58th Parliament
Alert Digest

No. 5 of 2017

Tuesday, 2 May 2017
on the following Bills

Crimes Legislation Amendment (Public Order) Bill 2017
Drugs, Poisons and Controlled Substances Miscellaneous Amendment Bill 2017
Family Violence Protection Amendment (Information Sharing) Bill 2017
Land Legislation Amendment Bill 2017
Mineral Resources (Sustainable Development) Amendment (Latrobe Valley Mine Rehabilitation Commissioner) Bill 2017
Worksafe Legislation Amendment Bill 2017
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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Useful information

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

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

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

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

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

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

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

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

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

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

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

‘VCAT’ refers to the Victorian Civil and Administrative Tribunal
[ ] denotes clause numbers in a Bill
Crimes Legislation Amendment (Public Order) Bill 2017

Introduced: 22 March 2017
Second Reading Speech: 23 March 2017
House: Legislative Assembly
Member introducing Bill: Hon Martin Pakula MLA
Minister responsible: Hon Martin Pakula MLA
Portfolio responsibility: Attorney-General

Purpose

The Crimes Legislation Amendment (Public Order) Bill 2017 would:

- amend the Summary Offences Act 1966 to require Councils to consult with Victoria Police before issuing a permit relating to a public protest
- amend the Control of Weapons Act 1990 to provide police officers with the power to direct a person to leave a ‘designated area’ in specified circumstances:
  - new section 10KA(1) would allow a police officer to direct a person wearing a face covering to leave a designated area if the person refuses to remove it when requested (the police officer must reasonably believe the person is wearing the face covering primarily to conceal his or her identity or to protect himself or herself from the effects of crowd-controlling substances (such as capsicum spray)) [6]
  - new section 10KA(2) provides that a police officer may direct a person to leave a designated area if the officer reasonably believes the person intends to engage in conduct that would constitute an offence under the new sections 195H or 195I of the Crimes Act 1958. These are the new offences of affray and violent disorder created in Part 4 the Bill [6]
  - new section 10L(2) would make it an offence to fail to comply with a direction given by a police officer under new sections 10KA(1) or (2), unless the person has a reasonable excuse. A penalty of 5 penalty units would apply to the new offence [7]

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1 The Chief Commissioner of Police may declare an area to be a designated area under section 10D or 10E of the Control of Weapons Act 1990.

Under section 10D, the Chief Commissioner may make a planned designation of a search area if he or she is satisfied that—
(a) either—
  (i) more than one incident of violence or disorder has occurred in that area in the previous 12 months that involved the use of weapons; or
  (ii) an event is to be held in that area and incidents of violence or disorder involving the use of weapons have occurred at previous occasions of that event (wherever occurring); and

(b) there is a likelihood that the violence or disorder will recur.

Under section 10E, the Chief Commissioner may make an unplanned designation of a search area if he or she is satisfied that—
(a) there is a likelihood that violence or disorder involving weapons will occur in that area during the period of intended operation of the declaration; and

(b) it is necessary to designate the area for the purpose of enabling police officers to exercise search powers to prevent or deter the occurrence of any violence or disorder that the Chief Commissioner is satisfied is likely to occur.
• amend the *Crimes Act 1958* to abolish the common law offences of affray, rout and riot and create new statutory offences of affray and violent disorder (new sections 195H or 195I)
• make consequential amendments to the *Crimes Act 1958* and other Acts.

**Content**

*Whether trespasses unduly upon rights or freedoms – Freedom of political communication – Police power to direct a person wearing a face covering to leave a designated area in certain circumstances – Police power to direct a person to leave a designated area if the officer reasonably believes the person intends to engage in conduct that would constitute an offence – Creation of an offence of failing to comply with such directions*

Under section 17(a)(i) of the *Parliamentary Committees Act 2003*, the Committee is required to consider and report to Parliament on any Bill that trespasses unduly on rights or freedoms, including the implied freedom of political communication contained in the Constitution.

The High Court has formulated, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the following two-step test for determining whether a law is compatible with the implied freedom:

- Does the law effectively burden freedom of communication about government or political matters?
- If so, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure for submitting a proposed amendment of the Constitution to the people?²

On the first limb of the *Lange* test, it seems clear that the proposed police powers in clause 6 and the associated offence in clause 7 do effectively burden the implied freedom, noting that the High Court has found that ‘communication’ includes symbolic forms of expression other than speech.³

On the second limb of the *Lange* test, the Committee notes that even if a law pursues a ‘legitimate’ objective, it is also important to consider whether it is ‘suitable, necessary and proportionate’.⁴

As Professors George Williams and David Hume have noted, the second limb of the *Lange* test includes the application of a ‘proportionality or balancing’ test for which the High Court has yet to articulate underpinning principles or a structured test.⁵ Instead, the High Court has considered a range of factors in determining the proportionality of various laws including (but not limited to):

- the ‘suitability’ of the law to its purpose
- the importance of the law’s purpose
- the ‘fit’ or ‘tailoring’ between the law and the purpose and
- whether there are alternative measures of achieving the same purpose which would produce less impairment of the implied right.⁶

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³ *Levy v Victoria* (1997) 189 CLR 579 at 622 per McHugh J. The High Court has also found in a number of cases that laws subjecting a person to criminal liability effectively burdened freedom of political communications, see: George Williams and David Hume, *Human rights under the Australian constitution*, 2nd edition, 2013, p. 193.
⁶ Ibid., pp. 137-140.
The Committee notes the following extract from the Statement of Compatibility:

These rights [i.e., the rights under the Charter to freedom of expression and to peaceful assembly] are relevant to the powers that police will have available in designated areas to direct a person to leave, particularly where the direction is to leave a protest. As I have noted above, the scope for police to use these powers is circumscribed and proportionate; police can only use these powers in the two ways described above. Section 15(3) provides that special duties and responsibilities are attached to the right to freedom of expression and the right may be subject to lawful restrictions to respect the rights of other people (such as other civilians or protesters) and for the protection of public order. I consider that the powers described above likely fall within the internal limitation in section 15(3).

