58th Parliament
Alert Digest

No. 5 of 2016

Tuesday, 12 April 2016
on the following Bills

Confiscation and Other Matters Amendment Bill 2016
Education and Training Reform Amendment (Miscellaneous) Bill 2016
Livestock Disease Control Amendment Bill 2016
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016
Witness Protection Amendment Bill 2016
The functions of the Scrutiny of Acts and Regulations Committee are –

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
   (i) trespasses unduly upon rights or freedoms;
   (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
   (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
   (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Privacy and Data Protection Act 2014;
   (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2001;
   (vi) inappropriately delegates legislative power;
   (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
   (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
   (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the Constitution Act 1975, or raises an issue as to the jurisdiction of the Supreme Court;
   (ii) if a Bill repeals, alters or varies section 85 of the Constitution Act 1975, whether this is in all the circumstances appropriate and desirable;
   (iii) if a Bill does not repeal, alter or vary section 85 of the Constitution Act 1975, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
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Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the Charter provides –

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

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

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

Glossary and Symbols

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

‘penalty units’ refers to the penalty unit fixed from time to time in accordance with the Monetary Units Act 2004 and published in the government gazette (as at 1 July 2015 one penalty unit equals $151.67 )

‘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
Education and Training Reform Amendment (Miscellaneous) Bill 2016

Introduced 22 March 2016
Second Reading Speech 23 March 2016
House Legislative Assembly
Member introducing Bill Hon. James Merlino MLA
Minister responsible Hon. James Merlino MLA
Portfolio responsibility Minister for Education

Purpose

The Bill would amend the Education and Training Reform Act 2006 to:

- empower the Secretary to the Department of Education and Training (DET) to summarily terminate the employment of a member of the Government teaching service for serious misconduct [5, 6]
- establish a statutory debt recovery arrangement for financial assistance that is provided by the Commonwealth (via authorities or bodies that represent or fund schools) to Victorian schools [10]
- provide for three new sexual offences under the Criminal Code of the Commonwealth to be taken into account when assessing the registration and performance of Victorian schools or teachers:
  - forced marriage involving a person under the age of 18 years — Refer to Charter Report below
  - using a carriage service for sexual activity with a person under 16 years of age
  - using a carriage service to transmit indecent communication to a person under 16 years of age [4]
- simplify and clarify procedures relating to the Victorian Institute of Teaching (the Institute) [8, 9]
- make minor and technical amendments.
Charter report

*Equal protection of the law – Cancellation of registration or permission to teach without inquiry – Extension of definition of sexual offence to include offence of forced marriage involving a person under 18 years of age.*

**Summary:** The effect of clause 4 of the Bill is to broaden the definition of “sexual offence” in s. 1.1.3(1) of the Education and Training Reform Act 2006 to include the offence of participation in a forced marriage involving a person under 18 years of age. If a teacher is convicted or found guilty of a sexual offence their teaching registration ceases and they are automatically disqualified from teaching in a school, without inquiry. The Committee will write to the Minister seeking further information.

The Committee notes that clause 4 extends the existing definition of “sexual offence” in s. 1.1.3(1) of the Education and Training Reform Act 2006 to include the offence of participation in a forced marriage involving a person under 18 years of age.

The Committee observes that the offence of forced marriage involving a person under 18 years of age is most likely to involve a marriage that has occurred overseas by participants from countries where marriages involving one or both persons who are under 18 years old is prevalent. The effect of clause 4 is to automatically disqualify teachers who are found guilty or convicted of being involved in a forced marriage involving a person under 18 years of age from teaching in a school, without holding any inquiry into the circumstances in which the offence occurred. This may breach the right to the equal protection of the law.

The definition of forced marriage in s. 270.7A of the Criminal Code (Cth) covers circumstances in which one party to the marriage (the victim) enters into the marriage without freely and fully consenting either because of the use of coercion, threat or deception; or because the party is incapable of understanding the nature and effect of the marriage ceremony. For the purposes of these provisions, a person under 16 years of age is presumed, unless the contrary is proved, to be incapable of understanding the nature and effect of a marriage ceremony. This means that where a child who is under 16 years old is a party to a marriage it is presumed that they are the victim of a forced marriage.

There are two forced marriage offences set out in s. 270.7B of the Criminal Code (Cth), the first of which addresses non-participants in the marriage (the offence of causing another person to enter into a forced marriage as a victim of the marriage) and the second of which addresses participants (where the person is a party to the marriage and is not a forced marriage victim). The first class of offences will capture the victim’s parents and other parties involved in causing an under 16 year old to marry and will not involve any sexual offences, although clause 4 of the Bill will define them as a “sexual offence”. Where third parties, such as a victim’s parents, are convicted of a forced marriage offence their teaching registration will be cancelled without a hearing into the surrounding circumstances of the marriage or their involvement in it.

In both classes of offences, where the alleged victim is under 16 years old the accused must prove that the alleged victim was capable of understanding the nature and effect of the marriage ceremony at the time that they were married in order to displace the presumption that the marriage was forced. It is unclear how an accused parent or spouse will prove an alleged victim’s capacity where a lack of capacity is alleged on the basis of age. Forced marriage charges may be laid well after a marriage has occurred when it is not possible to obtain expert evidence to prove the capacity of the alleged victim at the time of the marriage, as they may be significantly older by the time any expert comes to assess capacity. In practice the evidentiary burden imposed upon those charged under this section may mean that all marriages involving people under 16 years old are held to be forced marriages, regardless of capacity and consent.
The Commonwealth forced marriage offences do expressly allow for a defence of reasonable excuse in s. 270.7B(4). However this excuse only applies to the offence that addresses the other marriage participant, not to the offence of causing another person to enter into a forced marriage as a victim of the marriage, an offence that is likely to capture the parents of the victim.

In Australia it is not possible for a person to get married if they are under 18 years of age without the approval of a court. An Australian court would not authorise a forced marriage, so as a matter of practice the offence of forced marriage involving a person under 18 years of age will only ever involve a marriage that has occurred overseas. The Commonwealth forced marriage offences apply extraterritorially to overseas marriages.

In some countries it is lawful for a girl of 15 years old to be married (Mali, Chad and Niger for example). There are many more countries in which a large percentage of girls under 15 years old are married, despite the legal age for marriage being 18 years. According to UNICEF, in the Central African Republic, Chad and Bangladesh 29% of girls are married by the age of 15; in Niger 28% of girls are married by the age of 15; and in Mali 15% of girls are married by the age of 15. Given the presumption in s. 270.7A of the Criminal Code (Cth) that a marriage involving a child that is under 16 years old is forced, the offences in s. 270.7B are much more likely to apply to immigrants from these countries. These offences criminalise acts that will often have occurred in countries where they are lawful and are often committed by family members who are acting in accordance with culturally accepted norms and traditions in which these marriages are viewed as normal and desirable. Instead they reflect Australian norms and traditions, which focus on protecting children from sexual exploitation and according to which the marriage of a 15 year old is viewed as abnormal and undesirable.

