

No. 3 of 2014

Tuesday, 11 March 2014

On the following Bills

Corrections Amendment (Parole)
Bill 2014

Education and Training Reform
Amendment (Registration of Early
Childhood Teachers and Victorian
Institute of Teaching) Bill 2014

Fences Amendment Bill 2014

Gambling and Liquor Legislation
Amendment (Reduction of Red Tape)
Bill 2014

Honorary Justices Bill 2014

Mental Health Bill 2014

Transport (Safety Schemes Compliance
and Enforcement) Bill 2014

Vexatious Proceedings Bill 2014

The Committee



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Terms of Reference - Scrutiny of Bills

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

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

Table of Contents

	Page Nos.
Alert Digest No. 3 of 2014	
Corrections Amendment (Parole) Bill 2014	1
Fences Amendment Bill 2014	11
Gambling and Liquor Legislation Amendment (Reduction of Red Tape) Bill 2014	13
Honorary Justices Bill 2014	14
Mental Health Bill 2014	15
Transport (Safety Schemes Compliance and Enforcement) Bill 2014	18
Vexatious Proceedings Bill 2014	20
Ministerial Correspondence	
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	25
Appendices	
1 – Index of Bills in 2014	29
2 – Committee Comments classified by Terms of Reference	31
3 – Ministerial Correspondence 2014	33

Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the *Charter* provides –

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

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
 - (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

Glossary and Symbols

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

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

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

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

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

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

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (as from 1 July 2013 one penalty unit equals \$144.36)

'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. 3 of 2014

Corrections Amendment (Parole) Bill 2014

Introduced	18 February 2014
Second Reading Speech	18 February 2014
House	Legislative Council
Member introducing Bill	Hon Edward O'Donohue MLC
Portfolio responsibility	Minister for Corrections

Background

In November 1988 the Supreme Court sentenced Julian Knight to seven life sentences with a non-parole period of 27 years. The prisoner had pleaded guilty to seven counts of murder and 46 counts of attempted murder following a shooting rampage in Clifton Hill on 9 August 1987. The rampage left 7 dead and another 19 persons seriously injured. In his sentencing remarks the presiding judge, Mr Justice Hampel described the offending as 'one of the worst massacres in Australian history'.¹ At the time of sentencing the prisoner was 19 years old. The prisoner will be eligible to apply for parole in May 2014.

Purpose

The Bill inserts a new section 74AA² ('the amendment') in the *Corrections Act 1986* to provide for additional conditions for the making of a parole order for the prisoner Julian Knight.

The Bill also provides that the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') has no application to the amendment and specifically, that section 31(7) of the Charter (expiry of the override after 5 years) does not apply to the amendment.

The Committee notes that the Minister has made an override statement supporting an override declaration in the course of the second reading speech.

¹ *R v Knight* [1989] VR 705. Also available online at <<http://www.austlii.edu.au/au/cases/vic/VicRp/1989/62.html>>

² 74AA. Conditions for making a parole order for Julian Knight

- (1) The Board must not make a parole order under section 74 in respect of the prisoner Julian Knight unless an application for the order is made to the Board by or on behalf of the prisoner.
- (2) The application must be lodged with the Secretary of the Board.
- (3) After considering the application, the Board may make an order under section 74 in respect of the prisoner Julian Knight if, and only if, the Board—
 - (a) is satisfied (on the basis of a report prepared by the Secretary to the Department of Justice) that the prisoner—
 - (i) is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person; and
 - (ii) has demonstrated that he does not pose a risk to the community; and
 - (b) is further satisfied that, because of those circumstances, the making of the order is justified.
- (4) The Charter of Human Rights and Responsibilities Act 2006 has no application to this section.
- (5) Without limiting subsection (4), section 31(7) of the Charter of Human Rights and Responsibilities Act 2006 does not apply to this section.
- (6) In this section a reference to the prisoner Julian Knight is a reference to the Julian Knight who was sentenced by the Supreme Court in November 1988 to life imprisonment for each of 7 counts of murder."

The Committee notes that section 31(4) of the Charter declares that it is the intention of Parliament that an override declaration will only be made in exceptional circumstances.

The override statement in the second reading speech provides:

The Bill also includes a provision making it clear that the Charter of Human Rights and Responsibilities Act 2006 does not apply to the new section 74AA, and that this override provision does not need to be re-enacted every five years. Although the government considers that the Bill is compatible with the Charter Act, it is possible that a court may take a different view. In this exceptional case, the charter act is being overridden and its application excluded to ensure that the life sentences imposed by the Supreme Court for these egregious crimes are fully or almost fully served and to protect the community from the ongoing risk of serious harm presented by Julian Knight. To provide legal certainty and to avoid a court giving the bill an interpretation based on Charter Act rights which does not achieve the government's intention, the Bill provides that the Charter Act does not apply to the new section 74AA which sets conditions for any parole order for Julian Knight.

This provision is intended to serve as the override declaration envisaged by section 31(1) of the Charter Act but goes further to make clear that the Charter Act does not apply to section 74AA at all and that the override and non-application of the Charter Act do not expire after five years under section 31(7) of the Charter Act.

Whether the amendments sought to be made by the Bill constitute grounds for an 'exceptional circumstance' is a matter for Parliament to consider.

Charter report

Section 16 of the *Constitution Act 1975* (Vic) provides that: "The Parliament shall have power to make laws in and for Victoria in all cases whatsoever." The Parliament's power to legislate is limited only by the federal and Victorian constitutions. The Charter (an ordinary statute) has no effect on the Parliament's constitutional powers. In particular, the Parliament can pass laws that are incompatible with the Charter.³ Indeed, the Parliament has done so in the past.⁴

The Bill itself provides that the Charter 'has no application' to the proposed new section to be inserted into the *Corrections Act 1986* limiting the Adult Parole Board's power to grant parole. The effect of this provision is that, once the Bill is enacted, the Charter's provisions for discussing, interpreting and applying Victoria's legislation will not apply to the new section. In particular, Victoria's Supreme Court will not have the power to consider whether or not the new section is compatible with anyone's Charter rights or to make a declaration that the new section cannot be interpreted consistently with anyone's Charter rights.

³ See Charter ss. 29, 31(9), 32(3), 36(5)(a) and 38(2).

⁴ See *Summary Offences and Control of Weapons Amendment Act 2009* and *Control of Weapons Amendment Act 2010*, which were each accompanied by Statements of Compatibility stating that particular clauses were 'incompatible' with certain Charter rights.

However, until the Bill is enacted, this Committee remains bound by Charter s. 30, which provides: “The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.” In this report, the Committee addresses three Charter rights that may be affected by the Bill.

Charter of Human Rights and Responsibilities Act 2006 - Charter s. 8(3): Every person is equal before the law - Charter s. 10(b): A person must not be punished in a cruel, inhuman or degrading way - Charter s. 24(1): A person charged with a criminal offence has the right to have the charge decided by a court after a fair hearing – Parole board prohibited from giving parole to Julian Knight – Whether reasonable limit

Summary: Clause 3 bars the Adult Parole Board from making a parole order ‘in respect of the prisoner Julian Knight’ unless it is satisfied that the prisoner ‘is in imminent danger of dying, or seriously incapacitated’. There are three Charter rights that may be engaged by clause 3 of the Bill: rights to equality “before the law”; against “cruel, inhuman or degrading” punishment; and to “a fair hearing”.

The Committee notes that clause 3, inserting a new section 74AA(3)(a)(i), bars the Adult Parole Board from making a parole order ‘in respect of the prisoner Julian Knight’ unless it is satisfied that he ‘is in imminent danger of dying, or seriously incapacitated, and as a result, he no longer has the physical ability to do harm to any person’.

