



58th Parliament Alert Digest



No. 3 of 2015

**Tuesday, 14 April 2015
on the following Bills**

Domestic Animals Amendment Bill 2015

Jury Directions Bill 2015

Mental Health Amendment Bill 2015

National Parks Amendment (Prohibiting Cattle
Grazing) Bill 2015

Road Safety Road Rules 2009 (Overtaking
Bicycles) Bill 2015



The Committee



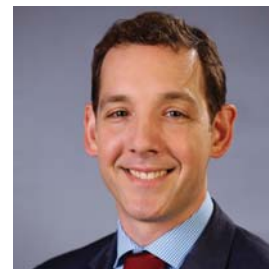
Ms Lizzie Blandthorn MLA
Chairperson
Member for Pascoe Vale



Hon. Richard Dalla-Riva MLC
Deputy Chairperson
Member for Eastern Metropolitan



Mr Josh Bull MLA
Member for Sunbury



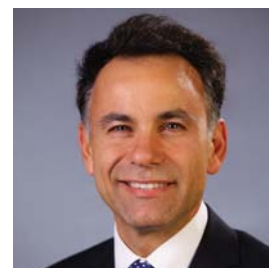
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Terms of Reference - Scrutiny of Bills

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 *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;

Table of Contents

	Page Nos.
Alert Digest No. 3 of 2015	
Domestic Animals Amendment Bill 2015	3
Jury Directions Bill 2015	4
Mental Health Amendment Bill 2015	8
National Parks Amendment (Prohibiting Cattle Grazing) Bill 2015	9
Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2015	10
Appendices	
1 – Index of Bills in 2014-2015	11
2 – Committee Comments classified by Terms of Reference	13
3 – Ministerial Correspondence 2015	15
4 – Statutory Rules and Legislative Instruments considered	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.

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 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. 3 of 2015

Domestic Animals Amendment Bill 2015

Introduced	17 March 2015
Second Reading Speech	18 March 2015
House	Legislative Assembly
Member introducing Bill	Hon. Jacinta Allan MLA
Portfolio responsibility	Minister for Agriculture

Purpose

The Bill amends the *Domestic Animals Act 1994* ('the Act') to impose a moratorium on the destruction of a restricted breed dog (RBD), in certain circumstances.

Extract from the Statement of Compatibility:

The moratorium period will start on commencement of the Bill and end on 30 September 2016 and is intended to provide sufficient time for the Joint Investigatory Committee to report to the Parliament, for the government to consider and respond to any recommendations made by the Committee and for the preparation and passage of any amending legislation that may be needed to implement a recommendation.

The Bill imposes a moratorium on the destruction of a RBD under sections 84P(a) and 84P(b) of the Act as they are the only provisions which permit destruction of a dog solely because it is a RBD.

Apart from preventing destruction of a RBD under those sections, the moratorium does not otherwise affect the operation of the act.

Charter report

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

The Committee makes no further comment

Jury Directions Bill 2015

Introduced	17 March 2015
Second Reading Speech	18 March 2015
House	Legislative Assembly
Member introducing Bill	Hon. Martin Pakula MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill will repeal the *Jury Directions Act 2013* and substantially re-enact its provisions in a new principal Act.

The purposes of the Bill are to:

- reduce the complexity of jury directions in criminal trials;
- simplify and clarify the issues that juries must determine in criminal trials;
- simplify and clarify the duties of the trial judge in giving jury directions in criminal trials;
- clarify that it is one of the duties of legal practitioners appearing in criminal trials to assist the trial judge in deciding which jury directions should be given;
- assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible;
- provide for simplified directions in relation to specific issues;
- re-enact the Jury Directions Act 2013 with amendments;
- amend the Evidence Act 2008 in relation to corroboration directions; and
- make consequential and other amendments.

