to the Aboriginal peoples of Victoria according to those traditions;
• not Aboriginal remains or an object that is likely to have been made for the purpose of sale; and
• in, or comes into, the custody of a State entity or a person ‘(other than an Aboriginal person who is the rightful owner of the object)’ on or after the commencement of the section.

New subsection 21A(3) makes it a criminal offence for a person who has custody of such an object but is not its owner to fail to take all reasonable steps to transfer the object into the custody of the Aboriginal Heritage Council as soon as practicable.

The Committee observes that the effect of new section 21A is to deprive any non-Aboriginal person who currently owns (or comes to own) a secret or sacred Aboriginal object in Victoria of that ownership (and to criminalise his or her subsequent custody of it.)
This effect does not apply to an Aboriginal person who is the object’s ‘rightful owner’ (section 21A), whether or not that person is the traditional owner of the object or of the area that the object is reasonably believed to have originated.

The Explanatory Memorandum explains:

Section 21A clarifies the intent that secret and sacred Aboriginal objects are no longer able to be lawfully owned by individuals or State entities other than in accordance with Aboriginal tradition. People in possession of secret or sacred Aboriginal objects on the commencement of the section must transfer these objects to the Victorian Aboriginal Heritage Council as soon as practicable. The provision creates an offence of failing to transfer secret or sacred objects to the Victorian Aboriginal Heritage Council as soon as practicable after the commencement of the section. The intent is to encourage compliance.

The Committee notes that new section 21A goes beyond existing s. 21, which only transfers the ownership of such objects if they are in, or come into, the custody of a State entity (defined to mean a person or body that ‘represents the State’), but not any other person.

The Statement of Compatibility remarks that ‘new amendments relating to private possession of secret and sacred Aboriginal objects’ will ‘impact on human rights.’ However, the Statement does not otherwise discuss new section 21A, identify which right or rights the section impacts or (as required by Charter s. 28(3)) state whether or how it is compatible with those rights.

The Committee considers that clause 20 may engage the Charter’s rights to equality and to not be deprived of property other than in accordance with law.” The Committee notes that new section 21A does not provide any mechanism for determining or resolving disputes about the classification or ownership of secret or sacred objects (other than criminal prosecution under new section 21A(3)) or for compensating current owners of such objects.

**The Committee will write to the Minister seeking further information as to whether or not new section 21A is compatible with the Charter’s right to equality and to not be deprived of property other than in accordance with law and, in particular, what mechanisms exist for resolving disputes about, or compensating current owners of, such objects.**

**Minister’s response**

The Committee thanks the Minister for the attached response.

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* Charter ss. 8 & 20.
Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Ms Blandthorn

ABORIGINAL HERITAGE AMENDMENT BILL 2015

Thank you for your letter regarding the Aboriginal Heritage Amendment Bill 2015 (Bill), dated 24 November 2015.

Purpose of new section 21A of the Bill

Section 21A of the Bill clarifies that secret and sacred Aboriginal objects will no longer be able to be lawfully owned by individuals or State entities, other than in accordance with Aboriginal tradition. People in possession of secret and sacred Aboriginal objects on the commencement of the section are compelled to transfer these objects to the Victorian Aboriginal Heritage Council, as soon as practicable. The provision creates an offence of failing to transfer secret or sacred objects to the Victorian Aboriginal Heritage Council as soon as practicable after the commencement of the section.

Secret and sacred Aboriginal objects are objects that are located with, or in, the direct vicinity of a traditional Aboriginal burial. The definition is not exclusive, so does not limit the range of objects regarded as secret or sacred to just objects found with Aboriginal burials.

Compatibility with the Charter of Human Rights and Responsibilities Act 2006 (Charter)

Section 19(2) of the Charter confirms the distinct cultural rights of Aboriginal people, including the right to not be denied the enjoyment of their identity and culture. This is reiterated as the central purpose of the Bill, as stated in clause 1 of the Bill.

Under section 20 of the Charter, a person has the right not to be unlawfully deprived of property. The Bill proposes to return secret and sacred objects to their rightful owners.

Also, section 8(2) of the Charter states that every person has the right to enjoy his or her human rights without discrimination. Traditional Owners have repeatedly emphasised that secret and sacred Aboriginal objects are as culturally sensitive as Ancestral Remains. For them, it is highly inappropriate for these objects to be privately owned and circulated. To reflect the sensitive nature of such objects, especially objects found in association with...
Ancestral Remains, secret and sacred objects in private ownership will, from the commencement of these provisions, be owned by the relevant Traditional Owners.

The Bill treats secret and sacred Aboriginal objects similarly to Ancestral Remains, with the Victorian Aboriginal Heritage Council required to follow the same procedures as for Ancestral Remains once it receives secret and sacred objects.

The Bill compels both institutions and individuals to transfer secret and sacred Aboriginal objects to the Victorian Aboriginal Heritage Council as soon as practicable. The Bill also inserts a requirement for public entities and universities which may hold Ancestral Remains to examine their holdings and report on any collections to the Victorian Aboriginal Heritage Council within two years of the commencement of the section, and creates an offence for failure to comply with these provisions. Individuals are specifically included under the secret and sacred Aboriginal objects provisions, as these objects are more likely to be in the possession of individuals. As a result, individuals, as well as institutions, should and must be compelled to transfer these objects to the Victorian Aboriginal Heritage Council.

The Bill does not engage section 20 of the Charter as the Bill requires the return of secret and sacred objects. The deprivation of property is not unlawful as it is in accordance with the procedures set out in the Bill. Instead, compelling individuals, as well as institutions, to be aware of their collections and to return these objects accords with Section 19(2) of the Charter, by confirming the distinct cultural rights of Aboriginal people, including the right to not be denied the enjoyment of their identity and culture. Also, the return of these objects is in keeping with section 8(2) of the Charter, as every person has a right to enjoy their human rights without discrimination.

Compensation and Disputes

There are no provisions for compensation in the Bill. Secret and sacred Aboriginal objects, similar to Ancestral Remains, are culturally sensitive. As a result of their cultural sensitivity these objects should not be in the possession of either institutions or individuals who do not have traditional links to these objects. Further, many of these objects were originally obtained from Traditional Owners without their informed consent or even contrary to their consent (which is also contrary to section 20 of the Charter) and continue to be held in private ownership against the wishes of Traditional Owners. It is not considered appropriate to offer compensation in this circumstance.

Equally, no provisions have been inserted regarding disputes around ownership. Traditional Owners are empowered by the Bill to be protectors of Aboriginal cultural heritage on behalf of all people. The purposes of the Bill include strengthening the ongoing right of Traditional Owners to maintain the distinctive spiritual, material and economic relationship with the land and waters and other resources for which they have a connection under traditional laws and customs. Only a person who has responsibility under Aboriginal tradition for the secret and sacred Aboriginal object or who is a member of a family or clan recognised under Aboriginal tradition as having responsibility for secret and sacred objects from an area is recognised as a Traditional Owner. Despite this, a person in possession of an object could bring a claim in administrative law in the Supreme Court for a declaration about whether or not an object is a secret or sacred object.
In these instances, the Supreme Court would hear evidence and make a decision on whether the object is a secret or sacred object and declare such accordingly.