The Committee observes that Julian Knight is presently serving 7 sentences of imprisonment for life⁵ and can be lawfully detained until his death. The Committee considers that clause 3 is compatible with the Charter’s right to liberty.⁶

However, the Committee notes that there are three other rights in the Charter of Human Rights and Responsibilities Act 2006 that may be engaged by clause 3 of the Bill:

- 1. Charter s. 8(3): “Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.”**

The Committee notes that Charter s. 8(3) provides that ‘[e]very person is equal before the law’. The Committee observes that clause 3’s restriction on parole orders only applies to Julian Knight.

The Committee notes that the equality rights in Charter s.8 generally concern rights against discrimination based on an attribute set out in the *Equal Opportunity Act 2010*, such as race, gender, political activities, etc. The Committee considers that clause 3 does not involve any discrimination in this sense. However, the Committee observes that the particular right in Charter s. 8(3) to equality before the law may not be limited to discrimination based on an attribute.

In particular, the Committee notes that some overseas human rights laws expressly prohibit legislatures from passing a ‘Bill of Attainder’,⁷ a reference to ‘the ancient practice of the Parliament in England of punishing without trial specifically designated persons or groups’. The Committee observes that clause 3 may be to similar effect.⁸

The Committee notes the remark by the Minister of Corrections in the Statement of Compatibility for the Bill that:

⁵ *R v Knight* [1989] VR 705.

⁶ Charter s. 21.

⁷ E.g., *United States Constitution*, Articles I.9.3 & I.10.1.

⁸ *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), 847.

It is not clear whether the statement in section 8(3) that every person is equal before the law is a separate right which is not limited by the concept of discrimination based on an attribute. If it is, then I consider that the right is limited in relation to Julian Knight because the bill makes unique provision for him alone.

The Committee considers that clause 3 of the Bill may limit the Charter's right to equality before the law. However, the Committee observes that a Bill that limits a Charter right may still be compatible with the Charter, so long as the limitation is a reasonable one.

The Committee discusses the question of whether or not clause 3 is a reasonable limit on human rights below.

2. Charter s. 10: "A person must not be:

- (a) subjected to torture; or**
- (b) treated or punished in a cruel, inhuman or degrading way; or**
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent."**

The Committee observes that the effect of clause 3 is that Julian Knight will remain ineligible for parole at least until he is either close to death or permanently incapacitated.

The European Court of Human Rights recently held in *Vinter v United Kingdom* that a similar regime breached the European prohibition on inhuman or degrading punishment because 'there is... now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved'.⁹ The Committee notes that Charter s. 10(b) may be to similar effect.

However, the Committee also notes that the remark by the Minister for Corrections in the Statement of Compatibility for the Bill that:

In my opinion, section 10(b) of the charter does not apply to life sentences with no non-parole period in the way the European Court held... In *DPP v. Hunter* [2013] VSC 440, the Supreme Court imposed a life sentence with no parole after considering *Vinter's* case and the Charter Act. That sentence as upheld by the Court of Appeal (*Hunter v. The Queen* [2013] VSCA 385). It follows that the application of *Vinter's* case of article 3 to whole of life sentences with no prospect of parole has not been followed in relation to the charter act section 10(b) by the Supreme Court of Victoria.

In *Hunter's* case, the sentencing judge stated that '[m]y function is to determine your individual case, not assess the human rights compatibility of Victoria's sentencing system'.¹⁰ The Committee further observes that nearly all Australian jurisdictions provide for a person to be imprisoned for life without eligibility for parole following a determination by a Supreme Court that such a sentence is appropriate.¹¹

⁹ *Vinter v UK* [2013] ECHR 645, [114]. The English Court of Appeal recently ruled in *R v McLoughlin* [2014] EWCA Crim 188, [33] that the same regime was compatible with human rights, because the *Human Rights Act 1998* (UK) requires that the regime be interpreted and applied in a way that provides for review and release as required by human rights. However, clause 3 is in narrower terms and the Charter does not apply to either its interpretation (due to override of the Charter in new section 74AA(4)) or its application by the Adult Parole Board (due to the exemption of that Board from the Charter by the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*.)

¹⁰ *Hunter v R* [2013] VSCA 385, [111].

¹¹ *Crimes Act 1914* (Cth), s. 19AB(3); *Crimes (Sentencing) Act 2005* (ACT), s. 65(4) (but see s. 68); *Crimes (Sentencing Procedure) Act 1999* (NSW), s. 54(a); *Sentencing Act 1995* (NT), s. 53A(5); *Criminal Law (Sentencing) Act 1988* (SA),

3. Charter s. 24(1): “A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.”

The Committee observes that the Julian Knight’s current sentence includes an order that he ‘not be eligible for parole [for] 27 years’.¹² The practical effect of clause 3 of the Bill may be equivalent to replacing that order with an order that his sentence not include any parole eligibility date.¹³

The Committee notes that clause 3 may therefore engage Julian Knight’s right under Charter s. 24(1) to have a criminal charge (including any sentence for a charge) decided by an independent court or tribunal after a fair hearing.¹⁴ However, it also notes the remark by the Minister for Corrections in the Statement of Compatibility for the Bill (in relation to the Charter’s liberty rights) that:

This bill does not alter the head sentences of imprisonment imposed by the Supreme Court under which Julian Knight is detained. It alters the conditions on which the adult parole board may order his release on parole during the currency of the sentence and after the expiration of a non-parole period. The bill does not require the cancellation of parole for Julian Knight if it is granted.

A prisoner has no right or entitlement to release on parole, nor to the continuation of a particular legislative scheme for release on parole throughout their sentence. In *Crump v. New South Wales* (2012) 286 ALR 658 at 670, French CJ stated that: ‘The power of the executive government of a state to order a prisoner’s release on licence or parole in the exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the state’.

The Committee observes that the NSW legislation reducing parole eligibility considered by the High Court of Australia in *Crump* was expressed in general terms and affected a number of prisoners, rather than a change to a single named prisoner’s parole eligibility.¹⁵

The Committee notes that the High Court’s holdings about the nature of legislation that alters serving prisoners’ eligibility for parole are relevant both to the compatibility of clause 3 with the Charter (a question that has no effect on the validity of clause 3) and to the compatibility of clause 3 with the federal constitution (which may effect the validity of clause 3.) The Committee discusses the question of the constitutional validity of clause 3 below.

Reasonable limits on Charter rights

The Committee has identified three Charter rights that may be limited by clause 3. However, that does not mean that clause 3 may be incompatible with the Charter. Rather, the Charter provides that any Charter right may be subject to reasonable limits. In this part of its report, the Committee addresses the Charter’s test for reasonable limits on Charter rights.

s. 32(5)(c); *Sentencing Act 1977* (Tas), s. 18(1)(a); *Sentencing Act 1991* (Vic), s. 11(1); *Sentencing Act 1995* (WA), s. 90(1)(b). The exception is Queensland: *Criminal Code 1899* (Qld), s. 305.

¹² *R v Knight* [1989] VR 705. The court could have instead ordered that Knight not be eligible for parole: see *Penalties and Sentences Act 1985*, s. 17(2).

¹³ Compare *Attorney-General (Qld) v Lawrence* [2013] QCA 364, [35], referring to a law allowing for executive detention orders where a court has ordered release: “The power to nullify orders of the Supreme Court, being exercisable upon the merits of each case on a case by case basis, is analogous with the power of an appellate court to set aside orders found to be made in error.”

¹⁴ See also Charter s. 25(4), providing a right to have any sentence imposed for a conviction reviewed by a higher court in accordance with the law.