Summary of provisions

Directions on other misconduct evidence

The term 'other misconduct evidence' is used to describe evidence of discreditable acts of the accused (other than those directly related to the offence charged) which are relied on to help to prove the accused's guilt. This type of evidence may be used to show that the accused had a tendency to behave in a certain way. [25-30]

Directions on unreliable evidence

Certain types of evidence may be inherently unreliable, such as, when the evidence is given by a witness who is criminally concerned in the events in question. Directions on such evidence may be required to ensure that the jury is careful when using the evidence. A further example concerns evidence given by a child where it is important that directions do not reinforce misconceptions about the unreliability of children as a class, or the unreliability of a child's evidence based solely on the age of that child. [31-34] (Refer to Charter report)

Directions on identification evidence

Identification evidence is problematic because it relies on a witness's memory and recall. It can also be overly persuasive, as honest, but mistaken, witnesses can be very convincing. There are many known cases in which mistaken identification evidence has contributed to wrongful convictions. [35-38]

Directions on delay and forensic disadvantage

Currently where there has been a delay between the alleged offence and the complaint, the direction requires the trial judge to tell the jury that it would be dangerous to convict on the complainant's evidence alone unless, after scrutinising the evidence with great care, considering the circumstances relevant to its evaluation, and paying heed to the warning, it is satisfied of the truth and accuracy of that evidence. This direction (a Longman direction) arises most frequently in sexual offence trials. [38-40]

Directions on the failure to give or call evidence

When an accused does not give evidence or call witnesses, the Bill will set out a clear and simple direction that the trial judge must give the jury, if requested by defence counsel, based on the common-law Azzopardi direction, and will prohibit the trial judge from giving the overly complex common-law directions. [41-44]

Directions on non-communication of consent

The Bill will include new jury directions on consent and reasonable belief in consent by amending the list of circumstances in the *Crimes Act* in which a person does not consent to include where the person does not say or do anything to indicate consent, and where, having initially consented to an act, the person later withdraws that consent. [45-47]

Directions on delay and credibility

In appropriate cases, the Bill will require the trial judge to address any general misconceptions about delay by complainants and their credibility early in the trial. The Bill will prohibit the trial judge and parties from saying or suggesting that sexual offence complainants are unreliable as a class, but will continue to allow the parties to make specific arguments about delay and credibility in the trial. [48-54]

Directions on what must be proved beyond reasonable doubt

The Bill will return the law to where it was before the High Court's decisions in Chamberlain and Shepherd requiring the trial judge to direct a jury that 'intermediate links in a chain of reasoning towards an inference of guilt' must be proved beyond a reasonable doubt. Instead the Bill provides that the trial judge may only direct the jury that it must be satisfied beyond reasonable doubt of the elements of the offence, and the absence of any relevant defences. [61-64]

Corroboration

The Bill will amend section 164 of the *Evidence Act* to abolish corroboration directions except in the case of perjury or a similar offence. [74]

Charter report

Expression – Rights of criminal defendants – Defence prohibited from making certain suggestions about child witnesses and co-accused

Summary: The Committee refers to Parliament for its consideration the questions of whether or not clauses 33 and 42, by prohibiting the defence from making certain suggestions about child witnesses and co-accuseds, limit the accused's Charter's rights to freedom of expression, to defend himself or herself and to examine witnesses against him or her; and, if so, whether or not clauses 33 and 42 reasonably limit those rights in order to provide simple and clear directions on the evidence and to help to ensure that misconceptions are not relied upon at a trial.

The Committee notes that clause 33 prohibits anyone at a jury trial from 'say[ing], or suggest[ing] in any way to the jury that:

- (a) children as a class are unreliable witnesses; or
- (b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
- (c) a particular child's evidence is unreliable solely on account of the age of the child; or
- (d) it would be dangerous to convict on the uncorroborated evidence of a witness because the witness is a child.'

The Committee observes that, in contrast to the existing law (which bars trial judges from making those statements)¹, clause 33 also prohibits these statements by prosecutors, defence counsel and any unrepresented accused.