The government respects the right of all Victorians to peaceful protest under section 16 of the charter and the powers in this bill will be directed only at persons who threaten violence while expressing their views. In this respect, the powers will also protect the rights of all other protestors to demonstrate peacefully. I consider that any limitations to the right to freedom of association for those threatening violence or deliberately shielding their face as proportionate and justified.

The implied constitutional right to freedom of political communication is also relevant to the use of these powers. As with the right to freedom of expression under the charter, it is justifiable to limit the implied freedom of political communication for persons using or threatening violence in protests. I consider that the limited use of special police powers in these circumstances is necessary to maintain peace and good order.

**The Committee refers to Parliament for its consideration the question whether or not clauses 6 and 7 are suitable, necessary and proportionate limitations on the implied freedom of political communication.**

**Charter report**

The Crimes Legislation Amendment (Public Order) Bill 2017 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment.**
Family Violence Protection Amendment (Information Sharing) Bill 2017

Introduced 21 March 2017
Second Reading Speech 22 March 2017
House Legislative Assembly
Member introducing Bill Hon Martin Pakula MLA
Ministers responsible Hon Martin Pakula MLA
Hon Fiona Richardson MLA
Portfolio responsibility Attorney-General
Minister for the Prevention of Family Violence

Purpose

The Bill would amend the Family Violence Protection Act 2008 (the Principal Act) to establish an information sharing scheme designed to enable entities to share family violence information to prevent or reduce family violence.

The Bill also would also provide for a framework for achieving consistency in family violence risk assessment and family violence risk management.


Content

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 of the Bill provides that the Act will come into operation on a day or days to be proclaimed (other than Division 2 of Part S and section 31 and 37), with a default commencement date of 1 July 2018, which is more than 12 months after the Bill’s introduction.

Section 31 would commence on either the day on which section 7 of the Act comes into operation (i.e., when proclaimed or by 1 July 2018), or the day on which section 6 of the Children Legislation Amendment (Reportable Conduct) Act 2017 comes into operation (i.e., when proclaimed or by 1 September 2017) (whichever date is the later). Section 31 therefore has a potential commencement date of 1 July 2018, which is more than 12 months after the Bill’s introduction.

Section 37 would commence on either the day on which section 7 of the Act comes into operation (i.e., when proclaimed or by 1 July 2018) or the day on which section 101 of the Medical Treatment Planning and Decision Act 2016 comes into operation (i.e., when proclaimed or by 12 March 2018) (whichever date is the later).
date is later). Section 37 therefore has a potential commencement date of 1 July 2018, which is more than 12 months after the Bill’s introduction.

The Second Reading Speech states:

The royal commission acknowledged the strong foundations built in Victoria over the previous 10 years, including through the Family Violence Protection Act 2008 and the family violence risk assessment and risk management framework, also known as the common risk assessment framework or CRAF. These initiatives have been instrumental in building a shared understanding of family violence and helping people working with victims and perpetrators to understand their roles and responsibilities.

At the same time the royal commission identified key gaps that need to be addressed through a redeveloped framework by the end of 2017. These included introducing specific risk indicators for children and victims of non-intimate partner violence, and additional risk management strategies that placed more focus on the perpetrator.

The royal commission also identified barriers to information sharing that needed to be addressed to enable more effective risk assessment and risk management, particularly so that agencies can share relevant information about perpetrators as needed to keep victims safe.

... As I have noted, the royal commission recommended a review and redevelopment of the framework be undertaken by the end of 2017. The new framework and supporting materials will provide a fit-for-purpose suite of risk assessment tools, clear minimum standards, roles and responsibilities, and comprehensive practice guidance to improve risk assessment and management practice across the system.

... The development of the new framework will include consultation with all sectors and workforces that will be affected. Analysis of sector readiness, workforce status, and current practice tools and operational guidance will inform the separate strategies for each sector to meet their obligations in aligning with the new framework.

It is important to note that this is enabling legislation. The requirement to align with the framework will not take effect for specific organisations until the framework review is completed, the minister approves a framework, and organisations are prescribed or, in the case of service providers, relevant agreements are entered into. This will ensure that there is sufficient lead time to support organisations to align with the framework prior to any formal obligations taking effect.

The development of the new framework will also be accompanied by a range of other system reforms such as building the required workforce through the 10-year industry plan, operationalising the central information point, and building evidence-based perpetrator interventions, such as through the work overseen by the expert perpetrator panel.

The Committee is satisfied that the possible delay in the commencement of the Bill is justified.

Right to be presumed innocent – Legal burden to prove defence

The offence provisions in sections 144R and 144RA in Division 9 of new Part 5A (which relate to inadvertent, reckless or intentional unauthorised use and disclosure of confidential information), contain defences that impose a legal burden on an accused. The defences provide that it is a defence to a charge for the accused to prove that the use or disclosure of the confidential information was done in good faith and with reasonable care.
New sections 208A and 208B — which impose accessorial criminal liability on agents or officers of bodies corporate that commit the offences in new sections 144R and 144RA of the Principal Act and which allow an officer of a body corporate to rely on the defences in those provisions — also impose a legal burden on an accused.