¹⁵ *Crimes (Administration of Sentences) Act 1999* (NSW), s. 154A, which applied to any serious offender who was the subject of a non-release recommendation by a sentencing court to the effect that the prisoner should never be released from imprisonment. A majority of the High Court has distinguished that formulation from one where one person was ‘the sole and direct “target”’ of the legislation: *Baker v R* [2004] HCA 45, [50].

Charter s. 7(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.”

The Committee notes that the Minister for Correction’s remarks in the Statement of Compatibility for the Bill (in respect of the Charter’s right to equality before the law) that:

I consider that the limitation on any such right is reasonable and justified because of the egregious circumstances of Julian Knight’s 7 murders and 46 attempted murders and because he continues to represent a danger to the community (as the adult parole board found in July 2012, some 25 years after the shootings). That Mr Knight still presents a danger to the community so long after such serious offending means that he should not be released on parole while physically capable of doing harm and this justifies the imposition on him of special restrictive conditions for the granting of parole.

The Committee observes that the Supreme Court of Victoria made findings about the egregious circumstances of Julian Knight’s 7 murders and 46 attempted murders in the course of his sentencing following his criminal trial.¹⁶ The Committee also observes that the Adult Parole Board stated its ‘view [that] the prisoner continues to represent a danger to the community’ in a letter to Knight following ‘[c]orrespondence from prisoner, further incident reports and reports from’ two experts.¹⁷ The Committee notes that the Supreme Court refused Knight leave to apply for judicial review of the Board’s view because ‘the Board has made no decision with any legal effect upon Mr Knight’s rights’.¹⁸

Charter s. 7(2)(e) provides that one relevant factor is ‘any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve’. The Statement of Compatibility does not discuss this factor. The Committee notes that Victoria’s *Serious Sex Offenders (Detention and Supervision) Act 2009* allows for the continued detention of a prisoner who is otherwise eligible for release, including a prisoner who has or may be released on parole,¹⁹ if the Supreme Court determines that there is an unacceptable risk that the prisoner will reoffend if he or she is not detained. The Committee also notes that a similar law in NSW was recently amended to include high risk murderers.²⁰ The Committee observes that such an extension may be considered less restrictive on Charter rights than clause 3 because of its general terms, provision for regular court review and non-penal character.

The Committee refers to Parliament for its consideration the question of whether or not extending Victoria’s existing laws for the continued detention of serious sex offenders who are otherwise eligible for release to include high risk murderers would be less restrictive on Charter rights than

¹⁶ *R v Knight* [1989] VR 705.

¹⁷ *Knight v Adult Parole Board* [2013] VSC 97, [5].

¹⁸ *Knight v Adult Parole Board* [2013] VSC 97, [39].

¹⁹ *Serious Sex Offenders (Detention and Supervision) Act 2009*, s. 4(2)(a) & 5(1).

²⁰ *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW), providing for the detention and supervision of high risk violent offenders, defined in new section 5A to cover the common law definition of murder (as well as intentional grievous bodily harm) and people complicit in such crimes.

clause 3 because of those laws' general terms, provision for regular court review and non-penal character.

Constitutional validity

Parliamentary Committees Act 2003 – Section 17(a)(i) – Undue trespass to rights or freedoms – Judicial power – Sentencing – Life sentence – Parole eligibility after minimum term – Whether legislation sets aside, varies, alters or otherwise nullifies a judgement, decree, order or sentence of the Supreme Court – Whether interference with exercise of judicial power – Doctrine in Kable v DPP (NSW) – Ad hominem (directed to the individual) legislation – Whether Bill is tantamount to a prohibition on parole for one individual – Whether legislation is a valid law

Changes to Parole eligibility

In the Second Reading Speech for the Bill, the Minister for Corrections remarked:

This Bill means that Julian Knight will never be released except in very restrictive circumstances, essentially mirroring preconditions contained in New South Wales legislation upheld by the High Court in the decision of *Crump v. New South Wales* (2012) 247 CLR 1 ...

By essentially mirroring the preconditions contained in the New South Wales legislation we are seeking to ensure the constitutional validity of the Bill. These provisions change the preconditions on which the adult parole board must be satisfied before it can grant parole to Julian Knight. These same preconditions have been upheld by the High Court in the *Crump* case.

The Committee reproduces a summary of the issues in *Crump v. New South Wales* from the Australian Law Journal Reports.²¹

The plaintiff was sentenced to life imprisonment in 1974 on one count each of murder and conspiracy to murder. The degree of criminality involved in the commission of the offences moved the sentencing judge to decline to fix a non-parole period and to express a view that the plaintiff ought never to be released from prison. At the time, the latter remark had no legal effect.

In 1997 the plaintiff, pursuant to sentencing legislation then in force, obtained an order from a judge to the Supreme Court of New South Wales replacing his life sentence for murder with a minimum term of 30 years and a balance term of imprisonment for the remainder of his natural life. Although eligible for parole once the minimum term expired, his actual release was dependent on the then Parole Board making an order to that effect. In 2001, before the minimum term expired, the New South Wales Parliament introduced a new provision into the Crimes (Administration of Sentences) Act 1999 (NSW). The new s 154A was directed at applications for parole by "serious offenders the subject of non-release recommendations" and provided in subs (3) that:

After considering the application, the Parole Authority may make an order directing the release of the offender on parole if, and only if, the Parole Authority:

- (a) is satisfied ... that the offender:
 - (i) is in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person, and
 - (ii) has demonstrated that he or she does not pose a risk to the community, and

²¹ 86 ALJR 623-624

- (b) is further satisfied that, because of those circumstances, the making of such an order is justified.

The plaintiff sought to establish that s 154A was invalid as it applied to the redetermination of his sentence. He brought a special case to the High Court of Australia, arguing that the redetermination was judgement, decree or order of the Supreme Court of New South Wales in a "matter" for the purposes of the Constitution, s 73 which the State legislature lacked power to set aside, vary, alter or otherwise stultify.

Crump involved a challenge to legislation introduced in New South Wales amending the *Crimes (Administration of Sentences) Act 1999* (NSW) (new section 154A). Those amendments are substantially those amendments now sought to be made by this Bill. However, the amended NSW regime may be differentiated from the current Bill as the amendment applied to a group of prisoners identified by references to remarks made by judges at the time they were sentenced. The remarks were to the effect that the prisoners should never be released from custody. The Committee further discusses below the possible significance of the key difference between this Bill and the NSW provisions, that is, the current Bill is concerned with one individual not a class of persons identified by some criminal acts committed by them (serious offenders as in the NSW Act).

The essential points taken in *Crump* were (1) the determination by the sentencing judge was a judgment, decree, order or sentence of the Supreme Court in a "matter", within the meaning of s 73 of the Constitution, (2) the State legislature lacked the power to set aside, vary, alter, or otherwise stultify the effect of that judgment, decree, order or sentence, and (3) in its application to him section 154A was invalid.

The High Court held:

- (1) (*Majority joint judgment and Heydon J agreeing*) The sentencing re-determination did not give the plaintiff any right or entitlement to release on parole. Section 154A did not impeach, set aside, alter or vary the sentence under which the plaintiff was deprived of his liberty. [60], [70], [71]
- (2) (*per French CJ*) – that there was a distinction to be drawn between the judicial function exercised in sentencing and the administrative function exercised by a parole authority in determining whether an eligible prisoner should be released [27], [28]
- (3) (*Joint judgment, French CJ and Heydon J agreeing*) the grant of parole is an executive decision to be excised in light of the statutory provisions that apply from time to time and may reflect changeable policies and practices. The judicial sentence and its legal effect was not changed by section 154A [28], [34], [35], [38], [58-60], [70], [72], [74]

For substantially similar reasons, all seven Justices of the High Court held the amendments to the *Crimes (Administration of Sentences) Act 1999* (NSW) to be valid.