If you have any queries, please contact Mr Jamin Moon, Acting Manager, Heritage Policy and Planning, Office of Aboriginal Affairs Victoria on (03) 9208 3235.

Yours sincerely

[Hon Natalie Hutchins MP]
Hon Natalie Hutchins MP
Minister for Aboriginal Affairs

Cc: Mr Nathan Bunt, Senior Legal Adviser, Parliament of Victoria.

- 4 DEC 2015
Drugs, Poisons and Controlled Substances Amendment Bill 2015

The Bill was introduced into the Legislative Assembly on 10 November 2015 by Hon Martin Pakula MLA, Attorney-General. The Committee considered the Bill on 23 November 2015 and made the following comments in Alert Digest No. 15 of 2015 tabled in the Parliament on 24 November 2015.

Committee comments

Charter report

Expression – Presumption of innocence – Offence to possess document containing instructions for trafficking or cultivating a drug of dependence without reasonable excuse – Defendant must prove that his or her purpose was not to traffic drugs to be eligible for an adjourned bond

Summary: New section 71E makes it an offence punishable by up to five years imprisonment to possess ‘a document containing instructions for the trafficking or cultivation of a drug of dependence’ without a reasonable excuse. To be eligible for an adjourned bond, the defendant must prove ‘on the balance of probabilities’ that he or she did not commit the offence for any purpose relating to cultivating or trafficking in a drug of dependence. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 10, inserting a new section 71E, makes it an offence punishable by up to five years imprisonment to ‘possesses a document containing instructions for the trafficking or cultivation of a drug of dependence’.

The Committee observes that new section 71E differs from existing s. 71A, which makes it an offence punishable by 10 years imprisonment to possess (amongst other things) a ‘document containing instructions relating to the preparation, cultivation or manufacture of drug of dependence... with the intention of using the... document... for the purpose of trafficking in a drug of dependence’, because the new offence:

• does not require that the prosecution prove that the defendant intended to use the document to traffic in a drug of dependence.

• applies to documents containing instructions for trafficking (which includes sale) of drugs of dependence, rather than just documents relating to preparation, cultivation or manufacture.†

• provides that, if the defendant gives or points to evidence that he or she was authorised or licensed under the Drugs, Poisons and Controlled Substances Act 1983 or regulations to possess the instructions, and otherwise had a ‘reasonable excuse’ to do so, then the accused must be acquitted unless the prosecution proves that the accused was neither authorised, licensed or had a reasonable excuse to possess the instructions.

• has a maximum penalty of 5 years imprisonment, rather than 10 years, and can be the subject of an adjourned bond for first-time offenders under existing s. 76.

The Statement of Compatibility remarks, in relation to both new section 71E and a further offence of publishing such documents intending or reckless as to their use by another person to traffic or cultivate drugs of dependence:

† See also Criminal Code 2002 (ACT), ss. 614 & 621; Drug Misuse and Trafficking Act 1985 (NSW), s. 11C(1); Misuse of Drugs Act 1990 (NT), s. 88(1); Drugs Misuse Act 1986, s. 8A(1) (Qld); Controlled Substances Act 1984 (SA), s. 33LAB(1).
While the offences in clause 10 may be said to limit freedom of expression by attaching penalties to the possession and publication of information, the limitation clearly falls within the internal limitation to that right in section 15(3) as lawful and reasonably necessary to protect public order and public health.

The objective of both offences is to assist enforcement efforts to shut down the domestic production of illicit drugs such as ice in clandestine drug laboratories. The offences are intended to deter and sanction conduct that makes drug ‘recipes’ more widely available in the community and increases the risk that individuals will either make or grow illicit drugs themselves, or incite or assist others to commit these crimes. Such behaviour increases the supply of illicit drugs in the community and potentially causes people harm.

According to the Australian Crime Commission, domestic production of methylamphetamine in clandestine drug laboratories has remained steady in Australia, despite an upward trend in importations of methylamphetamine since 2010, and continues to play a substantial role in supply.

The proposed offences are lawful in that they are established by legislation and the circumstances in which they apply are appropriately limited to ensure only those intended to be captured by the offences will be captured.

For example, the provisions exclude persons who possess or publish instructions for drug trafficking or cultivation in connection with activities that are authorised or licensed directly under the Drugs Act (such as drug manufacture, the provision of health services, or for industrial, educational, advisory or research purposes), and except persons who have a reasonable excuse.

...  

A further safeguard is that for the offence of possessing drug trafficking or cultivating instructions, the court will have the option of adjourning proceedings without conviction for up to 12 months for a first time drug offender, under amendments to the Drugs Act made by clause 13 of the bill. This will empower the court to allow the person to enter into an adjourned bond for 12 months under section 75(1) of the Sentencing Act 1991.

**However, the Committee notes that clause 13 provides that, to be eligible for an adjourned bond for first-time drug defendants, the defendant must prove ‘on the balance of probabilities’ that he or she did not commit the offence for any purpose relating to cultivating or trafficking in a drug of dependence.** The Committee observes that the Statement of Compatibility does not address the compatibility of the reverse onus in clause 13 with the Charter right of people charged with offences to be presumed innocent until proved guilty.³

The Committee notes that overseas courts have set out the following test for whether or not a law is a ‘lawful restriction’ on the right to freedom of expression:⁴

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

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³ Charter s. 25(2).
⁴ *Sunday Times v UK* [1979] ECHR 1, [49].
The Committee observes that:

- the heading to new section 71E – ‘Possession of document containing information about trafficking or cultivating a drug of dependence’ – is significantly broader than the text of new section 71E, which is limited to documents containing ‘instructions for’ such trafficking or cultivation. The Committee notes that the heading may be relied upon by lay people, police officers and (in interpreting the provision) courts.

- in contrast to new section 71F, there is no provision indicating whether or not the prosecution must prove that the instructions ‘actually work to traffick or cultivate a drug of dependence.’

- the term ‘reasonable excuse’ in new section 71E is not defined. The Second Reading Speech states: ‘It will be for the courts to determine reasonable excuse in all of the circumstances of each individual case.’ The Committee notes that, in light of clause 13, the fact that a person did not have the purpose of trafficking drugs may not be a reasonable excuse.

The Committee will write to the Attorney-General seeking further information as to:

- the accuracy of the heading to new section 71E;

- whether or not a prosecutor, in a proceeding for an offence under new section 71E, must prove that the instructions contained in the document actually work to traffick or cultivate a drug of dependence;

- whether or not it is a reasonable excuse under new section 71E that the defendant did not intend to use the document for trafficking in drugs; and

- whether or not clause 13, which requires the defendant to prove on the balance of probabilities that he or she did not possess the document for the purpose of trafficking in drugs to be eligible for an adjourned bond, is compatible with the Charter’s right to be presumed innocent until proved guilty.

Minister’s response

The Committee thanks the Minister for the attached response.