The Committee notes the following extract from the Statement of Compatibility:

> Although these provisions transfer, to a limited extent, a burden of proof onto an accused, I am nevertheless of the view that the imposition of a legal burden to rely on these defences is compatible with the right to presumption of innocence in section 25(1) of the charter, as any limits on the right will be reasonably justified under section 7(2) of the charter.

> In particular, I note that these defences are available for the benefit of an accused to escape liability where they have taken reasonable steps to ensure compliance, in respect of what could otherwise be an absolute or strict liability offence. Having regard to the highly sensitive character of the information that will be permitted to be shared in accordance with the bill, and the prescriptive nature of the regime, it is considered appropriate to impose a substantial threshold that must be met in order to avoid conviction for non-compliance with the regime to ensure the offences act as sufficient deterrence.

In the case of officers of a body corporate, the offences will only apply to officers that have a specific role and possess significant authority and influence over the body corporate. Moreover, whether a person or an officer of a body corporate has acted in good faith and with reasonable care, notwithstanding the fact they have disclosed information beyond what is authorised by the bill, is a matter peculiarly within the knowledge of that person. Such persons are best placed to prove whether they acted in good faith and exercised reasonable care. Conversely, it would be very difficult for the prosecution to prove the matter in the negative.

Accordingly, I am satisfied that the limitation of the presumption of innocence occasioned by these defences is demonstrably justified in accordance with section 7(2) of the bill.

The Committee is satisfied that the imposition of a legal burden of proof on an accused in relation to sections 144R, 144RA, 208A and 208B is justified in the circumstances.

**Charter report**

**Privacy – Disclosure of confidential information to an at-risk child or parent – Purposes other than assessing or managing risk of family violence**

Summary: The effect of new section 144M(2) is to permit an information sharing entity that believes that any child is at risk of being subject to family violence to disclose any confidential information to the child or parent for any purpose. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 7, inserting a new Part 5A, provides for the voluntary or mandatory disclosure of confidential information about people who an information sharing entity reasonably believes are at risk of committing or being subjected to family violence, or are alleged to pose a risk of family violence, or whose confidential information is relevant to assessing or managing a risk of another person committing or being subjected to family violence.

The Statement of Compatibility remarks:

Divisions 2 and 3 of new part 5A of the bill permit and require, in certain circumstances, ISEs to disclose confidential information about primary persons, persons of concern and alleged persons of concern, and linked persons, either to an ISE that is a risk assessment entity for a ‘family violence assessment purpose’ (i.e. for the purpose of establishing and assessing the risk
of a person committing family violence or a person being subjected to family violence); or to another ISE for a 'family violence protection purpose' (i.e. for the purpose of managing a risk of a person being subjected to family violence to reduce or remove that risk or to prevent its escalation, and includes the ongoing assessment of the risk of the person being subjected to family violence).

Division 4 of part 5A also provides for ISEs to voluntarily disclose confidential information about a person of concern to a primary person (or to a parent of the primary person other than the person of concern) for a family violence protection purpose; however, the bill also prohibits a primary person, or the parent of a child who is a primary person, from using or disclosing confidential information obtained about a person of concern under the bill except for the purposes of managing the primary person's risk, or their child's risk, of being subjected to family violence.

In each instance, confidential information may only be shared in accordance with these provisions if it is not 'excluded information'. The bill recognises a limited number of circumstances where information-sharing entities can refuse to share for legitimate reasons (e.g. where sharing information could endanger a person's life or result in physical injury, prejudice law enforcement or contravene legal professional privilege.)

I am satisfied that any interference with a person's privacy that occurs will be permitted by law. I am similarly satisfied that any interference with a person's reputation that may occur through the sharing of information pursuant to the regime will be lawful.

The circumstances in which confidential information may be shared are limited and clearly set out in the provisions and are appropriately circumscribed, having regard to the important objectives of this bill. Further, the provisions are not arbitrary as they are for legitimate purposes that are relevant to and necessary for the proper operation of the information-sharing regime. In particular, I wish to highlight the following points.

Although the bill represents a recalibration of rights to give precedence to the right to be safe from family violence over the right to privacy, it retains appropriate protections for the privacy of persons of concern and alleged persons of concern through the exclusion of 'excluded information' from the obligation to disclose, and the applicable thresholds that must apply for the information to be requested and provided. Existing privacy protections are only displaced to the extent necessary.

However, although nearly all of the disclosure rules in new Part 5A are restricted to disclosures for either a family violence assessment purpose (to assess risk) or a family violence protection purpose (to manage risk), new section 144M(2) is not restricted to such disclosures:

(2) An information sharing entity may disclose confidential information about a person of concern to any of the following persons if the primary person is a child and the confidential information is not excluded information—

(a) the child;

(b) a person who is a parent of the child, other than a person who is a person of concern in relation to the child.