In considering this key point the Committee is also assisted by this extract from the statement of compatibility:

This Bill does not alter the head sentences of imprisonment imposed by the Supreme Court under which Julian Knight is detained. It alters the conditions on which the adult parole board may order his release on parole during the currency of the sentence and after the expiration of a non-parole period. The Bill does not require the cancellation of parole for Julian Knight if it is granted.

A prisoner has no right or entitlement to release on parole, nor to the continuation of a particular legislative scheme for release on parole throughout their sentence. In *Crump v. New South Wales* (2012) 286 ALR 658 at 670, French CJ stated that: *'The power of the executive government of a state to order a prisoner's release on licence or parole or in the*

exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the state'.

The changes to the parole scheme effected by this Bill do not change the position that Julian Knight has been deprived of his liberty and lawfully detained for the duration of the head sentences imposed by the Supreme Court after conviction of serious offences in a fair hearing. In those circumstances, in my view, the Bill does not limit the rights in section 21 of the Charter.

The Committee considers the decision in *Crump* may indicate the current Bill is constitutionally valid as not infringing Chapter III of the Federal Constitution. That is, that the proposed law does not set aside, vary or nullify the original sentence.

One person laws – Ad hominem legislation (directed to the person)

There is a further question to be considered that is raised in remarks in the joint judgement of the Court (four justices) in an earlier case *Baker v The Queen* (2004) 223 CLR 513, which upheld the validity of earlier NSW legislation placing different restrictions on parole for prisoners who had been the subject of non-release recommendations when they were sentenced. Justices McHugh, Gummow, Hayne and Heydon JJ commented:

In the circumstances of the present case, it could not be said that the appellant was the sole and direct "target" of the 1997 Act, so it is unnecessary to determine what would have been the consequences of such a conclusion.

The Committee observes that it may be said that Julian Knight is the sole and direct "target" of the present Bill.

The High Court has previously struck down a state law where one person was the sole and direct target. In *Kable v New South Wales* (1996) 189 CLR 51, a majority of the Court struck down a law that authorised 'the making of a detention order against Gregory Wayne Kable, who was defined as 'the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable' as incompatible with the federal constitution's requirements for the integrity of the state judiciary as an institution.

All members of the majority expressly relied on the fact that the law was directed at one person:

- The extraordinary character of the legislation and of the functions it requires the Supreme Court to perform is highlighted by the operation of the statute upon one named person only. In this respect the Act is virtually unique. It does not define "a specified person" by reference to any class or category and it carries no consequences for any person, other than the appellant, to whom its language might otherwise be applicable. (Toohey J)
- In truth, the proceedings contemplated by [the NSW law] are unique with unique procedures and with rules which apply only to the appellant. (Gaudron J)
- In my opinion, those who initiated and passed the Act plainly expected and intended that the imprisonment of the appellant would continue after the expiration of his sentence for the manslaughter of his wife. The object of the Act, its ad hominem nature and the grounds and method of proof of the s 5 order together with the provision for s 7 interim orders leave no other conclusion open. Why else would the executive government have introduced legislation into the Parliament which is directed only to the appellant and which expressly states that its object is to protect the community by providing for the detention of the appellant unless the government intended that he should be kept in prison? (McHugh J)

- In the present case, the law speaks only ad hominem, applies proleptically the criminal law, determines the case by a civil standard, and provides directly for detention in prison. These are striking features of the legislation. (Gummow J)

By contrast, in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, the High Court upheld the validity of legislation allowing courts to order the detention of any serious sex offender. Several members of the Court remarked that such legislation is of a very different character from the legislation struck down in *Kable*, because 'It is an Act of general application, unlike the ad hominem nature of the legislation in *Kable*'.

However, the present Bill differs in an important way from the legislation considered by the High Court in *Baker*, *Kable* and *Fardon*. The legislation in *Baker*, *Kable* and *Fardon* imposed functions on courts (i.e. of making orders concerning eligibility for parole or for continuing detention.) By contrast, the present Bill does not impose any functions on a court, but instead restricts the powers of the Adult Parole Board (an executive body.) For that reason, the Committee considers that the particular ground of invalidity applied in *Kable* – that a state law gave state courts a role that was incompatible with their integrity – is not applicable to the Bill.

Instead, a possible ground of invalidity may be one that was applied recently by the Queensland Court of Appeal. In *Attorney-General (Qld) v Lawrence* [2013] QCA 364, the Queensland Court of Appeal applied the High Court's *Kable* decision to invalidate a state law that did not impose any functions on a court. The law in question empowered the executive government to a 'public interest declaration', requiring the detention of a sex offender, in cases where the Supreme Court declined to order such detention. The Court of Appeal held:

The exercise by the executive of the power... would undermine the authority of orders of the Supreme Court, orders which are otherwise vulnerable on appeal only on an appeal within the Supreme Court (from the Trial Division to the Court of Appeal) and to the High Court... The amendments do not merely treat the court order as the criterion by reference to which new rights or obligations are created by legislation; public interest declarations are to be made by the executive, they are to be made on a case by case basis on the merits as perceived by the executive, and the substantial effect of such a declaration is equivalent to a reversal of the Court's order.

The Committee notes that, unlike the Queensland law, the present Bill does not give any new powers to the executive. However, the Committee observes that it may be argued that a legislative decision to alter the parole eligibility of a single prisoner subject to a court-ordered non-parole period could be seen as having an analogous impact on the integrity of the judiciary to the Queensland law's empowering of the executive, on a 'case by case basis on the merits', to order the detention of people who the courts have ordered released from detention.

The Committee observes that, while the High Court in *Crump v NSW* held that the legislature can alter the parole eligibility of prisoners who were sentenced to a non-parole period, it did so in relation to a NSW parole eligibility law expressed in general terms and applicable to multiple prisoners. The question of the constitutional validity of a similar law that is targeted solely and directly at a named prisoner has not yet been decided by the High Court.

The Committee considers that the present Bill raises unique questions of constitutional law and refers those questions to Parliament for its consideration.

The Committee makes no further comment

Fences Amendment Bill 2014

Introduced	19 February 2014
Second Reading Speech	19 February 2014
House	Legislative Council
Member introducing Bill	Hon Edward O'Donohue MLC
Portfolio responsibility	Attorney-General

Purpose

The Bill amends the *Fences Act 1968* to:

- provide a procedure for the sharing of costs between neighbours for the construction and repair of dividing fences
- provide a mechanism for the resolution of disputes about dividing fences
- provide for other matters relating to dividing fences
- repeal the redundant provisions in Part III of the Act dealing with vermin-proof fencing.

The Bill makes consequential amendments to the:

- *Crown Land (Reserves) Act 1978*
- *Emerald Tourist Railway Act 1978*
- *Land Act 1958*
- *Zoological Parks And Gardens Act 1995*.

Extracts from the second reading speech:

Contributing to a sufficient dividing fence

The Bill shifts liability to contribute to dividing fences from occupiers of land to owners of land

... The Bill provides guidance about what constitutes a 'sufficient dividing fence' and establishes the general principle that adjoining owners must contribute in equal proportions to a sufficient dividing fence for their adjoining lands.