** Interpretation of Legislation Act 1984, s. 36(2A)(d).
Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Ms Blandthorn,

Drugs, Poisons and Controlled Substances Amendment Bill 2015

Thank you for your letter of 23 November 2015, seeking further information on a number of matters in relation to the Drugs, Poisons and Controlled Substances Amendment Bill 2015.

I have reviewed the matters raised by the Committee and my response to each matter is set out below.

- **The accuracy of the heading to new section 71E.**

  As the Committee has observed, the heading of new section 71E refers to “information about trafficking or cultivating” and is broader than the text of the new section, which is limited to “a document containing instructions for” drug trafficking or cultivation. I am informed that this inconsistency was overlooked in the finalisation of the Bill and will need to be corrected, to ensure the heading aligns accurately with the content of the provision.

  I have therefore asked that my department initiate arrangements for the heading to be amended at the next available opportunity, either through a statute law revision bill or another suitable amending bill. Thank you for bringing this matter to my attention.

- **Whether or not a prosecutor, in a proceeding for an offence under new section 71E, must prove that the instructions contained in the document actually work to traffic or cultivate a drug of dependence.**
New section 71E is intentionally distinct from new section 71F. The offence under new section 71E deals only with the act of possession. There is no requirement in new section 71E for a prosecutor to prove that the instructions contained in the document actually work to traffick or cultivate a drug of dependence, nor is the new section intended to be interpreted as applying such a requirement. In contrast to new section 71F, however, it was considered unnecessary to clarify this intention in the text of new section 71E given that the offence relates strictly to possession.

New section 71F deals with the more serious offence of publishing instructions to traffick in or cultivate drugs. In this offence, the prosecution must prove that the accused either intended that the instructions would be used by someone else for drug trafficking or cultivation purposes, or knew or was reckless as to whether the instructions would be used for these purposes. Given these elements of the offence, it was important to clarify under new section 71F(2) that the prosecution is not required to prove the instructions actually work, in order to prove the commission of the offence.

- Whether or not it is a reasonable excuse under new section 71E that the defendant did not intend to use the document for trafficking in drugs.

The reasonable excuse provision in new section 71E is intended to ameliorate the strictness of the offence in that new section by enabling a defendant to point to evidence of the facts of a reasonable excuse. It is for the courts to determine whether a reasonable excuse exists based on the circumstances of the particular case.

It is possible to envisage that a person might claim a reasonable excuse in circumstances where, for instance, the person was studying chemistry at a university. Whether or not these circumstances, or the circumstances outlined by the Committee, are reasonable excuses must remain a matter of judgement for the courts, based on the facts before them having regard to all the circumstances of the individual case.

- Whether or not clause 13, which requires the defendant to prove on the balance of probabilities that he or she did not possess the document for the purpose of trafficking in drugs to be eligible for an adjourned bond, is compatible with the Charter's right to be presumed innocent until proved guilty.

In my opinion clause 13 of the Bill is compatible with the Charter’s right for a person to be presumed innocent until proved guilty, because it does not reverse the onus of proof in relation to any element of the offence under new section 71E. It merely requires the offender to prove a factor in mitigation following a finding of guilt.

Section 76 of the Drugs, Poisons and Controlled Substances Act 1981 (Drugs Act) applies to certain drug cases in the Magistrates’ Court involving first time drug offenders. Where applicable, section 76 directs the magistrate, upon a finding of guilt, to impose an adjourned bond without conviction pursuant to section 75(1) of the Sentencing Act 1991, unless the court considers a conviction should be imposed. Clause 13 amends section 76 of the Drugs Act to enable the court to impose an adjourned bond where applicable for an offender found guilty of the offence under new section 71E, if the court is satisfied on the balance of probabilities that the offence was not committed for the purpose of cultivating or trafficking in drugs.

The requirement for the offender to prove this factor in mitigation is not expected to be necessary in every case. If a magistrate raises an issue of cultivation or trafficking in relation to a potential disposition under section 76 of the Drugs Act, evidence may need to be called in favour of the defendant. However, in cases where the prosecution concedes that the possession of the instructions was not for the purpose of cultivation or trafficking, this should not be necessary.
I thank the Committee for its comments and hope the above responses are helpful.

Yours sincerely

Hon Wade Noonan MP
Minister for Police
Notice of Amendments to Australian Rules of Harness Racing (ARHR) and Australian Trotting Stud Book Regulations (ATSBR)

The Committee wrote to the Minister for Racing in relation to the above legislative instrument.

The Committee thanks the Minister for the attached response.

Committee Room
7 December 2015

* The Committee reports on this Legislative Instrument pursuant to sections 17(d) and 17(fa) of the Parliamentary Committees Act 2003 and section 25A(c) of the Subordinate Legislation Act 1994.
9 October 2015

Minister for Racing

The Honourable Martin Pakula MP
Level 26, 121 Exhibition Street,
Melbourne 3000

Dear Minister

Notice of Amendments to Australian Rules of Harness Racing (ARHR) and Australian Trotting Stud Book Regulations (ATSBR) – Legislative Instrument (LI)

The LI was considered by the Regulation Review Subcommittee (the Subcommittee) of the Scrutiny of Acts and Regulations Committee (the Committee) at a meeting on 5 October 2015 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 LI on 7 December 2015 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

Notice of Amendments to Australian Rules of Harness Racing (ARHR) and Australian Trotting Stud Book Regulations (ATSBR) – Legislative Instrument (LI)

Rules 15(1)(k) and (1)(p) – Rule 299- section 49 of the Racing Act (the Act)

The LI was made by Harness Racing Victoria (HRV) pursuant to section 49 of the Act. Pursuant to section 49 the Board has the express power to make rules for or with respect to ‘the control of the sport of harness racing in Victoria...And any other matters which the Board is by or under this or any other Act required or empowered to perform.’ The LI commenced operation on 6 August 2015. The LI makes various amendments to the Harness Racing Victoria Rules (HRVR) by the ARHR so as to ensure consistency. In particular it amends Rule 15 which sets out the stewards’ powers. It inserts the word ‘item’ in the existing powers. It provides that the stewards:-

- May ‘inspect, examine or test in such manner as they consider appropriate any person, horse, racetrack, stable, stud artificial breeding station or other place, item, document, equipment, vehicle or substance’; (See Rule 15(1)(k)).

- May ‘confiscate or take possession of any substance or equipment or item or document permanently or for a period’; (See Rule 15(1)(p)).

Section 12D of the Human Rights certificate provides:-

‘...Under Harness Racing Victoria’s existing Rules, its stewards have the power to inspect, examine or test any person, horse, racetrack, stable, stud, artificial breeding station or other place, document, equipment, vehicle or substance. The proposed amendment will extend the application of this rule to include any item. The proposed amendments will allow HRV to clarify the existing rule so that a steward may exercise these powers in relation to devices such as computers and mobile phones....’

Rule 299 provides:-

All persons

(a) Licensed under these rules;

(b) Carrying on or purporting to carry on activities related to the harness racing activity; or

(c) Who in some other way are affected by the rules;

Are deemed to have knowledge of and be bound by them and of all things done under them.