The Committee observes that the effect of new section 144M(2) is to permit an information sharing entity that believes that any child is at risk of being subject to family violence to disclose (non-
excluded) confidential information to the child or parent of the child (other than a person of concern) for any purpose, including a purpose other than assessing or managing the risk of family violence.\(^8\)

The Committee notes that new section 144M(2) is subject to:

- new section 144J, which sets out ‘principles’ to be ‘used for guidance’ in relation to new Part 5A. New section 114J(2)(c) states that information sharing entities ‘should’:
  
  *only collect, use or disclose a person’s confidential information to the extent that the collection, use or disclosure of the information is necessary—
  *(i) to assess or manage risk to the safety of a person from family violence; and
  *(ii) to hold perpetrators of family violence accountable for their actions.*

- new section 144MA, which prohibits anyone who receives information under new section 144M(2) from using or disclosing the information except for the purposes of managing the child’s risk of being subjected to family violence. (No penalty is provided for a breach of s144MA.)

The Committee observes that, by contrast, under similar New South Wales and Western Australian information sharing regimes, an entity that has received information relating to the welfare of a child ‘must not, except as otherwise required or permitted by any law, use or disclose the information for any purpose that is not associated with the safety, welfare or well-being of the child or young person (or class of children or young persons) to whom the information relates.’\(^9\)

The Committee will write to the Attorney-General seeking further information as to whether or not restricting new section 144M(2) to disclosures for a family violence assessment purpose or family violence protection purpose would be a less restrictive alternative reasonably available to achieve the section’s purpose.

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**Privacy – Collection, use or disclosure of health, personal and sensitive information without consent or legal authority – Where necessary to prevent or lessen serious threat to life, health, safety or welfare of any individual – No requirement that threat be imminent or that it be unreasonable or impracticable to obtain consent**

**Summary:** The effect of clauses 19 and 22 is to allow any organisation to collect, use and disclose a person’s private information, without the person’s consent or any other legal authority, if the organisation considers that doing so is necessary to reduce any long-term serious threat to anyone, The Committee will write to the Attorney-General seeking further information.

The Committee notes that clauses 19, amending schedule 1 to the *Health Records Act 2001*, and 22, amending schedule 1 to the *Privacy and Data Protection Act 2014*, provides that organisations may collect, use or disclose health information, personal information or sensitive information if the collection is necessary to prevent or lessen a ‘serious’ threat to the life, health, safety or welfare of any individual.\(^10\) This alters the existing authorisation for such collection, use or disclosure if there is a ‘serious and imminent’ threat.

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\(^8\) Compare new section 144M(1), which is restricted to disclosures for a family violence protection purpose and Royal Commission into Family Violence, *Report and Recommendations*, March 2016, p. 190: ‘If it is necessary to tell a primary person something about an associated respondent in order to manage a risk to their safety, the person should be told.’

\(^9\) *Children and Young Persons (Care and Protection) Act 1998* (NSW), s. 245F. See also *Restraining Orders Act 1997* (WA), s. 70A(2).

\(^10\) Clause 22(2) also allows an entity to refuse to allow a person to access or correct the information if there is a serious, but non-imminent, threat to anyone’s life, health, safety or welfare.
The Committee observes the effect of clauses 19 and 22 is to allow any organisation to collect, use or disclose anyone’s private information, without the consent of the person or any other legal authority, if the organisation considers that doing so is necessary to reduce any long-term serious threat to anyone. The Committee notes that clauses 19 and 22 apply in all contexts and are not limited to family violence contexts.

The Statement of Compatibility remarks:

The requirement that a serious threat must be imminent before information can be used or disclosed without consent has been identified as problematic by a number of reviews and reports, and the Australian Privacy Principles have since been amended to remove the ‘imminence’ requirement from the equivalent exception. Further, evidence heard by the Victorian Royal Commission into Family Violence suggested that the threshold is unreasonably high, and the concept of ‘imminence’ is uncertain, making it difficult to establish and resulting in overcautious practices which may potentially put, in that context, victims at risk.

However, the Committee observes that the equivalent exception in the Australian Privacy Principles requires that both of the following requirements must be satisfied:11

(a) it is unreasonable or impracticable to obtain the individual’s consent to the collection, use or disclosure; and
(b) the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.

The federal government explained these twin requirements as follows:12

The Government agrees that the test of ‘imminence’ can be too restrictive.

At the same time, the Government recognises the concerns of a number of stakeholders that the removal of the ‘imminence’ requirement would excessively broaden the exception and remove an important safeguard against the mishandling of personal information.

Accordingly, the Government has determined that a compromise position should be pursued, which is less restrictive than currently applied, though prevents excessive broadening of the exception.

Agencies and organisations should be permitted to use or disclose personal information in the circumstances set out in the recommendation only after consent has first been sought, where that is reasonable and practicable.

For the purposes of this exception, whether it was ‘reasonable’ to seek consent would include whether it is realistic or appropriate to seek consent. This might include whether it could be reasonably anticipated that the individual would withhold consent (such as where the individual has threatened to do something to create the serious risk). It would also likely be unreasonable to seek consent if there is an element of urgency that required quick action. Whether the individual had, or could be expected to have, capacity to give consent would also be a factor in determining whether it was ‘reasonable’ to seek consent.

Seeking consent would not be ‘practicable’ in a range of contexts. These could include when the individual’s location is unknown or they cannot be contacted. If seeking consent would impose

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11 Privacy Act 1988 (Cth), s. 16A, Item 1, Column 3. See also Crimes (Domestic and Personal Violence) Act 2007 (NSW), s. 98M(2)(c).

a substantial burden then it may not be practicable. It may also not be practicable to seek consent if the use or disclosure relates to the personal information of a very large number of individuals.

In assessing whether it is ‘reasonable or practicable’ to seek consent, agencies and organisations could also take into account the potential consequences and nature of the serious threat.