Exclusion from teaching as a result of the inclusion of this offence in the definition of “sexual offence” is therefore a detriment that is more likely to be imposed on immigrants of certain races. Because race is a protected attribute under the Equal Opportunity Act 2010, the right to the equal protection of the law under the Charter may be limited by the inclusion of this offence in the definition of “sexual offence” under the Act. The Statement of Compatibility notes that the expansion of the definition of “sexual offence” promotes the protection of children from sexual exploitation in affording them greater protection from a wider range of “sexual offenders”. It does not address the potential for the inclusion of the forced marriage offence to capture a wider range of people who have not themselves engaged in sexual offences and who will often be immigrants from the specific countries mentioned. The Statement of Compatibility does not consider the differential impact of this extension of the definition upon teachers who have emigrated from countries with high girl-child marriage rates or whether this limits the right to equal protection of the law in s. 8 of the Charter. As a result there is also no consideration of whether any limit is a reasonable limit under s. 7(2) of the Charter, for example because inclusion of the forced marriage offence in the definition of “sexual offence” is necessary to protect school children from the person involved in the forced marriage offence.

The Committee will write to the Minister seeking further information as to the compatibility of the Bill with the right to equal protection of the law.

The Committee makes no further comment.

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Livestock Disease Control Amendment Bill 2016

Introduced 22 March 2016  
Second Reading Speech 23 March 2016  
House Legislative Assembly  
Member introducing Bill Hon. Jacinta Allan MLA  
Minister responsible Hon. Jaala Pulford MLA  
Portfolio responsibility Minister for Agriculture

Purpose

The Bill would amend a number of provisions in the Livestock Disease Control Act 1994 (LDCA) to require the publication in full (in the Government Gazette) of the relevant declaration or order. Those provisions currently require the publication of a notice of the making of the declaration or order only. However, full publication is an existing requirement under the Subordinate Legislation Act 1994. The amendments to the LDCA would therefore remove any apparent inconsistency.

The Bill would also amend the LDCA to:

- set out common requirements for vendor declarations when cattle and prescribed livestock are moved
- amend provisions that relate to the swill-feeding of pigs.

Charter report

The Livestock Disease Control Amendment Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016

Introduced 22 March 2016
Second Reading Speech 23 March 2016
House Legislative Assembly
Member introducing Bill Hon. Robin Scott MLA
Minister responsible Hon. Robin Scott MLA
Portfolio responsibility Acting Minister for Corrections

Purpose

The Bill would amend the *Serious Sex Offenders (Detention and Supervision) Act 2009* (SSODSA) (the Principal Act), the *Sentencing Act 1991*, the *Sex Offenders Registration Act 2004* (SORA), the *Corrections Act 1986* and other acts to protect the community further from serious sexual offenders.

The Bill would amend the Principal Act to:

- require that a person or body making a decision under the Act give ‘paramount consideration’ to the safety and protection of the community (new section 6A) [5]
- require that a court must make a sex offender registration order in relation to a person who is not already a registered sex offender upon the making, confirmation or renewal of a supervision or detention order (new section 6B) [5]
- create a new class of conditions in relation to supervision orders, to be known as ‘restrictive conditions’, which would comprise two categories:
  - the core conditions of every supervision order prohibiting further sexual offending or violent offending or conduct, which would apply to every offender on a supervision order
  - conditions declared by a court, which are tailored to the circumstances of an individual case (e.g. alcohol or drug abstinence, curfew, residence restriction etc.)
A sentencing court would be required to impose a term of imprisonment of not less than 12 months for the breach of a restrictive condition [4, 6, 9, 40] — see also the discussion on clause 40 below.
- specify new core conditions (relating to violent offences, conduct at residential facilities and the safety of any person, including the offender), which must be imposed on all supervision orders (new section 16) [12, 17] Refer to Charter Report below
- add to the list of additional conditions that a court must consider when imposing a supervision order or interim supervision order, a condition that the offender not engage in types of behaviour that (in addition to contributing to the risk that they may commit a relevant offence) would contribute to the risk that they may commit a violent offence or engage in violent conduct (amended section 17) [13] Refer to Charter Report below
- enable a court, when considering the conditions of a supervision or interim supervision order, to consider imposing any other conditions that it considers appropriate to reduce the risk that an offender may commit a violent offence or engage in violent conduct [14] Refer to Charter Report below
- provide that conditions imposed by the Adult Parole Board must be reasonably related to the gravity of the risk of reoffending by the offender, including the risk that an offender will
commit a relevant offence, violent offence or engage in violent conduct [15] Refer to Charter Report below

- make a number of amendments to the entry, search and seizure powers of supervision officers, community corrections officers, specified officers and police officers (Part 3 of the Bill), including:
  - reducing the threshold trigger for carrying out a search in a residential facility or other place of residence from ‘reasonable belief’ to ‘reasonable suspicion’ [19, 21]
  - provide supervision officers, specified officers and police officers with the power to examine things seized under section 143 of the Principal Act, and seize or take samples, on certain grounds, of anything found in the possession of an offender [20]
  - provide police officers with search and seizure powers in relation to offenders residing in locations other than residential facilities and provide all relevant officers with a power to examine things seized under these provisions [21, 22]
  - provide police officers with new search, seizure and examination powers exercisable at any premises where the offender is reasonably suspected to be located and entry is reasonably necessary to monitor their compliance with a supervision order [26]
  - provide police officers, community corrections officers, supervision officers or specified officers with the power to use reasonable force to assist in the conduct of a search and direct that an offender provide assistance in relation to granting access to computers and other devices. It would be an offence (subject to a maximum penalty of 5 years imprisonment) for an offender to fail to comply with a direction to provide assistance without reasonable excuse [27]
  - limit the liability of officers for any injury or damage caused by the use of force exercised in accordance with the Principal Act [Part 3, 34, 35]

The Bill would also amend the Sentencing Act 1991 to provide that a court must impose a term of imprisonment of not less than 12 months — unless it finds that there is a ‘special reason’ to impose a lesser sentence — if an offender ‘intentionally or recklessly’ fails to comply with a restrictive condition of a supervision order. [40]

Content

Trespass unduly on rights or freedoms – Abrogate the liberty of the individual and authorise detention

Clause 37 of the Bill would extend the maximum detention period for an offender from 10 hours to 72 hours (i.e., up to 3 days), without court approval or a charge, where a police officer suspects on reasonable grounds that there is an imminent risk that they will breach a condition of a supervision order.

The Committee notes that the High Court of Australia recently held that a provision empowering Northern Territory police to detain a person in respect of an infringement notice offence for up to four hours was not invalid under the federal separation of powers doctrine. However, the court also held that if the maximum period for which a person could be held in detention in respect of an infringement notice offence were ‘significantly greater…then a question might arise as to whether

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such an extended detention could be justified... and whether, beyond a certain point, it could still be characterised as administrative rather than punitive’. 3

The Committee is mindful that clause 37 of the current Bill relates to the detention of a serious sex offender who is suspected of breaching a condition of their supervision order, as opposed to persons in receipt of an infringement notice. The Committee also notes the following explanation in the Explanatory Memorandum:

...10 hours is too short a period of time to address an imminent risk where an offender needs to be held in police custody for the protection of other persons. There is insufficient time to assess the full risk and to respond.

...

The purpose of the detention of the offender by a police officer is preventative, not punitive. The holding power is designed to protect the community from an imminent risk of breaching a supervision order. The police officer may only exercise the power if the police officer has reasonable grounds to suspect that there is an imminent risk that the offender will breach a condition of a supervision order.

The Committee refers to Parliament the question whether clause 37 unduly trespasses on the liberty of offenders by extending the maximum detention period for the breach of a supervision order from 10 hours to 72 hours.