... Initiating fencing works

The current Fences Act does not contain any guidance on the process for commencing fencing works. The Bill addresses this gap by providing that an owner who proposes to undertake fencing works in respect of a dividing fence must generally either reach agreement with or give notice to an adjoining owner, even if no contribution towards the fencing works is being sought. Such notice must be in writing and contain particular information about the proposed fencing works.

However, the Bill allows fencing works to proceed if an owner cannot be located for the purposes of giving notice, or if fencing works need to be undertaken urgently. Fencing works may also be undertaken without the agreement of an adjoining owner if they are given notice but do not respond within 30 days. If fencing works are undertaken in circumstances where an adjoining owner could not be located or did not respond to the fencing notice, the owner who undertook the fencing works may recover contributions from the adjoining owner who could not be located or did not respond by filing a complaint and seeking an order in the Magistrates Court.

... Facilitating agreement between the parties

The recipient of a fencing notice may either agree to the proposal in the fencing notice or object to any aspect of the proposed works. If 30 days have passed and the owners still do not agree about any aspect of the proposed fencing works, either owner may commence proceedings in the Magistrates Court seeking orders about the fencing works.

... If neighbours are unable to agree about any aspect of their fencing works, the Bill clarifies the power of the Magistrates Court to hear and determine the dispute and make orders.

... The Bill also clarifies the jurisdiction of the Magistrates Court to hear and determine claims in adverse possession that may arise in the context of a fencing dispute.

Charter report

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

The Committee makes no further comment

Gambling and Liquor Legislation Amendment (Reduction of Red Tape) Bill 2014

Introduced	18 February 2014
Second Reading Speech	18 February 2014
House	Legislative Council
Member introducing Bill	Hon Edward O'Donohue MLC
Portfolio responsibility	Minister for Liquor and Gaming Regulation

Purpose

The Bill amends the *Gambling Regulation Act 2003* and the *Liquor Legislation Control Reform Act 1998*.

The amendments relate to:

- remove the requirement for Ministerial approval to conduct two up on or before ANZAC day
- remove existing prohibitions of holders of restricted club licences and renewable limited club licences from purchasing liquor from wholesalers
- provide minor business exemptions from the requirement to hold a liquor licence
- provide an extension of trading hours on New Year's Eve for most liquor licensees
- remove the requirement to seek approval to host alcohol-free underage and mixed-age music events on licensed premises

Charter report

The Gambling and Liquor Legislation Amendment (Reduction of Red Tape) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Honorary Justices Bill 2014

Introduced	18 February 2014
Second Reading Speech	19 February 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark
Portfolio responsibility	Attorney-General

Purpose

The Bill will consolidate and modernise provisions relating to bail justices and justices of the peace (collectively referred to as honorary justices) in one new principal Act.

The Bill will:

- provide for the appointment of justices of the peace and bail justices
- specify requirements of honorary justices in relation to the provision of information and training
- provide for a code of conduct applying to honorary justices
- set out the procedures for the suspension or removal from office of honorary justices
- provide for the use of titles by current and retired honorary justices
- provide for various offences such as impersonating an honorary justice or the unauthorised use of the title JP (Justice of the Peace) or BJ (Bail Justice) and provide it is an offence for an honorary justice to accept any financial reward for performing in the capacity of an honorary justice
- repeal Part 6 of the *Magistrates' Court Act 1989* which deals with Justices of the Peace and makes consequential amendments to a number of other Acts.

Charter report

The Honorary Justices Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Mental Health Bill 2014

Introduced	18 February 2014
Second Reading Speech	20 February 2014
House	Legislative Assembly
Member introducing Bill	Hon Mary Wooldridge MLA
Portfolio responsibility	Minister for Mental Health

Purpose

The Bill is for an Act to provide a legislative scheme for the assessment of persons who appear to have mental illness and for the treatment of persons with mental illness.

The Bill will provide:

- a) key definitions for, *mental illness*, *treatment criteria*, *treatment* and *medical treatment*. **[4-7]**
- b) for the objectives and mental health principles **[10, 11]**
- c) for a statement of rights to be given and explained to the person being assessed **[12, 13]**
- d) for a unrestricted right to communicate with specified persons including a legal representative, the chief psychiatrist or a community visitor **[14-18]**
- e) for the making of an advance statement setting out a person's preferences in relation to treatment in the event that they become a patient **[19-22]**
- f) for a person (the patient) to nominate another person to assist the patient **[23-27]**
- g) for compulsory patients including assessment orders, court assessment orders, temporary treatment orders and treatment orders **[28-67]**
- h) for matters relevant to the capacity to give informed consent to treatment, the meaning of informed consent and the circumstances relevant to treatment where a person does not consent to treatment **[68-71]**
- i) for treatment where consent is given and deal with who may consent to medical treatment if the patient does not have capacity to give informed consent and make provision for urgent medical treatment without consent in emergency circumstances **[74-77]**
- j) for an entitled patient to seek a second psychiatric opinion **[78-89]**
- k) for the Tribunal to hear and determine whether to approve electroconvulsive (ECT) for patients who do not have capacity to give informed consent to ECT and hear all cases involving ECT for persons under the age of 18 years regardless of informed consent **[90-99]**
- l) that neurosurgery for mental illness (NMI) may only be performed where a person has given informed consent and the Tribunal has determined that the person has capacity to give that informed consent and where the Tribunal determines that the person will benefit from the NMI **[100-104]**
- m) for the authorisation of restrictive interventions such as seclusion and restraint where less restrictive options are considered unsuitable **[105-116]**
- n) for the functions of the Secretary and for the appointment, role, powers and functions of the chief psychiatrist **[117-151]**
- o) for the establishment of the Mental Health Tribunal and provide for its powers and functions (the 'Tribunal') and to provide for reviews by VCAT **[152-212]**

- p) for community visitors to be appointed by the Governor in Council, and to provide for their functions and powers in respect to the provision of mental health services at prescribed premises **[213-225]**
- q) for the establishment of, and the functions and powers of the Mental Health Complaints Commissioner and provide for complaints, investigations and conciliation processes **[226-268]**
- r) for security patients and provide for court secure treatment orders and make provision for leave of absences and monitored leave **[269-304]**
- s) for forensic patients within the meaning of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* **[305-311]**
- t) for the continuation of the Victorian Institute of Forensic Mental Health and provide for its powers and functions **[328-345]**
- u) for the application in Victoria of interstate mental health provisions **[313-327]**
- v) that other than in specified circumstances the disclosure of a person's mental health information is prohibited. **[346]** and for the notification of reportable deaths **[348-349]**
- w) police with powers to apprehend a person who appears to have mental illness to prevent serious and imminent harm to the person or to another person, or to apprehend a person absent without leave. Restraint and sedation may be used where a less restrictive option is not considered suitable **[350-356]**
- x) for the repeal of the *Mental Health Act 1986* and make transitional arrangements as a consequence of that repeal **[373-428]**
- y) for the amendment of the *Sentencing Act 1991* and the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* **[429-457]**
- z) for consequential and statute law amendments to 37 other Acts. **[Schedule]**

Content

Closed proceedings – Unless the Tribunal determines that it is in the interests of the public, or the person who is the subject of the proceedings makes a written request for a hearing to be public, hearings of the Tribunal are to be closed to the public. **[193]**

Privilege against self-incrimination preserved – The Complaints Commissioner may compel attendance at an investigation but a person is not obliged to answer questions or produce documents that may tend to incriminate the person. **[256]** The Bill also contains a general privilege against self-incrimination under the powers exercised under the Act **[360]**

Disclosure of health information prohibited – other than in specified circumstances the disclosure of a person's mental health information is prohibited. **[346]**

Offence to give false or misleading information – a legal burden is imposed on an accused to prove, on the balance of probabilities, that at the time of the offence he or she believed that the information was correct. (Note: the discussion in the statement of compatibility why as to why imposing an evidential burden as a less restrictive option was considered insufficient). **[358]** (refer to Charter report below)

Submission

The Committee received a submission from the Victorian Equal Opportunity and Human Rights Commission. The Committee has determined to publish the submission on the Committee's website.