The Committee also notes that clause 42 prohibits anyone at a jury trial from 'say[ing], or suggest[ing] in any way, to the jury that, because an accused did not give evidence or a call a particular witness..., the jury may—

- (a) conclude that the accused is guilty from that fact; or
- (b) use the failure of the accused to prove an explanation of facts, which must be within the knowledge of the accused, to more safely draw an adverse inference based on those facts which, if drawn, could prove the guilt of the accused; or
- (c) draw an inference that the accused did not give evidence or call a witness... because that would not have assisted his or her case.'

The Committee observes that, in contrast to the existing law,² clause 42's prohibition extends to comments made by one accused about a co-accused.

The Statement of Compatibility remarks:

The aim of the Jury Directions Act 2013 was to assist judges in providing simple and clear directions on the law and the evidence in the case that jurors are likely to listen to, understand and apply. Re-enacting the act and including additional jury directions reforms further these aims. This will assist in ensuring a fair trial, and protecting rights in criminal proceedings, in particular the right to be presumed innocent, rather than limiting these rights...

Clause 33 of the bill prohibits the trial judge and parties from making certain statements and suggestions about the reliability and credibility of children's evidence. These prohibit

¹ *Evidence Act 2008*, s. 165A(1).

² *Evidence Act 2008*, s. 20(2).

statements or suggestions that relate to common misconceptions about the reliability of children's evidence. This enhances the protection of children under section 17 of the charter, by helping to ensure that misconceptions that discriminate against children are not relied on in a trial.

A paper recently published by the Department of Justice and Regulation adds:

[Clause 42] will treat a co-accused the same as any other party. This will avoid the problems with the current treatment of the co-accused... These problems concern the ability of the co-accused to suggest impermissible forms of reasoning, the difficulty for the trial judge directing on such comments in a way that is consistent with section 20 [of the Evidence Act 2008] and the fair trials of the accused and co-accused, and the difficulty for the jury in understanding these complex directions. Therefore, it is acceptable to limit the co-accused's right to comment in these cases.³

However, the Committee notes that clauses 33 and 42 may prevent accused persons from defending themselves using arguments of their choice, including arguments that are controversial, contested or contradicted by the trial judge's direction to the jury. The prohibition on 'suggest[ing] in any way' various arguments about a child witness or a co-accused may also make it difficult for an accused person (especially when unrepresented) to robustly attack the reliability of those witnesses. The Committee observes that clauses 33 and 42 may therefore engage the accused's Charter rights to freedom of expression, to defend himself or herself and to examine witnesses against him or her.⁴

The Committee notes that clauses 33 and 42:

- are not subject to clause 16, which permits otherwise prohibited directions 'if the trial judge considers that there are substantial and compelling reasons'.
- do not follow the approach of clause 51 (prohibiting certain comments on complainants in sexual offence cases), which distinguishes between comments about complainants 'as a class' (which no-one can put to the jury) and comments about a particular complainant (which only the trial judge is barred from putting to the jury.)

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

- **whether or not clauses 33 and 42, by prohibiting the defence from making certain suggestions about child witnesses and co-accuseds, limit the accused's Charter's rights to freedom of expression, to defend himself or herself and to examine witnesses against him or her; and**
- **if so, whether or not clauses 33 and 42 reasonably limit those rights in order to provide simple and clear directions on the evidence and to help to ensure that misconceptions are not relied upon at a trial.**

The Committee makes no further comment

³ Criminal Law Review, *Jury Directions: A Jury-Centric Approach* (Department of Justice and Regulation, 2015), p. 71.

⁴ Charter ss. 15(2), 25(2)(d) & 25(2)(g).

Mental Health Amendment Bill 2015

Introduced	17 March 2015
Second Reading Speech	18 March 2015
House	Legislative Assembly
Member introducing Bill	Hon. Martin Foley MLA
Portfolio responsibility	Minister for Mental Health

Purpose

The Bill amends the *Mental Health Act 2014* ('the Act') to enable the transfer and return of a forensic prisoner to a designated mental health service to obtain compulsory treatment.