**Entry, search and seizure without warrant**

As outlined above, Part 3 of the Bill would make a number of amendments to the entry, search and seizure powers of supervision officers, community corrections officers, specified officers and police officers. The Committee notes that while these powers are exercisable without a warrant, they are for the purpose of determining compliance with the Principal Act by a person who is subject to a supervision order under that Act.

**Charter report**

**Arbitrary detention – Prohibition on offenders posing a risk to good order of a residential facility or threatening their own safety – Minimum sentence of 12 months imprisonment**

**Summary:** The combined effect of clauses 4, 10 to 15, 40 and 41 is to prohibit offenders subject to supervision orders from engaging in conduct that ‘poses a risk to the good order of a residential facility’ or ‘threatens the safety of... the offender’ and to require offenders who engage in such conduct without reasonable excuse to ordinarily be imprisoned for at least 12 months. The Committee refers to Parliament for its consideration the question of whether or not these clauses are compatible with the Charter’s right against arbitrary detention.

The Committee notes that clause 12, amending existing s. 16(2), adds mandatory conditions to every serious sex offender supervision order, including that the offender:

- (ac) if the court requires an offender to reside at a residential facility, not engage in conduct that poses a risk to the good order of the residential facility or the safety and welfare of offenders or staff at the residential facility or visitors to the residential facility;

- (ad) not engage in conduct that threatens the safety of any person, including the offender

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3 *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 [38] (French CJ, Kiefel and Bell JJ).
Clauses 11, 13, 14 and 15, amending existing ss. 15, 17, 19 and 20, add the prevention of the offender’s ‘violent conduct’ to the purpose of discretionary conditions to such orders. Clause 10, amending s. 3, provides that ‘violent conduct’ means ‘conduct of a kind referred to in section 16(2)(ac) or (ad)’.

The Committee observes that the combined effect of clauses 10 to 15 is to prohibit, and require decision-makers to prevent, offenders subject to supervision orders from engaging in conduct that ‘poses a risk to the good order of a residential facility’ or ‘threatens the safety of... the offender’, whether or not that conduct is violent or potentially criminal.

The Statement of Compatibility remarks:

The new core conditions relate to prohibiting violent conduct, conduct posing a risk to the good order of a residential facility or safety of others. While prohibiting violent and other anti-social conduct may result in an incidental limitation on an offender’s human rights, any such limitation is plainly justified under section 7(2) of the charter. It is reasonable to limit a person’s conduct if it constitutes a violent crime or poses a risk to good order, security and safety, particularly in circumstances where there is a real and genuine risk of that nature.

Further, the nature of these new conditions have sufficient connection with the protective and rehabilitative purposes of the act and are not impermissibly punitive in their scope or practical effect. Violent and anti-social conduct can be integral factors in an offender’s overall risk of sexual reoffending, and it is essential to the effectiveness of the scheme that it have the capacity to protect against behaviour or conduct relevant to the risk of an offender reoffending, particularly in the case of some serious sex offenders who present with a risk of violence. It is also necessary that the scheme address violent behaviour or conduct engaged in by some serious sex offenders at a residential facility and violent behaviour generally, including at any place where a serious sex offender is residing or being supervised in the community.

However, the Committee notes that:

- the Bill does not define the terms ‘poses a risk to the good order’ or ‘threatens the safety’. By contrast, all the current core conditions in existing s. 12 require compliance with the criminal law or specific directions by the Adult Parole Board.
- the Statement of Compatibility does not address the inclusion of ‘conduct that threatens the safety of... the offender’ as a mandatory prohibition in all supervision orders or in the definition of ‘violent conduct’. By contrast, existing Victorian law provides that attempted suicide is not a criminal offence and only prohibits Victorians from conduct endangering others, not themselves.\(^4\)
- while the Committee considers that ‘violent and anti-social conduct can be integral factors in an offender’s overall risk of sexual offending’, it notes that ‘violent conduct’ (as clause 3 defines it) does not require any proof or connection to such a risk.

The Committee observes that no other similar Australian law for the supervision of sex offenders imposes, or requires decision-makers to consider imposing, conditions prohibiting conduct by such offenders that poses a risk to good order of a residential facility or that threatens the offender’s safety.\(^5\)

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\(^4\) Crimes Act 1958, ss. 6A, 22 & 23.

\(^5\) See Crimes (High Risk Offenders) Act 2006 (NSW), s. 11; Serious Sex Offenders Act 2013 (NT), s. 18; Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s. 16; Criminal Law (High Risk Offenders) Act 2015 (SA), s. 10; Dangerous Sexual Offenders Act 2006 (WA), s. 18.
The Committee also notes that the clause 4, amending existing s. 3, defines ‘restrictive condition’ to include the new conditions in s. 16(2)(ac) and (ad). Clause 40, inserting a new section 10AB into the Sentencing Act 1991, requires a court sentencing an offender for breach of a supervision condition without a reasonable excuse that finds that the ‘offender intentionally or reckless failed to comply with a restrictive condition of the supervision order’ to impose a term of imprisonment of not less than 12 months unless the court finds that a ‘special reason exists’ under existing s. 10A. Clause 41, amending existing s. 10A, requires a court to have regard to ‘the Parliament’s intention that a sentence of imprisonment of not less than 12 months should ordinarily be imposed for an offence covered by section 10AB’.

The Committee observes that the combined effect of clauses 4, 12, 40 and 41 is that offenders who, without reasonable excuse, intentionally or reckless engage in conduct that poses a risk to the good order of a residential facility or threatens their own safety must ordinarily be imprisoned for at least 12 months.

The Statement of Compatibility remarks:

Section 10 of the charter relevantly provides that a person must not be punished in a cruel, inhuman or degrading way. Section 21 of the charter relevantly provides that a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law. To be compatible with these rights, a scheme of minimum sentencing must be proportionate to the punishment that is appropriate by normal sentencing standards, having regard to the nature of the offence and the circumstances of the offender.

In my opinion, a statutory minimum sentence of 12 months imprisonment (with any non-parole period) for an offence of intentional or reckless failure to comply with a restrictive condition does not limit these rights, as it does not compel the imposition of a grossly disproportionate sentence, for the following reasons.

Firstly, the statutory minimum sentence is only triggered in limited circumstances, which involve breaches of restrictive conditions. A condition is restrictive either because it relates to prohibiting further sexual or violent offending or violent conduct, which by its very nature involves a high level of harm and culpability, or is a condition considered necessary to address the risk of an offender engaging in further sexual or violent offending. This ensures the minimum sentence is sufficiently connected and commensurate to certain breaches of an order which present the most serious risk to community safety. Further, the breach must be intentional or reckless, which focuses on the mindset of an offender and involves consideration of their level of premeditation or malicious intent prior to or during the offending.

Secondly, the minimum sentence is only 12 months (with any non-parole period of at least six months), which would be considered to be within the range of normal sentencing standards for any offence considered to be at the higher end of the objective range of wrongdoing.

Finally, the bill acknowledges the possibility that, in certain cases, there may be factors present which lessen the culpability of on offender, such that the offender should not be subject to the statutory minimum sentence. In this regard, the bill safeguards against the imposition of a disproportionate sentence by allowing a court to depart from the statutory minimum sentence if it finds that the personal characteristics and/or the particular circumstances of the case justify doing so. Once a special reason is found to exist, a court has full discretion and may impose any sentence it considers appropriate, including a non-custodial sentence.
However, the Committee notes that:

- clause 4’s definition of ‘restrictive condition’ does not require proof of either ‘a high level of harm and culpability’ or that the condition is ‘necessary to address the risk of an offender engaging in further sexual or violent conduct’.