Charter report

Presumption of innocence – Offence of giving information believed to be false or misleading – Both prosecution and accused bear the onus of proof on whether the accused believed the information was false or misleading – Practice Note No. 4

Summary: The Committee will write to the Minister seeking further information as to whether, in proceedings for an offence under clause 358, it is the prosecution or the defence who bears the legal burden of proof in any dispute about whether the accused believed that the information he or she provided under the Act was false or misleading.

The Committee notes that clause 358 provides:

- (1) A person must not—
 - (a) give information, prepare a document or make a statement required to be given or made under this Act that the person believes to be false or misleading in any material particular; or
 - (b) produce a document under this Act that the person knows to be false or misleading in a material particular without indicating the respect in which it is false or misleading and, if practicable, providing correct information.
- (2) In a proceeding for an offence against subsection (1) it is a defence to the charge for the accused to prove that, at the time at which the offence is alleged to have been committed, the accused believed on reasonable grounds that the information, document or statement was true or was not misleading.

The Statement of Compatibility remarks:

Clause 358(2) will place a legal burden of proof on the accused by requiring him or her to prove, on the balance of probabilities, the relevant defence. In doing so, this provision may be considered to limit the right to be presumed innocent ...

The burden of proof is imposed on the accused in respect of establishing the defence. The prosecution first has to establish the relevant elements of the offence.

However, the Committee observes that:

- clause 358(1) requires the prosecution to prove beyond reasonable doubt that the accused believed (or, in respect of a document produced but not made by the accused, knew) that the information provided was false or misleading;
- clause 358(2) requires that the accused to prove on the balance of probabilities that the accused believed that the information provided was true or not misleading.

The Committee recalls its *Practice Note No. 4*, which states that the Committee may write to Ministers where the explanatory material for a Bill that introduces a defence does not state whether or not the defence places a legal onus on the accused. The Committee notes that both clause 358 and the Statement of Compatibility appear to indicate that, in proceedings for an offence against clause 358, both the prosecution and defence bear the burden of proof on the same issue: whether or not the accused believed that the information provided was false or misleading.

The Committee will write to the Minister seeking further information as to whether, in proceedings for an offence under clause 358, it is the prosecution or the defence who bears the legal burden of proof in any dispute about whether the accused believed that the information he or she provided under the Act was false or misleading. Pending the Minister's response, the Committee draws attention to clause 358.

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

The Committee makes no further comment

Transport (Safety Schemes Compliance and Enforcement) Bill 2014

Introduced	18 February 2014
Second Reading Speech	20 February 2014
House	Legislative Assembly
Member introducing Bill	Hon Terry Mulder MLA
Portfolio responsibility	Minister for Public Transport

Purpose

The Bill is for an Act is to provide a scheme for the enforcement of transport system safety legislation to support Victoria's local rail, bus and marine safety regimes by:

- re-enacting, with modifications, provisions of the scheme under the *Transport (Compliance and Miscellaneous) Act 1983*
- adopting and adapting provisions from the Rail Safety National Law.

In order to avoid anomalies between local and national laws the Bill aligns local compliance and enforcement measures with national provisions drawing mainly from the national rail safety scheme.

Extracts from the statement of compatibility:

The main purpose of the Bill is to consolidate and improve existing monitoring, compliance, investigation and enforcement powers available to the Victorian Safety Director (Victoria's rail, bus and marine regulator) and transport safety officers following the implementation of national rail and marine safety schemes in Victoria.

... The Bill ensures that local compliance and enforcement standards for Victoria's locally regulated rail, marine and bus safety sectors enjoy the same levels of compliance and enforcement support as occurs under recent national schemes.

... The Bill provides the Safety Director and officers of Transport Safety Victoria with detailed entry, search, seizure, inquiry and questioning powers. It also includes important administrative sanctions, such as the power to serve improvement and prohibition notices and contains court-based sanctions.

...The provisions in the Bill broadly follow (with modifications and improvements) the monitoring and compliance provisions, enforcement measures and court sanctions in the rail safety national law (modified and applied as a law of Victoria by the Rail Safety National Law Application Act 2013).

Content

Delegation of legislative power – Commencement by proclamation – Whether justified

The Act is to come into operation on proclamation.

The explanatory memorandum remarks:

The Bill does not contain a default commencement date. This is because an open ended commencement is provided for the Rail Safety National Law Application Act 2013 and the associated Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Act 2013, to which the Bill relates. An open ended commencement date is usually provided for in respect of national law application Acts.

As explained, the substantive provisions in the Bill cannot commence prior to the commencement of the substantive provisions of those Acts. Nonetheless, once those Acts are in operation, the Bill is expected to be proclaimed to commence quickly, most likely shortly after Royal Assent.

The Committee considers the commencement by proclamation provision is appropriate in the circumstances.

Charter report

The Transport (Safety Schemes Compliance and Enforcement) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Vexatious Proceedings Bill 2014

Introduced	18 February 2014
Second Reading Speech	19 February 2014
House	Legislative Assembly
Member introducing Bill	Hon Robert Clark MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill is for an Act to reform and consolidate the law relating to the management and prevention of vexatious litigation in Victorian courts and tribunals.

The term ‘vexatious’ in respect to a proceedings or an interlocutory application includes, behaviour that constitutes an abuse of court process or that of a tribunal, is commenced or taken to harass or annoy another, is pursued without reasonable grounds, is designed to cause delay or detriment or for another wrongful purpose.

The Bill enables the courts and VCAT to make various types of litigation orders which increase in the level of restriction imposed on the litigant dependent upon the person’s litigation history and past behaviour. The Children’s Court will also have the power to make vexatious litigation restraint orders but only under the intervention order legislation. The Bill also extends to the Victims of Crime Assistance Tribunal. The Bill does not apply to the Coroners Court.

In deciding to make a litigation restraint order a court or VCAT may have regard to the persons litigation history in Victoria and in other Australian jurisdictions.

The three levels of order, from least restrictive to most restrictive are:

- a *limited litigation restraint order* which prevents a person from making unnecessary interlocutory applications within the one proceedings. A person must obtain the leave of the court or VCAT before making an application for a restraint order. The court or VCAT may grant leave where the application has merit and is not an abuse of process. **[Part 2]**
- an *extended litigation restraint order* where a person has frequently commenced or conducted vexatious proceedings against a specified person or other entity (harassing a person or organisation) or in relation to re-litigating a specified matter. A person must obtain the leave of the court or VCAT before making an application for a restraint order. The court or VCAT may grant leave where the application has merit and is not an abuse of process. **[Part 3]**
- a *general litigation restraint order* to prevent a person from continuing or commencing any proceedings in a Victorian court or tribunal, without leave. The order can be made where a person has persistently and without reasonable grounds commenced or conducted vexatious proceedings. The order may prevent a person from commencing or continuing proceedings in any Victorian court or Tribunal. The order is reserved for the most serious vexatious behaviour, and in circumstances where a lesser order may be ineffective. This type of restraint order must be on the application of the Attorney-General made in the Supreme Court. **[Part 4]**

The Bill further enables courts and VCAT to make:

- *acting in concert orders* against persons who are acting in concert with a person who is subject to a litigation restraint order. **[Part 5]**
- *appeal restriction orders* that limit appeal rights from decisions to refuse leave to make or continue an interlocutory application in a proceedings or refuse leave to commence or continue a proceeding **[Part 6]**

- *variation or revocation of litigation restraint orders* to prevent a person's ability to apply for the variation or revocation of a litigation restraint order. **[Part 9]**

The threshold test to be applied in relation to an application for leave by a person subject to a litigation restraint order is that the proceedings is not vexatious and that there are reasonable grounds for bringing the proceedings. If the court or tribunal proposes to grant leave, the person named in the proceedings (the defendant) will be notified of the leave application and will be given an opportunity to oppose the grant of leave.