The effect of Rule 299, subparagraphs (b) and (c) together with the recent amendments is unclear and may be very broad. It is unclear who may be covered by the Rules. It appears to the Subcommittee that the stewards may therefore inspect, take and confiscate permanently or for a period, a computer or mobile phone of potentially any person at a harness meeting.
The issue of stewards’ powers and how far they extend was considered in the case of Clements V Racing Victoria Limited (Occupational and Business Regulation)[2010] VCAT 1144. In that instance, stewards in Australian Racing (AR) were given the power pursuant to AR 8(b) ‘to require and obtain production and take possession of any mobile phones, computers, electronic devices, books, documents and records, including any telephone or financial records relating to any meeting or inquiry’.

The central issue was whether AR 8 applied to persons who have not consented (either expressly or impliedly) to be bound by the rules. It was held there the sources of stewards’ power is contractual and those powers do not extend to persons who have not agreed to be bound by the rules. However, the matter is complex and it is not clear whether the broad regulatory powers of the stewards with respect to the harness rules of the conduct of racing made under section 49 apply to a general member of the public or how far they apply. The Subcommittee further notes that the amendments have also been adopted by New South Wales, South Australia, Tasmania and Western Australia.

Section 21 (1)(d) of the Subordinate Legislation Act 1994 – Committee’s power of review

Section 21(1) of the Subordinate Legislation Act 1994 sets out the Committee’s power of review. Section 21(d) provides that:

(1) ‘The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before the Parliament.....

(d) Makes unusual or unexpected use of the powers conferred by the authorising act having regard to the general objectives of that Act.’

The issue for the Subcommittee is to consider the amendments to the ARHR in light of the requirements of section 21(1)(d) of the Subordinate Legislation Act 1994. Can the making of rules with respect to the control of the sport of harness racing authorise stewards to inspect, take or confiscate permanently or for a period a computer or mobile phone of potentially any person or member of the public at a harness race meeting be considered or unexpected use of the powers conferred under section 49 having regard to the general objectives of that Act?

There are no stated objectives of that Act. The long title simply states that it is ‘An Act to consolidate the law relating to Horse Pony Trotting and Greyhound Racing, the Registration of Bookmakers and their Clerks, and Totalizators’. This of itself provides little guidance.

The width of the powers conferred on the stewards which provide they may confiscate or take possession of a computer or mobile phone of any person at a harness race meeting may be considered an unusual or unexpected use of power. There is no apparent limitation on the exercise of the use of the powers with respect to general members of the public.
Given the foregoing, the Subcommittee seeks further information and your comments as to whether the amendments can be considered an ‘unusual or unexpected use of the powers conferred by the authorising Act’ as set out in section 21(1)(d) of the Subordinate Legislation Act 1994.

Human Rights

As the Human Rights certificate states, the extension of rules 15(1)(k) and 15(1)(p) to ‘items’ respectively engages the Charter’s rights not to have privacy or correspondence unlawfully or arbitrarily interfered with (Charter s. 13(a)) and not to be deprived of property otherwise than in accordance with law (Charter s. 20.) (The Subcommittee notes that the certificate incorrectly refers to Charter s. 12 throughout.)

After considering the amended rules, the Subcommittee has two queries about their human rights compatibility.

First, the Subcommittee notes that the terms ‘unlawfully’ and ‘in accordance with law’ are generally interpreted by overseas courts as requiring that any laws that limit privacy or property rights be:

adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. (See Sunday Times v UK [1979] ECHR 1, [49].)

Accordingly, the Subcommittee seeks further information about the following aspects of amended rules 15(1)(k) and 15(1)(p):

- What conditions must be satisfied before these powers can be exercised? In particular, what is the meaning of the requirement in rule 15(1)(k) that the suspect consider inspection, examination or testing be ‘appropriate’? And what preconditions (if any) must exist before rule 15(1)(p), especially the power to permanently confiscate an item, can be used?

- What items may be inspected, examined, tested, confiscated or taken?: In particular, are ‘items’ limited to computers and mobile phones? If not, what other items may be inspected, examined, tested, confiscated or taken under the amended rules? For example, could stewards search clothes or confiscate cash?

- What can stewards do with computers and mobile phones?: In particular, can stewards read emails or texts, copy or delete files, or otherwise use computers or phones? Also, can stewards open the hardware to remove, e.g. hard drives or sim cards? And, finally, can stewards require owners to supply passcodes or passwords for these devices?

- Which people can have their privacy interfered with or be deprived of their property? In particular, do amended rules 15(1)(k) and (p) apply to all three categories of persons listed in
rule 299. For example, can people who simply attend harness races as spectators have their phones searched or confiscated?

- What are the consequences of a person not co-operating with a request from the stewards under rules 15(1)(k) and (p)? In particular, can stewards use reasonable force to take items? And are they immune from civil and criminal liability for doing so?

In each case, the Subcommittee would appreciate information as to how stewards are trained in relation to their powers under rules 15(1)(k) and (p) and how the various categories of people whom fall within rule 299 are informed of those powers.

Second, the Subcommittee notes that any consideration of whether amended rules 15(1)(k) and (p) are reasonable limits includes a consideration of whether or not there are less restrictive means reasonable available to achieve their purposes (see Charter s. 7(2)(e)). In this regard, the Subcommittee observes that the Rules of Racing (Victoria) appear to contain narrower and clearer rules as follows:

- Australian Rule 8(b) empowers stewards ‘To require and obtain production and take possession of any mobile phones, computers, electronic devices, books, documents and records, including any telephone or financial records relating to any meeting or enquiry’. The Subcommittee notes that this is narrower than a rule allowing any ‘item’ to be inspected or taken.

- Australian Rule 88 gives broader powers to stewards to ‘examine... any article or thing’ and to remove or retain them for such period as the stewards consider necessary, but that power only applies when the stewards are on premises occupied by or under control of a licensed person. (See also Local Rule 66A(2)(b), a narrowly targeted power to require passwords.)

- Local Rule 3(2) (introduced in January 2014) sets out a rule for when stewards can use their powers on people who attend race meetings or otherwise participate in any activity connected with racing or betting, which requires that the steward hold one of a defined list of suspicions based on reasonable grounds.

The Subcommittee would appreciate your views as to whether or not including whether or not including similar rules in the Harness Racing Rules would be a less restrictive alternative reasonably available to achieve the purpose of the amendments to rules 15(1)(k) and (p).
Ms Lizzie Blandthorn MP
Chair
Regulation Review Subcommittee
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Ms Blandthorn

I refer to your letter of 9 October 2015 about the notice of amendments to the Australian Rules of Harness Racing (ARHR) and Australian Trotting Stud Book Regulations in which you sought advice on a range of issues.

Specifically, you have requested advice in response to queries from the Secretariat and Human Rights adviser to the Regulation Review Subcommittee (Subcommittee) of the Scrutiny of Acts and Regulation Committee (SARC) in respect of the Subcommittee’s consideration of the amending legislative instrument (LI).