- the terms ‘intentionally’ and ‘recklessly’ do not require proof of either the offender’s ‘premeditation’ or ‘malicious intent’. Rather, the High Court has held that such terms relate to the defendant’s ‘knowledge or belief about the facts’ and not the defendant’s understanding of the character of his or her actions.6

- while a sentence of 12 months is ‘within the range of normal sentencing standards for any offence considered to be at the higher end of the objective range of wrongdoing’, conduct that merely poses a risk to the good order of a residential facility or threatens the offender’s own safety may not be at the higher end of the objective range of wrongdoing.

- the Statement of Compatibility does not address clause 41’s requirement that a sentence for a breach of a restrictive condition should ‘ordinarily’ be ‘not less than 12 months’ imprisonment.

The Committee observes that the only other Australian legislation that imposes a mandatory minimum sentence for a breach of a supervision order by a sex offender is Queensland’s regime, where the minimum only applies to tampering with an electronic tag.7

The Committee refers to Parliament for its consideration the questions of whether or not:

- clauses 10 to 15, by prohibiting, and requiring decision-makers to impose conditions in order to prevent, sex offenders subject to supervision orders from engaging in conduct that poses a risk to the good order of a residential facility or threatens their own safety; and

- clauses 4, 12, 40 and 41, by requiring that offenders who engage in such conduct with reasonable excuse ordinarily be imprisoned for at least 12 months;

are compatible with the Charter’s right against arbitrary detention.8

Court control of detainees – Police officer may detain an offender for 3 days in a police station without charge or court supervision – Whether less restrictive alternatives reasonably available

Summary: Clause 37 extends the maximum period for which an offender subject to a supervision order can be detained in a police station by any police officer on suspicion of an imminent risk of a breach of a condition of the order from 10 hours to 72 hours. The Committee will write to the Minister seeking further information.

The Committee notes that clause 37, amending existing s. 168, extends the maximum period for which an offender subject to a supervision order can be detained under Division 3 of Part 11 of the Act from 10 hours to 72 hours. Division 3 permits any police officer to apprehend and detain an offender in a police station or police gaol if the officer has reasonable grounds to suspect that there is an imminent risk that the offender will breach a condition of a supervision order. There is no requirement for court approval of such detention, either before or after the offender is apprehended.

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6 The Queen v Tang [2008] HCA 39, [36]-[51].
7 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s. 43AA(2).
8 Charter s. 21(2).
The Committee observes that clause 37 may engage Charter s. 21(5)(a)’s provision that anyone who is ‘detained... on a criminal charge... must be brought promptly before a court’. Breach of a supervision order is a criminal offence punishable by up to five years imprisonment.

The Statement of Compatibility remarks:

It may be argued that extending the duration of the holding period to 72 hours is disproportionate and hence a limitation on the protection against arbitrary detention. It is my view that any such limitation would be justified under section 7(2) of the charter. The holding power is intended as a last resort to prevent imminent breaches of a supervision order from occurring, which, if not responded to immediately, will expose the community to a serious risk of harm. The current maximum duration of 10 hours is not considered an adequate period of time for any threat of an imminent breach to be sufficiently addressed and contained. Appropriate responses to any escalation of an offender’s risk include undertaking a further forensic assessment of an offender, making an urgent application to the court for an interim detention order or a review of the existing conditions of a supervision order, or holding an emergency hearing before the Adult Parole Board. The current maximum period of 10 hours is insufficient for any of these responses to occur and obstructs the legislative purpose of the holding power from being realised. I note that this amendment does not alter the existing procedural rights surrounding the exercise of the holding power, including the prohibition on questioning, notice and communication rights and reporting obligations, which ensure there are no unreasonable limitations on the human rights of offenders.

However, the Committee notes that neither clause 37 nor existing Division 3 of Part 11 limit a police officer’s detention of an offender to the need to ‘address and contain’ the threat of imminent breach or, in particular, the unavailability of the Adult Parole Board or a court to respond to that threat. By contrast, existing s. 120 provides the Adult Parole Board with a power to give a direction to any offender who is subject to a supervision order where there is an imminent risk of harm to the offender or the community and the urgency of the situation makes it impracticable to apply to a court for a variation of an order.

The Statement of Compatibility does not address whether or not there are any less restrictive alternatives reasonably available to achieve clause 37’s purpose, such as requiring detention without supervision for a shorter period than 72 hours or requiring that the offender be brought before the parole board or a court as soon as practicable. The Committee observes that all other similar Australian schemes for supervision of sex offenders either require that a court first authorise the detention of an offender on suspicion of a likely breach of a supervision order or require that any offender be brought before a court (or, in the case of South Australia, the parole board) as soon as practicable. No existing Australian law permits a police officer to detain an offender (or anyone else) in a police station for three days without charge or independent approval.

The Committee will write to the Minister seeking further information as to whether or not there are less restrictive alternatives reasonably available to achieve clause 37’s purpose.

The Committee makes no further comment
Witness Protection Amendment Bill 2016

Introduced: 23 March 2016
Second Reading Speech: 24 March 2016
House: Legislative Assembly
Member introducing Bill: Hon. Robin Scott MLA
Minister responsible: Hon. Robin Scott MLA
Portfolio responsibility: Acting Minister for Police

Purpose

The Bill would amend the Witness Protection Act 1991 (the Principal Act) to ‘improve the governance and administration of protection and assistance’ provided to witnesses. The Bill would:

- establish principles to which the Chief Commissioner of Police and other specified persons must have regard when making decisions or taking action under the Principal Act [5] Refer to Charter Report below
- extend the scope of the Principal Act by providing for ‘alternative protection arrangements’ in relation to witnesses who face a high level of risk but who are currently not covered by the Act [4, 6, 9, 11, 12]. This would include:
  - measures to prevent the public disclosure of information relating to witnesses in alternative protection arrangements by expanding the confidentiality scheme [13]
  - the creation of a new offence (subject to a maximum of 10 years imprisonment) relating to the disclosure of information, without a reasonable excuse, about a person to whom alternative protection arrangements are or have been provided [13]
- narrow the existing immunity from civil action of the Chief Commissioner (or delegate) for any action taken in accordance with the Principal Act — immunity would instead apply only in respect to a ‘key witness protection decision’ or to an action taken in the process of making such a decision [16]
- remove the existing immunity from civil action of a member of the police force for any action taken in accordance with the Principal Act [15]
- establish a framework for the independent monitoring of, and limited public reporting on, the operation of the Principal Act by the Independent Broad-based Anti-corruption Commission (IBAC) and the Public Interest Monitor (PIM). The Chief Commissioner of Police would also be required to report to the Minister on the Victorian witness protection program and on the alternative protection arrangements after the end of each financial year. [20]

The Bill would also amend the Crimes Act 1958 to create a new offence relating to intimidation towards, and reprisals against, witnesses (new section 257(1). The new offence would be subject to a maximum penalty of level 5 imprisonment (10 years maximum) [40] Refer to Charter Report below

The Bill would also make a number of consequential amendments [26 to 39].