The Bill also makes various amendments and statute law revision amendments to address administration, operational and policy issues identified following the implementation of the Act on 1 July 2014.

Content

Inpatient's right to communicate – Freedom of expression – Right to privacy

The Act prohibits restrictions being placed on an inpatient's right to communicate with their legal representative, the chief psychiatrist, the Mental Health Complaints Commissioner, the Mental Health Tribunal or a community visitor. Amendments to section 16 will allow additional persons or bodies to be prescribed in the regulations as persons or bodies with whom communication cannot be restricted.

The statement of compatibility remarks that 'it is anticipated that once established, mental health advocates will be prescribed by regulation to assist such inpatients'. [6]

Section 17 of the Act requires 'a carer' to be notified of a restriction on an inpatient's right to communicate. The Bill restricts the obligation to notify a carer to circumstances where the restriction on communication 'will directly affect the carer and the care relationship'. [7]

Application to perform electroconvulsive treatment (ECT) on a young person – Personal consent by young person

The Act requires that informed consent to electroconvulsive treatment by an adult patient must be provided personally by the adult patient and not by a substitute decision-maker such as a guardian. By contrast, section 94(1)(a) and (2)(a) of the Act **does not expressly require** the personal informed consent of the young person.

The Bill provides that the informed consent of the young person must be personal and not a substitute decision made by parent or guardian. [13(1)]

Charter report

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

The Committee makes no further comment

National Parks Amendment (Prohibiting Cattle Grazing) Bill 2015

Introduced	17 March 2015
Second Reading Speech	18 March 2015
House	Legislative Assembly
Member introducing Bill	Hon. Lisa Neville MLA
Portfolio responsibility	Minister for Environment, Climate Change and Water

Purpose

The Bill amends the *National Parks Act 1975* ('the Act') to prohibit cattle grazing in the Alpine and River Red Gum national parks.

The Bill clarifies that executive and administrative powers under the Act and the *Conservation, Forests and Lands Act 1987* cannot be used to provide for the introduction or use of cattle in the specified parks.

Charter report

The National Parks Amendment (Prohibiting Cattle Grazing) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2015

Introduced	18 March 2015
Second Reading Speech	18 March 2015
House	Legislative Council
Member introducing Bill	Ms Samantha Dunn MLC
Private Member's Bill	

Purpose

The Bill amends the *Road Safety Road Rules 2009 (the 'Road Rules')* to require motor vehicle drivers and motor bike riders to maintain at least a prescribed distance when overtaking bicycles on a road.

Charter report

The Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Committee Room

13 April 2015

Appendix 1

Index of Bills in 2014-2015

Alert Digest Nos.

Bills

Back to Work Bill 2014	1, 2
Cemeteries and Crematoria Amendment (Veterans Reform) Bill 2015	1
Domestic Animals Amendment Bill 2015	3
Education and Training Reform Amendment (Child Safe Schools) Bill 2015	2
Education and Training Reform Amendment (Funding of Non-Government Schools) Bill 2014	1
Interpretation of Legislation Amendment Bill 2015	1
Jury Directions Bill 2015	3
Legal Profession Uniform Law Application Amendment Bill 2015	2
Limitation of Actions Amendment (Child Abuse) Bill 2015	2
Mental Health Amendment Bill 2015	3
National Parks Amendment (Prohibiting Cattle Grazing) Bill 2015	3
Parliamentary Committees and Inquiries Acts Amendment Bill 2015	1
Public Health and Wellbeing Amendment (Hairdressing Registration) Bill 2015	2
Road Safety Road Rules 2009 (Overtaking Bicycles) Bill 2015	3
Statute Law Repeals Bill 2014	1
Statute Law Revision Bill 2014	1
Summary Offences Amendment (Move-on Laws) Bill 2015	1
Veterans and Other Acts Amendment Bill 2015	2
Wrongs Amendment (Asbestos Related Claims) Bill 2014	1

Appendix 2

Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

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

Back to Work Bill 2014

1

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.