The Subcommittee expressed concern about the effect and broad nature of the amendments, when considered with the existing Rule 299, which states:

299. All persons
   (a) licensed under these rules;
   (b) carrying on or purporting to carry on activities related to the harness racing industry; or
   (c) who are in some other way are affected by the rules are deemed to have knowledge of and be bound by them and of all things done under them.

The Subcommittee stated that it is unclear who may be covered by the rules and that it appears that the amended Rules 15(1)(k) and (p) will potentially allow Stewards to inspect, take and confiscate permanently or for a period, a computer or mobile phone of potentially any person at a harness racing meeting.

In accordance with its power of review under section 21(d) of the Subordinate Legislation Act 1994 (SLA), the Subcommittee stated that:
The width of the powers conferred on the stewards which provide they may confiscate or take possession of a computer or mobile phone of any person at a harness race meeting may be considered an unusual or unexpected use of power. There is no apparent limitation on the exercise of the use of the powers with respect to general members of the public.

Given the foregoing, the Subcommittee seeks further information and your comments as to whether the amendments can be considered an "unusual or unexpected use of the powers conferred by the authorising Act" as set out in section 21 (1)(d) of the SLA?

I note that the amendments to the ARHR are categorised as an LI and not a Statutory Rule which is covered by section 21(1)(d) of the SLA. Nevertheless, advice on the queries raised was sought from Harness Racing Victoria (HRV), the statutory body responsible for the control of harness racing in Victoria, including the application and enforcement of the ARHR and its local rules.

This letter provides a summary of HRV’s response. A copy of HRV’s full response is attached for your consideration.

The LI amends Rule 15 of the ARHR to include the word ‘item’ as follows:

15. (1) Stewards are empowered-
   ...
   (k) to inspect, examine or test in such manner as they consider appropriate any person, horse, racetrack, stable, stud, artificial breeding station or other place, item, document, equipment, vehicle or substance;
   ...
   (p) to confiscate or take possession of any substance or equipment or item or document permanently or for a period;

HRV submitted that it is not unclear who is covered by the Rules, with the provisions of Rule 299 enabling their application to persons who are:
- licensed participants (Rule 299(a))
- conducting licensed activities without holding a licence (Rule 299(b))
- persons such as disqualified persons who no longer hold a licence (Rule 299(c)).

As such, HRV advise that:

The suggestion that its Stewards may exercise their powers in relation to a person (ie. a member of the general public) at a harness racing meeting is, with respect, simply not the correct position.

... It is also incorrect to suggest that there is "no apparent limitation on the exercise of the use of the powers with respect to general members of the public."

In HRV's view, this effectively addresses the concerns and reservations expressed in the advice to SARC, and it follows that ARHR 15 is not an unusual or unexpected use of the powers conferred under section 49 of the Racing Act.

... Due to the varied circumstances which may present themselves in Stewards’ investigations there are no written guidelines governing the exercise of powers in ARHR 15. However, in practice the use of the specific power queried by the Advice to SARC has been utilised in relation to the analysis of phone devices only in instances of investigations of possible breaches of serious offences of the ARHR, and will continue to only be used in such matters. In practice, the power has been used with respect to licenced participants, with the only
exception being a veterinary clinic (regarding cobalt investigation) who were willing to provide consent to the analysis of their computer and phone devices. The use of such analysis is authorised only by the General Manager of Integrity or the Manager of Investigations, both whom have access to in house and external counsel should there be a need to determine whether a particular person falls within the scope of the rules. As mentioned above, the power could not be used on a person who merely went to or had a bet on a harness racing meeting.

Serious offences are defined in the Victorian Local Rules of harness racing.

Human Rights

In respect of the amendments to Rules 15(1)(k) and (p) engaging sections 13(a) (right not to have privacy or correspondence unlawfully or arbitrarily interfered with) and 20 (right not to be deprived of property otherwise in accordance with the law) of the Charter of Human Rights and Responsibilities Act 2006, the Subcommittee sought further information about the following aspects of the amended rules.

Question
What conditions must be satisfied before these powers can be exercised? In particular, what is the meaning of the requirement in rule 15(1)(k) that the suspect consider inspection, examination or testing be ‘appropriate’? And what preconditions (if any) must exist before rule 15(1)(p), especially the power to permanently confiscate an item, can be used?

Response
The use of such analysis is authorised only by the General Manager of Integrity or the Manager of Investigations, both of whom have access to in-house and external counsel should there be a need to determine whether a particular person falls within the scope of the rules. As mentioned above, the power could not be used on a person who merely went to or had a bet on a harness racing meeting.

The example below provides an illustration of the type of circumstances in which a Steward would consider it appropriate to exercise powers under ARHR 15.

Example – if Stewards found in its examination of a person or place a distinctive pen that matched the type of pen (concealing a syringe) allegedly used in the commission of a serious offence, the inability to collect such evidence on the basis that such an item could not be categorised as a substance, equipment or document poses a real threat to the integrity of harness racing.

Question
What items may be inspected, examined, tested, confiscated or taken? In particular, are ‘items’ limited to computers and mobile phones? If not, what other items may be inspected, examined, tested, confiscated or taken under the amended rules? For example, could stewards search clothes or confiscate cash?

Response
HRV advised that items are not limited to computers and phones.

HRV advised that the power to search a person depends on the circumstances of the case. For example, the stewards could search a person if they see them put a syringe in their pocket. However, they could not search through someone’s laundry at their house.

Question
What can stewards do with computers and mobile phones? In particular, can stewards read emails or texts, copy or delete files, or otherwise use computers or phones? Also, can stewards open the
hardware to remove, e.g. hard drives or sim cards? And finally, can stewards require owners to supply passcodes or passwords for these devices?

Response
The process involves a phone being analysed on site by HRV Stewards through the use of a UFED Cellebrite or similar device which does not change any settings, passwords or impact any content/instruments. The extraction would typically take less than an hour and is done in the presence of the owner of the device so in reality there is no deprivation of property.

The HRV Stewards can limit the extraction of data to capture only that required (e.g. call logs or only text messages may be required). For example, a recent matter involving a potential incident of race fixing involved the downloading and subsequent analysis of text messages and call logs.

The extracted data is also limited to specific time frames relevant to the alleged offence. It is not provided to any other agency or company unless there is a legal requirement to do so, eg, to Victoria Police or relevant law enforcement agency.

Once extracted, the data is stored on a secure drive within the HRV Integrity Department network, which is password protected and access limited to only Integrity Department staff involved in the specific investigation. The data is removed at the completion of the investigation. If there is a hard drive of captured data it is also kept in a locked cabinet within the secure Integrity Department area within HRV’s office. The analysis of the downloaded data is conducted by keyword search and records of these searches are made available for hearings of the Racing Appeals and Disciplinary Board (RADB) or Victorian Civil and Administrative Tribunal (VCAT) in connection with any such investigation.