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11 Explanatory Memorandum, p. 2.
Content

Delegation of legislative power — Delayed commencement — Whether justified

The Bill would come into operation on a day or days to be proclaimed, with a forced commencement date of 1 July 2017. The Explanatory Memorandum states that the reason for the possible delayed commencement is to enable financial year reporting in accordance with proposed new sections 20G, 20P and 20R inserted by clause 20 of the Bill.

The delayed commencement provision appears justified.

Rights or freedoms — Presumption of innocence — Burden of proof — Reverse legal onus — Common law rule that the prosecution has burden to prove elements of offence — Power to impose penalty

As noted above, clause 40 inserts new Division 5A into Part I of the Crimes Act 1958, to create a new witness intimidation offence. The clause includes new section 257(5), which provides that it is a defence for the accused to ‘prove’ that the conduct was engaged in without malice:

- in the normal course of a lawful business, trade, profession or enterprise
- for the purpose of an industrial dispute
- for the purpose of engaging in political activities or discussion or communicating with respect to public affairs.

The Committee notes that at common law, the legal burden of proof rests with the prosecution. Further, the prosecution’s burden of proof (proof beyond reasonable doubt) is fundamental to the presumption of innocence. It appears to the Committee that a person charged with an offence under new section 257(5) may bear the legal burden of proof to avoid the penalty.

As discussed in the Charter Report below, the statement of compatibility describes the burden in section 257(5) as representing ‘evidential onus’. However, the wording of the section, particularly the requirement that the accused must ‘prove’ that the conduct was engaged in without malice in one of the three situations set about above, may amount to a legal burden of proof. Refer to Charter Report below

Charter report

Fair hearing — Separation of the investigative and protective functions of Victoria Police ‘as far as practicable’

Summary: Clause 5 requires police administering the witness protection scheme to have regard to the principle that ‘as far as practicable, there should be a clear separation of the investigative and protective functions of Victoria Police’. The Committee will write to the Minister seeking further information.

The Committee notes that clause 5, inserting a new section 3AA, requires police administering the witness protection scheme to have regard to a number of principles, including (at new section 3AA(2)(b)) that ‘as far as practicable, there should be a clear separation of the investigative and the protective functions of Victoria Police’.
In his review of the Act, the Hon. Frank Vincent remarked:\(^\text{12}\)

The key policy reason for separating witness protection and investigating functions within a policing agency is to ensure the integrity of the criminal justice process. This separation serves to minimise the risk that the provision of protective assistance might be seen as an inducement for the giving of evidence favourable to the prosecution and thereby compromise its reliability and credibility. It follows that where a protected witness is a registered human source, the person’s entry into the program would ordinarily be expected to signal an end to the performance of any role as an active informer.

... Witnesses generally, while appropriately supported when necessary, must be kept at a proper professional distance by investigators in order to avoid both the fact and perception of contamination and unreliability arising from an overly close association. In the case of a person under protection, this is perhaps even more important but at the same time can be more difficult. There is likely to be an ongoing reliance upon the support of the police as their protector and a belief, which may or may not be justified, that their safety is dependent upon a successful prosecution outcome. This, in turn, can give rise to a significant risk of an identification of interests and a sense of "team membership" that may impact upon the perceived reliability of the witness’ evidence. On the other hand, it is not unknown for witnesses to exploit their importance to the prosecution and, using a threat of withdrawal of cooperation, to make increasing and potentially compromising demands or employ their position as witnesses to their personal advantage.

The line between the provision of protection and proper support for a witness and the gratification of the individual’s exploitative demands to encourage continued cooperation may sometimes be difficult to discern. Nevertheless, it can assume great importance when an assessment is made of the investigation and the probative value of the evidence adduced.

The Report’s recommendation of the adoption of a requirement that police comply with the principle of separation and investigative functions when administering the Act does not include the caveat ‘as far as is practicable’.\(^\text{13}\)

The Committee observes that clause 5 may engage the Charter right of criminal defendants to a fair hearing.\(^\text{14}\) While the Statement of Compatibility argues that other principles in new section 3AA further the Charter’s rights to life and protection of families and children, it does not address new section 3AA(2)(b).

**The Committee will write to the Minister seeking further information as to the compatibility of new section 3AA(2)(b), specifically its caveat ‘as far as practicable’, with the Charter’s right to a fair hearing.**

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\(^{13}\) Ibid, p. 36. The Explanatory Memorandum remarks: ‘The aim of the Bill is to implement all eight of the Hon. Frank Vincent AO QC’s recommendations for legislative reform contained in his Review of the Witness Protection Act 1991 (the Vincent Review).’

\(^{14}\) Charter s. 24(1).
**Expression – Presumption of innocence – Offence to cause detriment to anyone because of anyone's involvement in a criminal investigation or proceeding – Accused must prove that the conduct was done without malice in the course of a lawful business, industrial action or political communication**

**Summary:** The effect of clause 40 is to prohibit anyone from causing any ‘detriment’ on anyone because of anyone’s involvement in a criminal investigation or proceeding ‘in any... capacity’. The Committee will write to the Minister seeking further information.

The Committee notes that clause 40, inserting a new section 257 into the **Crimes Act 1958**, includes a prohibition on anyone ‘caus[ing] or procur[ing] any detriment of any kind to a person... because’ he or she ‘knows or believes that [any] person is, was, may be or may become involved in a criminal investigation or criminal proceeding’. New section 256 provides that:

- a person is ‘involved in a criminal investigation’ if he or she is ‘a witness to an alleged crime’, ‘a victim of an alleged crime’ or ‘involved in the investigation in any other capacity’;
- a person is ‘involved in a criminal proceeding’ if he or she is ‘a witness in that proceeding’, ‘a juror in that proceeding’ or ‘involved in the proceeding in any other capacity’; and
- ‘detriment, to a person, includes... loss or damage to a person’s property or business’ or ‘discrimination, disadvantage or adverse treatment in relation to the person’s employment, career, business, trade, profession or enterprise’.

The penalty for breaching new section 257 is up to ten years imprisonment.

**The Committee observes that the effect of clause 40 is to prohibit anyone from causing any ‘detriment’ to anyone because of anyone’s involvement in a criminal investigation or proceeding ‘in any... capacity’.

The Statement of Compatibility remarks:**

Clause 40, which inserts a new witness intimidation offence into the **Crimes Act 1958**, may restrict people from associating or communicating with a person involved in a criminal investigation or criminal proceeding in certain circumstances. However, the offence contains safeguards, as it does not apply to conduct engaged in by a person performing certain official duties. Defences are also available for conduct engaged in without malice in the normal course of a lawful business, industrial disputes, political activities or public affairs communication.

The offence also only prohibits association, expression and movement that the person either knows, or ought to know, would be likely to arouse apprehension or fear in a person. There is no less restrictive way to achieve the purpose of the offence, which is to protect people from intimidation and reprisals that are due to the person’s (or another person’s) known or believed involvement in a criminal investigation or criminal proceeding. Any limitation of these rights is balanced with the charter rights contained in section 9 (right to life) and section 17 (protection of families and children), and is reasonable and justified under section 7(2) of the charter.