This approach creates a presumption that agencies and organisations should consider seeking consent before using or disclosing personal information in the circumstances set out in the recommendation.

The Committee will write to the Attorney-General seeking further information as to whether or not limiting the collection, use or disclosure of a person’s private information for the purpose of reducing a serious threat to an individual to situations where it is unreasonable or impracticable to obtain the person’s consent – as required by s. 16A of the Privacy Act 1988 (Cth) – is a less restrictive alternative reasonably available to achieve the purpose of clauses 19 and 22.

The Committee makes no further comment.
Land Legislation Amendment Bill 2017

**Introduced** 21 March 2017  
**Second Reading Speech** 22 March 2017  
**House** Legislative Assembly  
**Member introducing Bill** Hon Richard Wynne MLA  
**Minister responsible** Hon Richard Wynne MLA  
**Portfolio responsibility** Minister for Planning

**Purpose**

The Bill would amend the *Transfer of Land Act 1958*, the *Subdivision Act 1988* and the *Valuation of Land Act 1960* to improve the operation of those acts. Key changes would include:

- acceleration of the general law land conversion process to ensure that all freehold land in Victoria can be dealt with under the *Transfer of Land Act 1958*
- clarification of the powers of the Registrar under the *Transfer of Land Act 1958* to act when a notice sent by the Registrar to a landowner or customer is returned or not delivered
- amendment of the *Valuation of Land Act 1960* to enable the provision of valuation data in the same manner that property sales data is currently provided.

**Charter report**

The Land Legislation Amendment Bill 2017 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.
Mineral Resources (Sustainable Development) Amendment (Latrobe Valley Mine Rehabilitation Commissioner) Bill 2017

Introduction:

- **Introduced**: 21 March 2017
- **Second Reading Speech**: 22 March 2017
- **House**: Legislative Assembly
- **Member introducing Bill**: Hon Wade Noonan MLA
- **Minister responsible**: Hon Wade Noonan MLA
- **Portfolio responsibility**: Minister for Resources

**Purpose**

The Mineral Resources (Sustainable Development) Amendment (Latrobe Valley Mine Rehabilitation Commissioner) Bill 2017 would amend the *Mineral Resources (Sustainable Development) Act 1990* (the Principal Act) to:

- create the Latrobe Valley Mine Rehabilitation Commissioner
- detail the commissioner’s functions and powers, which would include:
  - monitoring and auditing of rehabilitation activities and reporting to the minister
  - informing the public of the results of rehabilitation activities and associated matters
  - convening meetings of relevant stakeholders
  - carrying out investigations as referred by the minister
- require the minister to prepare and publish a Latrobe Valley Regional Rehabilitation Strategy.

**Content**

*Delegation of legislative power – Delayed commencement — Whether justified*

Clause 2 provides that Part 3 of the Bill would commence on 1 July 2020, which is more than 12 months from the date of the Bill’s introduction.

There is no explanation for the delayed commencement in the Explanatory Memorandum or Second Reading Speech. However, the Committee notes that Part 3 of the Bill is concerned with the monitoring and evaluation of the *regional rehabilitation strategy* (i.e., a document setting out the strategy for the rehabilitation of coal mine land), which the Minister is required to prepare by 30 June 2020 under Part 2 of the Bill (see new section 84AZM). The reason for the delayed commencement of Part 3 of the Bill is therefore clear from a reading of the Bill.

*The Committee is satisfied that the delayed commencement of Part 2 is justified.*

*Power of entry and inspection without a warrant*

Clause 5 of the Bill would insert new section 84AR into the Principal Act, which would provide the Commissioner or an authorised officer with a power of entry and inspection, without consent or a warrant, in relation to coal mine land or adjacent land for the purposes of investigating a referred matter.

Both the Second Reading Speech and the Statement of Compatibility refer to the safeguards contained in the Bill against the improper use of the powers contained in new section 84AR.
The Statement of Compatibility contains the following statement in relation to the powers of entry and inspection on natural persons (i.e., as distinct from corporations) who occupy land adjacent to a coal mine:

Before entering the land, the authorised person must produce his or her identification to the occupier and take all reasonable steps to notify the occupier of the land. The power of authorised persons to enter land without consent may only be exercised between 9.00 a.m. and 5.00 p.m. and does not extend to entry to residential premises. If the occupier of the land is not present when the authorised person enters the land, the authorised person must leave a notice setting out the time and purpose of entry, a description of things done while on the land, the time of departure and the contact details of the authorised person.

In my view, while the exercise of these investigatory powers may interfere with the privacy of an individual in some cases, any such interference will be lawful and not arbitrary. As noted above, the bill places significant limitations on when an authorised person may enter and inspect land adjacent to coal mine land. The matter must be referred by the minister and relate to the rehabilitation of coal mine land, the regional rehabilitation strategy or rehabilitation planning activities. The authorised person may only enter land adjacent to coal mine land if the commissioner believes on reasonable grounds that it is necessary to enter that land for the purposes of carrying out the investigation. The powers are also constrained by the terms of reference set by the minister.

An important purpose of the bill is to provide assurance to the Victorian community that public sector bodies and Latrobe Valley licensees are planning for the rehabilitation of coal mine land and implementing the regional rehabilitation strategy. The power to enter and inspect coal mine and surrounding land is necessary for the commissioner to effectively investigate referred matters and provide advice and reports to the minister and community. There is significant public interest in ensuring that the commissioner is able to access and inspect relevant land.

The committee is satisfied that the power to enter and search without a warrant, contained in new section 84AR, is necessary and reasonable in the circumstances.