Only Integrity Department staff of HRV who have conducted formal accredited training with the manufacturer of the phone reading device conduct such analysis. The authorisation of the use of the power is limited to the senior positions (General Manager of Integrity or the Manager of Investigations), both of whom possess extensive experience within Victoria Police and are cognisant of the overriding legal principles and regulations attached to the use of any power exercised by police or Stewards as the case may be. Due to the limited size of the organisation, the analysis is typically conducted by one of these two positions themselves. Other accredited staff who may perform analysis would do so under the guidance and supervision of such senior positions.

Question
Which people can have their privacy interfered with or be deprived of their property? In particular, do amended rules 15(1)(k) and (p) apply to all three categories of persons listed in rule 299? For example, can people who simply attend harness races as spectators have their phones searched or confiscated?

Response
Yes, the amended rules apply to all three classes of persons. However, as previously explained by HRV, these classes do not capture persons who simply attend at a harness racing meeting.

Question
What are the consequences of a person not co-operating with a request from the stewards under rules 15(1)(k) and (p)? In particular, can stewards use reasonable force to take items? And are they immune from civil and criminal liability for doing so?
Response
In past cases, all harness racing participants have been cooperative with the use of such powers. There has been no objection to the use of such power, which has been accepted by the industry and conducted by HRV Stewards without incident or question during otherwise vigorously contested cases.

There is no provision for Stewards to use force to conduct such analysis. If permission was not granted and the person refused to provide such permission after a direction from Stewards to cooperate, and justification for such direction to provide their device for analysis was given to them in accordance with the rules by the stewards, then the person would be advised that they may face action for refusing to comply with a direction under the provisions of ARHR 187.

This would effectively mean that if the person was of the view that they were not within the scope of the rules, or that there were insufficient grounds, then at most they may be charged with failing to obey a direction under ARHR 187 and it would fall upon the RADB or VCAT to determine whether such material was reasonably required in accordance with the circumstances of the case.

Question
In each case, the Subcommittee would appreciate information as to how stewards are trained in relation to their powers under rules 15(1)(k) and (p) and how the various categories of people whom fall within rule 299 are informed of these powers.

Response
HRV advised that all HRV Integrity Department staff are provided with in-house training. Additionally, the Office of the Racing Integrity Commissioner (ORIC) offers formal training to racing integrity staff from all three controlling bodies, including HRV Integrity Department staff. The ORIC training, which includes modules that deal with the powers of stewards, is conducted by integrity management staff from the three controlling bodies and external barristers. All members of the HRV Integrity Department (except for two new employees) have completed these modules.

Only HRV Integrity Department staff who have completed formal accredited training with the manufacturer of reading device(s) can conduct analysis of computer and phone equipment.

HRV advised that its rules are published on its website. Licence holders must agree to be bound by the rules as part of the conditions of their licences, which are renewed annually.

Question
The Subcommittee notes that any consideration of whether amended rules 15(1)(k) and (p) are reasonable includes a consideration of whether or not there are less restrictive means reasonably available to achieve their purposes (s 7(2)(e) of the Charter). In this regard, the Subcommittee observes that Racing Victoria’s Rules of Racing (RV Rules) appear to contain narrower and clearer rules as follows:

- AR 8(b) empowers stewards:
  
  to require and obtain production and take possession of any mobile phones, computers, electronic devices, books, documents and records, including any telephone or financial records relating to any meeting or enquiry.

  The Subcommittee notes that this is a narrower than a rule allowing any item to be inspected or taken.

- AR 8B gives broader powers to stewards to:
examine... any article or thing.

and to remove or retain them for such period as the stewards consider necessary, but that power only applies when the stewards are on premises occupied or under control of a licensed person. (See also LR 66A(2)(b), a narrowly targeted power to require passwords).

- LR 3(2), introduced in January 2014, sets out a rule for when stewards can use their powers on people who attend race meetings or otherwise participate in any activity connected with racing or betting, which requires that the steward hold one of a defined list of suspicions based on reasonable grounds.

The Subcommittee would appreciate your views as to whether or not including similar rules in the Harness racing rules would be a less restrictive alternative reasonably available to achieve the purpose of the amendments to rules 15(1)(k) and (p).

Response
The structure of RV and the RV Rules need to considered in their entirety and context. RV is not a statutory body and its rules and the power of its stewards are contractual in nature. As well, the way in which the ARHR are structured is different to the way in which the RV Rules are structured, with the scope of the ARHR set out at Rule 299, which is recognised in the advice to SARC.

By virtue of the limitations in scope of the harness rules provided by Rule 299 (as set out earlier), the powers contained in the ARHR are of much narrower scope than suggested in the advice to SARC.

The integrity of the Victorian harness racing industry and the ability of HRV to perform its statutory functions may be seriously compromised if the ARHR operated differently in Victoria from other Australian harness jurisdictions.

Yours sincerely,

[Signature]

THE HON MARTIN PAKULA MP
Minister for Racing
Encl.
## Appendix 1
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Committee Comments classified by Terms of Reference

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

**Alert Digest Nos.**

**Section 17(a)**

(i) *trespasses unduly on rights and freedoms*

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

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

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**Appendix 3  
Ministerial Correspondence 2015**

**Table of correspondence between the Committee and Ministers or Members during 2015**

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

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Appendix 4
Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 7 December 2015.

Statutory Rules Series 2015
SR No. 103 – Supreme Court (General Civil Procedure) Rules 2015
SR No. 109 – Traditional Owner Settlement (Negotiation Costs) Regulations 2015
SR No. 116 - Planning and Environment (Fees) Interim Regulations 2015
SR No. 117 - Subdivision (Fees) Interim Regulations 2015
SR No. 114 – Subordinate Legislation (Metropolitan Fire Brigades (General) Regulations 2005) Extension Regulations 2015
SR No. 119 – Local Government (General) Regulations 2015
SR No. 120 – Road Safety Road Rules Amendment (Lane Filtering) Rules 2015
SR No. 121 – Road Safety (General) Amendment (Lane Filtering) Regulations 2015
SR No. 122 – Conveyancers (Professional Conduct and Trust Account and General) Amendment Regulations 2015
SR No. 123 – Land Conservation (Vehicle Control) Amendment Regulations 2015
SR No. 124 – Drugs, Poisons and Controlled Substances (Drugs of Dependence – Synthetic Cannabinoids and Other Substances) Regulations 2015
SR No. 127 – Parliamentary Salaries and Superannuation (Allowances) Amendment Regulations 2015

Legislative Instruments 2015
Notice of Amendments to Australian Rules of Harness Racing (ARHR) and Australian Trotting Stud Book Regulations (ATSBR)
Ministerial Direction under Section 3.2.3 of the Gambling Regulation Act 2003
Driver Accreditation Application, Test, Course and Renewal Requirements Instrument
Submission to the Assisted Reproductive Treatment Amendment Bill 2015

The Committee received the attached submission from Monash University’s Castan Centre for Human Rights Law concerning the Assisted Reproductive Treatment Amendment Bill 2015.
Castan Centre for Human Rights Law

Submission to the Scrutiny of Acts and Regulations Committee

Assisted Reproductive Treatment Amendment Bill 2015

Prepared by Associate Professor Paula Gerber
(with research assistance provided by Nina Vallins and Sam Dipnall)

December 2015
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  2.1 The Best Interests of the Child..................................................................................................3
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3 Criminalising contact with donors ................................................................................................5
  3.1 Recommendations of the Castan Centre ................................................................................6
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4 Conclusion ......................................................................................................................................9
1. **Introduction**

The Castan Centre for Human Rights Law welcomes the Victorian Government’s commitment to legislating to give all donor-conceived people the right to access identifying information about their donors, irrespective of when the person was born.¹

Granting access to information about parents to individuals conceived through assisted reproduction techniques, specifically donation insemination, aligns with international human rights law promoting the rights of the child, including the right to know one’s parents. It is also consistent with international research showing that understanding one’s parentage – biological and social – is a critical element of a person’s healthy development, identity and well-being.²

The Castan Centre endorses the proposed method of regulating contact as set out in the Bill, but recommends against the imposition of any criminal penalty for a breach of the proposed contact preference regime. The imposition of a significant fine is not an appropriate measure to ensure compliance with the proposed contact management regime; has a number of unintended consequence; and is not analogous with other parent/child contact laws currently operating in Victoria.