However, the Committee notes that:

- the new offence does not ‘only prohibit... expression that the person knows, or ought to know, would be likely to arouse apprehension or fear in a person’. Rather, clause 40’s provisions on ‘detriment’ are not limited in this way and may extend to expression criticising the conduct of an investigation or proceeding (for example, alleging that someone involved in the investigation or proceeding was biased) in a way that damages the reputation of one or more people involved in the investigation.
other Australian offences of similar scope are variously limited to a person who causes or threatens ‘physical injury to a person or property’; detriments imposed because of someone’s ‘lawful’ or ‘good faith’ actions in an investigation; or actions that might influence the outcome of an investigation or prosecution.\(^{15}\)

- the remaining Australian offences are limited to detriments because of a witness’s testimony or to actions done in a proceeding and therefore do not extend to police and other officials involved in a criminal investigation.\(^{16}\)

The Committee also observes that the defence in new section 257(5) for actions performed without malice in a lawful business, industrial dispute or political communication may engage the Charter’s right to be presumed innocent until proved guilty of an offence.\(^{17}\) The Statement of Compatibility remarks:

> the offences in clauses 13(4) and 40 of the bill each place an evidential onus on the accused, requiring them to present or point to evidence that suggests a reasonable possibility of the existence of facts that would establish the excuse. The exceptions relate to matters that are peculiarly within an accused’s knowledge, which would be unduly onerous on a prosecution to investigate and disprove at first instance. Once the accused has pointed to evidence of the excuse, the burden shifts back to the prosecution who must prove the essential elements of the offence to a legal standard. As noted above, evidential burdens are not considered to limit the right to be presumed innocent and as such, I am of the view that these offence provisions are compatible with the charter.

However, the Committee notes that, while this analysis is correct for clause 13(4) (which sets out an offence with a ‘reasonable excuse’ exception) and clause 40’s new section 257(4) (which sets out an exception for official conduct), it may be incorrect for clause 40’s new section 257(5), which provides that ‘it is a defence to the charge for the accused to prove’ that his or her conduct was engaged in without malice in the course of a lawful business, industrial dispute or political communication.

The Committee will write to the Minister seeking further information as to whether or not new section 257(5) imposes a legal (as opposed to evidential) burden on the accused and, if so, whether or not it is compatible with the Charter’s right to be presumed innocent.

The Committee makes no further comment

\(^{15}\) Criminal Code 2002 (ACT), s. 709A; Criminal Code 1983 (NT), s. 103A; Crimes Act 1900 (NSW), s. 326(1); Criminal Code 1899 (Qld), s. 119B; Criminal Law Consolidation Act 1935 (SA), s. 248; Criminal Code 1913 (WA), s. 133.

\(^{16}\) Crimes Act 1914 (Cth), s. 36A; Criminal Code 2002 (ACT), s. 712 (and see also s. 709A(2), which does not extend to investigators); Crimes Act 1900 (NSW), s. 326(2); Criminal Law Consolidation Act 1935 (SA), s. 244(3); Criminal Code 1924 (Tas), s. 100.

\(^{17}\) Charter s. 25(1).
Confiscation and Other Matters Amendment Bill 2016

The Bill was introduced into the Legislative Assembly on 8 March 2016 by Hon Martin Pakula MLA, Attorney-General. The Committee considered the Bill on 21 March 2016 and made the following comments in Alert Digest No. 4 of 2016 tabled in the Parliament on 22 March 2016.

Committee comments

Keywords – Property – Forfeiture of unexplained wealth – Property subject to an encumbrance that has been partly discharged using unlawfully acquired funds

Summary: The Committee will write to the Minister seeking further information as to whether or not clause 14, to the extent that it allows the forfeiture of property to the Minister on the basis of an earlier owner’s use of unlawfully acquired funds to pay off a mortgage or other encumbrance, without the current owner’s knowledge of those payments, is compatible with the Charter’s right against being deprived of property other than in accordance with law.

The Committee notes that clause 14, amending existing s. 40G(1) of the Confiscation Act 1997, provides that, for the purposes of the Act’s provisions on unexplained wealth:

(f) property acquired by a person, whether or not it is acquired for sufficient consideration, is not property lawfully acquired if the person acquired the property knowing, or in circumstances such as to arouse a reasonable suspicion, that the property was derived or realised, or substantially derived or realised, directly or indirectly, from any unlawful activity;

(g) property acquired by a person that is or has been subject to a mortgage, lien, charge, security or other encumbrance is not property lawfully acquired if that mortgage, lien, charge, security or other encumbrance has been wholly or partly discharged using property that was not lawfully acquired.

Both of these provisions qualify existing s40G(1)(a)’s provision that ‘property acquired by a person for sufficient consideration that has otherwise been lawfully acquired is taken to have been lawfully acquired only if the consideration given for the property by the person was lawfully acquired’, which protects buyers of property (such as a house) from having that house deemed ‘unexplained wealth’ if an earlier owner acquired it using unlawfully acquired funds.

The Committee observes that the effect of new section 40G(1)(f) is that a person who receives property will generally be protected so long as he or she had no reason to suspect that the previous owner bought the property with unlawfully acquired funds. However, new section 40G(1)(g) removes this protection in the case of a property that has ever been subject to a mortgage or other encumbrance that was partly paid off with unlawfully acquired funds. The explanatory memorandum for new section 40G(1)(g) remarks:

For example, if a person purchases a house with funds obtained using a mortgage over that house, and then repays that mortgage with property not lawfully acquired, the house is considered not to have been lawfully acquired.

The Committee notes that the terms of new section 40G(1)(g) appear to apply equally to property where a previous owner paid off a mortgage in part using unlawfully acquired funds. Accordingly, the effect of clause 14 may be that, if a valid application for an
unexplained wealth order is made against the current owner of a house that a previous owner bought with a bank loan that he or she partly paid off using unlawfully acquired funds, then new section 40G(1)(g) will deem that house to be unlawfully acquired by the present owner in all cases, with the result that a valid unexplained wealth assessment order against the current owner will inevitably mean that the house will be forfeited to the Minister (subject to protections for third parties). By contrast, under a similar regime in New South Wales, the current owner would be able to establish that such a house was not ‘unexplained wealth’ by proving on the balance of probabilities that he or she purchased the house ‘for sufficient consideration without knowing, and in circumstances that would not arouse a reasonable suspicion, that’ the house had previously been subject to an illegally funded mortgage.

Discussing multiple provisions in the Bill addressing property that has been subject to an unlawfully funded encumbrance, the Statement of Compatibility remarks:

Section 20 of the charter provides ‘a person must not be deprived of his or her property other than in accordance with law’. The bill contains amendments to make clear that if a person purchases property with funds obtained with a loan, then repays that loan with the proceeds of crime, that that property can still be considered to have been derived from the proceeds of crime and not to have been lawfully acquired for the purposes of the act... There are provisions already in the Victorian act which provide that property purchased in these circumstances would most likely not be considered lawfully acquired for the purposes of the Victorian act. This amendment is being made to put this question beyond doubt. On this basis the amendment is not likely to raise section 20 charter issues, as it makes no substantive change to the law. If it is considered to engage section 20 property rights, section 20 will not be limited, as any deprivation of property will be clearly set out in the legislation, and is therefore in accordance with the law.

However, the Committee observes that clause 14 does appear to change the operation of the Act’s existing regime on unexplained wealth. While the existing regime permits the exclusion of all property purchased for sufficient consideration from being considered ‘unexplained wealth’ so long as the owner had no reason to suspect that an earlier owner acquired it with unlawful funds when he or she purchased it, the proposed regime effectively deems any property that was ever subject to an unlawfully funded encumbrance to be the unexplained wealth of every later purchaser. The Statement of Compatibility does not expressly address clause 14.