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Back to Work Bill 2014	Treasurer	24-02-15 13-03-15	1 of 2015 2 of 2015

Appendix 4

Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 13 April 2015

Statutory Rules Series 2014

- SR No. 162 – Building Further Amendment (New Residential Zones) Regulations 2014
- SR No. 165 – Country Fire Authority Regulations 2014
- SR No. 166 – Parliamentary Salaries and Superannuation (Allowances) Amendment Regulations 2014
- SR No. 170 – Royal Botanic Gardens Regulations 2014
- SR No. 173 – Building Amendment (Farm Buildings) Regulations 2014
- SR No. 187 – Confiscation Amendment (Unexplained Wealth) Regulations 2014
- SR No. 188 – Wrongs (Part VBA)(Asbestos Related Claims) Regulations 2014
- SR No. 189 – Estate Agents (Exemption) Regulations 2014
- SR No. 190 – Wildlife (State Game Reserves) Regulations 2014
- SR No. 191 – Conservation, Forests and Lands (Infringement Notice) Amendment Regulations 2014
- SR No. 192 – Assisted Reproductive Treatment Amendment Regulations 2014
- SR No. 193 – Drugs, Poisons and Controlled Substances (Commonwealth Standard) Revocation Regulations 2014
- SR No. 194 – Drugs, Poisons and Controlled Substances Amendment (Residential Medication Chart) Regulations 2014
- SR No. 195 – Drugs, Poisons and Controlled Substances (Drugs of Dependence – Synthetic Cannabinoids) Regulations 2014
- SR No. 196 – Building Amendment (Additional New Residential Zones) Regulations 2014
- SR No. 197 – Building Amendment (Live Music) Regulations 2014
- SR No. 198 – Tourist and Heritage Railways Amendment Regulations 2014
- SR No. 199 – Road Safety (Drivers)(General) and (Vehicles) Amendment Regulations 2014
- SR No. 200 – Road Safety (Drivers) Amendment (Probationary Prohibited Vehicles) Regulations 2014
- SR No. 201 – Road Safety (Vehicles) Amendment Regulations 2014
- SR No. 210 – County Court (Miscellaneous Amendments) Rules 2014

Legislative Instruments

- Notice of Amendments to Australian Rules of Harness Racing
- Amendment to the Determination that Specified Areas are Designated Bushfire Prone Areas
- Order Amending the Flora and Fauna Guarantee (Taking, Trading In, or Keeping of Listed Fish) Order No. 1/2009
- Declaration of Discount Factor under Section 19 of the Victorian Energy Efficiency Act 2007
- Notice – Mayoral and Deputy Mayoral Allowances Alteration – Greater Geelong City Council
- Notice – Mayoral and Councillor Allowances Adjustment
- Notice – Lord Mayoral, Deputy Lord Mayoral and Councillor Allowances Alteration – Melbourne City Council
- Notice – Senior Officer Remuneration Threshold Increase
- Ministerial Direction Requiring Certain Classes of Persons to Complete Advanced Responsible Service of Alcohol Training Pursuant to Section 146F of the Liquor Control Reform Act 1998

Notice of Amendments to Australian Rules of Harness Racing (ARHR), Australian Trotting Stud Book Regulations (ATSBR) and Australian Handicapping Rules (AHR)
Alcohol Interlock Guidelines
Greyhound Racing Victoria – Rule Amendments
Driver Accreditation (Metropolitan Hire-Car) Amending Instrument
Ministerial Order under Section 3.4A.5(3) of the Gambling Regulation Act 2003
Ministerial Order under Section 3.4A.20K of the Gambling Regulation Act 2003
East Gippsland Catchment Management Authority By-Law 2014-1 Waterways Protection