Charter report

The Mineral Resources (Sustainable Development) Amendment (Latrobe Valley Mine Rehabilitation Commissioner) Bill 2017 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The committee makes no further comment.
Worksafe Legislation Amendment Bill 2017

Introduced 21 March 2017
Second Reading Speech 22 March 2017
House Legislative Assembly
Member introducing Bill Hon Robin Scott MLA
Minister responsible Hon Robin Scott MLA
Portfolio responsibility Minister for Finance

Purpose


Key amendments to the Occupational Health and Safety Act 2004 include:

- extending the time limit, in certain circumstances, for prosecuting indictable offences
- amending the 12-month time limit for the prosecution of certain offences
- changing the existing offences of failing to notify WorkSafe of an incident and failing to preserve an incident site from summary to indictable offences and increasing the associated penalties
- introducing a specific offence of contravening an enforceable undertaking.

Key amendments to the Workplace Injury Rehabilitation and Compensation Act 2013 and Accident Compensation Act 1985 include:

- increasing travel and accommodation benefits for family members of severely injured or deceased workers
- ensuring that casual loadings which a worker was receiving prior to their injury are included in the calculation of their pre-injury average weekly earnings and are reflected in their weekly payments
- confirming that workers impacted by the decision of Samson Maritime Pty Ltd v. Noel Aucote (2014) (the Aucote decision) are validly covered under the WorkSafe scheme
- clarifying that a member of a medical panel or an expert giving advice to a medical panel cannot be compelled to give evidence relating in any way to their role and function as a member or expert
- expanding the grounds under which WorkSafe may review the approval of an employer as a self-insurer
- amending the 12-month limitation period for prosecutions against self-insurers.

The Bill would also amend the Dangerous Goods Act 1985 to include an express power to allow the Governor in Council to continue to issue emergency asbestos orders.
Content

Retrospective commencement – Assessment of a worker’s percentage of diminution of hearing under the Workplace Injury Rehabilitation and Compensation Act 2013

Clause 2 of the Bill provides that clause 27 (i.e., section 27 of the Act) would be taken to have come into operation on 1 July 2014.

The Committee notes the following explanation in the Explanatory Memorandum:

Clause 27 amends section 63(5) of the WIRC Act to ensure that there is no time limit to the Minister’s approval of the manner of the assessment of a worker’s percentage of diminution of hearing. This amendment corrects an anomaly introduced when the WIRC Act commenced and is to be made retrospective, commencing on 1 July 2014 in line with the commencement of the WIRC Act.

The Committee notes that section 63(5) of the WIRC Act currently provides that the Minister’s approval continues in force for 3 years (unless revoked by the Minister).

The Committee notes that the retrospective amendment in clause 27 is therefore beneficial to certain claimants under the relevant sections of the WIRC Act.

Right to be presumed innocent — Whether a legal burden to prove defence

As noted in the Charter Report below, it is unclear whether any burden is imposed on an accused in relation to the reasonable excuse provisions contained in clauses 12 and 13, and if so whether that burden is legal or evidential.

As noted in the Charter Report below, the Committee will write to the Minister seeking further information as to whether clauses 12 and 13 of the Bill reasonably limit the presumption of innocence.

Charter report

Presumption of innocence – Reverse onus – Conversion from summary to indictable offence

Summary: Clauses 12 and 13 of the Bill convert two pre-existing offences in the Occupational Health and Safety Act 2004 from summary offences to indictable offences and also introduce “reasonable excuse” defences into those sections. The Committee will write to the Minister seeking further information as to whether this provision is a reasonable limit on the presumption of innocence in s 25(1) of the Charter.

Clause 12 of the Bill adds a subsection to section 38 of the Occupational Health and Safety Act 2004 (OHSA) to provide that it is an indictable offence and amends the offence itself to include a defence of reasonable excuse, as highlighted:

38 Duty to notify of incidents

(1) An employer or self-employed person must not without reasonable excuse fail to notify the Authority immediately after becoming aware that an incident has occurred at a workplace under the management and control of the employer or self-employed person.

Clause 13 of the Bill adds a subsection to section 39 of the OHSA to provide that it is an indictable offence and amends the offence itself to include a defence of reasonable excuse, as highlighted:
38 Duty to preserve incident sites

(1) An employer or self-employed person who is required to notify the Authority of an incident that has occurred at a workplace must not without reasonable excuse fail to ensure that the site where it occurred is not disturbed until—

(a) an inspector arrives at the site; or

(b) such other time as an inspector directs when the Authority is notified of the incident.

The Committee observes that the effect of converting the offences in sections 38 and 39 of the OHSA from summary offences to indictable offences is to remove them from the purview of section 72 of the *Criminal Procedure Act 2009* (CPA), which only applies to summary hearings. Section 72 of the CPA provides that where an Act creates an excuse, an accused who wishes to rely on the excuse bears an evidentiary burden in relation to that excuse.

As a result of these amendments section 72 of the CPA will no longer apply to the offences in sections 38 and 39 of the OHSA so it is unclear whether any burden is imposed on an accused in relation to the reasonable excuse provision, and if so whether that burden is a legal or an evidential burden. In the absence of legislative guidance, the section will fall to be interpreted by the courts. These questions will need to be decided by a court having regard to the established rules of statutory interpretation – including the principle of legality, which would favour an interpretation that imposes no burden on the accused, or failing that, an evidential burden only. However, if the sections were interpreted by the courts as imposing a legal burden on an accused to prove they have a reasonable excuse, this section may limit the presumption of innocence, protected in section 25(1) of the Charter.