The Committee will write to the Minister seeking further information as to whether or not clause 14, to the extent that it allows the forfeiture of property to the Minister on the basis of an earlier owner’s use of unlawfully acquired funds to pay off a mortgage or other encumbrance, even if the current owner had no knowledge of those payments, is compatible with the Charter’s right against being deprived of property other than in accordance with law.

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i The Committee notes that this consequence may even apply to a person who acquired property from the sale and disposal of property pursuant to the Act using lawfully acquired funds, because the protection for such purchasers in s. 40G(3) does not apply to property covered by s. 40G(1)(g).

ii Criminal Assets Recovery Act 1990 (NSW), ss. 9(2A) (read with (4)) & 5(a) & 28B(2).

iii See existing s40G(1)(f), providing that: ‘property acquired by a person that is derived property is not property lawfully acquired unless (i) the property was acquired for sufficient consideration; and (ii) the person acquired the property without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was derived property.’

iv Charter s. 20.
Keywords – Property – Electronic device containing sexual descriptions or depictions of minors – Court may order forfeiture or destruction without notice

Summary: The Committee will write to the Minister seeking further information as to the compatibility of clause 18, to the extent that it permits a court to order the forfeiture of items that are lawful to possess and would ordinarily be readily excluded from a forfeiture application, without notice or recourse to either the offender or the item’s owner, with the Charter’s right not to be deprived of property other than in accordance with law.

The Committee notes that clause 18, amending existing s. 77 of the Confiscation Act 1997, provides that the DPP or a police officer can, ‘without notice’, apply to a court within six months of a person’s conviction of a ‘Schedule 1 offence’ (including any indictable offence) for a disposal order in respect of:

child pornography within the meaning of section 67A of the Crimes Act 1958 and including any of the following—

(i) a thing containing child pornography;

(ii) an electronic device or data storage device containing data from which can be generated text, images or sounds that are child pornography;

Examples

A computer, mobile phone, USB stick, memory card or hard drive.

(iii) all of the data contained in a device referred to in subparagraph (ii) that was ‘used, or was intended to be used, in, or in connection with, the commission of the offence or was derived or realised, directly or indirectly, by that person or another person, from the commission of the offence.’ Existing s. 78 permits any Victorian court to order that such property be forfeited to the State and destroyed or disposed of in such manner as is provided in the order if the court ‘considers it appropriate’.

Existing s. 67A of the Crimes Act 1958 defines ‘child pornography’ to mean:

a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context.

In contrast to other Australian definitions of child pornography, there is no requirement that the material be offensive. The Committee observes that the Victorian term covers all films, photos and other publications depicting people under 18 in sexual contexts, including items fall outside of the ordinary meaning of pornography and are generally lawful to possess, for example the book or TV series of ‘Game of Thrones.’

Discussing multiple provisions in the Bill, the Statement of Compatibility remarks:

The amendments aimed at making more robust the various asset confiscations schemes found in the act (for instance, the forfeiture and restraining orders, freezing orders, child pornography disposal orders and the proposed changes to definitions of lawfully acquired property and derived property) will engage section 20 of the charter. The very purpose of these confiscation schemes is to deprive persons of property, where that property was unlawfully acquired, or used in the commission of a serious offence. In doing so the schemes play a remedial and preventative role – by deterring persons from involvement in serious and organised crime, and returning the proceeds of such crime to the state.

The amendment to simplify the process for the disposal of child pornography can also be balanced against the protection of children under section 17 of the charter.
The Confiscation Act does not permit the deprivation of property otherwise than in accordance with law, and none of these amendments alter that position. The amendments do not affect any of the safeguards contained in the Act. Property will only be subject to restraint and forfeiture by court order. Persons will still be able to seek exclusion of property from forfeiture by explaining how it was lawfully acquired. I therefore do not consider that a person’s property rights are limited by the amendments, as any deprivation of property will be in accordance with the law.

However, the Committee notes that, in contrast to other forfeitures under the Act, people cannot seek exclusion of property from forfeiture under a destruction order, regardless of how those items were acquired and whether or not they knew of the item’s use in any offending or the characteristic that makes it liable to destruction. Moreover, unless a destruction order is sought more than six months after an offence, there is no requirement for the applicant or the court to notify anyone of the order, including the offender or the item’s lawful owner.

The Committee observes that, while the existing regime for destruction orders without notice is limited to things that either are generally illegal to possess in Victoria (e.g. drugs of dependence and explosive substances) or are of ‘negligible value’ or ‘not fit for use’, clause 18 extends existing s. 77 to some things that are not illegal to possess (e.g. material that has genuine artistic merit, is possessed for genuine medical, legal, scientific or educational purposes, or would be classified other than RC), as well as things that are not of negligible value (e.g. electronic devices or data storage devices.) For example, clause 18 may allow a court to order:

- the forfeiture to the Minister of an expensive office computer that a rogue employee used to illegally download child pornography, without any notice or recourse to the computer’s owner;
- the destruction of a 17 year-old’s mobile phone that was used to facilitate obtaining possession of cannabis and contains a ‘sex’ image of another 17 year-old that was sent to him by the 17 year-old, even though items used in the offence of possession of cannabis can usually be excluded from forfeiture\(^v\) and it is lawful for a 17 year-old to possess such an image.\(^v\)

By contrast, Victoria’s existing regime for forfeiture of child pornography does not extend to electronic devices containing such material, provides for relief by the owner of the property and bars any forfeiture until the appeal process is complete.\(^vi\) As well, Commonwealth legislation specifically dealing with forfeiture of child pornography (including computers or other electronic equipment that contains such pornography) is limited to offensive images or material; requires that the applicant give notice to anyone who has a right to possess or otherwise has an interest in the forfeitable property; provides for compensation to innocent property owners if the equipment is forfeited; and requires a police officer to supply copies of innocuous data to the owner before a device is destroyed.\(^vii\)

The Committee will write to the Minister seeking further information as to the compatibility of clause 18, to the extent that it permits a court to order the forfeiture of items that are lawful to possess and would ordinarily be readily excluded from a forfeiture application, without notice or recourse to either the offender or the item’s owner, with the Charter’s right not to be deprived of property other than in accordance with law.

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\(^v\) Confiscation Act 1997, s. 21(1).
\(^vi\) Crimes Act 1958, s. 70(2)(d).
\(^vii\) Crimes Act 1958, s. 70AA.
\(^viii\) Crimes Act 1914 (Cth), Part IE.
Keywords – Statement of Compatibility – Composite analysis of provisions with significant differences – No identification of specific provisions

Summary: The Statement of Compatibility’s discussion of Charter s. 20’s right to property addresses a large number of different provisions in a composite way, in some instances despite significant differences between those provisions that are relevant to whether and how a provision is compatible with human rights. The Committee will write to the Minister concerning the Statement of Compatibility.

The Committee’s Practice Note of 26 May 2014 remarks:

The Committee has determined that it will characterise a Statement of Compatibility, made under the Charter s. 28, as a form of explanatory memoranda equivalent in status to an explanatory memorandum accompanying a Bill…. Where there is insufficient information regarding the Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right or affect an operative provision of the Charter the Committee may report the matter to the Parliament, or, write to the relevant Minister seeking a further explanation, or do both, pursuant to section 17(a) of the Parliamentary Committees Act 2003.

The Committee notes that the Statement of Compatibility’s discussion of Charter s. 20’s right to property addresses a large number of different provisions in a composite way, in some instances despite significant differences between those provisions that are relevant to whether and how a provision is compatible with human rights. The Committee considers that provisions that operate in significantly different ways should be identified and separately considered for compatibility with human rights.