This submission was originally prepared in response to the Discussion Paper, but is equally relevant to SARC’s consideration of the *Assisted Reproductive Treatment Amendment Bill 2015*.

2. **International Law and the Rights of Donor-born Children**

2.1 *The Best Interests of the Child*

Article 3 of the Convention on the Rights of the Child (CRC) states that, ‘in all actions concerning children ... the best interests of the child shall be a primary consideration.’ If there is a conflict between the rights of a child to know his or her biological parents, and the rights of a donor to anonymity or privacy, the rights of the child should be the primary consideration.

Victoria’s *Assisted Reproductive Treatment Act 2008* (the Act) incorporates a similar best interests standard by providing that ‘the welfare and interests of persons born or to be born as a result of treatment procedures are paramount.’³ The Act actually goes further than the CRC, as best interests are a paramount, rather than primary, consideration. The Act also applies the

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¹ Department of Health and Human Services, *A right to know your identity: Giving donor-conceived people the right to access information identifying their donor* (June 2015), p. 5.


³ s 5(a).
best interests standard to all donor-conceived persons, not only children, which is consistent with the approach of the CRC. This means that in weighing up the rights of a person to know his or her parentage, against the rights of a donor to remain anonymous, the rights of the donor-conceived person should be the paramount consideration. The Act confirms as one of its guiding principles that ‘children born as the result of the use of donated gametes have a right to information about their genetic parents.’

Not all donor-conceived persons will want to access any or identifying information about the donor. However, for those persons who do, the inability to access such information can be distressing, frustrating, and traumatising.

### 2.2 Right to know one’s parents

Article 7 of the CRC protects a child’s right to know his or her parents:

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

The Committee on the Rights of the Child has interpreted this Article as requiring States Parties to ensure that adopted and donor-conceived children can discover the identity of their biological parent(s). This is evidenced in the following comments made by the Committee:

- The Committee has expressed concern at the practice of keeping the identity of biological parents of an adopted child secret, or limiting access to such information for adopted children or children born as a result of medically assisted procreation, and has recommended that the child should have access to information about his or her parents.

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4 s 5(c).  
5 See Wise and Kovacs, above n 2; Law Reform Committee, above n 2; Victorian Assisted Reproductive Treatment Authority *Consultation with donors who donated gametes in Victoria, Australia before 1998: Access by donor-conceived people to information about donors* (2013), 8.  
8 Concluding observations of the Committee on the Rights of the Child regarding Switzerland, 25 February 2015, CRC/C/CHE/CO/2-4; Concluding observations of the Committee on the Rights of the Child regarding Turkmenistan, 10 March 2015, CRC/C/TKM/CO/2-4; Concluding observations of the Committee on the Rights of the Child regarding Armenia, 26 February 2004, CRC/C/15/Add.225, at [38]; Concluding observations of the Committee on the Rights of the Child regarding Russian Federation, 23 November 2005, CRC/C/RUS/CO/3, at [40], [41]; Concluding observations of the Committee on the Rights of the Child regarding Uzbekistan, 2 June 2006, CRC/C/UZB/CO/2, at [40], [41]; Concluding Observations of the Committee on the
• The Committee has expressed concern about ‘anonymous births’ or facilities for anonymous abandonment of children and has recommended that States Parties take measures to obtain information so that such children can discover the identity of their parents.  

• The Committee has expressed concern about a practice of children who are fathered by Catholic priests not being aware of the identity of their fathers; and their mothers being required not to disclose information about the child’s paternity in return for a regular payment from the Church.

• The Committee has expressed concern that children born through surrogate mothers or to single mothers are not given information about their origins.

If a child’s right to know his or her parents has been violated, the obligation to repair the breach by providing this information to the child remains throughout his or her life. That is, a person does not lose the right to know his or parents upon the attainment of majority. Indeed, as John Eekelaar observed,

> It would be a grievous mistake to see the Convention as applying to childhood alone. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all people. It could influence their entire lives. If its aims can be realised, the Convention can truly be said to be laying the foundations for a better world.

3. **Criminalising contact with donors**

The 2012 *Inquiry into Access by Donor-Conceived People to Information about Donors*, recommended that establishing a contact veto scheme was appropriate, despite it limiting the rights of donors. It stated that:

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Concluding observations of the Committee on the Rights of the Child regarding The Holy See, 25 February 2014, CRC/C/V A T/CO/2, at [33], [34].

Concluding observations of the Committee on the Rights of the Child regarding Morocco, 14 October 2014, CRC/C/MAR/CO/3-4; Concluding observations of the Committee on the Rights of the Child regarding Israel, CRC/C/ISR/CO/2-4, paras 33 and 34.

John Eekelaar ‘The Importance of Thinking that Children have Rights’ in Philip Alston, Stephen Parker & John Semour (eds), *Children, Rights, and the Law* (Oxford University Press, 1992), p 234. Cited in Michelle Giroux and Mariana De Lorenzi ‘Putting the Child First: A Necessary Step in the Recognition of the Right to Identity’ (2011) 27(1) Can J Fam 53, 61. Giroux and De Lorenzi assert that the right to know one’s identity should not be limited to children alone, and ought to apply to every individual ‘whatever his or her age’.
It is appropriate that donors, and donor-conceived people, should have the option of lodging a contact veto. This would not prevent a donor’s offspring from accessing identifying information about them, but would prohibit donor-offspring from attempting to make contact with the donor. A contact veto could be enforced through legislated penalties which would apply if the veto was breached. The Committee is aware that the introduction of contact vetoes will have the effect of constraining people’s ability to freely associate with certain other people. The Committee believes, however, that this constraint is an appropriate measure to complement removing the right of donors to prevent their identity from being revealed to their donor-offspring.\footnote{Parliamentary Law Reform Committee, Victoria, Inquiry into Access by Donor-Conceived People to Information about Donors (March 2012), pp. 79-80.}

The Discussion Paper proposes regulating the release and use of identifying information via a contact preference process to be managed by the Victorian Assisted Reproductive Treatment Authority (VARTA). Both the donor and the donor-conceived person may lodge a contact preference with VARTA, for example, that contact be by email or phone, or that there be ‘No contact’. Donors will have two months after being notified that an applicant has sought their identifying information to elect whether or not to specify a contact method. If a contact preference is lodged, then prior to information being released to a donor-conceived offspring, that person must enter into an undertaking with the Secretary to the Department of Health and Human Services that they will comply with the contact preference. Breaches of this undertaking can attract a fine of up to 60 penalty units, which currently equates to $9,100.\footnote{See Penalty Interest Rate Act 1983 (Vic) s 2, and Victorian Government Gazette Number G18 dated 7 May 2015.}

If the applicant becomes aware of the location of the donor they must not act on that information or initiate contact with the donor. Rather, they must surrender this information to VARTA, who will then contact the donor, advise them that their identifying information has been released, and offer counselling and the option to lodge a contact preference. Again, if the donor-conceived offspring goes outside the regulatory regime and initiates contact, they can be fined up to 60 penalty units.