The Committee’s Consolidated Practice Note deals with reverse onus provisions:

> [T]he Statement of Compatibility (or explanatory material) for a provision that introduces or significantly alters an exception to a criminal offence should state whether or not the exception places a legal onus on the accused... For exceptions to summary offences, the explanatory material may address the effect of s.72 of the *Criminal Procedure Act 2009*. For exceptions that impose a legal onus on the accused without express words to that effect, the Statement of Compatibility may address whether or not the inclusion of express words would be a less restrictive alternative reasonably available to achieve the exception’s purpose.

The Committee will write to the Minister seeking further information as to whether clauses 12 and 13 of the Bill reasonably limit the presumption of innocence.

The Committee makes no further comment.

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13 Whilst sections 38 and 39 of the OHSA have been converted into indictable offences they are still able to be heard summarily. When these offences are heard summarily the provisions of section 72 of the CPA will still apply. The concerns addressed in this report only arise when the sections are being heard on an indictable basis.
Appendix 1
Ministerial responses to Committee correspondence

The Committee received Ministerial responses in relation to its correspondence on the Bills listed below.

The responses are reproduced in this appendix – please refer to Appendix 4 for additional information.

i. Drugs, Poisons and Controlled Substances Miscellaneous Amendment Bill 2017
Ms Lizzie Blandthorn MLA  
Chairperson  
Scrubuty of Acts and Regulations Committee  
Parliament House  
Spring Street  
EAST MELBOURNE  VIC  3002

Dear Ms Blandthorn,

Drugs, Poisons and Controlled Substances Miscellaneous Amendment Bill 2017


The Committee has queried whether the definition of ‘psychoactive substance’ in the Bill is sufficiently clear to ensure that people know what conduct is prohibited with respect to the production, sale and commercial supply of psychoactive substances and what substances may be seized, forfeited and destroyed.

In this context, the Committee has sought further information as to the compatibility of:

- clause 8 of the Bill, which prohibits the production and sale of psychoactive substances, with the right against retrospective criminal law under the Charter of Human Rights and Responsibilities Act 2006 (the Charter); and
- clauses 14, 15 and 17, which permit the seizure, forfeiture and destruction of psychoactive substances, with the Charter’s right to property.

The Committee has also sought further information as to whether the prohibition on advertising in new section 56F in clause 8 of the Bill would prohibit the use of signs, banners or leaflets making positive claims about psychoactive substances.

Definition of ‘psychoactive substance’ and its interaction with clauses 8, 14, 15 and 17

The purpose of the new scheme is to stop the production, sale and promotion of synthetic drugs that mimic the effects of illicit drugs, such as synthetic cannabis and synthetic ecstasy. There is no testing done to gauge the suitability of these synthetic chemicals for human consumption and they present a potentially grave risk to public health and safety.

In Australia, the dangers and risks posed by synthetic drugs have been realised with synthetic drugs linked to hospital emergency admissions and even fatalities, including three deaths in Victoria in a four month period between 2013 and 2014.

The shift away from the current approach of listing specific substances by their chemical composition is necessary because this approach has proved unable to keep pace with the rapid development of the synthetic drug market. The European Monitoring Centre for Drugs and Drugs Addiction observed in 2015 that nearly 300 new psychoactive substances were reported to the European Union’s early warning system in the 2013-2015 period—an average of 100 new psychoactive substances per year.
In Victoria, psychoactive substances continue to be marketed and sold openly in Victoria as drug manufacturers create new chemical compounds to circumvent drug laws. The diversity of substances available and the speed of their development has impeded the operation of Victoria’s drug laws. It has also created ambiguity around what substances are prohibited, as the number of substances continues to climb beyond the 63 synthetic substances or classes of synthetic substances currently listed as drugs of dependence under Schedule Eleven of the Drugs, Poisons and Controlled Substances Act 1981.

The move to a scheme that captures psychoactive substances based on their effect or purported effect is necessary to overcome these problems and remove ambiguity around what substances are prohibited and to prevent the harmful effects of these substances.

In clause 4 of the Bill ‘psychoactive substance’ is defined to mean a substance that either has a psychoactive effect when consumed or is represented as having such an effect, subject to exclusions. ‘Psychoactive effect’ is defined to mean either the stimulation or depression of the person’s central nervous system, resulting in hallucinations or in a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood, or causing a state of dependence, such as addiction.

Taken together, these definitions are intended to be capable of covering a broad range of substances, including those that may only become available in the future.

The effect-based limb of the definition makes it clear that all substances that do not have legitimate uses and cause significant disturbances to a person’s mood, thinking or behaviour (but are not drugs of dependence) are prohibited from being produced, sold or commercially supplied, regardless of their representation.

The use of the term ‘significant’ in this context is intended as a safeguard to clarify that there is no intention to capture products with legitimate uses that have only minor or low-level psychoactive impacts. For instance, products with added caffeine such as energy drinks may be consumed by people as a mild stimulant, but are not intended to be captured.

Additionally, there are explicit exclusions for food, alcohol, therapeutic goods and other specified items which could potentially induce psychoactive effects similar to those of illicit drugs when consumed, but are regulated or controlled elsewhere.

The effect-based prohibition is also required for the enforcement of the new offence of producing a psychoactive substance established by clause 8 of the Bill and the exercise of seizure, forfeiture and destruction powers established by clauses 14, 15 and 17.