The Committee also recalls its remark in Alert Digest No. 14 of 2007:ix

[T]he... Statement of Compatibility, which... deals with a large and complex amendment bill, does not identify by clause or section number any of the many provisions that it discusses... While appreciating the Statement’s comprehensiveness, the Committee considers that the absence of express references to clause or section numbers in relation to such a complex bill may render the statement incapable of informed consideration by members of Parliament.

The Committee notes that the Statement of Compatibility does not refer to any clause or section numbers in its discussion of Charter s. 20. In particular, the provision for child pornography destruction orders in clause 18 is not identified by clause or section number in the Statement of Compatibility and is also not referred to in the second reading speech.

The Committee will write to the Minister concerning the Statement of Compatibility.

Minister’s response

The Committee thanks the Minister for the attached response.

11 April 2016
Committee Room

Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
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EAST MELBOURNE VIC 3002

Also by email: nathan.bunt@parliament.vic.gov.au

Dear Ms Blandthorn,

Thank you for your letter 22 March 2016 regarding the consideration of the Confiscation and Other Matters Amendment Bill 2016 by the Scrutiny of Acts and Regulations Committee.

I also thank the Committee for the detailed consideration it has given to this Bill. I note the Committee has raised a number of questions regarding the provisions of the Bill.

Commencement of the Bill

As noted by the Committee, a number of provisions of the Bill are subject to a default commencement date of 1 July 2017.

This commencement date is necessary in relation to clause 41 and 42 of the Bill, which will amend the Surveillance Devices Act 1999 to replace in that Act references to the former Department of Environment and Primary Industries (DEPI) with references to both the Department of Environment, Land, Water and Planning (DELWP), and the Department of Economic Development, Jobs, Transport and Resources (DEDJTR).

The current references in the Act to DEPI are interpreted as references to DELWP, due to the operation of section 38AAA of the Interpretation of Legislation Act 1984. When the name of DEPI was changed to DELWP in 2015, a number of DEPI’s functions were transferred to the new DEDJTR. This included the responsibility for investigating illegal fishing. A consequence of this was that officers responsible for investigating illegal fishing were unable to seek warrants for the use of surveillance devices.

DEDJTR and DELWP have put in place an interim solution to continue to use surveillance devices. There is a possibility that the commencement of clauses 41 and 42 will invalidate this interim solution, which could jeopardise any prosecutions based on information collected under warrants issued prior to commencement of the new provisions.

A commencement date of 1 July 2017 will ensure that this issue can be investigated thoroughly and appropriate transitional arrangements are put in place in relation to these warrants. This will be completed as soon as possible, and likely well before 1 July 2017. However, given the possible consequences of a premature commencement of these provisions, I considered a delayed commencement was appropriate.
Property subject to an encumbrance that has been discharged using unlawfully acquired funds

I note that the Committee has raised concerns with clause 14 of the Bill, which amends the definition of ‘lawfully acquired’ in relation to the unexplained wealth scheme found in the Confiscation Act 1997.

As noted by the Committee, this clause inserts a new section 40G(1)(g) into the Confiscation Act which provides as follows:

property acquired by a person that is or has been subject to a mortgage, lien, charge, security or other encumbrance is not property lawfully acquired if that mortgage, lien, charge, security or other encumbrance has been wholly or partly discharged using property that was not lawfully acquired

The Committee discusses the impact of this provision on a hypothetical scenario where an innocent purchaser buys a house previously owned by another person, and that previous owner had been paying off his or her mortgage using property not lawfully acquired. The Committee states that the effect of new section 40G(1)(g) is to deem the house unlawfully acquired by its new owner.

With respect to the Committee, this is a misinterpretation of the Act and new section 40G(1)(g). The Act provides that (at section 3) ‘property’ in the Act includes an interest in property. References to ‘property’ throughout the Act are better understood with this in mind. It is not unusual for property to have multiple owners or be subject to multiple interests. Determining whether property has been lawfully acquired can only be done with reference to a person’s particular interest in that property. Otherwise, the unlawful acquisition of an interest in a house by one party could unfairly impact other persons with an interest in the house, such as an innocent spouse or mortgagee.

Having regard to this, it is clear that section 40G(1)(g) will have no impact on the innocent purchaser described in the Committee’s scenario. The previous owner’s mortgage will be completely discharged before the new owner acquires his or her interest in the property. This interest, as registered proprietor, will not be, and will not have been, subject to the previous owner’s mortgage. The proceeds of the sale however, now held by the previous owner, will be considered property not lawfully acquired, due to the operation of section 40G(1)(g) and other provisions in the Act. This is the intended operation of the Act.

Disposal orders – child pornography

I note the Committee’s observations that the current definition of ‘child pornography’ does not require material to be ‘offensive’, and may be broad enough to cover the television series ‘Game of Thrones’. I note that the current definition of ‘child pornography’ applies to very serious and harmful sexual images of children, and criminal prosecutions regarding this form of child pornography regularly occur in our courts. The harm caused to child victims of child pornography offending is recognised to include the loss of control of images depicting themselves, and the repeated viewing and distribution of these images on the internet (e.g. R v West (a pseudonym) [2015] VCC 1151 (21 August 2015), at [19]). This can further shame and traumatisse the child victim. As such, it is important to have an effective method of disposal for child pornography, in recognition of a child’s right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child (Charter s 17), as identified in the Statement of Compatibility.

The amendments contained in the Bill relating to disposal orders provide a lawful process for the forfeiture of property. As noted in your letter, the operation of the disposal order provisions is directly connected with conviction for a criminal offence.
Sections 77 and 78 currently provide for the lawful disposal of a range of property in addition to explosives and drugs. This includes an ‘instrument, device or substance’ that is or is capable of being used for drug offending (Confiscation Act 1997, s 77(1)(b)), and ‘any document’ or ‘any article of clothing or disguise’ (Confiscation Regulations 2008, r 47). These items, like devices used to download child pornography from the internet, are not inherently dangerous or unlawful, however are directly connected with offending.

Further, the proposed amendments allow for the forfeiture of data only (clause 18, paragraph (iii)). This is intended to address scenarios such as those highlighted by the Committee’s examples. The prosecution can apply for the disposal of the data on the device, but not the device itself. The data will then be wiped from the device. This will allow for the return of the device to its rightful owner with the assurance that it contains no child pornography. This process already occurs on an informal basis, but the proposed amendment allows for court oversight of these arrangements.

Finally, as previously raised in my second reading speech for the Crimes Amendment (Child Pornography and Other Matters) Bill 2015, a second stage of reform to Victoria’s child pornography provisions is currently under consideration and it is anticipated that any issues of terminology and definition can be addressed in more detail as part of that work.

Composite analysis of provisions

I note your comments regarding the composite analysis of provisions in the Statement of Compatibility’s discussion of the Bill’s impact on the right to property, and the Committee’s preference that individual provisions be the subject of separate analysis. I will take these comments into account when preparing future Statements of Compatibility.

Yours sincerely,

[Signature]

THE HON MARTIN PAKULA MP
Attorney-General
# Appendix 1
## Index of Bills in 2016

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Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(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

Judicial Commission of Victoria Bill 2015 1, 2

(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

Judicial Commission of Victoria Bill 2015 1, 2

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

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

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

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