The Bill provides for transitional arrangements for existing vexatious litigant orders made under various Acts and makes consequential amendments to a number of Acts.

The Bill repeals the vexatious litigation regimes in the *Family Violence Protection Act 2008* and the *Personal Safety Intervention Orders Act 2010*

The explanatory memorandum remarks:

The Bill aims to improve the effectiveness of the justice system by ensuring that unmeritorious litigation is disposed of at an early stage and that persons are prevented from wasting court time with further unmeritorious cases. This will allow court and judicial resources to be allocated to the determination of meritorious cases, which will reduce delays in the court system for other pending matters.

The Bill enables the Supreme Court, the County Court, the Magistrates' Court and VCAT to make various types of "litigation restraint orders", which increase in severity in accordance with a person's litigation history and pattern of vexatious behaviour. The Children's Court is also given the power to make litigation restraint orders, but only in relation to litigation conducted under the intervention order legislation. The tiered approach to litigation restraint orders promotes early intervention and aims to provide flexibility for the Courts and VCAT to adopt a proportionate response to a person's conduct.

Charter report

Fair hearing – Person may be permanently barred from having decisions relating to a litigation restraint order reviewed by a higher court

Summary: The Committee observes that the combined effect of various clauses in the Bill may be that, in extreme cases, a person who is the subject of a litigation restraint order may be permanently barred from having any decisions made in relation to that order reviewed by a higher court. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clauses 13, 25 and 32 provide that interlocutory applications and proceedings commenced in contravention of a litigation restraint order are 'of no effect'. The Committee observes that these clauses may engage the right of people who are subject to a litigation restraint order to a fair hearing.²²

The Statement of Compatibility remarks:

The bill's regime for the making of litigation restraint orders serves the legitimate objectives of preventing abuse of the courts' and VCAT's processes, preventing vexatious litigants from bringing unmeritorious cases, and minimising the cost to the community of such behaviour....

²² Charter s. 24(1).

The bill does not remove the right of a person subject to a litigation restraint order to issue proceedings, and thus does not remove their access to the courts and VCAT. A person subject to a litigation restraint order will be required to seek leave before commencing proceedings or making an application; if a proceeding has reasonable grounds and is not vexatious, leave will be granted.

The bill also contains safeguards, including an express right to be heard before a litigation restraint order, acting in concert order or appeal restriction order is made, and an express right to appeal from the making of litigation restraint orders and acting in concern orders. A person subject to a litigation restraint order may also seek leave to apply for the variation or revocation of the order, unless the person is subject to a variation or revocation application prevention order.

The Committee considers that clauses 13, 25 and 32 are compatible with the Charter's right to a fair hearing.

However, the Committee notes that:

- clauses 50(1), 52(3), 52(4), 54(2) and 65 specify that a person who is the subject of a litigation restraint order must apply for leave to commence a proceeding or to vary or revoke that order in a particular court or tribunal;²³
- clauses 37 to 39 and 74 permit such a court or tribunal to bar that person in some circumstances from appealing refusals to give leave or from applying to vary or revoke the litigation restraint order.

The Committee observes that a person who is the subject of a litigation restraint order always remains able to apply for leave to commence a proceeding. However, the combined effect of the above clauses may be to bar some people from having decisions concerning their litigation restraint order reviewed by a higher court.

The Statement of Compatibility remarks:

The provisions relating to appeal restriction orders and variation or revocation application prevention orders provided for by clauses 37 to 39 and 74 allows the courts and VCAT to prevent the repeated commencement of vexatious litigation by a person, ensuring that court and judicial resources are more effectively and fairly allocated, reducing delays for meritorious matters and preventing repeated abuse of the courts' and VCAT's processes.

While the Committee considers that restraints on appeals and applications relating to litigation restraint orders, like other restrictions on litigation, may be compatible with the right to a fair hearing, it notes that:

- clauses 42(2) and 77(2) permit a court or VCAT to make appeal restraint and variation or revocation application prevention orders indefinite; and
- clauses 42(3) and 77(3) do not provide for a court or VCAT to vary or revoke such orders, other than to extend them;
- clause 79 does not provide for such orders to be appealed.

The Committee observes that, where a litigation restraint order is itself indefinite,²⁴ the combined effect of these provisions may be that, in extreme cases, a person who is the subject of a litigation restraint order may be permanently barred from having any decisions made in relation to that

²³ There is an exception for general litigation restraint orders that provide otherwise: see clause 54(2).

²⁴ Clauses 27(2) and 42(2). See also clause 15.

order reviewed by a higher court. However, the Committee notes that clause 8 preserves the inherent or implied jurisdiction of the courts.

The Committee will write to the Attorney-General seeking further information as to whether or not a person who is subject to indefinite litigation restraint, appeal restriction and variation or revocation application prevention orders is able to have decisions made in relation to the litigation restraint order reviewed by a higher court. Pending the Attorney-General's response, the Committee draws attention to clauses 42, 77 and 79.

The Committee makes no further comment

Ministerial Correspondence

Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014

The Bill was introduced into the Legislative Assembly on 4 February 2014 by the Hon. Martin Dixon MLA. The Committee considered the Bill on 17 February 2014 and made the following comments in Alert Digest No. 2 tabled in the Parliament on 18 February 2014.

Committee Comments

Charter report

Freedom of expression – Person who is not registered as a teacher must not claim to have been registered as a teacher

Summary: The Committee will write to the Minister seeking further information as to the compatibility of clause 79, which may prohibit former teachers from making accurate claims about their previous registration as teachers or early childhood teachers, with the Charter's right to freedom of expression. Pending the Minister's response, the Committee draws attention to clause 79.

The Committee notes that clause 79, substituting existing sub-s. 2.6.58(1),ⁱ provides that:

- (1) A person who is not registered as a teacher under Division 3 must not claim to be or to have been, or hold himself out as being or having been, registered as a teacher under Division 3.

Penalty: 10 penalty units.

...

- (1B) A person who is not registered as an early childhood teacher under Division 3A must not claim to be or to have been, or hold himself or herself out as being or having been, registered as an early childhood teacher under Division 1A.

Penalty: 10 penalty units.

The Committee observes that the terms of new sub-sections 2.6.58(1) and (1B) may extend to accurate claims by a person who was (but no longer is) registered as a teacher or early childhood teacher about his or her past registration. For example, it may bar a person who has changed to a new profession (such as a former teacher who has become a member of Parliament) from listing his or her past employment as a school teacher or early childhood teacher in a resume or referring to his or her past job (whether in private or public).

The Committee notes that clause 79 may engage the Charter's right to freedom of expression.ⁱⁱ The Statement of Compatibility does not discuss clause 79. The Second Reading Speech remarks:

ⁱ Existing s. 2.6.58(1) provides: "A person who is not a registered teacher must not claim to be a registered teacher or hold himself or herself out as being a registered teacher."

ⁱⁱ Charter s. 15(2).

Like other professionals, such as school teachers, nurses, architects, and solicitors, only educators registered by the institute as early childhood teachers will be able to call themselves 'early childhood teachers'.