The Bill defines ‘produce’ to mean make, prepare, process, extract, refine, package or label. The offence relating to production in new section 56D thus extends to the act of packaging or labelling psychoactive substances (for example, where they have been imported in bulk). Under the new scheme, if police were to find a bulk form of psychoactive substance that had not yet been packaged for sale, they would need to rely on the effect-based element of the definition of psychoactive substance to enforce this offence.

Similarly, a definition of psychoactive substance that relied only on the representation of a substance would provide too narrow a basis for police to search for and seize a psychoactive substance found in bulk or to destroy the bulk product in the interests of health and safety.

Given these issues, I do not believe there is a less restrictive method of achieving the objectives of the new scheme, especially in light of the diversity and escalating number of substances available. In my view, the joint definitions of psychoactive substance and psychoactive effect, combined with exclusions, are the best means available to structure and confine the scope of the new scheme,
eliminate the current ambiguity around what substances are prohibited and enable Victoria Police to take effective enforcement action to prevent harm to the community.

As an additional safeguard, the new offences in clause 8 of the Bill relating to the production, sale or commercial supply of psychoactive substances require that a person must know or reasonably suspect that the substance is a psychoactive substance. The inclusion of these mental elements provides a further means of confining the scope of the new offence provisions.

Other Committee queries

I note the Committee has also queried:
1. the interaction between new section 56C, which removes the legal defence that a substance is labelled or represented as 'not for human consumption', and paragraph (1) of the definition of psychoactive substance, which excludes agricultural and veterinary chemical products imported, manufactured, used, supplied or represented as a means of achieving specified purposes, and whether that interaction may be unclear; and
2. whether the use of the term 'reasonably suspects' in the new offences in clause 8 of the Bill may be unclear, because this threshold is not used in other Victorian criminal offence provisions.

In regard to the first issue, many synthetic drugs are currently sold in packaging that states "not for human consumption" (for example as "bath salts" or "potpourri"), even though the substances are clearly sold for that purpose. The Bill clarifies in new section 56C that such a statement is not determinative. Substances with such a warning could still fall within the definition of a psychoactive substance, but only if they otherwise meet the definition of a psychoactive substance.

Agricultural and veterinary chemical products covered by paragraph (1) of the definition of psychoactive substance—which includes, as the Committee has noted, products represented as a means of agricultural control or as being suitable for administration to or consumption by animals—are excluded from that definition. Thus new section 56C does not apply to or otherwise affect the operation of paragraph (1).

In regard to the second issue, it is intended that the offences of producing a psychoactive substance (new section 56D) and selling or commercially supplying a psychoactive substance (new section 56E) will only apply where a person knows or suspects on reasonable grounds that the substance is a psychoactive substance. The second mental element is intended to capture conduct where the high threshold of knowledge is not applicable, but it appears the person had reasonable grounds for suspecting the true nature of the substance involved. It will be for the courts to determine whether this mental element is met in any individual case, having regard to all the circumstances of the case.

Compatibility with the Charter

For the reasons outlined in my preceding comments, I consider that the definition of psychoactive substance and its interaction with the new offence provisions is sufficiently clear and accessible to enable a person to know in advance whether their conduct is criminal. For this reason, my view is that the new offence provisions in clause 8 of the Bill do not limit the right against retrospective criminal laws (Charter, s 27(1)).

Similarly, I consider that the definition of psychoactive substance and its interaction with the search, seizure and destruction powers in clauses 14, 15 and 17 of the Bill is sufficiently clear to enable police to exercise these powers appropriately in the situations they are likely to encounter, and to ensure these powers cannot be exercised arbitrarily. In my opinion, therefore, the clauses do not limit property rights protecting against the deprivation of property other than in accordance with the law (Charter, s 20).
Even if the alternate view was taken that these rights were limited, I consider any such limitation would be reasonable and demonstrably justified when balanced against the importance of the scheme’s purpose to stop the production, sale and promotion of untested synthetic substances, which pose a potentially grave threat to public health and safety.

Therefore, I consider that the provisions in the Bill are compatible with the Charter.

Advertising to promote the consumption of psychoactive substances

The prohibition on the advertising of psychoactive substances in new section 56F is intended to capture the activity of advertising—by means such as advertising signs or leaflets—where this is undertaken to promote the retail sale or commercial supply of psychoactive substances to customers for the purpose of consumption as alternatives to illicit drugs.

Commonly, this type of advertising material would be expected to be found:
- displayed inside retail shops selling psychoactive substances, affixed to the exterior of such shops or displayed on boards or receptacles placed outside or nearby such shops; or
- affixed to vehicles or vessels in public places as a form of mobile marketing.

The prohibition is not intended to capture forms of public protest or commentary, unless the person displaying the banner, sign or leaflet does so with the intention of promoting the consumption, sale or supply of psychoactive substances, or with the knowledge that there is a substantial risk that those activities will be promoted. In such a case, the prohibition is designed to protect, and can be balanced against, public health and public order; the right to freedom of expression may be subject to lawful restrictions, including where reasonably necessary to protect public health or public order (Charter, s 15(3)(b)).

I thank the Committee for its report.

Yours sincerely

[Signature]

Hon Lisa Neville MP
Minister for Police

[Date] 27/4/17
## Appendix 2

### Index of Bills in 2017

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Appendix 3
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.

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(vi) inappropriately delegates legislative power
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(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities
Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2016 1
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## Appendix 4

### Current Ministerial Correspondence

### Table of correspondence between the Committee and Ministers or Members

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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