The overarching policy aim is to accord respect and dignity to all participants as far as possible by centralising, controlling and facilitating the linking up of pre-1998 donor-conceived offspring and their donors.

### 3.1 Recommendations of the Castan Centre

While the Castan Centre endorses the proposed method of regulating contact, it recommends against imposing a criminal penalty for a breach of the proposed contact preference regime.
Imposing a criminal penalty diminishes the utility of the proposed scheme and runs contrary to not only the tenor of the amendment, redressing an imbalance in the law and achieving substantive equality.

Creating a system for regulating information and access that is enforced through the threat of fines is not a tailored and effective measure to manage a highly sensitive issue for the donor-conceived offspring, and in its current form, is inconsistent with other Victorian laws concerning access to health and medical information, and contact regimes for adopted children.

3.2 The importance of a tailored regulatory approach to enforcement
A donor-conceived person wanting to access information about where they come from is a sensitive matter that requires a careful appraisal of the most appropriate way of achieving the policy objectives. The threat of prosecution and imposition of a significant fine is inconsistent with the overarching objectives of the proposed amendments. This is because it penalises people for wanting to find out the pieces of the jigsaw puzzle that can help them to construct their identity. The unique nature of the problem the amendments seek to address, requires a more nuanced and sensitive approach to enforcement.

3.2.1 Unintended consequences and multiplied harm
It is not difficult to envisage a variety of circumstances where, along their journey to identify their donor, an individual could be provided with the means of contacting and meeting their donor that breaches their undertaking, but was entirely consensual by all parties. It would be naïve to think that VARTA alone can entirely control each and every aspect of the contact management process. Volunteers, sympathetic not-for-profit organisations, community support groups and family members on both sides may be unaware of the significant penalties they could expose a donor-conceived child to, if they act in good faith in bringing together a donor and donor-conceived individual by imparting information that the individual might act upon instantaneously, without thinking about first notifying VARTA.

Furthermore, the proposed use of enforceable undertakings carries with it insensitive and disempowering connotations of similar conditional contact management regimes for persons engaged with the justice system, such as family violence\textsuperscript{15} and child protection.\textsuperscript{16} This is likely to place further mental burden on donor-conceived individuals going through the contact initiation process.

\textsuperscript{15} For example, Family Violence Protection Act 2008 (Vic), Pt 4, Div S.
\textsuperscript{16} For example, the Children, Youth and Families Act 2005 (Vic). See sections 272-273.
The proposed fine will not be an infringement penalty or ‘on-the-spot’ fine under the *Infringements Act 2006* (Vic), but rather one that requires VARTA or the Department of Health and Human Services to prosecute the donor-conceived individual through the courts. Such measures could well cause psychological harm and trauma to both the donor-conceived individual and the donor. Furthermore, the recording of a conviction against donor-conceived individuals will carry untold prejudicial and discriminatory affects, including, for example, limiting their future employment prospects. The Castan Centre recommends that the possibility of exposing donor-conceived individuals to the criminal justice system should be removed from the proposed reforms.

### 3.2.2 The need for a diverse range of enforcement options for VARTA

The prospective harm that the penalty seeks to ameliorate is undue interference or contact by donor-conceived individuals with their donors. As noted above, the threat of a fine is inappropriate in the circumstances. Even if it is to be retained as a potential penalty, it should be the last option rather than the only option. A more nuanced approach to enforcing the regulation of contact is required.

One option is to utilise the measures contained in existing contact and relationship management laws, such as the *Personal Safety Intervention Orders Act 2010* (Vic). VARTA could retain a statutory discretion to take regulatory action to prevent contact through obtaining a specific court order tailored to the needs of donor related contact when it reasonably suspects that a donor-conceived individual may go outside the contact preference regime. This proposed framework has the benefit of utilising the decision-making expertise of the courts, as well as providing an enforceable safeguard against further breaches by the applicant.

### 3.3 Relationship with other Victorian laws

The legitimacy of the proposed contact preference method requires that any changes to the *Assisted Reproductive Treatment Act 2008* (Vic) must be analogous with parent/child contact laws currently operating in Victoria.

The *Adoption Act 1984* (Vic) prohibits a parent intentionally contacting an adopted child against their wishes expressed in a current contact statement. However, it also explicitly states that no offence is committed if it is the adopted person who initiated contact with their biological parent. Thus the *Adoption Act 1984* (Vic) respects the wishes of persons who expressed a desire for no contact or only certain type of contact, but does recognise that where the breach

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17 An ‘irrelevant criminal record’ is not a protected attribute under the *Equal Opportunity Act 2010* (Vic) meaning that current and future employers are free to engage in discrimination on this basis.

18 See *Adoption Act 1984* (Vic) s 127A.

19 Ibid, s 127A(3).
is by a person struggling to make sense of their origins and identity, the imposition of criminal penalties is not appropriate. For the sake of consistency, and because it is an appropriate model, the *Assisted Reproductive Treatment Act 2008* (Vic) should replicate the approach in the *Adoption Act 1984* (Vic).

The imposition of a penalty, as proposed in the Discussion Paper, not only contradicts the approach in the *Adoption Act 1984* (Vic) – a parallel legislative regime – but also subverts the stated guiding principle that that ‘welfare and interests of persons born or to be born as a result of treatment procedures are paramount’, and undercuts the core guiding principle behind this reform that ‘children born as a result of the use of donated gametes have a right to information about their genetic parents.’ It is thus, at odds with the legislative intent, to grant a right, but simultaneously impose criminal sanctions upon a person for wanting to pursue that right.

4. Conclusion

The Castan Centre commends the Victorian Government for its commitment to facilitating access to donors by donor-conceived individuals, and finds the proposed approach is largely consistent with international human rights norms. However, the Castan Centre recommends that the Government not proceed with the proposed penalty provisions as they are incompatible with the human rights framework underpinning this regime, and inconsistent with the legislative approach used to address similar concerns in relation to adopted children seeking contact their biological parent.

Dated 6th December 2015

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20 *Assisted Reproductive Treatment Act 2008* (Vic) ss 5(a) & (c).