The Committee observes that neither current Victorian laws on school teachers, nurses, architects and solicitorsⁱⁱⁱ nor other Australian laws on accreditation or registration of teachers bar people from making accurate claims about their previous occupations.^{iv}

The Committee will write to the Minister seeking further information as to the compatibility of clause 79, which may prohibit former teachers from making accurate claims about their previous registration as teachers or early childhood teachers, with the Charter's right to freedom of expression. Pending the Minister's response, the Committee draws attention to clause 79.

Minister's response

Freedom of expression - Clause 79 Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014

I refer to Alert Digest No. 2 of 2014 of the Scrutiny of Acts and Regulations Committee (the Committee).

The Committee has requested further information as to whether clause 79 of the Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014 (the Bill) is compatible with the right to freedom of expression as protected by section 15 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter Act). In particular, the Committee queries whether clause 79 of the Bill prohibits former teachers from making accurate claims about prior registration .

The clause is not intended to apply to a person who makes a true claim regarding past registration . The heading of clause 79, as well as the heading of the section in the Principal Act amended by clause 79, reads 'False representation'. I draw the Committee's attention to section 36 of the *Interpretation of Legislation Act 1984*, which provides that headings form part of an Act.

Clause 79 of the Bill is intended to prohibit *false* representation; specifically the provisions of clause 79 have been inserted as a measure for the protection of children and to preserve the integrity of the teaching profession by prohibiting a person from falsely claiming that they are or have been a registered teacher.

Section 15(3) of the Charter Act provides that special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons; or for the protection of national security, public order, public health or public morality. Restrictions on freedom of speech in relation to false or misleading representations are common in regulated professions to preserve the integrity of a profession and to protect the rights of others.

ⁱⁱⁱ *Education and Training Reform Act 2006*, s. 2.6.58(1); *Health Practitioner Registration National Law*, s. 116(b)(ii), (c), (d); *Architects Act 1991*, s. 4(1); *Legal Profession Act 2004*, s. 4(1) (and see also the proposed *Legal Profession Uniform Law*, s. 11).

^{iv} *Teachers Accreditation Act 2004* (NSW), s. 26(2); *Education (Queensland College of Teachers) Act 2005* (Qld), s. 84; *Teachers Registration and Standards Act 2006* (SA), s. 20(1)(c); *Teachers Registration Act 2000* (Tas), s. 11(2); *Teachers Registration Act 2012* (WA), s. 9(1)(a).

Student safety is of the highest priority in Victorian schools and the Government is committed to making these learning environments safe and supportive. Teachers are an important part of that school environment and hold a position of great influence on the children they teach.

The process of registration for teachers is through the Victorian Institute of Teaching (the VIT) and in addition to extensive criminal record checking, establishes that a teacher has the knowledge, understanding and competence to have extended and unsupervised access to children. Registered teachers are exempt from the provisions of the *Working with Children Act 2005* due to the rigour of the VITs registration and assessment process.

Once a teacher is no longer registered (or is, for example, an unregistered person who 'teaches' in some capacity outside of a school), the community may not be aware that the person is not, or is no longer, subject to the same degree of scrutiny as registered persons and that the working with children requirements should apply to them. A false representation that a person is or was registered cannot be easily assessed by a parent or guardian, and may be misleading as to the suitability of that person to have unsupervised access to children.

I conclude that any limit on the freedom of expression by the operation of clause 79 of the Bill is reasonably necessary for the protection of children and is confined to false representation involving registration.

The Hon Peter Hall MLC
Minister for Higher Education and Skills
Minister responsible for the Teaching Profession

26 February 2014

The Committee thanks the Minister for this response.

The Committee notes that every other current Victorian provision with the heading 'false representations' (including another sub-section of the section amended by clause 79, as well as two other sections of the *Education and Training Reform Act 2006*) expressly provides that the prohibition is limited to false representations.^v The Committee observes that this drafting approach may be a more accessible and certain way of prohibiting false representations than the drafting approach used by clause 79.^{vi}

The Committee refers to Parliament for its consideration the question of whether or not expressly providing that new sub-sections 2.6.58(1) and (1B) only prohibit false representations about present or past teaching registrations is a less restrictive alternative reasonably available to achieve clause 79's purpose of prohibiting a person from falsely claiming that they are or have been a registered teacher.

^v *Births, Deaths and Marriages Registration Act 1996*, s. 53; *Credit Act 1984*, s. 117; *Drugs, Poisons and Controlled Substances Act 1981*, s. 78; *Education and Training Reform Act 2006*, ss. 2.6.58(2), 4.9.3; 5.3A.15; *House Contracts Guarantee Act 1987*, s. 27; *Relationships Act 2008*, s. 28; *Residential Tenancies Act 1987*, s. 501; *Transport (Compliance and Miscellaneous) Act 1983*, s. 137C; *Workers Compensation Act 1958*, s. 13.

^{vi} The Committee notes that overseas courts have held that the right to freedom of expression may only be limited by laws that are accessible and clear: *Sunday Times v United Kingdom* [1979] ECHR 1, [49].

Appendix 1

Index of Bills in 2014

Alert Digest Nos.

Bills

Assisted Reproductive Treatment Further Amendment Bill 2013	1
Children, Youth and Families Amendment (Security Measures) Bill 2013	1
Corrections Amendment (Parole) Bill 2014	3
Corrections Legislation Amendment Bill 2013	1
Crimes Amendment (Grooming) Bill 2013	1
Drugs, Poisons and Controlled Substances (Poppy Cultivation and Processing) Bill 2013	1
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	2, 3
Environment Protection and Sustainability Victoria Amendment Bill 2014	2
Fences Amendment Bill 2013	1
Fences Amendment Bill 2014	3
Gambling and Liquor Legislation Amendment (Reduction of Red Tape) Bill 2014	3
Game Management Authority Bill 2013	1
Health Services Amendment Bill 2014	2
Honorary Justices Bill 2014	3
Jury Directions Amendment Bill 2013	1
Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Bill 2014	2
Legal Profession Uniform Law Application Bill 2013	1, 2
Mental Health Bill 2014	3
Parliamentary Budget Officer Bill 2013	1
Sale of Land Amendment Bill 2014	2
Small Business Commissioner Amendment Bill 2013	1
State Taxation Legislation Amendment Bill 2014	2
Summary Offences and Sentencing Amendment Bill 2013	1
Transport (Safety Schemes Compliance and Enforcement) Bill 2014	3
Vexatious Proceedings Bill 2014	3
Victorian Civil and Administrative Tribunal Amendment Bill 2014	2
Water Amendment (Water Trading) Bill 2014	2

Regulations

Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	2
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	2

Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

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

Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	2
Legal Profession Uniform Law Application Bill 2013	1
Mental Health Bill 2014	3
Vexatious Proceedings Bill 2014	3

Appendix 3

Ministerial Correspondence 2014

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

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Legal Profession Uniform Law Application Bill 2013	Attorney-General	04-02-14 14-02-14	1 of 2014 2 of 2014
Planning and Environment (Fees) Further Interim Regulations 2013 (SR No. 127 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Subdivision (Fees) Further Interim Regulations 2013 (SR No. 128 / 13)	Planning	09-12-13 17-02-14	17 of 2013 2 of 2014
Education and Training Reform Amendment (Registration of Early Childhood Teachers and Victorian Institute of Teaching) Bill 2014	Education	18-02-14 26-02-14	2 of 2014 3 of 2014
Mental Health Bill 2014	Mental Health	06-03-14	3 of 2014
Vexatious Proceedings Bill 2014	Attorney-General	06-03-14	3 of 2014